

The Fight Against Unregulated Fishing in the Arctic

Deterring Unregulated Fishing by Vessels under the 2018 Central Arctic Ocean Fisheries Agreement

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Table of Contents

Index of abbreviations	iii
1 Introduction	1
1.1 Topic and objective	1
1.2 Research question	2
1.3 Legal sources and methodology	3
1.4 Structure.....	7
2 The Arctic and its fisheries.....	8
2.1 The Arctic and the European Union	8
2.2 The Arctic fisheries	9
2.3 The presence of a legal regime regarding Arctic fisheries	10
2.4 The Arctic fisheries – The Central Arctic Ocean Fisheries Agreement	11
2.5 The Arctic fisheries – the North-East Atlantic Fisheries Commission	12
2.6 The Arctic fisheries – the Joint Norwegian-Russian Fisheries Commission	13
3 Obligations of states with regards to fishing activities on the high seas of the Central Arctic Ocean.....	14
3.1 Obligations of states in a high seas area with no regional fisheries regulation	14
3.1.1 The high seas ‘freedom’ of fishing and its limitations.....	15
3.1.2 The problem with the high seas freedom of fishing – exclusivity of flag state jurisdiction.....	16
3.1.3 The evolution of flag state obligations on the high seas	19
3.2 Obligations of states in the high seas area under the Central Arctic Ocean Fisheries Agreement	22
3.2.1 Status of the Central Arctic Ocean Fisheries Agreement as a regional fisheries management arrangement	25
3.3 Flag state measures in respect of fishing vessels in the Central Arctic Ocean.....	26
3.3.1 Registration of fishing vessels.....	27

3.3.2	Authorization to fish.....	28
3.3.3	Recording of fishing vessels	30
3.3.4	Strengthening the duty to exercise effective control.....	30
3.4	Concluding remarks.....	37
4	Measures available to the parties to the Central Arctic Ocean Fisheries Agreement towards vessels of third states engaged in high seas unregulated fishing activities	37
4.1	Measures available to non-flag state vessels at sea	38
4.1.1	The right of approach	40
4.1.2	The right of visit – boarding and inspection	40
4.2	Measures available to port states	42
4.2.1	Fishing vessels and access to port	44
4.2.2	Fishing vessels and port state enforcement	47
4.2.3	Cooperation between port states and flag states.....	51
5	Conclusion.....	53
	Bibliography.....	56

Index of abbreviations

CAO	Central Arctic Ocean
CAOFA	Central Arctic Ocean Fisheries Agreement
EEZ	Exclusive Economic Zone
EU	European Union
FAO	Food and Agriculture Organization
FSA	Fish Stocks Agreement
ICJ	International Court of Justice
IPOA-IUU	International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, Unreported and Unregulated (fishing)
LOSC	Law of the Sea Convention
MCS	Monitoring, Control and Surveillance
NEAFC	North East Atlantic Fisheries Commission
OECD	Organization for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PSMA	Port States Measures Agreement
RFMA	Regional Fisheries Management Arrangement
RFMO	Regional Fisheries Management Organization

1 Introduction

1.1 Topic and objective

The near-coastal waters of the Arctic Ocean and its adjacent seas have been the scenery for fishing activities for centuries, and the Arctic coastal states have managed to regulate these activities within the areas of their national jurisdictions. However, with the ongoing climate change and its consequences, new challenges arise, such as the possibility of long-term changes in the thickness of the Arctic sea-ice¹ and the subsequent eventual opening of the waters of the Arctic Ocean and the fish stocks migration northwards², which would lead to increased fishing activities in these waters. Even though no commercial fishing currently takes place in the high seas of the Central Arctic Ocean (CAO), it could be assumed that the states will take the opportunity and commence fishing once they have access to these waters.

Responding to these challenges, the five Arctic coastal states³ (Arctic Five) commenced negotiations in 2014 in relation to the regulation of fishing activities on the high seas of the Central Arctic Ocean. The first result from the negotiations was the non-legally binding Oslo Declaration⁴ of July 2015, where the Arctic Five expressed their desire to comply with their duty to cooperate and to adopt interim measures to deter unregulated fishing on the high seas of the CAO. Negotiations then continued, with the aim of achieving a legally binding instrument and expanded the negotiated parties to the European Union (EU), Iceland, China, Japan and South Korea (Arctic Five plus Five). The outcome of the negotiations was the 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean⁵ ('Central Arctic Ocean Fisheries Agreement' or simply 'CAOFA'). The purpose of this agreement is the prevention of unregulated fishing in the area by imposing a 'temporary abstention from fishing'⁶ until sufficient scientific information is obtained, thus applying the precautionary approach.⁷ Therefore, any infringement of this prohibition would undermine the effectiveness of the CAOFA.

¹ NR Golledge et al., *Global environmental consequences of twenty-first-century ice-sheet melt*, Nature International Journal of Science (2019), vol. 566, p. 68.

² S Kaartveld, J Titelman, *Planktivorous fish in a future Arctic Ocean of changing ice and unchanged photoperiod*, ICES Journal of Marine Science (2018), vol. 75(7), p. 2312.

³ The coastal states to the Arctic Ocean are Norway, Denmark in respect of Greenland, Russia, Canada, and the USA.

⁴ Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean, 16 July 2015, Oslo, Norway.

⁵ Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, 03 October 2018, Ilulissat, Greenland, not yet in force.

⁶ EJ Molenaar, *Participation in the Central Arctic Ocean Fisheries Agreement*, in A Shibata et al (eds.), *Emerging Legal Orders in the Arctic: the Role of non-Arctic Actors*, New York, Routledge, 2019.

⁷ CAOFA, Preamble, para. 9.

For any conservation measures to be effective, they must be complemented with an enforcement element to ensure compliance, i.e. coercive measures imposed in relation to any infringement of the regulations.⁸ With regards to compliance and enforcement, the parties to the CAOFA are required to ensure that the interim measures are complied with. In relation to the enforcement measures towards states that are not parties to the CAOFA (third states), Art. 8(2) requires states to ‘take measures consistent with international law to deter the activities of vessels entitled to fly the flags of non-parties that undermine the effective implementation of this Agreement’. Thus, CAOFA does not specify which measures can be undertaken against non-compliant third-state vessels but rather formulates it vaguely. Therefore, the objective of this thesis is to investigate the rights and obligations of states in deterring unregulated fishing in the high seas waters of the CAO.

1.2 Research question

The issue of unregulated fishing can be found in various areas where no regional or international agreements establish conservation and management measures on high seas areas. Unregulated fishing can also occur when high seas fishing is conducted in contravention with established conservation and management measures or by stateless vessels or vessels of states that are not parties to the agreements under which the measures have been established.⁹ The conduct of this type of fishing is mainly driven by desire for economic profits.¹⁰ More importantly, however, unregulated fishing, as part of the concept of illegal, unreported and unregulated (IUU) fishing, has a serious impact on the ocean and its marine ecosystems and biodiversity. The effects of such fishing are often devastating for the marine living resources, and their conservation, and even survival, is directly threatened. Further, such conduct undermines the efforts made by the international community to achieve long-term sustainability and responsibility in relation to fish stocks, especially with regards to the stocks subject to stricter conservation and management measures.¹¹ Therefore, it is crucial that the international

⁸ E Franckx, FAO Legal Office, *Fisheries Enforcement, Related Legal and Institutional Issues: National, Sub-Regional or Regional Perspectives*, FAO Legislative Study, Rome, 2001, p. 94.

⁹ FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated and Unreported Fishing, 2 March 2001, Rome, para. 3(3) (hereinafter referred to as ‘IPOA-IUU’).

¹⁰ See Agnew et al., *Estimating the Worldwide Extent of Illegal Fishing*, PLoS ONE, 4(2): e4570, <https://doi.org/10.1371/journal.pone.0004570>. They estimated annual losses from IUU fishing to the amount of between 10 billion and 23.5 billion dollars. In 2015, the FAO stated it was highly likely that the magnitude of this type of fishing has changed significantly but still no specific numbers have become available. See also FAO, FIRO/R1160, Report of the expert workshop to estimate the magnitude of illegal, unreported and unregulated fishing globally, 2015, Rome, p. 1.

¹¹ FAO, Illegal, Unreported and Unregulated (IUU) fishing, available at <<http://www.fao.org/iuu-fishing/background/what-is-iuu-fishing/en/>>, accessed 01.09.2019.

community takes continuous steps towards the resolution of this issue until all incentives driving unregulated fishing are eliminated.

The case of the Central Arctic Ocean is significant in that regard as the new CAOFA takes a novel approach towards the conservation of the fish stocks found within the waters of the CAO. By applying precaution and establishing interim measures, it takes preemptive steps towards conservation before any fishing activities in the area have started and before any substantive scientific information is available. This is contrary to the traditional approach where states take conservation and management measures after fishing activities have started and the implications fishing has on the fish stocks found in an area have been scientifically proven.

As already mentioned, the purpose of the thesis is to investigate the possibilities for the parties to the CAOFA to deter unregulated fishing activities on the high seas of the CAO. In order to achieve this objective, two main questions are investigated, namely:

- What are the obligations of third states with regards to fishing activities of vessels flying their flag on the high seas of the Central Arctic Ocean?
- What measures are available to the contracting parties to deter vessels flying the flags of third states from engaging in unregulated fishing activities in the high seas of the Central Arctic Ocean?

1.3 Legal sources and methodology

The thesis investigates the research questions thoroughly by using the various sources of international law listed in Article 38 of the Statute of the International Court of Justice.¹² International conventions, customary international law, as well as general principles of law, apply in the Arctic and to the parties of the Central Arctic Oceans Fisheries Agreement as primary sources. Subsidiary sources, such as judicial decisions and publications of the most highly acclaimed authors are also utilized in order to provide overview of the different opinions in the current legal discussions. Additional sources, such as scientific reports, are used to obtain the most recent relevant data related to fisheries in the Central Arctic Ocean.

The legal framework applicable to the fisheries in the Arctic is highly fragmented and complex, so it is hard to establish an instrument of central attention. Therefore, the analysis comprises examination of the various legal instruments, both hard law and soft law, and how they can be applied simultaneously to the different aspects of the regime.

¹² Statute of the International Court of Justice, 26 June 1945, United Nations Treaty Series, vol. 993, p.1055.

The thesis is separated into two independent parts, but the instruments used for examination of the issues do not differ substantially. First, the basic rights and obligations of states are derived from the provisions of the 1982 Law of the Sea Convention¹³ (LOSC). Currently, the LOSC has 168 parties; all Arctic coastal states, except for the USA, have adhered to it.¹⁴

The obligations of states in relation to the conservation and management measures regarding straddling and highly migratory fish stocks on the high seas are elaborated and provided in the 1995 Fish Stocks Agreement¹⁵ (FSA). The FSA is an implementation agreement to the LOSC, i.e. the relevant provisions of the LOSC must be interpreted and applied in conjunction with the provisions of the FSA.¹⁶ Despite its description as an implementation agreement, however, it is in fact an independent instrument¹⁷, as a state might become a party to the FSA even if not a party to LOSC. This is specifically relevant in the case of the USA. The particular focus and emphasis on cooperation in the areas beyond national jurisdiction under the FSA falls upon the establishment of Regional Fisheries Management Organizations or Arrangements (RFMO/As), which have the mandate to adopt legally binding conservation and management measures applicable to their members. The role of the RFMO/As under the FSA is crucial for the investigation of the research questions of the thesis. Moreover, the FSA provisions in relation to cooperation in enforcement issues are also relevant and must be examined as providing global regulations.

The provisions of the Central Arctic Ocean Fisheries Agreement are analyzed as they form the basis for the research questions of the thesis. Moreover, the examination is performed in light of the rules of the FSA regarding forms of regional management, i.e. RFMO/As, in order to establish the status of the CAOFA as a regional management instrument. This allows for the subsequent determination of the rights and obligations of third states¹⁸, stemming from the CAOFA, as well as for the application of the relevant FSA provisions during the investigation of the thesis questions. The CAOFA is still not in force and will not be until

¹³ Convention on the Law of the Sea, 10 December 1982, Montego Bay, United Nations Treaty Series, vol. 1834, p. 397.

¹⁴ United Nations Treaty Collection, Chapter XXI, Status of the LOSC, available at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>, accessed 01.09.2019.

¹⁵ Agreement for the Implementation of the Provisions of the United Nations Convention on Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 04 August 1995, New York, the USA, 34 ILM, p. 1542.

¹⁶ FSA, Art. 4.

¹⁷ R Barnes, *International Regulation of Fisheries Management in Arctic Waters*, German Yearbook of International Law (2011), vol. 54, p. 208.

¹⁸ Non-participants to the discussed international or regional agreements and non-members of RFMO/As.

ratified by all states.¹⁹ Therefore, some of the discussions are based on the presumption that it will indeed come into force.

The North-East Atlantic Fisheries Commission (NEAFC) has been recognized through the CAOFA as the competent RFMO for a part of the high seas of the CAO.²⁰ Therefore, the thesis utilizes its Scheme of Enforcement and Control²¹ (NEAFC Scheme) when analyzing the rights and obligations of states in its Regulatory Area. The main focus is placed on the possibilities to its members, both as flag states and port states, towards third-state vessels. Currently, the NEAFC has not adopted any conservation and management measures applicable on the high seas area of the CAO, so similarly to the case of the CAOFA, the relevant discussions are based on the presumption that the NEAFC will establish such measures in order to align its regime with the provisions and purpose of the CAOFA.

The Joint Norwegian-Russian Commission²² (Joint Commission) is a bilateral instrument which has competence over the conservation and management of shared fish stocks between Norway and Russia and extends to high seas areas of the Arctic Ocean. Therefore, its potential competence, as well as the possible applicability of its conservation and management practice over the fisheries found in the high seas of the CAO, is assessed.

Additionally, the thesis examines the various legal instruments adopted under the United Nations Food and Agriculture Organization²³ (FAO). The Compliance Agreement²⁴ and Port State Measures Agreement²⁵ (PSMA) are the legally binding agreements which provide for obligations of states, both as flag states and as port states.

¹⁹ In May 2019, Canada became the third state to ratify it, after Russia and the EU. See Government of Canada News Release, available at <<https://www.canada.ca/en/fisheries-oceans/news/2019/05/canada-ratifies-landmark-international-agreement-to-prevent-unregulated-fishing-in-the-central-arctic-ocean.html>>, accessed 01.09.2019.

²⁰ CAOFA, Preamble, para. 7. See also Statement by the North-East Atlantic Fisheries Commission (NEAFC) regarding the conclusion of the negotiations on the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, available at <https://www.neafc.org/system/files/NEAFC-statement_Central-Arctic-Ocean-Agreement.pdf>, accessed 01.09.2019.

²¹ NEAFC, Scheme of Control and Enforcement, last amended in 2019, available at <<https://www.neafc.org/scheme/contents>>, accessed 01.09.2019.

²² Agreement between the Government of the Kingdom of Norway and the Government of the Union of the Soviet Socialist Republics on Co-operation in the Fishing Industry, 11 April 1975, Moscow, Russia, United Nations Treaty Series, vol. 983, p.7. The Agreement was supplemented by Agreement between the Government of the Union of the Soviet Socialist Republics and the Government of the Kingdom of Norway Concerning Mutual Relations in the Field of Fisheries, 15 October 1976, Moscow, Russia, United Nations Treaty Series, vol. 1157, p.146 and Agreement between Norway and the Soviet Union on a temporary practical arrangement for fishing in an adjacent area of the Barents Sea, 11 January 1978. The last one was repealed by the Treaty between the Kingdom of Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, 15 September 2010, Murmansk, Russia, available at <https://www.regjeringen.no/globalassets/upload/ud/vedlegg/folkerett/avtale_engelsk.pdf>, accessed 01.09.2019.

²³ FAO is the international organization mainly interested in and responsible for the regulation of fishing activities.

²⁴ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 24 November 1993, United Nations Treaty Series, vol. 2221, p. 91.

²⁵ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 22 November 2009, Rome.

The thesis also considers a number of soft law instruments in the interpretation of the different legally binding instruments. The soft law adopted by FAO, such as, *inter alia*, the Code of Conduct for Responsible Fisheries²⁶ and the IPOA-IUU, provides for guidelines for both flag states and port states. Although non-binding, it has been important for the development of the fisheries management on a regional and global level, and many of the legal norms found in soft law have been incorporated into legally binding agreements. A prominent example of such crystallization from soft law to hard law is the definition of unregulated fishing, as part of the IUU fishing concept, which has been first provided by the IPOA-IUU, but then codified in the legally binding PSMA.

In addition, the thesis examines the relevant EU law as part of the legislation that can be applicable to the high seas of the CAO. The main instrument considered is the EU IUU Regulation²⁷, as it provides for the main rights and obligations of the EU Members States in relation to the management of fisheries and the deterrence of unregulated fishing activities as part of IUU fishing. Other Regulations, which form part of the EU fisheries legislation, are analyzed where applicable in order provide for measures that can contribute to the fisheries regime in the Arctic.

It is necessary to note that all legal instruments mentioned above have varying parties among the states relevant for this thesis²⁸. In accordance with the *pacta tertiis* principle, states are not bound by the agreements to which they are not parties. Consequently, in cases where they are not parties to a specific instrument, they are bound only by its provisions which are recognized as customary international law; otherwise, they are under duties imposed by general international law, if any. Nevertheless, due to the large number of state parties to the CAOFA and the aim of achieving as a comprehensive picture of the range of possibilities as possible, the thesis explores the different themes by applying all instruments in parallel. Moreover, a

²⁶ FAO Code of Conduct for Responsible Fisheries, 31 October 1995, Rome, available at <<http://www.fao.org/3/v9878e/V9878E.pdf>>, accessed 01.09.2019.

²⁷ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, 29 October 2008, OJ L 286/1. For a discussion of the Regulation, see M Tsamenyi, PA Palma, B Milligan, K Mfodwo, *The European Council Regulation on IUU Fishing: An International Fisheries Law Perspective*, *The International Journal of Marine and Coastal Law* (2010), vol. 25(1), pp. 5-31.

²⁸ More specifically: 1) Norway, Canada, Denmark, and the EU are parties to all instruments, including NEAFC (Canada is a non-contracting cooperating party);

2) Russia is party to the LOSC, FSA and NEAFC but not to the Compliance Agreement and the PSMA;

3) The USA is party to the FSA, the Compliance Agreement and the PSMA but not to the LOSC and NEAFC;

4) Iceland is party to all instruments except for the Compliance Agreement;

5) Japan and South Korea are parties to all instruments except for the NEAFC;

6) China is only party to the LOSC.

deep analysis of which provisions contained in the relevant legal sources constitute customary international law is beyond the scope of this thesis.

The analysis of the legal sources listed above is conducted using both descriptive and analytical methods. The legal instruments are interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of the Treaties.²⁹

It must be emphasized that some of the discussions in the thesis are more general in nature. This is mainly due to the fact that the CAOFA is not yet in force, i.e. general international law is applicable at the moment for activities on the high seas of the CAO. Moreover, as no elaborate scheme of compliance and enforcement has been developed outside of the NEAFC regime, the considerations in that regard can only be theoretical and subject to general international law until an RFMO is established.

1.4 Structure

Chapter 2 provides for the factual background of the issues discussed in the thesis. It describes the Arctic fisheries, as well as the actors involved in the region. It also describes the regimes of the CAOFA, the NEAFC and the Joint Norwegian-Russian Fisheries Commission, which form the regional legal framework. Discussion on the status of the CAOFA as an RFMA is also provided in order to give direction to the further investigations of the research questions.

Chapter 3 investigates the first question. It first examines the obligations of flag States in high seas areas where there are no internationally agreed fisheries regulations. The analyses are based on the 1982 LOSC, 1995 FSA as well as the FAO Compliance Agreement. The obligations that third states have in respect to the Central Arctic Ocean Fisheries Agreement are also considered in light of its potential status of an RFMA. Both hard and soft law require states to adopt monitoring, control and surveillance measures, which allow further enforcement actions. Therefore, these measures are discussed both on an international level and on a regional level, on the basis of the NEAFC regime applicable in its Regulatory Area.

Chapter 4 examines the second question and the various measures available to the parties of the CAOFA for deterring vessels of third states from engaging in unregulated fishing on the high seas of the CAO. The discussion refers to the available measures that emanate from the provisions of the legal instruments forming the rights and obligations of the states on the high seas of the CAO. The possible measures are presented and briefly assessed with regards to their

²⁹ Vienna Convention on the Law of the Treaties, 23 May 1969, Vienna, Austria, United Nations Treaty Series, vol. 1155, p. 331.

applicability to fishing on the high seas of the CAO. The possibilities of enforcement at sea are assessed first, including approach, boarding and inspection. Second, the available port state measures directed at vessels suspected or established to have engaged in unregulated fishing on the CAO are examined. Such measures include access to port as well as in-port inspections and actions following the inspections.

Finally, considering the importance of the EU in the Arctic, relevant EU measures that can contribute to the strengthening of the combat against unregulated fishing are examined where applicable.

The thesis concludes with a summary of the findings and provides a cohesive response to the imposed research questions, with the purpose of fulfilling the objective of the thesis.

2 The Arctic and its fisheries

There is still no generally accepted geographical definition of what the Arctic Ocean and its marine environment is.³⁰ However, regardless of the choice of definition, Norway, Denmark in respect of Greenland, Russia, Canada and the USA have asserted maritime zones in the Arctic Ocean in their capacity as coastal states in accordance with the LOSC.³¹ These maritime zones include territorial sea, exclusive economic zone (fishery zone in respect of Svalbard) and continental shelf.³² In addition, there are also four high seas areas beyond national jurisdiction forming a significant part of the Arctic Ocean waters: the ‘Donut hole’ in the central Bering Sea, the ‘Loophole’ in the Barents Sea, the ‘Banana hole’ in the Norwegian Sea, and the Central Arctic Ocean.

2.1 The Arctic and the European Union

Despite not being ‘a coastal state’ or ‘a state’ at all, the European Union is also a significant participant in the Arctic region. Although no Arctic coastal state is a Member State

³⁰ In different legal works, definitions of the ‘Arctic’, ‘marine Arctic’ and ‘Arctic Ocean’ have been differing depending on the relevant topic. Mostly, the definitions provided by the different Working Groups of the Arctic Council have been used. See e.g. EJ Molenaar, *The Arctic, the Arctic Council and the Law of the Sea*, in R Beckman et al. (eds.), *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (2017), Leiden, Brill Nijhoff; EJ Molenaar, *International Regulation of Central Arctic Ocean Fisheries*, in MH Nordquist, JN Moore, R Long (eds.), *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries* (2016), Leiden, Brill Nijhoff; OS Stokke, *Barents Sea Fisheries – the IUU Struggle*, *Arctic Review on Law and Politics* (2010), vol. 1(2), pp. 207-224.

³¹ Despite not being a party to the LOSC, the USA has adopted a territorial sea and continental shelf in accordance with the 1958 Geneva Conventions on the Territorial Sea and Continental Shelf to which it is a party. Moreover, the concepts are already part of customary international law. Same is valid for the concept of EEZ, which was recognized as customary international law even before the LOSC came into force and which USA asserted in 1983. See G Andreone, *The Exclusive Economic Zone*, in D Rothwell, AG Oude Elferink, KN Scott, T Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (2015), Oxford, Oxford University Press, p. 162.

³² See LOSC, Art. 3, 57, 76.

of the EU³³, three of the other Arctic states, namely Sweden, Finland and Denmark, are. Moreover, from the states parties to the CAOFA, Iceland and Norway are participants in the European Economic Area³⁴, thus being in close relation with the EU and its market. With regards to fishing activities, EU vessels have been present in the Arctic ice-free areas³⁵, and in 2016 the Arctic states' fish import to the EU market amounted to 40% of its total import.³⁶ The EU has also not been idle in relation to the fisheries governance of the region. It has been adopting legislation since 1983, aiming at engaging with all challenges that the Arctic region faces. Finally, the EU is not only a party to the CAOFA, as already mentioned, but also a member of the NEAFC.

2.2 The Arctic fisheries

The Arctic Ocean, unlike the other world oceans, is a water body surrounded by continental mass. Therefore, fishing activities in the region occur both in the established maritime zones of the coastal states, as well as in the pockets of high seas; the only high seas area with no current commercial fishing is the Central Arctic Ocean. However, climate change has massive effect on the Arctic, so as a consequence of the receding of the ice, various valuable fish stocks might migrate northwards³⁷, away from the EEZs of the Arctic coastal states and into the high seas. A recent report was issued in 2016 with regard to fish stocks that can be found in the CAO.³⁸ According to the database at the time, there were twelve fish species sampled from locations verified to be in the high seas of the CAO, and three of them were of potential commercial interest – the Arctic cod, the Polar cod, and the Greenland halibut.³⁹ The report added, however, that the database included 339 species of fish and invertebrates surrounding the high seas and

³³ Denmark provided autonomous government to Greenland and it is not considered part of the EU. See Treaty amending, with regard to Greenland, the Treaties establishing the European Communities, 01 February 1985, OJ L 29/1.

³⁴ Agreement on the European Economic Area, entered into force in 1994, OJ L 1, Last updated 01.08.2016; available at <<https://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf>>, accessed 01.09.2019. The Agreement established one 'internal market' between the EU and Norway, Iceland and Liechtenstein.

³⁵ For details, see R Churchill, D Owen, *The EC Common Fisheries Policy*, Oxford University Press, Oxford, 2010, pp. 333-342; OS Stokke, *The Loophole of the Sea Regime*, in OS Stokke (ed.), *Governing High Seas Fisheries: The Interplay, of Global and Regional Regimes* (2001), Oxford, Oxford University Press, pp. 273-301.

³⁶ See EU Commission at <https://ec.europa.eu/fisheries/facts_figures_en?qt-facts_and_figures=5>, accessed 01.09.2019.

³⁷ See Kaartveld, Titelman, *supra*. 2 for a detailed discussion of the various fish stocks and their eventual movement with the ongoing changes.

³⁸ Final Report of the Fourth Meeting of Scientific Experts on Fish Stocks in the Central Arctic Ocean, January 2017, available at <https://www.afsc.noaa.gov/Arctic_fish_stocks_fifth_meeting/pdfs/Final_report_of_the_5th_FiSCAO_meeting.pdf>, accessed 01.09.2019. The Fifth Meeting's Report from April 2018 only makes a reference to the one of 2017, adding that the database is being maintained the by the US National Oceanic and Atmospheric Administration, while encouraging researchers to contribute new information.

³⁹ *Ibid.*, p. 45.

that the total number of the species found within the high seas was likely to increase.⁴⁰ Also, the report noted that some of the commercially valuable fish stocks found in the Barents Sea are observed to expand their distribution northward, with the possibility to reach the high seas of the CAO.⁴¹

2.3 The presence of a legal regime regarding Arctic fisheries

The information above shows how important it is to have a legal regime governing the fishing activities in the region, so as to accommodate all the changes that might be occurring. It was suggested that a legal vacuum existed in the Arctic after Russia planted its flag on the North Pole seabed in 2007.⁴² The Arctic coastal states, however, quickly refuted this statement and issued the Ilulissat Declaration⁴³ in 2008, where they reaffirmed that the Arctic is governed by the regime of the law of the sea and that there was ‘no need to develop a new comprehensive international legal regime to govern the Arctic Ocean’.⁴⁴

The LOSC, the FSA and the various FAO instruments, mentioned in the introductory chapter of the thesis, form the fisheries management aspect of the global jurisdictional framework, which was referred to as the ‘regime of the law of the sea’ in the Ilulissat Declaration. They allow for the establishment of the general rights and obligations of states in the Central Arctic Ocean regardless of the presence or lack of a regional regulation. The specific rights and obligations of flag states arising from these international instruments in relation to fisheries are discussed in detail in Chapter 3. In addition to rights and obligations, the provisions of this global framework also provide the guiding principles that need to be followed with regards to fisheries management. However, they do not contain neither specific standards nor conservation and management measures, e.g. allocation of fishing quotas or establishment of total allowable catch restrictions. These are provided by the states either individually or collectively. The main actors involved in the collective regulation are the different RFMOs, which have the role of imposing legally binding conservation and management measures upon their member states. In the Arctic, a substantial number of regional fisheries instruments apply to different parts of the Arctic Ocean. The following sections provide the fisheries instruments

⁴⁰ *Ibid.*

⁴¹ Such species include mackerel, herring, cod and beaked redfish. See *Ibid.*, p. 47-48.

⁴² EJ Molenaar, *The Arctic, the Arctic Council and the Law of the Sea*, *supra*. 30, p. 24.

⁴³ The Ilulissat Declaration on the Arctic Ocean, adopted at the Arctic Ocean Conference in Ilulissat, Greenland, 28 May 2008.

⁴⁴ *Ibid.*, para. 4.

only relevant for the high seas of the CAO, i.e. the CAOFA, the NEAFC and the Joint Norwegian-Russian Fisheries Commission.

2.4 The Arctic fisheries – The Central Arctic Ocean Fisheries Agreement

In light of the highly fragmented framework for the management of Arctic fisheries, the adoption of the CAOFA by the Arctic Five plus Five provides an instrument intended to fill in the gap of regional regulation over the high seas of the CAO. The CAOFA introduces an innovative approach and is the first agreement to apply before fishing has started in an area. It also provides for science-based measures and manifestation of the precautionary approach and not for a governance framework for exploitation.

The CAOFA is applicable to the fish stocks found within the high seas of the CAO, with the explicit exception of sedentary species.⁴⁵ Therefore, it applies to all straddling and highly migratory, as well as the anadromous and catadromous species and discrete high seas fish stocks. Although they are not mentioned, marine mammals should be considered as excluded⁴⁶ as they are governed by the regime of the ICRW⁴⁷ and the International Whaling Commission. Further, the interim conservation and management measures that states may adopt apply to commercial fishing activities only. Therefore, non-commercial fishing activities are excluded from the ban. They may include exploratory fishing or fishing for scientific purposes. It has been argued that recreational and subsistence fishing also fall within non-commercial fishing.⁴⁸

Exploratory fishing can be permitted only on the basis of strong scientific evidence and in accordance with measures adopted pursuant to the provisions of CAOFA, as well as subject to strict limitation laid down in Art. 5. With regards to fishing for scientific purposes, states have the obligation of due diligence⁴⁹ to ensure that the activities ‘do not undermine the prevention of unregulated commercial and exploratory fishing and the protection of healthy marine ecosystems’.⁵⁰ The parties are also required to encourage third states to adopt conservation and management measures which are consistent with the provisions of CAOFA.

⁴⁵ CAOFA, Art. 1(b).

⁴⁶ V Schatz, A Proelss, N Liu, *The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean: A Critical Analysis*, *The International Journal of Marine and Coastal Law* (2019), vol. 34, p. 16.

⁴⁷ International Convention for the Regulation of Whaling, 02 December 1946, Washington, the USA, United Nations Treaty Series, vol. 161, p. 72.

⁴⁸ EJ Molenaar, *The December 2015 Washington Meeting on High Seas Fishing in the Central Arctic Ocean*, the JCLOS Blog, 05 February 2016, available at <<http://site.uit.no/jclos/files/2016/04/The-December-2015-Washington-Meeting-on-High-Seas-Fishing-in-the-Central-Arctic-Ocean.pdf>>, accessed 01.09.2019.

⁴⁹ Schatz, Proelss, Liu, *supra*. 46, p. 33.

⁵⁰ CAOFA, Art. 3(4).

Further discussion of the provisions of the CAOFA related to the conservation and management measures that can be adopted by the state parties is provided in Section 3.2.

2.5 The Arctic fisheries – the North-East Atlantic Fisheries Commission

As also referred to in the body of the CAOFA itself, the most notable RFMO relevant in the CAO is the North-East Atlantic Fisheries Commission.⁵¹ It provides the common forum for the Arctic coastal states and the distant fishing states, enabling them to cooperate in the conservation and management of the fish stocks in order to ensure their sustainability, as required by the general rules of international fisheries law. Unlike most other RFMOs in the Arctic region, it regulates all fish stocks, including sedentary species, except for the highly migratory and anadromous species ‘in so far as they are dealt with by other international agreements’.⁵² The members of NEAFC are four Arctic states⁵³ and the EU, and Canada is a cooperating non-contracting party. The NEAFC Convention Area⁵⁴ includes parts of the North East Atlantic and Arctic Oceans, including both areas within and beyond national jurisdiction. One of the areas beyond national jurisdiction includes a part of the Arctic Ocean up to the North Pole, therefore overlapping with the CAOFA area of application.⁵⁵ The NEAFC Regulatory Area includes the high seas part of the Convention Area. NEAFC is competent to adopt conservation and management measures within the Regulatory Area.⁵⁶ This Area includes the Barents Sea Loophole⁵⁷ and the North Atlantic Banana hole, as well as parts of the high seas of the CAO.

NEAFC has the objective of long-term conservation and optimum utilization of the fishery resources in the Convention Area.⁵⁸ With regards to the Regulatory Area, it issues Recommendations, which are binding on the contracting parties.⁵⁹ The Recommendations are issued on the basis of the best scientific evidence available, apply the precautionary approach,

⁵¹ NEAFC was established by the Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, 18 November 1980, London, UK, United Nations Treaty Series, vol. 1285, p. 129.

⁵² NEAF Convention, Art. 1(2). This wording implies that NEAF Convention is excluding the stocks already covered by international agreements, such as for example the International Commission for the Conservation of Atlantic Tunas, which regulates the Atlantic tuna generally falling under the competence of NEAFC as well.

⁵³ Norway, Russia, Denmark in respect of Greenland and Faroe Islands, and Iceland.

⁵⁴ NEAF Convention, Art. 1(1).

⁵⁵ NEAFC Convention and Regulatory Area, available at <<https://www.neafc.org/page/27>>, accessed 01.09.2019.

⁵⁶ NEAF Convention, Art. 5.

⁵⁷ The Loophole’s regulation is a combination of coastal state and international regulation, where NEAFC has issued conservation and management measures, but outside its scope, Norway and Russia have established a certain control over the area. For details, see OS Stokke, *Managing Fisheries in the Barents Sea Loophole: Interplay with the UN Fish Stocks Agreement*, Ocean Development & International Law (2001), vol. 32(3), p. 246.

⁵⁸ NEAF Convention, Art. 2.

⁵⁹ *Ibid.*, Art. 5(1) and 12(1).

and consider the ecosystem approach for the protection of marine biodiversity.⁶⁰ With regards to the high seas of the CAO falling within the Regulatory Area, NEAFC has still not issued any Recommendations as there are currently no fishing activities, but it could be expected that such Recommendations will be put in place once fishing has commenced.

NEAFC has also contributed greatly to the combat against IUU fishing, and unregulated fishing in particular, which it considers as a threat to biodiversity. For instance, it was the pioneer among RFMOs in introducing a port control system as a means of ensuring that its conservation and management measures are properly monitored and enforced.⁶¹ The Scheme of Control and Enforcement is the main tool utilized in respect of deterring such fishing activities. The specific measures under the Scheme are discussed in detail in Chapter 4.

The success of the NEAFC can be attributed to the relatively small Regulatory Area and the political cooperation between its members.⁶² Moreover, most of the members are Arctic coastal states with significant political and economic development, whose EEZ fisheries encompass also some of the high seas' fisheries, so they have the interest and capability to maintain a high level of efficient fisheries management and enforcement. In this context, however, it is worthy to note that the USA is not participating in any capacity.

2.6 The Arctic fisheries – the Joint Norwegian-Russian Fisheries Commission

Another regional fisheries instrument, which might have relevance for the high seas of the CAO, is the agreement between Norway and Russia that established the Joint Norwegian-Russian Fisheries Commission⁶³ (the Framework Agreement).

The Framework Agreement is a bilateral instrument; therefore, it is binding only on its parties and no third state can derive rights or obligations from its provisions.⁶⁴ It provides regulations for the cooperation in the management of fish stocks shared between the two states.⁶⁵ Importantly, it does not define a spatial scope; therefore, the Joint Commission's mandate is not exclusively limited to the coastal maritime zones of the states within the Norwegian Sea and Barents Sea but can, in principle, extend into the high seas, such as the Loophole, and even into the CAO. However, it is doubtful that the Loophole practice⁶⁶ will be

⁶⁰ *Ibid.*, Art. 4.

⁶¹ NEAFC introduced the Port State Control in 2007. See <<https://www.neafc.org/mcs/psc>>, accessed 01.09.2019.

⁶² R Barnes, *supra.* 17, p. 216.

⁶³ *Supra.* 22.

⁶⁴ VCLT, Art. 34.

⁶⁵ Joint Commission, available at <<http://www.jointfish.com/eng/THE-FISHERIES-COMMISSION.html>>, accessed 01.09.2019.

⁶⁶ OS Stokke, *supra.* 57.

extended by the two states into the CAO mainly because this would have only limited effectiveness without the support of the other three Arctic coastal states.⁶⁷ This is further illustrated by the fact that the CAOFA explicitly refers to NEAFC and not the Joint Commission⁶⁸ as the competent RFMO for a part of the CAO. Therefore, its measures will not be further considered and discussed in this thesis.

3 Obligations of states with regards to fishing activities on the high seas of the Central Arctic Ocean

The previous chapter described the regional fisheries regulation applicable to the high seas of the CAO. This framework, however, will become fully applicable once the CAOFA comes into force, if at all. Until then, the NEAFC Regulatory Area remains under its competence, whereas the remaining part of the high seas of the CAO are subject to the general international law of the sea. Therefore, this Chapter examines the obligations that flag states have with regards to fishing activities under two possible hypotheses. First, the obligations of states where no regional fisheries regulation is applicable are investigated. Second, the obligations of third states in relation to the measures adopted under CAOFA are assessed, under the presumption that it will enter into force, thus becoming legally binding. Finally, the monitoring, surveillance and control tools are described as they form part of the specific duties related to the effective exercise of jurisdiction.

3.1 Obligations of states in a high seas area with no regional fisheries regulation

The Arctic coastal states reaffirmed that the applicable law in the Arctic Ocean is the law of the sea through the Ilulissat Declaration. The 1982 LOSC is the most comprehensive international legal instrument governing the field of law of the sea. It is referred to as the ‘constitution of the oceans’.⁶⁹ Its objectives include the establishment of a legal order of the seas and oceans and the equitable and efficient utilization of their resources⁷⁰, including marine living resources and their conservation. As mentioned, the USA is not a party to it; however, provisions on the conservation of marine living resources and the protection and preservation

⁶⁷ EJ Molenaar, *International Regulation of Central Arctic Ocean Fisheries*, *supra*. 30, p. 440.

⁶⁸ The Joint Commission seems to be regarded as a regional fisheries management arrangement (RFMA) by its two members despite they named it ‘Commission’. However, during the negotiations of CAOFA, some delegations expressed doubts about this RFMA status. See EJ Molenaar, *Participation in Regional Fisheries Management Organizations*, in R Cadell, EJ Molenaar (eds.), *Strengthening international Fisheries Law in an Era of Changing Oceans* (2019), Oxford, Hart Publishing, p. 106.

⁶⁹ T T Koh, President of the Third United Nations Conference on the Law of the Sea, ‘A Constitution of the Oceans’, available at <https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>, accessed 01.09.2019.

⁷⁰ LOSC, Preamble, para. 4.

of the marine environment are recognized as customary international law⁷¹, rendering the non-participation of the USA irrelevant as it becomes binding on all states.

3.1.1 The high seas ‘freedom’ of fishing and its limitations

The high seas consist of the international waters beyond the scope of national jurisdiction.⁷² The high seas are open to all states where they may exercise the ‘freedoms of the high seas’⁷³, including the freedom of fishing.⁷⁴ However, the freedom of fishing is not unlimited. It must be exercised subject to certain specific conditions⁷⁵; moreover, when exercising high seas freedoms, states must do so with ‘due regard’ to the interests of other states⁷⁶. This means they cannot adopt unilateral decisions on matters which might have any impact on other states without considering the interests and rights of the states that are concerned. Specific conditions for high seas fishing activities include the general duty of states, either unilaterally or in cooperation with others, to adopt measures for the conservation of living resources on the high seas, set forth in Art. 117 LOSC. The need for conservation is explained by the exhaustive nature of the fish resources. It is applicable to all states and their nationals, all vessels and all areas of the high seas.⁷⁷ Additional and crucial for the high seas fisheries regime is Art. 118 which imposes on states the obligation to cooperate in the conservation and management of the marine living resources. States whose nationals exploit the same fish stocks or different stocks but in an identical area are required to enter into negotiations and to establish regional fisheries organization with the purpose of establishing proper measures for the conservation of the living resources in the area. This obligation, however, is subject to the discretion of the states as they are required to cooperate by entering ‘into negotiations with a view’ to taking the measures and ‘as appropriate’. This implies that despite having the duty to negotiate, states are under no obligation to conclude the negotiations with any particular agreements. Moreover, Art. 119 sets the requirements for the establishment of the conservation

⁷¹ The protection and preservation of the marine living resources for part of the general obligation to protect the marine environment. See ITLOS, *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* Provisional measures (1999) 117 ILR 148, [70]; ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* Advisory Opinion (2015) ITLOS Reports 2015 4, [120]; PCA, *In the Matter of the South China Sea Arbitration (the Philippines and China)* Award (2016), [907].

⁷² LOSC, Art. 86.

⁷³ LOSC, Art. 87.

⁷⁴ LOSC, Art. 87(1)(e).

⁷⁵ LOSC, Art. 116 refers to engaging in fishing as a ‘right’, subject to three specific limitations, listed in the same Article.

⁷⁶ LOSC, Art. 87(2). The ICJ also classified the due regard requirement as a rule of general international law and denied the absolute freedom of fishing. See ICJ, *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)* Judgment (Merits) (1974) ICJ Reports 1974 175, [64]; ICJ, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)* Judgment (Merits) (1974) ICJ Reports 1974 3, [71-72].

⁷⁷ R Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (2004), Leiden, Brill Academic Publishers, p. 32.

measures, where states must take the measures on the basis of best scientific evidence, with the aim of maintaining the maximum sustainable yield of the fish stocks and with consideration of the associated and dependent species.

Specific provisions are relevant for the high seas straddling and highly migratory species; for straddling fish stocks, both coastal and flag states are obliged to ‘seek to agree upon’⁷⁸ conservation measures for these fish stocks, and this cooperation can be either direct or through an ‘appropriate’ organization, i.e. a regional RFMO. In the case of highly migratory species, states are obliged to cooperate directly or through RFMOs with the aim of optimum utilization of these species.⁷⁹ These provisions establish the general duty on states to cooperate; however, it is not further developed in the text of the Convention, which can be seen as a weak imposition of the obligation. Nevertheless, the language of the provisions contains the word ‘shall’ which renders them mandatory. In the Arctic, these provisions might gain further relevance with climate changes and the potential movement of various species within the Arctic waters and further into the high seas of the CAO.

Overall, it could be said that the LOSC provides for the freedom of fishing on the high seas, including on the CAO, but only subject to conditions. It requires states to cooperate through the establishment of regional cooperative mechanisms. However, with regards to unregulated fishing in such areas, and especially where such regional instruments have not been adopted or established, the LOSC fails to provide adequate response to the question of obligations of states, except for the general duty of conservation of living marine resources and the duty to cooperate towards the realization of such conservation. Therefore, there is a substantial gap in the LOSC regulation which has had to be further addressed in subsequent global and regional legal instruments.

3.1.2 The problem with the high seas freedom of fishing – exclusivity of flag state jurisdiction

The primary jurisdiction over high seas fishing activities is provided to the flag states. According to Art. 90, all states have the right to sail ships under their flag, where they must establish conditions for the ships to comply with in order to receive nationality, registration and right to fly the state flag.⁸⁰ The substantive requirement for the accordance of nationality set

⁷⁸ LOSC, Art. 63(2).

⁷⁹ LOSC, Art. 64(1).

⁸⁰ LOSC, Art. 91.

out in Art. 92 is that a ‘genuine link’ exists between the state and the ship. The meaning of the term is not established by the LOSC itself; the ITLOS provided some clarification and established that the purpose of the need for genuine link is to ‘secure more effective implementation of the duties of the flag State’.⁸¹ Therefore, the genuine link allows the state to exercise its ‘effective jurisdiction and control’ over ship flying its flag ‘in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices’.⁸²

Art. 92 subjects the ships to the exclusive jurisdiction of the flag state. Therefore, both the ship, its Master, and its crew are subject to the exclusive jurisdiction of the flag state apart from the said exceptions. The right to exercise jurisdiction over ships is transformed into an obligation once a ship sails under a flag of a state. Art. 94 builds on the right of the flag states under Art. 92 and imposes the duty to actually ‘effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag’. This provision lists both jurisdiction and control, which implies that flag states are granted both prescriptive and enforcement jurisdiction in that regard. It has even been suggested that as long as ‘jurisdiction’ and ‘control’ are connected with ‘and’, they should cover ‘all prescriptive, adjudicative and enforcement aspects’.⁸³ Moreover, the duty to exercise effective jurisdiction and control involves the duty of flag states to take measures ensuring that vessels flying their flags do not engage in fishing activities undermining the flag states’ responsibilities under the LOSC in relation to conservation and management of marine living resources.⁸⁴

Exclusivity of the flag state enforcement means that only the flag state has the capacity to stop, board and inspect vessels flying its flag, and eventually impose sanctions in case of violation of conservation measures adopted under its national legislation. The flag state may allow another state to perform boarding and inspection, but this should not be seen as a right to the other state, but rather as a ‘partial waiver of flag state jurisdiction’⁸⁵, which can be withdrawn at any moment.

The exclusive jurisdiction of the flag state over vessels flying its flag on the high seas, however, has its vulnerable aspects. The flag state jurisdiction entails that the flag state is

⁸¹ ITLOS, *M/V Saiga (No.2) (Saint Vincent and the Grenadines v Guinea)* Judgment (1999) 120 ILR 143, [83].

⁸² ITLOS, *M/V Virginia G (Panama v Guinea-Bissau)* Judgment (2014) 53 ILM 1164, [113].

⁸³ Y Takei, *Assessing Flag State Performance in Legal Terms: Clarifications of the Margin of Discretion*, *The International Marine and Coastal Law* (2013), vol. 28(1), p. 101.

⁸⁴ ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, [116-119], *supra*. 81.

⁸⁵ D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2009), Cambridge, Cambridge University Press, p. 9.

obliged to ensure that its vessels comply with the obligations on the high seas, undertaken and implemented by the state, and that enforcement actions are performed in case of violations of these duties. This, however, has been established as an obligation ‘of conduct’ and not ‘of result’. This means that the flag state is required ‘to deploy adequate means, to exercise best possible efforts, to do the utmost’⁸⁶ in order to prevent its vessels to engage in unregulated fishing activities. Therefore, it is a duty of ‘due diligence’, i.e. the obligation of the flag state ‘to take all necessary measures to ensure compliance’ and to prevent unregulated fishing by vessels flying its flag.⁸⁷

Since flag states are solely responsible for the enforcement of applicable measures on the high seas and no uniform organization is established with the purpose of enforcing international or regional fisheries legislation on the high seas, it follows that there is no uniformity in the extent of such enforcement. Therefore, a gap is created as there are varying levels of enforcement among states, giving rise to the so-called ‘flags of convenience’, which are states with less stringent regulations regarding the registering of ships, taxation, and control and enforcement of the national or international instruments.⁸⁸ In the context of high seas fisheries, such states’ unwillingness or incapability to enforce the applicable conservation and management measures allows vessels flying their flags to engage in fishing activities in breach of the measures and to avoid sanctions for such violations.

Another consequence of the failure of flag states to ensure proper compliance and enforcement is the case of unregulated fishing. Its definition is provided as part of the definition of the broader concept of IUU fishing in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing adopted by the FAO.⁸⁹ According to the definition, unregulated fishing is separated into two different sub-categories: the first one is fishing activities taking place in a RFMO area by vessels without nationality or with the nationality of a non-member state of the RFMO, or by a fishing entity, in contradiction with the measures adopted by the RFMO. The second one refers to fishing activities related to areas or fish stocks which are not subject to any conservation and management measures, where the activities are performed in contradiction with the state obligations for the conservation of

⁸⁶ ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* Advisory Opinion (2011) ITLOS Reports 2011 10, [110].

⁸⁷ ITLOS, *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, [129], *supra*. 81.

⁸⁸ E Osieke, *Flags of Convenience Vessels: Recent Developments*, *The American Journal of International Law* (1979), vol. 73(4), p. 604.

⁸⁹ IPOA-IUU, Art. 3 provides the full definition of IUU fishing.

marine living resources under international law. Considering the definition, it is evident that fishing activities in the CAO might fall within both options of unregulated fishing, depending on whether they take place in the Regulatory Area of NEAFC or the area covered by the CAOFA, which is currently subject to general international law. Unregulated fishing may occur also in case the CAOFA, if regarded as an RFMA, comes into force and fishing activities are undertaken in contradiction with the conservation and management measures adopted under it.

3.1.3 The evolution of flag state obligations on the high seas

The provisions of the LOSC related to fisheries management on the high seas, as established, fail to clearly address the issue of unregulated fishing and flag states obligations in that regard. However, various international legal instruments have been adopted after the adoption of the LOSC, following the growing international concern over the matter. The most prominent of these instruments are the 1995 Fish Stocks Agreement and the instruments adopted by FAO, such as the legally binding Compliance Agreement as well as non-legally binding ones.⁹⁰

3.1.3.1 Duty to cooperate

While the LOSC provides for general obligation to cooperate, the FSA provides for specific duties about how this cooperation can be achieved. The FSA requires strong collaboration among states, both coastal and flag, through the establishment of RFMOs⁹¹ with the purpose of ensuring the effective conservation of the fish stocks. Thus, it ‘institutionalizes’⁹²

⁹⁰ They include, *inter alia*, the FAO Code of Conduct for Responsible Fisheries, 31 October 1995, Rome, available at <<http://www.fao.org/3/v9878e/V9878E.pdf>>, accessed 01.09.2019. It introduced principles and standards to both conservation and management measures and their measures for their enforcement, available to flag and port states. See also the International Guidelines for the Management of Deep-Sea Fisheries in the High Seas, 2009, Rome, available at <<http://www.fao.org/3/i0816t/i0816t00.htm>>, accessed 01.09.2019. The Guidelines contributed to the interrupted use of large-scale pelagic driftnet fishing and introduced restriction to fishing on the bottom-fisheries on the high seas. See also FAO, Voluntary Guidelines for Flag State Performance, 2015, Rome, available <<http://www.fao.org/3/a-i4577t.pdf>>, accessed 01.09.2019. The Guidelines provided for a compilation of international measures, seeking to strengthen compliance of flag states with their international obligations regarding flagging and control of fishing vessels, thus effectively implementing flag states responsibilities and preventing and deterring IUU fishing. See also N Liu, E Kirk, *The European Union's Potential Contribution to Protect Marine Biodiversity in the Changing Arctic: A Roadmap*, International Journal of Marine and Coastal Law (2015), vol. 30(2), p. 268; P Sands, J Peel, A Fabra, R MacKenzie, *Principles of International Environmental Law* (2018), 4th ed., Cambridge, Cambridge University Press, p. 546.

⁹¹ FAO defines RFMOs as a part of the broader concept of Regional Fishery Bodies, which are mechanisms through which ‘States or organizations that are parties to an international fishery agreement or (“agreement” is fundamental, and different from arrangement) arrangement work together towards the conservation, management and/or development of fisheries’. The RFMOs under the definition of FAO have a management mandate and adopt fisheries conservation and management measures that are binding on their members. The difference between an RFMO and an RFMA is that the organization has established a Secretariat that operates under a governing body of member States and the arrangement does not have. See FAO, What are Regional Fishery Bodies (RFBs)?, available at <<http://www.fao.org/fishery/topic/16800/en>>, accessed 01.09.2019.

⁹² Rayfuse, *supra*. 77, p. 42.

the duty to cooperate under the LOSC. If no RFMO is set up in an area or with regard to a particular fish stock, states must cooperate to establish and to participate in such an organization or any other appropriate management for the conservation and management of the concerned fish stocks.⁹³ Where an RFMO is established and competent to adopt conservation and management measures for particular fish stocks, states are obliged to become members of the RFMO, or to apply the rules adopted by it, if they are to have access to and to exploit the fish stocks to which the measures apply.⁹⁴ Therefore, non-members are *de facto* excluded from the fisheries in the RFMO areas.

The admission to an existing RFMO, however, is restricted by the requirement of ‘real interest’ to the concerned fisheries.⁹⁵ There is no clear definition of this concept⁹⁶; however, it has been interpreted as directed at states intending to fish for the particular fish stock, where they must demonstrate their factual or specific interest in fisheries.⁹⁷ Therefore, the obligation to cooperate does not give an automatic right to participate in RFMOs, and *vice versa* – Art. 17 of the FSA does not discharge states which are not a member of an RFMO or do not respect its conservation and management measures from their obligation under Art. 117 LOSC. Moreover, such states are under the duty not to authorize fishing of straddling or highly migratory fish stocks in the area subject to conservation and management measures of the RFMO.

3.1.3.2 Duty to exercise ‘effective control’

The flag states obligation to exercise ‘effective control’ over their vessels is also strengthened by the FSA. Art. 18 of the FSA requires flag states to ensure that their vessels comply with the measures adopted by the RFMOs and that they do not undermine the effectiveness of these measures. They are also required to cooperate with the other states, either directly or through the RFMO. The substance of ‘effective control’ is further elaborated by the non-exhaustive list of measures that states must take in order to control the vessels flying their flag, such as registering, authorization to fish and record of fishing vessels.⁹⁸ This is further

⁹³ FSA, Art. 8(5). Art. 9(1) provides for a non-exhaustive list of subjects upon which the states must agree when establishing and RFMO/A, e.g. type of fish stocks and area of application.

⁹⁴ FSA, Art. 8(3) and (4).

⁹⁵ FSA, Art. 8(3).

⁹⁶ See EJ Molenaar, *The Concept of Real Interest and Other Aspects of Cooperation through Regional Fisheries Management Mechanisms*, International Journal of Marine and Coastal Law (2000), vol. 15(4), pp. 475-531 for a full discussion on the concept, not only in relation to states not participating in the RFMO/As.

⁹⁷ T Henriksen, G Hønneland, A Sydnes, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (2006), Leiden, Martinus Nijhoff Publishers, p. 20. See detailed discussion on the concept at pp.18-22.

⁹⁸ FSA, Art. 18(3).

enhanced by the FAO Compliance Agreement⁹⁹, which attempted to give the real substance of flag state duties towards vessels flying their flag. The Compliance Agreement, which is applicable to all vessels fishing on the high seas, requires the flag states to specifically authorize any vessel fishing on the high seas and to have the capacity to effectively exercise control over them before they grant the authorization. Thus, they are required to take all necessary measures to ensure that the effectiveness of the conservation and management measures applicable to the high seas is not undermined. Flag states are also required to cooperate in order to support the identification of vessels which are in breach of the constituted measures through the exchange of information, for example. Therefore, if a flag state fails to meet the requirements posed by Art. 18 FSA, it can be considered to have failed in its Art. 117 LOSC duties, thus forfeiting the right of its vessels to fish on the high seas for highly migratory and straddling fish stocks.¹⁰⁰

In addition to the obligation of effective control, Art. 19 FSA imposes on flag states the duty to exercise enforcement, regardless of where violations occur, and to conduct immediate and full investigation. In the event that sufficient evidence is found, flag states must bring the case before their authorities for prompt judicial proceedings and the sanctions imposed must be adequate to deprive the offenders of the benefits from the violations. Additionally, the duty to cooperate extends to enforcement measures as well, and states must collaborate or request aid in the investigation of alleged violations.¹⁰¹

Therefore, in the context of fisheries on the high seas of the CAO, flag states are restricted by the duties that general international law imposes on them. Regardless of the status of the CAOFA as an RFMA, or its entering into force, flag states are not released from their obligations to cooperate and to exercise effective control over the vessels flying their flag. It is true that the FSA and the Compliance Agreement have a limited application, as they are not as universally accepted as the LOSC. Therefore, their regulations apply only to the states that are parties to the instruments, as they still have not achieved the status of customary international law in full.¹⁰²

⁹⁹ FAO Compliance Agreement, Art. III, IV and VI.

¹⁰⁰ Rayfuse, *supra*. 77, p. 46-47.

¹⁰¹ FSA, Art. 20.

¹⁰² The precautionary approach under Art. 6(6) FSA is one of the emerging norms of customary international law. For a detailed discussion, see P Sands, J Peel, A Fabra, R MacKenzie, *supra*. 90, pp. 229-240.

3.2 Obligations of states in the high seas area under the Central Arctic Ocean Fisheries Agreement

As already mentioned, all states enjoy the right to engage in fishing activities on the high seas regardless of their participation in an RFMO/A. However, when vessels flying third-state flags conduct fishing in an area subject to the conservation and management measures adopted under an RFMO/A, a question about their rights and obligations arises. As noted, the FSA has far fewer parties than the LOSC. Therefore, the states not parties to the FSA are generally not bound by the conservation and management measures adopted under RFMO/As. This leads to the problem of states having differing obligations in relation to the conservation and management measures adopted by RFMO/As depending on their participation in the FSA.

When flag states are parties to the FSA but not members to RFMO/As, they are still under their obligations to cooperate, i.e. not to authorize fishing in an area or for fish stocks subject to the applicable conservation and management measures adopted under the relevant RFMO/A.¹⁰³ Also, irrespectively of their status as a member or a participant in RFMO/As, all flag states have the duty to comply with the relevant conservation and management measures in the area where the vessels flying their flag are conducting fishing activities.¹⁰⁴ With respect to non-parties to the FSA, the states are obliged to encourage the latter to become parties to the FSA and to adopt the appropriate laws.¹⁰⁵

In case a flag state is not a party to the FSA, however, the problem of the obligation to comply with applicable conservation and management measures adopted by an RFMO/A is very much present. Due to the *pacta tertiis* principle, such flag states are free to refuse to comply with the applicable regulations¹⁰⁶ even though such actions have adverse effect on the efforts to achieve sustainability regarding the fish stocks.¹⁰⁷ However, it has been argued that states derive obligations under the LOSC with respect to applicable conservation and management measures adopted by an RFMO/A even if they are non-members. The UN Secretariat was first

¹⁰³ FSA, Art. 8(1), 17.

¹⁰⁴ FSA, Art. 18(1).

¹⁰⁵ FSA, Art. 33(1).

¹⁰⁶ VCLT, Art. 33. See also E Franckx, *Pacta Tertiis and the Agreement for the Implementation of Stocks Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to Conservation & Management of Straddling Fish Stocks & Highly Migratory Fish Stocks*, FAO Legal Papers #8, June 2000, available at <<http://www.fao.org/3/a-bb041e.pdf>>, accessed 01.09.2019.

¹⁰⁷ The fishing by vessels of these states has been identified as one of the main causes for overfishing of the high seas fish stocks. See R Churchill, A Lowe, *The Law of the Sea* (1999), 3rd ed., Manchester, Manchester University Press, p. 301; UR Sumalia et al., *Potential Costs and Benefits of Marine Reserves in the High Seas*, Marine Ecology Progress Series (2007), vol. 345, p. 306. It has also been estimated that 67% of the fish stocks managed by RFMOs have been either depleted, overfished or both. See S Cullis-Suzuki, D Pauly, *Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations*, Marine Policy (2010), vol. 34, p. 1041.

in providing this statement¹⁰⁸, but the Report has been considered to be ‘not an in-depth discussion of the third states’ obligations or their foundation’.¹⁰⁹ Nevertheless, several arguments can be raised to support interpretation of the LOSC which points towards the relationship between the conservation and management measures adopted by RFMO/As and third states engaged in fisheries subjected to these measures.

The duties of the flag states with respect to high seas fisheries under the LOSC, as discussed above, are two – duty of cooperation and duty of conservation. Art. 117 establishes the duty to cooperate in taking measures for the conservation of living resources. Art. 118 reinforces this obligation by requiring states to ‘enter into negotiations with a view’ to adopting measures and to cooperate in the establishment of RFMOs. Therefore, this obligation is rather limited to the cooperation on the establishment of RFMOs and does not entail that states are obliged to establish or participate in the RFMOs.¹¹⁰ Further, with respect to the highly migratory and straddling fish stocks and their regulation by RFMOs, Art. 116(b) incorporates the provisions of Art. 63 and 64 governing the relationship of flag states and coastal states in the conservation of such stocks. These states are required to ‘seek... through... organizations, to agree’¹¹¹ and ‘participate in its work’.¹¹² Thus, they are still enabled to fulfil their cooperation obligations even without becoming members of such organizations.¹¹³

Moreover, Art. 119(2) requires states to contribute and exchange on a regular basis the available scientific information, catch and fishing efforts, as well as all other data that might be relevant for the conservation of the fish stocks. Such distribution of information must be ‘with participation of all states concerned’, thus encompassing both members of the RFMOs and third states. It follows that a state is under the obligation to provide such information in order to be able to fish in the area regulated by the relevant RFMO.

The second fundamental obligation of states is the duty of conservation of the fish stocks. As already mentioned, Art. 117 establishes the obligation of states to cooperate in the

¹⁰⁸ In 1992, the UN Secretariat prepared a report in which it argued that the flag state obligation to cooperate under the LOSC includes the duty to ensure that vessels flying their flag comply with the applicable RFMO conservation and management measures when fishing for stocks regulated by it. The report was controversial as it challenged the traditional freedom of fishing, where all states had open access to the high seas fish stocks. See UN Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: The Regime for High-Seas Fisheries – Status and Prospects*, E.92.V.12 1992, 28-29, as quoted in T Henriksen, *Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations*, *Ocean Development & International Law* (2009), vol. 40(1), pp. 80-96.

¹⁰⁹ T Henriksen, *ibid.*, p. 82.

¹¹⁰ M Hayashi, *Regional Fisheries Management Organizations and Non-Members*, in TM Ndiaye, R Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007), Leiden, Martinus Nijhoff Publishers, p. 762.

¹¹¹ LOSC, Art. 63(2).

¹¹² LOSC, Art. 64(1).

¹¹³ T Henriksen, *supra*, 108, p. 88.

adoption of conservation and management measures. However, the provision refers to ‘measures... as may be necessary’. Therefore, it is open-ended and does not provide any specifics as to which measures must be undertaken by states. Accordingly, states can potentially disagree on the nature and extent of the measures. Also, the duty of conservation is worded in such a way that it can be regarded as a duty of conduct and one not of result, so it is not clear what consequences the failure of states to agree on such measures can have.¹¹⁴ Still, when third states adopt unilateral measures, which are often less onerous¹¹⁵ from the ones adopted by the relevant RFMO, then their fishing activities may undermine the effective conservation of the fish stocks and lead to their overexploitation.

In addition, and as mentioned, Art. 116(b) refers to the provisions of art. 63 and 64 in relation to the highly migratory and straddling fish stocks, and directly subjects third states to the rights and interests of coastal states. Therefore, it also directly limits the freedom of third states on fishing for such living resources on the high seas.

Finally, all states are under the obligation to give due regard to the interests of the other states engaged in activities on the high seas.¹¹⁶ It has been suggested that this obligation can be read as at least strongly encouraging third states to coordinate their conservation and management with the measures adopted by the relevant RFMO. Then, by not adopting any measures or by adopting unilateral ones, states may authorize vessels flying their flags to engage in fishing activities that ‘either obstruct or are detrimental to the interests and rights of the other states’¹¹⁷ which exploit the same resources but are members of RFMOs.

Consequently, if one were to accept the interpretation described above, then it could be stated that even if not parties to the FSA, third states are compelled to adopt/comply with the conservation and management measures under RFMO/As¹¹⁸, or at least to undertake to ensure that vessels flying their flags do not engage in activities undermining the measures, in order to be able to engage in fishing activities in the same high seas area. In such a scenario, the classification of the CAOFA as RFMO/A needs to be considered in order to establish the

¹¹⁴ S Borg, *Conservation on the High Seas: Harmonizing International Regimes for the Sustainable Use of Living Resources* (2012), Cheltenham UK, Edward Elgar, p. 42.

¹¹⁵ *Ibid.*, p. 37.

¹¹⁶ LOSC, Art. 87(2).

¹¹⁷ T Henriksen, *supra*. 108, p. 90-91.

¹¹⁸ T Henriksen, *ibid.*, p. 91, acknowledges that such an obligation of third states to directly adopt the conservation and management measures of RFMOs might be overstretching of the duty cooperate.

significance of the conservation and management measures adopted under the CAOFA provisions and whether third states might have an obligation to respect them.

3.2.1 Status of the Central Arctic Ocean Fisheries Agreement as a regional fisheries management arrangement

The parties to the CAOFA did not consider it necessary to establish a new RFMO or an RFMA to regulate fisheries in the area and referred to NEAFC as the responsible RFMO to a part of the high seas of the CAO.¹¹⁹ This has fueled a discussion about whether the Agreement itself can be regarded as RFMA, as its status is not dependent on the view of the parties but on its legal nature.¹²⁰ Under the general law of the treaties, CAOFA is an international agreement signed among ten parties, meaning that its provisions are only binding upon them, and that third parties can derive neither rights nor obligations under it without expressing consent.¹²¹ However, considering the uncertainty about its nature of an RFMA, one could come to differing conclusions depending on whether the CAOFA is accepted as an RFMA or not. In case it is indeed considered as such, then pursuant to the provisions of the FSA¹²², third states have an obligation to comply with its provisions as well as the established conservation and management measures in order to have a right to participate in the fishing activities.¹²³ If it is not considered as an RFMA, then the obligations arising under general international law and customary international law are applicable. Therefore, an assessment of its status of an eventual RFMA is necessary.

According to the FSA, an RFMA is a cooperative mechanism established in accordance with the LOSC and the FSA ‘by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks’.¹²⁴ As the CAOFA is established by more than two parties, it must be investigated whether it is indeed a cooperative mechanism ‘for the purpose, *inter alia*, of establishing conservation and management measures’ in accordance with the FSA. The FSA defines conservation and management measures as ‘measures to conserve and manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law’, as laid down in the LOSC and the FSA.

¹¹⁹ CAOFA, Preamble, para. 7.

¹²⁰ Schatz, Proelss, Liu, *supra*. 46, p. 45.

¹²¹ VCLT, Art. 34.

¹²² FSA, Art. 8.

¹²³ Schatz, Proelss, Liu, *supra*. 46, p. 46.

¹²⁴ FSA, Art. 1(1)(d).

Some of the provisions of CAOFA, when examined against the definitions of the FSA, show indications that the agreement can be regarded as establishing an RFMA.¹²⁵ Art. 3 CAOFA includes the term ‘interim conservation and management measures’ in its title and provides for conservation and management measures, including the temporary abstention from unregulated fishing, falling within the definition of the FSA. Art. 3(3) in conjunction with art. 5(1)(d) CAOFA impose restrictions on states regarding the authorization of exploratory fisheries and provide for the competence to directly establish conservation and management measures for such activities, which seems to be in line with the definition under the FSA. Moreover, in relation to exploratory fisheries and in relation to the objective of CAOFA¹²⁶, the abstention from unregulated fishing¹²⁷, as well as the establishment of a Joint Program of Scientific Research and Monitoring to provide scientific information about the marine ecosystems of the CAO and their future sustainable utilization¹²⁸, qualify as ‘cautious conservation measures’ under the FSA rules about new and exploratory fisheries.¹²⁹ Further, Art. 3(1)(b) in conjunction with Art. 5(1)(c)(ii) CAOFA allow for the direct establishment of conservation and management measures, once negotiations for the establishment of an RFMO/A pursuant to Art. 5(1)(c)(i) CAOFA have commenced. On the basis of these considerations, it can be concluded that the CAOFA is more likely to be considered as an RFMA.

Therefore, it can be stated that, regardless of their participation in the FSA, flag states should at least ensure that vessels flying their flags do not engage in fishing activities which can undermine the conservation and management measures adopted under the provisions of the CAOFA. The same is valid for the Regulatory Area of the NEAFC extending into the high seas of the CAO if/when it adopts the relevant Recommendations.

3.3 Flag state measures in respect of fishing vessels in the Central Arctic Ocean

The international legal instruments, as described above, require states to take all necessary measures to ensure that they are effectively controlling their vessels before they grant them any authorization to conduct fishing activities, in order to ensure compliance with applicable conservation and management measures. The general measures that states must take

¹²⁵ See also EJ Molenaar, *supra*. 68, p. 106-107; Schatz, Proelss, Liu, *supra*. 46, p. 44-46.

¹²⁶ CAOFA, Art. 2.

¹²⁷ CAOFA, Art. 3(1).

¹²⁸ CAOFA, Art. 4.

¹²⁹ FSA, Art. 6(6).

under the international regulations include registration of fishing vessels, authorization to fish, and recording of fishing vessels.

3.3.1 Registration of fishing vessels

The LOSC stipulates that all states have the right to sail ships under their flag, balanced against their obligation to establish conditions for the ships to comply with, in order to receive nationality, registration and right to fly the state flag.¹³⁰ A substantive requirement is also that a ‘genuine link’¹³¹ exists between the state and the ship, which was discussed in the previous section. Based on these conditions, vessels are granted nationality of the state whose flag they are entitled to fly and are required to sail under the flag of one state only, where they cannot change flags during voyage or in port, subject to a few exceptions.¹³² The LOSC, however, does not provide more elaborate conditions for the registration of vessels by flag states. In this regard, states usually require only vessels of certain size to register, while smaller vessels ‘may be entitled to fly the flag of their owner state’s nationality without registration’.¹³³ Therefore, the flag states are not under the strict obligation to register the fishing vessels flying their flags.

Nonetheless, some of the key FAO fisheries instruments provide guidelines for the states in granting flag to fishing vessels. Although these instruments are of no legally binding nature, the measures contained therein can still be transformed into mandatory, if included in a treaty or under an RFMO.¹³⁴ The FSA and the FAO Compliance Agreement have incorporated some of these measures converting them into obligations upon their parties. More specifically, the FAO Code of Conduct and the FAO Technical Guidelines for Responsible Fisheries¹³⁵ require states to ensure that vessels flying their flags carry on board the original Certificate of Registry or a document that would attest to the nationality of the fishing vessels.¹³⁶ Additionally, the FAO Code of Conduct as well as the Voluntary Guidelines encourage¹³⁷ flag states to establish requirements for the marking of their fishing vessels in accordance with the FAO Standard Specifications for the Marking and Identification of Fishing Vessels.¹³⁸ FAO has also provided legal and technical measures for the marking of fishing gear in order to

¹³⁰ LOSC, Art. 91.

¹³¹ *Ibid.*

¹³² LOSC, Art. 92.

¹³³ Guilfoyle, *supra*. 85, p. 95.

¹³⁴ NEAFC Scheme, Art. 6.

¹³⁵ FAO, ‘Fishing Operations’, FAO Technical Guidelines for Responsible Fisheries No. 1, 1996, Rome.

¹³⁶ FAO Code of Conduct, Art. 8.2.2, FAO Technical Guidelines, para. 26.

¹³⁷ FAO Code of Conduct, Art. 8.2.3, 8.2.4; FAO Voluntary Guidelines, para. 14; FSA, Art. 18(3)(d); FAO Compliance Agreement, Art. III(6).

¹³⁸ FAO, The Standard Specifications for the Marking and Identification of Fishing Vessels, 1989, Rome.

identify the owner of the gear.¹³⁹ States must also consider other measures when registering fishing vessels, such as the requirement to ensure that their vessels do not engage in IUU fishing¹⁴⁰, to avoid registration of vessels with a history of non-compliance¹⁴¹, and to take all appropriate steps to prevent reflagging or flag hopping.¹⁴²

Despite these measures, the issue of fishing vessels of states which are not parties to these legal instruments or parties of RFMOs is still present, and the flag states are the only ones to provide for the registration of their fishing vessels. Unfortunately, there is still no global uniform system exclusively for the registration of fishing vessels. Moreover, national registration processes do not distinguish the fishing vessels from the other types of vessels.¹⁴³ In this regard, the EU sets a good example of a uniform system for registering of its fishing fleet, where the EU Member States are required to have national fishing fleet register¹⁴⁴ in which to collect, validate and record information about the identification and characteristic of fishing vessels, such as, inter alia, country of registration, name, type, gear, and external marking.¹⁴⁵ They must also transmit the information to the Commission, which must verify its correctness and register it in the Union fishing fleet register.¹⁴⁶

3.3.2 Authorization to fish

In addition to registration, flag states can effectively control their vessels through the authorizations to fish. FAO provides a link between the two measures, where states need to conduct separate processes of registration and authorization but in a manner that ensures that each process gives the appropriate consideration to the other.¹⁴⁷ The Compliance Agreement further stipulates that if a fishing vessel authorized to perform fishing activities loses its right to fly the flag of the state, its authorization to fish on the high seas must be deemed to have been cancelled.¹⁴⁸

¹³⁹ FAO Code of Conduct, Art. 8.2.4.; FAO Technical Guidelines, para.36, FSA, Art. 18(3)(d).

¹⁴⁰ IPOA-IUU, para. 34, 37.

¹⁴¹ IPOA-IUU, para. 36, Voluntary Guidelines, para. 18.

¹⁴² IPOA-IUU, para. 38; Voluntary Guidelines, para. 23. Flag hopping is defined in the IPOA-IUU and the Voluntary Guidelines as the practice of repeated and rapid changes of a vessel's flag for the purposes of circumventing conservation and management measures or provisions which have been adopted at a national, regional or global level or of facilitating non-compliance with such measures or provisions. See also FSA, Preamble, para. 5; FAO Compliance Agreement, Preamble, paras. 4, 9.

¹⁴³ MA Palma, M Tsamenyi, W Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (2010), Leiden, Brill | Nijhoff, p. 118.

¹⁴⁴ Commission Implementing Regulation (EU) 2017/218 of 6 February 2017 on the Union fishing fleet register, OJ L 34, 9 February 2017, 9-17, Art. 5.

¹⁴⁵ *Ibid.*, Annex I.

¹⁴⁶ *Ibid.*, Art. 6.

¹⁴⁷ IPOA-IUU, para. 41; Voluntary Guidelines, para. 19.

¹⁴⁸ FAO Compliance Agreement, Art. III(4).

Flag states are under the duty to grant authorizations to fish to the fishing vessels operating on the high seas, including in the areas under the management of RFMOs to which they are members, and to ensure that only such vessels engage in fishing activities.¹⁴⁹ Therefore, by granting authorizations for fishing on the high seas, states ensure compliance with their obligations in relation to any conservation and management measures, arising under both international law, customary law as well as all regional or bilateral instruments adopted by them. Furthermore, flag states can grant authorizations to fish only if they can ensure that the fishing vessels can comply with the conditions of the authorization, and that they do not engage in activities undermining the applicable conservation and management measures.¹⁵⁰ Therefore, states must not authorize vessels to fish on the high seas at all unless they are capable of preventing these vessels from undermining the relevant conservation and management measures.¹⁵¹ Consequently, when states set certain parameters and conditions for authorization to fish on the high seas, any surpassing of these parameters would infringe the authorization, thus triggering the obligation of the flag state to enforce the conditions set.¹⁵² Further, no authorization to fish on the high seas shall be granted to vessels which have been previously registered in a state that has undermined the effectiveness of international conservation and management measures, unless certain conditions have been satisfied.¹⁵³

The process of authorization to fish is not the only measure that ensures the effectiveness of this system in deterring illicit fishing activities. More importantly, a flag state must be able to enforce the conditions of the authorization. In that respect, the FSA provides that states must establish regulations on the application of terms and conditions of the authorization¹⁵⁴, but no details with regards to the specific terms and conditions are listed. The IPOA-IUU lists conditions under which authorizations may be granted¹⁵⁵; the authorizations must contain, *inter alia*, name of the vessel, persons authorized to fish, area of authorization, authorized gear and species.¹⁵⁶ Although some of the conditions may vary in their details, one

¹⁴⁹ FSA, Art. 18(3); FAO Compliance Agreement, Art. III(2); IPOA-IUU, para. 44; FAO Code of Conduct, Art. 8.2.2; Voluntary Guidelines, paras. 29, 30.

¹⁵⁰ FAO Compliance Agreement, Art. III(2) and (3); Voluntary Guidelines, para. 30.

¹⁵¹ DA Balton, *The Bering Sea Doughnut Hole Convention: Regional Solution, Global Implications*, in OS Stokke, *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001), Oxford, Oxford University Press, p. 168.

¹⁵² S Borg, *supra*. 114, p. 220.

¹⁵³ FAO Compliance Agreement, Art. III(5). For a discussion of the exception, see Palma, Tsamenyi and Edeson, *supra*. 143, p. 121.

¹⁵⁴ FSA, Art. 18(b)(i).

¹⁵⁵ IPOA-IUU, para. 47.

¹⁵⁶ IPOA-IUU, para. 46.

important that must be present in every authorization is the requirement to record and report in timely manner any vessel pollution, catch of target and non-target species, fishing effort and other relevant fisheries data in accordance with the sub-regional, regional and global standards for collection of such data.¹⁵⁷ Finally, conditions may depend also on the area of high seas for which fishing vessels have been granted the authorization to fish, as they also include the obligations under the measures adopted by RFMOs¹⁵⁸ or any other applicable conservation and management measures by which states are bound.

3.3.3 Recording of fishing vessels

The simple act of authorization to fish cannot ensure the effective control of the flag states over their fishing vessels unless they have the capacity to monitor the compliance of the fishing vessels with the conditions of their authorizations. Therefore, in order to facilitate this monitoring, states are under the obligation to maintain a record of fishing vessels. The recording of vessels must be distinguished from the act of registration, as registration refers to the process of granting of nationality of vessels. Records need to include, name and registration number of the vessel, port of registry, previous flag, if any; information about the owners; type of the vessel; fishing methods and other compulsory or voluntary information.¹⁵⁹ By recording such information, states are enabled to identify the basic characteristics of the vessels, as well their history of ownership and compliance (or lack thereof) with conservation and management measures on a regional or a global level. This also facilitates the ability of states to determine which vessels have been engaged in illicit fishing activities.

3.3.4 Strengthening the duty to exercise effective control

In order to ensure compliance with any legal instrument, states need to employ certain adequate monitoring, control and surveillance (MCS) tools which would allow them further enforcement actions. The aim of the MCS is to enhance the effective exercise of flag state responsibilities over the fishing vessels flying their flag and to ensure that states do not violate flag states' obligations under relevant legal instruments, in order to secure compliance with applicable conservation and management measures.¹⁶⁰ Therefore, by utilizing one or more

¹⁵⁷ FSA, Art. 18(3)(e). For specific fisheries data that needs to be reported, see FSA, Annex I, Art. 3(1).

¹⁵⁸ See NEAFC Scheme, Art. 4.

¹⁵⁹ FSA, Art. 18(3)(c); FAO Compliance Agreement, Art. III(6), IV, VI(1) and (2); FAO Code of Conduct, Art. 8.2.1, IPOA-IUU, para. 42.

¹⁶⁰ OECD, *Recommended Best Practices for Regional Fisheries Management Organizations*, Report of an independent panel to develop a model for improved governance by Regional Fisheries Management Organizations (2007), London, Chatham House, p. 44.

MCS tools, states are able to receive intelligence enabling them to proceed with effective enforcement, such as direct at-sea measures or at-port measures.

According to FAO, several definitions and interpretations of MCS exist, but in the context of fisheries, they can be still be given a broad definition, having three distinct but nevertheless intertwined elements. Monitoring is the continuous requirement for the measurement of fishing effort characteristics and resource yields. Control means the regulatory conditions under which the exploitation of the resource may be conducted. Surveillance encompasses the degree and types of observations required to maintain compliance with the regulatory controls imposed on fishing activities.¹⁶¹

The conventional MCS is performed by surveillance aircraft and patrol vessels, but as this is costly, other common tools have also been developed and utilized, such as vessel registers, listing of vessels engaged in unregulated fishing activities, vessel monitoring systems, and observers programs. The following sections describe how these MCS tools further strengthen the effective control of flag states over vessels flying their flags in order to deter them from getting engaged in unregulated fishing on the high seas of the CAO. They also refer to MCS tools available to the NEAFC as the relevant RFMO for a part of the CAO because they provide for the enhanced duties of the flag states whose fishing vessels operate in the region.

3.3.4.1 Vessel registers

The FSA, as well as other fisheries instruments, such as FAO Compliance Agreement, IPOA-IUU, and the most recent Voluntary Guidelines for Flag State Performance, emphasize on the need of vessel registration as a measure for the control of fishing vessels activities, which is especially relevant for high seas fishing. As already explained above, states are also required to maintain a record of the vessels flying their flags and authorized to fish on the high seas. In addition to these measures, RFMOs may also require from their members and cooperating non-contracting parties to establish such records or to, at least, provide information regarding the vessels authorized to fish within the areas under the competence of the RFMOs. In the Arctic, NEAFC requires the parties to notify the Secretariat of all fishing vessels flying its flag which

¹⁶¹ P Flewelling, *An introduction to monitoring, control and surveillance systems for capture fisheries*, FAO Technical Paper No. 338, Rome, 1995, available at <<http://www.fao.org/3/V4250E/V4250E03.htm>>, accessed 01.09.2019, para. 3.1.

are authorized to fish in the Regulatory area, and without being listed as notified, vessels cannot perform fishing activities there.¹⁶²

Despite the existence of such records, the information they contain cannot always be used to its fullest extent. This is due to the often inconsistent pieces of information or incompatible data formats, which can deem the tracking of vessels extremely difficult as they may either change their names or flags, and not all of them have the currently voluntary unique vessel identifier (UVI) provided by the International Maritime Organization.¹⁶³

Recognizing the need of one global reliable source of the existing fishing fleet, as well as their ownership and control, the international community has endeavored to establish one global register of vessel authorized to perform fishing activities on the high seas. The first step was the Compliance Agreement, which requires the flag states to not only maintain national records but to also transmit them to the FAO¹⁶⁴, which is to maintain the so-called High Seas Vessel Authorization Record (HSVAR).¹⁶⁵ However, the information in this record is often incomplete and outdated, or overall missing as some of the important fishing states are still not parties to the Agreement, so it has proven to be an unreliable source.¹⁶⁶

The unreliability of the FAO HSVAR led to further consideration of the issue, and in 2007, the FAO Committee on Fisheries (COFI) supported the development of a global record of fishing vessels.¹⁶⁷ The Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels (Global Record) is intended to involve both flag states and RFMOs ‘in compiling an online comprehensive and updated repository of vessels involved in fishing operations’¹⁶⁸, thus making it more complicated for vessels to operate in contradiction with the applicable law. One of its most important elements is the assignment of an UVI to every vessel, thus making the change of name, ownership or flag irrelevant. In 2018, the Global Record Information System was launched. If implemented successfully, it could improve the

¹⁶² NEAFC Scheme, Art. 5.

¹⁶³ OECD, *supra*. 160, p. 45. Currently, UVI is mandatory only for cargo ships under the regulations of the 1974 SOLAS Convention.

¹⁶⁴ FAO Compliance Agreement, Art. IV and VI.

¹⁶⁵ The Record was established in accordance with the requirements of Art. VI of the Compliance Agreement. A detailed description can be found on the website of FAO, available at <<http://www.fao.org/fishery/collection/hsvar/en>>, accessed 01.09.2019.

¹⁶⁶ OECD, *supra*. 160, p. 46.

¹⁶⁷ COFI, Report on the Development of a Comprehensive Record of Fishing Vessels’, doc. COFI/2007/Inf.12, available at <<http://www.fao.org/tempref/docrep/fao/meeting/011/j8870e.pdf>>, accessed 01.09.2019.

¹⁶⁸ FAO, Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels webpage, available at <<http://www.fao.org/global-record/background/about/en/>>, accessed 01.09.2019.

traceability of fishing vessels and their catch and to enhance the transparency of their operations¹⁶⁹, thus diminishing their opportunity to engage in unregulated fishing activities.

3.3.4.2 Vessel monitoring systems

The FSA was the first international legal instrument to refer to the establishment of vessel monitoring systems (VMS) as a means of control of the flag states over their vessels, stipulating that states must develop and implement VMS in accordance with regional, sub-regional and global programs.¹⁷⁰ The implementation of VMS by states was also supported by the IPOA-IUU¹⁷¹ and the FAO Code of Conduct.¹⁷² Although no global VMS program exists now¹⁷³, flag states and RFMOs are increasingly utilizing this MCS tool on a national and regional level, aiming to strengthen compliance and secure the effectiveness of the relevant applicable conservation and management measures.¹⁷⁴

The purpose of VMS is to provide accurate information to the flag state or relevant RFMO regarding the position of a fishing vessel at periodic time intervals, in near-real time.¹⁷⁵ Additional information, such as catch and effort data, can also be transmitted using some VMS. There are different types of VMS – the conventional reporting on vessel movement through radio, surveillance from air or the surface, radars and others¹⁷⁶; the other type is satellite based. The satellite-based VMS transmits data via GPS to automated reporting system, which then transfers the data to a communications system that conveys it to the monitoring agency.¹⁷⁷ The latter type of VMS is increasingly implemented because it provides accurate information at periodic intervals regarding the vessels location and catch reports. Therefore, the VMS not only provides for the tracking of information of licensed fishing vessels, but also allows authorities to easily detect vessels which are not authorized to fish in certain areas. Moreover, the vessel

¹⁶⁹ DJ Douman, *FAO Action to Combat IUU Fishing: Scope of Initiatives and Constrains on Implementation*, in D Vidas (ed.), *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (2010), Leiden, Martinus Nijhoff Publishers, p. 143.

¹⁷⁰ FSA, Art. 18(3)(g)(iii). See also Art. 5(j) and 18(3)(e).

¹⁷¹ IPOA-IUU, para. 24.3.

¹⁷² FAO Code of Conduct – Art. 7.7.3.

¹⁷³ In 2006, FAO's Expert Consultation on the use of VMS and satellites reviewed and assessed the potential use of VMS and satellites in MCS and did not recommend the development of a binding international agreement on the matter. See discussion in DJ Douman, *supra*. 169, p.139-140.

¹⁷⁴ OECD, *supra*. 160, p. 46.

¹⁷⁵ T Løbach, *Combating IUU Fishing: Interaction of Global and Regional Initiatives*, in D Vidas (ed.), *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (2010), Leiden, Martinus Nijhoff Publishers, p. 120.

¹⁷⁶ See full description in FAO, *Fishing Operations: Vessel Monitoring Systems*, FAO Technical Guidelines for Responsible Fisheries No. 1, Suppl. 1, Rome, 1998, p. 10.

¹⁷⁷ *Ibid.*, p. 8. See also Palma, Tsamenyi and Edeson, *supra*. 143, p. 144.

operators would be aware of the constant tracking, so the incentive to engage in unregulated activities is greatly diminished.

Among the RFMOs, the NEAFC was the first to establish a fully-fledged VMS program in 1998 which became binding on all vessels fishing in the area under its competence in 2000. The NEAFC requires its members and cooperating non-contracting parties to implement a VMS system to require their vessels to be equipped with systems to automatically transmit information regarding location and to communicate by satellite the relevant data in relation to their fishing activities¹⁷⁸. An infringement of this obligation is considered to be ‘serious’¹⁷⁹, thus leading to follow-up actions, such as inspections or calling to port.¹⁸⁰

It is evident that a compulsory system of VMS exists for the parties of NEAFC. Therefore, for third-state vessels which are not under the same obligations according to national or international instruments fishing outside the Regulatory area, information must be obtained by other means. Due to the vast size and remoteness of the parts of the CAO which fall outside of the scope of the NEAFC, the conventional VMS carried out by vessel or plane patrols might not be as feasible.¹⁸¹ Various remote observation systems possibilities have been explored and proposed, such as the use of space-based Automatic Identification Systems¹⁸², which should be used in combination with radar and high-resolution optical visual imagery from satellites.¹⁸³ Another satellite tool recognized as successful in identifying vessels involved in potentially unregulated activities is the Synthetic Aperture Radar (SAR), which allows for different modes of area observations, and has also been utilized in the NEAFC area with ‘good results’¹⁸⁴ for fisheries control.

In this regard, the EU can contribute to the remote observation over the high seas of the CAO. Its earth observation program Copernicus provides near-real time data on a global level based on satellite observation and in situ systems, such as ground stations.¹⁸⁵ As the EU

¹⁷⁸ NEAFC Scheme, Art. 11. See also Art. 12 and 13 for requirements for communication of catches, transshipments and ports of landing.

¹⁷⁹ NEAFC Scheme., Art. 29(e).

¹⁸⁰ NEAFC Scheme, Art. 30.

¹⁸¹ GE Shephard et al., *Assessing the Added Value of the Recent Declaration on Unregulated Fishing for Sustainable Governance of the Central Arctic Ocean*, Marine Policy (2016), vol. 66, p.55.

¹⁸² For detailed discussion, see DC Dunn et al., *Empowering High Seas Governance with Satellite Vessel Tracking Data*, Fish and Fisheries (2018), vol. 19, pp. 729-739, available at <<https://onlinelibrary.wiley.com/doi/epdf/10.1111/faf.12285>>, accessed 01.09.2019.

¹⁸³ GE Shephard et al., *supra*. 181.

¹⁸⁴ N Ansell, D Ardill, H Greidanus, *Using Technology in Combating IUU Fishing*, in D Vidas (ed.), *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (2010), Leiden, Martinus Nijhoff Publishers, p. 201. This Chapter provides a detailed discussion on the performed study and results regarding the use of satellite technology in detecting and deterring illicit fishing activities.

¹⁸⁵ EU Copernicus Program, available at <<https://www.copernicus.eu/en/about-copernicus>>, accessed 01.09.2019.

Commission stated, ‘the Copernicus program already provides for surveillance and monitoring services with satellites in polar orbits, thereby contributing to key environmental, safety and security needs’.¹⁸⁶

3.3.4.3 Observer programs

Another tool for securing the compliance with applicable conservation and management measures by fishing vessels is the establishment of observer programs. The FSA requires the states to implement national observer programs, to participate in sub-regional or regional programs, and to permit access to observers from other states under such programs.¹⁸⁷ The provisions of the FSA, however, do not provide for specific processes or functions of the observers. Usually, the observer programs monitoring the implementation of conservation and management measures include, *inter alia*, recording and reporting of fishery data, collect catch data, identify catch components, describe fishing gear, and verify vessels locations and entries into logbooks.¹⁸⁸ Therefore, as part of the MCS toolbox, such programs enable the effective fisheries management by states.

It is unfortunate that in this regard the NEAFC has abstained from developing an observer program for fishing activities in its area of competence, except for exploratory deep-sea fisheries. In this case, states will have to rely on the observer programs established on national level, but their efficiency is uncertain.

Therefore, in the context of the high seas of the CAO, observer programs are a possibility but with uncertain practicability, as neither fishing activities have started nor the CAOFA has entered into force. Consequently, until an RFMO is established in the region pursuant to the CAOFA, it is impossible to predict how practical this tool would be, if at all.

3.3.4.4 Blacklisting of vessels

A tool which is not directed at flag states *per se* but still available to strengthen the exercise of effective control and thus to secure compliance with applicable conservation and management measures, is the blacklisting of vessels engaged in illicit fishing activities. It is one of the most effective tools adopted by RFMOs in eliminating unregulated fishing.¹⁸⁹ This

¹⁸⁶ EC Commission, Joint Communication to the European Parliament and the Council: An Integrated European Union Policy for the Arctic, JOIN(2016) 21 final, 27 April 2016, Brussels, p. 12.

¹⁸⁷ FSA, Art. 18(3)(g)(ii). Non-binding legal instruments have also supported and encouraged the implementation of this tool; see IPOA-IUU – paras. 24.4, 47.4, and 80.9; FAO Code of Conduct – Art. 8.4.3.

¹⁸⁸ Palma, Tsamenyi and Edeson, *supra*. 143, p. 142, 222.

¹⁸⁹ Palma, Tsamenyi and Edeson, *supra*. 143, p. 210.

was addressed on a global level by the IPOA-IUU which called upon flag states to avoid flagging vessels with history of non-compliance¹⁹⁰ and by the PSMA which required port states to deny entry into ports to vessels which appear in RFMO lists.¹⁹¹

Under the regime of the NEAFC, vessels flying the flag of non-member states which have been sighted to fish in the Convention area are presumed to have engaged in unregulated activities and are placed in a provisional list.¹⁹² Thus, the burden of proof is shifted onto the vessels which must prove that they act in accordance with the conservation and management measures.¹⁹³ Vessels of contracting non-parties are subject to an immediate inclusion to the list if it is established that they operate in contradiction with the applicable conservation and management measures.¹⁹⁴ The vessels can be transferred to a confirmed list upon recommendation of the Permanent Committee for Control and Enforcement.¹⁹⁵ NEAFC has established a procedure for the mutual exchange and recognition of such lists with other RFMOs; it automatically includes vessels in the confirmed list upon receiving information about them by the RFMOs and only removes them upon notification from the RFMO which initially identified the vessel.¹⁹⁶ The NEAFC members are, therefore, obliged to take all necessary measures to deny any access, services or supplies with regards to vessels appearing on the lists.¹⁹⁷

In addition to the NEAFC measures, the EU could also contribute to this matter. The definition of unregulated fishing under the Regulation overlaps with the definition under the IPOA-IUU, therefore it is applicable not only to vessels infringing the NEAFC conservation and management measures, but also to vessels acting in contradiction of the high seas fisheries regulations applicable to the remaining part of the high seas of the CAO. The Regulation establishes a Community IUU vessel list, which applies to both EU and third-states vessels engaged in illicit fishing activities.¹⁹⁸ In addition to the identified vessels, the EU Community list encompasses also fishing vessels included in lists of RFMOs, whose removal is dependent on the decisions of the relevant RFMOs¹⁹⁹, similarly to the procedure adopted under the

¹⁹⁰ IPOA-IUU, para. 36.

¹⁹¹ PSMA, Art. 9(4).

¹⁹² NEAFC Scheme, Art. 44(1). The flag state of the vessel must be promptly informed by the Secretary.

¹⁹³ Palma, Tsamenyi and Edeson, *supra*. 143, p. 212.

¹⁹⁴ NEAFC Scheme, Art. 44(2).

¹⁹⁵ NEAFC Scheme, Art. 44(3).

¹⁹⁶ NEAFC Scheme, Art. 44(5) and (6).

¹⁹⁷ NEAFC Scheme, Art. 45.

¹⁹⁸ EU IUU Regulation, Art. 25-29.

¹⁹⁹ EU IUU Regulation, Art. 30.

NEAFC. The measures against vessels listed in the EU Community list include, *inter alia*, denial or withdrawal of authorizations to fish, denial of port access and services, confiscation of catch and gear, and prohibition of importation or exportation of fishery products.²⁰⁰

3.4 Concluding remarks

In sum, the global framework for fishing on the high seas, which is applicable also to the high seas of the CAO, imposes on flag states the duties to ensure the conservation of the fish stocks and to cooperate in achieving this goal. The LOSC, as well as the subsequent legal instruments provide a certain extent of clarity as to how this conservation is to be achieved. In addition, flag states must ensure the effective control over the activities of the vessels flying their flags and a range of measures is available in that respect. Moreover, it is evident that a wide range of MCS tools are available to states to ensure the compliance with conservation and management measures on the high seas of the CAO, thus strengthening the flag states duties with regard to the effective control over the vessels flying their flags. The NEAFC has established an extensive regime within its Regulatory area, applicable to all participants in the fishing activities there. In addition, the EU can contribute substantively with its EU Community list of vessels engaged in illicit fishing activities which is applicable to the whole area of high seas of the CAO, as well as with its earth observation system working on a global level which can provide data in real time. However, the exclusivity of the flag state jurisdiction, as well as the varying level of participation among the different instruments prove it difficult for states to establish a uniform system which will indeed fulfil the overall objective of achieving sustainability of the fish stocks found in the high seas of the CAO.

4 Measures available to the parties to the Central Arctic Ocean Fisheries Agreement towards vessels of third states engaged in high seas unregulated fishing activities

The effectiveness of any conservation and management measures, as already mentioned, is dependent on the level of compliance from the states engaged in fishing activities in the area governed by such measures as well as on the effective control and enforcement of states in order to ensure compliance and adequate sanctions for violations. In the context of the CAO, the NEAFC is competent for imposing such conservation and management measures in its Regulatory Area; when CAOFA enters into force, its provisions will become applicable for

²⁰⁰ EU IUU Regulation, Art. 37.

the whole high seas of the CAO. It is important that not only parties to the CAOFA but also third states do not infringe the measures applicable to the area if they are to be effective.

To this effect, Art. 8 CAOFA requires parties to encourage third states to take measures which are consistent with its provisions. Moreover, Art. 8(2), the wording of which is in line with Art. 17(4) FSA, requires the parties to deter activities of vessels flying the flags of non-parties in accordance with international law in order to ensure the effective implementation of its measures. It is evident that this is only a vague reference, which does not provide for any specific measures to be undertaken. Thus, it is for every individual party to the CAOFA to decide how to ensure that third-state vessels do not engage in unregulated fishing on the high seas of the CAO. The reasons for this vague formulation are unknown and are only subject to speculation. States might have decided to leave this specific issue to a future RFMO, which might be established either when the CAOFA enters into force or when fishing actually has commenced in the area. They might as well have left this choice to the individual states due to the varying participation in the different legal instruments forming the general international law of fisheries.²⁰¹ As stated, however, a conclusion cannot be established with any certainty. Therefore, an investigation of the measures available under general international law is necessary in order to determine which are the possibly applicable ones for the purpose of this thesis. Consequently, the remaining part of this chapter examines the measures available under the relevant global and regional legal framework as well as their applicability to fishing activities on the high seas of the CAO.

4.1 Measures available to non-flag state vessels at sea

It has been well established that it is a customary rule that the flag states are the main actors having enforcement jurisdiction over vessels fishing on the high seas in accordance with the provisions of LOSC.²⁰² The LOSC, however, provided for two major exceptions where states different from the flag state may take enforcement measures at sea in order to ensure compliance with applicable conservation and management measures due to the ineffective flag state jurisdiction, i.e. the right of visit²⁰³ and the right of hot pursuit²⁰⁴, which will not be discussed in the context of fisheries exclusively on the high seas. The direct enforcement measures that may be undertaken at sea by non-flag states include approach and visit in the

²⁰¹ See *supra*. 28.

²⁰² LOSC, Art. 92.

²⁰³ LOSC, Art. 110.

²⁰⁴ LOSC, Art. 111.

form of boarding and inspection. It is important to note that third-state enforcement can always be exercised upon the consent of the flag state, given either through the adoption of a treaty providing for such possibility or in *ad hoc* cases.²⁰⁵

The right of visit under Art. 110 LOSC has the purpose of verifying a ship's right to fly its flag, and envisages five scenarios where non-flag states have the right to undertake enforcement measures on the high seas; they are related to piracy, slavery, unauthorized broadcasting, statelessness of the vessel, and disguise of the flag of the vessel. Illicit fishing activities are not considered under this provision, so the only relevant possibility for taking non-flag enforcement measures is the absence of nationality of the vessel.²⁰⁶

The potential opportunities for at-sea measures have been enhanced by the provisions of the FSA, which set the obligations for international cooperation in enforcement and the conditions for non-flag state enforcement actions.²⁰⁷ Article 21, which will be discussed in detail later, strengthens the cooperation in enforcement by establishing provisions regarding the mutual boarding and inspection procedures for fishing vessels of the members of an RFMO for the purpose of enforcing applicable conservation and management measures.²⁰⁸ Article 20 provides a broad framework for cooperation between all states. Both flag and non-flag states are obliged to cooperate, either directly or through RFMOs, to ensure compliance and enforcement of the applicable conservation and management measures on the high seas. Further, in case a flag state conducts an investigation of an alleged infringement of the measures and requests another state for assistance, the non-flag state is obliged to endeavor to meet such a request. States also must assist each other in the identification of vessels which are reported to have engaged in activities undermining the effectiveness of adopted regional or global conservation and management measures. Moreover, states which are parties to RFMOs may take actions against vessels which have violated the applicable measures in order to deter them from fishing activities until the flag state takes appropriate actions.

²⁰⁵ Rayfuse, *supra*. 77, p. 61.

²⁰⁶ A stateless vessel is one without nationality. This absence of nationality can follow either from a failure to register the vessel in a state or from circumstances which assimilate a registered vessel to a stateless one. Such circumstances can be, e.g. deprivation of the flag by the flag state due to infringement of national laws or failure to comply with the requirement of genuine link between the state and the vessel under Art. 91 LOSC. For a detailed discussion on statelessness, see Rayfuse, *supra*. 77, p. 56-57.

²⁰⁷ FSA, Art. 20-22.

²⁰⁸ FSA, Art. 21. The RFMOs must adopt enforcement schemes in order to implement the provisions of the FSA, see Art. 21(3).

4.1.1 The right of approach

Before any enforcement action is undertaken at sea, states must have the information that a fishing vessel has allegedly engaged in activities undermining applicable conservation and management measures. Although states cannot interfere with the navigation of foreign-flagged vessels on the high seas, except for in specific circumstances, the same is arguably not applicable in relation to monitoring of vessels, including by modern technology means, such as e.g. remote observation systems as part of the MCS tools discussed above.

Regardless of the employment of MCS tools, however, states also have the customary right of approach to foreign vessels.²⁰⁹ It refers to the right of a warship or any other authorized vessel to approach another vessel and require it to show its flag, but this is constrained to the simple act of approach with no further actions. The vessels cannot be compelled to show their flags, and the establishment of identity and nationality is to be considered concluded once the flag is shown.²¹⁰ If, however, a vessel fails to show a flag, it may create reasonable grounds to be considered stateless or engaged in illegal activities, which would allow for the next enforcement level, namely the visit and search.²¹¹

4.1.2 The right of visit – boarding and inspection

As mentioned, Art. 110 LOSC gives the right to warships and other duly authorized vessel to visit foreign-flagged vessels only in cases of reasonable suspicion that a vessel has engaged in the listed activities. In the context of fisheries, the relevant circumstances under which it could be invoked are the absence of nationality of a vessel, which can be suspected following an approach and request for identification.

In addition to the right of visit under the LOSC, vessels may interfere when this right has been conferred by a treaty.²¹² Article 21 FSA provides for a ‘very significant exception’²¹³ to the flag state enforcement and strengthens the enforcement measures available to non-flag states. States which are members of RFMOs are given the right to ensure compliance with the applicable conservation and management measures by boarding and inspecting fishing vessels of states parties to the FSA, regardless of their stance in relation to the concerned RFMO.²¹⁴

²⁰⁹ DP O’Connell, *The International Law of the Sea*, vol. II (1984), Oxford, Clarendon Press, pp. 802-803.

²¹⁰ Rayfuse, *supra*. 77, p. 62.

²¹¹ *Ibid.* See also Y Cheng, *Fishing Entity Enforcement in High Seas Fisheries* (2014), Newcastle upon Tyne, Cambridge Scholars Publishing, pp. 75-76.

²¹² LOSC, Art. 110(1).

²¹³ Rayfuse, *supra*. 77, p. 74.

²¹⁴ FSA, Art. 21(1).

States must establish boarding and inspection procedures through the RFMOs, and if they fail to do so in two years after the adoption of the FSA, they must utilize the procedures provided in Art. 22 of the FSA.²¹⁵ Therefore, the FSA obliges all states that are parties to it to cooperate in the application of the conservation and management adopted by RFMOs, which would otherwise have no effect on them as third states. When states find sufficient grounds to believe that a vessel has infringed the applicable measures, they must secure the evidence and to inform the flag state, which has to respond and either investigate or authorize the inspecting state to perform the investigation and to take such action as instructed. Art. 21 also empowers inspectors from the inspecting state to remain on board to secure evidence and take subsequent enforcement actions²¹⁶ in cases of establishment of ‘serious violations’²¹⁷ where the flag state has failed to respond within the required time and to take the appropriate actions. Therefore, the possibility of states to take enforcement measures at sea against foreign-flagged states is not unlimited and is necessary to fall within the scope of the ‘serious’ violations.

In the Arctic, the NEAFC has established a boarding and inspection program, where all members must ensure that inspectors from other members are allowed to carry out inspections on board of the vessels to which the Scheme is applicable.²¹⁸ Detailed regulation of the means of inspection²¹⁹ and the inspection procedure²²⁰ is also developed. However, the program is not universally applicable but to vessels of the members and the cooperating non-contracting parties.²²¹ With regards to boarding and inspection of third states, and in accordance with the principle of exclusive flag state jurisdiction, NEAFC provides for inspection procedures only with the consent of the flag state, where inspectors must request permission to board and inspect the vessel which is suspected of having engaged in unregulated fishing activities.²²² If the master, however, does not consent to the boarding and inspection, the vessel is presumed to have engaged in activities undermining the applicable conservation and management measures.²²³

²¹⁵ FSA, Art. 21(2) and (3). Article 22 of the FSA sets the procedures for boarding and inspection, including obligations of inspectors and scope of inspection, and obligations of the flag states in relation to inspections, e.g. to ensure that the masters of the inspected vessels comply with the requirements of the inspectors.

²¹⁶ FSA, Art. 21(8).

²¹⁷ FSA, Art. 21(11) lists the activities amounting to serious violations.

²¹⁸ NEAFC Scheme, Art. 15(2).

²¹⁹ NEAFC Scheme, Art. 16.

²²⁰ NEAFC Scheme, Art. 18.

²²¹ It should be also considered as applicable to vessels flying the flags of state-parties to the FSA, in accordance with Art. 21 FSA.

²²² NEAFC Scheme, Art. 38(1).

²²³ NEAFC Scheme, Art. 38(3).

Therefore, in the high seas of the CAO, states have several opportunities to take measures at sea against vessels engaged in unregulated fishing activities, which would be undermining the applicable conservation and management measures. Within the Regulatory area of NEAFC, inspections may be carried out upon the consent of the flag state or the master of the suspected vessel. If no such consent is given, however, states can justify inspections by invoking Art. 110 LOSC in the case of stateless vessels. In the case of third-state vessels fishing for straddling and highly migratory fish stocks, and in the absence of boarding procedures established in the Regulatory area, states can utilize the basic inspection procedures provided by the provisions of the FSA. However, in the remaining part of the CAO, falling outside of the Regulatory area of NEAFC, the only legal bases for direct enforcement measures at sea towards foreign-flagged vessels are the consent of the flag state or the absence of nationality of the vessels.

4.2 Measures available to port states

Due to the incapability or lack of intention of flag states to provide for effective control and enforcement measures towards vessels flying their flag, the international community developed further measures for other actors as well in order to fill the gaps to a certain extent. Port states have been gaining importance in the fight against unregulated fishing activities. This is explained by the fact that vessels need to call in ports for various reasons, such as landing of catch, transshipment of catch, refueling, repairments or in emergencies. In the context of fishing on the high seas of the CAO, the Arctic port states, which are also the Arctic coastal states, are of utmost importance as they are the closest ports in the remote Arctic area and vessels would most probably have no other possible ports to call to whenever necessary.

All ports are part of the territory of a state and thus subject to its sovereignty. It is also a well-established rule of customary law that foreign-flagged vessels cannot enter the internal water or ports, except for cases of *force majeure* or distress. It follows that port states have exclusive jurisdiction²²⁴ over their ports as well as the right to establish conditions for vessels to enter into their ports.²²⁵ Therefore, vessels which are voluntarily in ports become subject to the laws, regulations and enforcement powers of the port state in relation to all port activities.²²⁶

²²⁴ For a detailed discussion on port state jurisdiction, see EJ Molenaar, *Port State Jurisdiction*, Max Planck Encyclopedia of Public International Law (2014), Oxford University Press.

²²⁵ LOSC, Art. 25(2) and 218.

²²⁶ GC Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port State Regime* (1993), Leiden, Martinus Nijhoff, p. 23. See also Palma, Tsamenyi and Edeson, *supra*. 143, p. 161.

However, the LOSC considers extraterritorial port state enforcement jurisdiction only in the context of vessel-sourced pollution occurring beyond the port state's national maritime zones.²²⁷ The FSA provides the explicit reference to port state jurisdiction especially in relation to high seas fisheries. It facilitates the right of port states to exercise port state jurisdiction and provides them 'the right and the duty' to take measures to ensure the effectiveness of regional and global conservation and management measures for fisheries when vessels are voluntarily in their ports. Moreover, port states can take enforcement measures by inspecting the vessels and their catch and prohibiting landing or transshipment of the catch if an infringement of the applicable measures has been established.²²⁸ Therefore, the FSA, despite not explicitly²²⁹, contributes the legal obligation of port states to take measures for deterring unregulated fishing on the high seas as an addition to their jurisdiction over vessels entering or visiting their ports.

The provisions of FSA were further supplemented by the FAO which for more than a decade developed a series of legal instruments²³⁰ as an attempt to strengthen port states' authority and effectiveness in the combat against illicit fishing activities. In 2009, FAO ultimately adopted the legally binding Port State Measures Agreement which was based on the instruments FAO had been developing²³¹; it provided for the harmonization of port state measures and the cooperation among port states. The harmonization is achieved by setting a minimum standard for measures that the states must adopt, recognizing that port states have the right to exercise their 'sovereignty over their ports in their territory in accordance with international law' as well as their right to 'adopt more stringent port State measures than those provided for in this Agreement, including such measures adopted pursuant to a decision of a regional fisheries management organization'.²³²

In the context of the Arctic, the NEAFC Scheme of Control and Enforcement adopts the PSMA as minimum standard for port state control for foreign fishing vessels, where the

²²⁷ LOSC, Art. 218.

²²⁸ FSA, Art. 23. In the CAO, the applicable measures would entail the conservation and management measures adopted under the regimes of the CAOFA and the NEAFC, where such infringements can be established by the employment of one or more MCS tools discussed before.

²²⁹ EJ Molenaar, *Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement*, in DA Russel, DL VanderZaag (eds.), *Recasting Transboundary Fisheries Management Agreements in Light of Sustainability Principles: Canadian and International Perspectives* (2010), Leiden, Martinus Nijhoff, p. 381.

²³⁰ FAO adopted a substantive amount of instruments, of which the most relevant are: FAO, Code of Conduct for Responsible Fisheries, 31 October 1995, Rome; FAO, International Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated and Unreported Fishing, 2 March 2001, Rome; FAO, Model Scheme on Port State Measures to Combat Illegal, Unregulated and Unreported Fishing, 2007, Rome. All instruments are non-legally binding but provide for best practices and guidelines which have been promoted by the UN General Assembly. For a discussion, see Palma, Tsamenyi and Edeson, *supra*. 143, pp. 16-20 and 64-74.

²³¹ FAO, *ibid*.

²³² PSMA, Art. 4(1)(b).

Contracting Parties are under the obligation to cooperate in its effective implementation.²³³ The PSMA applies as a minimum standard also in relation to port state control of fishing vessels of non-Contracting Party vessels.²³⁴

Based on these two legal frameworks, the following sections examine the specific measures that are available to port states to deter activities related to unregulated fishing on the high seas of the CAO.

4.2.1 Fishing vessels and access to port

The PSMA, as established, provides for specific measures port states must adopt in relation to foreign vessels calling at their ports. In the context of the CAO and on the basis of the presumptions that the CAOFA is an RFMA establishing conservation and management measures, and that the NEAFC will adopt Recommendations for the high seas of the CAO, it can be stated that the PSMA is applicable to the catches originating from the CAO and brought into port by foreign-flagged fishing vessels.

The NEAFC Scheme provides for measures which overlap with the provisions of the PSMA. Therefore, even though Russia is not a party to the PSMA²³⁵, it still has the same rights and obligations as a port state as the states that are parties, by virtue of being a NEAFC member.²³⁶ China is the only state from the Arctic Five plus Five that is neither party to the PSMA nor the NEAFC. It is a member of the regional Tokyo Memorandum of Understanding (MoU)²³⁷, which is the intergovernmental cooperation organization on port state control in the Asia-Pacific region. The discussion of the Tokyo MoU, however, is beyond the scope of this thesis.

4.2.1.1 Designation of ports

Fishing vessels are usually admitted only to certain ports which are able to comply with their needs, be it landing or transshipment of catch or other port services. Thus, port states are enabled to monitor and control the activities of these fishing vessels.²³⁸ Therefore, the PSMA

²³³ PSMA, Art. 20bis.

²³⁴ PSMA, Art. 38bis.

²³⁵ Canada ratified the PSMA on 20 June 2019, and the agreement came into force a month later, on 20 July. See Government of Canada, Fisheries and Ocean, available at <<https://www.dfo-mpo.gc.ca/international/isu-iuu-09a-eng.htm>>, accessed 01.09.2019.

²³⁶ *Ibid.*, Art. 34.

²³⁷ Memorandum of Understanding on Port State Control in the Asia-Pacific Region, 01 December 1993, Tokyo, Japan, available at <<http://www.tokyo-mou.org/doc/Memorandum%20rev18.pdf>>, accessed 01.09.2019.

²³⁸ Palma, Tsamenyi and Edeson, *supra*. 143, p. 163.

obliges the port states to designate ports in which vessels can request entry.²³⁹ Part of the duty is also the publication of the ports, and more importantly, the ability of the states to perform inspections in all designated ports.²⁴⁰ The NEAFC Scheme provides for the same obligation, where the members need to send their lists of designated ports to the NEAFC Secretary.²⁴¹ It has also added the requirement to designate competent authorities to receive prior notifications.²⁴²

4.2.1.2 Prior request for entry into port

The PSMA requires all vessels to provide an advance request for entry into port, giving reasonable time for the port state to examine the information²⁴³ in order to assess whether the vessel might have engaged in unregulated fishing activities, and to prevent access where suspicion arises. The PSMA provides a list of specific details that the port state may require from the foreign fishing vessels regarding the voyage, authorizations to fish and the catch on board, such as identification and ownership of the vessel, purposes for the port call, authorization to fish and/or transship, and total catch and catch to be offloaded at the port.²⁴⁴ This is in accordance with the provisions of LOSC granting the coastal states the right to prescribe requirement for vessels for entry into their ports.²⁴⁵

The PSMA does not give a formulation of what may constitute a reasonable prior notice, so it is left to the individual states and RFMOs to determine. The NEAFC, as well as the EU, have set the minimum period for advanced notification at three working days before the estimated time of arrival at port, where this period can be adjusted depending on the catch product type or the distance between the fishing grounds and the ports where the fish is intended to be landed.²⁴⁶

In addition to the prior notification, the NEAFC requires the flag states of the vessels intending to enter into port to confirm the legality of the catch on board by stating that, among others, the fishing vessels had the sufficient quota for the declared species and that they had the necessary authorizations to fish in the declared areas.²⁴⁷ Further, only after a confirmation that

²³⁹ PSMA, Art. 7(1).

²⁴⁰ PSMA, Art. 7(2).

²⁴¹ NEAFC Scheme, Art. 21.

²⁴² NEAFC Scheme, Art. 3(2).

²⁴³ PSMA, Art. 8. See also IPOA-IUU, para. 55.

²⁴⁴ PSMA, Annex A.

²⁴⁵ LOSC, Art. 25(2).

²⁴⁶ NEAFC Scheme, Art. 22 and 39; EU IUU Regulation, Art. 6.

²⁴⁷ NEAFC Scheme, Art. 23(1).

the fish has been caught in accordance with the applicable conservation and management measures has been received from the flag states, the port states may give authorization to the vessels to land and transship their catch at the port.²⁴⁸

The EU IUU Regulation also provides for additional measures to the prior notification of entry into port. A key aspect of the Regulation is the requirement for vessels to provide also a validated by the flag state catch certification when carrying on board fishery products²⁴⁹ in order to ensure that the fishery products imported into the EU are not derived from fishing in violation of applicable conservation and management measures.²⁵⁰ The vessels may be granted authorization to enter into port only after the verification of the provided information and catch certificate.²⁵¹ Currently, the catch certification scheme is being digitalized with the purpose of supporting the EU Member States ‘in their illegal, unreported and unregulated fishery-related verification tasks and help reduce the risk of fraud, facilitate the trade flows, and reduce the burden on operators and administrations’²⁵², making the procedure easier and more efficient.

4.2.1.3 Inspection of vessels at port

Once in port, vessels become subject to the inspection by port states authorities. The port states are required to carry out inspections to monitor and verify compliance with the applicable conservation and management measures. During such inspections, the port states can establish eventual infringements of national or regional fisheries regulations. The PSMA does not specify the amount of necessary inspected vessels but refers to ‘the number of vessels in its ports required to reach an annual level of inspections sufficient to achieve the objective of this Agreement’.²⁵³ Moreover, the states are required to seek the minimum level of inspection of vessels through RFMOs.²⁵⁴ NEAFC has established a minimum amount of full inspections of 5% of the landings and transshipments of fresh fish and 7.5% of frozen fish²⁵⁵, and the EU has set a requirement of at least 5% annual inspections of landing and transshipment operations of third-state vessels.²⁵⁶ When performing inspections, states must give priority to vessels which have been denied access to port, vessels subject to the request for inspection of other

²⁴⁸ NEAFC Scheme, Art. 23(2).

²⁴⁹ EU IUU Regulation, Art. 6(2).

²⁵⁰ EU IUU Regulation, Art. 12.

²⁵¹ EU IUU Regulation, Art. 7.

²⁵² EU Commission Press, available at <<https://ec.europa.eu/fisheries/press/european-commission-launches-new-tool-strengthen-eu%E2%80%99s-fight-against-illegal-unreported-and-en>>, accessed 01.09.2019.

²⁵³ PSMA, Art. 12(1).

²⁵⁴ PSMA, Art. 12(2).

²⁵⁵ NEAFC Scheme, Art. 25(1).

²⁵⁶ EU IUU Regulation, Art. 9(1).

states, and other vessels for which there is clear evidence that they have engaged in fishing activities infringing the applicable conservation and management measures.²⁵⁷ NEAFC has added the requirement that vessels flying the flags of non-members are prevented from landing or transshipping their catch until an inspection has been performed.²⁵⁸ Also, subject to a compulsory inspection are the vessels which request entrance into port but are included in the NEAFC IUU lists.²⁵⁹

During the inspection process, subject to review are the vessel itself as well as its documentation, gear and equipment, and fish on board.²⁶⁰ Thus, the information provided in the prior notice is examined against the information collected during the inspection. The inspection of the fishing gear and catch clarifies whether the gear has been used, and the fish harvested, in accordance with the authorization to fish²⁶¹, thus with the applicable measures as well.

After the performance of an inspection, the port state must report the result to the master of the vessel and to the flag state, other relevant states and RFMOs.²⁶² However, a certain degree of confidentiality²⁶³ must be respected when transferring the information to the relevant RFMO. Therefore, port states have to implement national regulations not only on the performance of inspections but also on the sort of information and the manner in which it can be transferred to other parties than the flag states.²⁶⁴

4.2.2 Fishing vessels and port state enforcement

If port states have reasonable grounds to believe that vessels have engaged in unregulated fishing activities, they have several possible measures to undertake. The enforcement actions must be based on the presumption that vessels have engaged in unregulated fishing, i.e. in contradiction with the applicable conservation and management measures in an area, either international or adopted by the relevant RFMO.²⁶⁵ The PSMA does not provide a list of activities which constitute unregulated fishing but refers to the definition of IUU fishing laid down in the IPOA-IUU as well as to fishing-related activities in support of such fishing.²⁶⁶

²⁵⁷ PSMA, Art. 12(3).

²⁵⁸ NEAFC Scheme, Art. 40(1).

²⁵⁹ NEAFC Scheme, Art. 45(1)(a).

²⁶⁰ PSMA, Art. 13.

²⁶¹ Palma, Tsamenyi and Edeson, *supra*. 143, p. 164.

²⁶² PSMA, Art. 15.

²⁶³ PSMA, Art. 6 and 16.

²⁶⁴ Palma, Tsamenyi and Edeson, *supra*. 143, p. 165.

²⁶⁵ *Ibid.*

²⁶⁶ PSMA, Art. 3(3) and 1(e).

Another basis for establishing a connection between vessels and unregulated fishing is their inclusion in RFMO IUU lists. In addition, violations of fisheries regulation warranting enforcement actions may result from the obstruction of port inspection or the failure to provide required information or falsification of documents.²⁶⁷

In case an inspection has provided sufficient evidence to believe that the vessel has engaged in unregulated fishing activities undermining the effectiveness of international conservation and management measures, the port state can either prohibit the landing and transshipment of fish or deny access to port and related port services.²⁶⁸

4.2.2.1 Prohibition of landing and transshipment of catch

The most common measure imposed by port states on foreign-flagged fishing vessels is the prohibition of landing and transshipment of the catch. It is also probably the most effective tool in deterring unregulated fishing as it has a direct influence on the marketing and trade of the caught fish.²⁶⁹

In the Arctic, vessels of non-Contracting parties of the NEAFC can be prohibited from landing and transshipping of their fish catch if, *inter alia*, inspection reveals that the catch on board is subject to issued Recommendations and the master fails to prove that it was caught outside the Regulatory area, or if the flag state has failed to provide information that was required by the port state, or if there is sufficient evidence that the vessel has been otherwise engaged in unregulated fishing activities.²⁷⁰ Further, vessels shall be prohibited to land or transship their catch if they appear on the IUU lists.²⁷¹ Additionally, if such a prohibition has been imposed on a vessel, it is also prohibited to perform transshipment in the waters under national jurisdiction of the NEAFC members.²⁷²

The EU has also adopted measures in relation to third states, imposing that ‘if the results of the inspection provide evidence that a third country fishing vessel has engaged in IUU fishing in accordance with the criteria set out in Article 3, the competent authority of the port Member State shall not authorize such vessels to land or transship their catch’.²⁷³

²⁶⁷ NEAFC Scheme, Art. 29 lists infringements which are to be considered serious and to trigger enforcement actions on behalf of the port state. See also Palma, Tsamenyi and Edeson, *supra*. 143, p. 166.

²⁶⁸ PSMA, Art. 18(1)(b).

²⁶⁹ Palma, Tsamenyi and Edeson, *supra*. 143, p. 166.

²⁷⁰ NEAFC Scheme, Art. 41(1).

²⁷¹ NEAFC Scheme, Art. 45(1)(b).

²⁷² NEAFC Scheme, Art. 41(2).

²⁷³ EU IUU Regulation, Art. 11(2).

4.2.2.2 Denial of access to port

Port states can also deny the access to port, including access to port services. The PSMA envisages denial to services such as ‘landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including, *inter alia*, refuelling and resupplying, maintenance and drydocking, if these actions have not already been taken in respect of the vessel, in a manner consistent with this Agreement, including Article 4’.²⁷⁴ According to the PSMA, the denial can occur on three different stages: before the vessels enter the port, upon its entry into port, and after an inspection.

Port states must deny access to their port before the vessels enter into it when a vessel has engaged in unregulated fishing activities or in activities supporting this type of fishing or when it is included in a list of vessels which have engaged in such activities adopted by an RFMO in accordance with international law.²⁷⁵ States may allow such vessels to enter exclusively for the purpose of inspection and taking appropriate actions which have at least the same effect as denial for the purpose of deterring unregulated fishing activities and must not allow any other port services while the vessel is in port.²⁷⁶

When a vessel is already in port, the port state must deny the use of port and port services when the vessel does not hold a valid or applicable authorization by the flag state, or when the vessel does not provide the required confirmation that the catch on board is harvested in accordance with the applicable conservation and management measures, or when the port state has reasonable grounds to believe that the vessel has engaged in unregulated fishing activities, unless the latter can provide sufficient evidence that it was acting consistently with the applicable measures.²⁷⁷ When imposing a denial, the port state is obliged to inform the flag state and/or the relevant RFMO.²⁷⁸

When the port state has performed an inspection on the vessel and has found reasonable grounds to believe that the vessel has engaged in unregulated fishing activities, after informing the flag state of its findings, it must prohibit the use of the port, as well as other port services to that vessel.²⁷⁹

²⁷⁴ PSMA, Art. 18.

²⁷⁵ PSMA, Art. 9(4).

²⁷⁶ PSMA, Art. 9(5) and (6).

²⁷⁷ PSMA, Art. 11(1).

²⁷⁸ PSMA, Art. 11(2).

²⁷⁹ PSMA, Art. 18(1).

In the Arctic, if vessels of non-parties of the NEAFC failed to provide the necessary notice, they are prohibited from entry into port²⁸⁰ and from use of the port services. Such a denial can only be withdrawn if there is sufficient proof that ‘the grounds on which use was denied were inadequate or erroneous or that such grounds no longer apply’.²⁸¹ In addition to these measures, the NEAFC requires its parties to impose monetary penalties with the purpose of effectively depriving the perpetrators of the economic benefit of their illicit activities or of providing sanctions which are proportionate of the gravity of the infringement.²⁸² Thus, future infringements of the applicable conservation and management measures can be effectively deterred.

The LOSC, as mentioned before, does not expressly provide for any particular enforcement measures to be undertaken by the port states. The FSA does not expressly set out the right to denial of access to port either. This, however, does not deprive the states of their right not to authorize fishing vessels to enter their ports.²⁸³ Such a denial can find grounds for justification in the general principle that vessels are subject to the sovereignty of the port state while in port, which is also laid down in the PSMA.²⁸⁴ A crucial point for this justification is the fact that port states must have all requirements for port access, procedures for vessels inspections and enforcement procedures incorporated in either their domestic legislation or in international treaties.²⁸⁵ Nevertheless, on the basis of international law, port states cannot deny access to ports to vessels in distress or in case of *force majeure*.²⁸⁶

The port control schemes and the need of coordinated port measures, despite having growing importance in deterring unregulated fishing activities, are not without a weakness. According to the PSMA, port states must take such ‘fair, non-discriminatory and transparent measures’ to deter activities of non-parties which might undermine the effectiveness of the Agreement.²⁸⁷ This is in line with the provisions of the LOSC imposing a general obligation of non-discrimination²⁸⁸, and of the FSA, where, when taking measures for ensuring the

²⁸⁰ NEAFC Scheme, Art. 39.

²⁸¹ NEAFC Scheme, Art. 41(4).

²⁸² NEAFC Scheme, Art. 31(2).

²⁸³ T Løbach, *Measures to be Adopted by the Port State in Combating IUU Fishing*, in FAO, Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia, 15-19 May 2000, FAO Fisheries Report No. 666, Rome, 2001, available at <<http://www.fao.org/3/Y3274E/y3274e0h.htm#bm17>>, accessed 01.09.2019, para. 52.

²⁸⁴ PSMA, Art. 4(1)(b).

²⁸⁵ Palma, Tsamenyi and Edeson, *supra*. 143, p. 171.

²⁸⁶ *Ibid.*, Art. 10. See also IPOA-IUU, para. 54.

²⁸⁷ PSMA, Art. 23(2). See also IPOA-IUU, para. 52.

²⁸⁸ LOSC, Art. 119(3) and 227.

effectiveness of the applicable conservation and management measures, the ‘port State shall not discriminate in form or in fact against the vessels of any State’.²⁸⁹ Nevertheless, the issue is the lack of definition of what constitutes ‘fair, non-discriminatory and transparent measure’, which therefore might be subject to various interpretations by states leading to differing practices. The OECD has provided guidance on the matter, stating that the aim of such measures should be the avoidance of unjustifiable discrimination between foreign vessels and between national vessels and foreign vessels.²⁹⁰ For the port states, that would entail making clear all grounds for denial of access to port or prohibition of landing and transshipment when developing their port state schemes.²⁹¹

4.2.3 Cooperation between port states and flag states

The port states have full jurisdiction over their territory on the basis of general international law, and this extends to the vessels flying their flags, where the states adopt the role of a flag state. The extent of their jurisdiction over foreign vessels, however, is not necessarily established clearly. Thus, it has been crucial to ensure this port state power, and as a result, the PSMA set a mechanism under which port states need to cooperate with flag states in order to undertake enforcement measures towards foreign-flagged vessels. This obligation for cooperation is found in the exchange of information and in the undertaking of enforcement actions, which are interrelated and dependent on each other processes.

According to the PSMA, a port state must promptly inform the flag state when an inspected vessel in its port is reasonably suspected in participating in unregulated fishing activities²⁹², and it also must transmit the result of the inspection to other relevant parties or RFMOs.²⁹³ The exchange of this information is important not just to ensure that the flag state is aware of the suspected vessel’s actions but to also allow it to take the necessary coercive measures. Indeed, upon receiving of such a notification, the flag state must investigate and take appropriate enforcement measures towards the vessel, the results of which actions it is obliged to transmit to the other parties.²⁹⁴ Further, whenever a flag state has clear grounds to believe that a vessel flying its flag is engaged in illicit fishing activities, and this vessel requests entry into or is already in a port, it must request the port state to perform an inspection or to take other

²⁸⁹ FSA, Art. 23(1).

²⁹⁰ OECD, *supra*. 160, p. 55.

²⁹¹ Palma, Tsamenyi and Edeson, *supra*. 143, p. 167.

²⁹² PSMA, Art. 18(1)(a).

²⁹³ PSMA, Art. 15. Such a relevant party is, e.g. the state of which the master of the vessel is a national.

²⁹⁴ PSMA, Art. 20(4) and (5).

measures.²⁹⁵ Following these two scenarios, port states have the right to take the enforcement measures towards foreign-flagged vessels discussed above.²⁹⁶ In addition to them, port states may take other actions to which the flag state has consented or has requested.²⁹⁷ The port states may also invite the flag states to participate in the inspections in case appropriate arrangements.²⁹⁸

The obligation of cooperation between port states and flag states is also set forth in the Compliance Agreement, which precedes the PSMA. According to it, whenever a fishing vessel is voluntarily in port of another state, the port state must inform the flag state if it has reasonable grounds to believe that the vessel has engaged in activities undermining the effectiveness of international conservation and management measures.²⁹⁹ Moreover, the two states can make arrangements enabling the port state to take necessary investigatory measures to establish whether the suspected vessel has indeed engaged in the alleged activities.³⁰⁰

In the Arctic, whenever a vessel is suspected in having engaged in unregulated fishing activities while in port of a NEAFC member, the Secretary of NEAFC must inform as soon as possible the flag state, as well as the vessel's master national state, where appropriate.³⁰¹ Additionally, the Secretary must request the flag state to undertake the necessary enforcement measures in order to ensure that the vessel is deterred from such activities that can undermine the effectiveness of the adopted conservation and management measures.³⁰² The flag states must also be required to exchange back information on the actions they undertake following such a request from the Secretary, which information is then to be transmitted among the NEAFC members.³⁰³

Briefly summed up, it is clear that the port states indeed have a crucial role in deterring unregulated fishing activities. By extending their jurisdiction over foreign-flagged vessels, they ensure that vessels which managed to avoid being detected by their flag state are still held responsible for any infringement of international conservation and management measures. In addition, this allows the flag states to be informed about such vessels, so that they are able to

²⁹⁵ PSMA, Art. 20(2).

²⁹⁶ PSMA, Art. 18(1)(b).

²⁹⁷ PSMA, Art. 18(3).

²⁹⁸ PSMA, Art. 13(2)(e).

²⁹⁹ FAO Compliance Agreement, Art. V(2).

³⁰⁰ *Ibid.* In a similar fashion, port states are encouraged to render assistance to flag states in the establishment of infringements of applicable measures when requested – see FAO Code of Conduct, para. 8.3.2.

³⁰¹ NEAFC Scheme, Art. 42(1).

³⁰² NEAFC Scheme, Art. 42(2).

³⁰³ NEAFC Scheme, Art. 42(3).

follow up with the appropriate enforcement measures or to receive assistance in doing so when necessary. Thus, port states effectively supplement the enforcement powers of the flag states in the fight against unregulated fishing activities. Finally, the port state measures can effectively prevent catch harvested in violation of the applicable measures from entering the market, therefore diminishing the financial incentive that the violators might have.

With respect to unregulated fishing under the CAOFA, the PSMA provides effective measures for ensuring proper enforcement towards third-state vessels. An elaborated port control scheme exists for the members of NEAFC; for the USA, which is not member of the NEAFC but a party to the PSMA, similar regulations apply. The EU, which is both a party to the PSMA and a member of the NEAFC, had adopted a robust port control scheme even before it became a party to the PSMA, and its role in the port state control is becoming more important, especially in light of the amounts of Arctic fisheries import on the EU market.³⁰⁴

5 Conclusion

States have been engaged in commercial fishing in the waters of the Arctic Ocean for many years and this has been occurring in the areas within national jurisdiction of the Arctic coastal states as well as in some of the high seas pockets. Although currently no fishing takes place in the Central Arctic Ocean, climate change and warming up of the waters will eventually result in more opportunities to exploit the fish stocks found there. Once commercial fishing is initiated, though, the chances of unregulated fishing increase as well. Moreover, the Arctic states are not the only ones engaged in fishing. A significant example of an additional actor is the EU because its Member States are also participating in fisheries in the region. Furthermore, 40% of the total import of fish of the EU originates from the ice-free Arctic waters.

Despite the lack of possibilities to fish in the CAO, the coastal states have not ignored the regulation of the region. First, they refuted the statement that there is a legal vacuum and proclaimed the law of the sea regime as the applicable law. As a further step, they signed the Central Arctic Ocean Fisheries Agreement and applied the precautionary approach by imposing temporary abstention from fishing. This is a preemptive measure for the prevention of unregulated fishing and the conservation of fish stocks since there is not much available information about the marine environment in the CAO.

³⁰⁴ See EU Commission, *supra*. 36.

Therefore, it was necessary to investigate how states could deter the unregulated fishing in the area. In order to do this, the obligations of flag states as well as the possible measures towards vessels engaged in unregulated fishing, were established. The analysis was informed by the international legal framework for the law of the sea, as well as the regional regulatory regime, including the NEAFC. The possible contribution of the EU was analyzed not only because it is an important actor in the region but also because it already has a well-established measures toolbox in the combat against unregulated fishing, as part of the bigger concept of IUU fishing.

Since the CAOFA is still not in force, two different scenarios had to be set. First, the obligations of all states before it enters into force needed to be established as in this case the area is without regional regulation. Second, in the case of the CAOFA already in force, it was necessary to assess whether the CAOFA has the legal nature of an RFMA in order to identify whether third states would have any obligations in respect to its provisions. As a result, it was concluded states have the obligation of conservation of fish stocks as well as the duty to cooperate towards this conservation. Moreover, as flag states, they need to exercise effective control over the fishing vessels flying their flags, through *inter alia*, registration and recording of fishing vessels and authorizations to fish. This duty is further strengthened by the obligation of states to employ a number of MCS tools, such as maintenance of vessel registers, blacklisting of vessels, and the establishment of vessel monitoring systems, including remote observation.

It was established that a number of measures may be undertaken in respect to third-state vessels with the objective of deterring them from engaging in unregulated fishing activities on the high seas of the CAO. Due to the failure of effective exercise of flag state jurisdiction, other states have been enabled to contribute to the safeguarding of the effective implementation of relevant conservation and management measures. Following the utilization of the MCS tools, states can receive information which allows them to take further enforcement actions. These actions include direct measures at sea, such as approach and boarding and inspection, which allow for establishing possible infringements of conservation and management measures. Moreover, several port state control measures are available, such as inspections in port and the subsequent denial of access and prohibition of landing and transshipment of catch.

Therefore, it is evident that even though no fishing occurs in the CAO, states have obligations with respect to the conservation of the fish stocks that may be found there. As soon as measures are established pursuant to the CAOFA, flag states will need to ensure that the

vessels flying their flag do not engage in fishing activities which might undermine their effectiveness. Following that, the state-parties to the CAOFA have a number of possibilities to ensure the compliance with such measures. However, as the parties decided to refer to general international law with respect to the latter, it is upon their discretion to determine which of the available measures will be the most useful. It is possible that such a decision will be within the competence of an eventual RFMO for the region; however, only time will tell.

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