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Evaluating Market Conditionality in Fisheries

Interactional Law and Global Administration

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[i] A phrase borrowed of course from Douglas Adams' famous *Hitchhiker's Guide to the Galaxy*, of which the fourth volume goes by this title.
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Abbreviations

ARSIWA	International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts
CBD	Convention on Biological Diversity
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CDS	Catch documentation scheme
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
Code of Conduct	FAO Code of Conduct for Responsible Fisheries
Commission	European Commission
COFI	FAO Committee on Fisheries
Council	Council of the European Union
EC	European Community
eds	editors
EEZ	Exclusive Economic Zone
etc.	etcetera
ETS	Emissions Trading Scheme
EU	European Union
FAO	Food and Agricultural Organization of the United Nations
FAO COFI	FAO Committee on Fisheries
Fish Stocks Agreement	Agreement for the implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

Friendly Relations Declaration	Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations
GFCM	General Fisheries Commission for the Mediterranean
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IMO	International Maritime Organisation
IOTC	Indian Ocean Tuna Commission
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
LOSC	United Nations Convention on the Law of the Sea
MSY	Maximum Sustainable Yield
NAFO	Northwest Atlantic Fisheries Organization
NEAFC	North East Atlantic Fisheries Commission
NGO	Non-governmental organisation
nm	nautical miles
NOAA	National Oceanic and Atmospheric Administration
NPFC	Northwest Pacific Fisheries Commission
PCIJ	Permanent Court of International Justice
RFB	Regional Fisheries Bodies
RFMO	Regional Fisheries Management Organisation
SEAFO	South East Atlantic Fisheries Organisation
SDG	Sustainable Development Goals
SIOFA	Southern Indian Ocean Fisheries Agreement
SPRFMO	South Pacific Regional Fisheries Management Organisation
SPPC	South Pacific Permanent Commission
TAC	Total Allowable Catch
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

UN	United Nations
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WCPFC	Western and Central Pacific Fisheries Commission

1. Introduction

The long-term sustainable management of marine living resources remains a long way off. This is nothing new, as humans have been fundamentally altering marine ecosystems since they first learned how to fish.[1] Human disturbance of the marine environment is however accelerating in magnitude and diversity. Long gone are the days that 153 large fish exceeded the normal capacity of a fishing net.[2] Today, a single haul can amount to tens of tonnes of fish.[3] Global capture in marine fishing amounts to a staggering 80 million tons a year,[4] and the fraction of the world's marine fish stocks that is fished within biologically sustainable levels continues to shrink.[5] With over 9 billion people to feed in this world and counting, human demand on the sea is growing. Long-term sustainability is hampered by the scientific complexity of determining what 'too much fishing' or 'the right kind of fishing' actually is.[6] It is also hampered by the widespread use of harmful fishing gear;[7] the threat of ocean acidification and ocean warming due to climate change, and resulting shifts in fish stocks;[8] plastic waste and other forms of pollution;[9] and negative impacts from other marine activities, such as shipping and construction.[10] The resulting picture is bleak to say the least. The UN Sustainable Development Goals (SDGs) include a target to effectively restore fish stocks to sustainable levels by 2020, and at least to levels that can produce Maximum Sustainable

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[1] Jeremy Jackson *et al* 'Historical Oversfishing and the Recent Collapse of Coastal Ecosystems' (2001) 293(5530) Science 629, p. 636.
[2] John 21:11, King James Version.
[3] S. Pascoe and D. Gréboval (eds) 'Measuring capacity in fisheries' (2003) FAO Fisheries Technical Paper No. 445, observing quantities of catch per haul of 50 to 60 tonnes.
[4] Recent years have shown trends of either just under or over 80 million tons, up to 81.5 million tons in 2011 (FAO Yearbook of Fishery and Aquaculture Statistics, available at: http://www.fao.org/fishery/static/Yearbook/YB2016_USBcard/navigation/index_content_capture_f.htm#NOTES).
[5] As per the latest assessment this is now reduced to 66.9% (FAO 'The State of World Fisheries and Aquaculture' (2018), p. 46).
[6] There is a growing awareness that whilst we harvest resources from the bottom of the food chain on land, we harvest resources from the top of the food chain at sea (Daniel Pauly *et al* 'Fishing Down Marine Food Webs' (1998) 279(5532) Science, p. 860-863).
[7] National Research Council *Effects of Trawling and Dredging on Seafloor Habitat* (National Academy Press, 2002).
[8] Philip Munday *et al* 'Replenishment of fish populations is threatened by ocean acidification' (2010) 107(29) Proceedings of the National Academy of Sciences; H. O. Portner and M. A. Peck 'Climate change effects on fishes and fisheries: towards a cause-and-effect understanding' (2010) 77(8) Journal of Fish Biology 1745, p. 1746 (looking also at other climate change related effects on species distribution).
[9] Marcus Eriksen *et al* 'Plastic Pollution in the World's Oceans: More than 5 Trillion Plastic Pieces Weighing over 250,000 Tons Afloat at Sea' (2014) 9(12) PLoS ONE 1.
[10] Karin Andersson *et al* (eds) *Shipping and the Environment*: *Improving Environmental Performance in Marine Transportation* (Springer, 2016), p. 16.

Yield (MSY).[11] The Food and Agricultural Organization of the UN (FAO)'s most recent biennial report on the state of World Fisheries and Aquaculture indicates that these good intentions are "very unlikely" to be realised.[12] Jesus may have saved the day when his disciples returned empty handed after a night of fishing on the Sea of Galilea, but faith alone is no longer enough to feed future generations.

Although some threats to ocean sustainability (like the issue of plastic pollution) remain unregulated at the international level,[13] there is a comprehensive legal framework in place for the conservation and management of marine living resources. Notably, the widely ratified 1982 United Nations (UN) Convention on the Law of the Sea (LOSC)[14] and 1995 UN Fish Stocks Agreement (Fish Stocks Agreement)[15] contain many provisions to this effect, including the obligation to maintain or restore fish stocks at levels that are capable of producing MSY.[16] Additionally, many transboundary (straddling or highly migratory) and high seas fisheries[17] are governed through Regional Fisheries Management Organisations or Arrangements (RFMOs).[18]

[11] SDG 14, available at: https://www.un.org/sustainabledevelopment/oceans/.
[12] FAO (supra note 5), p. 46.
[13] Work to regulate ocean plastics is underway. In June 2018, Canada, France, Germany, Italy, the UK, and the EU adopted a voluntary Ocean Plastics Charter outlining concrete actions to eradicate plastic pollution (https://plasticactioncentre.ca/wp-content/uploads/2019/04/PolicyPDF3.pdf). There is moreover a strong call from NGOs and Nordic countries for a treaty on ocean plastics (http://wwf.panda.org/wwf_news/?345653/Nordic-countries-call-for-global-treaty-on-ocean-plastic-pollution).
[14] United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UN Treaty Series 3) (hereafter: LOSC).
[15] Agreement for the implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (2167 UN Treaty Series 3) (hereafter: Fish Stocks Agreement).
[16] Arts. 61(3) and 119(1)(a) LOSC; Art. 5(b) Fish Stocks Agreement.
[17] The term 'transboundary' is used in this thesis in relation to marine living resources to denote resources (fish stocks) that occur between maritime boundaries. The term is general and can refer to shared stocks, straddling stocks, or highly migratory species, which are subject to specific legal regimes under the LOSC, as set out in chapter 3. It also encompasses the EU's concept of stocks of common interest, described in chapter 4.
[18] RFMOs are Regional Fisheries Bodies (RFBs), another term commonly used by the FAO. They differ from other RFBs that are purely consultative or scientific, in so far that RFMOs have the competence to adopt fishery conservation and management measures (CMMs) (Art. 2(6)(c) IPOA-IUU and Art. 1(i) Port Sate Measures Agreement). The Fish Stocks Agreement does not define what an 'organisation' is but defines the term 'arrangement' as a cooperative mechanism established in accordance with the LOSC and this Agreement by two or more states for the purpose, *inter alia*, of establishing CMMs in a sub-region or region for one or more straddling fish stocks or highly migratory fish stocks (Art. 1(1)(d)). An arrangement could be a series of conferences or instruments, or a designated committee (Erik J Molenaar 'The Concept of "Real Interest" and Other Aspects of Co-Operation through Regional Fisheries Management Mechanisms' (2000) 15 International Journal of Marine and Coastal Law 475, footnote 6 at p. 477). RFMOs and arrangements are treated the same throughout the Fish Stocks Agreement and the acronym RFMOs is therefore used holistically to refer to both organisations and arrangements.

This increase in regulation was matched by a growing awareness of the problem of 'free-riding'.[19] Many vessels simply flag to undemanding flag states (flag states that are not bound by certain agreements, and/or that do not diligently exercise their responsibilities), thus benefiting from other states' efforts at sustainability.

Around the turn of the last century, the various ways in which fishers fail to comply with applicable laws and regulations or circumvent them altogether by 'free-riding' became grouped together under the umbrella concept of illegal, unreported, and unregulated fishing (IUU fishing).[20] First conceived of within the context of RFMOs to draw the attention to fishing by vessels flagged to non-members,[21] the concept of IUU fishing has since taken on a life of its own. It is described in the International Plan of Action to Prevent, Deter, and Eliminate IUU Fishing (IPOA-IUU),[22] which was adopted within the framework of the FAO Code of Conduct for Responsible Fisheries (Code of Conduct).[23] The IPOA-IUU encapsulates a wide variety of unsustainable and/or undesirable fishing-related activities.[24]

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[19] A classic example of Hardin's famous theory of the tragedy of the commons (Garrett Hardin 'The Tragedy of the Commons' (1968) 162 Science 1243). Though not the first to describe the problem, Hardin theorises that when it comes to common resources, absent regulation, the acts of those who behave for the good of their groups will end up being undermined by those who are self-serving, which leads to the overexploitation of resources. This wisdom has since been questioned, e.g. by Elinor Ostrom's groundbreaking work in the 1990s showing that the tragedy of the commons can be avoided even without top-down regulation (most recently republished in Elinor Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP, 2015). Nevertheless, with increased regulation of marine fishing at the international and regional level since the adoption of the LOSC and Fish Stocks Agreement, awareness grew of the fact that may vessels would simply reflag to less demanding flag states, thus benefiting from other states' efforts and 'free-riding'. E.g. FAO 'FAO Technical Guidelines for Responsible Fisheries No. 9: Implementation of the IPOA-IUU', p. 1; World Bank Report (nr 92622-GLB) 'Trade in Fishing Services: Emerging Perspectives on Foreign Fishing Arrangements' [2014] Environment and Natural Resources Global Practice Discussion Paper #01, p. 58; Commission Staff Working Document, Accompanying document to the Proposal for a Council Regulation Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Impact Assessment, Brussels, 17 October 2007, SEC(2007) 1336, p. 48.

[20] FAO Guidelines for the Implementation of the IPOA-IUU (supra note 19), p. 1.

[21] The terms originate in work by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), see CCAMLR-XVI of 27 October-7 November 1997, Meeting Report, para 2.1, and Annex V paras. 1.2 and 1.28, see also chapter 3 of this thesis.

[22] International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001, available at: http://www.fao.org/publications/card/en/c/71be21c9-8406-5f66-ac68-1e74604464e7 (hereafter: IPOA-IUU).

[23] FAO Code of Conduct for Responsible Fisheries, 1995, available at: http://www.fao.org/3/a-v9878e.htm (hereafter: Code of Conduct).

[24] For a discussion, see William Edeson 'The International Plan of Action on Illegal, Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument' (2001) 16 International Journal of Marine and Coastal Law 603, p. 609 and p. 617-620; Jens T Theilen 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' (2013) 28 International Journal of Marine and Coastal Law 533; Andrew Serdy 'Simplistic or Surreptitious? Beyond the Flawed Concept(s) of IUU Fishing' in W. W. Taylor, A. J. Lynch, and M. G. Schechter (eds) *Sustainable Fisheries: Multi-Level Approaches to a Global Problem* (American Fisheries Society, 2011); Andrew Serdy *The New Entrants Problem in International Fisheries Law* (CUP, 2016), p. 149; Eva R. van der Marel 'An Opaque Blacklist: the Lack of Transparency in Identifying Non

This is discussed in more detail in chapter 3 of this thesis. Whilst the different uses and interpretations of the concept of IUU fishing and the unreported nature of most activities render it virtually impossible to quantify,[25] it has been suggested that the different types of IUU fishing together account for approximately one third of global catches.[26] Issues of definition notwithstanding, IUU fishing is considered as one of the greatest threats to the sustainability of marine ecosystems, and seen as undermining national, regional and global efforts to achieve this.[27]

The IPOA-IUU provides a tool-kit for states to prevent, deter, and eliminate IUU fishing. It asks for an integrated approach, and among other things specifically mentions 'internationally agreed market-related measures' as an effective mechanism against IUU fishing.[28] The reason for this is clear: fish and products derived from it are some of the most traded food products today. Around 35% of global fish production (60 million tons in 2016, including from aquaculture) enters international trade.[29] This represents a significant increase in world trade in fish and fish products in the last 40 years, both in terms of quantity (a 245% increase) and value (which rose from 8 to 143 billion USD).[30] This increase in trade in fish products has gone hand in hand with an increase in the awareness that markets can effectively discourage certain fishing activities, e.g. through certification, labelling requirements, and import and export restrictions.

The development of the IPOA-IUU took place against a backdrop of multilateral efforts at restricting international trade in fish and fisheries products harvested through illegal and

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Cooperating Countries under the EU IUU Regulation' in L. Martin, C. Salonidis and C. Hioueras (eds) *Natural Resources and the Law of the Sea* (Juris, 2017); Robin Churchill 'International Trade Law Aspects of Measures to Combat IUU and Unsustainable Fishing' in Erik J. Molenaar and Richard Caddell (eds) *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart Publishing, 2019).

[25] Graeme Macfadyen *et al* 'Review of Studies Estimating Levels of IUU Fishing and the Methodologies Utilized' (2016) Poseidon Aquatic Resource Management Ltd, available at: http://www.fao.org/3/a-bl765e.pdf , p. 23.

[26] David Agnew *et al* 'Estimating the Worldwide Extent of Illegal Fishing' (2009) 4(2) PLoS ONE. The quantity of IUU fishing is however difficult to determine accurately (Graeme Macfadyen *et al* (Ibid.)).

[27] *Inter alia* Pew Charitable Trusts at https://www.pewtrusts.org/en/projects/ending-illegal-fishing-project; FAO at http://www.fao.org/iuu-fishing/en/; European Commission at https://ec.europa.eu/fisheries/cfp/illegal_fishing_en; International MCS Network at http://imcsnet.org/resources/iuu/; Barents Watch at https://www.barentswatch.no/en/articles/Illegal-fishing---can-it-be-stopped/; Sea Shepherd at https://seashepherd.org/campaigns/iuu-fishing/; Forword to the Port State Measures Agreement at http://www.fao.org/3/a-i5469t.pdf, p. vii.

[28] Para. 65 IPOA-IUU.

[29] FAO Yearbook of Fishery and Aquaculture Statistics, available at: http://www.fao.org/fishery/static/Yearbook/YB2016_USBcard/root/commodities/a2.pdf.

[30] FAO (supra note 5), p. 7.

otherwise harmful fishing practices.[31] Such efforts have been growing steadily since. In 2006, the first Fish Stocks Agreement Review Conference openly urged parties to block market access to products derived from IUU fishing, so as to reduce its profitability, and this was encouraged also in follow up conferences.[32] The yearly UN General Assembly Resolutions on Sustainable Fisheries have since included a standard paragraph urging states, individually and through RFMOs, to adopt and implement internationally agreed market-related measures in accordance with international (trade) law, referring to the IPOA-IUU for support.[33] The Port State Measures Agreement moreover continues the trend of leveraging market access to counter IUU fishing by regulating the denial of access to ports (and thereby to national and international markets) to vessels upon proof that they have engaged in IUU fishing.[34]

Identified by the IPOA-IUU as a viable strategy to help prevent, deter and eliminate IUU fishing, it would appear that the international community now generally accepts market measures are a powerful tool for this purpose.[35] This has carved out a new role for countries when partaking in international fisheries management. Alongside their familiar roles as flag-, coastal-, and port state, countries now also have a distinct role to play as ‘market state’. A country acts out this role when it uses its market power to discourage particular behaviour by others, for instance by making market access conditional upon compliance with international fisheries norms and obligations (adopting market measures). The concept of the market state is looked at in more detail in chapter 2.

Various market mechanisms have been specifically designed for the purpose of influencing fishing practices. They have been adopted collectively through RFMOs, and by individual market states. Mechanisms include the establishment of lists of vessels that have engaged in IUU fishing, so that they can be denied entry to port (hereafter: vessel

[31] FAO Guidelines for the Implementation of the IPOA-IUU (supra note 19), p. 47.
[32] UN General Assembly ‘Report of the Review Conference on the Fish Stocks Agreement, New York, 22-26 May 2006’ A/CONF.210/2006/15, p. 23 and p. 40; UN General Assembly ‘Report of the Resumed Review Conference on the Fish Stocks Agreement, New York, 23-27 May 2016’ A/CONF.210/2016/5.
[33] Most recently in UN General Assembly Resolution of 11 December 2018 (A/Res/73/125), para. 98.
[34] Art. 9 of the FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, 2009, available at: http://www.fao.org/3/a-i5469t.pdf (hereafter: Port State Measures Agreement). Though the Agreement creates minimum obligations on port states that also have trade implications, the negotiating history shows that it was not necessarily intended as a trade instrument (David J Doulman and Judith Swan ‘A Guide to the Background and Implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing’ [2012] FAO Fisheries and Aquaculture Circular No. 1074, p. 68).
[35] David Doulman and Judith Swan (Ibid.), p. 94.

blacklists);[36] the establishment of lists of vessels that are exclusively allowed to fish in a particular area (hereafter: vessel whitelists);[37] mechanisms to trace catches through the supply chain by way of catch- and trade documentation schemes (CDS),[38] on which the FAO has recently adopted Guidelines to help streamline their design and help counteract the proliferation of different CDS in the world;[39] and in certain cases, the establishment of lists of countries that have failed to do enough to prevent, deter, and eliminate IUU fishing (hereafter: country blacklists).[40] Blacklisted countries are denied port access for vessels flying their flag, and market access for their fish and fish products, among other things. In so far that country blacklists are used to leverage market access, I refer to this mechanism more generally as market conditionality in fisheries.

Country blacklisting conditions market access upon a *country's* behaviour. I call this 'country-level' market conditionality.[41] Country-level market conditionality is clearly the

[36] Darren S. Calley *Market Denial and International Fisheries Regulation* (Martinus Nijhoff, 2012), p. 114-123; Carl-Christian Schmidt 'Issues and Options for Disciplines on Subsidies to Illegal, Unreported and Unregulated Fishing Environment' [2017] International Centre for Trade and Sustainable Development, p. 6. The thirteen RFMOs that currently operate IUU vessel negative lists are CCAMLR (though not technically an RFMO but takes measures for the conservation and management of marine living resources), the Inter-American Tropical Tuna Commission (IATTC), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), the Northwest Atlantic Fisheries Organization (NAFO), the North East Atlantic Fisheries Commission (NEAFC), the South East Atlantic Fisheries Organisation (SEAFO), the Western and Central Pacific Fisheries Commission (WCPFC), Commission for the Conservation of Southern Bluefin Tuna (CCSBT) (though currently no vessels are listed here), General Fisheries Commission for the Mediterranean (GFCM), the Northwest Pacific Fisheries Commission (NPFC), the Southern Indian Ocean Fisheries Agreement (SIOFA), and the South Pacific Regional Fisheries Management Organisation (SPRFMO).
[37] Darren S. Calley (supra note 36).
[38] Catch Documentation Schemes (CDS) certify the legality of a unit of catch (individual fish) at the point of capture by issuing a catch certificate to the legal owner, subsequently allowing the product to be traced throughout the supply chain by linking the catch certificate to an associated trade certificate (Gilles Hosch 'Trade Measures to Combat IUU Fishing: Comparative Analysis of Unilateral and Multilateral Approaches' [2016] International Centre for Trade and Sustainable Development, p. 7).
[39] FAO Voluntary Guidelines for Catch Documentation Schemes (2017).
[40] The blacklisting terminology has no racial connotations and is commonly used, including in studies and by the EU institutions (for instance European Commission, SEC(2007) 1336 (supra note 19); Carlos Palin and others 'Compliance of Imports of Fishery and Aquaculture Products with EU Legislation: Study' November 2013, available at: www.europarl.europa.eu/studies).
[41] This distinction is borrowed from Joanne Scott's categorization of EU measures that give rise to territorial extension; measures whose "application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad." This is discussed further in chapter 6, section 6.3. Scott distinguishes between different levels at which this can occur (global-level; country-level; firm-level; transaction-level) (Joanne Scott 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 American Journal of Comparative Law 87, p. 107). Following this dichotomy, vessel blacklisting (making certain benefits (port and market access) conditional upon a *vessel's* behaviour) can be called 'vessel-level' conditionality. Conditioning market access of a consignment of fish products upon the legality of that particular catch (verified through the presentation of a valid catch certificate) can then be called 'transaction-level' conditionality. See also Joanne Scott 'The Global Reach of EU Law: is Complicity the New Effects?' in Marisa Cremona and Joanne Scott (eds) *EU Law Beyond EU Borders: The*

most far-reaching of the abovementioned mechanisms, in so far that a trade ban adopted as a result is felt across the board for all products coming from that country, whether the products themselves have been caught legally or not.[42] Several RFMOs are currently competent to establish country blacklists and allow their members to restrict market access to fish coming from identified countries.[43] RFMOs have generally been hesitant to deploy these powers, however, and rather make use of vessel- and transaction-level conditionality mechanisms by setting up IUU vessel blacklists and CDS.[44] An exception is the International Commission for the Conservation of Atlantic Tunas (ICCAT), which already in the early 1990s required its members to ban imports from vessels flying the flag of states that had been identified as failing to cooperate in the conservation and management of a particular fishery.[45]

Extraterritorial Reach of EU Law (OUP, 2019), p. 47, explaining at footnote 142 that vessels are not easily captured by this dichotomy, unless a vessel can be captured as a 'firm'.

[42] This problem has been acknowledged also by the European Commission itself, in discussion with NGOs and industry stakeholders at an event organised in 2015 to discuss the EU IUU carding methodology. One of the conclusions that came out of this meeting was that participants "acknowledged the achievements of the EU's carding process" but called for increased consideration for the reputation risks for non-EU countries (hereafter: third countries), in particular considering the risk of "collateral damage" to legitimate operators whose businesses may be jeopardised by the poor practice of others, see "Understanding the EU's carding process to end illegal, unreported and unregulated (IUU) fishing", 6 October 2015, available at: http://www.iuuwatch.eu/wp-content/uploads/2015/07/Conclusions_Event_6-October.pdf.

[43] Gilles Hosch (supra note 38), p. 9.

[44] This can be gleaned for instance from the debate in CCAMLR over the EU's proposal to empower CCAMLR to recommend trade restrictions against those countries whose vessels undermine CCAMLR conservation measures (both CCAMLR members and non-members). The EU's Proposal (first Tabled at CCAMLR-XXV of 23 October-3 November 2006, Meeting Report, para. 3.55) received mixed reviews. Argentina, South Africa, Brazil, Namibia, and Uruguay were in particular opposed to it, variably referring to the ineffectiveness, inappropriateness, and unlawfulness of such measures; whereas *inter alia* the US supported the EU (CCAMLR-XXXI of 23 October-1 November 2012, Meeting Report, paras. 3.13-3.19; CCAMLR-XXXII of 23 October-1 November 2013, Meeting Report, paras. 141-143; CCAMLR-XXXIII of 20-31 October 2014, Meeting Report, paras. 3.72. 3.74, 3.75). After repeated attempts from the EU to push its Proposal through between, it was eventually taken off the table in 2014. Similarly, it has been explained that "trade-related measures have not been implemented by NAFO, for fear of contravening [World Trade Organisation (WTO)] regulations" (Péter D Szigeti and Gail L Lugten 'The Implementation of Performance Review Reports by Regional Fishery Bodies, 2004–2014', *FAO Fisheries and Aquaculture Circular No. 1108* vol 1108 (FAO 2015), p. 47).

[45] As early as 1994 and 1995, ICCAT adopted its Bluefin Tuna Action Plan and Swordfish Action Plan (Resolution 94-3 on Bluefin Tuna and Resolution 95-13 on Atlantic Swordfish, entered into force 22 June 1996) wherein ICCAT would identify non-members whose vessels had fished in a way that "diminished the effectiveness" of its CMMs. If further cooperation with the third country in question proved unsuccessful, ICCAT would require its members to prohibit the importation of those particular species where they were caught by a vessel registered to that country. This was the first occasion that multilaterally-endorsed market measures were adopted in the context of fishing, with Panama, Honduras and Belize identified in this manner (Recommendations 96-11 and 96-12, entered into force 4 August 1997). A similar scheme was adopted in 1996, extending this time to ICCAT members (Recommendation 96-14, entered into force 4 August 1997). This led to its identification of Equatorial New Guinea in 1999, which had exported significant numbers of Atlantic bluefin tuna despite having a zero catch limit at the time, and which had neither responded to ICCAT's inquiries nor reported any catch data (Recommendation 99-10, entered into force 15 June 2000).

The real pioneer of market conditionality is not an RFMO, but rather the European Union (EU).[46] The fight against IUU fishing has been a political priority for the EU for years.[47] It believes itself to be under a "specific responsibility in leading international efforts in the fight against IUU fishing" because of its status as a major fishing power; as the biggest market for fish and fish products in the world; and because of its self-imposed objective to improve management and avoid overexploitation of natural resources (as set out in the EU Sustainable development Strategy agreed at the European Council of June 2006).[48] Building on these strengths, the EU makes market access (and other economic benefits) conditional upon a country's compliance with a non-exhaustive list of international fisheries norms and obligations.[49] The legal framework by which it achieves this is Regulation (EC) No. 1005/2008 (EU IUU Regulation).

The EU IUU Regulation put in place various mechanisms, including the possibility to blacklist non-EU countries (hereafter: third countries) for failing to comply with international obligations to prevent, deter, and eliminate IUU fishing.[50] As a result of being blacklisted, a country loses the right to various benefits; most importantly, the right to export fish and fish products to the EU market. A similar market conditionality mechanism exists for countries allowing non-sustainable fishing on a stock of common interest, which was developed a few years later as Regulation (EU) No. 1026/2012 (EU Non-Sustainable Fishing Regulation).[51] These Regulations are meant to complement each other, in so far that measures adopted

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[46] In this thesis, wherever possible, references to what used to be the European Community (EC) are replaced by references to the EU.

[47] Communication from the Commission to the European Parliament and the Council on the Application of Council Regulation (EC) No 1005/2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Brussels, 1 October 2015, COM(2015) 480, p. 3.

[48] European Commission, SEC(2007) 1336 (supra note 19), p. 19-20. Data on the EU's market share in international fisheries can be found in EUMOFA *The EU Fish Market* (2018), available at: https://www.eumofa.eu/.

[49] The EU's own resources and fleet are governed through the Common Fisheries Policy, by way of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, 28 December 2013, OJ L354/22.

[50] 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 L286/1 (hereafter: EU IUU Regulation).

[51] Regulation (EU) No 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing 2012, 28 October 2012, OJ L316/34 (hereafter: EU Non-Sustainable Fishing Regulation).

under the latter must take into account measures already taken pursuant to the EU IUU Regulation.[52] Both Regulations are analysed in chapter 4.

These Regulations have significant impacts upon those affected. These impacts can be observed at different levels of governance (domestic, targeted country, and global), and can be evaluated in economic and normative terms.[53] Economic effects at all three levels include compliance costs, possible loss of market access, but also gains in terms of 'less IUU'.[54] Normative effects may also be felt at all levels.[55] EU IUU country blacklisting is strongly oriented towards inducing normative change abroad. The Commission states that "the primary objective of the EU's policy against IUU fishing is to work together with third countries to foster change in behaviour and strengthen fisheries governance", through structural reform, and that countries have only been blacklisted as a last resort.[56] It believes the EU to be helping third countries "through dialogue, cooperation, and technical and development aid (…) to improve the conservation and sustainable use of marine resources and offer better opportunities to fishing communities and honest operators".[57] The Commission proudly reveals that it has helped many third counties achieve this through legislative and administrative reforms.[58] The threat of market restrictions may indeed facilitate the ability to instigate change, though the Regulation's actual impact on reducing IUU and its long-term normative effects are difficult to prove.[59]

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[52] Art. 5(2) EU Non-Sustainable Fishing Regulation.

[53] This includes other transboundary effects, such as the social impacts of jobs being lost or created in the fisheries sector.

[54] Oceanic Developpement and MegaPesca Lda 'Analysis of Expected Consequences for Developing Countries of the IUU Fishing Proposed Regulation and Indeitification of Measures Needed to Implement the Regulation - Phase 2 (Final Report)' (4 May 2009) Contrat Cadre FISH 2006-20, p. 111-112. Some impacts are also felt *in the EU*, and when consulted the consolidated views of the industry was that "the IUU Regulation did not impact trade *per se* except in the short-term after the official entry into force of the legislation, but contributed to increase the administrative burden and costs of doing business" (European Commission 'Study on the Application and Implementation of the IUU Regulation' 16 April 2014, available at: https://ec.europa.eu/fisheries/sites/fisheries/files/iuu_regulation_final-report_en.pdf, p. 89).

[55] Because the EU is not a country, EU measures will also have to be implemented by EU member states. It can be observed that EU member states are still struggling with the effective implementation of the Regulation's requirements, in particular with regard to port inspections and risk-based catch certificate verifications, and generally the way individual member states have developed control measures to implement the IUU Regulation (Carlos Palin and others (supra note 40), p. 89; European Commission (supra note 54), p. 95).

[56] European Commission, COM(2015) 480 (supra note 47), p. 3 and 5.

[57] Ibid. p. 5.

[58] Ibid.

[59] It has been suggested that "the short term impact on the third country is likely to be a redirection of trade away to other markets." (Oceanic Développement, MegaPesca Lda, Report under FISH 2006-20 (2007), available at: https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/iuu_consequences_2009_en.pdf, p. 115). Moreover, there is "significant evidence that the IUU Regulation (...) third country carding process had a direct impact on seafood trade flows to the EU since the Regulation's entry into force in 2010", but "[d]ue to the

Whatever normative effects market conditionality has, these effects are amplified when the EU's decision to blacklist is used as a yardstick by other countries and organisations. There are some examples that this is already happening. In Taiwan, a foreign flagged fishing vessel that intends to enter into its ports shall be denied from port entry if the flag state of the fishing vessel is identified as "IUU fishing non-cooperating country" or is subject to a letter of identification for more than 2 years by other countries, international fisheries organisations, or other regional economic integrated organisations.[60] This appears to be a nod towards the EU IUU Regulation, from where the non-cooperating country terminology originates.[61] EU blacklisting moreover plays a role in the new IUU Fishing Index, which was designed to provide a snapshot overview of countries' vulnerability, exposure, and responses

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complexities inherent in seafood trade dynamics, the impacts of the IUU Regulation can be difficult to isolate from the influence of other factors, such as the conclusion of trade agreements or removal of tariff barriers (...) The potential impact of the IUU Regulation on trade dynamics appeared to differ depending on the specific import flow concerned." (Viktoria Mundy 'The Impact of the EU IUU Regulation on Seafood Trade Flows: Identification of Intra-EU Shifts in Import Trends Related to the Catch Certification Scheme and Third Country Carding Process' [2018] Environmental Justice Foundation, Oceana, The Pew Charitable Trusts, WWF, p. 96). Rashid Sumaila offers an economic perspective on the impact of the EU IUU carding system, arguing that it "could be significant for some targeted countries but its effect globally, with respect to reducing IUU fishing, would be minimal", though that this could "increase significantly if the [US] and Japan also instituted similar carding systems" (U Rashid Sumaila 'A Carding System as an Approach to Increasing the Economic Risk of Engaging in IUU Fishing?' (2019) 6 Frontiers in Marine Science 1, p. 1, 7). For an evaluation of the EU IUU Regulation and its effects in general, see also Indrani Lutchman,Stephanie Newman and Maxine Monsanto *An Independent Review of the EU Illegal, Unreported and Unregulated Regulations* (Institute for European Environmental Policy 2011); EU IUU Coalition *Risk Assessment and Verification of Catch Certificates under the EU IUU Regulation* (2016); Long Distance Advisory Council 'Opinion: Improving Implementation of the EU Regulation to Fight against IUU Fishing' [2016] R-08-16/WG5; Environmental Justice Foundation and others *The EU IUU Regulation. Analysis: Implementation of EU Seafood Import Controls* (2017). That the EU has triggered *normative* change is generally evident from legislative reforms abroad that coincide with EU presence. That the EU was a contributing factor has explicitly been ackowledged by some countries in their trade policy review reports before the WTO. For instance, Guinea describes that a key factor at the international level in the elaboration of its new policy framework on fisheries was the fact that it was blacklisted by the EU, which "acted as a trigger for reforms" (Guinea Trade Policy Review, WT/TPR/S/370/Rev.1, para. 4.48 (on file with author)). Thailand similarly explains that its new Fisheries Act aims to adjust resource management measures so as to be more compatible with international fisheries law and standards as well as the EU IUU Regulation (Thailand Trade Policy Review, WT/TPR/S/326, para. 4.37 (on file with author)). It is interesting to note that the normative effects are also felt by countries that have *not* been carded. Mauritania for instance never received a warning that it would be blacklisted (colloquially referred to as a yellow card, text surrounding infra note 94), yet made note at the WTO of its work towards "implementing international regulations against IUU fishing", for which it included a reference to the EU IUU Regulation (Mauritania Trade Policy Review, WT/TPR/S/371, para. 4.42 (on file with author)). Though "there is not always a clear causal link between the EU listing mechanism and subsequent legislative changes in third countries", Arron Honniball suggests that "[o]fficial statements and documentation do however suggest that the EU listing mechanism is one of the contributing factors to legislative reform" (Arron N Honniball 'What's in a Duty ? EU Identification of Non-Cooperating Port States and Their Prescriptive Responses' (2020) 35 The International Journal of Marine and Coastal Law 1, p. 3).

[60] Art. 22 of Presidential Order Hua-Tsung (1) Yi-Tzu No. 10500079291, promulgated on July 20, 2016.

[61] Taiwan received a yellow card just prior to the adoption of this Presidential Order, namely in October 2015, which may have influenced this provision.

to IUU fishing.[62] The Index relies on 40 indicators, weighed depending on their importance. One of the criteria to measure a country's response is whether or not the Commission has determined that that country has failed to prevent, deter, and eliminate IUU fishing, as per the EU IUU Regulation.[63] There also appears to be a growing interest from other market states (mainly the US) to resort to the blacklisting of countries and (the threat of) market restrictions to push seemingly 'laggard' states into complying with international fisheries norms and obligations.[64] In any event, there is clear interest in cooperating with the EU in fighting IUU fishing. The EU has already concluded Joint statements and Declarations on cooperation and the sharing of information concerning IUU fishing, with the US in 2011;[65] with Japan in 2012;[66] with Canada in 2016;[67] and with South Korea in 2018.[68] The normative reach of one

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[62] Available at: http://www.iuufishingindex.net/, launched on 7 February 2019.

[63] Indicator 30, which "measures whether a country has been issued with a yellow or red card by the EU under the EU Regulation" See the 'Methodology for IUU Fishing Index' on the Index's website (Ibid.). This indicator is given medium weight and is therefore not insignificant. The justification for this indicator is that "Countries that have been pre-identified (or identified) do generally fall short with regards to their duties and responsibilities to prevent, deter and eliminate IUU fishing."

[64] The US can also prohibit the import of fish products from countries whose vessels have engaged in IUU fishing (High Seas Driftnet Fishing Moratorium Protection Act, as amended by the Magnuson-Stevens Fishery Conservation and Management Act. See also the Illegal, Unreported, and Unregulated Fisheries Enforcement Act of 2015 (IUU Fisheries Enforcement Act), P.L. 114-81). The US Secretary of Commerce has been increasingly active in notifying states of the possibility of being identified. This triggers consultations with the relevant authorities on improving their fisheries management and enforcement practices, which that state must address within two years. The proceedings are documented in Biennial Reports to Congress which (1) identify countries for failing their international obligations, predominantly for violations of RFMO conservation measures by their vessels; (2) list (but not identify) countries 'of interest', for instance those whose vessels are also committing violations but which are being sanctioned for doing so; and (3) give a positive (or negative) certification of those countries that were identified in the previous report. A positive certification means that a country has documented corrective action to address the issues identified; a negative certification means that this is lacking and will lead to the denial of port privileges or import prohibitions. Whilst the US has not yet actively prohibited market access in this context, various countries have been identified over the last decade. Ongoing cooperation with Mexico over its identification in 2017 shows that its continued failure to sustain its efforts to combat IUU fishing could result in another negative certification in the National Oceanic and Atmospheric Administration (NOAA)'s 2019 Report to Congress, which then may lead to prohibitions being put in place (April 2018 Addendum to the 2017 Biennial Report). All reports are available at:https://www.fisheries.noaa.gov/international-affairs/identification-iuu-fishing-activities#findings-and-analyses-of-foreign-iuu-fishing-activities. To be effective at addressing IUU fishing worldwide, it has been argued on economic grounds that other markets (in particular the US and Japan) *should* also prohibit market access to IUU caught fish (U Rashid Sumaila (supra note 59), p. 8). This not to say that all players are interested in doing so. Juan He observes that some countries like New Zealand have shown to be "more conscious of unintended or undesirable consequences resulting from too ambitious individual actions to correct fishery practices", and have stated a preference *not* to adopt unilateral mechanisms (Juan He 'The EU Illegal, Unreported, and Unregulated Fishing Regulation Based on Trade and Market-Related Measures: Unilateralism or a Model Law?' (2017) 20 Journal of International Wildlife Law and Policy 168, p. 188).

[65] Available at: https://ec.europa.eu/archives/commission_2010-2014/damanaki/headlines/press-releases/2011/09/20110907_jointstatement_eu-us_iuu_en.pdf.

[66] Available at: https://www.eu.emb-japan.go.jp/Fishing%20Agreement%202012.html.

[67] Available at: https://ec.europa.eu/fisheries/eu-and-canada-step-cooperation-fight-against-illegal-fishing_en. More recently, in July 2019, Canada and the EU have also made a declaration on the establishment of an Ocean partnership whereby they *inter alia* commit themselves to "jointly work to effectively combat IUU fishing in the context of investigations on presumed or confirmed IUU fishing activities and promotion of FAO, RFMO, and

state's measures (a determination to blacklist, and withhold market access) is extended further where these determinations are treated as a benchmark by other market states, which leads to convergence.[69] On the contrary, where each market state applies different standards, this will lead to fragmentation and chaos for exporting- and supply chain countries.[70]

To summarise, market measures in general command a degree of support by the international community, and have in particular become part of the global effort to prevent, deter, and eliminate IUU fishing. The EU, the largest market power in fish products in the world, is leading the way on this front, spear-heading country blacklisting mechanisms under the IUU and Non-Sustainable Fishing Regulations. Other important fisheries markets are moreover being encouraged (and some are interested) to follow suit. The EU's measures are shown to have significant actual and potential transboundary impacts, especially on developing countries, which struggle most with IUU fishing and constitute the main target of the EU's mechanisms.[71] This thesis seeks to better understand how market conditionality in

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2018 G7 Charlevoix Blueprint initiatives aimed at preventing and combatting IUU fishing" (available at: https://pm.gc.ca/en/news/backgrounders/2019/07/18/declaration-canada-and-european-union). Charlevoix Blueprint initiatives refer to initiatives launched under the 'Charlevoix Blueprint for Healthy Oceans, Seas, and Resilient Communities' agreed upon by the leaders of the G7 (Canada, France, the UK, Italy, Germany, Japan, and the US) at a summit in Charlevoix, Canada, 8-9 June 2018, available at: https://safety4sea.com/wp-content/uploads/2018/06/G7-Charlevoix-Blueprint-for-Healthy-Oceans-Seas-and-Resilient-Coastal-Communities-2018_06.pdf.

[68] Available at: http://europa.eu/rapid/press-release_IP-18-6142_en.htm.

[69] The Commission habitually refers in its carding determinations to identifications made by the US. Moreover, in a review of 2013, the Commission identified "cooperation and synergies between key importing countries such as Member States and the United States", which it believes reinforces the impact of the Regulation (European Commission (supra note 54), p. 95.). Similarly, NOAA's website dedicates a section to "bilateral engagement with the EU" where it states to be working "closely" with the EU in combating IUU fishing (available at: https://www.fisheries.noaa.gov/foreign/international-affairs/bilateral-engagement-european-union). Indeed, it has been observed that "[t]here is consistency between the EU's list of non-cooperating countries, and the USA's identified countries, and between the EU's IUU vessel list and those lists kept by RFMOs." (Carlos Palin and others (supra note 40), p. 100.). At the same time, the US identifications do not always and necessarily overlap with the EU's carding decisions. The US has habitually identified *EU* countries for failing their international obligations regarding IUU fishing, including France, Italy, Portugal, and Spain – some of which have been identified multiple times for continuous violations and an enduring lack of corrective action. France and Italy were negative identified in 2009 for having vessels engaged in IUU fishing but following corrective action were positively certified in 2011; in the same report in 2011, Italy was however again identified, this time for repeat offenses on driftnet violations, and so was Portugal; Denmark in respect of the Faroe Islands, Estonia, and Spain were considered "of interest" but not identified in 2011; in 2013, both Italy and Portugal were positively certified for the concerns for which it was identified in the previous report but in the same report, Italy was again identified for continued use of driftnets, as well as Spain; Portugal was once again identified in 2015 but Italy and Spain were positively certified, although Spain remained "of interest"; Portugal was positively certified in 2017 and Italy remains a country "of interest" as of 2017.

[70] Carlos Palin and others (supra note 40), p. 100, observing that unless other markets are equally rigorous in controlling imports, illegal catches will be diverted there.

[71] U Rashid Sumaila (supra note 59), p. 7, 9 (noting that countries that would face the highest economic risk of being blacklisted by the EU are small developing countries). That the EU has mostly targeted developing countries is evident from the spread of countries that has been targeted thus far, namely: Belize, Cambodia,

fisheries works, and to consider the legal issues to which such mechanisms give rise. Given that there is no indication that the international community considers unilateral, country-level market conditionality to be an appropriate tool to promote compliance with international fisheries norms, there is a need to think normatively about the conditions under which such mechanisms can be justified. It is against this background that the next chapter formulates research questions, and provides a methodology for answering them.

Comoros, Curaçao, Fiji, Ghana, Kiribati, Korea, Liberia, Panama, Papua New Guinea, Philippines, Republic of Guinea, Sierra Leone, Solomon Islands, Sri Lanka, St Kitts and Nevis, St Vincent and Grenadines, Taiwan, Thailand, Togo, Trinidad and Tobego, Tuvalu, Vanuatu, Vietnam. This issue is discussed further in section 4.4.5.

2. Research questions and methodology

2.1. Introduction

This chapter begins by formulating the main research question that this thesis tries to answer (section 2.2). Section 2.3 delimits the scope of the research question, thereby identifying various sub-questions. Section 2.4 considers how to approach the research question. In light of this, section 2.5 sets out my methodology in detail. After concluding on issues of methodology, section 2.6 provides an overview of how the remainder of this thesis is structured. Section 2.7 concludes.

2.2. Main research question

I begin with a brief reflection on the aim of legal scholarship in general. It is said that we lack a shared vision of what kinds of legal scholarship are most valuable, and what the objectives of the enterprise of legal scholarship really are.[72] Anthony Kronman's premise is that the defining characteristic of legal scholarship – as of every scholarly endeavour – is first and foremost a preoccupation with the discovery of truth and the promotion of knowledge.[73] Through the study of laws and legal systems, the legal scholar's goal is to discover the world "as it truly is";[74] to discover more about the object of study, and to understand it better.[75] However, legal scholarship is no objective science, and therefore neither is the 'truth' we discover. A legal scholar's journey of discovery is inevitably coloured by her own values and preferences, even though I aim not to promote my own subjective point of view.

A more holistic explanation of legal scholarship is given by David Feldman, namely as "action informed by a distinctive attitude of mind, (…) a conception which results from the application of the concept of scholarship to the special kinds of problems that are discovered in the study of laws and legal systems".[76] Legal scholarship is then a pluralistic enterprise, and there are a multitude of disciplinary approaches to the study of law.[77] It involves curiosity

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[72] Deborah L Rhode 'Legal Scholarship' (2002) 115 Harvard Law Review 1327, p. 1328-330.
[73] Anthony T Kronman 'Forward: Legal Scholarship and Moral Education' (1981) 90 Yale Law Journal 955, p. 967.
[74] Anthony T Kronman (supra note 73), p. 968.
[75] David Feldman 'The Nature of Legal Scholarship' (1989) 52 The Modern Law Review 498, p. 498.
[76] David Feldman (supra note 75), p. 502.
[77] Elizabeth Fisher and others 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 Journal of Environmental Law 213, p. 216.

about the world, and this curiosity may be stimulated by the need to achieve a goal, such as addressing practical, policy, and legal questions; exposing the ideological underpinnings of current legal norms, and assessing their social value; informing law reform; classifying and systematising the law; or mere intellectual exploration.[78]

The research in this thesis is stimulated by such a 'real life' problematic. It raises the question of how country-level market conditionality operates and considers how it could be improved and why. I agree with Kronman that the primary objective of any scholarly endeavour is to discover and to promote knowledge, and this thesis aims to promote a richer descriptive understanding of market conditionality in IUU fishing. However, the knowledge thus acquired does not sit in a vacuum. It is also important to use it to evaluate existing mechanisms and to think about how these and future mechanisms can be improved. These objectives can be described as follows:

- Under what conditions is and ought market access for fish products to be made contingent upon countries' compliance with fisheries norms and obligations, and do the EU IUU and Non-Sustainable Fishing Regulations fulfil these conditions?

Answering this research question requires drawing up a general 'appropriateness framework' by identifying the (theoretical and actual) conditions under which it is appropriate to condition market access upon countries' compliance with fisheries norms. In other words, it is necessary to identify standards which should be met by states that engage in market conditionality. Having identified these standards, I then evaluate the EU IUU and Non-Sustainable Fishing Regulations against them. The question and the terminology of 'appropriateness' are outlined below. But before doing so, I make the following observations regarding my approach.

First, that the framework I build to evaluate country-level market conditionality is not limited to the *EU*'s country blacklisting mechanisms under the IUU and Non-Sustainable Fishing Regulations. I look at them by way of example, because of the EU's pioneering role in the area. However, the question of appropriateness is not limited to what makes only the *EU*'s market conditionality mechanisms, in their current form, appropriate.

[78] David Feldman (supra note 75), p. 503; Elizabeth Fisher and others (supra note 77), p. 216; Deborah L Rhode (supra note 72), p. 1338.

Second, that my appropriateness framework is built around market access conditionality, but *not* necessarily limited to this. This is explained below when delimiting the scope of the research question. Evidently, it is possible also to condition other economic benefits upon foreign behaviour, such as access to fisheries and development aid. This may raise some of the same questions of appropriateness, and the answers given in this thesis may also help in answering these.

My third observation is that, though my appropriateness framework is specific to the context of fisheries, it feeds into the broader debate on the international identity and role of the EU. Political science and international relations scholarship have variably conceptualised the EU as a 'power' (Normative Power Europe; Market Power Europe; and so on), capable of projecting its internal policies abroad in different ways.[79] This fuelled more specific legal research into the global reach of EU law. Different regulatory constructions have been identified through which EU law influences third country law and policy, including Anu Bradford's account of the 'Brussels effect' and Joanne Scott's categorisation of measures that operate by way of 'territorial extension', to which I refer in later chapters.[80] One of the many questions raised in the work by these and other scholars in the field is that of the legitimacy of the EU acting in this way. This is also an aspect of the broader question of appropriateness examined here, and something this research hopes to contribute to.

2.3. Scope

The scope of my inquiry into country-level market conditionality is limited in the following ways. First, this thesis examines only the appropriateness of conditioning *market access*. Second, this thesis considers only *country-level* market conditionality, as opposed to other

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[79] Ian Manners describes the EU as being constructed on a distinct normative basis (based on "core" and "minor" norms, including peace, liberty and the like) which, by being reinforced and expanded, allows the EU to present and legitimate itself as being "more than the sum of its parts". This normative basis predisposes the EU to act in a normative way in world politics, making it also a *normative power*, in so far that the EU also diffuses those norms, intentionally and unintentionally, in international politics (e.g. through procedural membership conditions, informational common strategies, and the overt role of EU delegations) (Ian Manners 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 Journal of Common Market Studies 235, p. 244-245; also Ian Manners 'The European Union's normative power' in Richard Whitman (ed.) *Normative Power Europe: Empirical and Theoretical Perspectives* (Palgrave, 2011)). A different conceptualisation of the EU is given by Chad Damrod, who not only explains the EU's core identity as a market power but also the different manners in which the EU uses its market and regulatory strengths to externalise internal policies. Such externalisation can be both unintentional (simply because the size of its internal market makes its standards attractive to outsiders) and intentional, through negative or positive conditionality (promising or denying benefits) (Chad Damro 'Market Power Europe' (2012) 19 Journal of European Public Policy 682), p. 691).

[80] Anu Bradford 'The Brussels Effect' (2012) 107 Northwestern University Law Review 1; Joanne Scott (supra note 41); Marisa Cremona and Joanne Scott (eds) (supra note 41).

market-related mechanisms. Third, a distinction is made between *unilateral* and *multilateral* mechanisms. The latter fall outside my scope of inquiry. Before examining each limitation in turn, I note that the terms *country* and *state* are used interchangeably. It is common in the framework of the law of the sea to refer to state capacity as flag-, coastal-, port-, and market state.[81] I also include in this the EU, which, though a non-state polity and essentially a group of countries in a customs union, acts together as one market for fish products, and is therefore treated in this thesis as a market state.[82] Moreover, through the Common Fisheries Policy, the EU acts together as one coastal- and port state, and also sometimes takes on flag state responsibilities.[83] It is also common to refer to countries that are a member of the EU as EU member states. However, non-EU countries are commonly referred to as *third countries*, and as explained in chapter 4, the relevant EU Regulations refer to 'non-cooperating third countries' and 'countries allowing non-sustainable fishing' in the context of blacklisting.

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[81] This is often capitalised in the literature, but not so in this thesis, which only capitalises the word 'state' in the context of the US, or a named state which is not a country, e.g. Washington State.

[82] Chad Damro (supra note 79), p. 682, that the EU is at its core a market, and therefore best conceived of as a *market* power as opposed to any other kind of power.

[83] The Common Fisheries Policy, with at its heart the Basic Regulation (supra note 49), creates a centralised EU system of fisheries management by 'pooling' resources in the territorial seas and EEZ of EU member states (Art. 4(1)(1) Basic Regulation) and allocating access among EU flagged vessels waters (referred to as 'Union fishing vessels' in Art. 4(1)(5)) through the principle of equal access (Art. 5(1)). It is also the EU that regulates activities by foreign vessels when they are practised in EU waters (Art. 1(2)(b)), and for EU vessels to access resources in third country waters (Art. 31). The EU thus effectively operates as one coastal state. Moreover, as an international organization with legal personality with treaty-making powers in respect of fisheries, the EU signs multilateral and bilateral treaties with third countries. The reason for this is the fact that the EU enjoys exclusive competence for the conservation of marine biological resources under the common fisheries policy (Art. 3(1)(d) of the Consolidated Version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ C326/47 (hereafter: TFEU)). However, it enjoys shared competence between the EU and its member states in the domain of fisheries, *excluding* the conservation of marine biological resources (Art. 4(2)(d) TFEU). Note that when a competence in shared, EU member states may regulate in that domain only insofar as the EU hasn't already availed itself of its power to do so. It is therefore the EU, rather than its individual member states, that cooperates with third countries by becoming a member of RFMOs (with the exception of CCAMLR, because of CCAMLR's wide substantive regulatory scope). However, this division of competence is not always clear, nor is it therefore always clear whether it is the EU or its member states that should be considered as bearing international responsibilities (for instance 'who' is the relevant flag or port state). The made declarations of competence upon ratifying the LOSC and Fish Stocks Agreement to clarify this complicated issue, by listing aspects that fall within the EU's shared competence. However, these declarations have shown to be inconsistent with EU practice (Robin Churchill and Daniel Owen *The EC Common Fisheries Policy* (OUP, 2010), p. 310, 311). Based on its practice, Churchill and Owen suggest that it appears that the EU "has exclusive treaty-making competence not only as regards 'conservation', but also in relation to the requirements of developing States, scientific research, port State measures, flag State enforcement jurisdiction on the high seas, and measures adopted in respect of non-members of RFMOs" (p. 313). It has in any event been established that, where an EU fishing vessel operates in third country waters under an access agreement concluded between the EU and a third country, the obligations of the flag state become the obligations of the EU, and it is the EU, rather than the EU member flag state, that bears international responsibility for the behaviour of EU fishing vessels operating under that agreement (*Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion), 2 April 2015, ITLOS Reports 2015, p. 4, para. 172). In those circumstances, the EU can also be seen as operating as one flag state.

2.3.1. The 'market access' dimension

EU IUU country blacklisting has various consequences for third countries that are difficult to categorise. Vessels flagged to an EU member state cannot reflag to a blacklisted country; they may not conclude chartering agreements with vessels flying the flag of a blacklisted country; they may not enter into joint fishing operations that involve EU flagged vessels and vessels flagged to a blacklisted country; and a blacklisted country no longer has the possibility to gain/provide fishing access; (Art. 38 EU IUU Regulation). Evidently, different kinds of economic benefits are being made contingent upon the behaviour of third countries. But the most significant 'benefit' that blacklisted countries lose out on is that of market access. This is the case both under the IUU and Non-Sustainable Fishing Regulations. I call this mechanism holistically *market conditionality*, and import and export restrictions that are adopted as a result *market measures*. This is notwithstanding the fact that the term market measures (or market-related measures, as this thesis makes no distinction between the two) is in and of itself sufficiently broad to describe measures other than market restrictions as well. Market measures relate to the exercise of market power; they are measures adopted by market states. I define *market state* as a country/state that is involved in the processing, wholesale, retail, and trade of fish or fish products through import or export.

These definitions of the market state/market measures build on those used in the Guidelines on the Implementation of the IPOA-IUU, introduced in chapter 1. The Guidelines define market states as "those states involved in the international trade of fish and fish products".[84] It is to those states that the section in the IPOA-IUU on "internationally agreed market-related measures" is addressed, with the goal of preventing international trade in fish and fish products harvested through IUU fishing while not creating unnecessary barriers to trade in other fish and fish products.[85] Examples of such market measures include multilaterally agreed import- and export restrictions and prohibitions, and other examples of trade-related measures to reduce or eliminate trade in fish derived from IUU fishing (para. 69). The IPOA-IUU Implementing Guidelines moreover note that "the term market-related measure (...) is generally understood to encompass several types of controls on the importation and exportation of goods".[86] The IPOA-IUU thus indirectly defines the market state by way of its participation in international trade. One could therefore also speak of trade

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[84] FAO Guidelines for the Implementation of the IPOA-IUU (supra note 19), p. 7 (emphasis added).
[85] Ibid. p. 7, 47-48.
[86] Ibid. p. 48.

conditionality and trade measures rather than market conditionality and market measures, but the choice is made here to do the latter.[87]

This thesis distinguishes the market state and market measures from *port state* and *port state measures*. Once again, these are not clear-cut categories. Considerable overlap exists between the categories of port- and market measures, and therefore the role of port- and market states. The FAO Guidelines on the implementation of the IPOA-IUU considers restrictions or prohibitions on the landing or transhipment of fish in port by foreign vessels to be port state measures, although the Guidelines acknowledge that they *could* be seen as falling within the definition of market measures, and that "obviously", there may be some overlap between categories.[88] IUU vessel blacklists are enforced in port and often trigger inspections and other port-related measures, but they also prevent a foreign vessel from landing or transhipping its catch. They are therefore regulated by the rules of the WTO and can constitute restrictions on trade or transit (discussed in chapter 7).[89] But a hard distinction between the categories of port- and market measures is not important, and is therefore not provided here. Rather, it is understood that market measures may be enforced in port, and thereby also constitute port measures. Moreover, that what may be envisaged as port measures (for instance because they appear as such in the Port State Measures Agreement) will have clear market-related implications, and may constitute trade restrictions in breach of WTO law.

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[87] Scholars variably speak of market- and trade measures without defining either or creating a clear distinction between the two. For example, Antonia Leroy, Florence Galletti and Christian Chaboud 'The EU Restrictive Trade Measures against IUU Fishing' (2016) 64 Marine Policy 82, p. 83 ("the 'market state' responsibilities refer to those applied to any state that trades fishery products (either processed or raw), e.g. countries that import into or export from its territory"); ILO 'Fishers First - Good Practices to End Labour Exploitation at Sea.' [2016] Fundamental Principles and Rights at Work Branch, p. 8-9 (listing the different types of states playing a role in global fishing as the source state; flag state; coastal state; port state; and trade- and market state. It defines trade- and market state as "those involved in the processing, wholesale, and retail of fish and fish products"); Mary Ann Palma, Martin Tsamenyi, and W. R. Edeson *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff, 2010), p. 187-188 text and footnote 72 (defining 'market measures' by reference to the IPOA-IUU as import- and export controls but also mentioning "eco-labelling and restricting business with IUU fishers" and defining 'trade measures' as "border controls that allow a State to regulate, restrict or prohibit trade. Examples of trade measures include landing actions, certification, labelling, or size requirements, among others", referring for the latter definition to Linda A Chaves 'IUU Fishing: WTO-Consistent Trade Related Measures To Address IUU Fishing (FAO Report and Papers Presented at the Expert Consultation on IUU Fishing, Sydney, Australia)' [2001] FAO Fisheries Report No. 666).

[88] FAO Guidelines for the Implementation of the IPOA-IUU (supra note 19), p. 7 and 48.

[89] Established by the Marrakesh Agreement Establishing the World Trade Organization (UN Treaty Series, 1867, p. 154) (hereafter: WTO).

Conditions placed on other (non) market benefits in the context of fisheries will not be evaluated in this thesis. However, it is acknowledged that conditioning *any* benefits upon country-level behaviour could raise some of the same questions of appropriateness as those raised here – in particular in relation to fairness. This makes the answers given in this thesis also (partially) relevant outside the scope of market access. The focus in this thesis is on the 'bite' of market conditionality: making market access contingent upon behaviour and circumstances abroad. Whether this is felt directly or indirectly by supply chain countries, the threat of market access denial appears to be the driving force behind the EU's measures. The denial of market access is also the most problematic consequence of country blacklisting in terms of their compliance with international law. I return to this below when explaining the term appropriateness.

2.3.2. The 'country-level' dimension

Market conditionality differs from other market mechanisms (CDS, vessel blacklisting) in so far that the blacklisting is contingent on the conduct of, or circumstances in, entire *countries*. Country blacklisting under the EU Regulations can be avoided by making regulatory and administrative changes. This can be contrasted with measures that are applied because of circumstances or behaviour at the transaction-level (is a valid catch certificate shown/was the fish caught legally?), or at vessel-level (does the vessel appear on any blacklists?).[90] One of the reasons for focussing on the country-level dimension is its more obvious and far-reaching transboundary effects, also on operators that *do* comply with the rules.

These country-level transboundary market measures harbour potential in terms of their effectiveness in promoting compliance with international norms and obligations and addressing IUU fishing, but raise questions. They enforce international obligations vis-à-vis those subject to them (namely, states), thereby forcing laggards to live up to their commitments. This is possibly more effective than taking non-compliant states through international dispute settlement, which can be slow and costly, although how market conditionality can really contribute to compliance will be examined at in some detail in chapter 5. Moreover, the effectiveness in addressing IUU fishing has been questioned, since markets simply risk being displaced.[91]

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[90] Joanne Scott (supra note 41), p. 107 (see also the explanation at supra note 41).
[91] Oceanic Développement, MegaPesca Lda (supra note 59), p. 115; U Rashid Sumaila (supra note 59), p. 1, 7.

In the case of the EU, and as explained more fully in chapter 4, such measures even enforce international fisheries norms that are not clearly binding on those against whom they are being enforced.

But conditioning market access on reform abroad also raises questions of legality. They raise questions from the point of WTO law, from the point of view of the law of the sea, and from the point of view of general international law. This essentially comes down to the fact that states' sovereign freedom to control port and market access needs to balanced against the sovereignty of other states,[92] which can infringed by market restrictions in certain (extreme) circumstances. I return to these questions in chapters 6 and 7. Furthermore, those targeted are often developing nations, highly dependent on exporting fish, and in a weak or no position to challenge decisions to restrict market access.[93] This raises the question how arbitrary decision making can be avoided. Section 2.3.5 returns to this.

I examine country-level market conditionality in a holistic manner, as a *mechanism.* This is in particular because of the example of the EU IUU Regulation. The country blacklisting mechanism as a whole deserves scrutiny, and not only the measures (import restrictions) that market states adopt vis-à-vis blacklisted countries. The mechanism/measures distinction is important first of all for the purpose of clarity, because the consequences of blacklisting may vary slightly depending on the design of the mechanism (different between the EU IUU or EU Non-Sustainable Fishing Regulations) and between individual blacklisted countries (an import ban on all fish products, or only on some; the denunciation of a fisheries access agreement; and so on). Furthermore, a narrow focus on market measures alone would fail to capture an important dimension of country-level market conditionality – or in any event, an important aspect of the EU IUU Regulation. As explained more fully in chapter 4, section 4.3, EU IUU blacklisting takes place in stages, whereby the Commission first notifies a third country of the *possibility* of being blacklisted for having failed its obligations. This stage is colloquially referred to as a yellow card.[94] If the Commission continues to be dissatisfied, it subsequently identifies the country as having failed its obligations. This is colloquially referred to as a red card. The Council of the EU (the Council) then adds the identified country

[92] Nigel D White and Ademola Abass 'Countermeasures and Sanctions' in Malcolm D. Evans (ed) *International Law* (OUP, 2018), p. 535.
[93] Supra note 71.
[94] The carding-terminology is widely used, including by the Commission (European Commission, COM(2015) 480 (supra note 47)).

to a blacklist. The EU yellow card does not entail formal economic restrictions of any kind, but in practice it causes reputational damage; generates significant costs; and triggers EU involvement in regulatory and administrative reform abroad.[95] However, unless the yellow card can be said to affect trade opportunities, it likely falls outside the scope of WTO law. In the vast majority of cases the yellow card is eventually lifted and an import ban avoided. A focus on market measures alone would clearly fail to capture this important aspect of the EU's market conditionality mechanism.

Finally, a narrow focus on the measures that are put in place against a blacklisted country as opposed to evaluating the appropriateness of market conditionality as a whole, might overlook the contribution of the entire carding process as a forum for interaction. The pre-yellow card and yellow card stages are meant to be helping third countries through dialogue and cooperation.[96] As I explain below, this is the real potential of market conditionality as a mechanism. Through promoting certain interactions and discussions it can help build shared understandings over the interpretation of international fisheries norms and obligations. The mechanism as a whole must therefore be evaluated, and not only if and when it leads to market restrictions.

2.3.3. Unilateralism vs multilateralism

A distinction can be made between unilateral and multilateral market conditionality mechanisms, and as a consequence, unilateral and multilateral market measures.[97] Market conditionality is unilateral where a decision (e.g. a decision to give a yellow card or to

[95] The reputational consequences of a yellow card have been documented at various occasions. According to an ABC news article, James Movick, Pacific Islands Forum Fisheries Agency's previous director general explained that developing alternative markets when under a yellow card would be "virtually impossible", not only because of the short timeline but also because of reputational issues: "if you're banned in one market then certainly the level of scrutiny in another market would presumed to be higher" (available at: http://www.abc.net.au/news/2015-02-03/tuna-industries-in-solomon-islands2c-png-and-tuvalu-warned-to-/6066732). Papua New Guinea's experience with the yellow card exemplifies this. The impact of the EU yellow card on the industry, on trade, on Papua New Guinea's reputation *and* the reputation on the wider region (parties to the Nauru Agreement) has been described as "negative for Pacific fishery exports, and beneficial to other international tuna fisheries as the European market appears to begin the process of closing its doors". Though acknowledging that the impact of the yellow card was difficult to quantify, it was felt that its impacts were "significant, and could so easily have been avoided with better communication" (as described in an independent consultation report prepared by Steve Dunn 'The Papua New Guinea yellow card' (2016) (on file with author), p. 10). Moreover, it has been observed that some EU member states (Spain) have operated an effective embargo on yellow-carded countries (Gilles Hosch (supra note 38), p. 47).

[96] European Commission, COM(2015) 480 (supra note 47), p. 5.

[97] It is acknowledged that the term 'unilateralism' is "both broad and amorphous", and has no legal meaning *per se* (Laurence Boisson de Chazournes 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' (2000) 11 European Journal of International Law 315, p. 315).

blacklist, and to adopt market restrictions) originates in a single market state (e.g. the EU). The EU IUU and Non-Sustainable Fishing Regulations' blacklisting mechanisms are therefore both unilateral mechanisms, and a decision to deny market access to a blacklisted country under either is a unilateral market measure, adopted by the EU as a single market state. Where an RFMO recommends that its members adopt market measures against a country, the origin of the decision is a collective of market states. Market conditionality is then deemed multilateral, even though they depend for their effective implementation on single market states.[98] For example, ICCAT's competence to recommend trade restrictions against a particular country is a multilateral market conditionality mechanism, and past recommendations to do so can be classified as multilateral market measures, subsequently implemented by its members (including the EU).[99] The same can be said for market measures taken pursuant to a multilateral agreement, consented to by several (market) states, such as the Port State Measures Agreement. The Agreement does not concern country-level market measures, but obliges state parties to deny port (and thereby market) access to vessels that have likely engaged in IUU fishing. According to the definition used in this thesis, these are multilateral market measures. What matters for the purpose of the distinction is thus the

[98] Though it should be remembered that multilateralism, like unilateralism, is a sliding scale (Daniel Bodansky 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11 European Journal of International Law 339, p. 343). The more an RFMO is closed to newcomers, the 'less multilateral' the origin of any market measures it recommends. My definition of unilateralism resembles the one used by Sarah Cleveland, namely "action by individual states which is not taken pursuant to the mandate of a regional or international organisation" (Sarah H Cleveland 'Norm Internalization and U.S. Economic Sanctions' (2001) 26 Yale Law Journal 103, footnote 5 on p. 4). Cleveland distinguishes unilateralism from action taken by individual states pursuant to the authorization of a regional body (including the EU) which she refers to as "regional", and from measures adopted or authorised by the UN, the World Bank, or other authoritative multilateral bodies, a "multilateral". This thesis does not follow this further nuance, since it examines EU as a single market power. The origin-focused unilateral/multilateral distinction used in this thesis appears to be commonly accepted in the context of fisheries. The Commission itself makes this distinction. It did so when it proposed that the EU be allowed to adopt "unilateral ambitious measures when multilateral measures fall short of [EU] expectations", referring to the possibility for the EU to place vessels and countries on IUU lists where RFMO measures fall short. The Commission explained that an important difference between measures adopted by RFMOs and those envisaged to be adopted by the EU was that RFMO measures "were enacted within a multilateral context (RFMOs) while the Community would envisage (…) to adopt unilateral measures" (European Commission, SEC(2007) 1336 (supra note 19), p. 8, 36, 56, and more specifically at p. 68). The unilateral (single market state)/multilateral (RFMO or other) distinction was also used during the negotiations leading up to the FAO Voluntary Guidelines for Catch Documentation Schemes, 2017, available at: http://www.fao.org/3/a-i8076e.pdf (hereafter: CDS Guidelines). These negotiations showed concern over the proliferation of individual market state measures, and the debate stagnated for a while over whether CDS adopted by RFMOs (called regional/multilateral) should be equivalent to, or would have precedence over, individual market schemes such as the EU CDS (called unilateral) (FFA, Report of the FAO CDS Technical Consultation, 7 May 2016 (on file with author)).

[99] This mechanism is now enshrined in ICCAT Resolution 3-15 concerning trade measures, replacing Resolutions 94-3, 95-13, 98-18 (supra note 45).

source of the measure; not whether or not the standards adopted reflect national interests or rather international law.

Market states like the EU and the US frequently resort to unilateral economic restrictions, ranging from withholding foreign assistance to blocking trade, so as to encourage foreign countries to adopt particular behaviour.[100] Unilateral market conditionality therefore "poses no novel challenge to the international legal system".[101] But novel or not, a challenge it remains. The controversial nature of unilateral measures has been raised in various official fora and in scholarly literature. The UN General Assembly has adopted several Resolutions strongly discouraging the use of trade restrictions by developed countries (unilaterally) in order to induce economic, political, commercial or social change abroad.[102] In the environmental sphere too, unilateral measures have been openly discouraged. Philippe Sands recounts the international community's increasing concern during the early 1990s with unilateral environmental standards for imported goods.[103] This provided the backdrop for the negotiations leading up to the Rio Declaration, adopted at the 1992 UN Conference on Environment and Development in Rio de Janeiro (Rio Conference).[104] The imposition of unilateral standards was a hotly contested topic.[105] One of the Principles agreed upon, Principle 12, states that "unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus."[106]

This dislike of unilateralism is voiced even more strongly in the context of fisheries. Market measures that do not originate in an RFMO or multilateral treaty but are adopted unilaterally by a single market are actively discouraged. The IPOA-IUU states that market

[100] Sarah H Cleveland (supra note 98), p. 4.
[101] Juan He (supra note 64), p. 169.
[102] Including UN General Assembly Resolution of 22 December 1989, A/RES/44/215; UN General Assembly Resolution 20 December 1991, A/RES/46/210; UN General Assembly Resolution of 21 December 2009, A/RES/64/189.
[103] Philippe Sands '"Unilateralism", Values, and International Law' (2000) 11 European Journal of International Law 291, p. 294.
[104] UN General Assembly, 'Report Of The United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992', A/CONF.151/26/Rev.l (Vol. l).
[105] Philippe Sands (supra note 103), p. 294.
[106] Supra note 104, Annex I, p. 5. Certain states like Mexico (claimant in the famous *US – Shrimp* litigation that arose at the time, discussed at infra note 123) even preferred a wording that would prohibit unilateral measures altogether. This was unsuccessful, and the resulting text rather sets out the conditions in which unilateral measures can be considered appropriate: namely, when they are based on international consensus, or when this consensus has been sought, but not achieved (Philippe Sands (supra note 103), p. 295).

measures should be used only in exceptional circumstances, and explicitly states that "unilateral trade measures should be avoided" (para. 66). Its section on trade measures is headed '*internationally agreed* market related measures" (emphasis added) and at various instances the text refers to the usefulness of *multilaterally* agreed instruments such as catch documentation and certification requirements or multilaterally agreed import prohibitions (paras. 68, 69).

Unilateral measures are thus perceived as more controversial than multilateral ones. As Daniel Bodansky quips, unilateralism is a term often used "tantamount to a dirty word."[107] From a practical point of view, the proliferation of unilateral conditionality mechanisms may be more disruptive for states seeking market entry than a single multilateral mechanism. There is a higher risk of arbitrariness where decisions are made unilaterally. They are not subject to structured oversight by others and therefore pose greater risks than multilaterally agreed measures.[108] They will be more readily considered as serving an individual state's interests, rather than collective interests.[109] The FAO therefore considers that RFMOs "lend legitimacy" to trade restrictions "that would be controversial if applied unilaterally".[110]

Nevertheless, unilateral market conditionality does not *necessarily* have to be disruptive or arbitrary, but can even be 'good' for international law, as argued by Daniel Bodansky and other scholars. Bodansky posits that unilateralism can mitigate ineffective or non-existing multilateral enforcement mechanisms by forcing foreign countries to comply with international norms.[111] Unilateralism can help overcome inaction and reinforce collective decisions.[112] In so doing, unilateral measures can have significant behaviour-modifying potential, and "contribute to the process of norm definition and internalization on various levels."[113] Bodansky suggests that unilateral measures can constitute a form of leadership where an international agreement reflects the lowest common denominator, such as in environmental agreements, and where unilateral action can set the bar higher.[114] It may

[107] Daniel Bodansky (supra note 98), p. 339.
[108] Monica Hakimi 'Unfriendly Unilateralism' (2014) 55 Harvard Journal of International Law 106, p. 111.
[109] Sarah H Cleveland (supra note 98), p. 86.
[110] FAO Guidelines for the Implementation of the IPOA-IUU (supra note 19), p. 56.
[111] Daniel Bodansky (supra note 98), p. 346; Sarah H Cleveland (supra note 98), p. 5; Maggie Gardner 'Channeling Unilateralism' (2015) 56 Harvard Journal of International Law 297, p. 56.
[112] Monica Hakimi (supra note 108), p. 130.
[113] Sarah H Cleveland (supra note 98), p. 7.
[114] Daniel Bodansky (supra note 98), p. 344-345.

promote the development of new international standards and spur the formation of customary law.[115] How actions by states can do so is explained below.

2.3.4. 'Fisheries norms'

Finally, the specific context in which this thesis examines and evaluates country-level market conditionality is that of fisheries. Country-level market conditionality has become the EU's weapon of choice to prevent, deter, and eliminate IUU fishing. This is in line with international efforts at combating IUU fishing, as explained in chapter 1 and examined further in chapter 4, section 4.2. Market conditionality also constitutes the key mechanism of the EU Non-Sustainable Fishing Regulation. What the conditionality mechanisms under both Regulations have in common is that they both seek compliance with fisheries norms and obligations (though this is not obvious from the original proposal for the Non-Sustainable Fishing Regulation, discussed in chapter 4, section 4.5.3). I use the concept of *norms* alongside that of *obligations* to emphasise that not all international norms constitute *legal* obligations. Many international fisheries norms can be found in non-binding instruments and, though they may reflect current law, it is often difficult to draw a clear distinction between law and non-law. This is discussed further below. Any analysis in this thesis of specific norms or obligations will always elaborate further on their legal nature. Furthermore, the EU at times goes *beyond* seeking compliance with international norms and obligations, or interprets them in a manner that fits EU interests. Examples of this are given in chapter 4, sections 4.4 and 4.5.2.

2.3.5. Three angles of 'appropriateness'

The question under what conditions market conditionality is appropriate is inherently value laden, and must be clarified. It ties in with the distinct problem of unilateral country-level market conditionality in fisheries, of which elements have been highlighted in previous sections. It has been said that although market measures in general command a degree of support from the international community to combat IUU fishing, this does not appear to extend to country-level measures – let alone when they are adopted unilaterally. The reverse is evidently not true. Market states generally encourage compliance with international

[115] Ibid. p. 344. Note that Allan Boyle shows that the EU has only been successful in pushing its agenda where there already existed sufficient international support for its proposed changes (Alan Boyle 'EU Unilateralism and the Law of the Sea' (2006) 21 International Journal of Marine and Coastal Law 15, p. 31).

fisheries norms and obligations by those seeking market access. Though the EU appears to pursue both international objectives and to serve its own interests, the discourse surrounding the EU IUU Regulation is nevertheless one of supporting and even leading international efforts in the fight against IUU fishing.[116] The IUU Regulation was adopted in the context of the EU's "efforts to improve international ocean governance", and "reflects the responsibility of every country, be it a member state or a third country, to fulfil their international obligations as a flag, port, coastal or market state."[117]

The question of appropriateness should be seen in this context. Although the international community discourages unilateral, country-level market conditionality in fisheries, the question is asked under what conditions it can nevertheless be an 'appropriate' tool to combat IUU fishing/ensure sustainable fishing. I consider there to be three main angles to this question, as follows.

In the first instance, I ask under what conditions market conditionality complies with international law. This is based on the assumption that compliance with international law is important for the international community.[118] The IPOA-IUU requires 'internationally agreed market-related measures' to conform to international law, and in particular the rules of the WTO (paras. 10, 13, 65, 66). States have attached great importance to this requirement. Both the EU IUU and Non-Sustainable Fishing Regulations have been designed with such compatibility in mind (though with questionable success, as examined in later chapters).[119] Fear of contravening international (trade) law has also repeatedly been mentioned by RFMO members as a reason to object to putting in place (multilateral) country-level market conditionality mechanisms.[120]

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[116] European Commission, SEC(2007) 1336 (supra note 19), p. 20 (emphasis added). Similarly, the European Parliament considers that the EU "has a major responsibility to play a key role in *mobilising the international community* in the fight against IUU fishing." (European Parliament, 'Resolution of 17 November 2011 On Combating Illegal Fishing at the Global Level – The Role of the EU', OJ C 153E, 31 May 2013 (emphasis added)).

[117] European Commission, COM(2015) 480 (supra note 47), p. 2, 5, and 10.

[118] This is notwithstanding the fact that non-compliant acts (for instance unlawful non-violent countermeasures) too may be 'good' for international law, in so far that they can push for change where this is needed and possibly even contribute to law making (Monica Hakimi (supra note 108)).

[119] European Commission, SEC(2007) 1336 (supra note 19), p. 68-69; Commission Staff Working Paper, Impact Assessment, Accompanying the document 'Commission proposal for a Regulation of the European parliament and of the Council on certain measures directed to non-collaborating countries for the purpose of the conservation of fish stock', Brussels, 14 December 2011, SEC(2011) 1576, p. 6-7.

[120] Péter D Szigeti and Gail L Lugten (supra note 44), p. 47; also in opposition to the EU's proposals for trade-related measures through CCAMLR (supra note 44).

But looking at legality alone does not help understand and evaluate the contribution of market conditionality to the international community's efforts to prevent, deter, and eliminate IUU fishing/ensure sustainable fishing. These international efforts take place within a strong and stable normative framework, which consists of the obligations of the LOSC and related instruments (international fisheries norms and obligations are described in chapter 3). A further assumption is therefore that market conditionality mechanisms in fisheries should not 'undermine' but rather 'support' these efforts. Where they truly promote compliance with international fisheries norms, they can be deemed to support international efforts.[121] But this potential is not always realised. Unilateral market measures in general have been criticised in the past for "distorting international norms" to serve the market state's own interest, being ineffective at altering the behaviour of the targeted state, and thereby undermining, rather than promoting compliance.[122] So how *can* this potential be realised? What happens when market access is made conditional upon compliance with more stringent standards, or when a market state interprets international fisheries norms radically different (distorts international norms)? Can market conditionality act as a catalyst for further developing international norms, or would this undermine compliance, and thereby undermine international efforts?[123] This is the second angle of appropriateness that I examine: Under what conditions can market conditionality help promote compliance with, and the further development of, international fisheries norms?

In light of the actual and potential effects on targeted countries, appropriateness should also be considered from the angle of those affected. This translates into a need to avoid

[121] Different reasons can be advanced for *why* compliance is important (supra note 169 and accompanying text, and chapter 5 for an introduction to different compliance theories).

[122] Sarah H Cleveland (supra note 98), p. 64-65. Cleveland ultimately argues that economic sanctions can play an important role in defining and clarifying international norms, and help internalise them into the domestic processes of states (p. 87). Chapter 5 examines this in more detail.

[123] Whilst undermining a particular norm does not necessarily undermine a regime as a whole, this risk exists that states' actions may "undermine" a regime by which they are bound is a known and noted fear. In *US – Shrimp* the Panel arrived at the conclusion that a state's measures which "undermine" the WTO multilateral trading system and thereby threaten its security and predictability cannot be justified under the regime (*US – Shrimp*, 15 May 1998, Panel report (WT/DS58/R), para. 7.44). On appeal, the Appellate Body admitted that "maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the WTO Agreement". Though it was not held to be a "right or an obligation", the Appellate Body hereby emphasised the general importance for measures not to undermine the regime (*US – Shrimp*, 12 October 1998, Appellate Body report (WT/DS58/Appellate Body/R), para. 116). The same concern can be expressed that market measures such as those adopted by the EU risk undermining rather than maintaining the regime applicable to sustainable fisheries. What is more, normative stability is important to the ongoing development of the international normative framework for fisheries. This is evident from current negotiations over a new international treaty on marine biodiversity in areas beyond national jurisdiction, which should "not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies" (UN General Assembly Resolution 69/292 of 19 June 2015, A/RES/69/292).

arbitrary decision-making; a need for fairness. This call for fairness ties in with the growing concern among scholars that international organisations and other bodies engaged in what can be called 'global governance' risk making arbitrary decisions, and cannot be held accountable by those affected by their decisions, nor can those affected otherwise influence their decision-making.[124] Fairness is not only morally appealing. The IPOA-IUU states that market measures are to be "implemented in a fair, transparent and non-discriminatory manner" (para. 65), a call that is echoed also in the Port State Measures Agreement for port state measures.[125] Chapter 5 develops this further, also suggesting that when decisions are made fairly, there is greater potential to promote compliance and norm development. Fairness is thereby an important aspect of market conditionality, whether from the international perspective or that of those affected, and constitutes the third angle of appropriateness that I examine.

The three angles from which I consider the appropriateness of country-level market conditionality mechanisms (legality, supporting normative efforts, and fairness) overlap. I already mentioned that part of a mechanism's success in promoting compliance with fisheries norms may depend on whether or not the mechanism itself is lawful and perceived as fair. Furthermore, conditions under which market conditionality can be deemed fair and support international normative efforts may already be set out as a matter of law. 'Simply' complying with international law would then in and of itself suffice to make market conditionality appropriate from all three angles. But these conditions may also *not* be set out as a matter of law, or only partly so. The exercise of deconstructing appropriateness is informative. It permits a deeper understanding of the role played by market states. It stimulates constant reflection about when market state behaviour is appropriate in the first place, and whether we currently have a normative framework in place to ensure that it is. It allows the category of law to be separated from other normative orders, which provides external (theoretical or 'ideal') standards by which to evaluate, and thus help develop, law. This is a useful exercise that has frequently been deployed in the history of jurisprudence and legal scholarship.[126] As

[124] The rise in global governance is discussed in chapter 5, section 5.6.1.
[125] The Agreement "shall be applied in a fair, transparent and non-discriminatory manner, consistent with international law" (Art. 3(4)). The same wording can also be found with regard to port state measures in the IPOA-IUU at para. 52 IPOA-IUU.
[126] Jan Klabbers and Touko Piiparinen 'Normative Pluralism' in Jan Klabbers and Touko Piiparinen (eds) *Normative Pluralism and International Law* (CUP, 2014), p. 20.

Klabbers and Piiparinen write, "if law and morality would be identical, there would be nothing left to strive for."[127]

2.4. Approach

The question whether market conditionality in fisheries complies with international law and the task of evaluating the EU's Regulations in light of this requires identifying and analysing the relevant international law; analysing the EU IUU and Non-Sustainable Fishing Regulations; and applying the relevant law to it. Doctrinal analysis plays an important role in this. Doctrinal analysis is the "staple of conventional legal theory", and essentially asks what the law is in a particular area and how it applies.[128] Doctrinal analysis focuses on law "as an internal self-sustaining set of principles" which can be studied from within itself.[129] It is normative and theoretical, rather than empirical. The most common (but not only) place to start is the theory of sources, which is part of a positivist methodology for identifying what makes law 'law'. This is described in section 2.5.1.1.

The second and third angles of appropriateness demand settling on a convincing theoretical framework that allow these aspects of appropriateness to be studied.

The question of promoting compliance and norm development requires a thicker description of how law is made and shaped, and how market state action can play a role in this. The interactional law account, developed by Jutta Brunnée and Stephen Toope, provides a compelling explanation to this effect, and suggests ideal conditions under which market conditionality can help promote compliance and even further develop fisheries norms. I introduce this account and its methodology in section 2.5.1.2, where I explain also the extent to which I follow this methodology.

The question of fairness is best approached through the theoretical framework offered by global administrative law (GAL). GAL helps situate conditionality mechanisms within the broader debate over arbitrariness in decision-making with significant transboundary effects. This describes the global administration-like character of conditionality mechanisms, and suggests principles and mechanisms to promote fairness. I introduce GAL in section 2.5.1.3.

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[127] Ibid. p. 29.
[128] Deborah L Rhode (supra note 72), p. 1339.
[129] Mike McConville and Wing Hong Chui *Research Methods for Law* (Edinburgh University Press, 2017), p. 1.

It can be argued that this thesis' contribution to understanding the role of market conditionality in fisheries and the question of fairness moves away from purely legal scholarship, but this would be too narrow a view. Absent a common vision as to what legal scholarship really entails, or should entail, it is preferable not to place it within rigid boundaries. Rather, and as Feldman argues, there is a need for tolerance towards different ways in which legal scholars may approach their subject, and the moral and political standards they adopt.[130]

In suggesting ways to improve the quality and impact of legal academic work, Rhode explains the importance of reading widely across academic literature. She suggests that legal scholars should consider different kinds of insights, including from outside the discipline of law, so as to foster sustained self-scrutiny; broaden and deepen legal scholarship; and to challenge the discipline into more critical thinking.[131] Feldman similarly warns that being too stuck in one particular school of thought risks "scholarly imperialism", where the importance of certain insights are blown out of proportion, distorting rather than enhancing the understanding that scholarship seeks.[132] Having one overarching theory risks distorting one's perception. Only applying doctrinal analysis does not allow for a holistic study. It is because of this that I rely also on other theoretical perspectives. But in so doing I have remained conscious of the need to avoid getting "stranded in a wilderness of relativism".[133] What distinguishes a legal scholar from "dilettantism", Feldman explains, is methodological rigour; self-conscious and reflective open-mindedness; and the dissemination of results, both for the illumination of others and to enable criticism.[134] This is all too often forgotten, in particular when faced with intellectually complex and incoherent areas of scholarship. Elizabeth Fisher and others argue that in environmental law scholarship, for instance, there is a tendency to "drag everything" into the discipline, taking concepts out of context and "happily picking and mixing social science disciplines".[135] These are present also when engaging in a study of appropriateness, as I do here. The line between dilettantism and innovation is a very fine one.[136]

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[130] David Feldman (supra note 75), p. 509.
[131] Deborah L Rhode (supra note 72), p. 1361.
[132] David Feldman (supra note 75), p. 513.
[133] Ibid. p. 508.
[134] Ibid. p. 503.
[135] Elizabeth Fisher and others (supra note 77), p. 224.
[136] Ibid. p. 225.

The theoretical perspectives of interactional law and GAL are coherent, and suited to provide relevant explanations for what makes market conditionality appropriate. They provide complementary perspectives; they each contribute something that the other perspectives lack. I have however maintained a ‘reflective open-mindedness’, also towards the theoretical perspectives that I have selected as relevant. Their shortcomings are addressed as much as their contributions. I also remain aware that the insights offered in this thesis itself only partially explain the appropriateness of market conditionality in fisheries, and only from the angles that have been selected as most relevant.

With this in mind, I now turn to my methodology for answering the research question, as outlined above. A fundamental component of answering this question is identifying applicable international law. This means distinguishing between law and non-law, even though a distinction between the two is often difficult to draw.

2.5. Methodology

The answer to the question of what makes a norm a ‘legal’ norm is different for everyone. Jan Klabbers pragmatically observes that “any international lawyer, whether she realises it or not, works on the basis of a set of assumptions about what the world is like and, more specifically, what international law is like”.[137] In a first part, this section explores these assumptions, and the choice of methodology in this thesis. In a second part, it lists the sources of normativity that are relevant for answering the research question, and discusses methods of interpretation.

2.5.1. Relevant theories of law

A question that must be asked first is whether there even is (and *should* be) a clear distinction between law and non-law. For ‘bright line’ scholars, norms are either law; or they are not.[138] Prosper Weil strongly argues that “on one side of the line, there is born a legal obligation that can be relied on before a court or arbitrator, the flouting of which constitutes an internationally unlawful act giving rise to international responsibility; on the other side, there is nothing of the kind.”[139] Other scholars take a less rigid approach, and explain legal

[137] Jan Klabbers *International Law* (CUP, 2017), p. 3.
[138] Joost Pauwelyn ‘Is It International Law or Not, and Does It Even Matter?’ in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds) *Informal International Lawmaking* (OUP, 2012), p. 127-128.
[139] Prosper Weil ‘Towards Relative Normativity in International Law?’ (1983) 77 American Journal of International Law 413, p. 418.

normativity as a sliding scale, rather than a clear distinction between law and non-law.[140] There then exists something of a "grey zone of normativity", in which norms can be "softly binding in some respects only, or in the process of becoming law as part of the formation of customary international law" (often referred to as soft law).[141]

Joost Pauwelyn posits that the key to resolving this debate is distinguishing between being law and having legal effect, though nevertheless advocates for "a theoretical bright line which separates law from non-law".[142] Pauwelyn thereby rejects the idea that soft law (norms that were not intended to be legally binding) is a form of law, as the term would suggest, yet he nevertheless notes that such norms may have important legal effects, such as that they may be referred to by a treaty through a rule of reference, or be used to interpret a formal treaty.[143] Because of the difficulty of determining when a norm is law (and according to which methodology) and the legal relevance of some norms that are not formally binding, I consider it relevant in this thesis to think of norms existing on a sliding scale of normativity. The well established hard law/soft law distinction is furthermore used to differentiate between norms that are formally recognised as law by the theory of sources, and norms that, even though they are not, have important legal effects (e.g. those that emanate from the FAO Code of Conduct and IPOA-IUU). I return to the relevance of soft law in section 2.5.2.5.

The current international legal landscape is thus one where *legal obligations* exist with greater or lesser strength or credibility.[144] This seems true from the point of view of the consequences of breaching a particular international norm. Even a breach of a binding obligation may fall outside the jurisdiction of a court of law (e.g. coastal state obligations to conserve and manage living resources under the LOSC, as discussed in the next chapter in section 3.8.4). Moreover, *methodologies* for identifying law exist in varying strength and credibility. Alan Boyle and Christine Chinkin observe that "[n]o survey can catch the current vitality in international legal theory and the many nuances that exist between scholars, even

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[140] Richard Baxter 'International Law in "Her Infinite Variety"' (1980) 29 International and Comparative Law Quarterly 549; R Higgins *Problems and Process, International Law and How We Use It* (Clarendon Press, 1995).
[141] Joost Pauwelyn (supra note 138). p. 129.
[142] Ibid. p. 130.
[143] Ibid. p. 155. This leads Pauwelyn and others to study "informal international lawmaking processes" or "in-LAW", the output of which can be both a formal legal act or one that is not, but which nevertheless may have legal effects (Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds) (supra note 138).
[144] Andrew T. Guzman and Timothy L. Meyer (supra note 241), p. 198.

those supposedly following the same approach."[145] In light of this, I have identified three main theories that each provide a methodology for identifying and interpreting legal obligations. They complement each other and are used in this thesis to analyse market conditionality in fisheries, and evaluate its appropriateness from the three angles I identified as relevant.

2.5.1.1. A positivist approach

It is well known that the two most prominent normative underpinnings of the present-day system of international law are that of naturalism and positivism. Methodologies of international law continuously navigate between these two approaches.[146] Natural law (or divine law), whose origins can be found in the philosophical traditions of Roman Law and the Roman Church, appeals to a higher plane of normativity (God, or the common interest) to evaluate behaviour.[147] Positivism on the other hand considers law to be "man-made", and puts great emphasis on the pedigree of a norm and the existence of sanctions.[148] A positivist approach to international law considers state consent (e.g. through agreeing to be bound by a treaty) paramount to the identification of international law.[149]

Positivism informs the 'traditional' or 'classic' view that international law is understood as a system of primary and secondary rules where the system of rules is internalised by the relevant members of the community.[150] Sources of (international) law can then be identified through a known rule of recognition, specifying sources of law and providing general criteria for the identification of its rules. This theory of sources plays a central role in the conceptualization of international law; it can be seen as a "meta-rule determining what counts as law".[151] The 'traditional' sources are reflected in Art. 38 of the Statute of the International Court of Justice (ICJ). Art. 38 states that the Court shall apply international conventions (treaties), whether general or particular, establishing rules expressly recognised by the

[145] Alan Boyle and Christine Chinkin *The Making of International Law* (OUP, 2010), p. 10.
[146] Martti Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (CUP, 2005), p. 108.
[147] Martti Koskenniemi (Ibid.); Jan Klabbers (supra note 137), p. 13; James Crawford (supra note 279), p. 7-8. Natural law is therefore at risk of being subjective.
[148] Jan Klabbers (Ibid.); James Crawford (Ibid.), p. 9.
[149] Jan Klabbers (Ibid.) p. 13.
[150] As proposed by H. L. A. HArt. It should be pointed out that Hart, whilst attacking John Austin's views, argued that international law lacked such a rule of recognition (H. L. A. Hart *The Concept of Law* (Clarendon Press, 1994), p. 214).
[151] Pierre d'Argent 'Sources and the Legality and Validity of International Law' in Jean d'Aspremont and Samantha Besson (supra note 280), p. 544.

contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognised by civilised nations; and, subject to the provisions of Art. 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Art. 59 provides that judicial decisions shall have no binding force except between the parties of a case. Whilst often presented as separate, the sources contained in Art. 38 influence each other in practice.[152]

Treaties and custom, as well as jurisprudence and scholarly literature as 'subsidiary means' for determining law, are the most important sources of normativity in this thesis. Sections 2.5.2.1, 2.5.2.2, and 2.5.2.4 elaborate on their identification and interpretation. But first, I discuss the relevance of two other theories of law that provide complementary methodologies relevant to analyse market conditionality in fisheries, and to evaluate its appropriateness. These are interactional law making and GAL.

2.5.1.2. Constructing law through interaction

Whilst formal sources are important to identify what international law is, they have also been criticised on many accounts. They do not *necessarily* constitute a "meaningful construction".[153] There is a wide variety of views on their relevance, role, and nature.[154] The sources of international law do not account for the diversification of international law making processes and the multiplication of participants in those processes.[155] It has convincingly been shown that "global regulation is becoming ever more pluralist", and that "novel forms of regulation are rapidly developing alongside more traditional forms of international law".[156] Already in the 1970s and 1980s, scholars began to look beyond the nation-state as the only relevant global actor, and began mapping the various formal and informal, public and non-public regimes, which promoted the evolution of norms, rules, and decision-making.[157]

[152] James Crawford (supra note 279), p. 20.
[153] Jean d'Aspremont and Samantha Besson 'The Sources of International Law: An Introduction' in Jean d'Aspremont and Samantha Besson (supra note 280), p. 11.
[154] As reflected in the fifty-two contributions on the topic by different authors in Jean d'Aspremont and Samantha Besson (Ibid.).
[155] Robert Mccorquodale 'Sources and the Subjects of International Law: A Plurality of Law making Participants' in Jean d'Aspremont and Samantha Besson (supra note 280).
[156] Gráinne de Búrca, Robert O Keohane and Charles Sabel 'Global Experimentalist Governance' (2014) 44 British Journal of Political Science 477, p. 477, referring *inter alia* to the growing literature on GAL and that of in-LAW (Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds) (supra note 138)).
[157] Harold Hongju Koh 'Why Do Nations Obey International Law?' (1996) 106 Yale Law Journal 2599, p. 2624.

Interactional law theory should be seen against this backdrop. It subscribes to the view that law is reasoned and constructed; not found.[158] Constructivist theories view practice (rather than form) as central to the emergence and continued existence of shared norms – including legal norms. The work undertaken by Jutta Brunnée and Stephen Toope is particularly instructive. They build on constructivist theories to develop a theory of what they call interactional law.[159] For them, law is created as follows. First, they see law as rooted in social practice that generates shared understandings; social norms. These need not reflect deep moral commitments *per se*; law may be rooted in thin, shared moral commitments.[160] For ambitious substantive norms to induce social change, though, this requires deeper shared understandings. Shared understandings, so they explain, can be made deeper through repeated interaction.[161] Second, for these social norms to be recognised as *legal* norms, they must also adhere to eight 'criteria of legality', as follows: norms must be general (prohibiting, requiring, or permitting certain conduct); promulgated (accessible); prospective; clear (not permitting and prohibiting simultaneously); realistic (not demand the impossible); constant; and there should be congruence between legal norms and the actions of officials operating under the law.[162]

These criteria were originally posited by Lon Fuller, so as to measure the "internal morality of law".[163] In contrast to the positivist views outlined above, Fuller suggests (like many others) that law does *not* depend for its existence as 'law' on enforcement.[164] Sanctions do not *create* legal obligation. Rather, legal obligation is the result of a sense of fidelity to the law, and that fidelity/sense of obligation is generated by adhering to these criteria of legality.[165] Through adherence to these criteria of legality, it becomes possible for subjects to "reason with rules", which eventually improves compliance.[166] This is a form of reciprocity (between law-makers and subjects). Rationalist legal scholars commonly refer to reciprocity as being at the heart of international law, but tend to understand reciprocity as transactions, or

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[158] Ian Dobinson and Francis Johns 'Legal Research as Qualitative Resarch' in Mike McConville and Wing Hong Chui (supra note 129), p. 25.
[159] Jutta Brunnée and Stephen Toope *Legitimacy and Legality in International Law, an Interactional Account* (CUP, 2010), p. 34.
[160] Ibid. p. 32.
[161] Ibid.
[162] Ibid. p. 27.
[163] Lon L. Fuller *The Morality of Law* (Yale University Press, 1969), p. 39.
[164] Ibid.
[165] Jutta Brunnée and Stephen Toope (supra note 159), p. 27.
[166] Ibid, p. 39.

material exchange.[167] For Brunnée and Toope, this does not go far enough. For them, reciprocity can *also* be grounded in the desire to interact and to create sustained relationships.[168] This resonates with James March and Johan Olsen's distinction between a "logic of appropriateness" and a "logic of consequences".[169] March and Olsen explain these as two ends of the scale of reasons that underpin decision-making. The latter describes rationalist-positivist reciprocity and the former describes a process where behaviour is aligned with existing (social or legal) norms, depending on an actor's constructed 'identity'. This does not mean that enforcement (monitoring, incentives, sanctions, and so on) is not important. But it is important because a lack of enforcement "leads to a sense of hypocrisy", and undermines this sense of fidelity.[170] Chapter 5 continues the discussion about compliance theories, which is relevant to understanding under what conditions country-level market conditionality can strengthen international normative efforts.

A final and important aspect of interactional law is what Fuller calls "congruence". Fuller describes congruence as official action matching an otherwise legitimate legal norm (i.e. a norm that is general, promulgated, prospective, and so on).[171] In the international law context, this translates into "congruence amongst the actions of a majority of international actors".[172] Here, Brunnée and Toope deviate somewhat from Fuller's account. For Fuller, it was the official administration of a norm that should match legal norms. But most international actors (states) are both subjects to *and* makers of international law. For Brunnée and Toope, then, it is therefore both official action *and* practice that should 'match' legal norms. They argue that congruence requires not only the substantial compliance of all actors (participants) in a legal system with Fuller's criteria, but also a continuing "practice of legality".[173] This means matching the *creation* of a norm in a way that fulfils Fuller's criteria with the *application* of that norm in a way that also satisfies these criteria.[174] This helps

[167] Ibid. p. 37-38; Rosalynd Higgins *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994), p. 16.
[168] Jutta Brunnée and Stephen Toope (supra note 159), p. 37-39.
[169] Ibid.; James G March and Johan P Olsen 'The Institutional Dynamics of International Political Orders' [1998] International Organization 943, p. 949-953. For an illustration of an actor operating out of a logic of appropriateness (in her example, the EU in the context of climate change) see Joanne Scott 'The Geographical Scope of the EU's Climate Responsibilities' (2015) 17 Cambridge Yearbook of European Legal Studies 92.
[170] Jutta Brunnéee and Stephen Toope (Ibid). p. 38.
[171] Lon Fuller (supra note 163), p. 89-90.
[172] Jutta Brunnée and Stephen Toope (supra note 159), p. 35.
[173] Ibid. p. 16.
[174] Ibid. p. 6-7.

construct the law "horizontally", through interaction.[175] Since, if shared social understandings "are reinforced through action based upon Fuller's criteria of legality, it becomes possible to generate obligation, or fidelity to law".[176] Importantly, Brunnée and Toope argue that congruence should not be seen as external to, but a condition for, law. In other words, law is not law if it is not grounded in a practice of legality.

Brunnée and Toope's broad definition of congruence raises questions, in particular because it is seen as a condition for calling law 'law'. As Nico Krisch points out, it means that "rather than being subjected to an inconsistent and unpredictable application of the law, the subjects themselves create the inconsistency through their diverging interpretations as well as their outright noncompliance."[177] This has important implications. Brunnée and Toope maintain that the "hard work of international law" is never completed, and that "rules are constructed, buttressed, or destroyed through the continuing practice of states and other international actors".[178] Interactional processes can facilitate social shared understandings, which can crystallise into law, provided Fuller's criteria are met. Interactional processes must then continue to uphold these norms. This means that "without sufficiently dense interactions and participation of its members, positive law will remain, or become, dead letter."[179] In other words, absent congruence, norms fall into disrepute, and stop being law. For instance, Brunnée and Toope conclude (and regret) that the absolute prohibition on torture contained in the UN Torture Convention is insufficiently matched with official action (or rather inaction), and that this prohibition does not meet the standards of interactional law.[180] Krisch critiques this by pointing out that the anti-torture norm is one of the few to be often included among customary law and even *jus cogens* norms.[181] More importantly, this type of reasoning could

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[175] Ibid. p. 54.
[176] Ibid. p. 34.
[177] Nico Krisch 'Legitimacy and Legality in International Law: An Interactional Account' (2012) 106 The American Journal of International Law 203, p. 206.
[178] Jutta Brunnée and Stephen Toope (supra note 159), p. 270.
[179] Ibid. p. 70.
[180] Ibid. p. 268-269.
[181] Nico Krisch (supra note 177), p. 206. Peremptory norms of general international law (*jus cogens*), are defined in Art. 53 of the Vienna Convention on the Law of Treaties (VCLT) (infra section 2.5.2.1) as "a norm accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." A treaty will be null and void if, at the time of its conclusion, it conflicts with a jus cogens norm. However, though numerous cases invoke jus cogens, there is very little case-law invoking it to impeach the validity of a treaty, and the "contours and legal effects of jus cogens remain ill-defined and contentious" (Report of the International Law Commission, Sixty-sixth session, 5 May-6 June and 7 July-8 August 2014, A/69/10, Annex, p. 274-275). After various previous attempts to include the topic of *jus cogens* in the International Law Commission's programme of work, it finally decided to do so in 2015

lead to the conclusion that law is limited to what states are already doing anyway. It abolishes the distinction "between normative-legal aspiration and actual behaviour".[182] Faced with this dilemma, Krisch suggests *not* to adopt a binary view of law versus non-law, but rather to focus on the "varying strengths of obligation" that may result from (not) ticking all criteria of legality.[183] As advocated earlier above, however, it is preferable to keep a conceptual 'bright line' between law and non-law. Alternatively, it could be considered in more detail 'whose' practice of legality matters. It may be possible to distinguish between types of official action, whereby only *some* types of inconsistent practice bear on the legal validity of a norm.

It is neither the aim of this thesis to solve all the questions that interactional law making theory raises, nor to blindly follow it as a methodology. Rather, the interactional law account serves here as inspiration to better understand the contribution of repeated interactions to fostering a sense of legal obligation, and thereby, improving compliance, and possibly even helping refine (or redefine) existing norms. However, I do not follow the argument further. I do not use the interactional law methodology to draw hard conclusions on the law-like character of individual norms.[184] I bracket the question whether posited norms (e.g. those found in a treaty) that are not or no longer supported by a practice of legality can actually stop being law. The reason for not following this aspect of the interactional law account is not only conceptual, but also practical. Identifying or disproving the legal quality of a norm following an interactional approach would require significant empirical work to (dis)prove the existence of shared understandings underpinning each individual legal norm in question, which falls outside the scope of this research. Moreover, as explained in sections 2.5.2.1 and

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(http://legal.un.org/ilc/guide/1_14.shtml). The Commission's most recent draft conclusions on the topic state the following: "A peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (Draft Conclusion 2). Moreover, "Peremptory norms of general international law (jus cogens) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable" (Draft Conclusion 3). The Draft Conclusions also *inter alia* contain criteria for identifying preremptory norms (it must be a norm of general international law, and accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (Draft Conclusion 4)) and sources in which they can be found (namely, custom and treaties (Draft Conclusion 5)) (International Law Commission, Seventy-first session, 29 April–7 June and 8 July–9 August 2019, A/CN.4/L.936).

[182] Nico Krisch (supra note 177), p. 206.

[183] Ibid., questioning Brunnée and Toope's radicalisation of Fuller's theory and notion of congruence.

[184] Nor is this the intention of the authors, who write that Fuller's criteria are not meant as "a mere checklist to tell us whether or not a particular legal form, e.g. a treaty or a court decision, is properly designed as 'law'. Instead, the criteria come alive when actors reason with the rules in continuing processes of mutual engagement, creating a community of legal practice." (Jutta Brunnée and Stephen Toope (supra note 159), p. 86).

2.5.2.2, a positivist approach will often lead to the same norms being identified as law anyway. Interactional law theory does not disparage the 'traditional' sources of international law (treaties; custom; general principles). Rather, positive law is seen as "a method of 'fixing' legal understandings, or creating 'short-cuts' to legal substance or procedure (...)"[185]

To summarise, Brunnée and Toope's more ambitious version of how law is made and destroyed (whereby norms that are not intended to be law become law, and vice versa, whereby posited norms that are no longer supported by a practice of legality can actually stop being law) requires further reflection before it can be applied as a methodology. In particular, it remains unclear how the account differs from the creation of customary law (section 2.5.2.2). Rather, the appeal of the interactional account lies in the weight it gives to interactional processes. It emphasises the importance of "building up of a more resilient community of legal practice in international society".[186] Brunnée and Toope believe that increased mutual engagement helps actors (even adversaries) learn from each other, and that increased interaction will allow for richer substantive rules.[187] Interactional law therefore provides a useful framework to examine market state interactions with targeted countries over the interpretation of international fisheries norms. Interactional processes can help interpret norms, including general and open-ended ones, and further refine them. Actors thereby arrive at or deepen shared understandings of existing norms (even in relation to soft law norms). This generates a sense of legal obligation or fidelity to the law, or in other words, creates a compliance pull.[188]

An important aspect of this, as explained further in chapter 5, is that market states themselves act within the remits of international law. The need for market states to comply with international law is reflected in the IPOA-IUU, which furthermore states that market measures are to be "implemented in a fair, transparent and non-discriminatory manner" (para. 65).[189] This leads me to suggest that these elements too are important for the market state's potential to promote compliance and norm development. The contrary (the unfair, opaque,

[185] Ibid. p. 69.
[186] Ibid. p. 87.
[187] Ibid.
[188] The concept of a "compliance pull" was coined in Thomas Franck *Fairness in International Law and Institutions* (Clarendon Press, 1995), p. 37.
[189] The same wording can also be found with regard to port state measures (para. 52 IPOA-IUU). Moreover, the Port State Measures Agreement contains the same wording. The Agreement, and thereby the measures that it calls for, "shall be applied in a fair, transparent and non-discriminatory manner, consistent with international law" (Art. 3(4)).

and discriminatory application of a market state's decisions towards affected countries) would surely hamper genuine and sustained relationships to develop. Chapter 5 returns to this.

The need for fair interactions resonates with the teachings of GAL, which offers a different, complementary analysis of the interactions between those involved in global governance. Drawing a parallel with GAL at this point helps explain the dual role that the market state (and other bodies engaged in the global administration of fisheries) can play. Namely, that of operationalising norms and strengthening them through promoting compliance and norm development. GAL also helps think about how the interactions between the market state and the targeted state can be fair rather than arbitrary, which appears to be important in successfully promoting compliance and norm development, at least in so far as market measures in fisheries are concerned.

GAL describes the workings of global governance not as horizontal interactions but as exercises of public authority (and in particular, of public authority of an administrative nature) that "demand a particular justification and that have already engendered a series of procedural and substantive adaptations", some of which are "reminiscent of Fuller's criteria for legality".[190] Although Brunnée and Toope do not pursue this argument, Krisch observes that GAL is a framework in which Fuller's work might also be meaningful.[191] Drawing a parallel with GAL in this thesis complements the views derived from the interactional law-making account. Both interactional law-making theory and GAL emphasise the importance of practice as a source of normativity, and consider the actions of, and interactions between, different actors engaged in global governance as a fundamental component of the workings of international law. The contribution of GAL is to better understand the contribution of market state actions in operationalising (administering) international fisheries norms and obligations at the global level; to draw the attention to the need to do so fairly; and to suggest ways in which this can be done. What the interactional account teaches us, then, is that, in administering international fisheries norms and obligations, the market state can also help promote compliance pull and norm development. However, the latter requires interactions to

[190] Nico Krisch (supra note 177), p. 209.

[191] Ibid., building on, and as also reflected in, Benedict Kingsbury 'The Concept of "law" in Global Administrative Law' (2009) 20 European Journal of International Law 23, p. 31. Kingsbury argues that 'publicness considerations' (which resonate with Fuller's criteria) tend to become important the moment the establishes sources criteria are no longer met (see further infra note 206).

be legal, and there is a strong call for interactions in the fisheries context to be fair, transparent, and non-discriminatory. GAL helps think about how this can be achieved, thereby not only providing an alternative theoretical framework but a complementary one. I turn to GAL and its methodology next.

2.5.1.3. GAL

I now turn to GAL theory and its methodology. As mentioned above, GAL helps understand another facet of market conditionality mechanisms in fisheries: namely, as an exercise of global administration. Describing market state action in terms of GAL bolsters the call for fairness, and helps think about how fairness can be ensured.

Through a bottom-up, inductive approach, GAL discerns and to some extent develops (it describes *and* prescribes) procedural norms applicable to global administrative action.[192] GAL is *prima facie* an unconstrained study of the realities of governance 'out there', combined with an inquiry as to where, how, and to what effect power is exercised, and how these exercises of power are justified.[193] From this study of global governance flow two parallel observations. One, that "present structures and practices of global regulatory governance often generate unjustified disregard of and consequent harm to the interests and concerns of weaker groups and targeted individuals."[194] Two, that in response to this, certain administrative law-type standards are being generated by/through the practice of these global bodies themselves. Global bodies increasingly, though arguably unevenly, respond to demands for accountability, and the protection of rights of those affected by their decisions. Such bodies therefore increasingly adhere to standards and develop mechanisms of transparency, participation of affected groups, reason-giving, and rights of review, that together comprise what is termed GAL.[195]

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[192] Jutta Brunnée and Stephen Toope (supra note 159), p. 527-528.

[193] Benedict Kingsbury, Megan Donaldson, and Rodrigo Vallejo 'Global Administrative Law and Deliberative Democracy' in Anne Orford and Florian Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (OUP, 2016), p. 529 and 531.

[194] Richard B Stewart 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 The American Journal of International Law 211, p. 211,

[195] Benedict Kingsbury, Nico Krisch and Richard B Stewart 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15, p. 645 and 690-691; Paul Craig *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP, 2015), p. 31; Benedict Kingsbury, Megan Donaldson, and Rodrigo Vallejo (supra note 193), p. 531; Sabino Cassese 'Administrative Law Without the State? The Challenge of Global Regulation' (2004) 37 New York University Journal of International Law and Politic 663, p. 193-195.

Administrative-law type standards (mostly in so far that they apply to domestic institutions engaging in administrative activities under, or pursuant to, global regimes) can be found in 'traditional' sources of international law, such as treaties and customary law, "and are unambiguously a part of the corpus of international law".[196] They can also be found in the internal rules of procedure of treaty bodies, or articulated in non-binding instruments.[197] Some of the most "intense generation and refinement of procedural norms" occurs *within* global bodies, however, "as they increasingly modify their practices on consultation, review and disclosure, and codify these changes in more detailed and formal 'policies', 'guidelines' and the like."[198] These practices matter, because GAL is inclusive by its very nature. GAL scholars have in common that "the exercise of public authority in the global administrative space brings with it requirements to adhere to public law norms", and that a focus on accepted sources alone is seen as insufficient to find these norms.[199] As the layers of common normative practice by global governance bodies thicken, administrative law-type standards "come to be argued for and adopted through a mixture of comparative study and a sense that they are (or are becoming) obligatory."[200]

It has been observed that where standards of GAL do *not* derive from any of the more traditional sources, they are usually justified (and perhaps required) by what is "intrinsic" to administrative law (or public law) as generally understood.[201] GAL scholars draw a comparison between administration at the global level, and at the national level.[202] However, direct analogies with national administrative law are limited; accountability challenges in national administration are different from those that arise at the global level, and may demand different responses.[203]

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[196] Benedict Kingsbury, Megan Donaldson, and Rodrigo Vallejo (supra note 193), p. 530.
[197] The extent that these standards are relevant, depends. One of the contributions of GAL is that global administration can be carried out by non-state actors, to whom treaties to not apply (Richard B Stewart 'The Normative Dimensions and Performance of Global Administrative Law' (2015) 13 International Journal of Constitutional Law 499, p. 29).
[198] Benedict Kingsbury, Megan Donaldson, and Rodrigo Vallejo (supra note 193), p. 530.
[199] Benedict Kingsbury (supra note 191), p. 30.
[200] Ibid.
[201] Ibid.
[202] Global and national administrative bodies often have overlapping functions through mixed bodies and procedures, joint decision-making processes, and so on (Carol Harlow 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 European Journal of International Law 187, p. 684).
[203] Sabino Cassese (supra note 195), p. 467; Benedict Kingsbury (supra note 191), p. 27.

But the question remains: to what extent do these administrative-law type standards, and to what extent should they, make claims to be law?[204] From the outset, I observe that GAL scholarship variably refers to standards, values, principles, and mechanisms. Mechanisms (in particular, participation and accountability) are discussed in chapter 5, sections 5.8.2 and 5.8.3). So as not to create conceptual confusion between GAL and generally accepted principles of law (section 2.5.2.2), I refer in the context of law to administrative law-type standards (or, as the discussion progresses in later chapters, procedural standards). This is conscientious of the discussion over whether some of these standards are principles of law, or rather merely reflect commonly held values.[205] As understood here, 'standards' can include both. This comes back to the question how 'law' can be identified in the first place. The preceding sections have already explained that different views exist on how to do this (source-based positivism; inherent morality of the law, a focus on practice and a sense of legal obligation; and so on).[206] There is risk in ascribing the status of 'law' to certain norms, and not to others. Identifying a unified body of normative practice common to global administrative bodies and deciding on principles that are 'intrinsic' and with which global

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[204] As eloquently phrased by Benedict Kingsbury (Ibid.), p. 39. See also Ming-Sung Kuo 'Taming Governance With Legality? Critical Reflections Upon Global Administrative Law As Small-C Global Constitutionalism' (2011) 44 International Law and Politics 55; Ming-Sung Kuo 'Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law' (2012) 10 International Journal of Constitutional Law 1050.

[205] Carol Harlow (supra note 202). Harlow makes a distinction between rights and 'principles', which form an essential building-block of a legal system, on the one hand, and standards and 'values', which are largely formulated outside that system, on the other (p. 190). Though a universal list of principles does not exist nor does she believe should it, she identifies the principle of legality (ultra vires) and due process are common to most administrative systems (p. 192). On the contrary, she also considers participation, accountability, and transparency to be 'good governance' values (p. 199), though these are treated in this thesis as mechanisms. Moreover, though I appreciate the distinction between values and principles, I consider standards to be a sufficiently broad term to incorporate both.

[206] This is further developed in the specific context of GAL in Benedict Kingsbury (supra note 191). Kingsbury suggests that Hart's rule of recognition should be understood as including a stipulation that only rules and institutions meeting certain requirements of 'generality' and 'publicness' (that are immanent in public law, and evidenced through comparative materials) should be regarded as law. Simply positing something as 'law' in an accepted source is no longer enough; the law must have been "wrought by the whole of society, by the public" and "address matters of concern to society" (p. 31). Kingsbury explains that GAL has not yet gone so far, but observes that in practice, 'publicness considerations' tend to become important the moment the establishes sources criteria are no longer met. This resonates with Lon Fuller's inner morality of law through criteria of legality (supra note 163), as Kingsbury also notes. Publicness is deemed to be immanent in law, and "is readily expressed as an attribute of law, but it may also inform the very concept of law, for example by being incorporated into a Hartian rule of recognition determining what counts and what can count as law in a particular legal system." (p. 40). In a critique, Paul Craig observes that Kingsbury's account is evidently driven by non-positivist reasoning, despite Kingsbury himself calling it an extended positivist approach (Paul Craig (supra note 195), p. 646). Alexander Somek echoes this, comparing Kingsbury's view to what some authors have dubbed "inclusive legal positivism", according to which criteria for legal validity could conceptually include moral principles (Alexander Somek 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2010) 20 European Journal of International Law 985). This essentially comes back to the critique that natural law-approaches to law are inherently subjective (supra note 147).

administration should comply, risks bias, and in particular, risks reflecting Western values only.[207] At the same time, Kingsbury argues that GAL *should* be "animated by some higher end".[208] There is a "normative desirability inherent in the idea of GAL", of which scholars are aware.[209] In fostering deliberation and the justification of public power, GAL provides some of the necessary prerequisites for deliberative democracy,[210] and in stabilising and legitimating public power, GAL contributes more generally to the rule of law.[211]

I conclude the following. As it stands today, GAL scholarship lacks a single clear and convincing methodology to identify standards with which global administration should comply. Rather, different GAL scholars work with different assumptions about how international law (and GAL in particular) may be identified.[212] For the purpose of this thesis, it is not necessary to establish to what extent all possible administrative-law type standards

[207] Carol Harlow (supra note 202), p. 211.
[208] Benedict Kingsbury (supra note 191) p. 532, 536.
[209] Benedict Kingsbury, Megan Donaldson, and Rodrigo Vallejo (supra note 193), p. 531.
[210] Ibid. p. 539-542, noting however that it is no panacea, and a coherent theory of representation at the global level remains an important missing element.
[211] Richard Stewart writes that "by promoting transparency and regularity in the exercise of power, GAL can help secure the rule of law in the global administrative space by promoting governance on the basis of general norms that are clear, public, prospective, reasonably stable, and consistently and impartially applied in the determination of particular matters" (Richard B Stewart (supra note 197), p. 501; see also Carol Harlow (supra note 202), p. 190). It is often argued that there *is* no such thing as an international rule of law. Even if there is, the normative content ascribed to the rule of law varies wildly across the literature, in particular where this pertains to the international sphere. The rule of law has been described as "a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency" (UN Secretary-General 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General', 23 August 2004, S/2004/616). A more constrained view is given by Crawford, who associates four basic values with the Rule of Law, namely: absence of arbitrary power; the non-retrospectivity of the law; the subjection of government to general laws (whatever their content); and the independence of the judiciary which must be 'established by law' (James Crawford 'International Law and the Rule of Law' (2003) 24 Adelaide Law Review). At times the term is used "as if synonymous with 'law' or legality; on other occasions it appears to import broader notions of justice; in still other contexts it refers neither to rules nor to their implementation but to a kind of political ideal for a society as a whole."(Jeremy Waldron 'The Rule of International Law' (2001) 30 Harvard Journal of Law & Public Policy 15, p. 332). The rule of law is thus often used to describe the virtues that a legal system should have to secure individual freedom, for instance by providing a predictable environment in which individuals can act freely, plan their affairs, and make their decisions (Paul Craig 'Global Administrative Law: Challenges' [2016] UK, EU and Global Administrative Law: Foundations and Challenges (the Hamlyn Trust lectures) 671, p. 17). Its modern "roots" may be found in Dicey's "thoroughly parochial but once widely influential articulation" at the end of the 19th century (James Crawford, p. 5). But whatever the characteristics we give it, Martin Krygier observes that in essence, the "immanent end(s) of the rule of law" is opposing arbitrariness in the exercise of power (Martin Krygier 'Why the Rule of Law Is Too Important to Be Left to Lawyers' (2012) 2 Prawo i Wiez, p. 34). In that way, limiting the arbitrary exercise of power at the global level thus helps ensure respect for the rule of law.
[212] Even leading to the question whether GAL is a coherent body of law, or nothing more but an "academic pipe dream" (Carol Harlow (supra note 202), p. 189).

that have been suggested as part of GAL are principles of law, nor to what extent they should be. I recall that, though a conceptual distinction between law and non-law is preferable, it is often difficult to draw this distinction, and not always necessary to do so.[213] GAL offers the valid observation that much of global governance is administrative in nature, and that administrative law-type standards and mechanisms are emerging across various governance sites. These standards and mechanisms of GAL do not only emanate from accepted sources of law, or from soft law instruments that play an accepted role (e.g. as proof of customary law or as a tool to interpret hard law, as discussed below). They also emanate from the practice of global administrative bodies themselves.

As further explained in chapter 5, market conditionality in fisheries can be seen as a form of global administration in fisheries. When thinking about how fairness can be improved in this context, it is informative not only to look at traditional sources of law, but the practice of other global bodies in fisheries that face similar issues. I explain that RFMOs are the principle bodies that engage in the global administration of fisheries, including through the adoption of market measures. Administrative law-type standards and mechanisms of transparency, participation, and review are increasingly called for, and relied upon, to avoid arbitrary decisions. These principles have grown out of a mixture of treaty, soft law, and RFMO practice, and are being applied by and to RFMOs (chapter 8, section 8.3.2).

Recalling the interactional account, I suggest that the procedural standards used to evaluate RFMO performance may usefully be explained as embodying shared (social, if not legal) understandings of how to ensure fairness when adopting market measures. These standards generate a growing sense of legal obligation, and in so far that they are applied by and to RFMOs, I am willing to accept that they may come to constitute legal obligations. It would be stretching the argument too far to apply these shared understandings as a matter of law to unilateral market measures. I do not claim that these are a source of law that can be applied directly. But the move within RFMOs to pay regard to these standards and to develop mechanisms to promote regard, when engaging in the global administration of fisheries, including when adopting market measures, is – if anything – evidence of growing state practice in this field. State practice is an important aspect of identifying customary law obligations, though currently, state practice is too sporadic and inconsistent for this. Furthermore, this practice is evidence of (growing) shared understandings that adherence to

[213] Joost Pauwelyn (supra note 138), p. 130.

administrative-law type standards is important in the administration of fisheries, including when adopting market measures. By engaging with these principles, market states could therefore do more than reduce arbitrariness. Interactions between market states and countries seeking market access can also help deepen and refine these understandings, where they openly engage with these procedural standards. This could pave the way towards the adoption of a soft law instrument on market measures, and even lead to the formation of law that satisfies the sources doctrine.

2.5.2. Relevant sources

The research for this thesis has been predominantly desktop-based, using the sources set out below, but also informed by empirical data. Much of the data required was however not publically available. In particular, documents regarding the implementation of country blacklisting under the EU IUU Regulation vis-à-vis third countries (letters documenting exchanges with yellow carded and blacklisted countries, and Action Plans issued by the Commission to carded countries) have to be requested through the EU's online system. My requests were only partially met, where confidentiality allowed me to have access, and the process took several months. I supplemented this information with reports and studies carried out by NGOs, consulting firms, and scholarly literature. I met with industry representatives, consultants, and government officials of third (mainly Asian and Pacific island) countries that have gone through or were going through the EU carding process. I carried out more or less formal interviews, and sent out questionnaires to key actors involved in this process (consultants and advisors). The few responses I received gave me insight into the practical aspects of the carding process, and helped me identify some of the practical problems related to these market measures. This information has *not* been used as a primary source, but rather guided my understanding of the problems at stake; led me to request certain official documents of which I otherwise would not have known their existence; and supplement opinions expressed elsewhere. In so far that the persons who participated in my questionnaires and those who provided me with non-publically available information allow, these sources are cited in this thesis as anecdotal evidence. The Action Plans that I received from the European Commission are included in Annex II.

I now set out the sources of normativity that are relevant in this thesis, how they can be identified, and how they will be interpreted. In turn, I look at treaties, customary international

law, general principles of law, scholarship and jurisprudence, and the relevance of non-binding instruments (soft law).

2.5.2.1. Treaties

International conventions (treaties) are the most significant source of legal obligation in international fisheries law. Treaties concern (and bind) only those states that have accepted the obligations contained therein (the principle of *pacta tertiis*). They are centred around the principle of state consent; only when explicitly ratified or adopted by a determined number of states can a treaty come into force.[214] Of particular importance here are: the LOSC, the Fish Stocks Agreement, FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement),[215] the Port State Measures Agreement, the General Agreement on Tariffs and Trade (GATT),[216] the Agreement on Technical Barriers to Trade (TBT Agreement),[217] the 1958 High Seas Fishing Convention,[218] the Convention on Biological Diversity (CBD),[219] the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[220] the UN Charter;[221] and the Vienna Convention on the Law of Treaties (VCLT). They will be introduced where appropriate in this thesis.

From the interactional law point of view, treaties can be seen as 'fixing' shared understandings, and proof that Lon Fuller's criteria are fulfilled. [222] In so far that the norms they contain are based on shared understandings and there is a robust practice of legality that generates a sense of obligation, the treaties mentioned above can therefore also be seen as

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[214] On the role that treaties play in modern international law and their pros and cons, see Karin Oellers-Frahm 'The Evolving Role of Treaties in International Law' in Miller and Rebecca M. Bratspies (eds) *Progress in International Law* (Brill, 2008).
[215] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993 (UN Treaty Series, 2221, p. 91) (hereafter: Compliance Agreement).
[216] General Agreement on Tariffs and Trade of 15 April 1994 (UN Treaty Series, 1867, p. 187) (hereafter: GATT).
[217] Agreement on Technical Barriers to Trade of 12 April 1979 (UN Treaty Series, 1186, p. 276) (hereafter: TBT Agreement).
[218] Convention on Fishing and Conservation of the Living Resources of the High Seas of 29 April 1958 (UN Treaty Series, 559, p. 385) (hereafter: High Seas Fishing Convention).
[219] Convention on Biological Diversity of 5 June 1992 (UN Treaty Series, 1760, p. 79) (herafter: CBD).
[220]Convention on International Trade in Endangered Species of Wild Fauna and Flora (UN Treaty Series, 993, p. 243) (hereafter: CITES).
[221] Charter of the United Nations of 24 October 1945 (UN Treaty Series, XVI, p. 1 (hereafter: UN Charter).
[222] Jutta Brunnée and Stephen Toope (supra note 159), p. 49-50; see also Jutta Brunnée 'Sources of International Environmental Law: Interactional Law' in Jean d'Aspremont and Samantha Besson (supra note 280), p. 956-957.

exemplary interactional law. They will be interpreted using the VCLT, which codifies customary rules surrounding the making, dissolving, and interpretation of treaties arising from custom (section 2.5.2.2). The VCLT also provides a framework for an orderly practice of legality.[223] It promotes congruence between treaty norms and subsequent international practice by limiting state behaviour through the principles of *pacta sunt servanda* (Art. 26) and material breach (Art. 60), whilst at the same time allowing for changing interpretations. The general rule of interpreting a treaty is to follow the ordinary meaning to be given to its terms, in their context, and in light of the object and purpose of the treaty (Art. 31(1)). This context can be derived from the text itself, its preamble, and its annexes, as well as subsequent agreements and subsequent practice (though certain conditions apply) (Art. 31(2)). Together with context, the interpreter shall take into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (Art. 31(3)(a)). The International Law Commission commented on the draft text of the VCLT that:

> "It is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation."[224]

Further, the interpreter shall take into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Art. 31(3)(b)). The threshold for establishing whether subsequent practice amounts to an agreement is high. For example, the Appellate Body of the WTO held that the essence of subsequent practice in interpreting a treaty is "a concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation."[225] This was confirmed in *South China Sea*, where the Arbitral Tribunal also referred to jurisprudence of the ICJ for a similarly high threshold.[226]

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[223] Jutta Brunnée and Stephen Toope (Ibid); Jutta Brunnée (Ibid.).
[224] International Law Commission 'Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly' (1966) II Yearbook of the International Law Commission 1 – 367, p. 221.
[225] *Japan – Alcoholic Beverages II*, 4 October 1996, Appellate Body report (WT/DS8/Appellate Body/R, WT/DS10/Appellate Body/R, WT/DS11/Appellate Body/R), p. 13.
[226] *The South China Sea Arbitration* (Republic of the Philippines v. People's Republic of China) (Award), 12 July 2016, PCA Award Series, para. 552, referring *inter alia* to *Kasikili/Sedudu Island* (Botswana v. Namibia)

Finally, the interpreter shall take into account any relevant rules of international law applicable in the relations between the parties (Art. 31(3)(c)). This provision has allowed and continues to allow for an 'evolutionary' interpretation of treaty provisions. The draft text of the VCLT contained a temporal limitation, stating that the terms of a treaty were to be determined "in the light of the general rules of international law *in force at the time of its conclusion*".[227] This "failed to deal with the problem of the effect of an evolution of the law on the interpretation of legal terms in a treaty and was therefore inadequate".[228] This temporal limitation was eliminated in the final text of the treaty. The ICJ explained in *Namibia Advisory Opinion* that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing *at the time of the interpretation*".[229] Art. 31(3)(c) thus reflects a "principle of integration", and "emphasizes both the unity of international law and the sense in which rules should not be considered in isolation of general international law".[230]

Art. 31(3)(c) VCLT has generated some interest for its potential to counteract the fragmentation of international law.[231] In general, however, academic commentary on the provision is relatively scarce, and Philippe Sands notes an "endemic reluctance" to refer to this provision in international jurisprudence.[232] This has changed only little in the twenty years following Sands remarks, and which may in fact be said of the VCLT rules of treaty interpretation in general. In the context of the law of the sea, Nigel Bankes notes there is "certainly no consistent self-conscious practice of applying the provisions [of the VCLT]," though he considers the recent *South China Sea* award to have been a sophisticated

(Judgment), 13 December 1999, ICJ Reports 1999, p. 104, paras. 48-63. Kasikili includes a detailed list of the ICJ's prior jurisprudence on subsequent practice at para. 50.

[227] International Law Commission (supra note 224), p. 222 (emphasis added). This initially referred only to the terms of a treaty, but after eliminating the temporal element the International Law Commission then suggested that it refer to both the term of a treaty and its context.

[228] Ibid.

[229] *Legal Consequences for states of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding the Security Council Resolution 276 (1970)* (Advisory Opinion), 21 June 1971, ICJ Reports 1971, p. 16, para.53 (emphasis added).

[230] Philippe Sands 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 85 Yale Human Rights and Development Law Journal 85, p. 95.

[231] The list of authors who have written about fragmentation is long. On the usage of Art. 31(3)(c) VCLT as a tool in resolving cross-sectoral conflicts, see Philippe Sands (supra note 230); Panos Merkouris 'Article 31(3)(c) of the VCLT and the Principle of Systemic Integration' [2010] Thesis submitted for the degree of Ph.D.; Campbell McLachlan 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279.

[232] Philippe Sands (supra note 230), p. 95-97.

application of its interpretative rules.[233] In *South China Sea*, the Tribunal referred to Art. 31(3) to substantiate its broad and evolutionary interpretation of the duty to protect and preserve the marine environment, in light of the corpus of international environmental law.[234] Chapter 3 elaborates on this in more detail.

Supplementary means of interpretation may be used to *confirm* the meaning of the text as established through the general rule of interpretation, to solve ambiguity, or because the general rule of interpretation leads to a manifestly absurd or unreasonable result.[235] Such supplementary means may include preparatory works or the circumstances in which a treaty was concluded. [236]

Where relevant, the rules on treaty interpretation as reflected in the VCLT are referred to throughout the thesis. So as to interpret the provisions of the LOSC, particular use will be made of what is commonly referred to as the *Virginia Commentaries*.[237] They are based on the documentation of the Third United Nations Conference on the Law of the Sea (UNCLOS III), which is the Conference that led to the adoption of the LOSC (described in chapter 3, section 3.2). Many of the contributors to these commentaries were principal negotiators or UN personnel who participated in the UNCLOS III. Though essentially scholarly literature, these commentaries can be seen as reflecting for a large part the preparatory works of the LOSC, and are often referred to by international courts and tribunals to support their interpretations.[238] In line with the rules on treaty interpretation, this thesis frequently refers to them as supplementary materials to confirm or clarify the meaning of certain of the provisions of the LOSC.

2.5.2.2. Custom

Custom and general principles provide other important sources of law that are relevant for this thesis. Customary international law is traditionally identified by widespread state practice, combined with evidence that states accept that this practice reflects international law

[233] Nigel Bankes 'The South China Sea Award and the Vienna Convention on the Law of Treaties', posted on 2 August 2016, University of Calgary Faculty of Law blog, available at: https://ablawg.ca/2016/08/02/south-china-sea-and-vienna-convention-on-treaties/.

[234] *South China Sea* (supra note 226), paras. 941-942.

[235] Art. 32 VCLT.

[236] Ibid.

[237] Myron H. Nordquist, Satya Nandan, and Shabtai Rosenne (eds) *United Nations Convention on the Law of the Sea* (Center for Oceans Law and Policy & Koninklijke Brill NV, 2014) (hereafter: *Virginia Commentaries*).

[238] E.g. in *Chagos Marine Protected Area* (Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland) (Award), 18 March 2015, PCA Award Series, para. 507; *South China Sea* (supra note 226), paras. 474 and 948.

(*opinio juris*).[239] Its material sources vary heavily, depending on circumstance.[240] Whilst custom is recognised as a primary source of international law, the lack of defining procedure for creating custom makes that custom remains very rudimentary and informal.[241] This lack of procedure also explains the vast amount of scholarly literature on the topic, highlighting the various conceptual and evidentiary uncertainties of the two-element definition of custom.[242] Identifying custom lacks clarity. It is generally difficult to determine that there is sufficient of either state practice or *opinio juris*, and the distinction between the two elements remains unclear: since, widespread state practice is often *evidence* of there being the belief that something is law. The *identification* of custom is therefore impossible to separate from its *creation*; a process that is itself heavily undisciplined and disordered.[243]

The traditional approach to identifying custom can be compared to the interactional account. Interactional law also considers that it is practice that grounds obligation, but does away with the concept of *opinio juris*.[244] Instead, interactional law provides Fuller's legality criteria for evaluating that practice, which helps distinguish the emergence of a new legal norm.[245] As mentioned previously, the interactional account is no panacea either, and its more ambitious explanation of how legal norms come into being and stop existing is not further engaged with in this thesis. Whilst interactional law 'solves' the difficulty of having to establish *opinio juris*, it creates new difficulties. It is for instance unclear at what point a norm is sufficiently supported by a practice of legality to be deemed 'law', and at what point this is no longer the case.

Not only is custom difficult to identify; it is difficult to separate its identification from its interpretation. Judge Tanaka points out the following in his dissenting opinion in the *North Sea Continental Shelf* cases:

> "Customary law, being vague and containing gaps compared with written law, requires precision and completion about its content. This task, in its nature being

[239] *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (Judgment), 30 February 1969, ICJ Reports 1969, p. 3, para. 77.
[240] James Crawford (supra note 279), p. 24.
[241] Andrew T. Guzman and Timothy L. Meyer 'Customary International Law in the 21st Century' in Miller and Rebecca M. Bratspies (supra note 214), p. 197.
[242] Ibid. p. 199-200; Curtis A. Bradley 'Introduction' in Curtis A. Bradley (ed) *Custom's Future, International Law in a Changing World* (CUP, 2016), p. 2; Monica Hakimi 'Custom's Method and Process: Lessons from Humanitarian Law' in Curtis A. Bradley (Ibid.), p. 148-149, and other works cited in footnote 2.
[243] Monica Hakimi (Ibid.) p. 149.
[244] Jutta Brunnée and Stephen Toope (supra note 159), p. 47.
[245] Jutta Brunnée (supra note 222), p. 970.

> interpretative, would be incumbent upon the Court. The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law."[246]

Reflecting on the question of interpretation, Panos Merkouris shows that the customary rules of interpretation *themselves* have been the object of interpretation on multiple occasions.[247] He therefore concludes that the interpretation of custom forms part of what he calls the life-cycle of custom; it is relevant for its very existence.[248]

Whilst custom is relevant in this thesis, it will often have been codified in treaty form. A good example are the abovementioned rules on treaty interpretation, now codified in the VCLT, as well as many of the obligations found in the LOSC. Where this is the case, this thesis will refer directly to the relevant treaty provisions.

2.5.2.3. General principles

Art. 38 ICJ Statute also names "general principles of law recognized by civilised nations" as a source of law. Neither their identification, nor their function, are altogether clear. Whilst some authors consider that general principles are a supplementary source of law "in the sense that they serve to fill gaps in conventional and customary international law", others consider them to be a tool to reinforce legal reasoning, a means to interpret other sources of law, as well as a source of obligation themselves.[249]

General principles have been described as those principles that originate in municipal law, but which are applicable to the relations between states.[250] It can be observed that the term "civilised nations" is now generally considered to be

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[246] Dissenting Opinion of Judge Tanaka, *North Sea Continental Shelf* (supra note 239), p. 182. There are many other examples in international jurisprudence that refer to the interpretation of customary law. For a brief analysis of possible rules of interpretation of custom, using logical and teleological interpretation as a springboard, see chapter 4 in Panos Merkouris *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill Nijhoff, 2015).

[247] Panos Merkouris 'Interpreting the Customary Rules on Interpretation' (2017) 19 International Community Law Review 126.

[248] Panos Merkouris (supra note 247), p. 143.

[249] International Law Commission, seventy-first session, first report on general principles of law by Marcelo Vazquez-Bermudes (special rapporteur), 29 April–7 June and 8 July–9 August 2019, A/CN.4/732, paras. 25 and 26, referring to a long list of authors at footnote 13; Alain Pellet 'Art. 38' in Andreas Zimmermann *et al* (eds) *The Statute of the International Court of Justice: A Commentary* (OUP, 2012), p. 836 and subsequent pages, explaining the difficulty of ascribing autonomous meaning to the notion of "general principles", and the difficulty of asserting what is indeed common to nations.

[250] James Crawford (supra note 279), p. 34; Hugh Thirlway *The Sources of International Law* (OUP, 2014), p. 95.

anachronistic, and no longer deployed.[251] What *is* important, however, is the question of recognition.[252] Lacking an accepted mechanism for international law to borrow from domestic law, general principles have evolved through international jurisprudence. Akin to customary law, tribunals have shown "considerable discretion" in identifying general principles, and they are often not formally referenced or labelled as such.[253] They appear to play a role in many areas of law, such as treaty-making and interpretation;[254] general interactions between states, *inter alia* through "certain principles of procedure and the principle of good faith",[255] abuse of right, freedom of consent, voidance of contractual agreements whose object is illegal, competence, and the notion of "shared expectations";[256] and have also been referred to in environmental law (e.g. the "polluter pays" principle).[257]

Many general principles are also embodied in treaty law, such as the principle of good faith and the concept of abuse of right (Art. 300 LOSC), and the rules enshrined in the VCLT, and I will therefor refer to the relevant treaty base when discussing them. It can also be observed that some general principles appear to overlap with principles of customary law.[258] They are nevertheless *different* from customary law in so far that custom requires there to be "general practice accepted as law" (accompanied by *opinio juris*), while a general principle of law needs to be "recognized by civilized nations",

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[251] International Law Commission (supra note 249), para. 19.

[252] Ibid. para. 18; *North Sea Continental Shelf* (supra note 239), para. 63, noting that that norms of general international law "must have equal force for all members of the international community".

[253] James Crawford (supra note 279), p. 35-36.

[254] Sir Hersch Lauterpacht has suggested that "the conditions of the validity of treaties, their execution, interpretation and termination are governed by international custom and, in appropriate cases, by general principles of law recognized by civilized nations" (International Law Commission, Documents of the fifth session including the report of the Commission to the General Assembly, report by H. R. Lauterpacht on the Law of Treaties, special rapporteur (1953) II Yearbook of the International Law Commission, p. 90, 105, and 106).

[255] Lord Phillimore, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annex No. 3, p. 335 (cited in Alain Pellet (supra note 249), p. 836, who notes that Lord Phillimore was the author of the proposal of Art. 38 that was finally adopted).

[256] International Law Commission (supra note 249), paras. 63-64, referring to work of the International Law Commissions.

[257] Mr. Daoudi commenting on the debate concerning allocation of loss in the case of transboundary harm arising out of hazardous activities and the suggestion that a body of principles be drawn up to guide states in their practice "whether such principles, apart from the "polluter pays" principle, were in fact general principles of international law recognized by civilized nations" (International Law Commission, Summary records of the meetings of the fifty-fourth session (2003) I Yearbook of the International Law Commission, p. 109, para. 48).

[258] Hugh Thirlway (supra note 250), p. 96; see also Duncan French 'Common Concern, Common Heritage And Other Global(-Ising) Concepts: Rhetorical Devices, Legal Principles Or A Fundamental Challenge?' in Michael Bowman *et al* (eds) Research Handbook on Biodiversity and Law (Edward Elgar, 2016), p. 354, questioning whether the principle of 'common concern' should be seen as a general principle of law in accordance with Art. 38 ICJ.

which suggests there to be a distinction[259] – although what exactly this distinction is remains unclear. Given these difficulties, the International Law Commission recently decided to include the topic in its programme of work, with the aim to clarify various aspects of general principles of law, with the aim to provide to those called upon to deal with general principles of law as a source of international law.[260]

General principles of law may also overlap with standards of GAL, in so far that general principles of law may embody procedural, administrative law-type standards. However, given the difficulty and uncertain surrounding their identification (as being general principles of law), this raises the same question already addressed throughout section 2.5.1. With respect to GAL, it was concluded that where such norms do not emanate from posited sources but from administrative practice, it is difficult to ascribe them the status of law – but that they may come to reflect law. Over time, this diverse administrative practice "may, in conjunction with domestic public law, give rise to broadly cast 'general principles of law', and by that avenue be incorporated within the dominant paradigm of international law".[261] As the law stands, however, it is difficult to ascertain at what point such practices give rise to general principles of law; and what general principles of law currently exist that can be included in GAL. As already explained, this thesis does not aim to give a conclusion on this point.

2.5.2.4. Subsidiary means of interpretation

Art. 38 ICJ Statute refers to judicial decisions and teachings (jurists' writings, scholarly or otherwise) as subsidiary means for determining the law. These also constitute an important source of normativity in this thesis, even though they do not *themselves* constitute a source of law. A coherent body of jurisprudence can in many instances be considered as *evidence* of the law, even though international law does not recognise judicial precedent as a source of law. It has been observed that international courts and tribunals therefore tend to strive for judicial

[259] International Law Commission (supra note 249), para. 28.

[260] International Law Commission, report of the sixty-ninth session, 1 May-2 June and 3 July-4 August 2017, A/72/10.

[261] Benedict Kingsbury, Megan Donaldson, and Rodrigo Vallejo (supra note 193), p. 530. That administrative law plays a role in identifying general principles of law is acknowledged also by the report of the special rapporteur in International Law Commission (supra note 249), paras. 157-158, who considers that *all* branches of law are relevant (administrative, constitutional, private, etc.) but that this needs to be "further assessed as the topic progresses and taking into account the practice of States and the decisions of international courts and tribunals".

consistency.[262] This is true also across disciplines, despite the concern that international law is increasingly fragmented. Such 'cross-fertilization' is clearly visible in the law of the sea. The LOSC has a complex dispute settlement mechanism, whereby member states can opt to have their disputes heard by either the ICJ, the International Tribunal for the Law of the Sea (ITLOS), or an arbitral tribunal.[263] These bodies often refer to one another to substantiate their findings. This includes references to the jurisprudence of other courts and tribunals on non-law of the sea related matters,[264] since the applicable law in a law of the sea dispute is the provisions of the LOSC as well as other compatible rules of international law.[265] This thesis therefore also examines jurisprudence and scholarship from different areas of international law, and where relevant, borrow interpretations from one field to impart meaning on another. I remain nevertheless careful not to apply concepts that have been specifically developed in one area of law to another, out of context.

Judicial decisions and scholarly accounts can thus be proof of law, or help explain the meaning of law. According to the interactional law account, a large expert community may also help contribute to the development of shared understandings and even the emergence of new interpretations.[266]

2.5.2.5. Non-binding instruments

Many formally non-binding instruments set out (non-legally binding) norms and principles in relation to fisheries, which may inform what country-level market conditionality mechanisms

[262] James Crawford (supra note 279), p. 37-38.
[263] Art. 287 LOSC. Depending on the subject matter, the case will be heard by what is referred to as an Annex VII Tribunal or an Annex VIII Tribunal, though the latter as thus far never been established.
[264] See the many references by the ITLOS and Arbitral Tribunals to jurisprudence of the ICJ, and even on occasion that of the WTO. For instance, references to ICJ jurisprudence to guide the interpretation of the standard of responsibility of states under the LOSC in *Advisory Opinion on Sponsoring in the Area* (*Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion), 1 February 2011, ITLOS Reports 2011, p. 10) and in *Advisory Opinion to the SRFC* (supra note 83); reference to a vast amount of ICJ jurisprudence on estoppel and good faith in *Chagos* (supra note 238), paras. 435-438; and reference to the ICJ jurisprudence and that of the WTO on the interpretation of subsequent practice in Art. 31(3) VCLT in *South China Sea* (supra note 226), para. 552.
[265] Art. 293 LOSC. Moreover, the ITLOS and Annex VII tribunals often explicitly situate law of the sea matters in their international law context. For instance, in *M/V "Saiga" (No. 2)* (Saint Vincent and the Grenadines v. Guinea) (Judgment), 1 July 1999, ITLOS Reports 1999, p. 10, the ITLOS expressly stated the following: "In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest *in the context of the applicable rules of international law* … Considerations of humanity must apply in the law of the sea, *as they do in other areas of international law*." (para 155, emphasis added). On the dangers of and potential for regime interaction between the law of the sea and trade more generally, including through references to other regimes by dispute settlement bodies, see Margaret A. Young *Trading Fish, Saving Fish: The Interaction Between Regimes in International Law* (CUP, 2011).
[266] Jutta Brunnée (supra note 222), p. 975-6.

should look like. Of particular interest here are the Code of Conduct and the IPOA-IUU, which have already been mentioned, the FAO CDS Guidelines,[267] and to some extent the FAO Flag State Performance Guidelines.[268] References will also be made to FAO technical guidance, and the yearly UN General Assembly Resolutions on Sustainable Fisheries.

Following a positivist methodology, formally non-binding instruments are not sources of law. Yet, as observed earlier in this chapter, normativity is more of a sliding scale than a binary distinction between law and non-law. Norms contained in non-legally binding instruments can have important legal effects, and are therefore often categorised as "soft law" in the literature.[269] Soft law has been described by distinguishing it from hard law, which has been described as legally binding obligations that are precise and that delegate authority for interpreting and implementing the law (e.g. treaties).[270]

Notwithstanding the question whether the pedigree of a norm is what makes law 'law', I use the term 'soft law' in this thesis to distinguish between norms that are formally law (hard law that is posited in a treaty, or recognised customary law and general principles) and norms that are formally non-binding. Nevertheless, I observe that a binary hard law/soft law distinction is difficult to draw in reality, as is the distinction between law/non-law. Norms that are "authoritatively hard" because they originate in a legally binding instrument can nevertheless be "effectively soft".[271] An example is the coastal state duty to conserve and manage the living resources in its EEZ, which as discussed in chapter 3 are exempt from compulsory dispute settlement under the LOSC.

Treaties at times refer indirectly or directly to non-binding instruments, thereby making them applicable by way of law. There are numerous references in the LOSC to other

[267] Supra note 98.
[268] FAO Voluntary Guidelines for Flag State Performance, 2014, available at: http://www.fao.org/3/a-i4577t.pdf (hereafter: Flag State Performance Guidelines).
[269] E.g. Alan Boyle 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 International and Comparative Law Quarterly 901; Kenneth W. Abbott and Duncan Snidal 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421; and more generally the informal law making project (Joost Pauwelyn, Ramses Wessel and Jan Wouters (supra note 138)) and literature on interactional law making and GAL in later sections of this chapter, which give alternative accounts of international law making, and which do not consider normativity to be based on the formality of the sources listed in Art. 38 ICJ Statute.
[270] Kenneth W. Abbott and Duncan Snidal (Ibid.), p. 421. States may choose to not adopt hard (treaty) law for various reasons; often, because non-binding instruments are quicker to agree upon; more flexible; easier to amend; and less costly.
[271] Monica Hakimi (supra note 108), p 123.

international rules and standards.[272] Chapter 3 will explain to what extent particular provisions may thereby be understood as a reference to soft law, thereby giving them legal effect. An obvious example of how this may occur is the precautionary approach formulated in Principle 15 the Rio Declaration. Whilst the Declaration is non-binding, it is referred to in the Nodules and Sulphites Regulations of the International Seabed Authority, which are applicable to states sponsoring deep seabed mining activities in the Area under the LOSC. This "transform[s] this non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation".[273]

Non-binding instruments may also promote the implementation of 'hard law' treaty obligations. Adopted by consensus in the context of the FAO, the Code of Conduct and the IPOA-IUU interpret and substantiate the provisions of the LOSC and the Fish Stocks Agreement. Together with the Compliance Agreement, Boyle therefore considers that they "can be viewed as a package of measures that reinforce and complement each other."[274] What is more, non-binding instruments may provide the basis for the progressive development of law. Certain UN General Assembly Resolutions (in particular where they pertain to rules or principles) have for instance been viewed as proof of *opinio juris*, and thereby important for the identification of customary law.[275] Non-binding instruments may moreover provide

[272] Such references in the LOSC include Art. 21(2), that coastal state rules on innocent passage "shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards"; Art. 60(5) that the breadth of the safety zone around such structures is determined taking into account "applicable international standards"; Art. 61(3) that coastal state CMMs are designed to ensure MSY, taking into account *inter alia* "generally recommended international minimum standards, whether subregional, regional or global"; Art. 119(1), mirroring Art. 61(3) but with regard to the high seas; Art. 197, that "states shall cooperate … in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment…"; Art. 94(5), that in exercising their flag state responsibilities on safety at sea, states are required "to conform to generally accepted international regulations, procedures and practices"; and so on.
[273] *Advisory Opinion on Sponsoring in the Area* (supra note 264), para. 127.
[274] Alan Boyle 'Further Development of the Law of the Sea Convention: Mechanisms for Change' (2005) 54 International and Comparative Law Quarterly 563, p. 572.
[275] James Crawford (supra note 279), p. 42; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) (Merits) (Judgment), 27 May 1986, ICJ Reports 1986, p. 14, explaining "…*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of states towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves" (para. 188); and regarding the principle of non-intervention, that "[i]t is true that the United states, while it voted in favour of General Assembly resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law" (Official Records of the General Assembly, Twentieth Session, First Committee, A/C. 1 /SR. 1423, p. 436). However, the essentials of resolution 2131 (XX)

agreed interpretations of treaty obligations, or articulate general principles that should be taken into account for the purpose of treaty interpretation.[276] Alan Boyle therefore points out that "subtle evolutionary changes in existing treaties may come about through the process of interpretation under the influence of soft law".[277] Robin Churchill notes that in the absence of judicial interpretation by international courts of fisheries matters, interpretation, clarification and amplification can be found in other (non-binding) instruments such as the Code of Conduct and its IPOAs. Consequently, he notes that "the current lack of a significant fisheries jurisprudence is not especially a matter for regret, nor is it particularly pressing or essential that the [ITLOS] (or any other international court) develop a jurisprudence relating to fisheries".[278]

Recalling the interactional account, soft law norms such as those found in the Code of Conduct and IPOA-IUU can also be explained as embodying shared understandings of the legal norms found in law of the sea related treaties. The processes of making non-binding norms and applying them would thereby contribute to a practice of legality. If what I referred to as the "more ambitious" interactional account were pursued, norms found in non-binding instruments could even be considered legitimate legal norms themselves, provided they fulfil Fuller's criteria and be upheld by a practice of legality. For an interactional law account, the source of the norm (a binding instrument or not) does not matter.

2.6. Thesis structure

Keeping in mind the research question, as delimited in this chapter, and the proposed methodology, the remainder of this thesis is structured as follows.

Chapter 3 provides an in-depth overview of the behaviour targeted by market states. It explains the different international obligations states are under to prevent, deter, and eliminate IUU fishing, and to cooperate in ensuring sustainable fishing. This provides a basis to refer back to when evaluating aspects of country blacklisting under the EU IUU and Non-Sustainable Fishing Regulation; namely, whether they indeed seek compliance with

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are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be "basic principles" of international law, and on the adoption of which no analogous statement was made by the United states representative" (para. 203).

[276] Art. 31(3)(a) and 31(3)(c) VCLT; Alan Boyle (supra note 274), p. 572-573.

[277] Alan Boyle (Ibid.), p. 574.

[278] Robin Churchill 'The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is There Much in the Net?' (2007) 22 International Journal of Marine and Coastal Law 383, p. 424.

international fisheries norms or rather EU standards. This is relevant for the question of congruence, examined in chapter 5. Chapter 3 moreover provides insight into *why* markets play an increasingly important role in international fisheries conservation and management. Absent adequate flag- and coastal state performance, powerful market states can pick up some of the slack.

Chapter 4 describes in detail how the EU uses its market (and in particular, market access) to ensure compliance with the fisheries norms and obligations described in chapter 3 by way of the IUU and EU Non-Sustainable Fishing Regulations. It discusses both the procedural aspects of country blacklisting under each Regulation, and the substantive threshold for blacklisting.

Having thus set out the legal context of market conditionality in fisheries, described the country blacklisting mechanisms found in the two Regulations, and analysed how they operate, the remainder of the thesis turns to the question of appropriateness.

Chapter 5 builds on the theories introduced in chapter 2, and examines market conditionality in fisheries through the lens of interactional law making and GAL. It identifies the ideal conditions under which market states can support normative efforts at the international level, and do so fairly. Chapter 6 looks at jurisdictional limitations, the principle of non-intervention, countermeasures, and how the rules of the LOSC bear upon market conditionality. Chapter 7 examines specifically the substantive requirements of WTO law (the GATT and the TBT Agreement). Chapter 8 examines whether and where the standards relating to appropriateness identified in chapter 5 find their normative grounding. It looks specifically at the procedural requirements that have been generated through WTO law and the law of the sea, as well as practice by other bodies engaged in the global administration of fisheries (namely, RFMOs), and applies them to country blacklisting under EU IUU and EU Non-Sustainable Fishing. Chapter 8 thereby builds on and completes the analysis in the preceding two chapters of the legality of market conditionality in fisheries.

By way of conclusion, chapter 9 points out the extent to which the EU mechanisms are exemplary, and suggests improvements where they fall short.

2.7. Conclusion

This chapter introduced and explained the research question and set out its scope, and defined the relevant terminology. It has explained why this thesis looks at the *country-level* dimension of market conditionality, and has limited the focus to *unilateral* mechanisms (those adopted by a single market state). It identified three different though overlapping angles from which to evaluate the appropriateness of such market conditionality in fisheries. Namely, under what conditions is it lawful for market access to be made contingent upon countries' compliance with fisheries norms and obligations? Under what conditions does market conditionality in fisheries promote compliance and norm development (i.e. support international efforts)? Under what conditions can it be deemed fair? Finally, because of the EU's leading role in market conditionality in fisheries, it was explained that this thesis will ask whether the EU IUU and Non-Sustainable Fishing Regulations fulfil these conditions.

Doctrinal analysis plays an important role in answering these questions, both to analyse the two EU Regulations and to evaluate their legality. In order to examine their role in promoting compliance and norm development and their fairness, there is however a need to look beyond the law as it was, is, or will be, and to think about it in context. It requires unpacking the process of how legal norms come into being and who shapes them and how, in order to understand the potential contribution of market state action in this regard. Furthermore, the question of fairness requires thinking about the effects of market conditionality on other states, and how law can play a role in reducing arbitrary decision-making. Interactional law and GAL have been identified as a useful lens for these two aspects of appropriateness.

Since this thesis discusses international law (variably referred to as legal norms, legal principles, legal standards, legal obligations, or legal duties), this chapter reflected on what makes law 'law'. Lacking certain important features often associated with law, such as organised coercive enforcement and a determinate sovereign above states, international law has not always been considered 'law' to begin with.[279] But, the majority of scholars and

[279] Jeremy Bentham is often cited for having doubts about the lawlike character of international law, though Mark Janis writes that "All we have are strong suggestions that Bentham, for himself, was at least sometimes satisfied that there was enough to international law that was lawlike to let one call it law" (Mark W Janis 'Jeremy Bentham and the Fashioning of "International Law"' (1984) 78 American Journal of International Law 405, p. 412). Janis moreover shows that Bentham was positive about the discipline of international law and wrote extensively on the topic. It is to him we owe the transformation the commonly used terminology of the

practitioners now recognise that "the question whether international law is 'really' law is a question now, happily, largely one of the past".[280] Though there is no universal agreement on what distinguishes law from other sources of normativity,[281] it is generally considered that a rigid categorization of sources of international law is in inappropriate.[282] Rather, there appears to be a growing self-reflection in the legal community whereby "very few [commentators] disparage sources altogether, but most of them [distance] themselves from what they have come to call the 'traditional' or 'classical' list of sources and identify new ones."[283]

In light of this, it was explained that the most important sources of normativity for this thesis are treaties, customary law, jurisprudence by international courts and tribunals, and, under certain conditions, in soft law instruments adopted by states and/or international organisations. Furthermore, so as to examine standards of (procedural) fairness relevant to market states, this thesis will briefly examine the practice of RFMOs, which also engage in the global administration of fisheries. RFMOs are increasingly being called upon to respect procedural standards of transparency, participation, and review, when engaging in the global administration of fisheries, including when adopting market measures. They also appear to be responding to these calls. This is evidence of a (growing) shared understanding that adherence to administrative law-type standards is important in the administration of fisheries. RFMO practice is what spurred the international community's concerns over IUU fishing and led to the adoption of soft law in this area. If a unified body of practice were to emerge from

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'law of nations' into 'international law' (Jeremy Bentham *An Introduction To The Principles Of Morals And Legislation* J. H. Burns & H. L. A. Hart (eds) in *The Collected Works of Jeremy Bentham* F. Rosen and Philip Schofield (eds) (OUP, 1996; Oxford Scholarly Editions Online, 2015)). Bentham's disciple John Austin later most famously denied the law-like quality of international law, writing that "… the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. . . . the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected" (John Austin *The Province of Jurisprudence Determined: And, The Uses of the Study of Jurisprudence (with an Introduction by H. L. A. Hart)* (Hackett Publishing, 1998), p. 201; see also James Crawford *Brownlie's Principles of Public International Law* (OUP, 2012), p. 10).

[280] Frederick Schauer 'Sources in Legal-Formalist Theories, A Formalist Account of the Role of Sources in International Law' in Jean d'Aspremont and Samantha Besson (eds) *The Oxford Handbook on the Sources of International Law* (OUP, 2017), p. 394.

[281] As discussed in this chapter, scholars have discerned various qualities that make law 'law'. These include: whether a norm was adopted through a particular procedure; the intent behind a measure (to be binding or not); a measure's effect, or lack thereof; the (lack of) particular characteristics that affect a norm's 'inherent morality' or 'legitimacy'; and the existence or absence of a 'practice of legality'. For a brief overview and discussion, see Joos Pauwelyn (supra note 138), p. 131.

[282] James Crawford (supra note 279), p. 37; Jean d'Aspremont and Samantha Besson (supra note 153), p. 6.

[283] Jean d'Aspremont and Samantha Besson (Ibid).

RFMOs that market measures should respect certain procedural principles, this could lead to further (legal) developments.

3. States' international fisheries obligations

3.1. Introduction

The EU makes market access conditional upon states' compliance with their duties under international law as flag, port, coastal or market state, to take action to prevent, deter and eliminate IUU fishing.[284] Moreover, where states manage a stock of common interest with the EU, market access is made conditional upon compliance with their duty to cooperate in the sustainable management of the stock in question.[285] These constitute the respective thresholds for country blacklisting under the EU IUU and Non-Sustainable Fishing Regulations, as described and analysed in some detail in chapter 4.

What this chapter aims for is to provide insight into these international fisheries obligations. Namely, what is it that states must do, as a matter of international law, to 'prevent, deter and eliminate IUU fishing'? What must states do, as a matter of international law, to cooperate in the management of a stock of common interest (a transboundary stock), and to ensure its sustainable use? This provides a basis to refer back to when discussion in the next chapter whether and where the EU indeed seeks compliance with international norms, shapes or refines the interpretation of these norms, or goes beyond.

Describing the international legal framework for fisheries also sheds light on why market conditionality is a useful tool. By making access to markets/ports conditional upon compliance, the market (and/or port) state can mitigate flag state failures to take responsibility for fishing vessels flying their flag, or coastal state failures to sustainably conserve and manage living resources in their EEZ. This provides the immediate political and legal context for how the EU's Regulations came about, and is the main reason for ordering chapters 3 and 4 in this way.

This chapter commences with a brief overview of how states' rights and responsibilities over marine (living) resources have evolved to what they are today, thus placing these rights and responsibilities in their legal and historical context. The narrative starts with the 'Grotian ocean' (section 3.2) via UNCLOS III (section 3.3) and subsequent agreements (section 3.4) and ends, for now, with the 'dawn' of IUU fishing (section 3.5). This is immediately

[284] Art. 31 EU IUU Regulation.
[285] Art. 3 EU Non-Sustainable Fishing Regulation. Note that the actual threshold for blacklisting is lengthier and more complicated than that reproduced here in the text (see also chapter 4).

followed by a more in-depth analysis in section 3.6 of the description of IUU, which is found in the IPOA-IUU.

The remainder of the chapter examines what a country must do under the instruments introduced above to prevent, deter, and eliminate IUU fishing, or otherwise ensure sustainable fishing. Moving from the general to the specific, section 3.7 starts with the overarching duty to protect and preserve the marine environment, which has received much attention in recent jurisprudence. Section 3.8 then examines how this duty is given specific meaning in the context of the Exclusive Economic Zone (EEZ), where the coastal state has wide-ranging powers and responsibilities to prescribe and enforce measures. This also touches upon the duties of the port state and arguably market state. However, the discussion of the *extent* that port- and market states can act is left to chapters 6 and 7. Section 3.9 examines how this duty to protect and preserve the marine environment has been given specific meaning on the high seas, and the responsibilities this entails for the flag state. Section 3.10 at long last turns to the fundamental duty to cooperate that permeates the LOSC. It explores what is demanded of states when fishing on a transboundary stock, and questions to what extent this places states under an obligation to conform to an RFMO's conservation and management measures (conservation and management measures). Cooperation is often required as a matter of due regard to the rights and duties of other states, which therefore also forms part of the discussion. Section 3.11 ends the narrative by looking at the responsibilities of the market state in fisheries, to the extent that these exist, and section 3.11 concludes.

3.2. Pre-LOSC, from Grotius to Geneva

The basic characteristic of marine fisheries is that fish are a common property resource, swimming freely outside territorial borders: they are not owned by anyone, and anyone can (in principle) enter a fishery.[286] Up until today, states have been trying to regulate the problems that have resulted from this (such as having to develop scientifically sound methodologies for stock assessment; overfishing; overcapacity; and the need to cooperate[287]).

States' rights and responsibilities are first of all zonally divided. The relevant geographical zones for fisheries are the territorial sea, the EEZ, the continental shelf, and the high seas. Each of these zones is subject to a different regime, with the general philosophy

[286] Robin Churchill and Alan Vaughen Lowe *The Law of the Sea* (Manchester University Press, 1999), p. 281.
[287] Ibid. p. 282-283.

being that the closer a zone is to the coast, the more jurisdiction the coastal state has. Jurisdiction here relates to the power of states to *prescribe* (legislate) or to *enforce* their laws, but the term can also describe the possibility for an (international) tribunal to *adjudicate* upon a matter brought before it.[288] The content of these duties is expanded on further below. First, I briefly introduce why and how this zonal division of rights and responsibilities came about.

As Tullio Scovazzi explains in great detail, "the whole historical development of the law of the sea is based on the interplay between the two ideas of freedom of marine waters, and states' sovereignty over them."[289] Following early 'discoveries' of the new world(s) overseas by Columbus and other explorers, the Spanish born pope Alexander XI donated to Spain all lands overseas, discovered or undiscovered. This led Portugal to conclude with Spain the Treaty of Tordesillas in 1494, which settled potential conflicts over yet to be 'discovered' lands and essentially divided up the new world between the two maritime powers.[290] In practice, however, no other European power accepted the Papal disposition or the Treaty of Tordesillas' subsequent division. Much more convincing and influential was Huig de Groot ('Grotius')'s booklet *Mare Liberum*, printed anonymously in 1609, which provided the theoretical foundations of the principle of the freedom of the high seas. Grotius argued that the sea is limitless and therefore common to all, whether from the point of view of navigation or fisheries.[291] Whilst this was followed by a century at least of doctrinal dispute, the principle of *mare liberum* shaped state practice throughout the 18th and 19th centuries and remains a fundamental principle of the high seas.[292] Until the mid-1970's, the high seas meant all maritime areas outside the territorial waters and, where recognised, the waters outside an additional fishing zone. In contrast to the high seas, internal and territorial waters have always been subject to the sovereignty of the coastal state, though territorial waters are subject to the well-recognised exception that foreign flagged vessels enjoy innocent passage.[293]

Though countries thus enjoyed full and exclusive access to fisheries in their territorial sea, the actual breadth of the territorial sea remained disputed until late in the 20th century. In

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[288] Adjudicatory jurisdiction can by and large be analysed in terms of prescriptive and enforcement jurisdiction.
[289] Tullio Scovazzi 'The Evolution of International Law of the Sea: New Issues, New Challenges' (2000) 286 Collected Courses of the Hague Academy of International Law 39, p. 54.
[290] 'Treaty of Tordesillas' in Encyclopaedia Britannica.
[291] Hugo Grotius *The Freedom of the High Seas: or the Right Which Belongs to the Dutch to Take Part in the Indian Trade*, Translated by Ralph Van Deman Magoffin, Introduction by James Brown Scott (OUP, 1916).
[292] Tullio Scovazzi (supra note 289), p. 66-68.
[293] The right to innocent passage is now codified in Art. 17 LOSC.

1702, Cornelis van Bynkershoek wrote that territorial waters should extend as far as a cannon could shoot, which was then considered custom, and upon suggestion by Galliari in 1782 became the more pragmatic 3 nautical miles (nm) breadth of the territorial sea.[294] Over the course of the 19th century, state practice verged between 3 and 12 nm, though states increasingly sought to extend their jurisdiction geographically, by claiming larger swaths of sea or by unilaterally regulating fishing in areas adjacent to the waters they had claimed.[295]

That same period was marked by states starting to mutually restrict high seas freedoms through bilateral and multilateral agreements.[296] The reasons for this were mainly necessity: better techniques led to increased fishing capacity, and conflicts arose over the exploitation of marine living resources, and the power to regulate this exploitation. The most biologically productive areas of the oceans are coastal waters. Though only accounting for a small percentage of the ocean's surface, coastal waters are in close proximity to the surface (daylight) which provides for vegetation, oxygenated water, and therefore suitable habitats. Yet the coastal state's powers to regulate the marine living resources in the waters just off its coast remained limited and contested for many more years.[297] On the high seas, only the flag state has the power to enforce conservation (or other) regulations against vessels flying its flag.[298] Absent incentives for the flag state to adopt and enforce stringent conservation measures without other flag states doing the same thing, this meant that there was no sufficiently adequate framework for the sustainable management of marine living resources.

An early dispute over the extent of coastal state jurisdiction over living resources arose between the US and Canada (Great Britain) in the 1893 *Bering Fur Seals* Arbitration.[299] The Arbitral Tribunal rejected the US claim to the right to prohibit pelagic fur seal hunting in

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[294] Tulio Treves 'Historical Development of the Law of the Sea' in Donald Rothwell and others (eds) The Oxford Handbook of The Law of the Sea (OUP, 2015), p. 5; Tullio Scovazzi (supra note 289), p. 72-75.

[295] This trend of unilaterally extending jurisdiction over living resources beyond territorial waters started by a number of Latin American countries, which manifested itself in a declaration jointly adopted by Chile, Ecuador and Peru in Santiago on 18 August 1952, proclaiming exclusive jurisdiction and sovereignty over the sea adjacent to their coast and extending 200 nm. states also sought to extend their jurisdiction geographically to regulate the natural (non-living) resources found in the seabed and the subsoil off their coasts – mainly for the purpose of exploiting petroleum and minerals. A famous precedent is the US Truman Proclamation of 28 September 1945. This was not objected to, and other states followed suit. The LOSC codifies this practice through its continental shelf regime. For a detail discussion, see Tullio Scovazzi (supra note 289), p. 93-103.

[296] For instance the 1946 International Convention for the Regulation Whaling.

[297] The decision by Chile, Ecuador, and Peru to claim a 200 nm zone was heavily contested for a few years, until changes in the political climate (such as decolonization) made that many other states too started claiming exclusive fishing rights (Tullio Scovazzi (supra note 289), p. 99 and 106-107).

[298] Now embodied in Art. 94 LOSC.

[299] *Rights of Jurisdiction of United states in the Bering's Sea and the Preservation of Fur Seals* (United states v. United Kingdom) (Award), 15 August 1893, Reports of International Arbitral Awards, Vol. XXVIII, p. 263.

areas beyond its territorial waters.[300] In so doing, it upheld the freedom for all states to exploit living marine resources on the high seas. As well as having the Tribunal settle their dispute over jurisdiction, the parties were aware of the need to cooperate over the management of the seals and therefore requested regulations from the Tribunal on how to manage the sealing. The Tribunal availed itself of this competence. The regulations it drew up laid down a prohibition to hunt for fur seals within the radius of 60 miles from the Pribilof Islands, and imposed seasonal restrictions for the high seas area; required permits and record keeping; restricted the use of certain hunting gear; required a certain level of competence and fitness of the hunters; and ensured that these rules would not affect subsistence hunting by indigenous peoples.[301] As a whole, the *Bering Fur Seals* arbitration thus found an intermediate solution that respected the principle of *mare liberum*, yet at the same time providing a precedent for the duty to cooperate over the exploitation of marine living resources, which characterises the law of the sea today.[302]

The principles laid down in those regulations formed the starting point for the conclusion, in the years following the arbitration, of various other bilateral and regional fisheries agreements and declarations concerned with preventing the depletion of shared fish stocks. The late first half of the twentieth century in particular saw the establishment of some twenty or more international fishery organisations to regulate particular species or in a particular regions, as well as some (*ad hoc*) international agreements to conserve living marine resources.[303] They faced significant limitations, though, and generally suffered from the inability to agree on scientifically sound measures; opting-out procedures; poor enforcement of management measures; and the inability to regulate fishing by outsiders, because marine fisheries are a common resource and thus open to all. Moreover, whilst "rudimentary ideas of sustainability" were expressed in these and other agreements, the focus at the time remained mostly on economic exploitation – not ecological conservation.[304]

Up until this point, the law of the sea was mostly based on custom. First attempts at codification were made at the Hague Conference of Codification of International Law, which

[300] Ibid. p. 269.
[301] Ibid. p. 270-271.
[302] Tullio Scovazzi (supra note 289), p. 87.
[303] Robin Churchill and Alan Vaughen Lowe (supra note 286), p. 286.
[304] Nele Matz-Lück and Johannes Fuchs 'Marine Living Resources' in Donald Rothwell and others (eds) The Oxford Handbook of The Law of the Sea (OUP, 2015), p. 2. For a history of the (evolution) of the law of the sea, see *inter alia* R. P. Anand *Origin and Development of the Law of the Sea* (Martinus Nijhoff, 1983), p. 491.

was convened by the League of Nations in 1930. Committee work leading up to the Conference sought to produce a draft convention on the territorial sea, but failed to reach agreement on all points – including its breadth.[305] The International Law Commission, created in 1949, then took the relay on the codification of the law of the sea. Under the leadership of a Special Rapporteur, the International Law Commission produced reports on different aspects of the law of the sea and eventually produced a single, draft text that it presented to the UN General Assembly in 1956.[306] This formed the basis for the first UN Conference on the Law of the Sea (UNCLOS I), which was held over two sessions in Geneva in 1958. The difficulty to ensure widespread agreement on an all-encompassing text proved such that, instead, four separate conventions were adopted, as well as an optional protocol on dispute settlement by the ICJ (the Geneva Conventions[307]). The outcome of UNCLOS I was a milestone achievement. It provided the "foundation for the contemporary international law of the sea" by having transformed the law of the sea from mostly custom-based to a regime based on a multilateral treaty framework.[308]

Whilst UNCLOS I achieved a great deal, states again failed to agree on two important issues with regard to fishing: the breadth of the territorial sea, and the extent of coastal state jurisdiction over fisheries.[309] The closest UNCLOS I came to regulating jurisdiction over fisheries was the adoption of the High Seas Fishing Convention, which lays some of the foundations of the fisheries regime of the LOSC. The High Seas Fishing Convention specifies who (which state) may lawfully enact and apply conservation rules and sets out the circumstances and conditions under which such conservation rules may be applied to foreign vessels operating on the high seas.[310] The High Seas Fishing Convention is interesting for its conservation-conscious approach. Its Preamble considers that the development of modern fishing techniques have put marine living resources at the danger of over-exploitation, and the Convention therefore seeks to restrain high seas fishing so as to achieve the conservation of the living resources of the high seas (Preamble and Art. 1). The latter is defined as "the

[305] *Actes de la Conférence pour la Codification du Droit International*, 9 August 1930, Vol 1, C. 351/M. 145, p. 50-51, and the Commission's report at p. 123 (Annex 10).
[306] Tullio Treves '1965 Geneva Conventions on the Law of the Sea' [2008] United Nations Audiovisual Library of International Law 1, p. 1
[307] The Convention on the Territorial Sea and the Contiguous Zone (UN Treaty Series, 516, p. 205), the Convention on the Continental Shelf (UN Treaty Series, 499, p. 311), Convention on the High Seas (UN Treaty Series, 450, p. 11), the High Seas Fishing Convention (supra note 218), and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (UN Treaty Series, 450, p. 169).
[308] Donald R. Rothwell and Tim Stephens *The International Law of the Sea* (Hart Publishing, 2010), p. 9.
[309] 'Introduction' in *Virginia Commentaries* (supra note 237), p. xv.
[310] Tullio Treves (supra note 306), p. 1208.

aggregate of measures rendering possible optimum sustainable yield … so as to secure a maximum supply of food from marine products" (Art. 2). It moreover qualifies the freedom to fish on the high seas by a duty to adopt, or to cooperate with other states in adopting, necessary measures for the conservation of living resources (Art. 1(2)).

The Convention provides for a special interest of the coastal state in the maintenance of living resources in areas adjacent to their territorial seas (Art. 6(1)). This translates to a priority for the coastal state to set conservation measures for stocks which occur both in the territorial waters and the area adjacent to it. This means that another state's conservation measures may not clash with the coastal state's measures, and the coastal state can request an agreement with other states on conservation measures. The failure to reach an agreement within twelve months results in the dispute being settled by a special commission, at the coastal state's request. Most interestingly, the coastal state also enjoys residual unilateral powers to adopt conservation measures if an agreement cannot be reached with other state parties within *six* months. However, the Convention has proven largely to be a "dead letter", attracting only limited ratifications, and because of the growing number of international fishery commissions that had already been set up to take conservation measures.[311]

The second Conference on the Law of the Sea in 1960 (UNCLOS II) again failed (by one vote!) to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights. Subsequent practice did however cement the coastal state's "special right" as a customary norm. In the 1974 *Fisheries Jurisdiction*, the ICJ held as follows: "Two concepts have crystallised as customary law in recent years arising out of the general consensus revealed at [UNCLOS II]. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries (…)."[312]

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[311] Robin Churchill and Alan Vaughen Lowe (supra note 286), p. 287.

[312] *Fisheries Jurisdiction* (United Kingdom v. Iceland) (Judgment), 25 July 1974, ICJ Reports 1974, p. 3, para. 52; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland) 25 July 1974, ICJ Reports 1974, p. 175, para. 44.

This special interest or special right of the coastal state became a topic of dispute in subsequent law of the sea negotiations. It should be born in mind that, prior to the acceptance of a 200 nm. EEZ at UNCLOS III, the coastal state's interest in conservation and management was given priority because of their otherwise very limited rights over stocks just off their coast, outside their territorial waters. The LOSC expands the coastal state's jurisdiction and gives it sovereign rights over the living resources in a much larger area. The coastal state's special right with regard to stocks in adjacent waters has now more or less been lost (for further discussion see the discussion below on the duty to cooperate).

3.3. The LOSC, Constitution of the Oceans

The LOSC was adopted under the auspices of the United Nations on 10 December 1982 in Montego Bay, Jamaica, and has been in force as of 16 November 1994. It builds on the Geneva Conventions and, between state parties, prevails over them (Art. 311 LOSC). Its conclusion was the result of a decade of negotiations; the third United Nations Conference on the Law of the Sea (UNCLOS III), held between 1973 and 1982. As opposed to UNCLOS I and II, UNCLOS III did not start with a draft text created by the International Law Commission. Instead, the conference built on work undertaken by the UN General Assembly Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond Limits of National Jurisdiction in the years leading up to the conference.[313] Following to some extent the division of work of the Seabed Committee, the negotiations during UNCLOS III were grouped around three substantive committees, an informal group on dispute settlement, and the drafting committee.[314] Each of the three main committees was concerned with different topics. This explains why fisheries is dealt with in a different part of the LOSC than the protection of the marine environment, for example, since the regime for the former was drawn up by the second committee; whereas the latter subject had been allocated to the third committee.

This division of labour in committees and informal working groups, back-room discussions and the need for trade-offs to ensure consensus was very successful, and Boyle and Chinkin hail UNCLOS III a milestone achievement in international treaty-making.[315] Its 'package deal' quality and consensus-oriented approach pushed states to compromise on

[313] 'Introduction' in *Virginia Commentaries* (supra note 237), p. xxvi.
[314] Ibid.
[315] Alan Boyle and Christine Chinkin *The Making of International Law* (OUP, 2010), p. 146

certain parts in exchange for a *quid pro quo* compromise on other parts. This paid off. On the day of its conclusion, 119 states signed the LOSC right away. As of today, the LOSC has been ratified by 166 countries. The most notable exception to this is the US, which objected to the deep seabed regime created by Part XI. [316] Even the US, however, accepts that the LOSC's principal provisions (in so far that they do not relate to the seabed) reflect customary law.[317]

The LOSC is often referred to as the 'constitution of the oceans'.[318] Its 320 articles and 9 annexes establish a comprehensive legal regime covering a wide range of issues. The LOSC both endorses and redefines the concept of zoned ocean space by setting out specific legal regimes for various maritime zones, both pertaining to the water column (territorial seas; contiguous zone; the EEZ; the high seas) and pertaining to the seabed (continental shelf; the Area). By establishing a 200 nm EEZ, it formally settles coastal state powers over living resources off its coast.[319]Moreover, the LOSC puts in place new institutions, including the International Seabed Authority, which governs the Area; the Commission for the Limits of the Continental Shelf, a scientific body which purpose is to help delineate the outer limits of states' extended continental shelf; and the ITLOS, which is one of the four fora which can be chosen by state parties for the compulsory settlement of their disputes. States' rights and responsibilities under the LOSC, in so far that they are relevant to fisheries, are discussed in detail further below.

What is important to note here is the following. The LOSC further erodes the freedom to fish on the high seas, replacing it by principles of sustainable and shared use.[320] However, the enforcement of measures on the high seas (including in relation to the sustainable exploitation of marine living resources) remains the exclusive domain of the flag state (Art. 94 LOSC). Whilst the flag state certainly has the responsibility to ensure that fishing vessels flying its flag are not involved in activities which will undermine its responsibilities in

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[316] James L Malone 'The United States and the Law of the Sea after UNCLOS III' (1983) 46 Law & Contemporary Problems 29.
[317] Ibid. p. 33.
[318] See the remarks by Tommy T. B. Koh of Singapore, President of UNCLOS III, 'A Constitution for the Oceans', adapted from statements by the President on 6 and 11 December 1982 at the final session of the Conference, available at: http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf.
[319] Arts. 55, 56, 57 LOSC. By the time of the negotiations of UNCLOS III, around 93 coastal states (both developing and developed) were claiming extensive exclusive economic/fishing zones, and such extensive exclusive rights over living marine resources (with the exception of highly migratory species like tuna) was therefore reflective of the customary law at the time (James L Malone (supra note 316), p. 35).
[320] Mary Ann Palma *et al* (supra note 87), p. 56.

respect of the conservation and management of marine living resources, the successful execution of this is still up to the flag state. What these responsibilities (should) entail is discussed in more detail later in this chapter. It suffices to note here that first of all, the LOSC is a framework agreement and therefore general in nature, and does not outline what can be deemed responsible fishing gear, fishing methods, how to calculate quotas, etc.; and that second, in practice, not all flag states are responsible. The LOSC furthermore does not sufficiently settle the division of competences between the coastal state and flag states fishing on the high seas for transboundary stocks (high seas/EEZ). Whilst the LOSC obliges states to cooperate, it does not wholly settle whether or not the coastal state retains a special interest (or preferential right) in the conservation and management of straddling stock resources beyond the EEZ or allow for residual unilateral powers of the coastal state should cooperation fail, as the High Seas Fishing Convention did. It is generally considered that the recognition of an EEZ may be seen as having superseded any such preferential rights. This is discussed in more detail below. All this led to further negotiations and discussions over flag state behaviour; fishing gear and methods; and cooperation over the management of stocks that straddle different zones in the years after the adoption of the LOSC.

3.4. Post-LOSC, momentum at Rio

The period immediately following the adoption of the LOSC can be best described as a "two-track approach to the problems of high seas overfishing".[321] One of the tracks was the development of two instruments by the FAO (the voluntary Code of Conduct, dealing with fisheries more generally in all maritime zones, and the binding Compliance Agreement to discourage abusive reflagging), to which I turn first. The other was the negotiation of what was to become the Fish Stocks Agreement, dealing specifically with straddling and highly migratory stocks, to which I turn next. Together, there is "little doubt that the sum total of the changes introduced has substantially strengthened [the LOSC] regime."[322]

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[321] William Edeson, David Freestone, and Elly Gudmundsdottir *Legislating for Sustainable Fisheries, a Guide to Implementing the 1993 FAO Compliance Agreement and 1995 UN Fish Stocks Agreement* (2001)
[322] William Edeson 'Towards Long-term Sustainable Use: Some Recent Developments in the Legal Regime of Fisheries' in Alan Boyle and David Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP, 1999), p. 165.

3.4.1. Track one: the FAO

The nineteenth session of the FAO Committee on Fisheries (COFI), held in 1991, agreed that rational fisheries management remained a problem, in particular with regard to the high seas.[323] It underscored that the FAO has an important role to play in promoting international understanding about the responsible conduct of fishing operations, and suggested that FAO elaborate guidelines or develop a code of practice for responsible fishing.[324] This proposal was next considered at the International Conference on Sustainable held in Cancun in 1992, which adopted the Cancun Declaration, tasking the FAO with drafting an international Code of Conduct for Responsible Fishing, taking into account the Cancun Declaration.[325] Soon thereafter, work also began on a binding Agreement on the issue of abusive reflagging.[326] Reflagging is the common practice of cherry picking convenient flags of states that are irresponsible and/or not a member of a particular RFMO, and thereby not bound by that RFMO's specific fisheries quotas or other management measures (sometimes called 'flags of convenience', or 'flags of non-compliance').[327] Flying these flags to circumvent fishery conservation and management measures undermines the effectiveness of these measures.

The Compliance Agreement was adopted on 24 November 1993.[328] Though it was adopted before the Code of Conduct, its Preamble states that it is to "form an integral part of the [Code of Conduct]", though it is somewhat unclear what this entails given the Code's voluntary status. It entered into force on 24 April 2003. As of today, it has been ratified by 41 countries and the EU on behalf of its member states, who have not individually ratified the Agreement.[329] The Agreement reemphasises the need to exercise effective jurisdiction and control over vessels, as set out in Art. 94 LOSC, by stipulating that a state may only allow those fishing vessels, in respect of which it is satisfied that it can exercise its responsibilities under the Compliance Agreement, to fish on the high seas (Art. 3(3)). Part and parcel of this

[323] Report of the nineteenth session of the Committee on Fisheries, Rome, Italy, 8-12 April 1991, FAO Fisheries Report No. 459, FIPL/R459, paras. 81, 82, 83.
[324] Ibid.
[325] Declaration of the International Conference on Responsible Fishing, Cancun, Mexico, 6-8 May 1992.
[326] Patricia Birnie 'New Approaches to Ensuring Compliance at Sea: The FAO Agreement to Promote Compliane with Intenrational Conservation and Management Measures by Fishing Vessels on the High Seas' (1999) 8 Review of European, Copmarative and International Law 48, p. 51; William Edeson, David Freestone, and Elly Gudmundsdottir (supra note 309), p. 2.
[327] They can be deemed to be so bound anyway if they have ratified the Fish Stocks Agreement and/or failed to discharge their duty to cooperate more generally, discussed below.
[328] Supra note 215.
[329] This is so because the EU has ratified the Compliance Agreement in its exclusively competence over the conservation of marine biological resources, see Arts. 3 and 4(d) and (e) TFEU (for a discussion: supra note 83).

is the obligation to take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures (Art. 3(1)(a)).

The Code of Conduct, which provides the framework for the Compliance Agreement, was adopted by consensus in November 1995 at the 28th Session of the FAO Conference – that is, *after* the text of the Fish Stocks Agreement had been agreed upon. It is non-binding, though many of its provisions are generally accepted to reflect customary law.[330] It can be described as a framework for creating "awareness of the need for all states to act responsibly in all fishing related matters everywhere in the world."[331] It is a very long document, containing both general provisions (principles) and detailed sections on fisheries management. Importantly, it allowed for the subsequent adoption of the IPOA-IUU, already discussed in the Introduction to this thesis, which is one of four IPOAs adopted under the Code of Conduct to date.[332] I return to the IPOA in below.

3.4.2. Track two: The Fish Stocks Agreement

With the extension of the 200 nm EEZ, many distant water fishing nations were displaced from their traditional fishing grounds. As a result, they had been left with (and continued the subsidised construction of) fleets of expensive, under-utilised vessels which, with few other fishing opportunities, continued to create conservation and allocation problems in stocks overlapping the EEZ/high seas zones.[333] Although the LOSC imposes mutual obligations to cooperate on all parties that together exploit a high seas or transboundary stock (discussed in detail in section 3.10 below), its obligations are of a general nature. For the high seas, the duty to cooperate is embodied in Art. 117 LOSC, which requires all states to take or cooperate with other states in taking necessary conservation measures for their respective nationals, and Art. 118 LOSC, which provides that states shall cooperate through negotiations, and as appropriate, cooperate to establish RFMOs to this end. Similarly, Art.

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[330] Patricia Birnie (supra note 326), p. 51.
[331] Ibid. p. 52.
[332] The first three IPOAs were developed over the course of two intergovernmental meetings held subsequent to the 22nd session of the FAO COFI in 17-20 March 1997. They were adopted at the next (23rd) session of COFI in 1999. They concern the management of fishing capacity (IPOA-capacity); the conservation and management of sharks (IPOA-sharks); and the reduction of incidental catch of seabirds in longline fisheries (IPOA-seabirds). The IPOA-IUU is the fourth and most recent of these IPOAs.
[333] As highlighted in a Report by the Canadian Task Force on Atlantic Fisheries, cited in Peter GG Davies and Catherine Redgwell 'The InternationaL Legal Regulation of Straddling Fish Stocks' (1997) 67 British Year Book of International Law 199, p. 221.

63(2) LOSC provides that the coastal state must cooperate with those states whose vessels fish stocks that straddle the EEZ/high seas boundary, and "seek to agree" on the necessary measures for the conservation of these stocks in the adjacent area. The provision stipulates that they can do so bilaterally, or through an RFMO. Moreover, the LOSC contains a list of highly migratory species in Annex I for which the coastal state and other states whose nationals fish for those species listed must cooperate with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the EEZ (Art. 64(1)). Again, they can either do so bilaterally or through an RFMO. But where no RFMO exists, states must establish one, and participate in its work (Art. 64(2)).

Though the LOSC thus recognises the need to cooperate, and even refers to RFMOs as the "recognised *modus operandi*" for doing so, its provisions leave many questions unanswered.[334] They do not provide an answer to the question whether or not the coastal state retains a special interest (or preferential right) in the conservation and management of straddling stock resources beyond the EEZ or allow for residual unilateral powers of the coastal state should cooperation fail, as the High Seas Fishing Convention did. They contain no further specification as to the nature and functioning of RFMOs. The mounting pressure from distant water fleets fishing on the high seas portion of transboundary stocks, and the fact that the balance of rights between the coastal state and other states remained unresolved, led to the following developments.

In 1990, the Canadian government convened a conference at St John's in Nova Scotia to address this problem, which proposed that the management of stocks within and outside the EEZ should be consistent.[335] This had decisive influence over the work that was at the time being undertaken in preparation for the 1992 Rio Conference,[336] and which gave considerable consideration to the question of high seas fisheries and straddling stocks.[337] On 22-26 July 1991 the UN Office for Ocean Affairs and the Law of the Sea moreover convened a Group of Technical Experts on High Seas Fisheries "with the view of drafting guidelines to assist states

[334] Rosemary Rayfuse 'Regional Fisheries Management Organisations and their Efforts and Measures to Regulate Fishing Activities' in Hans Joachim Koch *et al* (eds) *Legal Regimes for Environmental Protection* (Brill, 2015), p. 155.
[335] David Freestone 'International Fisheries Law Since Rio: the Continued Rise of the Precautionary Principle' in Alan Boyle and David Freestone (supra note 322), p. 143.
[336] As asked for by UN General Assembly Resolution of 22 December 1989, A/RES/44/228.
[337] David Freestone (supra note 335); Francisco Orrego Vicuña *The Changing International Law of High Seas Fisheries* (CUP, 1999), p. 120.

in improving the level of co-operation in the conservation and management of all such fisheries".[338] What followed were more preparatory meetings in the run up to Rio during which a group of developing states actively lobbied for recognition of special rights of the coastal state in the regulation of, and cooperation over, straddling stocks and highly migratory species.[339] This issue proved controversial, but after the Cancun Declaration called upon states to resolve their differences, a compromise was finally found by way of paragraph 17.50 of Agenda 21, adopted at the 1992 Rio Conference. Agenda 21 first of all identified many outstanding issues that hamper sustainable fisheries, building on what had been said at Cancun, and called for an intergovernmental UN conference to promote the effective implementation of the LOSC provisions on straddling and highly migratory fish stocks, which should identify and assess existing problems related to the conservation and management of such fish stocks, and consider means of improving cooperation on fisheries among states, and formulate appropriate recommendations … "fully consistent with the provision of [the LOSC], in particular the rights and obligations of coastal states and states fishing on the high seas.[340]

Close to the final rounds of negotiation on the text of the Fish Stocks Agreement, the problematic nature of straddling stocks came to the fore in the arrest by Canadian authorities of the Spanish flagged vessel *Estai.* The *Estai* had been fishing for Greenland halibut just outside the Canadian EEZ, in an area of the high seas that was regulated by NAFO. Frustrated with NAFO's inability to enforce its conservation and management measures, Canada had previously amended its Coastal Fisheries Protection Act, granting its fisheries protection officers wide-ranging powers to board, inspect, arrest, and even use force in arresting a vessel that fished in contravention of prescribed conservation and management measures in the NAFO area.[341] Objecting to NAFO's quota distribution for Greenland halibut, the EU had set its own unilateral quota for this stock, to which Canada objected.[342] Once Canada observed that the EU was fishing for *more* than the quota allocated by NAFO,

[338] Barbara Kwiatkowska 'The High Seas Fisheries Regime: At a Point of No Return?' (1993) 8 International Journal of Marine and Coastal Law 327, p. 346. The draft Guidelines that were prepared by the Group are attached to Kwiatkowska's paper in Annex I.
[339] Ibid. p. 347-351.
[340] Agenda 21 (UN General Assembly, 'Report Of The United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992', A/CONF.151/26/Rev.l (Vol. l)), para. 17.50.
[341] Coastal Fisheries Protection Act, section 5.2, amended by Statutes of Canada, 1994, c. 14, cited in Peter GG Davies and Catherine Redgwell (supra note 333), p. 210, which also gives a detailed overview and analysis of the dispute.
[342] Peter GG Davies and Catherine Redgwell (supra note 333), 215.

it seized the *Estai*, using force in doing so, and arrested its captain.[343] The arrest resulted in Spain bringing proceedings against Canada before the ICJ. However, prior to amending its legislation, Canada had suspended the compulsory jurisdiction of the ICJ for such time as it felt this was necessary" to take retaliatory action against those engaged in overfishing".[344] The ICJ indeed found it did not have jurisdiction,[345] and the parties eventually agreed on a share-out of the NAFO set quota.[346]

The Fish Stocks Agreement aims to deal with situations such as the above by putting flesh on the bones of the duty to cooperate over straddling stocks and highly migratory species, that are enshrined in the LOSC. It was adopted on 4 August 1995, by consensus, and entered into force on 11 December 2001. The Fish Stocks Agreement's underlying values are clearly rooted in the LOSC, but it is also coloured by the international community's heightened environmental awareness post-Rio.[347] It clearly states that nothing in the Agreement shall prejudice the rights, jurisdiction and duties of states under the LOSC, and the Agreement must be interpreted and applied in the context of and in a manner consistent with the LOSC (Art. 4). Whilst the title of the Fish Stocks Agreement includes the term 'implementing', the Fish Stocks Agreement remains a stand-alone agreement.[348] States can have ratified the LOSC but not the Fish Stocks Agreement, and the other way around.

The Fish Stocks Agreement's objective is "to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the [LOSC]" (Art. 2). It does this by establishing and operationalising general environmental principles, including *de facto* ecosystem-based management (Art. 5) and by setting out in some detail the precautionary approach (Art. 6 and Annex II). In response to the coastal state concerns outlined above, the Agreement demands that measures for the high seas and those under national jurisdiction be "compatible", and that measures established in respect of the high seas portion of a stock do not undermine the

[343] Ibid.
[344] Ibid. p. 213.
[345] *Fisheries Jurisdiction* (Spain v. Canada) (Jurisdiction of the Court) (Judgment), 4 December 1998, ICJ Reports 1998, p. 432.
[346] Peter GG Davies and Catherine Redgwell (supra note 333), p. 256.
[347] David Freestone (supra note 335), p. 146, 148.
[348] Ibid. p. 155.

effectiveness of coastal state measures for that same stock that apply in areas under national jurisdiction (Art. 7(2)(a)).[349]

The term 'areas under national jurisdiction' is not defined. It is considered that, following the rules of the VCLT, it can either be interpreted literally, as including the EEZ, territorial sea, archipelagic waters and internal waters; or, because the duty to cooperate implements that found in Art. 64 LOSC which concerns the EEZ and high seas, only the EEZ.[350] This question is of particular relevance in the Pacific, where large swathes of ocean are claimed as archipelagic waters, and there is a lack of clarity whether the relevant RFMO in the area (the WCPFC) has competence in these waters.[351]

Coastal state interest is furthermore given priority in the obligation to take into account the biological unity of the stocks, "'including the extent to which the stocks occur and are fished in areas under national jurisdiction" (Art. 7(2)(d)). This is discussed in more detail in section 3.10. The Fish Stocks Agreement moreover incorporates innovative provisions on high seas enforcement by non-flag states. Its provision on the general duties of the flag state mirrors the provisions of the Compliance Agreement (Art. 18).

Perhaps the Fish Stocks Agreement's most significant contribution is that it limits the freedom to fish on the high seas. In that respect, the Fish Stocks Agreement can be – and has been – considered as breaking "new ground" international fisheries law.[352] It essentially prohibits fishing in an area governed by an RFMO, without becoming a member or otherwise abiding by its conservation and management measures – which essentially means gaining approval to fish.[353]

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[349] I recall that the Seas Fishing Convention dealt with the question of compatibility by granting the coastal state the power to request an agreement with other states on conservation measures, and acknowledging residual coastal state powers to adopt conservation measures in the absence of an agreement (Art. 6(1)) (supra note 310 and surrounding text).

[350] Martin Tsamenyi and Quentin Hanich 'Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States' (2012) 27 The International Journal of Marine and Coastal Law 783, p. 789. The authors also point to Bill Edeson's work, who for example argues that the wording of Art. 3(1) on the scope of the Fish Stocks Agreement implies an application to more than just the EEZ, which would extend the competence of RFMOs also to territorial seas and archipelagic waters (William Edeson 'The Legal Aspects of the Collection of Fisheries Data' (1999) 953 FAO Fisheries Circular (Rome, FAO)).

[351] Martin Tsamenyi and Quentin Hanich (Ibid.), p. 788. This is discussed further in chapter 4, section 4.4.3.

[352] Tore Henriksen, Geir Hønneland, and Are Sydnes *Law and Politics in Ocean Governance* (Martinus Nijhoff, 2006), p. 1.

[353] Discussed below, and in Hyun Jung Kim 'The Return to a Mare Clausum Through Regional Fisheries Management Organizations?' (2013) 44 Ocean Development & International Law 205; Andrew Serdy 'Pacta Tertiis and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut

RFMOs occupy a central role in the cooperation over transboundary resources. Until the Fish Stocks Agreement was adopted in 1995, there was no international agreement on the management authority of RFMOs.[354] The Fish Stocks Agreement gave them a mandate and put them central stage, spurring the creation of many more RFMOs and influencing the 'design' of existing ones. RFMOs variably carry out important administrative functions, including the making, implementing, monitoring and enforcement of rules pertaining to fisheries.[355] RFMOs are organisations created by a treaty and vested with authoritative powers, often with a budget; a secretariat; consultative bodies; etc. They are variably may be in charge of gathering statistical and scientific information; they may adopt binding decisions, including on quotas; they may put in place monitoring schemes; etc. The rules they administer are rooted both in their own founding Treaty and the general regime of the law of the sea – including decisions adopted by the FAO. They may even have in place their own dispute settlement mechanisms.

The expectations placed on RFMOs are particularly high in the context of combating IUU fishing (see section 1.5) and the IPOA-IUU mentions RFMOs throughout the text as important venues for cooperation between coastal and flag states. These expectations may be growing in coming years. Current negotiations in the WTO over an agreement to reduce harmful subsidies for fishing look to RFMOs as one possible (albeit disputed) vehicle for identifying vessels to which a subsidy discipline might apply. A determination by an RFMO that a vessel has engaged in IUU fishing would then trigger the subsidy prohibition to that vessel or operator.[356] The negotiations have moreover highlighted the role RFMOs could play in identifying overfished stocks and fisheries management, whereby some states suggest that RFMOs should be *presumed* to be the relevant, trusted international bodies for this purpose, and no distinction should be made between existing or future RFMOs.[357]

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to a Legitimate Goal' (2017) 48 Ocean Development and International Law 345; Erik J Molenaar (supra note 18).

[354] Judith Swan *Decision-Making in Regional Fishery Bodies or Arrangements: The Evolving Role of RFBS and International Agreement on Decision-Making Processes. FAO Fisheries Circular. No. 995* (FAO 2004) , p. 2.

[355] The institutional characteristics and functions of RFMOs vary, however. A non-exhaustive list of the functions of RFMOs can be found in Art. 10 Fish Stocks Agreement. On the variety of decision-making of/within RFMOs, see Erik J Molenaar 'Non-Participation in the Fish Stocks Agreement: Status and Reasons' (2011) 26 International Journal of Marine and Coastal Law 195, p. 221; Ted L McDorman 'Implementing Existing Tools: Turning Words into Actions. Decision-Making Processes of RFMOs' (2005) 20 The International Journal of Marine and Coastal Law 423, p. 427, and further below in this chapter.

[356] Carl-Christian Schmidt (supra note 36).

[357] See discussion in Margaret A Young 'The "Law of the Sea" Obligations Underpinning Fisheries Subsidies Disciplines' [2017] International Centre for Trade and Sustainable Development.

The Fish Stocks Agreement thus institutionalises the duty to cooperate that is central to the LOSC through the medium of RFMOs, turning them into the primary vehicles for the conservation and management of straddling stocks and highly migratory species – and beyond.[358] The growing role of RFMOs – also beyond that envisaged by the Agreement – raises the important question however how procedural fairness in RFMO decision-making can be ensured.[359] The Fish Stocks Agreement does not put in place criteria or a procedure for assessing whether RFMOs are compatible with the Agreement; does not demand their performance to be systematically reviewed, or provide guidance for such reviews; or even contain a "blueprint" for what decision-making in RFMOs should look like.[360] Parallel to the emergence of the concept of IUU fishing and developments for discouraging different kinds of unsustainable fishing, we can therefore see a growing demand in international documents for the need to strengthen and improve fisheries governance through RFMOs. Section 1.5 returns to this in consideration of RFMO measures to combat IUU fishing.

It is also important to keep in mind that the rights and responsibilities enshrined in the Fish Stocks Agreement are binding *only* on those states that have ratified the Agreement, except in so far that they reflect customary law.[361] The Agreement now has 90 ratifications, whereas the LOSC has 168. Some very important coastal- and high seas fishing state are not yet party to the Fish Stocks Agreement, namely China and Argentina. On the other hand, Chile (11 February 2016), Thailand (28 April 2017), and most recently Vietnam (18 December 2018) have now ratified it.

Non-universal ratification of the Fish Stocks Agreement also means that different RFMO members may be under different international obligations.[362] For example, of the CCAMLR parties, Argentina has not ratified it. Within NAFO, Cuba has not ratified the Agreement, and China, remains an important non-participant of the Agreement yet is a member of ICCAT,

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[358] Rosemary Rayfuse 'To Our Children's Children's Children: From Promoting to Achieving Compliance in High Seas Fisheries' (2005) 20 International Journal of Marine and Coastal Law 509, p. 513.

[359] Their role for the purpose of WTO subsidies negotiations moreover raises the question of compatibility with other aspects of WTO law. It is submitted that RFMOs are likely *not* global standardising bodies for the purpose of the TBT Agreement for their lack of openness in terms of membership. This is not discussed further here, but in other chapters on file with the author. The lack of openness in RFMO membership is discussed in some detail in Erik J Molenaar 'Participation in Regional Fisheries Management Organizations' in Erik J. Molenaar and Richard Caddell (supra note 24), p. 121-123.

[360] Erik J Molenaar (supra note 355), p. 221; Ted L McDorman (supra note 355), p. 427.

[361] As per the general and fundamental principle *pacta tertiis* (*nec nocent nec prosunt*), namely that a treaty is binding only between its parties and does not create obligations on third states, now embodied in Art. 34 VCLT (Rosemary Rayfuse (supra note 334), p. 158-158.

[362] Ted L McDorman (supra note 355).

IOTC and WCPFC. This is often mitigated however by the fact that a number of RFMOs have amended their own constituting treaties to reflect some of the principles of the Fish Stocks Agreement, thus also minimising in practice the lack of universal ratification of the Agreement. The provisions of the Fish Stocks Agreement are also widely referred to by RFMOs whose management scope is broader than that of straddling stocks and highly migratory species, which also widens the Agreement's ambit.[363]

As the Fish Stocks Agreement continues to be ratified, it may however be argued that the relevant provisions of the LOSC are to be interpreted in conjunction with those of the Fish Stocks Agreement. David Freestone and Alex Oude Elferink suggest that "the Agreement and the [LOSC] are fundamentally inter-related in the sense that one can be used to inform the interpretation of the other."[364] The Agreement *may* by now perhaps be understood as a subsequent agreement between the parties regarding the interpretation and application of the LOSC provisions on straddling stocks and highly migratory species, as per Art. 31(3)(a) VCLT, and thereby influence the development of international fisheries law.[365] Such a reading would "assist in clarifying the content and extent of the freedom of fishing on the high seas as well as achieving a uniform law on the subject", in so far that this relates to the stocks covered by the Agreement.[366] Furthermore, there is the question whether the Agreement has influenced the formation of customary law. Whilst this may be so, care should

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[363] Christopher Hedley and others 'Perspectives for the UN Fish Stocks Agreement (Study for the European Parliament, IP/B/PECH/IC/2006_159)' [2007] Oceanlaw Information and Consultancy Services, p. 29, noting that the constitutive instruments of RFMOs established after the conclusion of the Fish Stocks Agreement clearly reflect its principles, even where there is no direct reference to Art. 5 ("Article 5 is repeated almost verbatim in the WCPFC Convention and the relevant principles are extensively reflected in the SEAFO Convention and the SIOF Agreement. Article 5 is also being used as a point of reference in the SPRFMO negotiations. The Galapagos Agreement, although notable generally for its rejection of the Fish Stocks Agreement language, also largely reflects the general principles of Article 5") and that (already at the time of their writing) several RFMOs had made good progress in modernising their constitutive instruments to implement the Agreement (p. 18).

[364] David Freestone and Alex Oude Elferink conclude that "the Agreement and the Convention are fundamentally inter-related in the sense that one can be used to inform the interpretation of the other."; David Freestone and Alex Oude Elferink 'Flexibility and innovation in the law of the sea' in Alex Oude Elferink (ed) *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers, 2005), p. 20.

[365] Alan Boyle (supra note 274), p. 571, though at the time of his writing only some 50 states had ratified the Agreement and he therefore concludes that a greater degree of participation, or acquiescence, is needed first. Others that entertain this argument include Tore Henriksen 'Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations' (2009) 40 Ocean Development & International Law 80, p. 81; David Anderson 'The Straddling Stocks Agreement of 1995 – an initial assessment' (1996) 45 *International Law and Comparative Law Quaterly*, p. 468. For an argument to the contrary and more generally recalling the limited value in practice of evolutionary interpretation, see James Harrison *Making the Law of the Sea: A Study in the Development of International Law* (CUP, 2011), p. 107-108.

[366] Tore Henriksen and Alf Håkon Hoel 'Determining Allocation: From Paper to Practice in the Distribution of Fishing Rights Between Countries' (2011) 42 Ocean Development & International Law 66, p. 71.

be taken to distinguish *which* provisions of the Agreement may have done so. James Harrison concludes that "at least" with regard to those provisions which are expressed in general terms and which are supported by consensus, "the practice of states in negotiating the Agreement may have led to the crystallization of new rules of customary international law", and points to state practice to support this view.[367] He maintains however that "it does not follow that all the provisions of the Agreement are now reflected in rules of customary international law", since some parts are clearly not general but drafted in terms of "States Parties."[368] As discussed below in the context of unregulated fishing and the duty to cooperate, despite the Agreement's importance and the growing centrality of RFMOs, it is for instance unlikely that customary law imposes a "blanket obligation" on RFMO non-member states to accept an RFMO's conservation and management measures.[369]

3.5. Post-Rio, the dawn of IUU

The final text of the Fish Stocks Agreement did not resolve all the different points of view between major fishing states, and raised 'new' issues. Disagreement and concerns remained over its compatibility with the high seas freedoms enshrined in the LOSC; whether the compatibility requirement of conservation and management measures for the high seas and for areas under national jurisdiction, favours coastal states' too much – or rather, not enough; and other issues, which hampered its immediate ratification by many important fishing nations.[370] These concerns are less and less important today, however, as the Agreement is increasingly ratified. What is more, as Erik Molenaar points out, the significance of wider ratification should not be overstated either, since the politically sensitive issues of restricting access and allocating fishing opportunities – the things that really matter for sustainable fisheries – are not dependent on that, but rather depend on action undertaken by RFMOs.[371]

This brings me to the 'new' issues that the Fish Stocks Agreement raises, namely ensuring the quality of, and compliance with, RFMO conservation and management

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[367] James Harrisson (supra note 365), p. 108-113.

[368] Ibid. p. 112. Andrew Serdy furthermore argues that the Fish Stocks Agreement does not yet reflect customary law (Andrew Serdy (supra note 353), p. 349); and does not bind third parties, as explained at length in Erik Franckx 'Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea' (2000) 8 Tulane Journal of International and Comparative Law 49, p. 74

[369] Tore Henriksen (supra note 365), p. 91.

[370] Erik J Molenaar (supra note 355). At the time of adoption, major fishing nations such as China, Japan, South Korea, Spain, Indonesia, Argentina, Philippines, and Thailand had not ratified the Agreement.

[371] Ibid. p. 221.

measures. The Agreement amplifies and implements the provisions of the LOSC with regard to straddling stocks and highly migratory species, but it in turn relies on RFMOs to amplify and implement *its* provisions at regional level, thus creating a "three-tiered structure" of mutual reinforcement and dependence.[372] The wake of the Fish Stocks Agreement saw a rise in the establishment of RFMOs, and with it, the by now familiar (and therefore not strictly speaking 'new') problem of dealing with outsiders. Whilst under the Fish Stocks Agreement, vessels flagged to non-members must comply with RFMO conservation and management measures to access the fishery, this is not clearly the case for vessels whose flag state have not ratified the Agreement.[373] This turned out to be a growing problem for many RFMOs, and ultimately led to the emergence of the concept of IUU fishing. In 1996, CCAMLR showed "extreme concern" for the growing presence of vessels of non-members, which undermined CCAMLR's fisheries management efforts.[374] The next CCAMLR meeting in 1997 then identified what were to become the three prongs of IUU fishing (illegal, unreported, and unregulated fishing), and requested the Secretariat and CCAMLR parties to further research measures to combat this.[375]

Ensuring compliance with RFMO measures (and in particular by non-members) is still a widespread and difficult to resolve issue. It provided – and still provides – fuel for further developments in international fisheries law and policy. But there is another side to this coin. When encouraging compliance with RFMO conservation and management measures, it is important to ensure the 'quality' (such as scientific soundness and fairness) of these measures. This is where the Fish Stocks Agreement significantly falls short. The Fish Stocks Agreement does not put in place criteria or a procedure for assessing whether RFMOs are compatible with the Agreement; does not demand their performance to be systematically reviewed, or provide guidance for such reviews; or even contain a "blueprint" for what decision-making in RFMOs should look like.[376] Parallel to the emergence of the concept of IUU fishing and developments for discouraging different kinds of unsustainable fishing, we can therefore see a growing demand in international documents for the need to strengthen and

[372] Peter GG Davies and Catherine Redgwell (supra note 333), p. 269.
[373] Section 3.5 below on the definition of IUU fishing, and in particular unregulated fishing.
[374] William Edeson 'Closing the Gap: The Role of "Soft" International Instruments to Control Fishing' (1999) 83 *Australian Yearbook of International Law* 83, p. 94; CCAMLR-XV of 21 October-1 November 1996, Meeting Report, paras. 7.12-7.13 and Annex 6.
[375] CCAMLR-XVI of 27 October-7 November 1997, Meeting Report, para. 8.13 and Annex 6. Evidently, illegal fishing has been a concern for regulators since the dawn of international fishing regulations, and international conflicts over fishing rights has a long history, as elaborated on earlier in this chapter.
[376] Erik J Molenaar (supra note 355), p. 221; Ted L McDorman (supra note 355), p. 427.

improve fisheries governance through RFMOs. This is not further elaborated on at this point in the thesis. I discuss the need for procedural fairness in the decision-making of bodies engaged in global governance (including RFMOs) in chapter 5. More specifically, I turn to the outcomes of RFMO performance reviews and criteria for ensuring 'good governance' by RFMO in the context of global administration in international fisheries in chapter 8, section 8.3.2.

Returning to the concept of IUU fishing, it can be noted that whilst it originates in CCAMLR, Agenda 21 already identified 'unregulated fishing' as one of many issues that challenge the sustainable management of high seas fisheries,[377] and the 49th session of the UN General Assembly in 1994 had already elaborated on the problem of 'unauthorised fishing' in zones of national jurisdiction (which amounts to illegal fishing).[378]

In the following years, the concept of IUU fishing quickly gained international traction. In October 1998, the Consultation on the Management of Fishing Capacity, Shark Fisheries and Incidental Catch of Seabirds in Longline Fisheries, which led to the adoption of the previously mentioned IPOA-sharks, IPOA-seabirds, and IPOA-capacity,[379] showed concern over the growing amount of what is now frequently termed IUU fishing, including by flags of convenience. The Report noted that "states should recognise the need to deal with the problem of those states which do not fulfil their responsibilities under international law as flag states with respect to their fishing vessels, and in particular those which do not exercise effectively their jurisdiction and control over their vessels which may operate in a manner that contravenes or undermines the relevant rules of international law and international conservation and management measures. States should also support multilateral co-operation to ensure that such flag states contribute to regional efforts to manage fishing capacity." [380]

Soon thereafter, Australia presented a paper to the 23rd session of the FAO COFI, in February 1999, which highlighted the need for the FAO to adopt an IPOA on IUU fishing.[381] At that meeting, various delegations called for a meeting of experts to identify suitable

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[377] Agenda 21 (supra note 104), para 17.45; Mary Ann Palma *et al* (supra note 87), p. 26.
[378] *Unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources of the world's oceans and seas*, G.A. res. 49/116, 49 UN GAOR Supp. (No. 49) at 142, U.N. Doc. A/49/49 (1994).
[379] Supra note 332.
[380] Report of the Consultation on the Management of Fishing Capacity, Shark Fisheries and Incidental Catch of Seabirds in Longline Fisheries, Rome, 26-30 October 1998, Appendix G para. 33.
[381] David J Doulman 'Illegal, Unreported, and Unregulated Fishing: Mandate for an International Plan of Action' [2000] Document AUS:IUU/2000/4, http://www.fao.org/docrep/005/Y3274E/y3274e06.htm#.

measures to deal with IUU fishing, which would take into account RFMO action on that front, followed by a technical consultation that would report to the next COFI meeting.[382] At the next meeting on the implementation of the Code of Conduct, in March 1999, fisheries Ministers explicitly referred to the "growing amount of illegal, unregulated and unreported fishing activities being carried out" and unanimously called for the development of a global plan of action to deal with "all forms of IUU including fishing vessels flying 'flags of convenience'" through coordinated efforts by states, FAO, RFMOs and other relevant international agencies such as the International Maritime Organisation (IMO). [383] Meeting in June, the FAO Council then "agreed that a global approach be taken by FAO to develop a strategy to address the problem of IUU, noting that this initiative should be carried forward through the development of an IPOA within the framework of the Code of Conduct".[384] In May 2000, an Expert Consultation on IUU fishing was organised by Australia, in cooperation with the FAO. The Expert Consultation produced a first draft of the IPOA-IUU.[385] This was followed by and a joint FAO/IMO Ad Hoc Working Group on IUU fishing and related matters and two Technical Consultations in October 2000 and February 2001, at which point a revised draft was adopted.[386] Final amendments were agreed at an informal "friends of the Chair" meeting, led by David Balton, following which the final text of the IPOA-IUU was agreed upon and endorsed at the FAO Council on 23 June 2001.[387]

The reason for setting out this process is in some more detail is, as William Edeson points out, that the IPOA-IUU was negotiated "as if there was a risk that it would become a binding legal text."[388] For instance, at the second Technical Consultation, which adopted a revised draft IPOA-IUU, various countries had reservations about the final text. Some points in particular are interesting, such as the statement of the EU. It "recorded its concern" that the definition of IUU fishing, which has not changed in the adoption of the final text of the IPOA-IUU, "is not entirely appropriate, but could be accepted in the interests of supporting adoption of the IPOA, with the understanding that the EU would not recognise this definition

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[382] FAO, Report of the Twenty-third Session of the Committee on Fisheries, Rome, 15-19 February 1999, FAO Fisheries Report No. 595, para. 72.

[383] The Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries, adopted by the FAO Ministerial Meeting on Fisheries, Rome, 10-11 March 1999, paras. 2, 12.

[384] FAO, Report of the Hundred and Nineteenth Session of the Council, Rome, 14-19 June 1999, para. 30.

[385] William Edeson (supra note 24), p. 606; the background papers and documents to the Consultation and draft IPOA-IUU are available at: http://www.fao.org/docrep/005/Y3274E/y3274e00.htm#Contents.

[386] FAO, Report of the Second Technical Consultation on IUU Fishing, Rome, 22-23 February 2001, FAO Fisheries Report No. 646.

[387] FAO, Report of the Hundred and Twentieth Session of the Council, Rome, 18-23 June 2001, para. 9.

[388] William Edeson (supra note 24), p. 604.

as having any force other than in the context of the IPOA."[389] This attitude has much changed since, and the EU commonly demands that third countries incorporate the definition of IUU fishing from the IPOA-IUU in their national legislation in implementation of the EU IUU Regulation.[390] The text of the IPOA-IUU and its wording were thus taken very seriously. At the same time, the final text provides a definition of IUU fishing that is far from legally precise, which again reflects the non-binding nature of the agreement and its negotiating history (below).

The IPOA-IUU is a voluntary instrument and therefore utilises "soft" language (states "should", "are encouraged", "to the greatest extent possible") (at paras 4 and 13). It provides a tool-kit of measures to prevent, deter, and eliminate IUU fishing, while acknowledging that nothing in the instrument affects states' existing obligations under international law (para. 8 and 13). It has a broad scope,[391] requiring states to use "all available jurisdiction in accordance with international law" and to cooperate so as to apply measures in an "integrated manner" (para. 9.3). The IPOA-IUU encourages all states to ratify and implement the Fish Stocks Agreement and the Compliance Agreement (paras. 11, 12); to encourage scientific research on fish identification (para. 77); to apply conservation and management measures adopted by RFMOs which have a bearing on IUU fishing, even where they are not a member, in the spirit of cooperation (paras. 78-79); to develop innovative ways to combat IUU fishing within RFMOs (para. 80); and to cooperate to provide support to developing countries (paras. 85-86). Institutionally, the IPOA-IUU calls for the strengthening of RFMOs (para. 80(1)), while also establishing a clear role for the FAO, namely to collect data; support the development and implementation of national action plans; convene an expert consultation on Catch Documentation Schemes (CDS), which recently led to the adoption of FAO Guidelines[392]; and carry out research on IUU fishing (in collaboration with the IMO) (paras. 88-93).

More specifically, the IPOA-IUU lists the following measures that states should adopt in their different capacities. It identifies the primary responsibility of the *flag state* to exercise jurisdiction over vessels flying its flag to ensure that they do not engage in, or support, IUU

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[389] FAO (supra note 386), para. 12.
[390] Supra note 956.
[391] Judith Swan 'Port State Measures — from Residual Port State Jurisdiction to Global Standards' (2016) 31 The International Journal of Marine and Coastal Law 395, p. 405.
[392] FAO Voluntary Guidelines for Catch Documentation Schemes, 2017, http://www.fao.org/3/a-i8076e.pdf.

fishing (paras. 9.3 and 34). It stipulates *inter alia* that the flag state should ensure that it is capable of doing so before it registers a vessel; avoid flagging vessels with a history of IUU fishing; disincentivise flag-hopping through refusing fishing permits; maintain a record of its fishing vessels; and make catch and transhipment data available to other states, RFMOs and the FAO (paras 35-50). Priorities for the *coastal state* include undertaking effective monitoring, control and surveillance of fishing activities in its EEZ; cooperation with other states; and only issuing fishing licenses to vessels with no history of IUU fishing. (para. 51). For the *port state*, the IPOA-IUU calls for port access to be restricted to certain ports and requested prior to entry, and be subject to the provision of catch data. Access should be denied (except in cases of *force majeure* or distress) where there is evidence of IUU fishing, while in-port inspections should be conducted and the flag state notified of any IUU fishing (paras. 52-64).

The IPOA-IUU also encourages states to utilise their *market power* to incentivise other actors, over which they have no direct control, to comply with their obligations. States are to take all steps necessary, consistent with international law, to prevent fish caught by vessels identified by RFMOs to have been engaged in IUU fishing from being traded or imported into their territories (para. 66). States should cooperate to adopt appropriate multilaterally agreed trade-related measures that are necessary to combat IUU fishing for specific stocks or species, such as multilateral CDS and import and export prohibitions (paras. 68-69). Moreover, states are encouraged to improve the transparency of their own markets, allowing for better traceability of fish or related products (para. 71).

In 2005, so as to reinforce the implementation of the IPOA-IUU, the FAO adopted a voluntary 'Model Scheme' on port state measures to combat IUU fishing.[393] Within months of its adoption, moves were underway towards a more binding solution, culminating in the Port State Measures Agreement. The Port State Measures Agreement was adopted at the thirty-sixth session of the FAO Conference in November 2009 and entered into force on 5 June 2016, and is the first and only legally binding global instrument directly concerned with IUU fishing.

The Port State Measures Agreement aims to prevent, deter and eliminate IUU fishing, as defined in the IPOA-IUU, by implementing effective port state measures (Art. 1(e)). Its

[393] Available at: http://www.fao.org/3/a-a0985t.pdf.

adoption marks one of the high points in the evolution of port state jurisdiction in the law of the sea, a process that arguably started with Art. 23 of the Fish Stocks Agreement[394] and which provided a "springboard" for the development of global standards for port state measures.[395] Ports play an important role in enforcing fisheries norms and obligations. As seen below, the coastal state can make use of its ports to *require* the landing of catch caught in its EEZ, for the purpose of monitoring and controlling compliance with the rules it has put in place so as to conserve and manage its living resources. It will moreover habitually enforce its conservation and management rules in port and impose sanctions on vessels for various fisheries-related infractions. Furthermore, port-related measures could include a prohibition on entry into port and the use of port services, and the denial of landing, transhipment, or processing of fish – hereby overlapping with market conditionality in fisheries.

The Port State Measures Agreement creates minimum standards for exercising port state jurisdiction in the context of IUU fishing. A key provision is the denial of access to ports (and thereby to national and international markets) to vessels upon proof that they have engaged in IUU fishing, exemplified by inclusion on an IUU vessel list operated by an RFMO (Art. 9). The Port State Measures Agreement builds upon the generally accepted presumption that vessels have no right under international law to access to port;[396] thus, access to ports may be denied also to vessels flagged to non-parties to the Agreement.[397] Accordingly the Port State Measures Agreement constitutes an obligation rather than a right for parties to exercise port state jurisdiction to deny access to vessels having engaged in IUU fishing. It further establishes minimum requirements for port inspections and requires the denial of port services to vessels once they have entered the port under certain conditions or if, upon inspection, it transpires they have engaged in IUU fishing or related activities, or where the port state has "reasonable grounds" to believe this is the case (Arts. 11 and 18).

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[394] Stipulating that the port state has "the right and the duty" to take measures in its ports to promote the effectiveness of RFMO CMMs (Art. 23).
[395] Judith Swan (supra note 391), p. 399.
[396] Though subject to general principles of good faith and abuse of right, and of course trade obligations; see Sophia Kopela 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons Global Commons' (2017) 47 Ocean Development & International Law 89, p. 94, who also discusses the question whether entry requirements should be restricted by a jurisdictional basis.
[397] On whether the Port State Measures Agreement could override other obligations established under bilateral or multilateral agreements (such as the WTO) to ensure access to ports (and thereby markets), see Andrew Serdy 'The Shaky Foundations of the FAO Port State Measures Agreement: How Watertight Is the Legal Seal against Access for Foreign Fishing Vessels?' (2016) 31 The International Journal of Marine and Coastal Law 422.

The Port State Measures Agreement thus continues the trend of leveraging market access to combat IUU fishing, although it does not *expressly* include trade-related measures "because it was not intended as a trade instrument".[398] In practice, however, restricting access to ports will constitute a trade restriction (see chapter 7).

3.6. Defining IUU fishing

"[And the Lord said] Go to, let us go down, and there confound their language, that they may not understand one another's speech."[399]

There is some confusion over the terminology of IUU fishing. Similar to the builders of the tower of Babel (after divine intervention), those fighting IUU fishing often do not understand one another's speech. Whilst often treated as if it were a monolithic concept, IUU fishing can include a wide variety of unsustainable and/or undesirable fishing-related activities.[400] The following two observations can be made in relation to its definition, which are then discuss in detail: One, that despite what is often thought, IUU fishing is *not* always illegal.[401] Two, that the (much more relevant) question is not whether a particular fishing activity 'is or is not IUU', but at what point a breach of international fisheries norms and obligations can be attributed to the state. What must a country do to exercise jurisdiction over certain behaviour so as to prevent, deter, and eliminate IUU fishing; *what degree of responsibility* is required of a state to fulfil its international fisheries related commitments?

One, IUU fishing is *not* always illegal. This is so from both the perspective of national law, and the perspective of international law; an important distinction to draw. Public international law does not apply directly to individuals; rather, international treaties such as the LOSC bind the states that have ratified them. From the perspective of the individual operator (fisherman), (il)legality is determined by national law. Fishing activities that may fall within the definition of IUU (e.g. such as fishing without a licence; fishing in an RFMO area) may well be legal under national law in so far that a state has not made particular

[398] David J Doulman and Judith Swan (supra note 34), p. 68.
[399] Genesis 11:7, King James Version.
[400] Supra note 24.
[401] NGOs, international organisations, and international networks generally equate IUU fishing with illegality *per se*, and even piracy and pirate fishing, despite also referring to the IPOA-IUU's more complex description (examples available at: http://oceansbeyondpiracy.org/subject/iuu-fishing; https://worldoceanreview.com/en/wor-2/fisheries/illegal-fishing/; https://ejfoundation.org/what-we-do/oceans/ending-pirate-fishing; https://eu.oceana.org/en/press-center/press-releases/oceana-calls-pirate-fishing-be-made-environmental-crime; https://www.worldwildlife.org/threats/illegal-fishing).

conduct *il*legal (e.g. does not have in place licencing requirements; does not require an authorisation for high seas fishing; etc.). Fishermen that fish accordingly are simply operating within the parameters of the law as it applies to them. The Technical Guidelines on the Implementation of the IPOA-IUU further clarify this, noting that IUU fishing is a broad term that captures a wide variety of fishing activity, *most of which* (but clearly not all) is illicit.[402] Rather, IUU fishing is "wrongful, depending on the circumstances", since "fishers who conduct activity that is unregulated solely because the relevant state or states have not adopted any regulatory measures for the fishery concerned cannot be said to be engaged in wrongful acts."[403]

What is important is therefore to determine the (il)legality of IUU fishing from the *international* perspective; to determine at what point it constitutes a breach of an international obligation of a *state*. The LOSC and subsequent binding instruments do not provide a definition of IUU fishing. The exception to this is the Port State Measures Agreement, which as previously mentioned references back to the IPOA-IUU. Nevertheless, as judge Lucky of the ITLOS also points out, without referring specifically to IUU fishing, the LOSC does specify where and when fishing activities are "legal, lawful and regulated".[404] To see which provisions in particular are relevant, the lengthy description of IUU fishing found in the IPOA-IUU must be considered in some detail. This description, found in paragraphs 3(1)-(4), sets out the following:

> "(1) 'Illegal fishing' means fishing activities:
> (a) conducted by national or foreign fishing vessels in maritime waters under the jurisdiction of a state, without the permission of that state, or in contravention of its laws and regulations;
> (b) conducted by fishing vessels flying the flag of states that are contracting parties to a relevant regional fisheries management organisation, but which operate in contravention of the conservation and management measures adopted by that organisation and by which those states are bound, or of relevant provisions of the applicable international law; or
> (c) conducted by fishing vessels in violation of national laws or international obligations, including those undertaken by cooperating states to a relevant regional fisheries management organisation;

402 FAO Guidelines for the Implementation of the IPOA-IUU (supra note 19), p. 1, 5-6. Note 12 on p. 6.
403 Ibid.
404 Separate Opinion of Judge Lucky in *Advisory Opinion to the SRFC* (supra note 83), para. 29. The distinction between legal and lawful is not elaborated upon in the Separate Opinion and with regard to fishing it is not certain what is meant. It may reflect the distinction made here between illegal/legal fishing under national law and illegal/legal under international law, whereby behaviour can be strictly legal under national law (because it is not made *illegal*) yet still undermine a state's international responsibilities.

(2) 'Unreported fishing' means fishing activities:
(a) which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
(b) which have been undertaken in the area of competence of a relevant regional fisheries management organisation and have not been reported, or have been misreported, in contravention of the reporting procedures of that organisation;

(3) 'Unregulated fishing' means fishing activities:
(a) conducted in the area of application of a relevant regional fisheries management organisation by fishing vessels without nationality, by fishing vessels flying the flag of a state not party to that organisation or by any other fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organisation; or
(b) conducted in areas or for fish stocks in relation to which there are no applicable conservation or management measures by fishing vessels in a manner that is not consistent with state responsibilities for the conservation of living marine resources under international law.

(4) Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action (IPOA)."

Whilst international law does not directly apply to individual fishermen and operators, the LOSC and Fish Stocks Agreement stipulate who should comply with whose rules, in which maritime zones. Both the flag state and the coastal state have obligations in that regard, and these are set out below. As I will explain, the coastal state must ensure that maritime waters under its jurisdiction (territorial sea and EEZ) are regulated for the purpose of sustainably conserving and managing stocks; they must enforce these laws and regulations, including vis-à-vis foreign vessels that are given access to fish; and flag states must ensure that vessels flying their flag and their nationals comply with them. Breaching third country laws and regulations (para. 3(1)(a) IPOA-IUU) is therefore indeed illegal under international law. The same holds true for an RFMO of which a flag state is a member or a cooperating non-member and by which it is therefore bound (para. 3(1)(b) and (c)). A flag state that is a member of an RFMO or a cooperating non-member is bound by the conservation and management measures the RFMO adopts. It should however be noted that many RFMOs allow for opt-out (objection) procedures, allowing states to *not* be bound by certain measures.

The function of this is similar to making a reservation to a treaty provision.[405] The extent to which not complying with an RFMO's conservation and management measures that have not been consented to can still be deemed a breach of an international obligation, depends on a number of factors. Member states still remain bound by the Constitutive Treaty of the RFMO in question, and more generally the duty to cooperate under the law of the sea (see below).

Conservation and management measures adopted by an RFMO or a coastal state may pertain to reporting fishing activities. Where a state is bound by them and they are subsequently breached (not reporting *in contravention of* an obligation to do so), this is clearly also a matter of illegality, though the IPOA-IUU describes this as unreported rather than illegal fishing (para. 3(2)). As previously mentioned, the illegality of unreported fishing becomes more difficult to ascertain where a flag state is a member of an RFMO but avails itself of an opt-out procedure, and is thus not bound by an obligation to report catch. In that case, unreported fishing would not be a breach of an international obligation, except if this can be construed as a failure of the duty to cooperate.

Clearly, both illegal and unreported fishing (as described in the IPOA-IUU) are therefore essentially concerned with behaviour that is contrary to international law.

As for unregulated fishing, the IPOA-IUU describes two types. Para. 3(b) refers to fishing in an unregulated area or for an unregulated stock, which is inconsistent with states' responsibilities for the conservation of living resources under international law. IUU fishing of this type could include fishing with destructive gear on an unregulated high seas stock; e.g. dynamite fishing for a high seas stock not regulated by an RFMO. Fishing "contrary to a state's responsibilities" is, necessarily, once again a matter of illegality (sections 3.8 and 3.9.2 below).

Para. 3(a) describes unregulated fishing as fishing that is not in compliance with an RFMO's conservation and management measures by stateless vessels or those flagged to a non-member of that RFMO. Whether unregulated fishing as described in para. 3(a) is contrary to international law, is more complex. Stateless vessels are, as Churchill and Lowe put it, in a "curious position". There is not always a recognised basis to assert jurisdiction

[405] Michael W Lodge and others 'Recommended Best Practices for Regional Fisheries Management Organizations' [2007] Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations 160, p. 76-77.

over them on the high seas outside coastal waters, except possibly for the national state of the owners of the ship.[406] A vessel *without* nationality can be boarded and inspected ("visited") by any state (Art. 110 LOSC).Art. 91 LOSC stipulates that a vessel "shall sail under the flag of one state only" save exceptional circumstances, implying a duty to *not* be stateless, as well as an explicit duty not to sail several flags at once. This would make fishing (in any way) by a stateless RFMO non-member illegal *per se*.[407] If the absence of a flag does *not* necessarily make the fishing illegal from the point of view of the LOSC, then the opposite conclusion must be reached. Though stateless vessels cannot be members of RFMOs, their fishing activities should then be seen as legal. The problematic corollary of such a conclusion is, of course, that if such fishing vessels were to act in a way that undermines international commitments to sustainable fishing, it would have to be determined which state is responsible for their actions. Absent a flag state, the state of nationality would be a likely candidate, but this would raise the mostly unexplored question whether state parties to the LOSC incur obligations over their nationals when they are on someone else's vessel – or in this scenario, an stateless vessel.

I next turn to the question whether fishing by a (flagged) non-member of an RFMO fishing on a regulated stock in a manner that is not consistent with or contravenes the conservation and management measures of that RFMO is a breach of an international obligation. This essentially boils down to the question whether states are *at all times* bound by *any* RFMO conservation and management measures, regardless of their membership status. The short answer is that this is probably not the case. It should be pointed out that the most important type of conservation and management measures is "obviously that which generally constitutes the very basis of prevention of over-fishing"; namely the TAC and its allocation.[408] Any non-allocated non-member catch will therefore automatically contravene an RFMO's conservation and management measures, and as per the definition in the IPOA-IUU constitute a type of unregulated (IUU) fishing.[409] But as this chapter shows, states are not necessarily, and not always, bound by an RFMO's conservation and management

[406] Robin Churchill and Alan Vaughen Lowe (supra note 286), p. 214.
[407] An interesting argument to the contrary has been made that a flag is a necessity, but not a requirement, under international law, though this would result in the practical problem that that flag is not subject to anyone's jurisdiction (as foreseen in Art. 110, any other state may therefore visit it) (Barry Hart Dubner and Mary Carmen Arias 'Under International Law. Must a Ship on the High Seas Fly the Flag of a State in Order to A Void Being a Stateless Vessel ? Is a Flag Painted on Either Side of the Ship Sufficient to Identify It?' (2017) 29 U. S. F. Maritime Law Journal 100).
[408] Erik J Molenaar (supra note 18), p. 491. It should be noted that not all RFMOs set quotas.
[409] Andrew Serdy (supra note 24), p. 149.

measures (including set quotas). Whether they are so bound depends on the treaties they have ratified (in particular the Fish Stocks Agreement and the Compliance Agreement); the interpretation given to the duty to cooperate under those treaties; and the circumstances at hand (discussed further below). From the point of view of international law, unregulated fishing as described in para. 3(a) IPOA-IUU is not necessarily, and not always, illegal, as it is not always a breach of an international obligation. This is seemingly confirmed by para. 3.4 of the IPOA-IUU, which states that "notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the [IPOA-IUU]".

The illegality of IUU fishing from the point of international law thus depends on various circumstances. The reason for this lack of clarity can perhaps best be explained by the context of the IPOA-IUU. The focus at the time of drafting the IPOA-IUU was not on listing illegal behaviour or drafting "a legally perfect definition of IUU" (though states' commitment to the negotiating process and 'reservations' to the agreed upon text have been duly noted), but rather the process sought to identify what RFMOs considered to be "priority tasks of particular concern".[410] Rather than providing any definition whatsoever, the initial draft of the IPOA-IUU set out a non-exhaustive list of undesirable fishing practices.[411] Strong political demand then triggered a work on providing some definition of IUU, which eventually led to the definition copied above.[412] As acknowledged at a recent FAO workshop, the IPOA-IUU, as adopted, provides "only illustrative descriptions (not a definition of IUU fishing *per se*) of the concept of IUU fishing and its different components".[413] It was never meant to only describe illegal behaviour; nor should it now be interpreted as such. This leads to my second observation.

The question of exactly what behaviour fits within the definition of IUU fishing and what does not is important in so far that the IPOA-IUU definition is being used by the Port State Measures Agreement and by some RFMOs as a standard for measuring the behaviour of vessels. However, the important question for evaluating a country's behaviour to gain market access is not what behaviour fits or does not fit within the definition of IUU fishing, or even

[410] William Edeson (supra note 374), p. 98.
[411] Appendix D, para. 3 draft IPOA-IUU (supra note 385).
[412] William Edeson (supra note 374), p. 518.
[413] FAO, Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally, Rome 2-4 February 2015, FAO Fisheries and Aquaculture Report No. 1106, p. 3.

whether particular behaviour breaches an international obligation. Rather, the question must be asked what duties international fisheries law imposes on countries (and what degree of responsibility is required of them to discharge these duties) in their different capacity as flag-, coastal-, port state and possible also market state. It is well known that the actions of non-state actors cannot *necessarily* be attributed to the state. This led the Tribunal in *South China Sea* to observe that unlawful (and unregulated) fishing is often "carried out covertly, far from any official presence, and it will be far from obvious what the flag state could realistically have done to prevent it."[414] Even where IUU fishing (of any kind) is detected and legal obligations have been breached (e.g. fishing in contravention of a coastal state's laws and regulations), this does not immediately constitute a wrong that can be attributed to the flag state of that vessel, or to the coastal state in whose waters the illegal activity took place. As this chapter will show in some detail, whether a state is responsible for the illegal activities of its vessels (or a coastal or port state for illegal fishing by others), will depend on whether it has exercised a sufficient degree of diligence.

3.7. Protecting and preserving the marine environment: a duty on all states

Whilst the legal regime for the oceans is geographically and functionally divided, the LOSC contains fundamental (environmental) obligations that span across these zones. Because of their overarching nature and growing importance in recent jurisprudence, I start my analysis of international fisheries obligations by exploring these principles and the degree of responsibility required of states.

3.7.1. The general duty to protect and preserve

The LOSC's fundamental environmental principles can be found in Part XII, which is headed Protection and Preservation of the Marine Environment. Art. 192, the first provision of Part XII, simply stipulates that "states have the obligation to protect and preserve the marine environment". The provision is a landmark one. It is the first explicit statement, in a global treaty, of the general obligation to protect and preserve the marine environment.[415] According to the majority of scholars, it is an *erga omnes* obligation; an obligation towards the

[414] *South China Sea* (supra note 226), para. 754.
[415] 'Art. 192' in *Virginia Commentaries* (supra note 237), p. 36.

international community as a whole, and in whose fulfilment all states have a legal interest.[416] This is relevant later in the discussion in chapter 6, section 6.8 on countermeasures, where I return to this. Thus, any state will have standing to sue for a breach of Art. 192. Art. 193 follows with the message that "states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment".

Whilst the rest of Part XII is explicitly oriented towards issues of pollution and dumping rather than fisheries, the ITLOS drew a link between the protection and preservation of the marine environment and the conservation of living resources in the *Southern Bluefin Tuna* cases. Its oft-quoted observation on the issue was that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine

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[416] Detlef Czybulka 'Art. 192' in Alexander Proelss (ed) *United Nations Convention on the Law of the Sea, a Commentary* (Beck, 2017), nm. 22, p. 1285, referring to Alexander Proelss *Meeresschutz im Völker- und Europarecht.: Das Beispiel des Nordostatlantiks* (Duncker & Humblot, 2004), p. 79; Patricia Birnie, Alan Boyle, Catherine Redgwell *International Law and the Environment* (OUP, 2009), p. 387; Jonna Ziemer *Das gemeinsame Interesse an einer Regelung der Hochseefischerei: Dargestellt am Beispiel des Fish Stocks Agreement* (Duncker & Humblot, 2009), p. 217. The Institut de Droit International also considers the obligations relating to the environment of the international public domain as belonging to obligations *erga omnes* (Preamble to the 2005 'Krakow Resolution' (Résolution Concernant les Obligations et les Droits *Erga Omnes* en Droit International) ("Considérant qu'en vertu du droit international, certaines obligations s'imposent à tous les sujets du droit international dans le but de préserver les valeurs fondamentales de la communauté internationale; considérant qu'il existe un large consensus pour admettre que ((...)) les obligations relatives à l'environment des espaces communs constituent des examples d'obligations qui reflètent lesdits valeurs fondamentales ((...))")). The Krakow Resolution is referred to by Hyun Kung Kim, who moreover reminds us that the living resources of the high seas constitute an important element of the marine environment in the international public domain, thus making their protection an *erga omnes* affair (Hyun Jung Kim (supra note 353), p. 28, footnote 36). Furthermore, Prosper Weil points out that a member of the International Law Commission (Mr Ushakov) more generally referred to "the current rules of the law of the sea" as an "example" of obligations *erga omnes* (International Law Commission 'Summary records of the twenty-eighth session 3 May-23 July 1976' (1976) I Yearbook of the International Law Commission, p. 71) though this was written before the adoption of the LOSC and moreover fails to specify what rules in particular constitute such examples (Prosper Weil (supra note 139), p. 432). Weil is moreover highly critical of creating too broad a category of *erga omnes* obligations. Finally, as also discussed in chapter 6, the International Law Commission gives the example of "a coastal state affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest" as an example of a state which can adopt countermeasures because of a breach of an *erga omnes* obligation (namely, the duty to protect the marine environment as per Art. 192, though the provision is not explicitly referred to) (International Law Commission 'Report of the International Law Commission on the Work of Its Fifty-Third Session' (2001) II Yearbook of the International Law Commission 1, p. 127). An opposite view is held by Malgosia Fitzmaurice 'Liability for Environmental Damage Caused to the Global Commons' (1996) 5(4) *Review of European, Comparative & International Law* 305-311, p. 306; Christian Tams *Enforcing Obligations Erga Omnes in International Law* (CUP, 2005), according to who state practice only supports the development of *erga omnes* obligations in the context of human rights and humanitarian norms. This is cited with approval by Barbara Cooreman 'Addressing Environmental Concerns Through Trade: A Case for Extraterritoriality?' (2016) 65 International and Comparative Law Quarterly 229, p. 241, to conclude that under the current status quo of environmental law, no *erga omnes* obligations have been clearly identified.

environment".[417] This allowed the ITLOS to prescribe provisional measures to protect tuna, which was at risk of overexploitation in the dispute at hand, since provisional measures can only be prescribed to preserve the parties' rights or "to prevent serious harm to the marine environment" (Art. 290). More recently, the Arbitral Tribunal in *South China Sea* confirmed this and explicitly rejected "the suggestion that (…) Part XII (is) limited to measures aimed at controlling marine pollution. While the control of pollution is certainly an important aspect of environmental protection, it is by no means the only one".[418] The duty to protect and preserve the marine environment is a "fundamental principle",[419] and marine living resources are an "integral element" of this.[420]

Whilst the duty to protect and preserve the marine environment is of a general nature, the Tribunal in *South China Sea* took the view that it is "well established" that it imposes a *duty* on states, the content of which is informed by three categories of norms: the corpus of international law relating to the environment; the other provisions of Part XII; and, through Art. 237 LOSC (one of the other provisions of Part XII), by reference to specific obligations set out in other international agreements.[421] The duty that Art. 192 imposes a *positive* obligation to take active measures to protect the marine environment from future damage and to preserve it (in the sense of maintaining or improving its present condition), as well as a *negative* obligation not to degrade it.[422] It applies to all states in all maritime zones, and entails obligations not only in relation to activities directly taken by states and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment.[423]

The reference to the corpus of international environmental law allows for an evolutionary interpretation of the duty to protect and preserve the marine environment under the LOSC, in line with new developments. As explained in chapter 2, section 2.5.2.1, the general rule of interpreting a treaty, as confirmed in the VCLT, is to follow the ordinary meaning of the terms of a treaty, in their context, and in light of the context and purpose of the treaty. The

[417] *Southern Bluefin Tuna* (New Zealand v. Japan; Australia v. Japan) (Provisional Measures), Order of 27 August 1999, ITLOS Reports 1999, p. 280, para. 70; *South China Sea* (supra note 226), para. 956.
[418] *South China Sea* (supra note 226), para. 945, referring with approval to in *Chagos* (supra note 238), para. 320.
[419] *Advisory Opinion to the SRFC* (supra note 83), para. 216.
[420] Ibid. paras. 120 and 219.
[421] *South China Sea* (supra note 226), paras. 941-942.
[422] Ibid.
[423] Ibid. para. 944.

Preamble of the LOSC, which provides such context, recognises *inter alia* the desirability of establishing a legal order for the seas and oceans, to promote the equitable and efficient utilization of their resources the conservation of their living resources, and the study, protection, and preservation of the marine environment. Together with context, the interpreter shall take into account relevant rules of international law applicable in the relations between the parties. The LOSC also explicitly envisages this, stating that the applicable law in a dispute is the LOSC as well as other rules of international law not incompatible with the LOSC (Art. 293(1)). The Tribunal in *South China Sea* referred to both the VCLT and Art. 293(1) in its award on Jurisdiction and Admissibility to justify the relevance of other rules of international law when interpreting the content of the duty to protect and preserve the marine environment.[424]

In *South China Sea*, the Tribunal considered that the relevant corpus of environmental law entailed the following. The Tribunal cited the Advisory Opinion of the ICJ in *Nuclear Weapons*, in which the ICJ confirmed the principle established previously in the *Trail Smelter* arbitration that states must ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control.[425] It furthermore cited with approval the Partial Award in *Kishenganga*, that states thus have a "positive duty to prevent, or at least mitigate, significant harm to the environment when pursuing … activities".[426] The activities in question were China's large scale construction operations, but since the duty to prevent significant harm is of a general nature this extends to other activities that risk harming the marine environment as well. The Tribunal then referred to the CBD to interpret the reference in Art. 194(5) to the term "ecosystem".[427] As abovementioned, the other provisions of Part XII, together with the corpus of international environmental law, inform the general duty to protect and preserve the environment under Art. 192. Art. 194(5) provides that measures taken in accordance with Part XII "shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened

[424] *The South China Sea Arbitration* (Republic of the Philippines v People's Republic of China) (Award on Jurisdiction and Admissibility), 29 October 2015, PCA Award Series, para. 176.
[425] Ibid. para. 941; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 8 July 1996, ICJ Reports 1996, p. 226, para. 29, building on *Trail Smelter* (United states v. Canada), 11 March 1941, Reports of International Arbitral Awards, Vol. III, p. 1905-1982.
[426] *Indus Waters Kishenganga Arbitration* (Pakistan v. India) (Partial Award), 18 February 2013, PCA Award Series, para. 451, citing *Iron Rhine Railway* (Kingdom of Belgium v. Kingdom of the Netherlands) (Award) 24 May 2005, PCA Award Series, para. 59; *South China Sea* (supra note 226), para. 941.
[427] *South China Sea* (supra note 226), para. 945; *South China Sea (Jurisdiction and Admissibility)* (supra note 424), para. 176. The term "ecosystem" is defined in Art. 2 CBD as "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit".

or endangered species and other forms of marine life." The Tribunal furthermore identifies CITES as relevant for interpreting the general duty to protect and preserve the marine environment, since it is subject to near universal adherence.[428] By virtue of Art. 192 and 194(5), the Tribunal found that states are under a due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection, and referred to CITES as evidence that the species in question were so recognised.[429]

The Tribunal's liberal usage of CITES to inform its decision about the status of a species as being threatened or not is remarkable. Some of the species that concerned the Tribunal, namely sea turtles, figure on CITES Appendix I; but giant clams and various corals, which were also harvested *en masse* by Chinese fishing vessels, figure on CITES Appendix II. CITES Appendix I lists species that are in acute danger, and severely restricts trade in them, whereas CITES Appendix II lists species that are threatened to a lesser degree, and controls trade in those species. The Tribunal recognised these differences, but considered nevertheless that giant clams and corals where "unequivocally threatened, even if they are not subject to the same level of international controls as Appendix I species."[430] This raises the question whether the general duty to protect and preserve the marine environment under the LOSC should be read as entailing an obligation to ensure that species listed on CITES Appendix II (or even Appendix III) are not harmed, and if so whether the degree of diligence required from states would be different for species on Appendix I (the level of diligence required is discussed further below). Ultimately, The Tribunal did not have to pronounce itself on this question. Rather, the Tribunal relied on scientific evidence to conclude that the large-scale harvesting of giant clams and corals "has a harmful impact on the fragile marine environment", and "that a failure to take measures to prevent these practices would constitute a breach of Articles 192 and 194(5)".[431]

To summarise, a state's obligation to protect and preserve the marine environment pursuant to Part XII is as follows: A state has a general duty to protect and preserve the marine environment and its living resources, and this entails both positive obligations to protect and to preserve, and a negative obligation not to do harm. The content of the

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[428] *South China Sea* (Ibid.), para 956.
[429] Ibid.
[430] Ibid. para. 957.
[431] Ibid. para. 960.

obligation to protect and preserve includes at least a duty to prevent the harvest of endangered species recognised internationally as requiring international protection. It extends moreover to the prevention of harms that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat. This general duty extends both to activities taken by the state and its organs, and to ensuring that activities within its control and jurisdiction do not harm the marine environment – including the environment of other states or of areas beyond national control. The standard of responsibility for this general duty is one of due diligence.[432] I turn to this next.

3.7.2. A standard of due diligence

In *South China Sea*, the Tribunal held that the duty to protect and preserve the marine environment, of which living resources are an integral part, is one of due diligence.[433] This marks a trend in recent jurisprudence on the law of the sea on the degree of responsibility required of states when fulfilling their duties under the LOSC. This is of particular relevance to fisheries, as it decides on the degree of action required of states when discharging their international obligations. In other words, it marks the point at which we can say that a state has not discharged its duties under international law to prevent, deter, and eliminate IUU fishing.

In the *Advisory Opinion to the SRFC*, one of the questions put to the ITLOS concerned the possibility to hold a flag state responsible for actions by fishing vessels flying its flag. The Tribunal's jurisdictional scope was limited in the case at hand, and it could only consider flag state responsibility over vessels flying its flag that were fishing in the EEZ of another state. However, many of its observations speak more generally to the level of diligence required by flag states, also where their vessels fish on the high seas. I return to this later in this chapter, when considering flag state responsibility. What is important here is that in *Advisory Opinion to the SRFC,* the ITLOS held that as far as fishing activities are concerned, the flag state must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine its responsibilities in respect of the conservation and management of marine living resources, which includes the

[432] Ibid. para. 944.
[433] That Art. 194(2) LOSC contains a due diligence obligation had also been mentioned in *Advisory Opinion on Sponsoring in the Area* (supra note 264), paras. 112-113.

obligation to protect and preserve the marine environment, and of which fishing is a major part.[434]

It was said earlier in this chapter that the actions of non-state actors cannot *necessarily* be attributed to the state. Unlawful (and unregulated) fishing is often “carried out covertly, far from any official presence, and it will be far from obvious what the flag state could realistically have done to prevent it.” [435] Rather, the wording ‘to ensure’ implies an obligation of conduct, not result, and as such means that the flag state had to exercise due diligence. In the *Pulp Mills* case, the ICJ had previously held that “an obligation to adopt regulatory or administrative measures (…) and to enforce them is an obligation of conduct”, and that “(b)oth parties are therefore called upon to exercise due diligence.” [436] The ICJ furthermore held that exercising due diligence is an “obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators”.[437] This was cited and confirmed in *Advisory Opinion on Sponsoring in the Area*, where the ITLOS Seabed Disputes Chamber furthermore concluded, and this was also repeated in the *Advisory Opinion to the SRFC*, that exercising due diligence means “to deploy adequate means, to exercise best possible efforts, to do the utmost”.[438] A failure to exercise due diligence could lead to the flag state being held responsible under international law.[439]

The *South China Sea* test for the level of due diligence required by states differs slightly from that set by the ITLOS in *Advisory Opinion to the SRFC.* The level of vigilance of exercising best possible efforts and doing the utmost had been suggested by the Philippines as

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[434] *Advisory Opinion to the SRFC* (supra note 83), para. 119.
[435] *South China Sea* (supra note 226), para. 754.
[436] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment), 20 April 2010, ICJ Reports 2010, p. 14, para. 187.
[437] Ibid. para. 197.
[438] *Advisory Opinion on Sponsoring in the Area* (supra note 264), para. 110; *Advisory Opinion to the SRFC* (supra note 83), para. 129.
[439] International Law Commission (supra note 416), containing the draft articles on the Responsibility of States for Internationally Wrongful Acts and a commentary, at p. 34: “Whether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation (…). Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case”.

the appropriate standard of conduct, but this was not referred to by the Tribunal.[440] The Tribunal instead only cited the standard used in *Pulp Mills* that due diligence "is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control (…)".[441] Of course, the question can be put whether the two-pronged standard for due diligence from Pulp Mills (the prescription of measures and their enforcement/control) *de facto* amounts to the same standard as exercising best possible efforts and doing the utmost. A "certain level of vigilance" *can* be interpreted just as broadly as "best possible efforts" and "doing the utmost". In in *Advisory Opinion on Sponsoring in the Area*, the ITLOS explained this as follows:

> "The standard for exercising due diligence is in any event a flexible one, and its scope and application contextual. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity."[442]

Evidently, the standard depends partly on the severity of the activities that are being undertaken, whereby "[t]he standard of due diligence has to be more severe for the riskier activities."[443] Furthermore, given that it is a variable standard and is dependent on the state that is acting (*its* best possible efforts), it can be argued that states are therefore under differentiated standards to ensure sustainable fishing.[444] This suggestion is entertained further

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[440] *South China Sea* (supra note 226), paras. 726-727.
[441] Ibid. para. 944; *Pulp Mills* (supra note 436), para. 197.
[442] *Advisory Opinion on Sponsoring in the Area* (supra note 264), para. 117.
[443] Ibid.
[444] It can be argued that the principal of common but differentiated responsibilities, as reformulated in the Paris Agreement (adopted under the UNFCCC, 12 December 2015, FCCC/CP/2015/L.9), is now clearly part of the body of international environmental law. See also Nele Matz-Lück and Erik van Doorn 'Due Diligence Obligations and the Protection of the Marine Environment' (2017) 42 *L'Observateur des Nations Unies* 168, p. 171. The question whether developing states enjoy any preferential treatment with regard to their responsibilities has been discussed by the ITLOS in the specific context of responsiblity over operators when exploiting the Area in *Advisory Opinion on Sponsoring in the Area* (supra note 264). The ITLOS that "none of the general provisions of the [LOSC] concerning the responsibilities (or the liability) of [sponsoring states with regard to exploiting the Area] 'specifically provides' for according preferential treatment to sponsoring States that are developing States. As observed above, there is no provision requiring the consideration of such interests and needs beyond what is specifically stated in Part XI. It may therefore be concluded that the general provisions concerning the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developing or developed." (para. 158). This conclusion was derived from the specific wording of Art. 140 LOSC, according to which the "general purpose of promoting the participation of developing States in activities in the Area taking into account their special interests and needs is to be achieved "as specifically provided for" in Part XI (…) A perusal of Part XI shows immediately that there are several provisions designed to ensure the participation of developing States in activities in the Area and to take into particular consideration their interests and needs" (para. 156). Moreover, and the ITLOS referred to this as well, the Nodules and Sulphines Regulations already explicitly incorporated the wording of the Rio Declaration, according to which

in chapter 6, section 6.6, where I consider limitations on market conditionality and the need for fairness. As will become evident from the sections below, many fisheries-related obligations found in the LOSC are obligations of due diligence. Due diligence therefore "offers a gateway to enrich the obligations established under the LOSC to protect and preserve the marine environment with environmental principles."[445]

Building on the overarching duty to protect and preserve the marine environment, the next section turns to how this duty has been given specific meaning in the EEZ.

3.8. Conserving and managing in the EEZ: coastal state responsibilities

Having considered states' general duties to protect and preserve the marine environment, I now turn to the duty to conserve and manage living resources in the EEZ, and what this entails for the *coastal state*. In other words: what duties are incumbent upon the coastal state to prevent, deter, and eliminate IUU fishing under international law, and to ensure sustainable use?

3.8.1. Conserving and managing in the EEZ

The LOSC first of all grants the coastal state "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil" (Art. 56(1)). Sovereign rights have been interpreted broadly by the ITLOS to encompass "all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures".[446] In addition, the coastal state has jurisdiction with regard to the promotion and preservation of

States shall apply the precautionary approach "according to their capabilities" (para. 161). The ITLOS highlighted the need for equality of treatment between developing and developed sponsoring so as to prevent commercial enterprises based in developed countries from setting up companies in developing countries, possibly leading to "sponsoring States 'of convenience'", which "would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind" (para. 159). Notwithstanding the obvious need not to use differential responsibilities as a reason to excuse non-compliance, the ITLOS' reasoning regarding the Area does *not* imply that developing county status should not be a factor whatsoever in determining whether countries have "done the utmost" to discharge their due diligence responsibilities with regard to other parts of the LOSC, where developing countries are not already specifically provided for. The "best efforts" of a country with limited capacity will necessarily be less effective than the "best efforts" of a country with more capacity.

[445] Nele Matz-Lück and Erik van Doorn (Ibid).

[446] *M/V "Virginia G"* (Panama v. Guinea-Bissau) (Judgment), 14 April 2014, ITLOS Reports 2014, p. 4, para. 211.

the marine environment (Art. 56(1)(b)(iii)). As a corollary of these special rights, the coastal state also has the responsibility to ensure the sustainable exploitation of these resources. This looks as follows.

The aim is to promote the objective of optimum utilisation of resources in the EEZ (Art. 62 LOSC(1)). This is a "well-established principle" of the LOSC.[447] To achieve this, the coastal state must determine the TAC and assess its own capacity to harvest the catch (Art. 61(1)). Where the coastal state is incapable of harvesting the entire TAC that it has determined, it must grant other states access to the surplus (Art. 62(2)).[448] So as to ensure the food security of land-locked and geographically disadvantaged states, such states benefit from a special right of access to participate in the exploitation of part of the surplus, subject to certain conditions (Arts. 69, 70). The common philosophy during UNCLOS III was not to waste biological resources, given the world's shortage of protein.[449]

The coastal state's duty to promote optimum utilization remains explicitly "without prejudice" to the duty to conserve living resources, and it must ensure that the maintenance of living resources "is not endangered by over-exploitation" (Art. 61(2)). The overall message here is that states are under the obligation to conserve and develop fish stocks as a viable and sustainable resource. This was explained succinctly in relation to the call for "conservation and development" of shared stocks in the EEZ regime (Art. 63(1)), which according to the ITLOS essentially calls for sustainable management, namely, to "conserve and develop [fish stocks] as a viable and sustainable resource".[450] There is no reason to believe that the conservation and management of non-shared fish stocks should aim at anything different.

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[447] *Advisory Opinion to the SRFC* (supra note 83), para.213.

[448] A problem with these obligations is that not every coastal state has the capacity to determine a scientifically sound total allowable catch, and that the temptation is big for poor coastal states to sell access to 'surplus' fish even where this is no real surplus, and doing so is unsustainable in the long term. This can (and has) lead to the controversial scenario where foreign fishing fleets deplete the resources in a coastal state's EEZ but avoid legal responsibility, since it is the coastal state which has the legal obligation to ensure that the living resources in its EEZ are not endangered by overexploitation. An example is the much-criticised fisheries access agreements negotiated by the EU with (developing) third countries (Vlad M Kaczynski and David L Fluharty 'European Policies in West Africa: Who Benefits from Fisheries Agreements?' (2002) 26 Marine Policy 75; Frédéric Le Manach and others 'European Union's Public Fishing Access Agreements in Developing Countries' (2013) 8 PloS one e79899; Emma Witbooi 'The Infusion of Sustainability into Bilateral Fisheries Agreements With Developing Countries: The European Union Example' (2008) 32 Marine Policy 669). With the overhaul of its Common Fisheries Policy in 2014, the EU now seeks to ensure that access agreements (now renamed 'sustainable fisheries partnership agreements') instead become a tool for development, cooperation and sustainable exploitation (infra note 606).

[449] James Harrison and Elisa Morgera 'Art. 62' in Alexander Proelss (supra note 416), nm 1, p. 495.

[450] *Advisory Opinion to the SRFC* (supra note 83), paras. 190-191.

The principle management tool to achieve this is MSY (Art. 61(3)), also on the high seas (Art. 119). From a conservation point of view, the success of the LOSC to ensure sustainable fishing thus depends to a large extent on the interpretation and use of the concept of MSY. Yet, MSY has been much critiqued as a viable management tool for being solely focused on capture, and failing to take into account the important socio-ecological dimensions of fisheries management that an ecosystem based approach would capture.[451] The obligation to maintain or restore harvested species to MSY is further qualified by reference to a non-exhaustive list of "relevant environmental and economic factors", which may include fishing patterns; the interdependence of stocks and generally recommended international minimum standards; the economic needs of coastal fishing communities; and the special requirements of developing states. It has therefore been said that "the provision referring to MSY is sufficiently broad that the coastal state has ample authority to take into account any factor important to its interests and to adjust its interests as external factors indicate".[452]

Ecosystem-based fisheries management was not part of the negotiations of UNCLOS III, and there is no firm obligation under either the LOSC or the Fish Stocks Agreement to engage in it. But states must take into consideration the effects on associated or dependant species to maintain or restore their populations above levels at which their reproduction may become *seriously threatened* (Art. 61(4)). The LOSC Preamble further recognises that "the problems of ocean space are closely interrelated and need to be considered as a whole".

There is also reason to adopt an evolutionary interpretation of coastal state obligations. First, the coastal state must "take into account the best available scientific evidence available to it" (Art. 61(4)). The reference to "best" suggests that the coastal state is under a duty to keep its conservation and management measures under review on the basis of the most up-to-date scientific evidence, which in turn supports an adaptive management approach that would require impact assessments and the like.[453] Second, Art. 61(3) makes explicit reference to "any generally recommended minimum standards, whether subregional, regional or global", which a coastal state must take into account when drawing up its conservation measures. No official standardising body for fisheries management currently exists, but a broad reading of

[451] Ellen Hey 'The Persistence of a Concept: Maximum Sustainable Yield' (2012) 27 International Journal of Marine and Coastal Law 763; Francisco Vicuña (supra note 337), p. 51.
[452] William T Burke 'Highly Migratory Species in the New Law of the Sea' (1984) 14 Ocean Development & International Law 273, p. 296.
[453] James Harrison and Elisa Morgera (supra note 449), nm. 25, p. 490-491.

what this entails could accept conservation and management measures adopted by RFMOs as such relevant standards. This also appears to have been the general intention during UNCLOS III.[454] FAO instruments are another good candidate for setting relevant "standards", in particular widely accepted and implemented instruments such as the Code of Conduct and its IPOAs.[455] It has moreover been suggested that decisions adopted by the CBD Conference offer valuable guidance, in particular on integrated ocean management, an ecosystem approach, and the establishment of Marine Protected Areas as a management tool.[456] Finally, the reference to "standards" may also be seen as a reference to the Fish Stocks Agreement, which contains a string of ecosystem-related considerations. I turn to these in more detail, also for their direct relevance to signatory parties.

Whilst most of the Fish Stocks Agreement concerns areas beyond national jurisdiction, Arts. 5, 6 and 7 apply to coastal states and states fishing on the high seas/in foreign waters alike. Art. 3(2) of the Fish Stocks Agreement stipulates that "in the exercise of its sovereign rights for the purpose of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction, the coastal state shall apply *mutatis mutandis* the general principles enumerated in Art. 5." In accordance with Art. 5(a) Fish Stocks Agreement, states must adopt measures to ensure long-term sustainability of straddling and highly migratory fish stocks and promote the objective of their optimum utilization. This reflects the LOSC. In accordance with Art. 5(f) Fish Stocks Agreement, states shall "minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species, (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques". The language is soft, allowing for discretion. A slightly harder obligation is set out in Art. 5(h), according to which states "shall take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources". Again however the concepts of "overfishing", "excess capacity" and not exceeding "sustainable use" are open to different interpretations.

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[454] 'Art. 61' in *Virginia Commentaries* (supra note 237). RFMOs are moreover put central stage during current negotiations at the WTO over fisheries subsidies, see for further discussion chapter 5, section 7. However, RFMOs are likely *not* global standardising bodies for the purpose of WTO law, as discussed in chapter 7.
[455] James Harrison and Elisa Morgera (supra note 449), nm. 18, p. 487.
[456] Ibid. nm. 19, p. 487-488.

Where the Fish Stocks Agreement innovates is with Art. 5(d), which explicitly obliges states to take into account both human and environmental factors that may impact fishing. Art. 5(e) furthermore sets out the need to adopt conservation and management measures for species that belong to the same ecosystem as the targeted stock, or that are otherwise associated with or dependent on that stock. Art. 6 sets out, in some detail, the precautionary approach. This has its roots in Principle 15 of the 1992 Rio Declaration, which states that there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. More progressive versions of the 'precaution theme' have emerged since in international treaties and instruments, including in Art. 6(2) of the Fish Stocks Agreement itself, which requires that "states shall be more cautious when information is uncertain, unreliable or inadequate, and that the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures."

The greatest contribution of Art. 6 and Annex II, to which it refers, are the procedural requirements they put in place. The most important procedural requirements that flow from Art. 6 and Annex II are: the setting of 'precautionary reference points'; the need to decide on measures to be taken if reference points are exceeded; the need to enhance monitoring where the status of target stocks or associated, or dependent, species is of concern; the need to *revise* reference points regularly; and the need to put in place emergency measures.

Whilst the Fish Stocks Agreement is more explicit and detailed than the LOSC in requiring ecosystem considerations to be taken into account, international environmental law has matured in recent years, and with it the jurisprudence related to states' general duties to protect and preserve the marine environment. The judges of the ITLOS and the few recent Arbitral Tribunals that dealt with law of the sea matters have thus far shown to favour a conservation-friendly approach. This has already been discussed in the context of the general duty to protect and preserve the marine environment. The need for a precautionary approach in fisheries conservation and management has become well recognised, though not always put in practice. In the *Southern Bluefin Tuna* cases, New Zealand and Australia challenged Japan's experimental tuna fishing programme and demanded provisional measures from the ITLOS in accordance with Art. 290(5) of the LOSC, pending the constitution of an Annex VII Arbitral Tribunal. New Zealand and Australia argued that Japan had "breached its obligations under Articles 64 and 116 to 119" in relation to the conservation and management

of the Southern Bluefin tuna stock, including by “failing to adopt necessary conservation measures for its nationals fishing on the high seas so as to maintain or restore [the stock] to levels which can produce [MSY], as required by Art. 119 and contrary to the obligation in Art. 117 to take necessary conservation measures for its nationals”.[457] The ITLOS did not pronounce itself explicitly on this, but agreed to issue provisional measures out of precaution. It moreover observed that “the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern Bluefin tuna” despite there being “scientific uncertainty regarding measures to be taken”.[458]

The Tribunal’s Seabed Disputes Chamber went a step further in its Advisory Opinion on *Sponsoring in the Area.* Sponsoring states were under a direct obligation to apply the precautionary approach. This was explicitly stipulated in the International Seabed Authority’s Regulations. But, the Chamber also pointed out that the obligation to observe a precautionary approach formed an integral part of a sponsoring state’s general obligation of due diligence.[459] It observed that “the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this initiated a trend towards making this approach part of customary international law.[460] The Chamber furthermore considered the precautionary approach to be a relevant rule of international law for the purpose of treaty interpretation (Art. 31(3)(c) VCLT) by reference to *Pulp Mills*, in which the ICJ had held that the “precautionary approach may be relevant in the interpretation and application of the provisions of the Statute” (a bilateral treaty whose interpretation was the main bone of contention). [461]

To conclude, the general obligation on the coastal state to ensure the sustainability of the living resources in its EEZ has much evolved in recent years. Whilst the provisions of the LOSC allow for much discretion (and those of Fish Stocks Agreement also, though to a lesser extent), these provisions much be interpreted broadly. The reference to “best” scientific evidence, to international standards, the ITLOS’ consideration of the precautionary approach

[457] *Southern Bluefin Tuna* (supra note 417), paras. 28 – 29.
[458] Ibid. paras. 77 and 79. Note that the Tribunal ultimately found it did not have jurisdiction to decide on the merits (infra note 1475).
[459] *Advisory Opinion on Sponsoring in the Area* (supra note 264), para. 131.
[460] Ibid. para. 135.
[461] Ibid.; *Pulp Mills* (supra note 436).

as a relevant rule of international law for the purpose of treaty interpretation, if not part of customary law, and finally the abovementioned evolutionary interpretation of the general duty to protect and preserve the marine environment, are all arguments in favour of an evolutionary interpretation of coastal state obligations.

3.8.2. The coastal state's right and duty to prescribe

To ensure the sustainable exploitation of the living in resources in its EEZ as set out above, the coastal state has the power to prescribe and enforce rules. The coastal state therefore has the "primary responsibility" to prevent, deter, and eliminate illegal fishing in its EEZ.[462] Importantly, it is the coastal state that decides on the manner in which its surplus stock is exploited by others. For this purpose may adopt measures concerning the licensing of fishermen, collecting fees, determining the species and seasons in which they may be caught, setting requirements for net size, etc. (Art. 62(4)).

An important and topical question is the *scope* of this prescriptive jurisdiction, and thereby the extent to which the coastal state is effectively capable of ensuring sustainable fishing in its EEZ. In other words, beyond fulfilling its international duties, what *can* even be expected of the coastal state? There are two main aspects to this: the substantive scope (what can be regulated) and the geographical scope (where the conduct that is being regulated has taken place).

The question of the *substantive* scope of coastal state prescriptive jurisdiction most recently arose in *Virginia G*. The ITLOS had to answer the question whether, in exercise of its sovereign rights to explore, exploit, conserve and manage living resources in its EEZ, the coastal state is also competent to regulate the bunkering of foreign vessels fishing in its EEZ. This same question had been considered by the ITLOS in its very first case, *Saiga*, which concerned the prompt release of a vessel. There, the Tribunal indicated that "that laws or regulations on bunkering of fishing vessels may arguably be classified as laws or regulations on activities within the scope of the exercise by the coastal state of its sovereign rights to explore, exploit, conserve and manage living resources in the EEZ", but also put forward the possibility to conclude the contrary.[463] In *Saiga*, the Tribunal did not have to conclude on

[462] *Advisory Opinion on Sponsoring in the Area* (Ibid.), para. 106.

[463] *M/V "Saiga"* (Saint Vincent and the Grenadines v. Guinea) (Judgment), 4 December 1997, ITLOS Reports 1997, p. 16, paras. 56-58 and 63.

which approach was right, since it was merely concerned with the prompt release of the arrested vessel (see the discussion below on enforcement). In *Virginia G*, however, the Tribunal explicitly concluded that the coastal state could regulate such bunkering activities. It held that it is apparent from the text of the relevant provision, namely Art. 62(4) LOSC, "that for all activities that may be regulated by a coastal state there must be a direct connection to fishing", and that "such connection to fishing exists for the bunkering of foreign vessels fishing in the exclusive economic zone since this enables them to continue their activities without interruption at sea".[464]

The decision in *Virginia G* looks like a direct departure from the early arbitration award on *Filleting in the Gulf of St. Lawrence*, and the scope of a coastal state's prescriptive jurisdiction should be considered in light of both cases. In *Filleting in the Gulf of St. Lawrence*, the Arbitral Tribunal had to consider a dispute over Canada's ban on the fileting of fish in the Gulf of St. Lawrence. Canadian-French fisheries relations were based on Treaty from 1972, but in its interpretation of the law at hand the Tribunal decided to also take into account, on the basis of Art. 31(3)(c) of the VCLT, any other pertinent rule of international law applicable between the parties. In this case, this was the newly adopted LOSC. Since it had not yet entered into force at the time, the Tribunal decided it would take it into account in so far that it laid down generally accepted rules and expressed customary law.[465] In its consideration of Art. 62(4) LOSC, the Tribunal concluded that the coastal state's prescriptive jurisdiction with regard to foreign fishing vessels in its EEZ did not *à priori* include the authority to regulate subjects of a different nature than those described; in this case, it did not include the filleting (processing) of fish.[466] Churchill and Lowe criticise the Arbitral Tribunal's "narrow reading" of Art. 62(4) by limiting the coastal state's competence to prescribe legislation for foreign fishing vessels in its EEZ to "conservation measures *stricto sensu*".[467] However, the Tribunal did in fact acknowledge that, by making the landing of caught fish obligatory, certain coastal states regulated the treatment of fish on board foreign vessels, and that such activities *could* have their foundation in Art. 62(4)(h). The problem faced by the Tribunal was the existence of the 1972 Treaty between the two parties, which

[464] *M/V "Virginia G"* (supra note 446), para. 215.
[465] *Affaire Concernant Le Filetage à l'intérieur Du Golfe Du Saint-Laurent* (Canada v. France) (Award), 17 July 1986, Reports of International Arbitral Awards, Vol. XIX, p. 225–296, para. 49.
[466] Ibid. para. 52.
[467] Robin Churchill and Daniel Owen (supra note 83), p. 291.

gave French vessels registered in St. Pierre and Miquelon the right to continue to fish.[468] Granting Canada the prescriptive jurisdiction to regulate filleting in its EEZ would render these agreed rights without effect. The Tribunal resolved this dilemma by deciding that a coastal state's conservation and management measures such as those related to landing obligations, or the type, size or number of fishing vessels, could only be imposed on foreign vessels if the coastal state was not already bound by a similar provision in another, specific treaty. Here, these issues were expressly regulated in the 1972 Treaty, and the Tribunal decided to give priority to this.

The Tribunal furthermore invoked the 'reasonableness-test' set out by the ICJ in *Barcelona Traction* and concluded that it would be unreasonable to subordinate the rights resulting from the 1972 Treaty to rules that would render their enjoyment impossible.[469] A similar test had been applied in the *North Atlantic Fisheries* Arbitration. There, the Arbitral Tribunal had to examine, among other things, the extent to which Great Britain could legitimately exercise its sovereign right to adopt fisheries regulations despite the existence of a century old Anglo-American Treaty which granted extensive liberties on the inhabitants of the US. The Tribunal concluded that Great Britain could only adopt fisheries regulations in respect those liberties "in that such regulations must be made *bona fide* and must not be in violation of the said Treaty".[470] The Tribunal continued that regulations which are "(1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the Treaty in good faith, and are therefore reasonable and not in violation of the Treaty".[471] In *Filleting in the Gulf of St. Lawrence*, Canada's ban on the fileting of fish was, so considered the Tribunal, in fact a covert attempt

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[468] This was part of the phasing-out 'deal' that Canada had concluded with Metropolitan France through the 1972 Treaty, which allowed French vessels registered in St. Pierre et Miquelon to fish in the Gulf for an extended period of time.
[469] *Filetage* (supra note 465), para. 54; *Barcelona Traction* (Belgium v. Spain) (Judgment), 5 February 1970, ICJ Reports 1970, p. 3, para. 93.
[470] *North Atlantic Coast Fisheries Case* (Great Britain, United states) (Award), 7 September 1910, Reports of International Arbitral Awards, Vol. XI, p. 167-226, p. 189.
[471] Ibid.

to control the types of fishing vessel and their fishing techniques that by virtue of the 1972 Treaty were allowed to continue fishing in the Gulf of St. Lawrence.[472]

Whilst the Tribunal's reading of the coastal state's prescriptive jurisdiction may therefore have been narrow in *Filleting in the Gulf of St. Lawrence*, it clearly did consider the *possibility* for a wider interpretation of the coastal state's prescriptive jurisdiction but decided to balance this against the rights granted by the 1972 Treaty. Not only has the ITLOS now made it clear in the case of the *Virginia G* that fishing-related activities *can* indeed be regulated by the coastal state, provided there is a direct connection to fishing, but also the passage of time has made it less likely for a similar conflict to arise as the one that had arisen between Canada and France.[473]

The question of *geographical* scope overlaps with the question of the geographical reach of market- and port state jurisdiction; namely, whether a state can ascertain jurisdiction in its port (its territory) over conduct that has taken place abroad.[474] The question of (jurisdictional) limitations in port therefore also bears upon the legality of market access conditionality. The question recently came to the fore in the *Norstar* dispute,[475] and will be discussed in chapter 6.

3.8.3. The coastal state's right and duty to enforce

Besides prescriptive jurisdiction, the coastal state also enjoys enforcement jurisdiction in exercise of its sovereign rights to explore, exploit, conserve and manage living resources in the EEZ. The coastal state "may take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance" with the coastal state's laws and regulations (Art. 73(1) LOSC). As previously mentioned, in so far that a coastal

[472] *Filetage* (supra note 465), para. 39.
[473] For a detailed study of the scope and substance of coastal state's jurisdiction, including an analysis of the regulation of 'fishing' and related activities, see Camille Jean Goodman 'The Nature and Extent of Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone' [2019] Thesis submitted for the degree of Ph.D. gives a thorough overview of state practice on the matter and concludes on this basis that there is "no longer any need for confusion regarding the coastal state's right to regulate a broad range of fishing and fishing related activities, and a wide variety of fishing and fishing support vessels in the EEZ", p. 161.
[474] Punitive enforcement measures such as sanctions and detention of a vessel are enforced in port, thereby creating overlapping categories between coastal and port state measures. The question may also arise whether enforcement measures *at sea* in the EEZ (boarding and inspecting, arrest at sea) for behaviour that has occurred *outside* the EEZ (high seas or waters under another state's jurisdiction) is allowed under international law. This is an interesting question of jurisdiction that goes beyond the scope of this thesis.
[475] *M/V "Norstar"* (Panama v. Italy), 10 April 2019 [to be included in ITLOS Reports 2019].

state's enforcement measures are enforced *in port*, there is a degree of overlap with the category of port state measures.

The issue of enforcement came up as a corollary to one of the questions put to the ITLOS in its *Advisory Opinion to the SRFC*. The first question the Tribunal was asked to answer was the extent of a flag state's obligations vis-à-vis its vessels when fishing within the EEZ of another state. To meet its responsibilities under Art. 62(4), the Tribunal held that the coastal state "is required to adopt the necessary laws and regulations, *including enforcement procedures*".[476] The discretion of the coastal state lies thus in the choice of measures available under the LOSC, namely whichever measures may be necessary "to ensure compliance".[477]

Without adequate enforcement by the coastal state, illegal fishing activities (fishing without a licence; under- or misreporting; etc.) would likely go unnoticed. Whilst the flag state retains jurisdiction over vessels flying its flag, as discussed in more detail in the next section, the coastal state is clearly in a better position to monitor what happens in its EEZ. There is therefore a strong practical as well as legal requirement for the coastal state to treat its enforcement powers as responsibilities; not simply rights. In order to ensure that the living resources in its EEZ do not risk overexploitation, the coastal state must adopt the necessary laws and regulations, including enforcement procedures. These responsibilities exist not only vis-à-vis its own fishing vessels, but vis-à-vis other states. As mentioned above, all states have an interest (a practical if not a legal one) in the sustainable conservation and management of marine living resources, and therefore the adequate enforcement of conservation and management measures, regardless of maritime zones. This sits at the heart of the argument that the duty to protect and preserve the marine environment is an *erga omnes* obligation, as discussed above.

Adopting the necessary laws and regulations, including enforcement procedures, is a way for the coastal state to fulfil its due diligence obligations. The Tribunal's high threshold for exercising due diligence thus provides guidance as to what the 'necessary' measures it should adopt are. On this basis, it is likely that the coastal state not only has a *right* but a *duty* to use its prescriptive and enforcement powers extensively.

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[476] *Advisory Opinion to the SRFC* (supra note 83), para. 104.
[477] Ibid. para. 105.

Ports hereby play an important role in fulfilling international fisheries norms and obligations . The coastal state can make use of its ports to require the landing of catch caught in its EEZ, for the purpose of monitoring and controlling compliance with the rules it has put in place so as to conserve and manage its living resources. It will moreover habitually enforce its conservation and management rules in port and impose sanctions on vessels for various fisheries-related infractions, and the scope of Art. 73 LOSC has been discussed in this context. Ports may be used to prohibit entry into port, the use of port services, and the denial of landing, transhipment, or processing of fish. This is not only a possibility but an obligation for states that have ratified the Port State Measures Agreement.

Whilst there is thus a clear obligation to enforce, the question arises once more how far coastal states *can* reasonably go. Its rights to enforce are not unfettered. The coastal state may only enforce those measures it has adopted accordance with the LOSC, the scope of which has been discussed in the previous paragraph. Art. 73 stipulates that vessels shall be "promptly released upon the posting of reasonable bond or other security", and the penalties may not include corporal punishment, such as imprisonment. Moreover, the coastal state must notify the flag state "promptly" and "through appropriate channels". Where the coastal state fails to release the vessel upon the posting of reasonable security, the flag state may bring its application for release before the ITLOS or the ICJ, or put the matter to arbitration (Art. 292).

Thus far, "prompt release" cases have made up the majority of the case law before the ITLOS. It is clear from the case law that whilst the coastal state may confiscate a vessel that has violated its laws and regulations on fisheries (or related activities), this may not "upset the balance of the interests of the flag state and of the coastal state established in the (LOSC)"; the ship owner must have recourse to available domestic judicial remedies; and the proceedings must be consistent with international standards of due process of law.[478]

In addition, the coastal state's enforcement powers are curtailed by both a necessity-test, and a reasonableness-test. This played an important role in the case of the *Virginia G*. Here, a bunkering vessel had committed what the Tribunal described as a "serious violation".[479] Nevertheless, the confiscation of the vessel and the gas and oil on board was seen as

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[478] *"Tomimaru"* (Japan v. Russian Federation) (Judgment), 6 August 2007, ITLOS Reports 2005-2007, p. 74, paras. 75 and 76; cited with approval in *Advisory Opinion to the SRFC* (supra note 83), para. 254.
[479] *M/V "Virginia G"* (supra note 446), para. 267.

unnecessary in light of the aim pursued; namely, sanctioning the violation that had been committed or deterring its recurrence.[480] Moreover, the Tribunal highlighted that the principle of reasonableness, which appears in the text of Art. 73 in relation to a reasonable bond, "applies generally to enforcement measures under [Art. 73 LOSC]", and that in "applying enforcement measures, due regard has to be paid to the particular circumstances of the case and the gravity of the violation".[481] In light of the particular circumstances of the case, and despite the seriousness of the violation, the confiscation of the *Virginia G* and the gas oil on board was deemed to be unreasonable (as well as not necessary).[482] Whilst the Tribunal unfortunately did not elaborate on what *can* be deemed reasonable in the context of enforcement,[483] the concept of a reasonableness-test is in and of itself a well-established principle of international law. As mentioned above, in *Barcelona Traction*, the ICJ stated that "in the field of diplomatic protection as in al1 other fields of international law, it is necessary that the law be applied reasonably".[484] This was also confirmed in the previously mentioned *Filleting in the Gulf of St. Lawrence* Arbitration, in which the Tribunal explained that the exercise of regulatory authority is always bound by the rule of reasonableness.[485]

3.8.4. The coastal state's exemption from compulsory dispute settlement

Despite the coastal state's evolving duties to conserve and manage living resources in its EEZ, a word has to be said about the difficulty, if not near impossibility, for other states to challenge a coastal state on its failure to do so. This once again speaks in favour of the market state 'stepping in' through market conditionality mechanisms. Whilst all other fisheries disputes are settled in accordance with the compulsory dispute settlement procedures set out in Part XV, section 2 LOSC, the coastal state does not have to submit for compulsory settlement "any dispute relating to its sovereign rights with respect to the living resources in

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[480] Ibid. para. 269.
[481] Ibid. para. 270.
[482] Ibid.
[483] The jurisprudence of the ITLOS does however contain many explanations to what can constitute a reasonable bond. For instance, the obligation of prompt release of vessels and crew includes "elementary considerations" of humanity and due process of law, and the requirement that the bond be "reasonable" indicates that "a concern for fairness is one of the purposes of this provision" (*Juno Trader* (Saint Vincent and the Grenadines v. Guinea-Bissau), 18 December 2004, ITLOS Reports 2004, p. 17, para. 77). Building on this reasoning, in *Tomimaru*, the ITLOS noted that a decision to confiscate must not prevent a shipowner from having recourse to domestic judicial remedies, and must not be taken through proceedings that are "inconsistent with international standards of due process of law" (*"Tomimaru"* (supra note 478), para. 76).
[484] *Barcelona Traction* (supra note 469), para. 93.
[485] *Filetage* (supra note 465), p. 225-296.

the EEZ or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other states and the terms and conditions established in its conservation and management laws and regulations" (Art. 297(3)(a)). Conciliation can be requested by one of the parties where other peaceful means of dispute resolution (in accordance with Part XV, section 1) have not led to a settlement. And even then, the dispute can only be submitted to conciliation in the case of a manifest failure on behalf of the coastal state to comply with its conservation and management obligations set out in Art. 61, if it has arbitrarily refused to set a total allowable catch, or if it has arbitrarily refused to allocate its surplus.[486] Whilst this *could* allow a coastal state's conservation measures to be challenged, the process is long; the possibility to submit the dispute for conciliation is limited to a 'worst case' situation; and Art. 297(c) further emphasises the coastal state's discretion by stating that "in no case shall the conciliation commission substitute its discretion for that of the coastal state".

The Fish Stocks Agreement, as an implementing agreement of the LOSC, uses the dispute settlement mechanism set out in Part XV of the LOSC. Where cooperation over compatible conservation measures fails to reach agreement within a reasonable time period, the issue may be referred by either party to dispute settlement (Art. 7(3)). Pending agreement on compatible measures, states are obliged, "in a spirit of understanding and cooperation", to "make every effort to enter into provisional arrangements of a practical nature" (Art. 7(5)). Where they fail to do so provisional measures may be requested from a Court or Tribunal. The possibility to request provisional measures already exists under the LOSC and the ITLOS has availed itself of this possibility for the purpose of conserving living resources in the previously mentioned *Southern Bluefin Tuna* cases. State parties to the Fish Stocks Agreement have the additional duty to try and establish provisional measures themselves.

Whilst it is thus difficult to hold the coastal state to account for failing its duty to ensure sustainable fishing in the EEZ, except in case of manifest failure, the previously mentioned duty to protect and preserve the marine environment is not subject to such restrictions.

[486] It must be alleged that "(i) a coastal state has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered; (ii) a coastal state has arbitrarily refused to determine, at the request of another state, the allowable catch and its capacity to harvest living resources with respect to stocks which that other state is interested in fishing; or (iii) a coastal state has arbitrarily refused to allocate to any state, under articles 62, 69 and 70 and under the terms and conditions established by the coastal state consistent with this Convention, the whole or part of the surplus it has declared to exist." (Art. 297(3)(b) LOSC).

Arguably, a coastal state that fails to protect and preserve the marine environment – including where this concerns the living resources in its EEZ – could therefore be brought before compulsory dispute settlement. In practice, it is unlikely that other state parties to the LOSC would bring such a case, so as to avoid political repercussions.

It should be emphasised that unlike for the coastal state's obligations for the conservation and utilisation of the living resources in its EEZ, the general duty to protect and preserve the marine environment is not excluded from compulsory dispute settlement. What is more, I have shown that this duty is an obligation *erga omnes*, and every state therefore has legal standing to challenge its breach. A dispute pertaining to a coastal state's failure to manage its EEZ could in theory be characterised as a dispute over the protection and preservation of the marine environment instead. This would however be very controversial.

3.9. Conserving and managing on the high seas: flag state duties

Having considered states' general duties to protect and preserve the marine environment and to conserve and manage living resources in the EEZ, I now turn to the regime of the high seas, and consider what this entails for the *flag state*. In other words: what duties are incumbent upon the flag state to prevent, deter, and eliminate IUU fishing under international law, and to ensure sustainable use?

3.9.1. Conserving and managing high seas resources

Art. 87 LOSC confirms the principle of *mare liberum,* which comprises the "freedom of fishing, subject to the conditions laid down in [Part V] section 2", and notes that this freedom (as well as the other freedoms, such as the freedom of navigation) must be exercised with due regard to other states. Part V section 2 contains Arts. 116-120 and is entitled 'The Conservation and Management of the Living Resources of the high seas'. Art. 116 reiterates states' right for their nationals to engage in fishing on the high seas, subject to: their treaty obligations; the rights, duties and interests of the coastal state; and the provisions of section 2. Arts. 116-119 mostly spell out the duty to cooperate with other states in the conservation and management of living resources, which is discussed further below. They also contain some direct obligations with regard to the level of management required, which are the following.

In accordance with Art. 117, "all states have the duty to take (…) such measures for their respective nationals *as may be necessary* for the conservation of the living resources of the high seas" (emphasis added). This is further specified in Art. 119, which mirrors Art. 61(3)-(5) by requiring states to maintain or restore species to MSY, as qualified by environmental and economic factors, "taking into account" fishing patterns, the interdependence of stocks and any general recommended international minimum standards, and considering the effects on associated or dependant species. As the previous section showed, these obligations should be interpreted broadly.

It is interesting to note that states must give more weight to scientific evidence than is required for the management of EEZ resources. Art. 119 requires states to adopt measures "designed on the best scientific advice available to the states concerned", whereas Art. 61(2) merely requires the coastal state to "take into account" the best scientific advice available to it. "Designed on" implies a closer fit between the conservation measures and the scientific evidence than "taking into account".[487] As discussed, science develops over time, and Art. 119 is thus an evolving provision. As a result, so (also) is the nature of the flag state's obligations to conserve and manage living resources on the high seas. Indeed, in practice it appears that fisheries management efforts incorporate a progressively wider range of ecosystem considerations.[488]

In addition, it should be reminded that the Fish Stocks Agreements' abovementioned provisions on the precautionary approach and ecosystem considerations apply to state parties. Referring back to *Southern Bluefin Tuna*, *Sponsoring in the Area* and *Pulp Mills* and the discussion in the previous section, Art. 119 LOSC may nowadays moreover be read in light of the precautionary approach, in accordance with Art. 31(3)(c) VCLT. What level of precaution is required and for what species remains a question, in particular where this concerns the exploitation of stocks with a less well documented conservation status than in *Southern Bluefin Tuna*. The *Southern Bluefin Tuna* case was specifically concerned with a species that was clearly under a severe threat; the Tribunal remarked that "that there is no disagreement between the parties that the stock of southern Bluefin tuna is severely depleted

[487] Ted L. McDorman, 'The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World' (2002) 17 Int'l J. Marine & Coastal L. 301, p. 314.
[488] Erik J Molenaar 'Ecosystem-Based Fisheries Management, Commercial Fisheries, Marine Mammals and the 2001 Reykjavik Declaration in the Context of International Law' (2002) 17 International Journal of Marine and Coastal Law 561, p. 581.

and is at its historically lowest levels and that this is a cause for serious biological concern".[489] As a migratory species listed in Annex I of the LOSC, the coastal states (New Zealand and Australia) were in a particularly strong position to require cooperation from Japan on the basis of Art. 64 (discussed further in section 3.10).

Finally, Art. 116(a) emphasises that states have the right for their nationals to fish on the high seas, *subject to their treaty obligations.* These include the abovementioned fundamental duty to protect and preserve the marine environment. Conservation and management measures for high seas fishing can therefore not be *less* than what would fulfil this duty.

3.9.2. The role of the flag state

In *Advisory Opinion to the SRFC*, the ITLOS "wishe[d] to emphasise that the primary responsibility of the coastal state in cases of IUU fishing conducted within its [EEZ] does not release other states from their obligations in this regard."[490] Considering "that the issue of flag state responsibility for IUU fishing activities is not directly addressed in the LOSC" the ITLOS therefore examined the flag state's responsibilities "in light of general and specific obligations of flag states under the [LOSC] for the conservation and management of marine living resources."[491] It is to this issue of flag state responsibility that the following sections turn, considering both is obligations in the EEZ and on the high seas.

In order to set out the obligations on the flag state with regard to fishing activities carried out by vessels flying its flag or by its nationals, it must be remembered that vessels are subject to the exclusive jurisdiction of the flag state (Art. 92(1) LOSC). This is a consequence of the fact that no state *has* to grant its nationality. A ship derives its nationality from having been granted a flag by a state, on the conditions set by that state, at the discretion of that state (Arts. 90 and 91 LOSC). On the high seas, no other state has prescriptive or enforcement jurisdiction over another state's vessels, except in case of piracy, since a pirate ship and crew may be seized and prosecuted by any state (Art. 105 LOSC) and in the case of certain states with regard to unauthorised broadcasting (Art. 109, 110 LOSC).

I begin with a brief introduction to the concept of a genuine link, which sits at the heart of the issue of flag state responsibility over fishing vessels and is thus crucial to the analysis

[489] *Advisory Opinion to the SRFC* (supra note 83), para. 71.
[490] Ibid. para. 108.
[491] Ibid. para. 110.

in this chapter. All states can grant their nationality, register a ship, give it a flag and fix the conditions for doing so, provided there is a genuine link between the flag state and the vessel (Art. 91(1) LOSC). The concept of a "genuine link" was codified in Art. 5 of the 1958 Convention on the High Seas, but almost sixty years later its meaning is still contested. Neither the 1958 Convention nor the LOSC defines what a genuine link is, or what the consequences are of granting nationality to a ship if no such link exists. This is no lacuna: state practice was simply too divergent to reach consensus on the necessary criteria. As the UK delegation pointed out in its comments on the draft articles on the regime of the high seas and the territorial sea, adopted by the International Law Commission, "any attempt to reduce the criteria governing recognition of a national flag to a few simple rules is bound to be extremely difficult, and it may well prove impossible to draft rules which are not in conflict with national law in one country or another".[492] This scepticism proved to be true; in its commentary on the final draft text, the International Law Commission openly acknowledged that existing state practice had been too divergent to be governed by criteria adopted by the Commission. In light of these difficulties, the Netherlands therefore suggested to only lay down the "guiding principle according to which, for purposes of recognition, there must be a genuine connexion between the ship and the state", and to prescribe in a closely linked yet separate provision safeguards to ensure safety of navigation – an interrelated issue to prevent abuse of the flag state's laws and regulations.[493] Such safeguards had already been put forward by the International Law Commission, but their scope was subsequently broadened. This became the draft Art. 34 on the flag state's obligation to ensure safety at sea for its vessels, and in doing so to observe internationally accepted standards. The level of control required by the flag state over ships flying its flag thus *presupposes* the existence of a genuine link. The International Law Commission clarified this in its commentary on the final draft articles, in which it stated that "the jurisdiction of the state over ships, and the control it should exercise in conformity with Art. 34 of these articles, can only be effective where there exists in fact a relationship between the state and the ship other than mere registration or the mere grant of a certificate of registry".[494]

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[492] International Law Commission 'Documents of the eighth session including the report of the Commission to the General Assembly' (1956) II Yearbook of the International Law Commission 1 – 303, p. 81.
[493] Ibid. p. 15
[494] Ibid. p. 279.

The 1958 Convention on the High Seas, as adopted, kept the separate provision with regard to safety at sea (draft Art. 34 became Art. 10), but added to Art. 5 that "there must exist a genuine link between the state and the ship; *in particular*, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag" (emphasis added). This sentence was kept in the LOSC, but separated from the right to grant a ship nationality (Art. 91 LOSC) and instead added to the provision on the need to ensure safety at sea (Art. 94 LOSC). Thus, Art. 94 is broadly labelled 'duties of the flag state' and starts with spelling out the obligation on every state to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. The article then sets out a non-exhaustive list of things the flag state must do (Art. 94(2)-(4)), including the obligation, in taking those measures, to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance (Art. 94(5)). This is a much broader reference than the reference to internationally accepted standards, as was the case in Art. 10 of the Convention on the high seas. What exactly those procedures and practices are is unclear (see below). Where an infraction is reported to the flag state, the flag state *must* investigate the issue and, if appropriate, remedy the situation by any action necessary (Art. 94(6)).

Partly citing *Saiga (No. 2)*, the ITLOS recently held in *Virginia G* the following on the matter:

> "The requirement for a 'genuine link' between the flag state and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag state to grant its nationality to ships (…) There is nothing in Art. 94 to permit a state which discovers evidence indicating the absence of proper jurisdiction and control by a flag state over a ship to refuse to recognise the right of the ship to fly the flag of the flag state (…) Once a ship is registered, the flag state is required, under Art. 94 of the [LOSC], to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of 'genuine link'."[495]

This pragmatic approach has shifted the focus from the genuine link-question to the nature and extent of the consequences of granting nationality; namely, flag state responsibility.

The duties of the flag state to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag, as enshrined in Art. 5(1)

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[495] *M/V "Virginia G"* (supra note 446)), paras. 110 and 113, citing and elaborating on *Saiga (No. 2)* (supra note 265), para. 82.

of the 1958 Convention on the High Seas and now Art. 94(1) LOSC, are therefore general duties, and are *not* limited only to safety at sea. This was eloquently phrased by Judge Paik, who said that "flag state jurisdiction and control have evolved to cope with new issues, reflecting the changing needs of society and the new demands of the time. In interpreting Art. 94, it is important to take into account this evolving, open-ended context of the duties of the flag state".[496]

3.9.3. The flag state's right and duty to exercise jurisdiction

The flag state's prescriptive and enforcement jurisdiction comes with certain explicit responsibilities. For example, the flag state must make it an offence for a ship flying its flag or for one of its nationals to damage a submarine cable (Art. 113 LOSC). With regard to pollution from vessels, states must adopt laws and regulations that have at least the same effect as that of generally accepted international rules and standards established though the IMO (Art. 211(2)). Moreover, they must effectively enforce the IMO's rules, as well as their own rules adopted against marine pollution from vessels, irrespective of where a violation occurs (Art. 217(1)). This obligation on the flag state to make use of its enforcement jurisdiction with regard to pollution from vessels goes a long way, and includes an obligation to periodically inspect its vessels, to ensure that ships carry on board the necessary certificates, to prohibit ships from sailing if they are not in compliance with the rules, to immediately investigate and where appropriate institute proceedings in respect of an alleged violation, etc. (Art. 217).

Concerning fishing vessels, the content of flag state responsibility is less clearly spelled out, though I recall that the duty to protect and preserve the marine environment under Part XII is no longer strictly reserved for instances of pollution. In the EEZ of another state, the flag state is under an obligation to ensure compliance by vessels flying its flag with the coastal state's conservation and management measures. Art. 58(3) LOSC stipulates that in exercising their rights and performing their duties under the LOSC in the EEZ, "states shall comply with the laws and regulations adopted by the coastal state in accordance with [the LOSC]". In addition, Art. 62(4) determines that nationals of other states fishing in the EEZ shall "comply with the conservation measures and with the other terms and conditions

[496] Separate Opinion of Judge Paik in *Advisory Opinion to the SRFC* (supra note 83), para. 9.

established in the laws and regulations of the coastal state." The focus of Art. 62(4) is on the coastal state, not the flag state. The main object and purpose of Art. 62 as a whole is to spell out the extent to which the coastal state can exercise prescriptive jurisdiction in exercise of its sovereign rights over living resources, with which nationals of other states shall comply. Nonetheless, the ITLOS has taken the view that Art. 62(4) also implies an obligation on other states to ensure that their nationals comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal state.[497] It thus complements Art. 58(3).

To effectively exercise its jurisdiction and control over ships flying its flag, the flag state must, as far as fisheries are concerned, adopt the necessary administrative measures "to ensure" that such vessels are not involved in activities which will undermine the flag state's responsibilities in respect of the conservation and management of marine living resources.[498] The flag state's responsibilities in respect of the conservation and management of marine living resources have already been discussed.

It has been explained that the flag state is not, nor can it always, be held responsible for the actions of fishing vessels flying its flag.[499] The flag state is therefore not under an obligation of result. Rather, in *Advisory Opinion to the SRFC,* the ITLOS found that the obligation "to ensure" was found to be an obligation of conduct, and therefore of due diligence. As discussed previously in this chapter, this threshold was found to be a high one, and the Tribunal concluded that the flag state must therefore take all the "necessary measures, including enforcement" to ensure compliance with a coastal state's rules and regulations, and take the necessary measures to prohibit its vessels from fishing in the EEZ of another state without its consent (Arts. 58(3) and 62(4)).[500]

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[497] *Advisory Opinion to the SRFC* (Ibid.), para. 123.
[498] Ibid. para. 119.
[499] *South China Sea* (supra note 226), para. 754.
[500] *Advisory Opinion to the SRFC* (supra note 83), paras. 134-135. Valentin Schatz provides an interesting analysis of the Tribunal's reasoning, observing that, prior to the Advisory Opinion, "most scholars consider that, *de lege lata*, no flag State obligations to combat illegal fishing in the EEZs of other States can be read into any provisions of the [LOSC]" – at least, not expressly so (Valentin J Schatz 'Combating Illegal Fishing in the Exclusive Economic Zone Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State' (2016) 7 Goettingen Journal of International Law 383, p. 399; Valentin Schatz 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ' (2016) 47 Ocean Development and International Law 327, p. 331 and subsequent analysis).

Whilst the ITLOS did not have jurisdiction in the case at hand to consider high seas fishing, it is to be presumed that the same level of vigilance can be expected where vessels fishing on the high seas undermine a flag state's conservation and management responsibilities. This comes back to the question of whether unregulated fishing, as defined in the IPOA-IUU, is unlawful, and to what extent this is the responsibility of the flag state. This is further discussed as part of the duty to cooperate, below.

With regard to enforcement in particular, the Tribunal concluded that "while the nature of the laws, regulations and measures that are to be adopted by the flag state is left to be determined by each flag state in accordance with its legal system, the flag state nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations. Sanctions applicable (…) must be sufficient to deter violations and to deprive offenders of the benefits accruing from their (violation of the coastal state's conservation measures)".[501] Furthermore, Art. 94(6) LOSC provides that if a state has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised, he may report the facts to the flag state. Upon receiving such a report, the flag state shall investigate the matter and, if appropriate, take any action necessary to remedy the situation. In *Advisory Opinion to the SRFC*, the Tribunal was of the view that the flag state is also under the obligation to inform the reporting state about the action taken.[502] If the illegal behaviour occurs in waters under foreign jurisdiction, the action to be taken by the flag state is, however, without prejudice to the rights of the coastal state to take enforcement measures pursuant to Art. 73 LOSC (section 9, above).[503]

Judge Paik points out in his Separate Opinion that sanctions are not actually mentioned in the LOSC.[504] The Tribunal was likely inspired by Art. 19(2) of the Fish Stocks Agreement (that "sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities"), the wording of which is also reflected in para. 8.2.7 of the Code of Conduct and para. 21 of the IPOA-IUU. However, since only two of the SRFC member states which had asked for the Advisory Opinion where

[501] *Advisory Opinion to the SRFC* (Ibid.), para. 138.
[502] Ibid. para. 118.
[503] Ibid. para. 139.
[504] Separate Opinion of Judge Paik in *Advisory Opinion to the SRFC* (Ibid.).

party to the Fish Stocks Agreement, the Tribunal relied solely on the text of the LOSC, without however elaborating on *why* it came to the conclusion it did.

Judge Paik offers an alternative methodology to reach the same conclusion that sanctions are necessary, which is to rely on the rule of reference set out in Art. 94(5) LOSC to argue for a more evolving interpretation of the LOSC. Art. 94(5) provides that, in taking measures to ensure effective jurisdiction and control in administrative, technical and social matters over ships flying its flag, the flag state must conform to generally accepted international regulations, procedures and practices. Whilst this is to ensure safety at sea, Judge Paik did not believe there to be a reason to confine the rule of reference approach only to that context.[505] Paik furthermore points out that "it is evident that such regulations, procedures or practices *need not be customary law or treaties of general acceptance*".[506] Whilst on the one hand, "there is no doubt that the Tribunal should not allow itself to apply soft law or *lex ferenda*", on the other hand Paik deplored that scant attention paid to the legal developments related to flag state responsibility in respect of IUU fishing since the adoption of the LOSC, which he believed to be "one of the most significant developments of international fisheries law during the past two decades or so."[507] For the purpose of the rule of reference in Art. 94, Paik concludes the following:

> "[R]egulations, procedures or practices established in international legal instruments that are accepted by a sufficient number of states may be regarded as being generally accepted. It may also be relevant that those regulations, procedures or practices are consistently upheld by a series of legal instruments. Thus what constitutes generally accepted international regulations, procedures and practices to which the measures to be taken by the flag state must conform requires an examination of those international agreements and legal instruments addressing flag state responsibility in respect of IUU fishing. This is a reason why the Tribunal should look carefully into the post-[LOSC] legal developments, not because they are binding upon states as either treaty law or customary law, but rather because they are indicative of such regulations, procedures and practices."[508]

The rule of reference could possibly be used to give teeth to the FAO Voluntary Guidelines for Flag State Performance, endorsed by COFI in June 2014, which set out minimum

[505] Ibid. para. 24.
[506] Ibid. para. 26 (emphasis added).
[507] Ibid. para. 22.
[508] Ibid. paras. 26-27.

benchmarks for flag states by way of performance criteria.[509] Though voluntary, the UN General Assembly habitually calls upon states to implement the Guidelines as soon as possible.[510]

Also relevant is the work being undertaken by the FAO on a Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels (Global Record), which is intended to become a global repository of data identifying vessels engaged in fishing and fishing-related activities, part of which is the use of a unique vessel identifier. Both the implementation of the Guidelines and the work on the Global Record are however, as of now, work in progress. [511]

3.10. Cooperating and regard when fishing across boundaries

In *Advisory Opinion to the SRFC*, the ITLOS quoted the *MOX Plant Case* that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the [LOSC] and general international law", and added that this obligation extends also to cases of alleged IUU fishing activities.[512] The duty to cooperate is thus fundamental to the issue at hand. It is also a duty that has increasingly come under scrutiny through the debate over unregulated fishing. In this section, I aim to answer the question what is expected of states when exploiting a fish stock which requires cooperation, in particular transboundary stocks, and whether and when they are under a duty to apply an RFMO's conservation and management measures.

I recall that the LOSC distinguishes both horizontally between different parts of the ocean (the deep sea-bed in the Area and the continental shelf from the water column above it) and vertically (between internal waters, territorial seas, the EEZ and the high seas). Different

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[509] This is suggested in Victor Alencar Mayer Feitosa Ventura 'Tackling Illegal, Unregulated and Unreported Fishing: The ITLOS Advisory Opinion on Flag State Responsibility for IUU Fishing and the Principle of Due Diligence' (2015) 50 Brazilian Journal of International Law, p. 58. Natalie Klein challenges this however, arguing that the Guidelines will likely "predominantly be utilized as a tool for flag States themselves and/or within the frame of RFMO decision-making" rather than to hold flag states responsible (Natalie Klein 'Strengthening Flag State Performance in Compliance and Enforcement' in Erik J. Molenaar and Richard Caddell (supra note 24), p. 364).

[510] Most recently in UN General Assembly Resolution of 11 December 2018 (A/Res/73/125), para. 105 ("…urges all flag States to implement those Guidelines as soon as possible, including, as a first step, by carrying out a voluntary assessment").

[511] Natalie Klein (supra note 509), p. 362.

[512] *Advisory Opinion to the SRFC* (supra note 83), para. 140; *MOX Plant* (Ireland v. United Kingdom) (Provisional Measures), 3 December 2001, ITLOS Reports 2001, p. 95, para. 82.

rules apply in each zone, and to the species in it. Since fish do not respect these legal boundaries, the LOSC explicitly identifies various situations in which cooperation is required to ensure the sustainable exploitation of living resources. I consider these in turn. Separate provisions apply to the different scenarios, with each a somewhat different wording. Linguistic differences notwithstanding, it will be shown that the duty to cooperate is both essential and applies to all, generally requiring the highest level of diligence of those involved.[513]

3.10.1. From a special right for the coastal state to mutual responsibilities

Art. 117 LOSC provides that states must take, or cooperate with other states in taking, such measures for their nationals as may be necessary for the conservation of the living resources of the high seas. Furthermore, Art. 118 LOSC stipulates the following (emphasis added):

> "States *shall cooperate with each other* in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, *shall enter into negotiations* with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, *cooperate to establish subregional or regional fisheries organisations* to this end."

Both provisions leave a great deal of discretion. There is no obligation for negotiations to be successful, and the consequences of not reaching agreement are not spelled out.[514] Neither is there an explicit requirement in either provision that cooperation must be effectuated in a particular way; it can be done bilaterally, or through an RFMO. Exactly at what stage it is appropriate to establish an RFMO remains a matter of speculation. The central role of RFMOs is considered in the section that follows.

At the same time, the ITLOS in *Advisory Opinion to the SRFC* showed great awareness of the need to manage a stock throughout its entire area of distribution, involving all parties concerned. Whilst it was limited to examining the rights and obligations of the coastal state in the EEZ, the Tribunal felt it necessary to note that fisheries conservation and management measures, to be effective, should concern the whole stock unit *over its entire area of*

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[513] *Advisory Opinion to the SRFC* (supra note 83), para. 215.

[514] Dawn A. Russell and David L. van der Zwaag 'The International Law Policy Seascape Governing Transboundary Fisheries' 9-25 in Dawn A. Russell and David L. van der Zwaag (eds) *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles* (Martinus Nijhoff 2010), p. 11.

distribution or migration routes.[515] For migratory species like tuna, this extends the duty to cooperate to many a state.

An important question that remains is whether cooperation is still tilted in favour of a particular party. As previously mentioned, prior to the LOSC, the coastal state enjoyed a special right in this regard. To what degree must those fishing on the high seas nowadays still give preference to nearby coastal states, in particular where this regards the management of a transboundary stock between the high seas and the EEZ?

When carrying out fishing activities in another state's EEZ, there is a clear emphasis in favour of the coastal state, which enjoys sovereign rights over the living resources in its EEZ.[516] On the high seas, there is no such clear hierarchy between states. Art. 116(b) stipulates that the right to fish on the high seas remains "subject to" the rights and duties as well as the interest of the coastal state, as provided for, *inter alia*, the LOSC provisions on straddling stocks, anadromous and catadromous stocks, highly migratory species and marine mammals. This does not however lay down a clear hierarchy between coastal state rights and those fishing on the adjacent high seas for transboundary (high seas/EEZ) stocks.

Scholars are divided on whether coastal states retain a special interest in straddling stocks beyond the EEZ under the LOSC regime, and on the juridical nature of that interest.[517] It could be argued that fishing in the adjacent high seas for an already fully exploited transboundary stock harms the coastal state's sovereign rights to exploit the living resources in its EEZ, and undermines its duty to protect them. This is argued by William T. Burke, who concludes that "Art. 116 means that the right to fish on the high seas is subject to the sovereign rights, as well as the interest of coastal states as provided in the articles of [the EEZ regime]".[518] Barbara Kwiatkowska similarly suggests that by extending Art. 116(b) to the rights derived from the EEZ regime in general, "practices of the high seas fishing states cannot be allowed to undermine the conservation and management practices of the coastal

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[515] *Advisory Opinion to the SRFC* (supra note 83), para. 214 (emphasis added).
[516] Alexander Proelss 'Art. 56' in Alexander Proelss (supra note 416), nm. 26-29, p. 432-433. Also section 3.10.4 on due regard.
[517] Peter GG Davies and Catherine Redgwell (supra note 333), p. 234 and pages that follow, giving a detailed overview of the divided positions on whether or not a coastal state retains any special interests; also Barbara Kwiatkowska (supra note 338), p. 228-331 and 333-340, who generally rejects a requirement of recognition of coastal state "special rights", though concedes it is an "open question";
[518] William T. Burke *The New International Law of Fisheries* (OUP 1994), p. 133.

state".[519] This would effectively oblige other states whose nationals fish for straddling stocks to comply with the coastal state's conservation and management measures. Unlike the High Seas Fishing Convention, which allowed for such special rights and even allowed the coastal state to resort to unilateral measures where negotiations failed, the LOSC does not clearly settle this issue.[520] However, any unilateral measures adopted by the coastal/port state against the vessels of a third state for breach of coastal state and/or international conservation measures applicable to the high seas portion of a straddling stock would have to be careful not to overstep the jurisdictional boundaries set out in chapter 6. This is in particular so where these enforcement measures are not taken in port, but at sea, as in the case of the previously mentioned dispute over the Canadian seizure of the Spanish flagged vessel *Estai*.[521]

It is more plausible that the recognition of an EEZ may be seen of having superseded any such preferential rights. The only obvious rights of the coastal state which supersede high seas fishing activities are the coastal state's rights over anadromous and catadromous stocks. This view is taken by Judge Shigeru Oda, for who Art. 116(b) creates unnecessary confusion.[522] The coastal state is explicitly given the primary interest in anadromous stocks (Arts. 66(1)), and the responsibility for both anadromous stocks and catadromous stocks if the latter spend the greatest part of their life cycle in the coastal state's waters (Art. 67(1)). Fishing for either of these stocks is prohibited on the high seas, except with regard to anadromous stocks where this would otherwise lead to the economic dislocation of another state (Arts. 66(3) and 67(2)).

On the contrary, the provisions on transboundary stocks, to which Art. 116(b) refers, do not set out preferential rights for the coastal state. As discussed in the sections that follow, they rather stipulate mutual obligations to cooperate on all parties – though without an obligation to reach any particular agreement. As per Art. 63(2) LOSC, the coastal state and those fishing for a straddling stock in the adjacent area shall "seek to agree", directly or through appropriate RFMOs, upon the measures necessary for the conservation of these stocks in the adjacent area. The reference to "conservation" alone in the adjacent area (and not also the exploitation of such resources) *could* be construed in favour of the coastal state,

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[519] Barbara Kwiatkowska (supra note 338), p. 330.
[520] This is also clear from the negotiating history of the EEZ regime ('Art. 63' in *Virginia Commentaries* (supra note 237), p. 641).
[521] Supra note 341 and surrounding text; Peter GG Davies and Catherine Redgwell (supra note 333), p. 234.
[522] Shigeru Oda *International Control of Sea Resources* (Reprint, Martinus Nijhoff, 1989).

though the argument is tenuous. Art. 64(1) stipulates that the coastal state and other states whose nationals fish for species listed in Annex I to the LOSC (highly migratory species) must "cooperate", either bilaterally or through an RFMO, with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the EEZ. Art. 64(2) contains the clear requirement that states must cooperate to establish an RFMO where none exists, and participate in its work. In so doing, Art. 64 seeks a balance of interests between the coastal state and others, and arguably does away with any suggestion that the coastal state retains a special right to manage such species.

For straddling and highly migratory species, the Fish Stocks Agreement demands that measures for the high seas and those under national jurisdiction be "compatible", and that measures established in respect of the high seas portion of a stock do not undermine the effectiveness of coastal state measures for that same stock that apply in their EEZ (Art. 7(2)(a)). Coastal state interest is furthermore given priority in the obligation to take into account the biological unity of the stocks, "'including the extent to which the stocks occur and are fished in areas under national jurisdiction" (Art. 7(2)(d)).

However, where the coastal state has *not* yet adopted any measures, recent jurisprudence suggests otherwise. In *Advisory Opinion to the SRFC*, the Tribunal opined that the measures taken by coastal states pursuant to the obligation to cooperate under Art. 64 LOSC "should be consistent and compatible with those taken by the appropriate regional organisation (…) throughout the region, both within and beyond the EEZ".[523] In the case at hand, this meant that the measures adopted by the coastal states in question for the sustainable management of tuna in the region should be consistent and compatible with those taken by ICCAT. This suggests that, where there is an RFMO already in place that manages a highly migratory species listed in Annex I of the LOSC, coastal states who have not yet adopted conservation and management measures have a duty to ensure that they adopt measures compatible with *its* conservation and management measures, *including* where this pertains to their EEZ, rather than the other way around.[524] Whereas, where coastal states have already adopted

[523] *Advisory Opinion to the SRFC* (supra note 83), para. 207(iii).
[524] In practice, it can be observed that compatibility is approached differently by different RFMOs, and that in any case, the question may not be purely temporal (who adopted measures first) but that different approaches are needed for different stocks.

conservation and management measures for a transboundary stock, the Fish Stocks Agreement suggests the contrary.

To summarise, the requirement for compatibility with RFMO measures argues in favour not of a special interest of the coastal state, but rather of a special interest of cooperation through RFMOs.

3.10.2. The duty to cooperate through RFMOs

The previous section showed that the conservation and utilization of Annex I species, both within and beyond the EEZ, requires states to cooperate to establish an RFMO where none exists, and participate in its work (Art. 64 LOSC). The question is now put whether cooperation *must* be effectuated through an RFMO, where one already exists, and whether this implies abiding by its conservation and management measures, both as far as parties to the Fish Stocks Agreement are concerned and in general for those fishing for straddling stocks and highly migratory species. The answer to this question will determine whether and when fishing activities by non-members to an RFMO on a regulated stock is illegal from the point of view of international law. It may be recalled that fishing by a non-member to an RFMO without a quota (provided quotas are set) only undermines a flag state's responsibilities under international law – i.e. is illegal – where that flag state is bound to observe the RFMO's conservation and management measures. The relevance of such conservation and management measures as potential international and regional standards has already been discussed. Now, the question is examined whether a state is bound to observe an RFMO's conservation and management measures through the duty to cooperate.

Several instruments are relevant to answer this question, beyond the abovementioned provisions of the LOSC on cooperation. First of all, Art. III(1)(a) of the Compliance Agreement obliges its parties to take the necessary measures to ensure that their fishing vessels do not undermine the "effectiveness" of international conservation and management measures, such as those adopted by an RFMO. Fishing by a non-member not in compliance with an RFMO CMM is therefore *stricto sensu* a breach of the Compliance Agreement. However, the concept of "undermining" is vague and unqualified.

The Fish Stocks Agreement is more specific in this regard. The Fish Stocks Agreement provides that states fishing for stocks on the high seas and relevant coastal states shall give effect to their duty to cooperate by becoming members of an existing RFMO or by agreeing

to apply its conservation and management measures (Art. 8(3)). This appears to be a clear-cut obligation that a non-member of an RFMO that has not obtained a quota from that RFMO cannot fish for the managed stock.

However, the Fish Stocks Agreement lacks universal ratification and Serdy argues that it is doubtful that its provisions on membership and compliance with RFMO conservation and management measures have reached the status of customary law.[525] If such a customary duty does exist, Serdy argues that the same could then be said of Art. 11 Fish Stocks Agreement, from which it would follow that a universal standard now exists that regulates the right to join RFMOs and receive an allocated quota.[526] Yet this does not appear common practice by RFMOs.

It is true that RFMOs widely assimilate unregulated fishing with illegal fishing, and indeed adopt sanctions against vessels of non-members fishing in RFMO regulated areas, as discussed below. This could indicate a new customary duty and *de facto* mare clausum. But acceptance of this practice is not uniform and more likely the result of political compromise than a sense of legal obligation.[527] Such an obligation would ignore issues of equity unless RFMOs operated a fair and accessible quota allocation system. This is not yet the case. Rather, Serdy observes the “regrettable propensity in international fisheries for states to favour imposing disciplines on others that they are not prepared to accept for themselves”.[528]

A reluctance to hold non-member states to conservation and management measures adopted by RFMOs *per se* is also evident from the Port State Measures Agreement, which stipulates that a party does not hereby “become bound by measures or decisions of, or recognise, any regional fisheries management organisation of which it is not a member” (Art. 4(2)). This hesitance towards giving too much power to RFMOs moreover shines through in current negotiations at the WTO on reducing harmful subsidies. The negotiators are *inter alia* looking towards RFMOs (and potentially coastal states) as relevant bodies to determine whether a vessel has engaged in IUU fishing, thereby triggering a prohibition to subsidise the vessel. Recent discussions show that member states are weary of that in “recognising RFMO lists of IUU vessels for the purpose of subsidy disciplines, WTO members do not

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[525] Andrew Serdy (supra note 353), p. 349.
[526] Ibid.
[527] Andrew Serdy (supra note 24), p. 157.
[528] Ibid. p. 154.

inadvertently find themselves subject to other rules of RFMOs they are not party to."[529] One proposal therefore explicitly includes the general provision that "[e]xcept as otherwise provided in this instrument, a Member does not thereby become bound by measures or decisions of, or recognise, any regional fisheries management organisation of which it is not a party to."[530]

On the other hand, Rayfuse argues that "state practice indicates both the assertion and the acceptance of a customary duty to cooperate through the medium of [RFMOs] and that an essential element of that duty is the requirement for both member and non-member flag states alike to respect (its measures) either by compliance or through restraint from fishing. This duty is not limited to straddling and highly migratory stocks fisheries but arguably applies to discrete high seas stocks as well."[531] This would result in an effective prohibition on fishing for a species regulated by an RFMO, depending on how generous the RFMO is in allocating quotas to non-members. If this is the correct interpretation of the LOSC obligations to conserve and to cooperate, and/or if this represents the current status of customary international law, then both prongs of unregulated fishing – and indeed all elements of IUU fishing as defined in the IPOA-IUU – effectively concern illegal activities.

Regardless of whether or not there is now a customary duty to cooperate through an RFMO, which appears plausible, the question whether fishing without a quota on a stock governed by an RFMO undermines that flag state's responsibilities in respect of the conservation and management of marine living resources (as phrased in the *SRFC Advisory Opinion*)[532] remains complex. Art. 8(3) Fish Stocks Agreement provides that states having a "real interest in the fisheries concerned" may become members of such an RFMO, and that they shall not be precluded from membership or participation or be discriminated against. A similar safeguard can be found in Art. 119 LOSC, which instructs states more generally to ensure that conservation measures are adopted and applied in a way which in form or fact do not discriminate against fishermen from any state. This raises the problem of new entrants to

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[529] Margaret A Young (supra note 357), p. 15; Carl-Christian Schmidt 'Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing' (2005) 20 International Journal of Marine and Coastal Law 479, p. 6.
[530] FAO Report of the Expert Workshop to Estimate the Magnitude of IUU Fishing Globally (supra note 413), para. 1.5.
[531] Rosemary Rayfuse 'Countermeasures and High Seas Fisheries Enforcement' (2004) 51 Netherlands International Law Review 41, p. 59.
[532] *Advisory Opinion to the SRFC* (supra note 83), para. 119.

a fishery which is already being fully exploited. This is also acknowledged in the *Virginia Commentaries* on Art. 119, which has the following to say on the matter:

> "All things being equal, new entrants who cooperate in conservation and management of high seas living resources, in accordance with Art. 119, should not in principle be excluded from a share in the total allowable catch. On the other hand, where conservation and management measures have already been established, new entrants must seek to exercise their right to fish through that mechanism. They cannot ignore or flaunt such measures simply in exercise of their rights or because they have not been able to obtain an allocation." [533]

The commentary concludes by referring to Part XV on dispute settlement to further deal with any disagreement over this. Opinions continue to differ about the exact meaning and relevance of Art. 119. The provision appears to create obligations going both ways, and indeed Tore Henriksen contributes that it could also "require RFMO member states to take into account third state interests when adopting conservation and management measures, including the allocation of fishing rights."[534]

The Fish Stocks Agreement does not specify what a real interest is. With regard to new members, Art. 11 gives a non-exhaustive list of elements states should take into account when determining the nature and extent of participatory rights for new members. Since this list is not exhaustive and given the soft language of the provisions ("take into account…") it is not easy for a newcomer to establish himself in an existing fishery. This is all the more so since most fisheries are already fully exploited, and there is little incentive for fishing nations to limit their quota in favour of a newcomer. A thorough analysis of the issue is provided by Erik Molenaar, who points out the very existence of the term implies that not all states have a real interest – otherwise, a mere copy of Art. 118 LOSC would have sufficed.[535] Whilst the need for states to show a real interest risks being used as a bar to participation in the RFMO, in practice, discrimination is most likely to take place through quota allocation (or the lack thereof) to new entrants.[536]

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[533] 'Art. 119' in *Virginia Commentaries* (supra note 237), p. 313.

[534] Tore Henriksen (supra note 365), p. 90. Henriksen acknowledges that the opposite argument (that third states should therefore accept RFMO conservation and management measures) may also be entertained, but concludes that this would imply a considerable restriction in their right to fish on the high seas and probably overstretch the duty to cooperate.

[535] Erik J Molenaar (supra note 18), p. 495.

[536] Ibid. p. 500. An example is NAFO, which in 1999 adopted Regulation 1/99 to Guide the expectations of future new members to fishing opportunities in the NAFO Regulation Area. Regulation 1/99 states that "should any new member of NAFO obtain membership in the Fisheries Commission, in accordance with Article XIII(1) of the Convention, such new members should be aware that presently and for the foreseeable future, stocks

It is questionable whether a flag state is still bound by the prohibition not to fish in Art. 8(3) Fish Stocks Agreement if the other parties to the Agreement do not hold up their end of the bargain, and either play a 'closed club' or do not allocate a sufficient quota. In theory, a failure on behalf of RFMO members to give access to a newcomer (discrimination; not giving effect to a real interest) could be construed as a material breach in accordance with Art. 60 VCLT. This would allow the aggrieved flag state to terminate or suspend the Fish Stocks Agreement vis-à-vis the non-complying parties (the RFMO), among other things, and enter the fishery. Evidently, this does not relieve the flag state concerned of its general duties to protect and preserve the marine environment, and to take the necessary measures to ensure sustainable fishing in accordance with the relevant provisions of the LOSC (depending on the fishery concerned, Arts. 116, Art. 63(2), and Art. 64).

In any event, the duty to cooperate requires further examination. Clearly, a flag state's responsibilities are not necessarily undermined by vessels flying its flag not complying with every conservation or management measure adopted by any RFMO – this depends on both its, and the RFMO's, willingness to provide access to stocks for which a quota has been set. Rather than focus solely on whether or not a flag state is bound by an RFMO's conservation and management measures at all cost, the next section explores further what the duty to cooperate entails from all parties involved – newcomers and existing RFMO members.

3.10.3. Cooperation as a due diligence obligation

In *Advisory Opinion to the SRFC*, the ITLOS concluded that the previously mentioned obligations to "seek to agree" under Art. 63 LOSC and to cooperate under Art. 64 LOSC are no obligations of result, but of conduct, and therefore of due diligence.[537] I have shown that recent jurisprudence has set a high threshold for exercising due diligence in the law of the sea. In so far that this relates to the duty to cooperate, the ITLOS held the following:

> "The obligation to "seek to agree . . ." under articles 63, paragraph 1, and the obligation to cooperate under article 64, paragraph 1, of the [LOSC] are "due diligence" obligations which require the States concerned to consult with one another

managed by NAFO are fully allocated, and fishing opportunities for new members are likely to be limited, for instance, to new fisheries (stocks not currently allocated by TAC/quota or effort control), and the "Others" category under the NAFO Quota Allocation Table". A closer look at the NAFO Quota Allocation Tables show that the "Others" category generally contains only extremely limited opportunities compared to the quotas set side for specific members, and at times, none. Annual Quota Table for 2015, available at: http://www.nafo.int/fisheries/regulations/quotas/2015.pdf.

[537] *Advisory Opinion to the SRFC* (supra note 83), para. 210.

> in good faith, pursuant to article 300 [LOSC]. *The consultations should be meaningful* in the sense that *substantial effort should be made by all states concerned*, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.
>
> The Tribunal is of the view that the conservation and development of shared stocks in the exclusive economic zone of an SRFC member State require from that State effective measures aimed at preventing over-exploitation of such stocks that could undermine their sustainable exploitation and the interests of neighbouring member States."[538]

What exactly meaningful consultations, substantial effort, and effective measures are will depend on the facts of the case.

The ITLOS furthermore "wished to emphasize" that "when it comes to conservation and management of shared resources, the [LOSC] imposes the obligation to cooperate on each and every State Party concerned".[539] It noted in this regard that, while coastal states have sovereign rights to explore, exploit, conserve and manage living resources in their EEZ, in exercising their rights and performing their duties under the LOSC in their respective EEZs, they also must have due regard to the rights and duties of one another.[540] The implication of this for the purpose of shared fish stocks is cooperation. As previously mentioned, a coastal state must take "effective measures aimed at preventing over-exploitation of such stocks that could undermine their sustainable exploitation and the interests of neighbouring [states]."[541] Moreover, effective fisheries conservation and management measures must concern the entire area of distribution of that stock, or its migration routes.[542] Evidently, a coastal state's exercise of its duty to sustainably manage a transboundary resource in its EEZ *will* affect another coastal state's duty to do the same; and that over a potentially large geographical area (the stock's range). It must therefore manage the resources in its EEZ with due regard to the duty of other coastal states to manage that same resource. This necessarily requires cooperation.

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[538] Ibid. paras. 210-211 (emphasis added).
[539] Ibid. para. 215.
[540] Ibid. para. 216; Art. 56(2), Art. 58(3), Arts. 192 and 193 LOSC, and the Preamble of the LOSC, which recognises "the desirability of establishing through [the LOSC] *with due regard for the sovereignty of all states*, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment" (emphasis added),
[541] *Advisory Opinion to the SRFC* (Ibid.) para. 211.
[542] Ibid. para. 214.

In other words, the duty to cooperate over shared resources stems not only from the LOSC's explicit provision to do so in Arts. 63 and 64, but more generally from the duty to have due regard to the rights and duties of others. This is important, as the duty of due regard is of a more general nature; in exercising its rights and performing its duties under the LOSC in the EEZ, the coastal state shall have due regard to the rights and duties of other states (Art. 56(2)). It has the potential further expand the duty to cooperate beyond the transboundary resources mentioned in Arts. 63 (straddling and shared stocks) and 64 (highly migratory species). It may be envisaged that the coastal state's obligation to have due regard to the rights and duties of nearby coastal and flag states to sustainably exploit marine living resources demands cooperation *not only* when the resources are themselves transboundary, but for instance where they are a keystone species of a particular ecosystem.

The standard of due regard was not further elaborated on in *Advisory Opinion to the SRFC*, but courts have done so elsewhere. I turn to this next.

3.10.4. Due regard and no unjustifiable interference

Already in 1974, in the *Fisheries Jurisdiction* cases, the ICJ explained that "the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all".[543] This duty had first been codified in Art. 2 of the 1958 in the Geneva Convention of the High Seas as a duty on states to exercise their high seas freedom "with reasonable regard to the interests of other states in their exercise of the freedom of the high seas." It is now codified in the LOSC as a duty of due regard (variably to rights, duties and interests of other states) across various provisions, covering the high seas as well as the EEZ, as well as the previously mentioned general obligation to act in good faith and not constitute an abuse of right. The most significant for the purpose of fisheries is the obligation in Art. 56(2), that it exercising its rights and performing its duties under the LOSC in the EEZ, the coastal state shall have due regard to the rights and duties of other states; Art. 58(3), that in exercising their rights and performing their duties under the LOSC in the EEZ, states shall have due regard to the rights and duties of the coastal state; and Art. 87(2), that

[543] *Fisheries Jurisdiction* (UK v. Iceland) (supra note 312), para. 72; *Fisheries Jurisdiction* (Germany v. Iceland) (supra note 312), para. 64.

high seas freedoms shall be exercised by all states with due regard for the interests of other states in their exercise of the freedom of the high seas and activities in the Area.

Obligations of due (or reasonable) regard project both substantive and procedural requirements.[544] Substantive aspects include the content of the two conflicting rights and the result of the balance between them.[545] Procedural aspects consist in the obligation upon the states concerned to act in good faith in order to agree on how the due regard requirement should be put into effect.[546] These procedural requirements are predominantly obligations of consultation and negotiation, as is apparent from a number of international decisions. In the 1974 *Fisheries Jurisdiction* cases, the ICJ found that the most "appropriate method" for the solution of a dispute that was essentially about balancing rights and interests was "clearly that of negotiation", with the objective to delimit the rights at stake and to balance and regulate equitably questions related to fishing allocations and the like.[547]

Most illustrative is also the recent dispute in *Chagos*, where the disputing Parties (Mauritius and the UK) disagreed over the extent of due regard required by the coastal state to the rights and duties of other states. The coastal state in question (the UK) had created certain legitimate expectations towards Mauritius, which had not been met. The disputed matter concerned a 1965 Agreement between the UK and its ex-colony Mauritius which obliged the UK to certain undertakings, including to ensure that fishing rights in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable.[548] When the UK declared an MPA in the Archipelago in 2009, without having involved Mauritius much in the decision-making process, the latter protested. A LOSC Annex VII Arbitral Tribunal upheld the need to act in good faith as a general rule of international law (Art. 2(3) LOSC), as well as the need to pay due regard to other states' rights in accordance with Art. 56(2). For all intents and purposes, the Tribunal found that these two obligations (good faith and due regard) were equivalent.[549]

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[544] Tullio Scovazzi '"Due Regard" Obligations, with Particular Emphasis on Fisheries in the Exclusive Economic Zone' (2019) 34 The International Journal of Marine and Coastal Law 56, p. 64.s
[545] Ibid.
[546] Ibid.; Mathias Forteau 'The Legal Nature and Content of "Due Regard" Obligations in Recent International Case Law' (2019) 34 The International Journal of Marine and Coastal Law 25, p. 32; Alexander Proelss 'Art. 56' in Alexander Proelss (supra note 416), p. 431.
[547] *Fisheries Jurisdiction* (UK v. Iceland) (supra note 312), para. 73; *Fisheries Jurisdiction* (Germany v. Iceland) (supra note 312), para. 65.
[548] *Chagos* (supra note 238), para. 488.
[549] By reference to *Maritime Delimitation in the Black Sea* (Romania v Ukraine) (Judgment), 3 February 2009, ICJ Reports 2009, p. 61, paras. 517 and 520.

Mauritius considered it a "mandatory and unambiguous obligation" on the UK to "refrain from acts that interfere with (Mauritius') rights."[550] Mauritius *inter alia* relied on the VCLT and the International Law Commission's Commentary that 'reasonable regard' under the previously mentioned 1958 Geneva Convention meant that "states are bound to refrain from any acts that might adversely affect the use of the high seas by nationals of other states".[551] The UK, on the other hand, argued that due regard to rights "stops well short of an obligation to give effect to such rights" and extends only to "taking account" of or "giving consideration" to them; a viewpoint that Mauritius rejected.[552] Agreeing that unjustifiable interference and due regard, or indeed good faith, are functionally equivalent,[553] the Tribunal decided that:

> "(...) the ordinary meaning of "due regard" calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. *The Tribunal declines to find in this formulation any universal rule of conduct*. The [LOSC] does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the [LOSC] will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches. *In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State*."[554]

This passage was cited with approval in the *South China Sea* arbitration, where the Arbitral Tribunal considered the duties of China (as flag state) with respect to fishing by its nationals in another state's EEZ.[555] Referring also to *Advisory Opinion to the SRFC*, the Tribunal concluded that anything less than due diligence in preventing its nationals from unlawfully fishing would fall short of the regard due pursuant to Art. 58(3) LOSC.[556] In so doing, the Tribunal equated the duty of due regard under Art. 58(3) to 'at least one of due diligence'. It should be remembered that the standard of due diligence is a high one, requiring best possible efforts and entailing both the adoption of appropriate rules and measures and a level of vigilance in their enforcement.

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[550] *Chagos* (supra note 238), para. 471.
[551] International Law Commission (supra note 492), p. 278.
[552] *Chagos* (supra note 238), paras. 472 and 475.
[553] Ibid. para. 540, comparing Art. 194(4) LOSC (unjustifiable interference with the activities of other states) with the duty of due regard and good faith.
[554] Ibid. para 519.
[555] *South China Sea* (supra note 226), para 742.
[556] Ibid. paras. 743-744.

Mauritius rights to fish in its EEZ and territorial sea where deemed to be "significant", and therefore entitled to a "corresponding degree of regard."[557] Evaluating the interactions between the UK and Mauritius, the Tribunal drew a comparison to the UK's approach to consultations with the US. This provided it with "a practical example of due regard and a yardstick against which the communications with Mauritius can be measured. The record shows that the United States was *consulted in a timely manner* and *provided with information*, and that the United Kingdom was *internally concerned with balancing the MPA with U.S. rights and interests*".[558] Measuring the UK's interactions with Mauritius against this "yardstick", the Tribunal confirmed once more that:

> "(…) obligation to act in good faith and to have "due regard" to Mauritius' rights and interests arising out of the Lancaster House Undertakings, as reaffirmed after 1968, entails, at least, *both consultation and a balancing exercise with its own rights and interests*. With respect to consultations, the Tribunal does not accept that the United Kingdom has fulfilled the basic purpose of consulting, given the *lack of information actually provided* to Mauritius and the *absence of a reasoned exchange* between the Parties, exemplified by the misunderstanding that characterized the 21 July 2009 meeting. Furthermore, the United Kingdom's statements and conduct created reasonable expectations on the part of Mauritius that there would be *further opportunities to respond and exchange views*. This expectation was frustrated when the United Kingdom declared the MPA on 1 April 2010."[559]

Exercising due regard thus translates into fulfilling certain procedural requirements, though the nature of these requirements remains contextual. Where a significant right is at stake, such as a coastal State's sovereign right over its living resources, the regard owed must also be significant. The UK contended that there was no duty to consult other states, lest it be explicitly written into a provision of the LOSC.[560] However, it follows from the Tribunal's decision that there is almost *always* a need for consultations. Not only that, but where a planned activity risks interfering with a significant right, such as the right to fish, then these consultations must be timely; information must be provided to the potentially affected party; and there must be a reasoned exchange between them. Where this gives rise to reasonable expectations of further exchange of views, this too must be respected. It is important to keep in mind that these consultations must allow the state which is planning the interference to "internally balance" the rights and interests at stake. In order to do so, it is difficult to see

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[557] *Chagos* (supra note 238), para. 521.
[558] Ibid. para. 528 (emphasis added).
[559] Ibid. para. 534 (emphasis added).
[560] Ibid. para. 477.

how anything less than meaningful consultations could suffice. Whilst the term "meaningful consultations" was not explicitly used in the *Chagos* case, the Tribunal's explanation of what consultations must entail reflect the ITLOS' views on discharging the duty to cooperate when exploiting transboundary resources, discussed above, which were said to entail "meaningful consultations".

Finally, there is good reason to expect states to explore available alternatives. This is both evident from the abovementioned statement in *Chagos* that the degree of regard depends on the availability of alternative approaches, and the Tribunal's elaboration on the procedural requirements of Art. 194(4). Art. 194(4) stipulates that states must refrain from "unjustifiable interference" with the activities of other states. The Tribunal reminded the parties that this provision was "functionally equivalent" to the obligation to give due regard and to act in good faith, and therefore also "requires a balancing act between competing rights, based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue."[561] The only different is that Art. 194(4) only applies to activities that are presently being carried out by states pursuant to their rights, rather than their rights themselves, and is not prospective in nature.[562]

The constraints that states are under as a matter of due regard/no interference are procedural rather than substantive in character, and do not demand a particular *result*. Yet, they should not be taken lightly. Contemplating the extent of its adjudicative jurisdiction, the Tribunal made it clear that it had "little difficulty with the concept of procedural constraints on state action" and that "procedural rules may, indeed, be of equal or even greater importance than the substantive standards existing in international law. In the Tribunal's view, the obligation to consult with and have regard for the rights of other states, set out in multiple provisions of the [LOSC], is precisely such a procedural rule."[563]

These requirements are important to understand the duty to cooperate with other states over the conservation and management of living resources, which as previously mentioned requires consultations in good faith in accordance with Art. 300 LOSC. Furthermore, the balancing provisions of due regard/non-interference provide a tool to limit market conditionality in fisheries. I return to this in chapter 6.

[561] Ibid. para. 540.
[562] Ibid.
[563] Ibid. para. 322.

3.11. Market state rights and responsibilities

Thus far, this chapter has considered the rights and obligations (and thereby to some extent the limitations) on states to 'prevent, deter, and eliminate IUU fishing' and to cooperate so as to ensure sustainable fishing. It has looked at flag- and coastal state duties as well as port state duties, which arise specifically under the Port State Measures Agreement and as a corollary to coastal state enforcement under Art. 73 LOSC. This section considers to what extent *market* states incur international fisheries obligations.[564] This is first of all important because, as previously mentioned, the EU IUU Regulation makes market access conditional *inter alia* upon a country's compliance with its market state obligations to prevent, deter, and eliminate IUU fishing. Chapter 4 will show that the Commission interprets this mostly as a demand for 'full traceability', and the section below therefore looks at what traceability requirements exist under international law. But I also ask here whether international law in fact imposes a duty on to leverage market access the way the EU does. In other words, and though this thesis examines first and foremost the *appropriateness* of unilateral, country-level market conditionality in fisheries, is doing so the expression of a duty? This is examined next.

3.11.1. Traceability and the CDS Guidelines

From the outset, it can be observed that the only explicit reference to market state action is found in the Code of Conduct and IPOA-IUU. Art. 11 Code of Conduct sets out good practices for post-harvest activities and responsible international trade. Art. 11(2) and 11(3) state that international fish trade should not compromise sustainable development of fisheries and should be based on transparent measures as well as on simple and comprehensive laws, regulations and administrative procedures. Art. 11(1)(11) suggests that countries should ensure that international and domestic trade in fish and fishery products complies with sound conservation and management practices by improving the identification of the origin of fish and fishery products traded. Building on this, and as previously mentioned, the IPOA-IUU specifically calls upon market states to prevent fish caught by vessels identified by RFMOs to have been engaged in IUU fishing from being traded or imported into their territories (para. 66); to cooperate to adopt appropriate multilaterally agreed trade-related measures that are

[564] This thesis does not consider any obligations that arise in the context of CITES, which imposes obligations not to allow or to control trade in specifically listed endangered species, included some marine living resources. See text at supra note 428.

necessary to prevent, deter, and eliminate IUU fishing for specific stocks or species, such as multilateral CDS and import and export prohibitions (paras. 68-69); and to improve the transparency of their own markets, allowing for better traceability of fish or related products (para. 71).

Whilst all non-binding provisions and couched in flexible, soft language, there is a clear awareness of the need for market states to act responsibly. In particular traceability has received a lot of attention in the last decade as a tool to combat IUU fishing, and to promote sustainable fisheries management more generally.[565] Chapter 4 returns to this in more detail, since the European Commission considers a *lack* of full traceability to be a failure to comply with international fisheries obligations. To some extent, traceability may indeed be required as a corollary to responsible flag- and coastal state behaviour, and the duty to cooperate. Specifically, it may be required when participating in a CDS. As previously mentioned, work undertaken by FAO on traceability and its central instrument, the CDS, has recently led to the adoption of Guidelines on CDS. The CDS Guidelines do not aim to promote the establishment of CDS *per se*. Rather, where a CDS is developed, they provide guidance on when and how this should be done, and what can be expected from countries along the supply chain.

The Guidelines basic principles include the principle that CDS must be risk-based, and not constitute unnecessary barriers to trade (para. 3). A CDS should therefore clearly define its objective, be the least trade-restrictive measure to achieve its objective, and be designed to minimise the burden on those affected by its requirements (para 4.2). Every effort should be made to ensure that CDS are only implemented where they can be an effective means to prevent products derived from IUU fishing from entering the supply chain (para. 4.4). Moreover, unilateral CDS (such as that operated by the EU) are discouraged; rather, CDS should preferably have a multilateral or regional (RFMO) origin (para. 5.1). The Guidelines furthermore state that all those involved in the supply chain of a product should make every effort to cooperate in the design, implementation and administration of a CDS, with an aim to

[565] Interest in an "integrated and compatible traceability system" for capture fisheries and aquaculture came to the fore at the 2012 COFI meeting, where it requested FAO to conduct research on existing traceability systems. Various studies and analyses have been carried out since, centring around CDS as a traceability mechanism. For an overview of FAO work carried out on the topic of traceability and a thorough study of how CDS and traceability relate to each other, what traceability mechanisms are inherent in, and provided by current CDS, and which complementary mechanisms need to be provided along the supply chain by participating countries (Gilles Hosch and Francisco Blaha 'Seafood Traceability for Fisheries Compliance: Country-Level Support for Catch Documentation Schemes' [2017] FAO Fisheries and Aquaculture Technical Paper 619).

ensure that ensure that the risk assessment (to develop a CDS) is based on clear objective criteria; that imports of fish originate from catches are made in compliance with applicable legislation; to facilitate the importation of fish and the verification requirements of catch certificates; and provide for the establishment of a framework for the exchange of information (para. 5.2). The Guidelines furthermore state that the CDS validation process, different roles of relevant states to authorise, monitor, and control fishing operations and verify catch, landing, and trade should be fully recognised. According to the specific circumstances of the fisheries, all relevant states could take part in the verification of information in the catch documentation (para. 6.3). The latter appears to be in response to the concern of some countries that the EU puts the onus of validating a catch certificate on the flag state alone, thereby overlooking the important role played by coastal- and port states – as discussed in chapter 4. The Guidelines are of course non-binding, and the extent to which these requirements can be said to flow from states' general duties (as discussed in this chapter) remains up for discussion. Once again, however, the previously mentioned high standard of due diligence required and the many references to generally recommended minimum standards mean that the requirements in the CDS Guidelines will at the very least have to be taken into account by states when establishing a CDS, as well as when partaking in one.

States may therefore be under a duty to provide a degree of traceability so as to discharge their international responsibilities. What is more, because of this need for traceability throughout the supply chain, states may under a duty to cooperate with one another. This supplements the duty to cooperate over transboundary fish stocks, discussed in the section above. Against this backdrop, it can be argued that the market state at times acts *out of a duty to cooperate.* In particular where measures are adopted by a market state whose nationals exploit the same stock as the targeted state, which is situated somewhere along the geographical distribution or migration route of the stock. I return to this when examining the EU Non-Sustainable Fishing Regulation. However, since 'cooperation' with targeted states takes place against the backdrop of market denial, the good faith nature of such cooperation may be questioned. I return the question of good faith as a limiting factor on market state action in chapter 6.

3.11.2. Market conditionality as the expression of a duty?

That market states have the right to avail themselves of their market power and block market access except under certain conditions is examined in later chapters. Here, I ask whether it also has a duty to do so. Whilst not a prerequisite for examining the legality of market conditionality in fisheries, examining whether such a duty exists is relevant. Not only does it better help understand the role played by market in promoting compliance with international fisheries norms and obligations by 'laggard' states, the existence of such a duty would bring market measures squarely within the legal regime of the LOSC. This section therefore asks wheter a state's responsibilities in respect of the conservation and management of marine living resource are undermined by giving market access to fish caught in contravention of the LOSC. And, if so, whether this implies that market states are under a duty to ensure that this doesn't happen; a duty to exercise control over market access. This would mirror the flag state's duty to exercise jurisdiction and control over fishing vessels flying its flag, as discussed above. Though there is no explicit duty under the LOSC on the market state to exercise jurisdiction and control 'over its market' as there is on the flag state over fishing vessels flying its flag, I briefly explore the argument.

I recall that Art. 192 imposes both a *positive* obligation to take active measures to protect the marine environment from future damage and to preserve it (in the sense of maintaining or improving its present condition), as well as a *negative* obligation not to degrade it.[566] It applies to all states in all maritime zones, and entails obligations not only in relation to activities directly taken by states and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment.[567] By providing a market for fish harvested in contravention of international law, market states indirectly contribute to the degradation of the marine environment, and the living resources in it. This realisation is at the heart of the Port State Measures Agreement, in so far that denying port (and thereby market) access to IUU caught fish, would reduce the profitability of IUU fishing, and the IPOA-IUU's call for port- and market measures.[568] In practice, too, a clear sense of environmental responsibility underpins the EU's recourse to market conditionality. This is reflected among other things in the European Commission's concern for the dramatic environmental and socio-economic consequences of IUU fishing. As the world's largest

[566] *South China Sea* (supra note 226), paras. 941-942.
[567] Ibid. para. 944.
[568] David J Doulman and Judith Swan (supra note 34), p. 34.

market and importer of fisheries products, the Commission concluded that the EU had the "specific responsibility in making sure that fisheries products imported into its territory do not originate from IUU fishing".[569] The EU IUU Regulation therefore "reflects the responsibility of every country, be it a member state or a third country, to fulfil their international obligations as a flag, port, coastal or market state (…) By acting against IUU fishing both within and outside the EU, the EU protects the resources necessary for the livelihood of people (...)."[570]

One might therefore cautiously suggest that market conditionality in fisheries is an expression of the duty to protect and preserve the marine environment, in so far that states with a particular share of the market in fish products should not to knowingly provide market access to fish caught in contravention of international law. Though the 'market' is not a maritime zone as such, market access will commonly be denied in port, where the duty to protect and preserve the marine environment is applicable. However, this line of argument would mean that the requirements of the Port State Measures Agreement are in fact already implied in the duty to protect and preserve the marine environment, because restricting market access will have to be implemented also in port. This suggestion is somewhat controversial. Nevertheless, the argument must be taken a step further. I recall that this thesis looks at mechanisms that make market access conditional not on the legality of the catch per se, but the behaviour of the flag state/country of origin. The argument that *country-level* market conditionality in fisheries is an expression of the duty to protect and preserve the marine environment is even more difficult to substantiate. But it is not impossible.

To explore this further, it is informative to look at the distinction between first- and second order responsibilities advanced by Simon Caney. Caney first of all describes "first-order responsibilities" as those actions that "certain agents have to perform (or omit)."[571] Using the example of non-compliance with duties to mitigate climate change, he then argues that certain agents (namely, those who *can* make a difference) also incur a responsibility to enforce, enable or otherwise encourage *others* to perform their "first-order

[569] European Commission, Proposal for a Council Regulation establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, COM(2007) 602, p. 20.
[570] European Commission, COM(2015) 480(supra note 47), p. 2 and 5.
[571] Simon Caney 'Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens' (2015) 22 Political Theory Without Borders: Philosophy, Politics and Society 9 18, p. 134.

responsibilities."[572] This is something which he refers to as a "second-order responsibility."[573] Joanne Scott builds on Caney's work to explain how far (geographically) the EU's responsibilities should extend under the climate change regime, arguing that the EU's "second-order climate responsibilities" make it incumbent upon it to use its market power in an effort to induce other agents to comply with their "first-order climate responsibilities".[574]

When applying the first- and second-order responsibility logic to the context at hand, the picture looks similar. States would have first-order responsibilities under international to ensure sustainable fishing/protect and preserve the marine environment, as discussed in this chapter. Powerful market states moreover incur a second-order responsibility to induce other states to comply with these first-order responsibilities. For instance, where a flag- or coastal state fails to assert jurisdiction over its vessels or over illegal conduct in its EEZ to the extent required by law, it would be in the interest of the international community if another country not only *could* but *should* then assert jurisdiction over this illegal behaviour (e.g. by blocking market access). This is effectively another way of explaining the intent behind the Port Sate Measures Agreement, which requires state parties to deny port (and thereby market) access to vessels having engaged in IUU fishing. But it goes beyond this, and justifies also the 'country-level dimension' of market conditionality in fisheries. It carves out a more general role for states which, by virtue of their market power, are in a position to pressure other *countries* for their non-compliance with international duties (as opposed to putting pressure on individual vessels, which is the case under the Port State Measures Agreement).

This extensive interpretation of Art. 192 is similar to, but different from, the possibility for a state to adopt countermeasures vis-à-vis another state. Considering the suggestion earlier in this chapter that states' obligations to protect and preserve the marine environment may be considered *erga omnes* obligations, a state that is specifically affected by such a breach may take countermeasures to pressure it into compliance. Countermeasures are discussed further in chapter 6. But this differs from there being a second-order responsibility on market states to act on the basis of Art. 192, in so far that the latter sees market states as

[572] Ibid. p. 142.
[573] Ibid. p. 135.
[574] Joanne Scott (supra note 169), p. 8.

fulfilling a *duty* to press others into fulfilling their first-order responsibilities, whereas the possibility to adopt countermeasures is a (narrowly described) *right*.

However, it is unlikely to be accepted that the general, overarching duty to protect and preserve the marine environment under Art. 192 could be interpreted as obliging states to use their market power in an effort to induce others to comply with their obligations as a matter of law. No evidence of this exists in the text of the treaty. Nor is there evidence that an evolutionary interpretation of the provision could arrive at such a conclusion (in light of the corpus of international law relating to the environment; the other provisions of Part XII; and, through Art. 237 LOSC (one of the other provisions of Part XII), by reference to specific obligations set out in other international agreements).[575]

If not a *legal* duty, then a *moral* duty for market states to act (a second-order responsibility) may be envisaged. Indeed, Caney and Scott also conceive of second-order responsibilities in moral terms. As to the question when such a moral duty can be said to arise, Cedric Ryngaert's 'new theory of jurisdiction' is instructive.[576] Ryngaert encourages jurisdictional assertions that increase global welfare and justice, whereby states with the strongest jurisdictional nexus retain the primary right to exercise their jurisdiction but, where they fail to do so, others that are harmed by this may step in on the basis of subsidiarity, provided this is in the interest of the global community.[577] He explains that "unilateral jurisdiction then in fact becomes an internationally cooperative exercise, with States stepping in where other States unjustifiably fail to establish their jurisdiction".[578] This is a hopeful account of a system of cooperative unilateral jurisdiction which restricts excessive assertions of jurisdiction, whilst at the same time encouraging it where it is needed from the point of view of the international community.[579] But even if it were accepted that the market state is under a moral, second-order responsibility to act where this is in the interest of the international community, many questions remain, both of a legal and practical nature. E.g. *when* would a market state's duty be triggered (when has another state truly failed to assert jurisdiction?), and who should act (only states with a particular market share?)? And, as this

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[575] *South China Sea* (supra note 226), paras. 941-942.
[576] Cedric Ryngaert *Jurisdiction in International Law* (OUP, 2015).
[577] Ibid. p. 217-220.
[578] Ibid. p. 229.
[579] By connecting sovereign interests with global interests, Ryngaert's approach shows some similarities also to the views expressed by Barbara Cooreman, who designs jurisdictional limitations trade measures under the rules of the WTO, discussed in chapter 7 (Barbara Cooreman *Global Environmental Protection Through Trade* (Edward Elgar, 2017)).

thesis asks (and this regardless of the market state being under a duty to act or not), under what conditions is it appropriate to do so?

The question of appropriateness needs no further elaboration at this point. I furthermore return to Ryngaert's suggestions on how to restrict overzealous assertions of jurisdiction by way of a 'reasonableness test' in chapter 6, because this provides practical limitations on market conditionality mechanisms. As for the questions who should act and when, it should be kept in mind that the Art. 192 entails a due diligence obligation to act, with a high standard; doing "the utmost". As argued earlier in this chapter, this implies a different standard of responsibility for different countries. *If* the market state were found to be under a duty not to provide a market for fish caught in contravention of the duties set out under international law, then it may be argued that this affects certain countries (those with a big market share/economic potential) differently than others.

The point must be stressed that I do not argue that states are under a legal duty to leverage market access so as to protect and preserve the marine environment (Art. 192). Such a legal duty only clearly arises for parties to the Port State Measures Agreement, in narrowly described circumstances. Whilst Art. 192 *may* be interpreted so as to imply a degree of port state control and even port and thereby market conditionality, there is no evidence that this extends to country-level market conditionality. It is submitted that the arguments for such a moral duty are compelling, thereby asking powerful market states to 'step in' in the interest of the international community. But my claim is more modest. Namely, that where a market state willingly takes on this moral, second-order responsibility and choses to use its market power to protect and preserve the marine environment vis-à-vis countries that it perceives as failing to do so, then that market state acts on the basis of Art. 192. I return to this in chapter 6, which argues that in doing so, the market state must refrain from unjustifiable interference with activities carried out by other states in the exercise of their rights and in pursuance of their duties in conformity with the LOSC (Art. 194(4)).

3.12. Conclusion

This chapter has set the political and legal context for market conditionality in fisheries, and even suggested that market states may be seen as acting out of a (perceived, moral) duty when they leverage market access thus. Furthermore, this chapter has examined in some detail the behaviour targeted by market conditionality; it has identified states' responsibilities

to ‘prevent, deter, and eliminate IUU fishing’ and to cooperate in order to ensure sustainable fishing under international law. These responsibilities often leave a great deal of discretion, though recent jurisprudence has shown willing to adopt evolving and ‘sustainability oriented’ interpretations. Though most obligations in relation to fisheries are of conduct, rather than result, the standard of responsibility required is one of due diligence, and the threshold is high. Alongside the specific obligations that states incur (as flag state, coastal state, port state, and market state), the duty to cooperate is fundamental to ensure sustainable fishing. RFMOs play an increasingly central role in this. The duty to cooperate (as well as the duty to have due regard) is again one of due diligence, and entails clear procedural requirements. Where this concerns cooperation through RFMOs over transboundary resources, it must be emphasised that this entails obligations for all parties involved – newcomers and existing RFMO members alike.

4. EU market conditionality: The IUU and Non-Sustainable Fishing Regulations

4.1. Introduction

This chapter describes and examines the EU IUU Regulation, in order to get a detailed understanding of the process leading up to a third (non-EU) country being placed on the EU's list of non-cooperating third countries (third country blacklist). A parallel description will be given of the more recently adopted Regulation on measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing (EU Non-Sustainable Fishing Regulation). The focus of most sections is on the former, since the Non-Sustainable Fishing Regulation was adopted with a specific scenario in mind and has been put into practice only once. The EU IUU Regulation puts in place a more complex regime, it is extensively being used to blacklist third countries, and as this chapter observes, its scope is wide.

Section 4.2 introduces the developments that paved the way for the adoption of the EU IUU Regulation, and sets out its key mechanisms. Whilst the focus in this thesis is on country-level market conditionality rather than conditions on individual operators (catch documentation) or vessels (vessel blacklisting), these mechanisms are intertwined with the country blacklisting mechanism and therefore warrant a brief description. Section 4.3 examines the process of carding countries under the EU IUU Regulation. Section 4.4 looks at some of the EU's demands of third countries to avoid blacklisting, focussing on instances where EU standards appear to go beyond what is required by international law. The chapter then shifts focus to the EU Non-Sustainable Fishing Regulation. Section 4.5 examines both the Regulation's scope, the problems it aims to address, and how it is different (or in fact not so much) from the EU IUU Regulation. Section 4.6 concludes.

4.2. The EU IUU Regulation

The EU IUU Regulation builds on a decade of EU action to combat IUU fishing, which kicked off with the EU's active involvement in the conception of the IPOA-IUU. The EU implemented the IPOA-IUU by adopting its own Action Plan for the eradication of IUU

fishing in 2002 (EU IUU Action Plan).[580] This is in accordance with Art. 25 of the IPOA-IUU, through which all signatories commit themselves to adopting a national action plan within three years of the adoption of the IPOA-IUU.

The EU IUU Action Plan identified several actions that were to be undertaken at EU level, at regional (RFMO) level, and at the international level. At EU level, the action plan called for procedures to be defined to give binding effect to international instruments for the responsible management of fish stocks, such as the UN Resolution banning driftnet fishing. In order to achieve this, the action plan called for the adoption of EU rules “banning trade in fishery products taken in breach of international agreements on responsible fishing and/or sustainable management of fish stocks” (para. 2.2). Furthermore, the Action Plan proposed that the EU “should publish lists of IUU vessels and, where appropriate, of operators directly associated with their activities, as drawn up and approved by RFMOs” (para. 2.3). Other proposed actions included more active involvement at RFMO level, including encouraging the reform of CDS both in RFMOs and, with other states, at the FAO (para. 3.6). Finally, as one of the actions the EU could undertake at the global level, the Action Plan called for a diplomatic initiative to convene an international conference to negotiate an international agreement defining the rights and responsibilities of port states concerning access by fishing vessels to port facilities (para. 4.4).

Some of the immediate effects of the IPOA-IUU and the EU IUU Action Plan on EU law were the amendments made to the Regulation on the Common Fisheries Policy at the end of 2002.[581] This extended the scope of the Common Fisheries Policy to nationals of EU member states, even when they were not located in the territory of a member states, fishing in EU waters, or fishing with an EU flagged vessel. The new Basic Regulation of 2002 thus also targeted those trying to get away with illegal fishing by changing flag or fishing in unregulated waters.[582] Furthermore, the EU became actively involved in the elaboration of a FAO model for port state measures in 2005, and subsequently, the Port State Measures

[580] European Commission Communication, Community Action Plan for the eradication of illegal, unreported and unregulated fishing, 28 May 2002, COM(2002) 180; and Council Conclusions of 7 June 2002.

[581] Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, 13 December 2002, OJ 2002 L358/59 (hereafter: 2002 Basic Regulation), now repealed by the new Common Fisheries Policy Basic Regulation (supra note 49).

[582] Robin Churchill and Daniel Owen (supra note 83), p. 19.

Agreement.[583] As for the references to trade measures and improved certifications schemes, these laid the foundations for the EU IUU Regulation (and in particular, the CDS, the EU IUU vessel blacklist, and the third country blacklisting mechanism).

In the years following the adoption of the EU IUU Action Plan, progress was made both at the international and regional level at combating IUU fishing. The Community played an active role in this, including by strongly supporting the RFMOs of which it was a member in adopting conservation measures and IUU vessel blacklists.[584]

In response to intensified international calls for action and in an effort to review the EU's policy against IUU fishing, a couple of years after the adoption of the EU IUU Action Plan, the Commission tabled a Proposal for a Regulation to prevent, deter and eliminate IUU fishing in 2007.[585] The aim of the new EU IUU Regulation, as stated in the Impact Assessment accompanying the Proposal, would be to "increase the efficiency of action against this international plague and its environmental, economic and social consequences".[586] This also reveals a great level of frustration at the time with competition from vessels engaging in IUU fishing. Vessels flagged to a third country were deemed to be subject to less stringent requirements to land their fish products in Community ports, than Community-flagged vessels themselves. These and other socio-economic consequences were an important driving factor behind the Proposal, as well as the aforementioned desire to lead international efforts in combating IUU fishing.[587]

Shortly thereafter, the EU IUU Regulation was adopted, which came into force on 1 January 2010 (Art. 57). The Regulation is supplemented by detailed rules which are set out in the Implementing Regulation.[588] The EU IUU Regulation's geographical scope is wide, and it concerns all IUU fishing and associated activities carried out within the territory of EU member states; within EU waters; within maritime waters under the jurisdiction or

[583] European Commission, COM(2002) 180 (supra note 580), p. 20.
[584] European Commission, SEC(2007) 1336 (supra note 19), p. 20; this was not always very effective, see the debate in CCAMLR over the EU's proposal to empower CCAMLR to recommend trade restrictions (supra note 44).
[585] Ibid.; European Commission COM(2007) 602 (supra note 569), p. 11.
[586] European Commission COM(2007) 602 (Ibid.), p. 1.
[587] Ibid. p. 12-13; European Commission, SEC(2007) 1336 (supra note 19), p. 19-20.
[588] Commission Regulation (EC) No 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 27 October 2009, OJ L280 (hereafter: EU IUU Implementing Regulation).

sovereignty of third countries; and on the high seas (Art. 1(3)). It should be noted that the IUU Regulation is only part of the EU's arsenal of measures to manage and control fisheries. Other important measures include the Control Regulation,[589] which ensures compliance with the EU's Common Fisheries Policy and which is currently undergoing reforms.[590] The Control Regulation and the rules of the Common Fisheries Policy fall outside the scope of my inquiry, since they regulate the behaviour of EU flagged vessels and EU resources, rather than the behaviour of third countries seeking access to the EU market.[591]

The EU IUU Regulation establishes various EU-wide mechanisms to prevent, deter, and eliminate IUU fishing. These include prior notification and authorization to enter EU ports for third country fishing vessels (Arts. 6, 7); increased inspections in EU ports (Art. 9-11); an EU-wide alert system (Art. 23); an obligation for fishery products coming into the EU to be accompanied by a validated catch certificate (Art. 12); increased control over EU nationals' support of and engagement in IUU fishing (Art. 39); the blacklisting of fishing vessels known to have engaged in IUU fishing and a prohibition on blacklisted vessels to enter EU ports (Arts. 27, 37); and the possibility to blacklist third countries (Art. 31, 38). As touched upon already, the blacklisting of third countries takes place in stages, whereby what is colloquially referred to as a yellow card constitutes a formal warning; a red card constitutes a decision by the Commission to blacklist, which is then formally effectuated by the Council; and a green card lifts either the warning or the decision to blacklist. An in-depth overview of this follows below.

The mechanisms put in place by the EU IUU Regulation should not be considered in isolation from each other; in particular, the catch certification scheme, the IUU vessel blacklisting, and the third market conditionality mechanisms are mutually supportive. For example, information obtained through administrative cooperation over catch certification, or

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[589] Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006, 22 December 2009, OJ J343/1 (hereafter: Control Regulation).

[590] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1224/2009, and amending Council Regulations (EC) No 768/2005, (EC) No 1967/2006, (EC) No 1005/2008, and Regulation (EU) No 2016/1139 of the European Parliament and of the Council as regards fisheries control, Brussels, 30 May 2018, COM(2018) 368 final.

[591] There is a strong external dimension of the Common Fisheries Policy that this thesis is not concerned with. For instance, the EU concludes agreements with third countries to gain access to their fisheries resources.

through cooperation with flag states over foreign IUU fishing vessels, provides the Commission with insight into third countries' fisheries regulation and management. This, in turn, can drive the Commission to further investigate foreign fisheries policy related matters, and initiate the process leading to blacklisting. Furthermore, the blacklisting of a country directly bears on the acceptance of a catch certificate. The acceptance of a certificate under the EU CDS is dependent on the 'good behaviour' of the vessel operator; however, it is *also* contingent upon the conduct of the validating flag state. As a result of a country being blacklisted by the EU, a foreign flag state can no longer validate catch documents for export to the EU; any catch documents validated by it are no longer accepted.[592] These results in an import ban on fish products coming from blacklisted countries.

Whilst neither the catch certification scheme nor the IUU vessel blacklist are directed towards a *country* and therefore do not raise the same conceptual problems as market conditionality as discussed in chapter 2, section 2.3.2, the interrelated nature of these mechanisms calls for a brief overview. The next sections therefore consider in more detail the functioning of the catch certification scheme and the EU IUU vessel blacklist, before turning to the carding process/market conditionality. Unless specified otherwise, provisions referred to in brackets are those of the EU IUU Regulation.

4.2.1. The EU catch certification scheme (EU CDS) [593]

So as to avoid the direct or indirect importation into the EU of fish products obtained from IUU fishing, the EU IUU Regulation makes it mandatory that imports of fishery products into the EU, or re-exports from an EU country, are accompanied by a catch certificate (Arts. 21(1) and 2). The function of the catch certificate is to prove that catches have been made in accordance with applicable laws, regulations and international conservation and management measures (Art. 12(3)).

While broadly similar to CDS operated by RFMOs, the EU system only applies to exports to the EU. Some fishery products are excluded from the catch certificate requirement

[592] Art. 38 EU IUU Regulation.

[593] The Regulation refers to the EU scheme as a CCS (catch certification scheme) (Chapter III EU IUU Regulation), not a CDS (catch documentation scheme), and only uses the latter terminology in the context of RFMO CDS (Art. 13). Technically, for a CCS to be a CDS, it would need a registry structure and be specific to a fishery, rather than be specific to the receiving market. In a way, the EU scheme resembles an export certificate, since it only covers volumes *being sent to the EU*, and not the original catch (which may partly have been sold elsewhere (Francisco Blaha, personal communication). This distinction between CDS and CCS is not important here, and for the sake of simplicity not used in this thesis.

altogether (Art. 12(5) and Annex I). For all other fishery products, the EU IUU Regulation lists the information that needs to be contained in the catch certificate (Art. 12(4) and Annex II). These information requirements are lengthy, but a level of flexibility is allowed for particularly small vessels which land their catch only in the flag state, and which can make use of a simplified catch certificate (Art. 6 of the Implementing Regulation). This is important for small-scale operators, especially those from developing countries.

Catch documents validated in conformity with catch documentation schemes adopted by an RFMO can be used instead of the EU CDS provided they are recognised as complying with the requirements laid down in the EU IUU Regulation (Art. 13). Equivalent schemes are set out in Annex V of the EU IUU Implementing Regulation and for now include the CCAMLR scheme for *Dissostichus spp.* and the ICCAT Bluefin tuna Catch Documentation Program. The CCSBT CDS can moreover be used subject to additional conditions, namely the provision of information on transport details.

Catch certificates must be validated by a public authority of the flag state (Art. 12(4)). For a catch certificate to be accepted into the EU, a third country must notify the Commission that it has in place national arrangements for the implementation, control and enforcement of laws, regulations and conservation and management measures which must be complied with by its fishing vessels, and that its public authorities are empowered to attest to the veracity of the information contained in the certificates and to carry out their verification on request of the importing EU member state (Art. 20 and Annex III). This includes details about the validation authorities, so that they can be identified by the importing EU member state. Details about all competent authorities are kept on record, disseminated to authorities in the member states, and published in the Official Journal (Art. 22).

The EU IUU Regulation only requires a third country to notify the Commission, *not* to justify the competence of its authorities to attest to the veracity of catch certificates. In turn, the Commission can only request missing elements from the notification (Art. 20(3)), but is not explicitly empowered to test a third country's authorities as a precondition for market access. Whilst the Commission may seek to "cooperate administratively with third countries in areas pertaining to the implementation of the Regulation's catch certification provisions" (Art. 20(4)), this may not be construed as a precondition for the application of chapter III (which covers the need for catch certificates to import fisheries products into the EU) to imports originating from catches made by fishing vessels flying the flag of any state (Art.

20(5)). According to Art. 20, areas of administrative cooperation include the use of electronic means to establish, validate or submit the catch certificates. Pursuant to this provision, the Commission has first of all set up administrative arrangements with third countries that allow for their traceability systems to be used *in lieu* of an EU catch certificate for certain fishery products. The Implementing Regulation provides an updated list of these administrative arrangements in place. As of August 2019, the EU accepts the Norwegian, US, New Zealand, Icelandic, Canadian, Faroese, and South African catch certificates for fisheries products obtained from vessels flying the flag of those countries, and has developed mutual assistance to facilitate the exchange of information between the respective competent authorities (Art. 33 and Annex IX Implementing Regulation).

However, in practice, it would appear that notifications submitted by third countries under Art. 20 are *not* immediately accepted, even when all information is provided. Moreover, Art. 20(4) has been used to carry out missions abroad with a much broader aim than 'merely' verifying a flag state's arrangements in place in accordance with Art. 20(1). The Commission's missions generally aim to evaluate a country's capabilities to prevent, deter, and eliminate IUU fishing, and is followed by suggestions as to ways in which the situation can be improved. These missions are discussed below for their relevance to blacklisting countries. Many of the countries which the Commission cooperates with in name of Art. 20(4) never notified flag state authorities to the Commission pursuant to Art. 20(1) in the first place; they do not trade directly in fishery products with the EU. Clearly, then, Art. 20(4) is used in a more general fashion to initiate a dialogue with third countries, including those who do not actively partake in validating EU catch certificates. As I explain more fully below, where a country does not have in place sufficient arrangements and does not cooperate with the Commission effectively, it will be seen as failing its international obligations to combat IUU fishing, and its catch certificates will no longer be accepted (it loses market access). Despite the wording of Art. 20(5), then, "administrative cooperation" with the Commission *does* constitute a de facto precondition for the acceptance of valid catch certificates. It is nevertheless a condition that is verified 'after the fact', in so far that a country can end up being investigated (leading to a yellow card, and possibly blacklisting) years after the acceptance of an Art. 20(1) notification. Evidently, and as also observed by others, the "whole procedure lacks transparency".[594]

[594] Carlos Palin and others (supra note 40), p. 106.

Products which have been processed in a country other than the flag state must not only be accompanied by a catch certificate (validated by the flag state), but also a statement by the third country processing plant, which must be endorsed by that country's competent authorities (Art. 14(2)). Similarly, where products are transported from another third country than the flag state (where they have been unloaded, reloaded, or undergone "any operation designed to preserve them in good and genuine condition"), the products must be accompanied by transport documentation (Art. 14(1)). Whilst Art. 14 refers again to third country "competent authorities" that must "endorse" a processing statement and provide information on transhipment, there is no requirement (as for flag states) to notify the Commission beforehand about these authorities, and the Regulation contains no criteria as to who they may be. For some countries, they will be same as the authorities competent to validate catch certificates; for others, not so.[595] Annex IV contains a template processing statement, which is relatively simple. Third country plants must confirm that the processed fish products have been obtained from the catches whose certificate is being presented; provide their contact details; and provide information about the plant's health certificate number and date, thus cross-linking the IUU Regulation to EU health and safety requirements and allowing for easier verification of both. This is important, as up to 90% of imports into the EU are processed and imported indirectly (that is, processed in a country other than the flag state) or transhipped.[596]

Upon the arrival of fish products at the EU market border, the importer in the importing EU member state transmits a validated catch certificate (and, if relevant, transport and processing documents) to the competent authorities of that member state, which may carry out all the verifications they deem necessary (Art. 17(1)-(6)). Some verifications are obligatory, such as checking the certificate in light of the information that the flag state has submitted to the Commission about its capacity to validate catch certificates (Art. 16(1)). When the competent authorities of the member state doubt the validity of the catch certificate, or question the compliance of products with conservation and management measures, they may seek assistance from the flag state (Art. 17). Whilst these verifications are being carried out, the products are stored at the cost of the operator (Art. 17(7)).

[595] Ibid. p. 107.
[596] Ibid.

The importing EU member state has the power to refuse to import the fishery products in question where there is no certificate, where the certificate is not validated, or where for various reasons it is incomplete or incorrect (Art. 18(1)-(2)). Rejected imports may be discarded or sold, and the profits "may" be used for charitable purposes (but, clearly, do not have to be used for such purposes) (Art. 18(3)). Any person may appeal a refusal of importation which concerns him in accordance with the laws of the EU member state (Art. 18(4)).

A detailed analysis of the EU CDS falls outside the scope of this chapter, but it can be observed that the current paper-based scheme is generally seen as out of date. Stakeholders and NGOs have called for a centralised electronic database to facilitate a more coordinated approach and the real-time exchange of information, arguing that the current scheme does not provide for effective supply chain traceability.[597] Moreover, the CDS has been critiqued for not being adequately tailored to complex supply chains. Francisco Blaha for instance notes that the EU CDS "would have benefited greatly from an in-depth study and understanding" of the reality of harvesting and trading complex species in complex regions (like tuna in the Pacific), *before* adopting "substandard" measures.[598]

4.2.2. Vessel blacklisting

The EU IUU vessel blacklist gives an overview to all EU member states and port authorities of which third country vessels are engaged in IUU fishing. The consequences for a third country vessel of being put on the IUU list are numerous, and include *inter alia* a refusal to be granted the authorisation to fish in EU waters; a refusal to be granted access to an EU port, except in case of *force majeure*; and a prohibition to import its catch to the EU (and consequently the non-acceptance of the catch certificates for the products it has on board) (Art. 37).

[597] Gilles Hosch and Francisco Blaha (supra note 565), p. 5; Carlos Palin and others (Ibid.), p. 110 (that "[t]he existing paper based system, and the large number of [catch certificates] and Processing Statements involved, mean it is impossible for EU [memer states] to monitor, much less control, the use of [catch certificates] and Processing Statements individually. Each country is at liberty to design its own format. Collectively, this risk is compounded, as the same [catch certificates] and Processing Statements can be reused."); Long Distance Advisory Council (supra note 59) (calling to move away from a paper based system); and Shelley Clarke and Gilles Hosch *Traceability, Legal Provenance, and the EU IUU Regulation: Russian whitefish and Salmon imported into the EU from Russia via China* (April 2013), in particular p. 37, 43, 48, 51, 53-54, 55 on the lack of effetive control and other gaps in traceability of the EU CDS more generally.

[598] Francisco Blaha 'Impacts of the European Commission yellow cards in the Pacific' SPC Fisheries Newsletter Nr. 148 of September – December 2015.

IUU vessel blacklists adopted by RFMOs are automatically included in the EU IUU vessel blacklist, and their removal from the list is governed not by the Commission, but by the decisions taken with regard to them by the RFMO whose IUU vessel list they are on (Art. 30(1)). There exists no procedure for the Commission to scrutinise the RFMO's reasons for its decision.[599]

The EU IUU Regulation also allows the Commission to add or remove vessels on its own, even without an RFMO decision. The Commission compiles and analyses all the relevant data it obtains on IUU fishing, including through port inspections of vessels, the catch certification scheme, as well as trade information from national statistics and statistical document programmes of RFMOs (Art. 25(1)-(2)). The Commission then keeps a file on every fishing vessel reported as allegedly involved in IUU fishing (Art. 25(3)). When sufficient information has been obtained to presume that the vessel has engaged in IUU fishing, the Commission will formally identify the vessel and notify the flag state of an official request for an enquiry into the alleged IUU fishing of their vessels (Art. 26(2)).

Whether the vessel is effectively placed on the EU IUU vessel list depends *inter alia* on the actions subsequently undertaken by its flag state. The Commission will request a flag state to investigate a vessel presumed to have carried out IUU fishing, to share the results of its investigation with the Commission, and to take enforcement action if the allegation is proven to be founded (Art. 26(2) (a)-(e)). Only if there is sufficient proof that a vessel has engaged in IUU fishing and the flag state in question has not complied with the Commission's official requests to investigate and take enforcement action, will the vessel be blacklisted (Art. 27(1)). If and when this happens, the flag state is again notified and requested to notify the owner, and to take all the necessary measures to eliminate IUU fishing, including the withdrawal of the registration or the fishing license (Art. 27(6)). Before a vessel is blacklisted, the owner and, where appropriate, the operator have the right to provide additional information and they have the right to be heard and defend their case (Art. 27(2)).

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[599] This is somewhat problematic, since unregulated fishing may be a result of the difficulty of obtaining fishing allocations for new entrants, as discussed in chapter 3, section 3.10.2. Moreover, RFMO dispute settlement mechanisms leave much to be desired (Marika Ceo and others 'Performance Reviews by Regional Fishery Bodies: Introduction, Summaries, Synthesis and Best Practices, Volume I: CCAMLR, CCSBT, ICCAT, IOTC, NAFO, NASCO, NEAFC', *FAO Fisheries and Aquaculture Circular No. 1072* vol I (FAO 2012), p. 71-72). I return to this in chapter 8, section 8.3.2.

I give an example. In 2011, the Commission found evidence that a Panamanian flagged carrier vessel had supported or engaged in fishing activities in breach of the national laws of Guinea, Liberia, and Guinea Bissau.[600] The Commission had been put on the trail of the vessel following an inspection in port in Spain (Las Palmas) in March 2011, following official letters from the aggrieved coastal states. Sixteen South Korean flagged fishing vessels that had transhipped their catches to the Panamanian vessel had been found to have committed infringements related to these fisheries products in several West African countries. Since it appeared that the Panamanian carrier vessel had the same beneficial owner as some of the South Korean flagged vessels, the Commission presumed that the beneficial owner must have known about the illegality of these activities. Furthermore, the carrier had itself breached the law of Guinea Bissau by illegally transhipping in its waters. Upon asking the vessel's flag state (Panama), the Commission received an email that the vessel had moreover operated without holding the mandatory licence that it required from its flag state (namely, a licence for transport, transhipment, and support to fishing activities). The Commission therefore concluded that the carrier vessel had itself engaged in IUU fishing. There was sufficient proof to presume that the vessel had engaged in an illegal fishing-related activity, namely transhipments in breach of coastal state laws and supporting illegal fishing activities by other vessels.[601] The Commission notified the Panamanian authorities of this by letter.[602] The Commission moreover requested that Panama: (1) investigate the matter, and share the results of the investigation; (2) if found guilty, take immediate enforcement action against the vessel concerned, and inform the Commission of this; (3) notify the owner, and where appropriate, the operators of the fishing vessel concerned, of the detailed statement of reasons for the intended blacklisting, and the consequences of being blacklisted; and (4) provide the Commission with the information about the vessel's owners and, where appropriate, operators, to as to ensure that these persons can be heard. The country was given one month to provide said information about the vessel. Absent a "complete and satisfactory response", the Commission contacted the owner/operator a few months later about its intention to list the

[600] Letter from the European Commission to Panamanian authorities of 28 October 2011 concerning the identification of presumed IUU fishing activities carried out by a Panamanian carrier vessel, Ares(2011)1158274 (on file with author).
[601] I recall the discussion in chapter 3 (in particular supra note 446 and surrounding text) that the coastal state has sovereign rights not only to regulate fishing activities, but also fishing-related activities, namely where there is a direct connection to fishing.
[602] Letter of 28 October 2011 (supra note 600); letter from the European Commission to Panamanian authorities of 16 December 2011, reminder concerning the identification of presumed IUU fishing activities carried out by a Panamanian carrier vessel, Ares(2011)1372067 (on file with author).

vessel in question, whereby it gave him/her another month to provide additional information, be heard, and defend his/her case.[603]

The requirements to notify and engage with the flag state in case of presumed IUU fishing and a failure of the flag state to act, as set out in the EU IUU Regulation, is in line with international law. Art. 94(6) LOSC stipulates that "where a state has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised, it may report the facts to the flag state. Upon receiving such a report, the flag state shall investigate the matter and, if appropriate, take any action necessary to remedy the situation." In the *Advisory Opinion to the SRFC*, the Tribunal concluded that the obligations set out in Art. 94(6) LOSC equally apply "to a flag state whose ships are alleged to have been involved in IUU fishing when such allegations have been reported to it by the coastal state concerned. The flag state is then under an obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting state of that action".[604] Whilst the EU does not represent a grieved coastal state, the text of Art. 94(6) is not limited in its application to reports from coastal states. If the Commission has clear grounds to believe that a vessel has engaged in illegal fishing activities, and reports this to the vessel's flag state, then it certainly appears that the flag state is obliged to investigate the matter and, if appropriate, remedy the situation in accordance with Art. 94(6).

Vessels can be removed from the vessel blacklist if the flag state demonstrates that IUU fishing did not occur or that proportionate, dissuasive, and effective sanctions have been applied (Art. 28(1)). If the flag state does not undertake any enforcement action, the vessel owner or operator may also request the Commission to review the status of the vessel (Art. 28(2)). This provides the owner/operator with some protection against its own flag state,

[603] Letter from the European Commission of 2 March 2012 concerning the possible IUU listing of a vessel, Ares(2012)249701 (on file with author). Since the letter's addressee is kept confidential, it is unclear *who* the letter is addressed to, but the wording implies that it is addressed to the owner/operator of the vessel ("The European Commission hereby informs you that it intends to list your vessel on the EU IUU vessel"). Whether the vessel was subsequently listed or not is unclear. It can be observed that various vessels (including some flagged to Panama) were added to the EU IUU vessel list later that year, but these vessels all already appeared on RFMO lists, which the Commission automatically incorporates anyway. Though it appears from the EU's correspondance with Panamanian authorities and relevant RFMOs over the years that the Commission in the past successfuly lobbied before the relevant RFMOs (in particular IATTC and WCPFC) to have Panamanian flagged carrier vessels that transhipped in RFMO waters without being registered in the RFMO data base for doing so, put on the relevant RFMO IUU lists (various email exchanges between the Commission and Panamanian authorities between 2008 and 2010 filed under Ares(2011)1224959 (on file with author)). This suggests that the Commission prefers going through RFMO IUU blacklists first, and only failing this, would independetly include a vessel on the EU IUU list.

[604] *Advisory Opinion to the SRFC* (supra note 83), para. 139.

where it does not exercise its flag state responsibilities, but where the owner/operator can prove that the vessel is no longer engaged in IUU fishing. The Commission may then consider removing the vessel from the blacklist (Art. 28(2) (a)-(b)).

4.2.3. Country blacklisting

Art. 31(1) of the EU IUU Regulation stipulates that the Commission "shall identify third countries that it considers as non-cooperating third countries in fighting IUU fishing" (red card). The legal consequences for a third country of getting a red card by the Commission are effectively that its catch certificates are no longer accepted in the EU (a de facto import ban) (Art. 18(1)(g), which will be in place whilst the formal blacklisting procedure is being completed. The consequences of subsequently being formally blacklisted by the Council (Art. 33) are set out in Art. 38. The importation into the EU of fishery products caught by fishing vessels flying the flag of a blacklisted country is prohibited, and accordingly, any accompanying catch certificates are no longer accepted. The import ban may be restricted to certain stocks or species only if the blacklisting was justified by the lack of appropriate measures adopted by the country in question in relation to IUU fishing affecting a given stock or species. Other actions vis-à-vis blacklisted countries include restrictions on the purchase by EU operators of fishing vessels flying their flag, a prohibition on vessels flagged to an EU member state to reflag to such countries, restrictions on chartering arrangements, and other such measures. Moreover, the EU shall denounce any bilateral fisheries access agreement with a blacklisted country.[605] No new negotiations over such agreements can be entered into as long as a country appears on the third country blacklist. The effects this has on third countries has already been highlighted.[606]

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[605] This is only the case if the fisheries agreement provides for the termination of the agreement in case of failure to comply with undertakings with regard to combating IUU fishing.

[606] Supra note 59. These effects are likely amplified where a fisheries access agreement is in place (since the most recent reforms of the EU common fisheries policy, these go by the moniker 'sustainable fisheries partnership agreements'). The newest generation of EU fisheries access agreements are not only intended to improve the environmental dimension of fisheries agreements but also to further contribute to sustainable fisheries management in the partner country. Fisheries access agreements establish a legal, environmental, economic, and social governance framework for fishing activities carried out by EU flagged vessels in the waters of a third country. Through them, the EU endeavours to ensure that fisheries access agreements also benefit the local population and fishing industry abroad. The denunciation of a fisheries access agreement as a result of a country being blacklisted under the IUU Regulation would logically trigger the termination of the EU's sectoral support that is provided as part of the fisheries access agreement, with all the consequences that follow.

The Regulation does not foresee consequences for processing and transit countries. Blacklisting does not explicitly affect the validity of Annex IV processing statements or transport documentation, which must be provided pursuant to Art. 14. In practice, however, the Commission uses the carding process to influence traceability issues in processing and transit countries by threatening them with a yellow card. Where such countries do not also directly export to the EU (do not have in place the competent authorities to validate catch certificates), the effectiveness of doing so can be put into question. I turn to this below in my examples of the Commission's interpretation of the Art. 31 threshold.

The identification process can be divided into a procedural part and a substantive part, which I discuss in turn.

4.3. Process of country blacklisting

Similar to the identification of IUU fishing vessels, the sources on which the Commission bases its carding decisions are non-exhaustive. The EU IUU Regulation stipulates that the Commission shall base its identification on all the information it has obtained through its dealings with third countries in the implementation of the Regulation, such as port state controls of fishing vessels and through administrative cooperation with third countries over catch certification (Art. 31(2)). This can also include information obtained by RFMOs on IUU fishing, catch data, national statistics on trade, and "any other information obtained in the ports and on the fishing grounds".

The procedural part of country blacklisting consists of various overlapping stages of information gathering and dialogue. No formalised process exists for the exchanges prior to the yellow card, and it remains unclear what triggers the Commission's investigations. Nevertheless, based on informal interviews with those who have participated in the process and documentation made available by the Commission upon request, the following appears to be a common pattern of behaviour.

The first significant step is the Commission's evaluation mission (also commonly referred to as 'audit') to the targeted third country, prior to which the country will have to fill out a questionnaire. The purpose of these missions is to verify information concerning the foreign flag state's arrangements for the implementation, control and enforcement of the laws, regulations and conservation and management measures with which, according to the Commission, its fishing vessels must comply.

Where the country in question has made a flag state notification pursuant to Art. 20 (trades in fish products with the EU), the objective of the Commission's visit (and the questionnaire) is framed in terms of evaluating the implementation of the Regulation *by the notified authorities*, and of assessing if the information notified to the Commission corresponds to the legal environment and the practical administrative procedures in place, and to see if these procedures meet the requirements of Arts. 20(1)-(3).[607] Where the country has not made such a flag state notification and does not trade with the EU in fish or fish products, the objective of the visit and questionnaire is framed more generally as necessary in order to analyse and verify the implementation of policies related to preventing, deterring and eliminating IUU fishing, as described in the EU IUU Regulation.[608]

The questionnaire requires individual countries to provide an answer to a number of questions and sub-questions, which will help prepare the Commission for its mission. The Commission may ask whether and what species the country exports to the EU, if any; whether it has artisanal fisheries (and if so, where, and whether this is exported to the EU); whether it lends access to its EEZ resources to other countries (and if yes, whether this is landed in port, and/or exported to the EU); what aquaculture operations exist; what port state measures it has in place; what traceability requirements it has in place; what fisheries legislation it has and whether this is being kept under review; what RFMOs it is a member of; etc. A country then has some (commonly three) months to respond to the questionnaire and to provide all relevant information (including legislative histories and English translations of all documents, where necessary), following which the Commission will prepare its mission in agreement with the targeted country.

The missions are typically carried out by less than a handful of Commissioners and are only of a very short duration (around a week or two). They are carried out with the consent of the targeted country, and it has been observed that some countries (India) have actually repeatedly denied the Commission access (possibly because their system would not live up to the EU's standards).[609]

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[607] Letter from the European Commission to the Deputy Minister for Fisheries of Ghana (Questionnaire in Annex), 13 December 2011 (Ares(2011)1349551).

[608] Questionnaire intended for the Republic of Kiribati, 8 October 2014 (Ares(2014)3328905).

[609] Interview with Francisco Blaha (Consultant (EU – DG Mare/DG Sante, FFA, FAO, SIPPO, APEC, NZ Industry) (24 April 2015) (on file with author). I return to the problematic of some countries denying the Commission a visit and thereby avoiding a yellow card/blacklisting whereas other cooperate with the EU and end up with a yellow card/blacklisting in chapter 8, section 8.4.5.

During these missions, the Commissioners visit a handful of sites, such as port facilities and processing plants. It will seek to verify the information contained in the answers to the questionnaire, and collects further data. After the mission, a third country can expect a mission report. This is no swift process; a country can expect not to hear anything for several months up to a year before a report is issued about their status. In most cases comments on the report are exchanged, and in the following months or years the Commission may send subsequent missions abroad to follow up on actions taken in the first mission. In some instances, the Commission also organises videoconferences, technical meetings, and capacity building workshops with representatives of the targeted country.[610] If the Commission is dissatisfied, a yellow card will be issued.

The length and the depth of these pre-identification (pre-yellow card) exchanges between the Commission and third countries vary wildly. The Commission's missions can take place years after the Commission first accepts a flag state's notification in accordance with Art. 20(1) – if such a notification was sent in the first place. For example, the Commission accepted the notification of the Republic of Ghana as flag state in accordance with Art. 20 as of 1 January 2010. It was only three years later, from 28 to 31 March 2013, that it carried out its first verification mission.[611]The longest period of cooperation so far that eventually lead to a yellow card has been with Thailand. On 6 October 2009, the Commission received Thailand's notification as flag state in accordance with Art. 20 of the EU IUU Regulation. In April 2011, the Commission carried out its first mission in the context of administrative cooperation, to verify information concerning Thailand's arrangements in place. A subsequent visit to follow up actions taken in the first visit was conducted in October 2012. Many exchanges of information and comments followed, and the Commission carried out a third mission in October 2014. Following further meetings and despite Thailand's revision of its Fisheries Act, the Commission finally issued it a yellow card in April 2015.[612]The card was finally lifted on 8 January 2019.

Lengthy exchanges also took place with Papua New Guinea. On 4 February 2010, the Commission accepted Papua New Guinea's notification as flag state in accordance with Art. 20. A first mission abroad was carried out by the Commission in November 2011, a second

[610] Annex I, Philippines yellow card.
[611] Annex I, Ghana yellow card.
[612] Annex I, Thailand yellow card.

mission followed in November 2012, and following various exchanges and meetings, the Commission issued a Decision in June 2014 notifying Papua New Guinea of the possibility of being identified as a non-cooperating third country.[613] Similarly, in the case of Belize and the Philippines, the time between the Commission's first mission abroad and the countries being issued a yellow card was approximately two years.[614] On the other side the spectrum, in the case of Curaçao, the time between the Commission's first mission abroad and Curacao being issued a yellow card was eight months, and in the case of Ghana, six months.[615]

On the basis of all the information thus obtained, as well as information from any other sources mentioned in Art. 31(2), the Commission makes its preliminary assessment of the fisheries sector of a third country. If the Commission identifies a country as not fulfilling the criteria set out in the Art. 31, discussed in substance below, it is sent a notification of the possibility of being identified as a non-cooperating third country (the yellow card). This decision is published in the Official Journal of the EU.

The Commission explains the aim of the yellow card as being "to induce the third country to put an end to its internationally wrongful behaviour without further restrictive countermeasure", and "to identify the shortcomings and offer suggestions for remedial action on the side of these countries."[616] The yellow card triggers a formalised dialogue between the Commission and representatives of the country concerned about the latter's fisheries sector. The steps that must be taken in respect of such a country are governed by Art. 32. The notification is accompanied by a formal request to take any necessary measures to cease the IUU fishing activities in question, to prevent any future such activities, and to rectify any act or omission that may have diminished the effectiveness of applicable laws, regulations, or international conservation and management measures (Art. 32(2)). In order to provide the country with the opportunity to respond to and rectify the situation, the Commission's notification must contain the reasons and all supporting evidence for the identification. The third country can then respond to the Commission by providing evidence to the contrary, a plan of action to improve the situation, or by asking the Commission for more information

[613] Annex I, Papua New Guinea yellow card.
[614] Annex I, Belize yellow card and Philippines yellow card.
[615] Annex I, Curaçao yellow card and Ghana yellow card.
[616] Letter from the European Commission (signed Lowri Evans) to the author concerning a request for access to documents, 6 May 2916, Ares(2015)1920274 (on file with author).

(Art. 32(1)). A country must get adequate time to answer he notification and reasonable time to remedy the situation (Art. 32(4)).

When a country is issued a yellow card, the Commission meets with its representatives and discusses the state of play, and invites it to establish and implement "in close cooperation with the Commission" an action plan to rectify the shortcomings identified by the Commission.[617] In practice, it is the Commission that outlines what actions need to be undertaken, which are summarised in form of an action plan to the country concerned.[618] The country then has the opportunity to respond to the Commission by endorsing the suggested actions, by re-formulating them, or by presenting their possible plan of action. The action plan becomes a national roadmap for the country in question to tackle the identified shortcomings.[619] The Commission then invites the country concerned to take all necessary measures to implement the action plan; to assess the implementation of the actions; and to send every so many months detailed reports to the Commission assessing the implementation of each action as regards, *inter alia*, their individual and/or overall effectiveness in ensuring a fully compliant fisheries control system.[620]

If the country concerned makes the necessary improvements and cooperates with the Commission, the yellow card is lifted, and the threat of being blacklisted is thereby removed. If not, and provided a reasonable period of time has passed to rectify the situation, the Commission will identify the country as a non-cooperating third country on the basis of Art. 31 (red card). The decision to identify a country as such is made by the Commission following the "examination procedure" as set out in the new Comitology Regulation.[621] The

[617] Standard phrasing included in all yellow card decisions.
[618] Action plans for Belize, Cambodia, Ghana, Guinea, Korea, Philippines, Papua New Guinea, Fiji, Panama, Sri Lanka, Togo, and Vanuatu (Annex II).
[619] European Commission (DG Mare), email communication, 15 November 2018.
[620] Annex I, Belize red card, para. 12.
[621] Arts. 27(1), 28(1), 30(1), and 54(2) EU IUU Regulation, referring to Art. 4 of Decision 1999/468/EC. This set out what used to be called the 'management' procedure, but this has now been repealed and replaced by Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, 28 February 2011, OJ L55/13 (hereafter: Comitology Regulation). Art. 13(1)(b) Comitology Regulation stipulates that where prior EU law makes reference to Art. 4 of Decision 1999/468/EC, the "examination procedure" shall apply (Art. 5 and 7 Comitology Regulation, with the exception of the second and third subparagraphs of Art. 5(4)). The new "examination procedure" rules apply to acts now classified as "implementing acts" (Art. 291 TFEU). Implementing acts are effectively seen as executing a legislative act without amendment or supplementation, and can be distinguished from delegated acts (Art. 290 TFEU), which are secondary measures that are rather "legislative"3 or "quasi-legislative" in nature and therefore subject to more stringent sets of controls (Paul Craig 'Delegated Acts, Implementing Acts and the New Comitology Regulation' (2011) 36 European Law Review 671, p. 672.).

same procedure is used when the Commission makes a decision to accept an RFMO CDS as equivalent, or decides to place a vessel on (or take it off) the IUU blacklist, as described in the sections above. Accordingly, the Commission is assisted in its decision by a committee composed of the representatives of the member states and chaired by the representative of the Commission. Where the committee delivers a positive opinion, or where no opinion is delivered, the Commission adopts its proposed measure.[622] Where the committee gives a negative opinion, the Comitology Regulation stipulates that the Commission does *not* adopt the measure, unless there is urgency, to avoid significant market disruption or because of financial risks (Art. 7). Where an implementing act is deemed to be necessary, the chair may either submit an amended version of the draft measure to the same committee within 2 months of delivery of the negative opinion, or submit the draft measure within 1 month of such delivery to the appeal committee for further deliberation (Art. 5(3)). The appeal committee, the rules of which are set out in Art. 6 of the Comitology Regulation, again disposes of the possibility to block the Commission's measure by issuing a negative opinion.

The adoption of a red card by the Commission is thus subject to a degree of scrutiny from EU member states. This is important, as the ultimate decision to place a non-cooperating country on the EU country blacklist is made by the Council, without involvement of the European Parliament or other checks. Upon issuing a red card, the Commission will also propose to the Council that the country is placed on the third country blacklist. The Council, acting by a qualified majority, makes the ultimate decision to blacklist, and also influences the exact consequences of blacklisting (namely, decides whether the resulting import ban is total or partial) (Art. 33(1)). The same process is followed for the removal of a country from the blacklist, whereby the Commission proposes that the Council adopts a measure to amend the list of non-cooperating third countries. The country must demonstrate that the situation has changed, warranting its removal from the blacklist, and the Commission will take into consideration whether measures have been adopted that are capable of achieving "lasting improvement of the situation" (Art. 34(1)). Where the Council does so, the Commission will also repeal its decision to issue a red card, habitually with effect from the entry into force of the Council decision.

[622] Art. 5(2), (4) Comitology Regulation. The committee adopts its decision by a qualified majority, as weighed in accordance with Art. 16(4) Consolidated Version of the Treaty on European Union, 26 October 2012, OJ C326/13 (hereafter: TEU) and Art. 238(3) TFEU (Art. 5(1) Comitology Regulation).

As of August 2019, twenty-five countries have received a yellow card, although twelve yellow cards have since been rescinded. Six of these carded countries have received a red card and have been formally blacklisted, of which three have been subsequently delisted.[623]

4.4. Threshold for country blacklisting

The threshold for being identified as a non-cooperating third country (blacklisted) is set out in Art. 31(3) of the EU IUU Regulation, which reads as follows:

> "A third country may be identified as a non-cooperating third country if it fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market state, to take action to prevent, deter and eliminate IUU fishing."

The extent to which states are required by law to prevent, deter, and eliminate IUU fishing in their different capacities as flag-, coastal-, port-, and market state have been set out in some detail in chapter 3. The Regulation does not specify what exact duties fall within the scope of Art. 31, nor which international legal instruments the Commission must take into account. Nevertheless, Art. 31(4)-(7) contain some parameters. The Commission shall "primarily rely on" the examination of measures taken by a third country in respect of recurrent IUU fishing by fishing vessels flying its flag or by its nationals, or by fishing vessels operating in its maritime waters or using its ports, and access of fisheries products stemming from IUU fishing to its market (Art. 31(4)). The Commission shall "take into account" whether the third country concerned effectively cooperates with the EU during the investigation; whether it has adopted effective enforcement measures; the history, nature, circumstances, extent and gravity of the IUU fishing considered; and finally, for developing countries, the existing capacity of their competent authorities (Art. 31(5)). Finally, the Commission shall "also consider" the country's international status, namely whether or not it has ratified international fisheries instruments, its status as a contracting party to RFMOs, and any act or omission that may have diminished the effective of applicable laws, regulations, or international conservation and management measures. The Commission's reasoning for giving a yellow card is always structured along these parameters.

Not all issues listed in Art. 31(4)-(6) have to be present for a country to fail the Art. 31 threshold. The Commission has wide discretion to decide whether or not a third country complies with international fisheries norms and obligations. Before giving some examples of

[623] A list is available at: https://ec.europa.eu/fisheries/cfp/illegal_fishing/info.

this, I observe that all five Council Implementing Decisions only explicitly blacklisted countries upon the conclusion that the actions undertaken by these countries as a *flag state* were insufficient in light of international law. The Council's explicit reference to flag state responsibilities may be explained by the sanctions set out in Art. 38, which centre on the flag state. It is the flag state that validates catch certificates for the purpose of export to the EU; a prerogative that it loses upon blacklisting (import ban). In order to ensure compliance with the WTO, chapter 7, section 7.3 explains that an import ban will need to be justified on one of the grounds listed in Art. XX GATT. Depending on the import ban's chosen legitimate objective (e.g. to protect the environment, or conserve exhaustible natural resources), the provision *inter alia* requires that a measure to be "necessary" or "related to" that objective. Denying a flag state the capacity to validate catch certificates for the reason that this is "necessary" or "related to" combating IUU fishing will be easier if the reason for the import ban is that flag state's poor track record. Put differently, it may be difficult to justify the necessity of denying an impeccable flag state the opportunity to validate catch certificates only because, say, it does not manage its own resources responsibly (fails its coastal state duties).

The Council's reasoning suggests that, when push comes to shove, countries are only blacklisted for failing their flag state responsibilities, and not for the many other (in)actions highlighted by the Commission throughout the carding process. However, the Council also habitually states that its decision to blacklist is based on the Commission's investigation and dialogue procedures, including the correspondence exchanged and the meetings held, and that the reasons underlying those procedures and acts are the same as those underlying the Council's Decision. The Commission's reasoning (which pertains to a third country's (in)actions more generally, not only as a flag state) remains therefore of relevance for understanding the Art. 31 threshold.

4.4.1. What normative basis?

Although Art. 31 sets the threshold for being identified as a non-cooperating third country (blacklisted) at failing international *legal duties*, the Commission bases its requirements for third countries on both hard and soft law. Chapter 2, section 2.3.4 explained this is why Art. 31 can be best described as seeking compliance with 'international fisheries norms and obligations' rather than 'international fisheries law', since the former denotes a wider spectrum of normativity. Though the references to soft law may be proof of the positive

contribution that these instruments make to international fisheries law and governance, the Commission often fails to explain satisfactorily their relevance to its findings (chapter 2, section 2.5.2.5 offered different suggestions on how soft law can play a role here). This undermines the Commission's conclusion that a country has not complied with international law.

Soft law appears in the Commission's reasoning in various ways. First of all, it appears as a normative basis on its own. The most obvious example is the requirement to have in place a national plan of action to combat IUU fishing (NPOA-IUU). The Commission habitually requires third countries to have in place an NPOA-IUU, substantiating this by reference to paras. 25, 26, and 27 IPOA-IUU.[624] Para. 25 IPOA-IUU states that states "should" develop and implement, no later than three years after the adoption of the IPOA, NPOA-IUUs "to further achieve the objectives of the IPOA and give full effect to its provisions as an integral part of their fisheries management programmes and budgets". Para. 26 moreover adds that at least every four years after the adoption of NPOAs, states should review the implementation of these plans for the purpose of identifying cost-effective strategies to increase their effectiveness, and to take into account their "reporting obligations to FAO" under the IPOA-IUU. Whilst the language is soft ("should", not "shall"), there is thus a clear deadline for adopting and reviewing NPOA-IUUs. Moreover, para. 26 curiously refers to reporting *obligations* to FAO "as set out in para. 87". Para. 87 IPOA-IUU cross-refers to the reporting requirements states incur under the Code of Conduct. It provides that states' biennial reports pursuant to the Code of Conduct should include progress on the elaboration and implementation of their NPOA-IUUs. Thus far, 15 NPOA-IUUs have been notified to the FAO, of which the last 4 new NPOA-IUUs coincide with EU intervention pursuant to the IUU Regulation.[625] Whilst there is thus consensus amongst states that an

[624] This is evident from Commission action plans, including those for Ghana, Korea, Papua New Guinea, and Sri Lanka (Annex II). Somewhat curious is the Commission's normative basis for demanding an NPOA-IUU for Cambodia. The yellow card to Cambodia observed that "contrary to the recommendations in points 25, 26 and 27 of the IPOA-IUU, Cambodia has not developed a national plan of action against IUU fishing" (Annex I, Cambodia yellow card, para. 97). In its action plan, however, the Commission demanded Cambodia to transpose into its legislation the provisions of the regional plan of action of the Fisheries Committee for the West Central Gulf of Guinea (FCWC), which recommends members to draw up an NPOA-IUU – but Cambodia was not a member. In other words, in order to comply with the Art. 31 threshold, Cambodia was *inter alia* asked to transpose into law a non-binding action plan of an RFMO of which it was not a member. Nor had Cambodia ratified the Fish Stocks Agreement or even the LOSC, which could potentially have justified it doing so.
[625] St Kitts and Nevis notified a detailed NPOA to FAO in 2015, soon after having received a yellow card in December 2014; Belize notified its NPOA to FAO in 2014, having been blacklisted that same year in March (and was subsequently taken off the blacklist in December); Ghana received a yellow card in 2013, and notified

NPOA-IUU *should* be adopted, doing so is not a legal obligation, and adopting an NPOA-IUU is not necessary so as to fulfil any of the obligations discussed in chapter 3.

The Commission has also suggested that, when reforming national fisheries laws and regulations, third countries explicitly refer to international instruments – both hard and soft law.[626] This has been contested by targeted countries. For instance, the Vanuatu Director of Fisheries made clear in writing that this was "legally inappropriate".[627] Whilst he stressed Vanuatu's commitment to both instruments, he noted that Vanuatu did not have a tradition of referring to non-binding or voluntary instruments in its legislation. He reminded the Commission of the fact that both the Code of Conduct and IPOA-IUU's provisions are non-binding. Both instruments are moreover drafted with a high level of generality, and do not lend themselves to direct incorporation. A direct reference to them would cause confusion if national law were to come before the courts. These concerns are valid for other third countries as well. It would appear that the Commission not only stretches the notion of international obligation by requiring national legislation to explicitly refer to an international legal basis (let alone soft law); it imposes standards that are inappropriate for legal traditions that differ from its own.

Most commonly, however, the Commission refers to non-binding commitments alongside hard (treaty) law. This is meant to support its argument that a country has failed its international legal obligations. Council Implementing Decisions habitually state that "the lack of compliance with non-binding recommendations and resolutions was considered *only as supporting evidence* and not as a basis for the identification."[628] Upon closer examination, though, the Commission often fails to explain how these non-binding commitments support its finding of a breach of international law. The sections that follow contain examples of this.

Finally, there have been instances in which the Commission has actively drawn on EU health and safety standards in its dealings with third countries under the IUU Regulation. In

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FAO of its NPOA in 2014; and Korea received a yellow card in 2013, and notified FAO of its NPOA in 2014. A complete list of NPOAs is available at: http://www.fao.org/fishery/ipoa-iuu/npoa/en.

[626] Evaluation Mission to Fiji, 16-18 January 2012, Final Recommendations (Ares(2012)153244), 10 February 2012 (on file with author), p. 4; Evaluation Mission to Vanuatu, 23-24 January 2012, Final Recommendations (Ares(2012)165342), 14 February 2012 (on file with author), p. 3.

[627] Vanuatu Director of Fisheries, letter of 7 May 2012 (Ares(2012)625058), 25 May 2012 (on file with author).

[628] Annex I: Comoros blacklisting decision, para. 16; Sri Lanka blacklisting decision, para. 19; Belize blacklisting decision, para. 16; St Vincent and the Grenadines blacklisting decision, para. 21; Cambodia blacklisting decision, para. 23; Guinea blacklisting decision, para. 31.

its action plan to Guinea, the Commission recommends that Guinea continues to not validate catch certificates under the IUU Regulation until it has complied with EU sanitary requirements for fishery products. The Commission had previously put in place emergency measures for this purpose, and in its action plan refers to a need to comply with these measures first.[629] From a practical point of view, it is clear that non-compliance with EU sanitary requirements (which will effectively trigger an import ban) coincide with a non-acceptance of catch certificates for the purpose of the IUU Regulation. However, it raises the question how 'fulfilling EU sanitary requirements' is an international legal obligation to prevent, deter, and eliminate IUU fishing.

Another example is the yellow card to Taiwan. The Commission argued that its analysis of products caught by Taiwanese flagged vessels revealed various inconsistencies, including "vessels not listed in the [EU] sanitary approved establishments lists."[630] Whilst this could constitute proof of a general lack of oversight of Taiwanese authorities, the Commission again did not explain how this feeds into its analysis of a third country's failures to comply with international law for the purpose of Art. 31.

4.4.2. Traceability

The Commission requires 'full traceability' from third countries so as to fulfil the Art. 31 threshold. The degree to which international law requires traceability was set out in chapter 3, section 3.11.1. I recall that the IPOA-IUU calls upon states to "take steps to improve the transparency of their markets to allow the traceability of fish or fish products" (para. 71). Whilst some traceability is undoubtedly required from states to fulfil their international obligations in relation to fishing, there is little clarity over what exactly is required. These sections give examples of what the Commission expects in the name of traceability and the normative grounding for its claims. Where relevant, it also draws a comparison with difficulties that the EU faces with traceability issues at home.

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[629] Commission Decision of 2 February 2007 on emergency measures suspending imports from the Republic of Guinea of fishery products intended for human consumption. Non-compliance with sanitary reasons was also mentioned in the yellow card decision to Guinea, where the Commission reasoned that "(...) Guinea did not take adequate measures to detect continuous and repeated violations of international law and to prevent fisheries products stemming from IUU fishing from entering the EU market. *In this respect* it is recalled that the Union had introduced measures prohibiting entry into the EU of fisheries products because of sanitary reasons." (Annex I, Guinea yellow card, para. 148 (emphasis added)).

[630] Annex I, Taiwan yellow card, para. 56.

4.4.2.1. Traceability and the EU CDS

Traceability means that a product can be traced through *all* stages of production and distribution, whereas certification allows a state to determine where and when a fish was harvested and by whom (and whether this was done in compliance with applicable rules).[631] Where certification follows a product throughout the supply chain 'from net to plate' and is effective, as is intended with the EU CDS, this promotes traceability. Gilles Hosch and Francisco Blaha explain this as follows:

> "Fish legally entering a supply chain at the harvesting end must be quantified and qualified, and the quantity of fish – which will be separated into thousands of individual catch certificates – must then be traced step-by-step throughout the supply chain by means of the issue and re-issue of export or re-export certificates – i.e. trade certificates – that link the traded products to their previous certificate (...) The cardinal rule is that the sum of products recorded on child certificates (mother certificates show the source of a consignment and child certificates show the products derived from it) must never exceed the volume of product on the mother certificate. A CDS must be capable of monitoring and enforcing this as fish move through the supply chain. In the absence of a traceability mechanism that provides for hard links between mother and child certificates, the origin and legality of product batches along the supply chain becomes an unknown."[632]

They also note that an essential requirement for achieving traceability is a central registry through which certificates and related data are issued and recorded at every step along the supply chain.[633]

So as to ensure the proper functioning of the EU CDS, the EU will thus have to ensure traceability along the supply chain. The country blacklisting mechanism has proven to be a useful mechanism for this. Whilst the Regulation presents country blacklisting as separate from the CDS, the Commission's reasoning on when a third country has failed the Art. 31 threshold shows that it is often directly linked to the degree to which a country can ensure traceability along the supply chain of products that eventually end up on the EU market. In its yellow card decisions, the Commission often draws a direct link between the requirement for full traceability abroad so as to fulfil the Art. 31 threshold, and the EU market.[634] The

[631] FAO Guidelines for the Implementation of the IPOA-IUU (supra note 19), p. 53.
[632] Gilles Hosch and Francisco Blaha (supra note 565), p. 17.
[633] Ibid p. 7.
[634] The Commission often draws a direct link between traceability and the EU market, e.g. Taiwan's lack of traceability "increases the risk that fish products destined to the Union market, stemming from Taiwanese origin fish, cannot be guaranteed as not being sourced from IUU fishing" (Annex I, Taiwan yellow card, para. 51); Vietnamese authorities "were not able to demonstrate they have all the necessary information required to certify

Commission is even more explicit about this in its action plans. It has demanded of third countries that their regulations ensure the fulfilment of rules as set out under chapter III of the EU IUU Regulation – namely, the provisions establishing the EU catch certification scheme.[635] That traceability is important for the purpose of Art. 31 is also evident from the wording of the Regulation. I recall that the Commission must primarily rely on the examination of measures taken by a third country in respect of (*inter alia*) access of fisheries products stemming from IUU fishing to its market (Art. 31(4)). Absent any other obvious market obligations in fisheries (chapter 3, section 3.11.1), this may be seen as a reference to traceability, mainly for the purpose of the EU CDS.

As previously mentioned, it is on the basis of Art. 20(4) (administrative cooperation with third countries "in areas pertaining to the implementation of the Regulation's catch certification provisions") that the Commission engages in its pre-yellow card dialogue with third countries. The reference to Art. 20(4) as the relevant legal basis for the Commission to engage in this dialogue process is standard. It appears in all yellow card decisions, *even* if the country in question never notified the Commission of having in place the necessary authorities to validate catch certificates, and does not trade in fish products with the EU. This effectively means the following. Regardless of whether a third country is actually involved in validating catch certificates and exports to the EU, its failure to comply with fisheries norms and obligations *in general* is seen as "pertaining to" the implementation of the EU CDS, which justifies the Commission's involvement (administrative cooperation pursuant to Art. 20(4)). Around 44% of countries that received a yellow or red card are not currently approved by DG SANCO to export fish products to the EU under EU health and safety rules, and therefore do not trade in fish or fish products with the EU. Yet, such countries are often important transhipment or processing hubs.

Evidently, country blacklisting provides a tool to investigate traceability across the board, including transhipment and processing countries (that is, countries that do not directly

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the legality of imports and processed products destined for the Union and its market" (Annex I, Vietnam yellow card, para. 23); the lack of traceability in the Solomon Islands was indirectly a problem for the EU market because, though most of its raw products are meant for the US market, it could not guarantee that IUU-caught fish entered its processing units and thereby exported to the EU (Annex I, Solomon Islands yellow card para. 28); improving traceability in Papua New Guinea was explicitly needed "so as to guarantee that raw material imported into Papua New Guinea for processing from countries whose products are not authorised to enter the EU market do not arrive in the EU (neither as processed product nor unprocessed)" (Annex II, Papua New Guinea action plan), and so on.

[635] Annex II: Vanuatu action plan; Belize action plan; Fiji action plan; Panama action plan; Sri Lanka action plan.

export to the EU). One of the reasons why the EU is interested in securing traceability along the full supply chain so is to secure the proper functioning of the EU CDS, and thereby to reduce IUU fishing worldwide.[636] However, the effectiveness of using country blacklisting as a tool to investigate and improve traceability in these countries is limited. There are no immediate consequences for a non-exporting country of being blacklisted. A third country's ability to endorse processing statements or provide transport information for the purpose of exporting fish or fish products to the EU is not affected by its status (blacklisted or not). This is in stark contrast to the consequences of blacklisting on a country's competence to validate catch certificates for export to the EU. The threat of blacklisting for processing and transhipment countries may lie in reputational damage, the loss of other economic benefits (such as the denunciation of a fisheries access agreement with the EU), or simply the lost opportunity to develop an export market in the future.[637] This can be illustrated with the example of Vanuatu, a non-exporting country that received a yellow card. During the pre-yellow card dialogue process, the Vanuatu Fisheries Department wrote to the Commission the following, upon receiving the Commission's mission report: "[w]hile addressing all the issues highlighted in your report will no doubt benefit our standing as a responsible fishing nation, we thought it was useful to point out that the threat of being qualified as a non cooperating third country and the consequences of a product embargo does in fact not affect the present trade relations between Vanuatu and the [EU] in terms of fishery products. This is because they are currently non-existent."[638]

The recently adopted CDS Guidelines suggest that the Commission benefits from a degree of multilateral support (though not necessarily an international legal basis) to demand cooperation from countries along the supply chain of the products imported to the EU, and to evaluate their willingness to exchange information. At the same time, it is questionable whether the EU CDS *itself* fulfils the FAO CDS Guidelines' requirements of necessity, transparency, and clarity, and therefore whether the Commission's specific requirements for third countries to ensure traceability 'à la EU' are warranted. I now turn in some more detail to what the Commission looks at in the name of traceability. This helps determine whether,

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[636] Supra note 47 and surrounding text.

[637] Though this thesis focuses on the loss of market access (chapter 2, section 2.3.1), EU IUU country blacklisting also results the loss of other economic benefits, as set out in Art. 38 EU IUU Regulation (described earlier in this chapter at section 4.2.3).

[638] Vanuatu Director of Fisheries (supra note 627). One of the reasons for nevertheless being interested in avoiding blacklisting was the potential for future indirect exports to the EU (exports to other third countries for processing, and from there the EU market).

despite the evident focus on improving the EU CDS, the Commission still seeks compliance with international law, as the Art. 31 threshold requires; with non-binding norms that nevertheless benefit from a degree of international support; or rather only with EU requirements.

4.4.2.2. Traceability and the Art. 31 threshold

The Commission frequently requires "real time" control in the form of e-logbooks and electronic catch reporting systems to be introduced.[639] In its action plan for Panama, the Commission moreover required "correcting the deficiencies identified in terms of human resources, in terms of availability of data on the fishing vessels positions in real time or historic data, in terms of methods used and training of the officials in charge" and demanded that the Panamanian Fisheries Monitoring Centre be "more closely involved in the catch certification scheme".[640] The Commission has also suggested that countries should reduce their fleet, if they cannot control it.[641] The Commission habitually demands the development of VMS and the transmission of VMS signal by all domestic and foreign fishing vessels in a country's EEZ, and for a countries' own high seas fleet,[642] going as far as to sometimes request "flawless VMS operation".[643] For coastal states, the Commission has moreover demanded that they conclude bilateral agreements or organisation arrangements with flag states whose vessels fish in their EEZ to give them "immediate" access to VMS data, landing declarations, and so on, so that these flag states can correctly validate EU catch certificates.[644]

The collection and supply of accurate data on fishing activities is undoubtedly required by international law as an essential component of countries' general obligations to conserve and manage resources. It is a common theme of the Code of Conduct, IPOA-IUU, Compliance Agreement, and the Fish Stocks Agreement.[645] However, the Commission

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639 Evaluation Mission to Fiji (supra note 626), p. 6; Annex I: Taiwan yellow card, para. 50; Curaçao yellow card, para. 183; and Belize yellow card, para. 64.
640 Annex II, Panama action plan.
641 Evaluation Mission to Fiji (supra note 626), p. 5. Fiji's Ministry of Fisheries and Forests counteracted this by writing to the Commission that "instead of reducing our fleet, we will re-submit our request for additional staff" (Letter of 8 March 2012 (Ares(2012)366868), 29 March 2012 (on file with author)).
642 Annex II: Ghana action plan (here, specifying that the requirement only pertains to *industrial* fishing vessels, including trawlers); Philippines action plan (no specification whether this pertains to industrialised vessels; stating that "all vessels" should be covered by VMS, whether in the Philippines EEZ, high seas, or third country waters).
643 Annex II: Cambodia action plan; Belize action plan; Togo action plan.
644 Annex II: Papua New Guinea action plan.
645 William Edeson, David Freestone, and Elly Gudmundsdottir (supra note 309), p. 30.

interprets these requirements very strictly. Annex I to the Fish Stocks Agreement contains standard requirements on how state parties should collect and share data regarding fishing activities by their vessels. Even if these standards are now considered the norm for all states, including non-parties, these provisions allow for a degree of discretion. Annex I, Art. 6 stipulates that states (or RFMOs) should establish mechanisms for verifying fishery data, but gives a non-exhaustive list of what mechanisms can be used. They include, but are not limited to, position verification through VMS; scientific observer programmes; reporting; and port sampling. Moreover, whilst collected data must indeed be made available to other flag states and relevant coastal states, Art. 7 regulates only data exchange through RFMOs and the FAO. Where an RFMO does not exist, Art. 7(2) stipulates that "that organization *may* also do the same at the sub-regional or regional level by arrangement with the States concerned" (emphasis added).

I briefly compare this to the problems the EU faces at home. The European Court of Auditors recently investigated whether the EU has in place an effective fisheries control system.[646] It carried out visits to the Commission as well as Spain, France, Italy, and the UK (who together represent more than half of EU fleet capacity and almost half of EU fish catches) between April and October 2016. In short, the answer is that the EU does not.[647] Some issues that are relevant here include the fact that member states do not sufficiently verify the accuracy of the information on the vessels in the fleet register, and therefore discrepancies exist between the vessel details recorded in the fleet register and those contained in the supporting documents.[648] Furthermore, though VMS is generally considered as an important tool for monitoring fisheries activities, including in the EU, 89% of the EU's own fleet is *not* actually monitored by VMS.[649] This mostly concerns small (non-industrial) vessels of under 12 meters or vessels of between 12 and 15 meters which only carry out limited fishing activities. These vessels are explicitly exempt from the Control Regulation's requirement to have VMS installed on board (Art. 9). Though seemingly small-scale, this represents a significant part of the EU fleet that, absent adequate alternative monitoring requirements, hereby seriously hampers traceability. This is in particular problematic in the Mediterranean basis, where smaller vessels are commonly used, where 95% of assessed fish

[646] European Court of Auditors 'EU Fisheries Controls: More Efforts Needed' , 30 May 2017, Special Report No 08/2017, 78.
[647] Ibid. para. 95.
[648] Ibid. para. 23.
[649] Ibid. paras. 32, 39, 40, 49-54.

stocks are deemed overfished, and where other ways of collecting catch data (e.g. paper based certificates) are poorly implemented.[650] Partly because of this, data on fishing activities collected are not sufficiently complete and reliable, and moreover often incorrectly recorded, and significant discrepancies were found between declared landings and subsequent records of sale.[651] Though the Commission plans to actively address these issues,[652] the Court of Auditors' report postdates many yellow card determinations. Clearly, though the EU sets the bar high elsewhere, it is questionable whether it achieves similar measures at home. I return to this in chapter 7, for its relevance to proving even-handedness under WTO law.

Another relevant point to traceability that often appears in yellow card determinations is that of transhipment. Uncontrolled transhipment at sea are generally considered to hamper traceability, and this is therefore an important issue also for the Commission.[653] The Preamble to the IUU Regulation notes that transhipments at sea escape any proper control by flag or coastal states and constitute a usual way for operators carrying out IUU fishing to dissimulate the illegal nature of their catches (rec. 11). The Regulation strictly regulates transhipment operations of EU flagged vessels. It *prohibits* transhipments between third country flagged fishing vessels or between third country-EU flagged vessels in EU waters; rather, transhipments can only take place in a designated EU port (Arts. 4(3), 5(2)). Even when operating outside EU waters, EU flagged vessels may not tranship catches from third country fishing vessels, unless the fishing vessels are registered as carrier vessels under the auspices of an RFMO (Art. 4(4)). Third country vessels can, of course, tranship at sea if they so like, but masters of third country fishing vessels or their representatives will have to notify the competent authorities of an EU member states prior to arriving at an EU port about this. The information to be provided includes the zone or zones where the catch was made or where transhipment took place, and whether this was in EU waters, in zones under the jurisdiction or sovereignty of a third country or on the high seas (Art. 6(1)(g)).

Fisheries regulations regarding at-sea transhipment vary from one country to another. This is mostly due to the fact that port size and port facilities vary heavily, and many

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[650] Ibid. paras. 32, 39, 40, 49-54.
[651] Ibid. paras 54, 56, 58, 64.
[652] Ibid. Annex III 'Replies of the Commission'. The Control Regulation is in the process of being reformed, also on this point, and the Proposal that is currently being discussed suggests the use of mobile phone technology for monitoring smaller vessels (proposed Art. 9(3), supra note 590).
[653] E.g. Environmental Justice Foundation 'Transhipment at Sea: The Need for a Ban in West Africa' (2013); Annex I, Philippines yellow card, para. 54 and Panama yellow card, para. 244.

developing countries simply cannot accommodate larger reefers at port.[654] The Commission appears to acknowledge this variety, and does not try and prohibit transhipments at sea. It does however require that third countries do not authorise transhipments "in the absence of effective controls," by reference to Arts. 18 and 23 of the Fish Stocks Agreement.[655] This seems in line with international law.

Having in place reliable traceability of fish products and certification is thus a standard part of the Commission's requirements to fulfil the Art. 31 threshold. Chapter 3, section 3.11 argued that a degree of traceability is required by virtue of states' obligations under the LOSC and related instruments. However, what exactly this entails, is circumstantial. There does not currently appear to be a coherent set of best practices on fisheries traceability either. A recent gap analysis for FAO concludes that, whilst various actors are undertaking steps to promote better traceability in fisheries (notably by the EU, the US, Japan, and some RFMOs), "not all traceability systems are equivalent and/or interchangeable, nor can they necessarily be consolidated".[656] The study notes that there appears to be wildly differing understandings across jurisdictions and even across the literature on what traceability is, and how it should be achieved. The study highlights current technological challenges on behalf of the industry that impede traceability, as well as hurdles caused by badly designed policy (by way of example, the study notes that the EU lacks a robust fishery control-based catch certificate, has inadequate document security for split consignments, and has insufficient maintenance of batch integrity).[657]

Absent best practices on fisheries traceability, it is difficult to conclude whether or not the Commission's requirements in this respect go beyond, or are in line with, international law. What can however be observed is that the Commission's reasoning raises many questions. The Commission mostly relies on soft law to substantiate its findings that a country has failed its international legal duties, rather than a careful analysis of states' international legal duties. The examples of the Comoros and Taiwan are particularly illustrative in this respect, and I consider them in turn.

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[654] Environmental Justice Foundation (supra note 653).
[655] *Inter alia* in Annex II: Vanuatu action plan and Fiji action plan.
[656] Melania Borit and Peter Olsen 'Seafood Traceability Systems: Gap Analysis of Inconsistencies in Standards and Norms' [2016] FAO Fisheries and Aquaculture Circular No. 1123, FIAM/C1123 39.
[657] Ibid. This mirrors the critique of the EU CDS for its effective lack of traceability voiced *inter alia* by Shelley Clarke and Gilles Hosch (supra note 597).

The Comoros had ratified the LOSC but not the Fish Stocks Agreement, and had a fisheries access agreement in place with the EU at the time the yellow card was issued. Comoros did not export fish products to the EU (it had not notified any competent authorities for the purpose of validating catch certifications). However, fish was processed and traded through Comoros. Among the many issues highlighted by the Commission, the following related to traceability.

Comoros had 20 vessels operating outside its EEZ, without having authorised them to do so, and without these vessels being subject to any monitoring, control, or surveillance. Vessels operating in the Comorian EEZ did not need to have VMS on board, or even observer coverage. Vessels authorised to operate in the EEZ of the Comoros had been using logbooks, but these were produced in Sri Lankan languages. The Commission concluded that the lack of translation requirements and the lack of a logbook model hinders transparency and contravenes para. 24 IPOA-IUU, as well as para. 33 of the FAO Voluntary Guidelines for Flag State Performance.[658] Moreover, the Commission found that Comorian vessels did not transmit information regarding their fishing activities, landings, and transhipments to the Comorian authorities.

Without further legal analysis, the Commission concluded that all of the above was contrary to Art. 94 LOSC. Continuing its reasoning, the Commission referred to Art. 11 Code of Conduct, which sets out good practices for post-harvest activities and responsible international trade, and paras. 65 to 67 IPOA-IUU on internationally agreed market-related measures to support the argument that states must reduce and eliminate fish trade in products derived from IUU fishing (see chapter 3, section 3.11). The Commission then presented evidence that Comoros lacked robust traceability and certification schemes, which it argued increases the risk that products sourced from IUU fishing activities could be processed and traded through the Comoros.[659] Again without providing further analysis or a reference to an international legal basis, the Commission finished by concluding that Comoros had failed to discharge its “duties under international law as a flag, port, coastal and market state in respect of IUU vessels and IUU fishing carried out or supported by vessels flying its flag or by its

[658] Annex I, Comoros yellow card, para. 32.
[659] Ibid. para. 36

nationals and to prevent access of fisheries products stemming from IUU fishing to its market".[660]

The Comoros received a yellow card in October 2015, and was subsequently blacklisted by Council Decision in July 2017, where it remains today. Furthermore, in May 2017, the Commission decided to give Comoros a red card. It argued *inter alia* that Comoros had not subsequently introduced any "appropriate corrective measure" to rectify the situation described in the yellow card, and therefore not in a position to "guarantee the transparency of its markets in a way to allow the traceability of fish or fish products as required in Point 71 of the IPOA IUU and Article 11.1.11 of the FAO Code of Conduct".[661]

Taiwan, due to its political status, is not a member of the UN and had has therefore not signed or ratified any of the international agreements governing fisheries. It notified its competent authorities for the purpose of catch certification pursuant to Art. 20 EU IUU Regulation, which triggered the Commission's immediate interest in Taiwan as an exporting country. The Commission's legal reasoning went as follows. Hundreds of Taiwanese catch certificates presented at EU borders had been found wanting on various accounts. The Commission concluded from this that products processed or traded through Taiwan undermined sustainable post-harvest rules, contrary to Art. 11 Code of Conduct. It also concluded that this further highlighted how Taiwan failed to cooperate with third countries in which its vessels fish and land products, and failed to implement measures that ensure transparency and traceability of products through the market, contrary to paras. 67-69 and 71-72 IPOA-IUU. The Commission noted that Taiwanese trading companies did not yet incorporate in their accounting systems information concerning traceability of fishing transactions. Furthermore, Taiwanese electronic databases supporting the authorities' systems were currently incomplete and crucial documents in the supply chain such as landing declarations, e-logbooks and information from designated ports were either not fully recorded or missing.

According to the Commission, all of the above highlighted the failures of Taiwan's traceability system as a whole. Taiwan was deemed "unable to ensure *full transparency in all stages of fishing transactions* i.e. catch, transhipment, landing, transport, factory processing,

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[660] Ibid.
[661] Annex I, Comoros red card, paras. 46-47.

export and trading", and its system was therefore "deficient".[662] This deficiency was amplified by having in place a significant number of long distance fleet fishing vessels operating far from Taiwanese control, whose potential illegal fishing activities go undetected, yet who send fish back to be processed in Taiwan. Taiwanese trading companies were moreover not being audited by the Taiwanese Fisheries Agency, making it presumably impossible to detect illegally caught fish in the supply chain. Adding to this the lack of accuracy of the catch certificates, the Commission concluded that Taiwan had failed the Art. 31 threshold and had not complied with its international legal obligations.[663] Taiwan received a yellow card in October 2015, which to date has not been lifted.

When it comes to traceability requirements, soft law appears to be playing a much more important role than merely supporting evidence of a failure to breach international law. For better or for worse, this begs the question whether the IUU Regulation really enforces *international legal* norms. This section has shown that the Commission imposes very specific traceability demands, including during export and trading. The extent to which this reflects international law is questionable, in particular where this pertains to processing and trading facilities on land.

Whilst the Commission may have been correct in its findings that Comoros and Taiwan failed their international fisheries obligations (on various accounts), it failed to explain its use of soft law to substantiate them. Whilst practice on traceability remains inconsistent, and despite the non-committed wording of paras. 71 IPOA-IUU ("taking steps to improve transparency") and Art. 11 Code of Conduct, it could have argued that some traceability requirements are necessary to discharge the general requirements contained in the LOSC. It could have pointed out that a flag state's duties to effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag are general and evolving, and should be read in light of particular new developments, such as the FAO's work on the Global Record, and growing state practice to make VMS data available.[664] The Commission could have pointed at "generally accepted international regulations, procedures

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[662] Annex I, Taiwan yellow card, paras. 49-40 (emphasis added).
[663] Annex I, Taiwan yellow card, para. 60.
[664] That these obligations are evolving was highlighted in the Separate Opinion of Judge Paik in *Advisory Opinion to the SRFC* (supra note 83), para. 9. Growing state practice on sharing fisheries data is evident from work undertaken by the NGO Global Fishing Watch, which offers free data and real-time tracking of global commercial fishing acivity. Countries that make VMS tracking data available through them include Indonesia, Peru, and Pamana (available at: https://globalfishingwatch.org).

and practices", which must be taken into account by the flag state (Art. 94(5) LOSC). It could also have argued that a complete lack of legible logbooks constitutes a far cry from exercising due diligence, either for the flag or coastal state. Yet, the Commission did not point at any specific international legal obligation to be interpreted in line of Art. 11 Code of Conduct and para. 71 IPOA-IUU.

4.4.3. Compliance with RFMO measures and IUU lists

The previous examples already indicated that the Commission interprets international legal duties very broadly, including by reference to non-binding standards. It has also made liberal use of custom, to which I turn now. The Commission has habitually considered that compliance with RFMO conservation and management is required by *all* states, regardless of the treaties they have ratified. It will refer to the LOSC, Fish Stocks Agreement, or rather customary law where a country has ratified neither.

An example is the case of Togo, which received a yellow card in 2012, which was only lifted two years later. At the time of the Commission's decision, Togo was not a party to the Fish Stocks Agreement, but had ratified the LOSC. It was not a member or a cooperative non-member of any RFMO. Togo's reluctance to prevent its vessels from fishing in the Convention areas of various RFMOs, and its non-compliance with CCAMLR conservation and management measures, led to the conclusion that it had failed in its flag state obligations under international law.[665] The Commission relied on a combined interpretation of general flag state duties and the LOSC provisions on the conservation of living marine resources on the high seas to conclude that the existence over time of a number of vessels which appear on RFMO IUU vessel lists, and their continued fishing after having been included on such lists, highlights a failure of a flag state's duties under the LOSC.[666]

This same reasoning led to the conclusion that Cambodia had failed its flag state responsibilities, although Cambodia had ratified neither the Fish Stocks Agreement nor the LOSC, nor is it a member of any RFMO. The Commission was quick to conclude that this was actually "immaterial", and argued that the LOSC provisions on the navigation in the high seas (Arts. 86 to 115), on which it built its arguments, are recognised as customary

[665] Annex I, Togo yellow card.
[666] Ibid. paras. 350–352.

international law.[667] The Commission considered that Cambodia's failure to ensure compliance by its vessels with the conservation and management measures adopted by ICCAT and CCAMLR, which it could have done by deterring its vessels from fishing in their management area, constituted proof of Cambodia's failure to fulfil its international obligations as a flag state.[668] The Commission thus considered that flag states are obliged, as a matter of customary law, to ensure full compliance by their vessels with RFMO conservation and management measures, where these exist.[669] Cambodia was blacklisted in March 2014 (precluding all trade in fishery products), and has not been delisted since.[670]

The same reasoning was followed in the case of Taiwan. Upon issuing a yellow card to Taiwan, the Commission opined that "the obligation of flag states to comply with their due diligence responsibilities concerning, *inter alia*, IUU fishing activities of their vessels forms part of international customary law".[671]

Whilst not necessarily wrong, the Commission's conclusions on the current state of customary law raise questions. For instance, a state cannot always be held responsible for fishing by its vessels on a stock governed by an RFMO of which it is not a member. I recall that unlawful (and unregulated) fishing is often "carried out covertly, far from any official presence, and it will be far from obvious what the flag state could realistically have done to prevent it."[672] As far as compliance with RFMO conservation and management measures goes, chapter 3, section 3.10.2 concluded that rather than imposing a blanket obligation on states to comply with (any) RFMO CMM, states are under mutual obligations to cooperate. This is particularly true for parties which have not ratified the Fish Stocks Agreement.

What the Commission *could* have argued is that a flag state's customary duty to effectively control its vessels means that it must ensure that its vessels do not undermine its customary law responsibilities vis-à-vis other states regarding international fisheries

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[667] Annex I, Cambodia yellow card, para. 97.
[668] Ibid. p. 9-10.
[669] Ibid. p. 9; also Mercedes Rosello 'Cooperation and Unregulated Fishing: Interactions between Customary International Law, and the European Union IUU Fishing Regulation' (2017) 84 Marine Policy 306, that "the obligation to cooperate by ensuring that vessels do not engage in 'inconsistent' unregulated fishing, and that they refrain from fishing unless in posession of RFMO authorisation, cannot be traced to any LOSC provision or general international law, deriving instead from the [Fish Stocks Agreement]" (p. 308). Rosello also analyses the case of Cambodia as well as the nature of the customary duty to cooperate to come to the conclusion that the Commission's reasoning lacks adequate international legal rationale (p. 310).
[670] Annex I, Cambodia red card and Council blacklisting decision.
[671] Annex I, Taiwan yellow card, para. 36.
[672] *South China Sea* (supra note 226), para. 754.

conservation and management. It could then have carefully set out what it believes these customary law responsibilities to be (e.g. what level of cooperation is required from non-RFMO members and existing members, what level of diligence is required of the flag state vis-à-vis its vessels, and so on.). Unfortunately, it does not appear that the Commission examined at great length what steps existing CCAMLR and ICCAT members had undertaken to cooperate with the flag state whose vessels had been found to fish on a stock governed by them.

A related issue is the Commission's alleged attempts to bring RFMO conservation and management measures in 'through the back-door'. A pertinent example here is the discussion over whether WCPFC conservation and management measures apply to territorial seas and archipelagic waters, in which states are sovereign. Various WCPFC members control significant areas of archipelagic waters and territorial seas.[673] The EU is a member of the WCPFC as a distant water fishing nation present in the area. According to Art. 3 of the WCPFC Convention, the WCPFC area of competence comprises in principle all waters of the Pacific Ocean (bounded to the south and to the east by defined lines), but it recognises countries' claims over the status and extent of their waters and zones and, according to Art. 4, shall not prejudice the rights, jurisdiction, and duties of states under the LOSC. Although Art. 6 stipulates that conservation and management principles and measures shall be applied by coastal states within areas under their national jurisdiction, the term "areas under national jurisdiction" is not defined. Moreover, the provision continues that coastal states must do so *in the exercise of their sovereign rights for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks.* This suggests that Art. 6 is concerned only with the EEZ (where WCPFC measures must apply).

Other references to areas under national jurisdiction in the WCPFC Convention allow for more discretion, and as under the Fish Stocks Agreement, Art. 8 of the Convention calls for compatible measures between the high seas and areas under national jurisdiction so as to ensure conservation and management of highly migratory species in their entirety. So as to avoid conflict, some WCPFC conservation and management measures specifically indicate their geographical scope of application. The CMM for bigeye, yellowfin and skipjack tuna for instance explicitly applies to "all areas of high seas and all EEZs in the Convention Area except where otherwise stated", and encourages coastal states to "take measures in

[673] Martin Tsamenyi and Quentin Hanich (supra note 350), p. 114.

archipelagic waters and territorial seas which are consistent with the objectives of this Measure and to inform the Commission Secretariat of the relevant measures that they will apply in these waters".[674] The problem remains however for data reporting requirements. The WCPFC requires scientific data from all fisheries throughout the range of the stocks (including from archipelagic waters) to ensure accurate stock assessments. However, because conservation and management measures do not extend to fisheries in archipelagic waters and territorial seas, this data is not (necessarily or wholly) reported.[675]

The wording 'areas under national jurisdiction' originates in the Fish Stocks Agreement, which, as explained in chapter 3, section 3.4.2, also does not define these terms. The question was discussed in some detail at the fifth regular session of the WCPFC in 2008, where in the end it was concluded that "there were many differences of view among Members as to how the term 'areas under national jurisdiction' should be interpreted and applied with respect to implementation of the WCPF Convention. The issue will require further consideration and clarification among Members."[676] It appears in any event that many WCPFC members consider that WCPFC rules do not fully apply to waters under their sovereignty or in which they have sovereign rights (the EEZ), and in any case, that archipelagic waters go be beyond the scope of application of WCPFC measures.[677] This is not however the EU's position, which considers WCPFC rules to apply in these areas as well (a literal interpretation of Art. 3

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[674] WCPFC CMM 2018-01.

[675] Sixth Regular Session of the Scientific Committee to the WCPFC, Summary Report, 10-19 August 2010, Nuku'alofa, Tonga, para. 272; that this is a problem emerges from the EU yellow card to the Philippines, para. 101 (Annex I).

[676] Fifth regular session of the WCPFC, Summary Report, 8 – 12 December 2008, Busan, Korea, para. 174. Note however Papua New Guinea's objection to this paragraph. In a statement the following year, Papua New Guinea recoded its "disappointment with the manner in which the record of proceedings of the WCPFC5 was handled", and that it considered paragraph 174 to be inconsistent with the advice from the Commission's Legal Advisor (Papua New Guinea, Statement of Position on "Areas Under National Jurisdiction" in the WCPFC, 8 December 2009, WCPFC6-2009/DP3).

[677] Annex I: Philippines yellow card, para. 101; Solomon Islands yellow card, para. 64, 73; Tuvalu yellow card, para. 41, 48; Papua New Guinea yellow card, paras. 78, 87 (also Papua New Guinea (Ibid)); Kiribati yellow card, para. 32. Japan stated that it is clear that the WCPFC Convention "applies only to the high seas and EEZs in the Convention Area but does not apply to territorial seas, archipelagic waters and internal waters, unless otherwise specified such as measures for inspection at port" (Tenth regular session of the WCPFC, Summary Report, 2 – 6 December 2013, Cairns, Australia, para. 214). Moreover, Indonesia (a cooperating non-member) was long hesitant to join the WCPFC was related to its scope of application and the interpretation of Art. 3 WCPFC Convention, in particular, the fear that this would affect their archipelagic waters, which are important grounds for juvenile yellowfin and bigeye tuna (Statement by Indonesia, 8 December 2008, WCPFC5-2008/OP03). It has consistently held this position throughout the Multilateral High Level Conference and Preparatory Conference to the WCPFC, and upon the renwabl of its status as cooperating non-member consistently higlhights that it considers that WCPFC measures do not apply to archipelagic waters (Eight regular session of the WCPFC, Summary Report, 26 – 30 March 2012, Tumon, Guam, US, para. 46)
Most if not all Pacific members of the WCPFC hold this position.

of the WCPFC Convention). The European Commission has repeatedly brought this up in its dealings with Pacific countries under the EU IUU Regulation.[678] For instance, in its yellow card to the Philippines, the Commission stated that "by considering its archipelagic waters to be beyond the scope of application of the WCPFC measures [the Philippines] is in breach of these measures".[679]

The Commission has a point in so far that countries cannot manage the resources in waters under their jurisdiction as they see fit, in particular not if they are a member of an existing RFMO that deals with transboundary stocks that are also exploited in their waters. In so far that the EU gives de facto primacy to RFMO measures, however, this stretches the interpretation of the coastal state's duty to cooperate, and in any event goes against shared understandings in the Pacific over the scope of WCPFC competence.

It is however unclear to what extent the Commission was bringing compliance with WCPFC conservation and management measures in territorial and archipelagic waters 'in through the backdoor', or whether it actually took issue with the lack of compatible conservation and management measures in these areas, and whether the yellow card to the Philippines was merely poorly phrased. I recall that countries are not absolved of their broader international obligations to manage their fisheries in territorial and archipelagic waters, and that the duty to protect and preserve the marine environment (Art. 192 LOSC) applies to all maritime zones In all Pacific carded countries, the Commission *also* noted that they did not have in place measures that were compatible with those adopted by WCPFC.[680] The general conclusion reached by the Commission in these countries was that WCPFC conservation and management rules in archipelagic waters *and* the lack of adoption of compatible measures was in breach of international obligations and thereby the Art. 31 threshold.[681] This suggests that, if compatible *measures had been in* place, the Commission might not have sought to push its argument that WCPFC measures also apply in territorial seas and archipelagic waters. This would then be in line with the Fish Stocks Agreement, which as explained in chapter 3, section 3.4.2, demands that measures for the high seas and

[678] As in the case of the Philippines, Solomon Islands, Tuvalu, Papua New Guinea, and Kiribati (Ibid). Papua New Guinea even argued that it had previously sought legal advice on the matter and was advised that, indeed, WCPFC rules do *not* apply to their archipelagic waters, and that it had tabled that advice at the WCPFC without dissent from members (Steve Dunn (supra note 95), p. 15).
[679] Annex I, Philippines yellow card, para. 101.
[680] E.g. Papua New Guinea had argued that its Tuna Management Plan dealt with these issues, but the Plan did not apply to archipelagic waters, only the EEZ (Steve Dunn (supra note 95), p. 16).
[681] It reached this general conclusion for all Pacific countries that have been carded thus far.

those under national jurisdiction be "compatible" (Art. 7(2)(a)). Though of course there is still room for discussion over whether the Fish Stocks Agreement even applies to territorial seas and archipelagic waters. In any event, the EU's attempts were ill received, and on this point do not appear to have been successful.[682] As acknowledged in a consultancy report on Papua New Guinea, had the EU made less specific claims concerning the application of WCPFC conservation and management measures and rather discussed how sustainable fisheries could be achieved in archipelagic waters, this could have actually *encouraged* legal argument.[683]

Another interesting issue that came up in the Commission's dealings with Pacific countries is the main fisheries management scheme for purse-seiners for Pacific coastal states organised through the Nauru Agreement (which predates the WCPFC): namely, the Vessel Day Scheme (VDS). The VDS is a system that limits fishing effort of the purse seine fleet through the allocation of fishing days, and restrictions and regulations on transhipping. The VDS has been implemented as part of the WCPFC, and thus applies to WCPFC members' EEZs.[684] The EU is no great supporter of the VDS, likely because the VDS also has an economic objective. The VDS creates competition between distant water fishing nations to purchase units of fishing effort in days, thereby driving up the price. The EU (itself a distant water fishing nation in the region) has long not wanted to accept the VDS. It believes the VDS to be "an efficient tool to improve [Parties to the Nauru Agreement] countries' revenue derived from tuna resources" but that it has "failed to provide guarantees in terms of sustainability, transparency and effectiveness".[685] The EU had in fact created an exemption

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[682] For instance, the Vanuatu (Fisheries Act (No. 10 of 2014) repealing the one of 2006) maintains Vanuatu's sovereign decision to (not) apply RFMO CMMs in Vanuatu waters (defined as the EEZ, territorial sea, archipelagic waters, and internal waters) without the express consent of the governemnt (Art. 2(1)(3)). Similar, the Solomon Islands (Fisheries Management Act 2015) stipulates that "The provisions of this Act concerning the application of applicable international CMMs do not apply to internal waters, archipelagic waters, and territorial sea of the Solomon Islands (…) and shall have limited application if deemed necessary for a specifies period of time and with the expressed consent of the Solomon Islands Government" (available at: http://www.fao.org/faolex/country-profiles/en/).

[683] Steve Dunn (supra note 95), p. 16.

[684] Through WCPFC CMM 2005-01for Bigeye and Yellowfin Tuna in the Western and Central Pacific Ocean, which has most recently been replaced by CMM 2018-01. It would appear that all FFA countries consider the WCPFC VDS to not apply in their archipelagic waters and territorial seas (Liam Campling and Elizabeth Havice, FFA Fisheries Trade News, Vol. 6, Issue 1, January - February 2013, that "regulation of archipelagic waters is outside of the jurisdiction of the [Vessel Day Scheme] and WCPFC and is at the discretion of individual countries because of the high level of sovereignty within these water" (available at: https://www.ffa.int/node/722)).

[685] Letter from Cesar Deben on behalf of the European Commission to Mr Vu Van Tam, Director General, Directorate of Fisheries, Vietnam, 18 November 2014 (Ares(2014)3831926) (on file with author). The letter was addressed to Vietnam because of Vietnamese vessels operating in Papua New Guinean waters. The Commission

for EU (Spanish) flagged vessels from the VDS through its fisheries access agreement with Kiribati, agreeing to a set vessel day rate of 2207 USD in return for million USD in aid from the EU through the Agreement.[686] The Agreement was suspended when Kiribati, under pressure from other Pacific countries, started to enforce the VDS also against EU flagged vessels (September 2015).[687] A yellow card to Kiribati followed shortly thereafter (April 2016). This is circumstantial and not evidence that the EU's dislike of particular conservation and management measures affects its judgment whether a (Pacific) country has complied with its international fisheries obligations. Nevertheless, this is how it was perceived by those working on the ground.[688] In its yellow card determinations, the Commission has not gone so far as to demand that Pacific countries to give up the VDS, which because of its inclusion in the WCPFC is binding also on the EU. However, it has habitually demanded that Pacific countries *improve* on the VDS by providing real-time VDS data to foreign flag states, and generally making public the criteria and data of allocation and utilisation of fisheries licenses and fishing rights under the VDS.[689]

Whilst the EU's dealings with Pacific countries appear to be at least partly motivated by its interests as a distant water fishing nation in the region, its requirements do not lack an international legal basis – though this depends on how the issue of compatibility with RFMO conservation and management measures is understood. As far as transparency of fishing effort in areas under national jurisdiction goes, however, the previous section pointed to growing practice in making fisheries data available. With the objective of long-term sustainability in mind, it is suggested that catch data *should* be made available, also where the catch took place in sovereign waters, and in particular if the fish stock in question is managed through an RFMO, or where it concerns a foreign vessel and the flag state requires this data to exercise its flag state responsibilities.

asked Vietnam, as the flag state, to contact Papua New Guinea to get immediate access to data, so as to be able to certify the validity of catch certificates that accompanied Vietnamese fish caught in the Pacific and exported to the EU market.

[686] Agnes David Yeeting and others 'Stabilising Cooperation through Pragmatic Tolerance: The Case of the Parties to the Nauru Agreement (PNA) Tuna Fishery' (2018) 18 Regional Environmental Change 885, p. 894.

[687] Ibid.

[688] Francisco Blaha (supra note 609).

[689] Agnes David Yeeting and others (supra note 686), p. 894; Annex II, Papua New Guinea Action Plan.

4.4.4. Serious infringements and penalties

An issue that frequently arises in yellow card decisions is that of sanctions for IUU fishing. Before looking at the Commission's reasoning, it is informative to set out the EU IUU Regulation's requirements for this. These requirements are applicable only to EU member states, but it transpires from the pre-yellow card cooperation process and past yellow card decisions, they provide guidance for the Commission in its dealings with third countries.

The IUU Regulation describes the actions to be undertaken by EU member states when they suspect, or determine, a serious infringement. It hereby complements the Control Regulation's provisions that set out a points system for (serious) infringements of the Common Fisheries Policy more generally.[690] These provisions apply to conduct that takes place in EU territory and waters; on the high seas or in third country waters but that is detected in the EU; or conduct anywhere, by EU flagged vessels or nationals (Art. 41). Art. 42 IUU Regulation defines a 'serious infringement' as follows: IUU fishing; the conduct of business that is directly connected to it (trade in/or the importation of IUU fishery products); and the falsification of or use of falsified or invalid catch documentation. The actions to be undertaken are set out in Art. 43, and include the following. Where a serious infringement is suspected, EU member states must investigate the matter, and take immediate enforcement measures. Enforcement measures must be "of such nature as to prevent the continuation of the serious infringement concerned and to allow the competent authorities to complete its investigation." In particular, EU member states shall take the following measures: the immediate cessation of fishing activities; the rerouting to port of the fishing vessel; the rerouting of the transport vehicle to another location for inspection; the ordering of a bond; the seizure of fishing gear, catches or fisheries products; the temporary immobilisation of the fishing vessel or transport vehicle concerned; and the suspension of the authorisation to fish.

Furthermore, the Regulation indicates what sanctions are appropriate for serious infringements (Art. 44). It stipulates that member states shall ensure that a natural person having committed or a legal person held liable for a serious infringement is punishable by effective, proportionate and dissuasive administrative sanctions; they shall impose a maximum sanction of at least five times the value of the fishery products obtained by committing the serious infringement; and in case of a repeated serious infringement within a

[690] Arts. 90, 91, 92 Control Regulation.

five-year period, member states shall impose a maximum sanction of at least eight times the value of the fishery products obtained by committing the serious infringement. Furthermore, member states shall take into account the value of the prejudice to the fishing resources and the marine environment concerned. Effective, proportionate and dissuasive criminal sanctions may be used as an alternative, where this is appropriate. Art. 44 moreover provides a non-exhaustive list of various other sanctions that *may* (but clearly do not have to) accompany sanctions for a serious infringement, including the temporary or permanent ban on access to public assistance or subsidies.[691]

The Commission expects more or less the same from third countries, so as to meet the Art. 31 threshold (so as to be deemed in compliance with international law), though it never explicitly refers to the provisions in the IUU Regulation.

It can be observed from various yellow card decisions that the Commission expects countries to put in place the following: a definition of IUU fishing; provisions on serious infringements; and specific sanctions for recidivists (i.e. a provision on aggravated infringement).[692] A register of infringements or sanctions should also be put in place to readily link infringements to detect repeated offences.[693]

For instance, in its yellow card to St. Vincent and the Grenadines, the Commission reached the following conclusions.[694] The laws and regulations in St. Vincent and the Grenadines did not include a definition of IUU fishing activities. Furthermore, its legal framework lacked a definition of serious infringements and a comprehensive list of serious offences to be addressed with proportionate severe sanctions. The sanction system was therefore deemed not comprehensive and adequate in severity to achieve its deterrent function. In the case of Belize, the Commission took issue with the fact that the country's new draft High Seas Sanction Regulation foresaw merely administrative sanctions, and did not regulate clearly the amount of fines. The Commission concluded that "[t]he lack of a clear definition of the amount of the fines is an indication that Belize, if the draft is adopted, would not be able to fulfil the requirements of Article 19(2) [Fish Stocks Agreement]. The

[691] This is likely to become a mandatory sanction if current negotiations at the WTO on harmful fisheries subsidies are successful.
[692] *Inter alia* Annex I: St. Kitts and Nevis yellow card, para. 33; Solomon Islands yellow card, para. 49; Thailand yellow card, para. 80; and examples in text.
[693] Annex I: Thailand yellow card, para. 69; Curaçao yellow card, para. 186.
[694] Annex I: St. Vincent and the Grenadines yellow card, para. 57.

lack of the clear definition of the amount of the fines, if the draft is adopted, would be furthermore not in line with the recommendations in point 21 of the IPOA-IUU."[695]

The Commission also expects countries to exercise jurisdiction over illegal activities by vessels flying their flag where these take place outside their territory. For instance, in the yellow card to the Philippines, the Commission noted with disapproval that "the current legislation does not include a definition of IUU fishing, provisions on serious infringements or particular sanctions for recidivists (...) The current law in force only applies to the waters under the jurisdiction of the Philippines. Hence, as it stands, there is no legal basis for the Philippines authorities to impose sanctions on IUU activities by vessels flying its flag and operating beyond national jurisdiction (...) Hence, penalties in their current form are not comprehensive and severe enough to achieve their deterrent function. Indeed, the level of penalties is not adequate to secure compliance, to discourage violations wherever they occur and to deprive offenders of the benefits accruing from their illegal activities."[696]

As for the level of fines, the Commission habitually states this has to be sufficient to deprive vessels of the benefits accrued from potential illegal activities; they have to comprehensive and severe enough to achieve a deterrent function. Deregistering a vessel for IUU fishing is required, but is not enough. In its observations following the evaluation mission to Fiji (prior to giving a yellow card), the Commission recommended that Fiji establish specific criteria so as to avoid registering vessels that have previously been engaged in illegal activities, as well as putting in place a *deregistering* procedure for fishing vessels having committed illegal activities or presenting a "high risk".[697] In the yellow card to Cambodia, the Commission explained that "the simple deregistration of a vessel without any additional fine or other sanction as a measure of inadequate severity".[698] In both the yellow card to both Togo and Cambodia, the Commission therefore found it therefore "pertinent" to note that these countries had merely deregistered vessels that appeared on RFMO blacklists in lieu of adopting other sanctions.[699] A very specific example is also Taiwan, where the Commission observed that the level of fines in Taiwanese law was deemed not sufficient to

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[695] Annex I, Belize yellow card, para. 46.
[696] Annex I, Philippines yellow card, para. 81.
[697] Evaluation Mission to Fiji and their measures against IUU in general and the Implementation of the EU IUU Regulation, 16-18 January 2012, Final Recommendations (Ares(2012)153244), 10 February 2012 (on file with author), p. 3.
[698] Annex I, Cambodia yellow card, para. 101.
[699] Annex I, Togo yellow card, paras. 357-359; Annex I, Cambodia yellow card, para. 80.

deprive large commercial vessels of the benefits accrued, since maximum fines were set to approximately 9000 euros.[700] Though the Commission failed to substantiate this with evidence of *why* it is insufficient, presumably, 9000 euros only represents a small percentage of the (illegal) catch of large commercial vessels in the area.

An interesting issue that furthermore arose in Taiwan was Taiwan's failure to exercise jurisdiction over its *nationals*. The Commission deplored the fact that Taiwan lacked specific provisions concerning nationals supporting or engaged in IUU fishing activities.[701] The monetary sanctions foreseen were not mandatory and it was "not clear whether they are applied in case other countries have imposed fines of insufficient severity to Taiwanese nationals on the same infringement."[702] The latter can be understood in different ways. Presumably, the Commission does not expect countries to exercise jurisdiction over their nationals wherever in the world they infringe a foreign (third country or RFMO) fisheries obligation, regardless of the vessel they are on. This would significantly stretch states' international duties. Rather, the Commission's point could refer to the fact that Taiwan had "also indicated that it is fully committed in ensuring that its fishing vessels that have been sanctioned by coastal States for infringements with sanctions of insufficient severity will be further punished in Taiwan."[703] In other words, the Commission wants to ensure that flag states do not relieve themselves of their responsibilities only because a coastal state has already exercised its jurisdiction by fining a vessel, and where this fine is insufficient. This is in line with international law. I recall from chapter 3, section 3.9.2, that "the primary responsibility of the coastal State in cases of IUU fishing conducted within its [EEZ] does not release other States from their obligations in this regard".[704]

Furthermore, the Commission has highlighted the need to have in place effective procedures. In the case of Ghana, the Commission listed various procedural shortcomings. There no legal service in charge of suing individuals or companies liable for IUU fishing activities; procedures where excessively lengthy; and poor results had been achieved in terms of infringements detected and sanctions applied.[705] This led the Commission to conclude that "the current legal enforcement and prosecution procedures in place do not allow the

[700] Annex I, Taiwan yellow card, para. 72.
[701] Ibid.
[702] Ibid.
[703] Ibid. para. 73.
[704] *Advisory Opinion to the SRFC* (supra note 83), para. 108.
[705] Annex I, Ghana Yellow Card, para. 107.

competent Ghanaian authorities to take effective enforcement measures".[706] Similarly, Belize's new draft High Seas Sanction Regulation was criticised for not foreseeing "clear deadlines for carrying out the examination of alleged infringements. There if no clear cut division of responsibilities among the competent Belizean authorities in the implementation of the proposed sanctioning scheme."[707]

Generally, a combination of the concerns above will lead the Commission to find that a third country has failed to uphold its obligations to impose effective enforcement measures under Art. 94 LOSC, and that it has failed to demonstrate it has in place an adequate sanction regime to combat IUU as outlined in para. 21 of the IPOA-IUU. It will have failed the Art. 31 threshold, as far as the Commission is concerned. Whether this reflects current international law is debatable. I recall that whilst the LOSC does not refer to sanctions, they are clearly expected as part of a flag state's responsibility over vessels flying its flag. The flag state is under the obligation to have in place enforcement mechanisms to monitor and secure compliance with its laws and regulations, and that sanctions must be sufficient to deter violations and to deprive offenders of the benefits accruing from violations.[708] In so far that the Commission demands third countries to have in place monitoring and enforcement mechanisms and to impose sufficiently high sanctions, this should therefore not be considered as 'overstretching' international norms beyond what can be considered a reasonable interpretation of flag state responsibilities. A need for this is also evident from at least some RFMO practice. For example, the WCPFC requires its members to sanction fishing activities that they describe has serious violations,[709] and the IOTC provides that a vessel will not be taken off an RFMO IUU list until "adequate sanctions" have been imposed.[710]

However, the requirement to have in place a definition of IUU is questionable. I recall that the definition of IUU fishing in the IPOA-IUU (as copied into the EU IUU Regulation) is problematic for its lack of nuance, and fails to distinguish between unregulated fishing that is

[706] Ibid.
[707] Annex I, Belize yellow card, para. 46.
[708] Ibid. para. 138.
[709] E.g. see the WCPFC Convention ("Each member of the Commission shall ensure that, where it has been established, in accordance with its laws, that a fishing vessel flying its flag has been involved in the commission of a serious violation of the provisions of this Convention or of any conservation and management measures adopted by the Commission, the vessel concerned ceases fishing activities and does not engage in such activities in the Convention Area until such time as all outstanding sanctions imposed by the flag State in respect of the violation have been complied with" (Art. 25(4)).
[710] E.g. IOTC Resolution 11/03, point 19.

illegal, and what is not (chapter 3). The concept of IUU fishing was never meant as a legal definition in the first place; it provides only "illustrative descriptions (not a definition of IUU fishing *per se*) of the concept of IUU fishing and its different components".[711] Chapter 3, section 3.5 noted that the EU previously recorded its concern that the definition of IUU fishing in the IPOA-IUU is not entirely appropriate, and that the EU would not recognise this definition as having any force other than in the context of the IPOA.[712] The original Proposal for the IUU Regulation also did not include the definition of IUU fishing in the substantive part of the instrument, and referred to the IPOA-IUU and its 'definition' *only* in the Preamble. This was modified upon the suggestion of the European Parliament, in its first reading of the Proposal.[713] Demanding that third countries transpose the long-winded and descriptive 'definition' of IUU fishing in their national law so as to deal with illegal fishing activities by their vessels would appear to be overstretching flag state responsibilities beyond what can be considered a reasonable interpretation, and not for the better.

Furthermore, requiring that third countries establish in their national legislation a minimum fine of a particular sum fails to take into account the differences in countries legal systems. Rather, the level should be set in the abstract, following the standard established in international law, namely, that fines should be sufficient to deprive perpetrators of the gains derived from particular fisheries infractions. Yet, in its dealings with Fiji prior to the yellow card, the Commission objected to the fact that the level of administrative sanctions for illegal fishing operations was decided on a case by case basis; there was no specific scale of sanctions.[714] Fiji contested the Commission's objection for "international legal reasons" which were not specified, but eventually conceded that its new Offshore Fisheries Management Decree would effectively address the issue of low fines.[715] Nevertheless, Fiji was issued a yellow card less than one month later. The Commission explained in its action plan that, among other suggested reforms, "Fiji should set a deterrent regime of administrative sanctions where the level of administrative sanctions in the form of fines/fees decided by the Fisheries Department should be in proportion with the level of incomes

[711] FAO, Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally, Rome 2-4 February 2015, FAO Fisheries and Aquaculture Report No. 1106, p. 3.
[712] FAO (supra note 386), para. 12.
[713] European Parliament legislative resolution of 5 June 2008 on the Proposal for a Council Regulation establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 26 November 2009, OJ C285 E/74.
[714] Evaluation Mission to Fiji, Final Recommendations (supra note 639), p. 8.
[715] Fiji Permanent Secretary for Fisheries and Forests, Memorandum of 22 October 2012 (Areas(2012)1316667), 8 November 2012, Annex II (on file with author).

generated by the illegal activities at stake."[716] Similarly, in a letter to the Commission, Vanuatu pointed out that it is usual, in a common law system, for the actual level of penalties to be decided by a judge.[717] Nevertheless, upon giving Vanuatu a yellow card some months later, the Commission maintained that "Vanuatu should review the level of certain sanctions" and set "administrative sanctions in the form of fines/fees decided by the Fisheries Department in proportion with the level of incomes generated by the illegal activities at stake."[718]

The Commission's insistence on a set level of fines raises questions. From the one hand, the argument can plausible be made that simply deregistering a vessel is insufficiently deterrent a sanction. From the other hand, the Commission's narrow view on determining the level of fines for illegal fishing imposes the EU's own view of how domestic administrative law should respond to international obligations. Some of the reactions from targeted countries indicate that this fails to have regard to their different legal traditions – though whether the Commission's view on what a reasonably deterrent sanction is stretches international interpretations is difficult to determine in the abstract. What can however be observed is that sanctions applied by EU member states *themselves* are not always dissuasive either.[719] Though the Control Regulation is currently undergoing reforms and may lead to improved sanctions, one of the main reasons cited that the Court of Auditors made this finding was a lack of coherent implementation by member states. This would not be addressed by reforming the Regulation itself.

4.4.5. Developing country status

I now turn to the question how developing country status is being taken into account in all this. Art. 31(7) IUU Regulation stipulates that "where appropriate, specific constraints of developing countries, in particular in respect to monitoring, control and surveillance of fishing activities, shall be duly taken into consideration" when listing countries. Presumably, it is "appropriate" to do so whenever a country is a developing country. Thus far every

[716] Annex II: Fiji action plan; Annex I, Fiji yellow card, paras. 113-117.
[717] Vanuatu Director of Fisheries (supra note 627).
[718] Annex II: Vanuatu Action Plan. It can be observed that the amended Fisheries Act (No. 10 of 2014) repealing the one of 2006 now incorporates in its Art. 1 a definition of "serious violation" (including a list of offenses, e.g. falsifying a catch certificate; contravening a court order to ban a person on board a ship, unauthorised transhipment at sea, and so on) and of "IUU fishing" (available at: http://www.fao.org/faolex/country-profiles/en/).
[719] European Court of Auditors (supra note 646), paras. 87, 90.

yellow card decision has explicitly considered whether or not a country faces specific constraints that would justify it failing to comply with international fisheries norms and obligations.

The critique has been made that the Commission only pays "lip service" to the requirement to take into account developing country status.[720] Looking at the spread of countries that have been carded, it can be observed that Cambodia, Guinea, Togo, Vanuatu, Comoros, the Solomon Islands, and Tuvalu are all least developing countries according to the United Nations Human Development Index, and/or are included in Annex II to Regulation (EC) No 1905/2006 as a country falling within the category of least developed countries. Yet this has not stopped the Commission from issuing them a yellow card, and for three of them to end up on the IUU country blacklist (Cambodia, Guinea, and Comoros). Moreover, developing country constraints do not appear to weigh heavily in the Commission's decision making. This can be explained by looking at the Commission's reasons for carding developing countries, which goes as follows. A third country's lack of legal framework, a lack of the necessary administrative environment, and the absence of a sanctions mechanism cannot, in the Commission's opinion, be attributed to specific capacity constraints.[721] Similarly, financial or technical constraints cannot justify a country's decision to take on more than it can handle (e.g. registering a large fishing fleet without having sufficient capacity to monitor). A good example is Vanuatu, where the Commission explained that the argument of limited resources did not "tally" with Vanuatu's policies for the development of its fishing industry, and particular the voluminous number of vessels registered under the Vanuatu flag and operating on the high seas, which were deemed to undermine the existence of effective monitoring, control and surveillance of fishing activities.[722] The development status and overall performance of Vanuatu with respect to fisheries were therefore deemed not to be impaired by its level of development.[723] The Commission also takes into account whether the EU has already previously given financial and technical aid, which would alleviate a country's constraints.[724]

[720] Steve Dunn (supra note 95), p. 6.
[721] Annex I, Comoros yellow card, para. 52; Solomon Islands yellow card, para. 79.
[722] Annex I, Vanuatu yellow card, para. 436.
[723] Ibid. para. 438.
[724] *Inter alia* in Annex I: Fiji yellow card, para. 122; Guinea yellow card, para. 180, 215; Panama yellow card, para. 279; Sri Lanka yellow card, para. 338; Togo yellow card, para. 381; Vanuatu yellow card, para. 437.

Whether market conditionality *should* take into account developing country status is a question left for chapter 6, section 6.6, which looks at the need for non-discrimination in the law of the sea. This draws on the view that the flexible standard of due diligence could give rise to differentiated standards for countries under the law of the sea, and that this is something to be taken into account when allocating responsibility, as already suggested in chapter 3, section 3.7.2. At this point, I merely observe that the Commission *does* explicitly consider a country's capacity constraints. However, there is no evidence that the Commission operates differentiated standards of responsibility, and considers states' due diligence obligations to be a matter of differentiated responsibility.

In fact, the Commission generally does not analyse the standard of responsibility required under international law in the context of IUU fishing. Immediately after the adoption in April 2015 of the *Advisory Opinion to the SRFC*, which set a due diligence standard for flag state responsibility, the Commission made note of a need for due diligence in its yellow cards to Taiwan and Comoros. This opened the door to a more nuanced approach, and could have led to differentiated standards for developing countries. The Commission observed the following:

> "The concept of flag state responsibility and coastal state responsibility has been steadily strengthened in international fisheries law and is today envisaged as an obligation of 'due diligence', which is an obligation to exercise best possible efforts and to do the utmost to prevent IUU fishing, including the obligation to adopt the necessary administrative and enforcement measures to ensure that fishing vessels flying its flag, its nationals, or fishing vessels engaged in its waters are not involved in activities which infringe the applicable conservation and management measures of marine biological resources, and in case of infringement to cooperate and consult with other states in order to investigate and, if necessary, impose sanctions which are sufficient to deter violations and deprive offenders of the benefits from their illegal activities."[725]

However, the Commission did not go into further detail what it considered 'best possible efforts' to mean, and whether this might mean something different for developing countries – in particular a least developed country like Comoros. Furthermore, in the case of Taiwan, it appears the Commission misunderstood the meaning of due diligence altogether. Rather than treat due diligence as the standard of state responsibility when fulfilling certain duties under the LOSC, it appeared to be under the impression that due diligence is a stand-alone normative basis for action. Since Taiwan has not ratified any international agreements due to

[725] Annex I, Taiwan yellow card, para. 36; Comoros yellow card, para. 7.

its political status, the Commission had to base its demands on other sources of law. It concluded that Taiwan "is considered covered by pre-existing rules of customary law *as well as* by due diligence obligation with respect to its fishing vessels conducting IUU fishing".[726] Presumably, what is meant is that Taiwan needs to comply with customary international law principles (including flag- and coastal state obligations, which are codified in the LOSC), and that some of these obligations (flag state responsibility) *are* obligations of conduct, rather than of result, whereby states are required to exercise due diligence.[727]

Subsequent carding decisions have not mentioned the need for due diligence. This is a pity. As the examples in the preceding sections have shown, the Commission generally underpins its yellow and red card decisions by giving long lists of factual shortcomings, with ample references to soft law and the general provisions in the LOSC and Fish Stocks Agreement, but without engaging in carefully constructed legal analysis of what it considers to be expected of third countries as a matter of international law.[728] It is altogether difficult to understand the Commission's position on what is demanded of states by way of international law, and what needs to be done to secure EU market access. An independent Review Report of the Regulation also concludes that the process surrounding these evaluation missions is "opaque", making it "impossible" to understand the position of the European Commission on what it considers the problem to be, and that there is a strong case for a formalised and transparent system of evaluating third countries.[729]

4.5. The EU Non-Sustainable Fishing Regulation

The EU Non-Sustainable Fishing Regulation lays down a framework for the adoption of measures against third countries that do not cooperate in a satisfactory way with the EU over certain shared fishery resources. The Regulation lacks the complexity of the EU IUU Regulation. It is but 4 pages long and made up of a mere 8 articles, in comparison to the 54

[726] Annex I, Taiwan yellow card, para. 80 (emphasis added; the omission of the article "a" is from the original text).
[727] "Once a ship is registered, the flag state is required, under Art. 94 of the [LOSC], to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of 'genuine link'." (*M/V "Virginia G"*(supra note 446), paras. 110 and 113, citing and elaborating on *Saiga (No. 2)* (supra note 265), para. 82).
[728] Also Mercedes Rosello (supra note 669), p. 310, deploring the fact that the Commission fails to provide adequate legal reasoning for its findings, building on the example of the yellow card to Cambodia.
[729] Carlos Palin and others (supra note 40), p. 119

pages long EU IUU Regulation, which contains 57 articles. Moreover, it was only put into practice once, as I discuss further below.

4.5.1. Scope and mechanisms

Unlike the EU IUU Regulation, the Non-Sustainable Fishing Regulation is limited in scope to stocks of common interest. These are defined in Art. 2(1) as a fish stock which is geographically available to both the EU and third countries, and the management of which requires their cooperation, in either bilateral or multilateral settings. Whether EU vessels should also be *actually* fishing for that stock is not specified. As the previous chapter has shown, states must cooperate in the management of all transboundary and high seas stocks. Stocks are presumably 'geographically available' to the EU in the following instances: shared stocks with the EU (stocks that span the EU EEZ and other EEZs); straddling stocks (EEZ-high seas) and highly migratory species, where the EU fishes on the high seas portion of that stock *or* where the EU is the coastal state, having to cooperate with third countries fishing on the high seas portion of that stock; and high seas only stocks that are either not governed through an RFMO and on which the EU fishes, or that are governed through an RFMO and the EU cooperates with that RFMO/is a member, and has authorisation to fish. Section 4.4.3 demonstrated that the Commission appears to operate on the presumption that states are prohibited from fishing on an RFMO-governed stock without its authorisation as a matter of customary law, seemingly regardless of whether or not that RFMO has shown cooperative goodwill towards the state seeking authorisation to fish or seeking membership. A stock governed by an RFMO and of which the EU is not a member/for which the EU does *not* have permission to fish, is therefore *not* geographically available to it, and should fall outside the scope of the Regulation. The last example is mostly hypothetical, however, given the EU's widespread membership of RFMOs.

Possible conflict could however arise over cooperation over stocks covered by the Framework Agreement for the Conservation of the Living Marine Resources of the High Seas of the South Pacific (so-called Galapagos Agreement, not yet in force as of April 2019), adopted in the framework of the South Pacific Permanent Commission (SPPC).[730] The

[730] Framework Agreement for the Conservation of the Living Marine Resources of the High Seas of the South Pacific (Galapagos Agreement), Santiago, 14 October 2000, https://www.jus.uio.no/english/services/library/treaties/08/8-02/living-marine-resources.xml;

Galapagos Agreement covers straddling stocks on the high seas adjacent to the EEZs of a number of South American coastal states, who negotiated and concluded the Agreement amongst themselves and without inviting the EU, who has a fishing presence in the (see also chapter 6, section 6.2, on the relevance of this to the *Swordfish* dispute). The Agreement has not yet entered into force. What is more, it will only be opened for signature to other interested states *after* having entered into force, for a twelve month period, after which time any interested state may accede to the Agreement (Art. 16). This effectively allows the coastal states to already agree on conservation and management measures before others join. Decision-making under the Galapagos Agreement is moreover heavily tilted in favour of coastal states, since substantive decisions are made by consensus or a two-third majority, including a majority of the coastal states (Art. 12). It can be envisaged that the Agreement will come into force and that conservation and management measures are adopted (the Agreement contains no list of species to be regulated; this remains to be determined). These may include designating fishing zones; catch limits; designating closed seasons; etc. (Art. 6). Given the EU's opposition to the Agreement and possible objections to any conservation and management measures that may be adopted before it can join, it is possible that the EU would *not* become party, but would want to maintain a fishing presence.[731] The question could then arise whether any stocks regulated by the Agreement, though on the high seas, are still 'geographically available' to the EU as a non-party, and whether it could use the Non-Sustainable Fishing Regulation to leverage its position.

The consequences of a country being identified as a country allowing non-sustainable fishing are similar but less severe than those under the EU IUU Regulation, and are listed in Art. 4. They may include quantitative restrictions on importations of fish from the stock of common interest, as well as associated species, caught under the control of that country; restrictions on the use of EU ports by vessels flying the flag of that country, and fishing for the stock of common interest; a prohibition on EU economic operators to purchase a vessel

for a discussion of the Galapagos Agreement in light of the political context of the dispute between Chile and the EU over swordfish, see Rosemary Rayfuse *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff, 2004), p. 318-323, who writes on p. 322 that "by refusing to admit fishing states to the process it made what was already a controversial attempt to extend coastal state jurisdiction over the high seas even more unacceptable to the EU."

[731] "It is striking that the [EU] and other interested countries were not invited to this negotiating table [of the Galapagos Agreement]. Besides, the [EU] repeatedly showed its willingness to take part in a similar multilateral negotiating exercise. Instead, what Chile proposed to the [EU] and other interested states is participation in a unilateral "take it or leave it" agreement [the Galapagos Agreement]. This clearly raised doubts on Chile willingness to enter into co-operative arrangements with the [EU]." (press release available at: http://europa.eu/rapid/press-release_MEMO-00-77_en.htm).

flagged to that country; a prohibition to reflag an EU flagged vessel to that country; a prohibition on EU member states to conclude chartering agreements whereby EU economic operators charter their vessels to economic operators of that country; a prohibition on the exportation to that country of fishing vessels, equipment, and supplies needed to fish on the stock of common interest; a prohibition on private trade agreements that would allow EU flagged vessels to use fishing opportunities in that country; and a prohibition on joint fishing operations involving fishing vessels flagged to the EU, and to the third country in question. I observe that that Commission may mitigate the severity of these measures by identifying where necessary, the specific vessels or fleets of that country to which certain measures are to apply.

Importantly, Art. 5 of the Regulation contains some parameters for the application of Art. 4. These parameters can be summarised as follows: the measures adopted by the Commission may only be related to the conservation of the stock of common interest; they must be made effective *in conjunction with* similar restrictions on fishing by EU vessels; they must be proportionate to the objectives pursued, and compatible with international law; they must take into account measures already taken pursuant to the EU IUU Regulation; they must not be applied in a manner which could constitute a means of arbitrary or unjustifiable discrimination; they must be environmentally sound, effective, proportionate and compatible with international rules, evaluate the environmental, trade, economic and social effects of those measures in the short and long terms and the administrative burden associated with their implementation; and they must provide for an appropriate system for their enforcement by competent authorities. An equivalent article is missing from the EU IUU Regulation. Its function here appears in particular to be to ensure that any market restrictions will be compatible with the law of the WTO, as discussed further in chapter 7.

The procedure of identifying a country allowing non-sustainable fishing is set out in Art. 6, in a briefer fashion than under the EU IUU Regulation, and with explicit time limits. The country concerned must be notified of the Commission's intention and it must be given the reasons for the identification. It must be given a reasonable opportunity to respond to the notification in writing and to remedy the situation within one month of receiving that notification. Compared to the EU IUU Regulation, for which the reasonable period to remedy a situation is undefined, and can take years, the EU Non-Sustainable Fishing Regulation is clearly aimed at swift action. This is all the more so since the measures are adopted by the

Commission, whereas the decision to amend the list of non-cooperating third countries under the EU IUU Regulation is ultimately made by the Council.

4.5.2. Threshold for country blacklisting

The test for being identified as country allowing non- sustainable fishing is set out in Art. 3 of the EU Non-Sustainable Fishing Regulation, which reads as follows:

> "A country may be identified as a country allowing non-sustainable fishing where:
>
> (a) it fails to cooperate in the management of a stock of common interest in full compliance with the provisions of the [LOSC] and the [Fish Stocks Agreement], or any other international agreement or norm of international law; and
>
> (b) either:
>
> (i) it fails to adopt necessary fishery management measures; or
>
> (ii) it adopts fishery management measures without due regard to the rights, interests and duties of other countries and the Union, and those fishery management measures, when considered in conjunction with measures taken by other countries and the Union, lead to fishing activities which could result in the stock being in an unsustainable state. This condition is considered to be complied with also where the fishery management measures adopted by that country did not lead to the stock being in an unsustainable state solely due to measures adopted by others."

The term 'unsustainable state' is defined in Art. 2(f) as "the condition where the stock is not continuously maintained at or above the levels that can produce maximum sustainable yield or, if these levels cannot be estimated, where the stock is not continuously maintained within safe biological limits; the stock levels determining whether the stock is in an unsustainable state are to be determined on the basis of best available scientific advice". Safe biological limits are defined in Art. 2(g) as "the boundaries of the size of a stock within which the stock can replenish itself with high probability while allowing high yield fisheries on it".

The following two situations would fall short of the threshold, according to the text of the Regulation. One, where a third country fails to comply with its international legal duties to cooperate in the management of a stock of common interest with the EU, and fails to adopt the necessary fishery management measures (presumably, fails to unilaterally reduce its fishing effort to whatever level is deemed to be sufficiently low to allow for different actors to fish on a shared stock). Two, where a third country fails to comply with its international legal duties to cooperate; does not have due regard to the rights, interests and duties of other

states (including the EU); and where the resulting fishing activities by all states concerned could result in the stock being in an unsustainable state.

Like the EU IUU Regulation*,* the Non-Sustainable Fishing Regulation thus also targets a country's non-compliance with its international commitments. The difference is predominantly the more limited substantive and geographical scope of the Non-Sustainable Fishing Regulation. Cooperation is important to both the Art. 31 threshold (EU IUU) and the Art. 3 threshold (EU Non-Sustainable Fishing), but the topic of cooperation differs. To avoid being identified under the IUU Regulation, a country must *inter alia* cooperate with the Commission *throughout the process*, and is called upon to cooperate *with other coastal- and flag states*, in particular by exchanging data on fishing activities. An important underlying theme here is the need to promote traceability throughout the entire supply chain of fish products coming into the EU. In so far that these are international legal requirements, they are mostly a corollary of other flag- and coastal states obligations. For instance, to fulfil its flag state responsibilities, a flag state must *inter alia* investigate alleged violations, and inform the state that notified it of these violations of the actions it has undertaken in response.[732] The Non-Sustainable Fishing Regulation on the other hand is concerned with the management of transboundary fish stocks (setting limits for fishing efforts) in concert with the EU; the 'duty to cooperate', as described in chapter 3, section 3.10.

I recall that cooperation on issues pertaining to the conservation and management of transboundary fisheries resources, as well as the promotion of the optimum utilization of those resources, and generally the duty to cooperate in the protection and preservation of the marine environment, are fundamental principles of the LOSC.[733] The duty to cooperate is not an obligation of result, but one of conduct, and therefore one of due diligence.[734] States concerned will have to consult with one another in good faith, and these consultations should be meaningful in the sense that substantial effort should be made by all states concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of the stocks in question.[735] The ITLOS explained it is of the view that the conservation and development of transboundary stocks requires from coastal states effective measures aimed at preventing over-exploitation of such stocks that could undermine their

[732] *Advisory Opinion to the SRFC* (supra note 83), para. 118.
[733] Ibid. para. 140; *MOX Plant* (supra note 512), para. 82.
[734] *Advisory Opinion to the SRFC* (Ibid.), para. 210.
[735] Ibid. paras. 210-211 (emphasis added).

sustainable exploitation *and* the interests of neighbouring coastal states, and that states must consult each other when setting up management measures for those shared stocks to coordinate and ensure the conservation and development of such stocks.[736] This flows not only from the provisions of the LOSC on cooperation and conservation and management, but also from the duty to have due regard to the rights and duties of other. Fisheries conservation and management measures, to be effective, should moreover concern the whole stock unit over its entire area of distribution or migration routes, which requires cooperation of all states concerned.[737]

Viewed in light of the current state of international law, the Art. 3 threshold for blacklisting a third country is curious. When a country fails to cooperate in the conservation and management of a stock that is available both to it and to the EU, this implies that it did not nor will adopt the "necessary" fishery management measures. The necessary fishery management measures cannot, in that situation, be determined without cooperation, which is required as a matter of international law. Without cooperation, they are simply not the fishery management measures that are "necessary". The first tier of the threshold (Art. 3(a) and (b)(i)) is thus always fulfilled if a country fails to fulfil its international duties to cooperate. As for the second tier of the threshold, the situation is a bit more complex. Failing to cooperate also and necessarily implies a lack of due regard to the rights, duties, and interests of other states that have access to that stock and therefore themselves under a duty to preserve it. Theoretically, it is possible for a third country to fail to cooperate over a stock of common interest (and therefore fail to have due regard to the EU), but where the fishery management measures of all involved do *not* lead to fishing activities that could result in the stock being in an unsustainable state. In that case, the second tier of the threshold (Art. 3(a) and (b)(ii)) is not met. The situation is highly improbably, since most if not all industrial fishing activities could result in overfishing, and the chances that this will happen are exacerbated when states do not cooperate to coordinate their fishing activities. To conclude, therefore, the threshold for blacklisting under the Non-Sustainable Fishing Regulation is best understood as simply failing to give effect to the duty to cooperate under international law, and as a corollary, the duty to have due regard. This simplified understanding of Art. 3 is also reflected in the recital 2 of the Regulation, which reads as follows:

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[736] Ibid. paras. 212-213.
[737] Ibid. para. 215.

> "Where a third country with an interest in a fishery involving a stock of common interest to that country and to the [EU] allows, without due regard to existing fishing patterns or the rights, duties and interests of other countries and the [EU], fisheries activities that jeopardise the sustainability of that stock, and fails to cooperate with other countries and the [EU] in its management, specific measures should be adopted in order to encourage that country to contribute to the conservation of that stock."

From the outset, the threshold reflects international law – though as previously mentioned it is most curiously worded and appears overly complicated. As explained in the Proposal for the Regulation, the specific problem that the Regulation aims to address is the situation where the EU cannot come to an agreement with a third country over the allocation of quotas for a stock that is targeted by both the EU and the third country in question, as well as potential others, and where this undermines the sustainability of a stock.[738] This points to an expectation of a certain result, whereas the duty to cooperate is clearly one of conduct, and of due diligence. However, in its Impact Assessment, the Commission also highlights the need for EU intervention "where third countries refuse to abandon harmful unilateral behaviour and fail to show the necessary goodwill to achieve an arrangement for the management of migrating fish stock."[739] This could point at an expectation of negotiations in good faith – which is part of states' obligations to exercise due diligence and in line with international law – and consequently, that a country only risks blacklisting where it has not fulfilled these obligations.

The blacklisting mechanism was put into effect only once, and it is therefore somewhat unclear how the threshold (the extent of the duty to cooperate) is interpreted in practice.[740] Market restrictions were adopted for Atlanto-Scandian herring and Northeast Atlantic mackerel caught under the control of the Faroe Islands, which led to a dispute discussed in more detail in chapters 6 and 7.[741] The example of the Faroe Islands would suggest that it is

[738] Proposal for a Regulation of the European Parliament and of the Council on certain measures in relation to countries allowing non-sustainable fishing for the purpose of the conservation of fish stocks, Brussels, 14 December 2011, COM(2011) 888 final, p. 2.

[739] European Commission, SEC(2011) 1576 (supra note 119), p. 45.

[740] Commission Implementing Regulation (EU) 793/2013 of 20 August 2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock, 20 August 2013, OJ L223/1.

[741] The EU prohibited specified Atlanto-Scandian herring and Northeast Atlantic mackerel products from entering the territory of the EU, and banned the use of EU ports by certain vessels flying the flag of the Faroe Islands and certain third-country vessels transporting specified fish or fishery products. As a result, Denmark on behalf of the Faroe Islands requested the establishment of a panel at the WTO (*EU – Herring*, 7 November 2013, Request for Consultations (WT/DS469/1)). For a commentary, see for example Mihail Vatsov 'Changes in the geographical distribution of shared fish stocks and the Mackerel War: confronting the cooperation maze' (2016) Working Paper No 13, Scottish Centre for International Law, Edinburgh.

the actual outcome (the lack of reaching agreement) that will be the deciding factor as to whether a third country has fulfilled its international duties to cooperate, under the Regulation.

As pointed out in the Impact Assessment, the specific scenario that triggered the Commission's Proposal was that of overly lengthy negotiations under the auspices of NEAFC over catch limits for blue whiting. [742] The EU considers these to have been set too high, with disastrous consequences. The EU had moreover failed to agree on the allocation of catches for North-East Atlantic mackerel with the Faroe Islands and Iceland over their share (in their EEZs, which fall outside the area of competence of NEAFC).[743] The latter had set high quotas for mackerel going well above the quota agreed upon in negotiation with the EU and other coastal sates fishing for that stock, in a non-binding management plan of 2008. Part of the mackerel fishing occurred within these countries' own EEZs, which fall outside the regulatory area of the NEAFC. Though the EU disagreed with the new elevated quota that the coastal states had allocated themselves, and because of the non-binding nature of the 2008 management plan, the EU found itself without a mechanism to contest their decisions. The Commission considered that the decision of the Faroe Islands to break the 2008 arrangements for the management plan "could not be taken as a breach of international law that could lead to apply the measures of the IUU Regulation."[744] It is here that the nature of the Non-Sustainable Fishing Regulation becomes complicated. Whilst the threshold is framed as a matter of law as one of *international duties*, the Commission appears to be quite aware of the fact that it is going beyond this.

Although no other countries have been carded since, the Commission has suggested that similar problems might arise in the future over other stocks, especially in situations where no RFMO is competent and only non-legally binding arrangements and understandings exist between states fishing on stocks of a common interest.[745] As mentioned above, the Galapagos Agreement could lead to a dispute in the future, and with shifting fish stocks due to climate change, states who see an increase of a particular stock in their waters may seek to increase

[742] European Commission, SEC(2011) 1576 (supra note 119), p. 8 and Annex II.
[743] Ibid.
[744] Ibid. p. 70.
[745] Ibid.

their fishing efforts. The Commission pointed out “no stock is free from the danger of a coastal state breaking the equilibrium achieved in the multilateral consultations”.[746]

4.5.3. IUU vs Non-Sustainable Fishing

Having examined both EU Regulations, it appears that a distinction between preventing, deterring, and eliminating IUU fishing on the one hand, and the long-term conservation of stocks of common interest on the other, lacks nuance. When proposing the EU Non-Sustainable Fishing Regulation in 2011, the European Commission distinguished it from the EU IUU Regulation with the argument that the latter targets illegal fisheries “strictly speaking”, whereas the former would target fisheries that are carried out under domestic law and which are therefore not illegal, but where the legal framework in place does not “guarantee sustainability”.[747] This distinction between the IUU Regulation targeting illegality *per se* and the Non-Sustainable Fishing targeting sustainability sits at odds with the EU IUU Regulation’s own Preamble. Rec. 6 of the Preamble notes that EU action under it should primarily target behaviour that “causes the most serious damage to the marine environment, the sustainability of fish stocks and the socio-economic situation of fishermen abiding by the rules on conservation and management of fisheries resources”. The Preamble reflects the FAO’s explanation of the IPOA-IUU (and thus the fight against IUU fishing) being concerned primarily with fishing “that is likely to frustrate the achievement of sustainable fisheries”.[748] In other words, though the objective of the IUU Regulation is to prevent, deter, and eliminate IUU fishing, the *reason* why we want to do so in the first place is to ensure the long-term sustainability of fisheries. As Rosemary Rayfuse sums up, “[t]he whole point of the objection to IUU fishing is that it directly threatens effective conservation and management of fish stocks thereby adversely affecting both fisheries and the people who depend on them”.[749]

The IUU Regulation moreover applies globally, to all IUU fishing and associated activities carried out within the territory of EU member states, within EU waters, within maritime waters under the jurisdiction or sovereignty of third countries, and on the high seas. It does

[746] Ibid.
[747] Ibid. p. 8, 10.
[748] FAO Guidelines for the Implementation of the IPOA-IUU (supra note 19), p. 6.
[749] Rosemary Rayfuse (supra note 334), p. 161.

not distinguish between stocks of interest only to third countries and those of common interest also to the EU, and the latter logically also fall within its scope.

What is more, both Regulations make market access conditional upon third countries' non-compliance with fisheries norms and obligations. In that sense, they both target the lack of observance by states of their international fisheries related commitments. In so far that this actually constitutes a breach of international law, *both* Regulations target a state's unlawful behaviour.

The distinction between the two Regulations may have become moot, and I question the continued relevance of the Non-Sustainable Fishing Regulation. In recent years, the Commission has adopted an extremely broad understanding of what it means for a country to prevent, deter, and eliminate IUU fishing. This has reduced the conceptual gap between the two Regulations to the point of disappearing. I give some examples. In its assessment of Vietnam under the EU IUU Regulation, the Commission noted that "the Vietnamese legal framework only provides for limited conservation and management measures in territorial waters" and that national legal provisions and control systems "appear not to be sufficient".[750] Therefore, it noted that Vietnam was in breach of both is obligation to ensure that the maintenance of living resources in the EEZ is not endangered by overexploitation, and its obligation to ensure optimum utilization, under the LOSC.[751] These obligations are analysed further below. What matters here is that they are not related to the issues that form part of the definition of IUU fishing, but rather pertain to the sustainable management of living resources more generally. The Commission has thus expanded its fight against IUU fishing towards a more general focus on whether or not third countries ensure sustainable fishing in line with their international obligations. Vietnam's failure to sustainably manage its fisheries contributed to the Commission's conclusion that it had failed the duties incumbent upon it under international law to prevent, deter, and eliminate IUU fishing. The Commission showed similar concerns elsewhere, for instance in its assessment of Tuvalu, where it noted Tuvalu's failure to base its "conservation and management measures in relation to the waters under national jurisdiction (…) on scientific advice".[752]

[750] Annex 1, Vietnam yellow card, p. 6.
[751] Ibid.
[752] Annex 1, Tuvalu yellow card*,* p. 26.

It is true that IUU fishing *need* not be synonymous with unsustainable fishing. A (legal) total allowable catch may simply be set too high to be sustainable; potential harmful gear or trawling techniques used by the regulated vessel may not have been outlawed, yet are harmful nonetheless; and the wider environmental impact of operating a big vessel (e.g. greenhouse gas emissions, polluting refrigerants, and waste discards) falls outside the 'IUU-assessment'. However, the examples of Vietnam and Tuvalu show that 'not ensuring unsustainable fishing' has now also become part and parcel of a state's international obligations to prevent, deter, and eliminate IUU fishing – at least as far as the Commission is concerned.

4.6. Conclusion

This chapter has set out the main market mechanisms under the EU IUU and Non-Sustainable Fishing Regulations. It described the mechanisms under the IUU Regulation (the CDS, the IUU vessel blacklist, and the third country blacklisting mechanism and its carding process) as well as country blacklisting under the Non-Sustainable Fishing Regulation. The latter two mechanisms make EU market access conditional upon fulfilling a host of international norms and obligations related to ensuring legal and sustainable fishing, which were described in chapter 3. This chapter demonstrated that the Commission interprets these international obligations very broadly. Evidently, through these mechanisms, the EU has the potential to promote compliance with international fisheries norms and obligations. It also follows from the examples given that the EU both 'takes' international norms (where it more or less sticks to an accepted interpretation of an international norm) and tries to 'shape' their interpretation. The EU could therefore even act as a catalyst for the further development of these norms, though it remains to be examined in the next chapter whether and under what conditions market conditionality can be truly successful at this.

However, it was also shown that the supposed cooperative process through which the Commission tries to influence third country behaviour lacks transparency. There is no list available of the countries that have been scrutinised by the Commission (pre-yellow card missions). None of the documentation is published, except for the yellow card, red card, and blacklisting decisions, which appear in the Official Journal of the EU. This lack of transparency is not only apparent in the absence of documentation; the Commission reasoning itself is not based on clear criteria, and the Commission enjoys a great deal of discretion. This general lack of transparency and the absence of clear criteria on which

decisions to blacklist are based (and thereby the criteria for imposing market restrictions) is cause for concern. I return to this in the chapters that follow.

5. Supporting international normative efforts, fairly: interactional law and GAL

5.1. Introduction

Chapter 2 identified three overlapping angles from which to consider the appropriateness of market conditionality in fisheries: their compliance with international law; their potential to promote compliance and norm development ('support normative efforts'); and their fairness from the point of view of those affected. This chapter continues this discussion so as to identify under what conditions market conditionality can do the latter two: support international normative efforts in fisheries, and do so fairly.

Section 5.2 picks up where chapter 2 left off, and looks at compliance theories and how market states can contribute to this; namely, by constructing interactions that can contribute to a practice of legality. Section 5.3 examines more closely the substantive aspects of a practice of legality, and in particular, what it means for market states to practice congruence. Section 5.4 then examines the procedural elements of practicing legality, and how (market state) interactions should be constructed. It will *inter alia* be suggested that market measures that are perceived as fair will be more successful at promoting compliance and norm development. Section 5.5 turns to the concept of fairness in some detail, and concludes that there is predominantly a need for market measures to follow fair process. This is not only the case because interactions that are perceived as fair have greater normative potential. Procedural fairness is also important in and of itself. This is best understood when examining market state action in the context of the rise in global administration, to which I turn in section 5.6. This rise has led scholars to reflect on how arbitrary decision making can be reduced, and thereby fair decision making encouraged. Section 5.7 suggests that in fisheries, the FAO, RFMOs, and market states all exercise administrative-like functions, and that we can analyse this as the global administration of fisheries. Scholars have turned to administrative law-type standards and mechanisms to enhance the procedural fairness of instances of global administration, and section 5.8 explores this further. Section 5.9 concludes on the role of market conditionality by bringing the different elements of this chapter together, and proposes a list of appropriateness standards going forward.

5.2. Constructing interactions

In order to understand the role of market conditionality as a mechanism to promote compliance and norm development, this section first provides a more comprehensive introduction to compliance theory than that given in chapter 2. It aims to answer the question: what is it that makes norms 'stick' (why comply)?

Different theories about compliance have been developed over the years.[753] Harold Koh summarises these theories following three distinct explanatory pathways. First, he identifies a rationalistic account by scholars such as Robert Keohane, Duncan Snidal, Oran Young, Kenneth Abbott, and John Setear, who argue that states obey international law when it serves their short or long-term self-interest to do so.[754] Second, he identifies a Kantian, liberal pathway, which includes both Thomas Franck's theory that only legitimate rules generate "compliance pull", and Anne-Marie Slaughter's view that compliance depends on whether or not there is a representative government; where civil and political rights are being guaranteed; and whether or not there exists a judicial system dedicated to the rule of law.[755] And third, Koh identifies a constructivist pathway, which considers that the norms, values, and social structure of international society help form the identity of actors who operate within it. He argues that rules are complied with because "a repeated habit of obedience remakes [actors'] interests so that they come to value rule compliance".[756]

Koh considers these different theories to be complementary. Whilst all "provide useful insights, none, jointly or severally, provides a sufficiently thick explanation of compliance with international obligations".[757] He therefore formulates his own compliance theory based on transnational legal process, which takes into account the importance of interaction between actors within the transnational legal process, the interpretation of international norms, and the domestic internalization of those norms.[758] Following Chayes and Chayes and Thomas Franck, Koh conceives international law more as process than as a system of rules, and he explains how repeated interactions can trigger the interpretation and internalization of

[753] Harold Hongju Koh (supra note 157), p. 2632. Koh gives a thorough historical overview of the topic citing major works by Robert Keohane, Robert Axelrod, Oran Young, Roger Fisher, Chayes and Chayes, Kenneth Abbott, Michael Byers, Anne-Marie Slaughter, and many others.
[754] Ibid. p. 2632.
[755] Ibid. p. 2633.
[756] Ibid.
[757] Ibid. p. 2649-2651.
[758] Ibid. p. 2634.

norms, so they become part of a state's "internal value set".[759] Transnational legal actors involved in this process can be both governmental and non-governmental, and through their interactions they "create patterns of behavior that ripen into institutions, regimes, and transnational networks. Their interactions generate both general norms of external conduct (such as treaties) and specific interpretation of those norms in particular circumstances (...) which they in turn internalise into their domestic legal and political structures through executive action, legislation, and judicial decisions."[760] Interactional processes are thus relevant to "bring[ing] international law home",[761] and give an answer to the question: why comply?

Seen against this backdrop, market conditionality is what Koh calls the "transmission belt" through which international norms on fisheries are interpreted and internalised by others.[762] They can become part of this transnational legal process. Chapter 4 demonstrated that through meetings, reports, recommendations and so on, EU market conditionality triggers discussions on the interpretation of international fisheries norms. This could then lead to the internalization of these international norms in the domestic spheres of targeted countries, and thereby promote compliance.[763]

But the question still remains exactly which conditions allow market conditionality to do so. Koh does not provide an answer to this, and stops short of providing a clear description of what transnational legal process looks like. Rather, he points to areas that require further study: how repeated interaction can occur; what fora are available or how fora can be adapted for norm-enunciation and elaboration; and what strategies can be followed to internalise norms (executive action, judicial interpretation, legislative action, domestic lobbying, etc.).[764]

The image of a 'transmission belt' can also be explained by reference to interactional law's concept of a practice of legality. As seen in chapter 2, section 2.5.1.2, the interactional law account teaches us that law is made and maintained not through hierarchy between law-

[759] Ibid. p. 2642, 2646.
[760] Ibid. p. 2654.
[761] Jutta Brunnée and Stephen Toope (supra note 159), p. 118; see also Harold H. Koh 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35 Houston International Law Journal 623.
[762] Harold Hongju Koh (supra note 157), p. 2651.
[763] As also reflected in the work by Sarah Cleveland, who builds on Koh's work to to argue that "economic sanctions have an importance beyond their classical role in seeking to punish and alter a foreign state's behavior – that of assisting in the international definition, promulgation, recognition, and domestic internationalization of (...) norms" (Sarah H Cleveland (supra note 98), p. 6),
[764] Harold Hongju Koh (supra note 157), p. 2656-2659.

givers and subjects, but through collaborative processes between actors to build shared understandings, which creates congruence between legal norms and practice. Brunnée and Toope explain that "[w]hether or not a genuinely shared legal understanding emerges, and whether or not it can be widened by resolving ambiguities in and disagreements about the principle, will ultimately depend on whether a community of practice grows around the principle and whether that community practices legality."[765] Chapter 4 showed that the country blacklisting mechanisms under the EU IUU and Non-Sustainable Fishing Regulations are designed, on the face of it, as interactive processes. I posit that market conditionality mechanisms have the potential to sustain or deepen shared understandings about the international fisheries norms they enforce; refine and shape these norms; and (thereby) help generate compliance pull. The question that arises is specifically how market states can do this; how they can contribute to a 'successful' practice of legality in fisheries. This is important in terms of both process (how should market states act), and substance (what norms can market access be made conditional upon). In light of the Commission's far-reaching interpretations of international law and its frequent reliance on formally non-binding norms, the latter is of some importance. In so doing, does the Commission help further develop international fisheries norms? I look at each aspect (substance and process) in turn.

5.3. The substance of practicing legality

I start with the question of substance. Brunnée and Toope do not mention the specific construct of market conditionality in their work, and do not directly answer the question what happens when market states try to impose far-reaching interpretations of international norms upon countries seeking market access. But the answer is provided indirectly. A central tenet of a practice of legality in international law is congruence amongst the actions of a majority of international actors; that is, there must be a relation between explicit rules and how states and other international actors actually behave.[766] Interactional law requires there to be a strong correlation between legal norms and the shared understandings that underpin them. Legal norms should not be pushed too far beyond internationally shared understandings. Rather, they must match them. The importance of this is evident in the context of agreeing on

[765] Jutta Brunnée and Stephen Toope (supra note 159), p. 72.
[766] Ibid. p. 35.

what to put in a treaty (not positing norms that clash with domestic understandings).[767] Brunnée and Toope explain that "when diverse domestic practices and interpretations remain within the margin of appreciation left by international norms, the norm is maintained or even strengthened. When they consistently stretch beyond the margin, or even reject the international norm altogether, the latter will eventually be weakened, altered or even destroyed."[768]

This explanation nevertheless leaves some questions unanswered. One being, again, the question of threshold. I come back to the point made in chapter 2, section 2.5.1.2 that it is unclear at what point Brunnée and Toope consider a norm to have lost its status as law because of an absence of a practice of legality. Whose practice matters; should some practice be regarded as carrying more weight; and what is the tipping point for a posited legal norm to no longer be 'law'? The same critique can be applied here. When are interpretations pushed beyond the margin of appreciation of what is 'reasonable', and when do rather help refine and shape norms instead? There is no clear answer to this. If the aim of market conditionality is to foster compliance with international fisheries norms, and even to help develop them further, it follows from the explanation above that the market state should interpret norms in a way that remains within their margin of appreciation, and that does not clash with the shared understandings that underpin these norms. A degree of consistency is required between a market state's interpretation of an international norm and shared understandings of what this norm should be.

However, this does not mean that market states should stick only to the 'lowest common denominator', and interpret international norms unduly narrowly. This leads to the second problem with the requirement that practice should match existing norms. For norms to *develop*, there is also a need to do *more* than apply what is already there, or else the law would never change.[769] Ostensibly, for norms to change, it is necessary to push the

[767] Ibid. p. 119.

[768] Ibid. p. 121. I reiterate that I do not necessarily follow Brunnée and Toope's more ambitious claim that a lack of congruence can result in international legal norms no longer being law. I do however consider a lack of congruence to be disruptive, and see it as 'undermining' rather than 'supporting' international normative efforts in fisheries.

[769] Sarah Cleveland offers a more restrictive view. For her, unilateral economic sanctions can contribute to the promulgation and internalisation of international norms related to human rights, but only by promoting recognised human rights standards (Koh's transnational legal process). According to Cleveland, this positively contributes to the development of a global human rights system (rather than compete with or undermine it), though this suggests that unilateral economic sanctions cannot play a role in norm *development* (since they cannot go beyond promoting what is already there) (Sarah H Cleveland (supra note 98), p. 7).

boundaries of how they are being interpreted – at least by a bit. What interactional law teaches us is that these boundaries can be pushed only as far as underlying shared understandings allow them to be pushed. A positivist point of view would likely reach the same conclusion. Even norms that are posited as treaty law can be further developed and change over time. Subsequent practice is accepted as evidence of a changing interpretation, though the VCLT also sets limits to an evolutionary interpretation of treaty norms (as explained in chapter 2, section 2.5.2.1).[770] The boundaries of interactional law are more fluid (and therefore also less clear) than those set out in the VCLT for treaty interpretation. But what is clear from Brunnée and Toope's account is that legal norms are continuously constructed and changed, but where they are no longer grounded in shared understandings, they will not generate the required sense of legal obligation that gives them a compliance pull. What is needed to further develop norms, then, is to help thicken shared understandings where these are thin, and to bring more clarity over what the law means where this is lacking (recalling that clarity is one of Fuller's criteria). So as to measure whether practice is compliant with legal norms that are posited in a treaty, the rules of the VCLT can be used, and in particular the requirement of *pacta sunt servanda* (Art. 26 VCLT) and the rule on material breach (Art. 60 VCLT).[771]

The example of the EU is telling in this regard. Though it is difficult to assess what shared understandings are in relation to norms, what *can* be assessed is what the Commission does is relation to these norms. Chapter 4, section 4.4 considered when the Commission acts in a manner that is consistent with a reasonable interpretation of international fisheries norms, and when it does not. It demonstrated that the Commission at times pushes boundaries by promoting norms that are not yet recognised legal norms according to the sources doctrine (the need for full traceability; to have in place an NPOA-IUU; to have in place a definition of IUU fishing; to have in place maximum sanctions; to refer to soft law in national legislation; and so on). Building on the analysis set out above, I conclude at this point that doing so is not *necessarily* problematic, provided that the norms that are promoted build on, rather than contradict, existing law. States' international fisheries obligations under the LOSC and related instruments are sufficiently open-ended that the Commission's interpretations on this

[770] In practice, it is often unclear to what extent international courts and tribunals follow the rules of the VCLT when interpreting treaty norms (e.g. Nigel Bankes (supra note 233).
[771] Jutta Brunnée and Stephen Toope (supra note 159), p. 50, acknowledging that the VCLT rules "to a very large extent instantiate Fuller's criteria of legality", and pointing to Arts. 26 and 60 as examples on how the VCLT promotes congruence between treaty norms and subsequent practice.

do not constitute a material breach. The Commission can be seen as merely refining the general obligations contained therein. Moreover, soft law exists to support much of the Commission's demands (IPOA-IUU, FAO Guidelines on CDS and Flag Sate Performance, and so on). It is submitted that market states should take stock of these relevant fisheries norms and actively build on them, rather than use these norms in a manner that sits at odds with them.

Chapter 4 concluded the opposite regarding the Commission's ambitious claim that a customary law duty exists to (apparently, at all times) comply with an RFMO conservation and management measures, regardless of RFMO membership, and regardless of a flag state having ratified the Fish Stocks Agreement or not. By reference to chapter 3, section 3.10.2, it was explained that this offends against the principle of *pacta tertiis*.[772] I recall that the Commission does not appear to consider the mutual good faith obligations that exist for *both* non-members of an RFMO whose vessels fish for a stock regulated by that RFMO, and for established RFMO members, and whether these have been discharged *from both sides*.[773] As for parties to the Fish Stocks Agreement, the failure of all parties involved to cooperate could be seen as constituting a material breach on the part of the existing RFMO members. Chapter 3, section 3.10.2 suggested that in this case, a flag state would no longer be bound by the prohibition to abstain from fishing (as it otherwise would be pursuant to Art. 8(3) Fish Stocks Agreement). Whilst such activities are caught by the definition of IUU fishing, they are not reflective of any unjustified breach of international law on behalf of the state whose vessels are seeking fisheries access. In such cases, the flag state would have complied with international law. The Commission's decisions do not appear to build on and further refine the duty to cooperate, but rather fail to take the nuanced approach required by law. In particular, it failed to take into account the procedural obligations that flow from this duty, and whether all parties had discharged them (in particular, whether all parties involved had cooperated in good faith, and engaged in meaningful consultations).[774]

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[772] Recalling Andrew Serdy (supra note 353), p. 349; Erik Franckx (supra note 368), p. 74 (that the Fish Stocks Agreement does not yet embody customary law), and more specifically on apply RFMO CMMs to non-parties, Hyun Jung Kim (supra note 353); Andrew Serdy (supra note 353); Erik J Molenaar (supra note 18).

[773] The duty to cooperate requires consultations in good faith, which must be "meaningful in the sense that *substantial effort should be made by all states concerned*" (para. 210), furthermore emphasising that "when it comes to conservation and management of shared resources, the [LOSC] imposes the obligation to cooperate on each and every State Party concerned" (*Advisory Opinion to the SRFC* (supra note 83), para. 215).

[774] *Advisory Opinion to the SRFC* (supra note 83), para. 210.

A different conclusion could be reached if the Commission were to actively engage with these nuances, elaborate on what it believes to be required of both existing RFMO members and any non-members, and examine on whether they all discharged their duties, before concluding on any one state's failure of its duties under international law. As things stand now, however, it appears that the Commission's interpretation of the duty to cooperate is not congruent.

The same reasoning applies to the Commission's interpretation of the duty to cooperate *with the EU* over stocks of common interest under the EU Non-Sustainable Fishing Regulation. Under international law, the duty to cooperate is one of conduct and not one of result. But chapter 4, section 4.5.2 observed that the Commission will consider a third country to have failed this duty where no mutually satisfactory agreement is reached with the EU on how to allocate quota. This would appear to go beyond a reasonable interpretation of the duty to cooperate, so as to serve the EU's own political interests. This does not foster a sense of legal obligation (compliance pull) in the targeted state or deepen shared understandings over the duty to cooperate. The heated dispute that arose over the EU's actions when it denied market access to fish products coming from the Faroe Islands reflects this.[775]

As a final remark on congruence, the international community evidently shares the understanding that market measures (and therefore, the interactions between market states and other states) should *themselves* be legal. Previous chapters have already mentioned the explicit call in the IPOA-IUU for market measures to comply with international law, and in particular, the rules of the WTO. The need for legality also informs to how market states should interact with the targeted state, a question to which I turn next. Extreme scenarios aside (where market states interpret fisheries norms in a wholly unrelated way to how they should be understood), the way in which these interactions take place may ultimately be more important to fostering compliance, than the substantive norms that market states encourage compliance with. After all, "pressure exerted by powerful actors to enforce compliance is unlikely to be effective in the long-run unless it is embedded in a practice of legality".[776]

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[775] *EU – Herring,* Request for consultations (supra note 741).
[776] Jutta Brunnée and Stepehen Toope (supra note 159), p. 93.

5.4. The process of practicing legality

Having looked at how far the market state could deviate from existing norms and still contribute to a practice of legality, I now examine how the market state should act. Brunnée and Toope describe a practice of legality as matching the *creation* of a norm in a way that fulfils Fuller's criteria with the *application* of that norm in a way that also satisfies these criteria.[777] This would suggest that norms should be applied equally to all; in an open and clear way, that enables those subject to it to know what is required; not be applied retroactively; not be applied in a contradictory way; not demand the impossible; and be applied consistently. But this still does not fully explain the interactional element that the authors consider to be so important. This is located in the need for justificatory processes. Brunnée and Toope are not alone in pointing at the relevance of justificatory processes, but draw on Chayes and Chayes' work on managerialism.[778] Although the Chayes' are more rationalist than the constructivism-oriented Brunnée and Toope, they all share an interest in justificatory processes (argument and persuasion) to "deepen the enmeshment" of states in international regimes.[779] I recall that international relationships are meaningful when they constitute *interactions*, rather than being a "*unidirectional* transmission belt".[780] Above all, when the interactions are of a particular kind. The difference with Chayes and Chayes is that for Brunnée and Toope, these processes mean more: they effectively construct a sense of legal obligation. For them, "persuasion, arguing or contestation, acculturation, and coercion are all modes of interaction that are shaped by, and in turn shape, norms (...) [W]hen legality is interactional, each of these modes of interaction entails collective engagement with, and around, legal norms, and is distinctive because it forms part of a broader practice of legality."[781] The *kind* of interactions that would support international normative efforts are thus those of argument and persuasion, fostering collective engagement with underlying norms. To contribute to international normative efforts, market conditionality should promote or at least allow for these kind of interactions to take place, rather than a one-way transmission belt whereby the market states 'exports' its views.

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[777] Ibid. p. 6-7.
[778] Abram Chayes and Antonia Handler Chayes *Thee New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995).
[779] Jutta Brunnée and Stephen Toope (supra note 159), p. 104-105.
[780] Ibid. (emphasis added), p. 122.
[781] Ibid. p. 111.

Can the process of adopting and applying market measures vis-à-vis other countries create a forum in which such processes of argument and persuasion and collective engagement with norms can take place? In theory, yes. Brunnée and Toope envisage many different kinds of fora and different modes of interaction. For instance, opportunities for legal interaction can (but do not have to) be institutionalised by a regime, such as through the deliberations that occur under the auspices of international institutions; meetings of plenary bodies to treaties to assess commitments or review performance, often building on the activities of technical and scientific sub-committees; UN meetings; and compliance procedures and review processes set up by a regime.[782] Actors engaged in these interactions may include states, but also other actors. What is important is their continuous collective engagement with the underlying legal norms, e.g. through argument, persuasion, and contestation. This allows them to uphold norms and draw delinquent actors back towards compliance.[783]

In the area of the law of the sea, international tribunals play some role in stimulating a practice of legality. As explained in chapter 3, the LOSC creates a compulsory dispute settlement mechanism which rules also on disputes under the Fish Stocks Agreement. Law of the sea cases are, however, few and far between. Since its creation, the ITLOS has only ruled on 25 cases, most of which were cases related to the prompt release of a detained vessel.[784] The ICJ has also only ruled on a number of law of the sea related cases; mostly, related to maritime delimitation. Fisheries related disputes are less likely to make it to court. I recall that the coastal state's exercise of its sovereign rights in the EEZ is exempt from compulsory dispute settlement. Only in cases of manifest failure may another party request conciliation to settle a dispute. This significantly limits the use of compulsory dispute settlement in cases where a coastal state has failed its duty to conserve and manage its living resources, including where it has allocated too large a total allowable catch or not sufficiently monitored foreign fishing vessels. Yet these responsibilities are an important part of a state's fisheries related obligations. Chapter 4 observed that failures to do so are examined under EU IUU country blacklisting, even though they do not strictly fall under the definition of IUU fishing. Political sensitivities and the slow process of international adjudication simply make international dispute settlement less than an ideal venue for enforcing fisheries related norms.

[782] Ibid. p. 101.
[783] Ibid.
[784] A list is available at: https://www.itlos.org/cases/list-of-cases/.

Market conditionality mechanisms could fill the gap left by infrequent use of compulsory dispute settlement, and the general lack of collective enforcement in international relations.[785] They constitute proof of a growing interest in operationalising fisheries norms. But market conditionality is not strongly institutionalised at the international level, and in the case of the EU, unilateral. The risks that this entails have already been highlighted in chapter 2, section 2.3.3. It is therefore all the more important to ensure that those interactions take place in a manner and within a framework of rules that is rooted in shared understandings and adheres to principles of legality. I recall that this thesis operates on the basis that the international community demands that market measures should comply with international law. There is therefore a strong case for arguing that their potential to promote compliance and norm development is also related to their own lawfulness.[786] This is reflected in the IPOA-IUU, which furthermore states that market measures are to be interpreted and applied in accordance with the rules of the WTO, and "implemented in a fair, transparent and non-discriminatory manner" (para. 65).[787] This would also support the case that, so as to be effective at fostering compliance and promoting norm development, decisions to restrict market access must be fair, transparent, and non-discriminatory (in so far that this is not already required by law). In fact, given the need to respect Fuller's principles, it is hard to argue to the contrary. The unfair application of norms would surely lead to a sense of hypocrisy, and thereby undermine the sense of legal obligation that market conditionality aims to achieve. I return to this below.

To summarise the points made in this section, the following conditions would allow market conditionality in fisheries to contribute to a practice of legality and thereby strengthen international normative efforts towards sustainable fishing:

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[785] Jutta Brunnée and Stephen Toope (supra note 159), p. 112.

[786] This is not necessarily and not always the case. In analysing the law making potential for what she calls "unfriendly unilateralism", Monica Hakimi claims that even claims that *unlawful* exercises of state power can play this role. She considers that the exclusive focus on whether or not unilateralism is lawful "misses the point" (Monica Hakimi (supra note 108), p. 109). Not everyone agrees with Hakimi's position, though. Sarah Cleveland for instance argues that economic sanctions must necessarily be "employed in a manner consistent with the broader principles of the international system" so as to legitimately promote norm internalization, and thereby play a role in law making (Sarah H Cleveland (supra note 98), p. 48). But in context at hand, there is a clear understanding that market conditionality determinations *should* comply with international law. Not doing so would likely undermine their potential to contribute to a robust practice of legality of international fisheries related norms.

[787] The same wording can also be found with regard to port state measures (para. 52 IPOA-IUU). Moreover, the Port State Measures Agreement contains the same wording. The Agreement, and thereby the vessel-oriented market measures that it calls for, "shall be applied in a fair, transparent and non-discriminatory manner, consistent with international law" (Art. 3(4)).

- Market conditionality in fisheries should embody congruence. In making market access conditional upon compliance with international fisheries norms and obligations, market states should take stock of these norms and build on them. They should remain within the margin of appreciation left by these norms, that is, not go beyond what may be considered a reasonable interpretation;
- Market conditionality in fisheries should be interactional, and trigger collective engagement with the underlying fisheries norms and obligations that they promote compliance with. This means market conditionality mechanisms should constitute a two-way street rather than a 'unidirectional transmission belt'; and
- Market conditionality in fisheries should comply with international law. It also suggested that market measures should be implemented in a fair, transparent, and non-discriminatory manner.

For market conditionality in fisheries to display the abovementioned qualities, determinations to blacklist/adopt market measures will need to be transparent, and involve relevant actors throughout the decision-making process. These are also necessarily elements to ensure fairness, which is the third angle from which I examine the appropriateness of market conditionality. I turn to fairness below, where I will also examine the mechanism of participation and the requirement of transparency in more detail. Here, the interactional account and the literature on GAL overlap, and can complement each other.

5.5. Fairness in substance and procedure

Having painted a picture in which compliance with and the development of international legal norms depends on and deepens with interaction, and in which market conditionality can help stimulate such interaction, I next consider how they can do so fairly. First, a sense of fairness could improve compliance, in so far "those affected by policymaking processes are much more likely to accept outcomes if they feel that the procedures were fair and due process was provided".[788] But it is also important to think about fairness because of the

[788] Daniel C Esty 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 Yale Law Journal 1490, p. 1490. That the fair application of a norm contributes to compliance sits at the heart of many compliance theories, as previously mentioned. Similarly, Yoshifumi Tanaka 'Reflections on Reporting Systems in Treaties Concerning the Protection of the Marine Environment' (2009) 40 Ocean Development & International Law 146 refers to Franck's work on fairness that "the legitimacy of international rules is an important element with a view to promoting compliance" (footnote 18). Its practical application has been observed by the Commission in relation to compliance by individual fishermen. The European Commission has observed that "[t]he introduction of effective and coherent arrangements for monitoring fishing activities is a

important impacts that market conditionality has on those affected (third countries, foreign operators and fishermen, and so on). The consequences of making market access conditional upon regulatory changes abroad (and the consequences of withholding market access if those changes are not made) can be significant, in particular where those affected are developing countries.[789] There is therefore a need to think about how the interests of those affected can be given sufficient regard – a question to which I return below. The need fairness is also reflected in para. 65 IPOA-IUU, which calls for the fair implementation of market measures in fisheries.

However, it is not clear what exactly the IPOA-IUU's call for the fair implementation of market measures in fisheries should entail. Fairness is not explicitly referred to in the LOSC or Fish Stocks Agreement. 'Fairness', like many other concepts such as 'justice' and 'legitimacy', is a bit of a buzzword, and "just like beauty [exists] in the eye of the beholder".[790] The specific mention of WTO law, transparency, and non-discrimination in the same paragraph of the IPOA-IUU suggests this to be relevant context to examine the notion of fairness. Transparency, non-discrimination, and fairness are overlapping principles. Transparency is an 'enabling principle', in so far that it enables one to verify whether a measure is indeed non-discriminatory and fair (or corresponds to any other standard), and I look at this in more detail in chapter 8, section 8.4.1. Non-discrimination can be both a substantive and a procedural requirement, and is conceptually close to that of fairness. It is a cornerstone of WTO law *and* the law of the sea, and is for that purpose examined in chapters 6 and 7. Fairness overlaps with, yet goes beyond, non-discrimination. This is best understood by way of the following illustration, borrowed from WTO jurisprudence. In *US – Tuna II (Mexico) (Art. 21.5)*, the WTO Panel had to determine whether the US amended tuna measure affords "less favourable treatment" to Mexican tuna than to tuna from the US and other WTO members, which would be a breach of Art. 2.1 Technical Barriers to Trade Agreement (TBT Agreement).[791] This involved examining the even handedness of the trade

key element in the success of a sustainable policy for the conservation and management of fish stocks. The more restricting these CMMs are, the greater the temptation to seek to evade them. Fishermen and the various stakeholders involved will acknowledge their legitimacy only if they feel that they are being applied fairly" (European Commission, COM(2002) 180 (supra note 580), p. 3)).

[789] The economic and normative effects of blacklisting were described at supra note 54; the reputational effects of a yellow card were described at supra note 95.

[790] Y. Dinstein in the roundtable discussions reproduced in Rudiger Wolfrum and Volker Roben (eds) *Legitimacy in International Law* (Springer, 2008), p. 384.

[791] Agreement on Technical Barriers to Trade of 12 April 1979 (UN Treaty Series, 1186, p. 276) (hereafter: TBT Agreement).

measure, so as to evaluate whether the detrimental impact it had caused stemmed exclusively from a legitimate regulatory distinction. The TBT Agreement is examined more fully in chapter 7, section 7.4. What matters here is the Panel's following observation:

> "In our view, "even handedness" directs our attention to what can perhaps best be called the "fairness" of a technical regulation. The plain meaning of "even handed" is "impartial, fair". "Fair", in turn, means "just, unbiased, equitable". Terms like "fair" and "just" are notoriously difficult to define a-contextually; accordingly, the specific criteria or indicia through which the fairness of a technical regulation should be assessed are not comprehensively enumerable in the abstract."[792]

The Appellate Body later remarked upon the "quite sweeping" nature of these statements.[793] It however upheld the finding that while "even handedness" (or "fairness", as per the Panel) may overlap with the concept of "arbitrary discrimination", both terms are conceptually distinct; showing "arbitrary discrimination" is one way of demonstrating that a measure is not even handed, but "even handedness" may call for an examination of other elements as well.[794] This confirms the understanding that the IPOA-IUU's call for fairness and non-discrimination in the implementation of market measures suggests two different standards.

Fairness thus requires as a minimum, but may mean *more* than, non-discrimination. It is highly contextual.[795] Lacking a working definition for the purpose of its application to market conditionality beyond what has been said in the WTO, I refer to Thomas Franck for inspiration, whose framework on fairness is widely referenced.[796] For Franck, fairness is composed of two elements: procedural legitimacy and justice (or equity). Procedural legitimacy refers to the attribute of a rule which conduces to the belief that it is fair, because it is made and applied in accordance with the 'right' process.[797] Justice, on the other hand, is explained as a moral pursuit. In practice, in environmental regimes, this often plays out

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[792] *US – Tuna II (Mexico) (Art. 21.5)*, 14 April 2015, Panel report (WT/DS381/RW), para. 7. 96.
[793] *US – Tuna II (Mexico) (Art. 21.5)*, 20 November 2015, Appellate Body report (WT/DS381/Appellate Body/RW) para. 7.100.
[794] Ibid. paras. 7.97 and 7.102; *US – Tuna II (Mexico) (Art. 21.5)*, Panel report (supra note 792), para. 7.96.
[795] Ibid.; Thomas Franck (supra note 188), p. 14.
[796] E.g. see the various presentations and record of round table discussions on legitimacy (and as part of this discussion, concepts of fairness and justice) in Rudiger Wolfrum and Volker Roben (eds) (supra note 790), in which many authors start their discussion by looking at Franck's work, because, as Hanspeter Neuhold notes, of Franck's "particularly important conceptual contributions to the debate on legitimacy" (p. 336).
[797] Thomas Franck (supra note 188), p. 7. In line with positivist thinking, Thomas Franck gives the example that for popular belief demands that rules should be firmly rooted in a framework of formal requirements about how rules are made, interpreted, and applied.

through the notion of distributive justice.[798] I use this distinction as a conceptual starting point to discuss the fairness of market conditionality in fisheries.

I start by examining whether and why we might want market conditionality in fisheries to be just, or equitable. The law of the sea regime gives expression to ideas of equity and distributive justice in various ways, notably through the regime for the Area which is to be exploited for the benefit of mankind, but also for the purpose of allocating resources and delimiting maritime boundaries.[799] As set out in its Preamble, the LOSC recognises the desirability of establishing a legal order for the seas and oceans which will promote the *equitable* and efficient utilization of its resources, and notes that "the achievement of these goals will contribute to the realisation of a *just and equitable international economic order* which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked" (emphasis added). The desire for an equitable distribution of fisheries resources is furthermore reflected in the provisions that land-locked and geographically disadvantaged states have a special right to participate, on an equitable basis, in the exploitation of an appropriate part of a coastal state's surplus stock (Arts. 69 and 70 LOSC). It has also been argued that the coastal state used to have a special interest in the conservation and management of transboundary stocks on the high seas, though I note that this question has likely been resolved since the establishment of the 200 nm EEZ and the conclusion of the Fish Stocks Agreement.

The LOSC is an evolving regime, and it is possible that the responsibilities that states have under the LOSC – and in particular their environmental obligations to ensure sustainable fishing – should be interpreted in light of different national circumstances. States' international obligations to ensure sustainable fishing (to protect and preserve the marine environment, to ensure that vessels flying their flag do not undermine their conservation and management obligations, and so on) are generally obligations of due diligence, which implies

[798] Ibid. p. 8, p. 380 and see the discussion on the following pages on fairness in environmental normative systems.

[799] Ibid. Equity appears as a basis for resolving potential conflict between the coastal state and other states within the EEZ in the case that the LOSC does not attribute rights or jurisdiction to either state (Art. 59); to delimit maritime zones between states (Art. 74, 83); and in the exploitation of resources in the Area, which is to be done for the benefit of mankind (Art. 80).

they must make “best possible efforts”.[800] What such efforts are for a developing country is not the same as for a developed country, and this opens the door for a differentiated standard of responsibility, as discussed further in chapter 6, section 6.6. The IPOA-IUU also explicitly acknowledges the need to help developing countries to meet their commitments and obligations under international law, including their duties as flag states and port states (para. 85).

Thomas Franck concludes that “equity is developing into an important, redeeming aspect of the international legal system”, and that “as the extent and impact of international law increases, equity will play a growing role in ensuring the fairness of the system”.[801] Justice and equity (substantive fairness) play an important role also in international fisheries law, and possible also trade law.[802] Notions of distributive justice clearly form part of the law of the sea regime, as Franck also shows is the case also for other environmental regimes (such as for the protection of the ozone layer, management of climate change, outer space, Antarctica, biodiversity, and the preservation of species and forests).[803]

In their exercise of enforcing compliance with the obligations of this regime, and in so far that market conditionality aims to contribute and not undermine this regime, there is an argument to be made that market conditionality determinations (EU blacklisting decisions and the adoption of market measures) should give effect to the law of the sea regime’s concerns for equity and distributive justice. They should take into account the fact that the standard of diligence expected of developing countries may be less high than for others. I revisit this in some more detail in chapter 6, section 6.6 which suggests that this is how the duty not to discriminate under the law of the sea should be understood. Beyond this, there is however no clear support for a substantive standard of fairness applicable to market conditionality in fisheries.

The need to behave fairly is also reflected in the general law principle of good faith, codified in Art. 300 LOSC. Whilst motivated by a sense of moral justice, good faith translates in practice into predominantly procedural standards. The reason for this is that, as Eyal

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[800] *Advisory Opinion on Sponsoring in the Area* (supra note 264), para. 110; *Advisory Opinion to the SRFC* (supra note 83), para. 129.

[801] Thomas Franck (supra note 188), p. 79.

[802] The WTO regime further gives matters of substantive fairness a place through the Generalized System of Preferences, see Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, 28 November 1979, GATT Doc. L/4903 (contracting parties’ decision).

[803] Thomas Franck (supra note 188), p. 380.

Benvenisti explains, "substantive justice is difficult to ascertain and to agree upon", but "a carefully designed decision-making process that ensures that the decision-makers are impartial and skilful is likely to reach decisions that are substantively just."[804] This can be substantiated by reference to chapter 3, which showed that many of the provisions in the LOSC actually impose obligations of conduct, of fair behaviour, rather than a particular fair result.

Following this, it is perhaps more convincing to interpret the IPOA-IUU's reference to fairness as one pertaining to *procedural* fairness. Procedural fairness (what Franck calls legitimacy) is not only a way to facilitate just, substantive outcomes. As mentioned, it also contributes to compliance. Eyal Benvenisti posits that procedural fairness enhances effectiveness, increases a sense of legitimacy, and thereby ensures deference to rules or decisions and compliance.[805] Similarly, Sabino Casesse believes that "a fair procedure plays an important role in building social consensus" and may thereby lead one to perceive particular behaviour (or a rule, or an institution) as legitimate.[806] There are many examples to be found in the LOSC and WTO law to this effect, which are examined in chapter 8.

To summarise, there is some normative support to believe that market conditionality should be fair, both because it is deemed important in and of itself and because it is beneficial to promote compliance and norm development, in the following ways. First of all, when examining whether a country has complied with its international fisheries obligations, the flexible standard of due diligence should be interpreted as entailing differentiated responsibilities, although how responsibilities are to be differentiated under the law of the sea will require further study. Second of all, market measures should be implemented following a fair procedure. This is important to avoid arbitrariness, and improves the chances of a substantively fair outcome.

There are various strands of scholarship that explain *how* arbitrariness can be limited at the global level through a focus on procedure. Of particular relevance is the literature on global governance and GAL, already introduced in chapter 2, section 2.5.1.3. GAL provides a framework and vocabulary to situate market conditionality within the broader framework of

[804] Eyal Benvenisti *The Law of Global Governance* (Brill Nijhoff, 2014), p. 64.
[805] Ibid. p. 64; Tom R Tyler 'Social Justice: Outcome and Procedure - International Journal of Psychology' (2000) 35 117, p. 120.
[806] Sabino Cassese 'A Global Due Process of Law?' (2006) Paper presented at New York University Hauser Colloquium on Globalization and its Discontents.

fisheries governance. GAL aims to enhance the stabilization and legitimation of instances of global administration; identifies how different global administrative bodies respond to the problem of procedural fairness; and proposes mechanisms, principles, practices, and supporting social understandings to this effect.[807] I turn to this next.

5.6. Global governance and global administration

To begin with, the following sections briefly document the rise in global governance structures, and then explain why much of this can be analysed as administrative in nature. This will help explain why market conditionality in fisheries can be seen as a form of global administration.

5.6.1. A rise in global governance

It is in the absence of a clear institutional hierarchy at the global level that the concept of global governance gained traction. It is this absence that distinguishes gover*nance* from govern*ment*.[808] Global governance mirrors at the international level, and in the absence of sovereign authority, what governments do at home.[809] Lawrence Finkelstein argues that global governance should therefore cover a wide range of overlapping categories of functions that are performed at the global level.[810] The adoption of rules is perhaps a "primary objective" of governance, though Finkelstein emphasises that "it is not the only function of governance, precisely because it is not the only thing governments do".[811] A similarly broad approach to governance is taken by other scholars. Eyal Benvenisti describes the act of governance by global bodies as including "the adoption of formal norms (international or domestic), informal standards and private contracts", which "shape the rights, interests and expectations of diverse stakeholders across political boundaries".[812] One clear delimitation is

[807] Benedict Kingsbury, Nico Krisch and Richard B Stewart (supra note 193), p. 17.
[808] Lawrence S Finkelstein 'What Is Global Governance?' (1995) 1 Global Governance 367, p. 367.
[809] Ibid. p. 370. It should of course be noted that the term 'rule' can be interpreted very broadly so as to broaden the concept of regulation, but this would lose some of the nuance that could otherwise be had.
[810] Including *inter alia* information creation and exchange; formulation and promulgation of principles and promotion of consensual knowledge affecting the general international order, regional orders, particular issues on the international agenda, and efforts to influence the domestic rules and behaviour of states; good offices, conciliation, mediation, and compulsory resolution of disputes; formation, tending, and execution; adoption of rules, codes, and regulations; allocation of material and program resources; provision of technical assistance and development programs; relief, humanitarian, emergency, and disaster activities; and maintenance of peace and order.
[811] Lawrence S Finkelstein (supra note 808), p. 369.
[812] Eyal Benvenisti (supra note 804), p. 687.

however given. Governance is an activity; it is a "purposive act".[813] Tacit arrangements, though perhaps influential, should not be equated with the act of governing.[814]

The *globalness* of global governance pertains to the problems that drive its development, the actors that engage in it, and those who are affected by it. In a globalised world, fields such as trade, investment, environmental protection, and so on, are increasingly interdependent and transboundary. This makes it difficult for governments to regulate them effectively. A growing number of issues can simply no longer be addressed or resolved by national governments alone, being beyond their regulatory power. In other words, "global problems require global institutions".[815]

This leads to the next point, namely the globalness of those who govern. Traditionally, the nation state has been the locus of all regulation. The difficulty of regulating problems of scale has brought a change in this, as is clear from the range of responses to globalization from governments. Governments can seek to extend the scope of national regulation beyond their national boundaries. They can do so by adopting extraterritorial measures to directly regulate conduct abroad, or by taking into account conduct or circumstances abroad when regulating conduct that falls within the scope of their jurisdiction (regulating by territorial extension, as explained below). This type of response to globalization preserves the central role of the state as the main regulator. Where this is insufficient to effectively regulate a global problem, regulatory power may be shared with other bodies (i.e. through cooperation), or entirely delegated to a separate institution. The result is a myriad of bodies (co)operating at different levels (private, national, regional, global) that can be said to be engaged in the exercise of global governance. They include both clearly established international governmental institutions and organisations, and less traditional intergovernmental co-ordination (or networks); public/private institutions (joint ventures of government and private actors); and private institutions and NGOs.[816] In particular since the 1990s, an "irresistible rise of rules, institutions and regimes" of this kind has taken place, now regulating almost all policy areas.[817]

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[813] Lawrence S Finkelstein (supra note 808), p. 369.
[814] Ibid.
[815] Paul Craig (supra note 195), p. 466.
[816] Sabino Cassese 'Global Administrative Law: The State of the Art' (2015) 13 International Journal of Constitutional Law 465, p. 67.
[817] Lorenzo Cassini 'The Expansion of the Material Scope of Global Law' in Sabino Cassese (ed) *Research Handbook on Global Administrative Law* (Elgar, 2016), p. 25.

There is also a global aspect to those who feel the effects of global governance. Whereas public international law traditionally governs state-to-state relations, global governance can *also* be directed at private individuals. Examples of global governance institutions that affect individuals include the World Bank's procedure for blacklisting corrupt contractors, the International Olympic Committee's disqualification of athletes guilty of doping, the UN High Commissioner for Refugees' determinations of refugee status, and targeted sanctions by the UN Security Council. I return to this below, describing different instances of global administration.

Global governance thus denotes the exercise of public authority at the global level, in the absence of a global government, concerning problems of scale, by a non-exhaustive range of actors operating at various regulatory levels, and affecting a wide range of parties. This gives us a very broad definition of global governance that takes into account "an expanding universe of actors, issues, and activities".[818] Much of these actions are regulatory. I use the term 'regulatory' in its broadest sense, referring to "the organisation and control of economic (...) and social activities by means of making, implementing, monitoring, and enforcing of rules".[819] The complex regulatory framework of norms, procedures, and disputes that take place at different levels and by different actors remains, as Richard Stewart puts it, as dizzying as a Jackson Pollock painting.[820]

The rising complexity and informality of global governance has triggered much scholarship from different disciplines to map the terrain.[821] It is against this backdrop that GAL scholars theorise that many instances of global regulatory governance are predominantly administrative in nature. I turn to this next.

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[818] Sabino Cassese (supra note 195), p. 368.
[819] Lawrence S Finkelstein (supra note 808), endnote 4.
[820] Richard B Stewart 'The Global Regulatory Challenge to US Administrative Law' (2005) 37 International Law and Politics 695, p. 703; see also Lorenzo Casini 'Beyond Drip-Painting? Ten Years of GAL and the Emergence of a Global Administration' (2015) 13 International Journal of Constitutional Law 473.
[821] Paul Craig (supra note 195), p. 570, giving an overview of some important contributors, including Anne-Marie Slaughter, whose well-known book offers an international relations perspective on the transforming role of networks, Anne-Marie Slaughter *A New World Order* (Princeton University Press, 2004).

5.6.2. The challenges of global governance and how to analyse it

The rise in global governance structures poses challenges to democratic principles and the protection of individual and collective rights.[822] Many scholars picked up on this "challenge", designing "approaches to come to terms with at least some exercises of global governance".[823] There exist widely, though perhaps not universally, shared understandings that power should not be exercised arbitrarily. There are various strands of scholarship that explain *how* arbitrariness can be limited at the global level (how power can be "tamed"). At their heart is a drive towards respect for the rule of law at the global level.[824]

Significant scholarly approaches that aim to provide a theory for the legality of global power include that of global constitutionalism. Global constitutionalists consider a wide range of normative concerns that arise out of global governance, and seek to respond to the fragmentation of international law across regimes (human rights, trade, environment, and so on) by creating hierarchy.[825] This hierarchy is achieved by delineating clear substantive legal constraints that are of constitutional importance – though global constitutionalism is hereby restrained to a limited number of principles that warrant such status. The relation between GAL and constitutionalism (and other theories) remains underexplored.[826] Some conceive of GAL as paving the way for constitutionalising global administration;[827] others consider GAL to be a counter-concept to constitutionalism, or at least, more developed.[828] Despite differences in opinion and in particular in nuance, though, the doctrinal features of GAL are very similar to those found in the work of authors writing about constitutionalism, informal law making, global or multi-level governance and the like.[829] There is a general understanding that the rise in global governance structures has not seen a parallel rise in accountability structures (or other mechanisms that can promote regard to those affected).

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[822] Eyal Benvenisti (supra note 804), p. 687.
[823] Paul Craig (supra note 211), p. 306.
[824] Supra note 211and surrounding text.
[825] Jeffrey L. Dunoff and Joel P. Trachtman 'A Functional Approach to International Constitutionalization' in Jeffrey L. Dunoff and Joel P. Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP, 2009), p. 33-34.
[826] Ibid. p. 35: Jeffrey L. Dunoff 'The Politics of International Constitutions: The Curious Case of the World Trade Organization' in Jeffrey L. Dunoff and Joel P. Trachtman (eds) (Ibid.), p. 204; Christoph Mollers 'Constitutional Foundations of Global Administration' in Sabino Casesse (ed) (supra note 817), p. 107.
[827] Jeffrey L. Dunoff and Joel P. Trachtman (eds) (Ibid.), p. 204.
[828] See for example Jan Klabbers, Anne Peters, and Geir Ulfstein *The Constitutionalization of International Law* (OUP, 2009); Sabino Cassese (supra note 195), p. 471; Sabino Casesse and Elisa d'Alterio 'Introduction: the Development of Global Administrative Law' in Sabino Casesse (ed) (supra note 817), p. 3.
[829] Carol Harlow (supra note 202), p. 673.

GAL is perhaps the most prominent and widespread approach to limiting arbitrariness in global governance, having rapidly developed in the last decade, mainly in the US and in Italy.[830] It "revitalises" and further develops theories of international administrative law, which pioneered in the late 19th century and developed further after the creation of the League of Nations in the 1920s.[831] International administrative law is concerned with the cooperation of domestic administrative actors within the framework of international institutions or "unions" (e.g. dealing with postal services, navigation, and telecommunication), whose decisions often do not require national ratification to become legally effective, and which rely for their success on the actions of domestic administrative actors.[832] International administrative law can be understood as denoting the rules, procedures, and institutions through which international organisations deal their internal matters (in relation to those who work for them) as well as the rules that govern the effects of a foreign state's administrative acts in another state's legal order.[833] Lorenz von Stein, who conceived of international administrative law in 1866, described it as an "ensemble of legal rules based partially on international sources and partially on domestic sources dealing with administrative activity in the international field as a whole."[834] International administrative law therefore enhances accountability and legitimacy, but does not concern broader powers of administrative review over rules or decisions made by the relevant organisation.[835] GAL encapsulates this and more, and its scope extends to all the rules and procedures that help ensure the accountability of and participation in global administration in general. In so doing, GAL explores the limits of power exercised at the global level. The concepts of accountability and participation are explored in sections 5.8.2 and 5.8.3.

The *appeal* of analysing much of global governance as administrative in nature is that it draws the attention to a lack of sufficient regard to those affected, and provides a way to mitigate this by reference to principles found in national systems of administrative law and by providing new mechanisms of administrative law at the global level to enhance participation

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[830] Christoph Möllers 'Ten Years of Global Administrative Law' (2015) 13 International Journal of Constitutional Law 469, p. 469.
[831] Paul Craig (supra note 211), p. 604.
[832] Benedict Kingsbury, Nico Krisch and Richard B Stewart (supra note 193), p. 19-20.
[833] Ibid. p. 28, referring also to Paul Négulesco 'Principes du droit international Administratif' 51 *Recueil des Cours* 579 (1935), p. 593.
[834] Klaus Vogel 'Administrative Law: International Aspects' in Rudolf Bernhardt (ed) *Encyclopedia of Public International Law* (North Holland (Elsevier), 1992), p. 23, cited in Benedict Kingsbury (supra note 191), p. 23-24.
[835] Paul Craig (supra note 211), p. 604.

and, in particular, accountability. In so doing, GAL is both a descriptive and a normative venture.[836] It *describes* a rise in global governance structures and analyses them as predominantly administrative in nature. It is normative in so far that it *prescribes* a particular solution.

5.6.3. Defining global administrative action

I now turn in more depth to the salience of the description of global governance as 'administrative'. Recalling Finkelstein's definition of global governance as mirroring what governments do at home, GAL scholars draw a parallel between domestic administrative action which is subject to administrative law, and what happens at the global level. There is no universally accepted definition of 'administration' or indeed 'administrative law', and the boundaries of what is and is not administrative are fluid.[837] However it can be generally said that at the *national* level, administrative acts are carried out by (or on behalf of) the government. The administration traditionally executes laws adopted by the legislature through the making, implementing, monitoring, or enforcement of rules. They are therefore not primarily legislative or judicial in nature, although different types of government action can overlap and administration may contain legislative and judicial elements.[838] In the context of WTO law, the verb "to administer" means "putting into practical effect or applying a legal instrument", which may involve include providing guidance on the meaning of specific requirements of a measure.[839]

Extrapolating from the domestic to the global setting and building on the definition of global governance given above, global administration can therefore be described as follows:

First, it is the exercise of public authority at the global level. At the domestic level, something is administrative because it is carried out by the executive arm of a government and its agencies. These institutional structures are not present at the global level, though it has

[836] Eyal Benvenisti (supra note 804), p. 66; Mario Savino 'What If Global Administrative Law Is a Normative Project?' (2015) 13 International Journal of Constitutional Law 492

[837] See the definition given in the *Britannica Academic*, s.v. 'Administrative law', available at: http://academic.eb.com/levels/collegiate/article/administrative-law/109459; Elizabeth Fisher 'Transparency and Administrative Law: A Critical Evaluation' (2010) 63 Current Legal Problems 272, p. 286; Martin Shapiro 'Administrative Law Unbounded: Reflections on Government and Governance' (2001) 8 Indiana Journal of Global Legal Studies 369.

[838] Mario P Chiti 'Forms of European Administrative Action' (2004) 68 Law & Contemporary Problems p37, p. 17.

[839] *US – COOL*, 18 November 2011, Panel report (WT/DS384/R, WT/DS386/R), paras. 7.821-7.823.

been observed that the institutional structures of some global governance bodies are fairly similar to those of traditional domestic administrative agencies.[840] In the absence of a global government, however, global administration is increasingly informal, and by definition most of it will *not* be structured similar to traditional administrative agencies.[841]

Second, global authority can be carried out by any of a number of actors (co)operating at different levels, and it may affect a variety of parties. Similar to administration at the domestic level, administrative action can be exercised by private parties on behalf of the government. Administration can also be cooperative. In EU administration, it is increasingly common to allow for mixed or composite administration involving the EU and member states, rather than to rely on indirect execution (implementation) by member states alone.[842] These complex forms of administrative action (by private parties or joint administrations) are conceptually similar to those at the global level. At the global level, multiple actors carry out public functions, and this often involves cooperation at different levels (private; national; regional; administrative). The emphasis is clearly on *function* over *form*.

Third, global administration is a type of public authority that is concerned with the making, implementation, monitoring, and enforcement of rules. This can be done in many ways, and the range of possible administrative actions is wide, as it is at the domestic level. For Kingsbury, Krisch and Stewart, it means that global administration can conceptually be distinguished from "legislation in the form of treaties, and from adjudication in the form of episodic dispute settlement between states or other disputing parties".[843]

Nevertheless, the distinction between administrative and non-administrative action (legislative or adjudicatory) is difficult. It may appear contradictory to the view advanced by the interactional account that international law is continuously constructed, whereby states' interactions with legal norms (through reasoned exchanges and so on) are part of the law

[840] Kenneth W Abbott and Duncan Snidal 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' [2008] The Politics of Global Regulation 44, p. 218; also Richard B Stewart (supra note 194), p. 668, who in considering the administrative nature of the CCBST puts emphasis on its institutional features; and (Sabino Cassese (supra note 195), p. 218), that in particular more formal international organisations may employ full-time officials, rely on experts, and include specialised committees that carry out defined tasks and functions.
[841] Eyal Benvenisti (supra note 804), p. 63.
[842] Edoardo Chiti and Bernardo Giorgio Mattarella 'Introduction' in Edoardo Chiti and Bernardo Giorgio Mattarella (eds) *Global Administrative Law and EU Administrative Law. Relationships, Legal Issues and Comparison* (Springer, 2011), p. 20.
[843] Benedict Kingsbury, Nico Krisch and Richard B Stewart (supra note 193), p. 17.

making process. If it is upheld that these interactions strengthen and shape legal norms, these interactions should all be seen as legislative. Yet, from a GAL point of view, interactions that operationalise existing legal norms are seen as administrative. However, the fact that the same interactions can be described as administrative from one point of view, and part of the law making process from the other, is not necessarily problematic. It means that neither analogy is perfect, and that functions can overlap. Amongst the different interactions between actors that together construct international law, those actions that operationalise or elaborate on legal norms (norms that are enshrined in a treaty or established customary law) are similar in nature to those tasks carried out by domestic administrations. This does not negate the fact that in so doing, such actions also help maintain and shape the law.

The lack of a perfect analogy does not undermine the relevance of categorising global governance in the way GAL scholars do, nor does this categorisation undermine the view that these administrative-type interactions are also important for law making. Identifying certain exercises of global governance as predominantly administrative in nature is a truly useful exercise. It helps identify the problem, and the solution. The problem is, as previously mentioned, that such exercises of power have significant global effects on many actors, yet that there is no clear framework for ensuring that this power is exercised fairly. Those affected by the decisions need to have their interests taken into account – whether through participation *ex ante* or accountability *ex post*. The solution is given by analogy to domestic administrative law: namely, that this can be done through respect for administrative law-type standards and by developing mechanisms that ensure fair process. And indeed, the literature on GAL shows that instances of global administration increasingly respond to this. Before focusing on GAL's solution to the problem of sufficient regard, I first turn to some examples of global administration to substantiate the point that market conditionality can be viewed as a type of global administration.

5.7. The global administration of fisheries

With the previous section's description of global administration in mind, this section spots instances of global administration in global fisheries. This not only explains why market conditionality mechanisms should be seen as a form of global administration, but identifies other relevant global administrative bodies in fisheries that struggle with questions of fairness. I return to this (and in particular RFMOs) in chapter 8.

5.7.1. FAO and RFMOs

First of all, it is commonly agreed that formal international organisations often engage in global administration. These organisations are not administrative *per se*, but the *types* of activities that they undertake "display features similar to administrative actions".[844] For example, they may adopt subsidiary legislation and binding decisions (such as sanctions) on specific countries (the UN Security Council), conduct refugee status determinations (the UN High Commissioner for Refugees), assess and issue warnings concerning global health risks (the World Health Organization), etc.[845] These are instances of public authority; they are executive rather than legislative; and are concerned with implementing and monitoring rules – here, through adopting subsidiary legislation and making authoritative decisions.

The normative framework for sustainable fisheries, set out in chapter 3, is governed by such international organisations. The FAO plays a key and central role here. Its functions are many and varied, and the ambit of its functions is much wider than fisheries alone. It is a complex UN agency with many different organisational levels, and has set up further agencies with important governance functions – such as the Codex Alimentarius Commission, which is not further discussed here, but which itself forms part of a global administrative system for food safety.[846] FAO actively gathers data, including on fisheries conservation and management. This wealth of information is compiled and analysed, and flows back out into society in the form of statistical databases[847] and advisory documents such as the Code of Conduct, the IPOAs, guidelines, etc. A notable example is the frequent elaboration of Technical Guidelines for Responsible Fisheries, which the FAO Secretariat adopted in implementation of the Code of Conduct.[848] The FAO may also initiate and approve treaties, an example of which is the Port State Measures Agreement.[849] These nonbinding instruments are variably normative, either directly where they reflect custom or interactional law, or indirectly by providing the standards which should *inter alia* be taken

[844] Sabino Cassese (supra note 816), p. 475.
[845] Lorenzo Casini (supra note 820), p. 21.
[846] Edoardo Chiti and Bernardo Giorgio Mattarella (supra note 842).
[847] E.g. http://www.fao.org/fishery/statistics/en.
[848] FAO Conference Res. 4/95 of 31 October 1995, para. 5, urges the FAO "(…) to elaborate, as appropriate, technical guidelines in support of implementation of the Code." A list is available at: http://www.fao.org/fishery/publications/technical-guidelines/fr.
[849] Constitution of the Food and Agriculture Organization, Article IV.

into account by states when developing conservation and management measures.[850] All in all, the FAO presents "a modern and influential normative framework and collection of best practices which provides the basis for functional cooperation and management efforts of many important actors in fisheries governance at various levels of governance and across functional divides".[851]

FAO's role in the global governance of fisheries can be seen as predominantly administrative. The FAO (*inter alia*) exercises a form of public authority, concerned with the adoption and implementation of rules and decisions, of a non-legislative or judicial nature. Its function is to give effect and operationalise international law pertaining to fisheries, though in so doing it effectively contributes to the normative framework for sustainable fisheries.

Alongside the FAO, RFMOs are key actors in global fisheries governance. RFMOs occupy a central role in the cooperation over transboundary resources. Until the Fish Stocks Agreement was adopted in 1995, there was no international agreement on the management authority of RFMOs.[852] The Fish Stocks Agreement gave them a mandate and put them central stage, spurring the creation of many more RFMOs and influencing the 'design' of existing ones. The expectations placed on RFMOs are particularly high in the context of combating IUU fishing, and the IPOA-IUU mentions RFMOs throughout the text as important venues for cooperation between coastal and flag states.

I recall that RFMOs are competent to adopt normative (binding) decisions. RFMO decisions are also be relevant to non-members, and can come to represent standards for the conservation and management of a particular fishery. IUU vessel lists drawn up by RFMOs moreover have a normative effect on parties to the Port State Measures Agreement, who must deny entry to port to vessels blacklisted by an RFMO "in accordance with the rules and procedures of such organisation and in conformity with international law" (Art. 9(4)).

RFMOs variably carry out important administrative functions, including the making, implementing, monitoring and enforcement of rules pertaining to fisheries.[853] RFMOs are

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[850] The different ways in which non-binding instruments can be normative is highlighted in chapter 2. The requirement to take into account international and regional standards in fisheries management, and the potential role for the FAO in this regard, is set out in chapter 3.
[851] Alan Boyle (supra note 115), p. 1561.
[852] Judith Swan (supra note 354) , p. 2.
[853] The institutional characteristics and functions of RFMOs vary, however. A non-exhaustive list of the functions of RFMOs can be found in Art. 10 Fish Stocks Agreement. On the variety of decision-making

organisations created by a treaty and vested with authoritative powers, often with a budget; a secretariat; consultative bodies; and so on. The rules they administer are rooted both in their own founding Treaty and the general regime of the law of the sea – including decisions adopted by the FAO. They may even have in place their own dispute settlement mechanisms.

The public authority exercised by many of these RFMOs can be captured as a form of global administration.[854] The authority they exercise is administrative rather than legislative or adjudicatory, though these elements are present and, as noted above, there is some conceptual overlap between them at the global level. But it is *through* RFMOs that states give effect to their international duties; in particular, the duty to cooperate, and the duty to conserve and management transboundary resources. They are set up with the very purpose to enable states to put in practice agreed upon international law. Their regulatory powers are those of implementation and operationalisation, akin to that of a national administrative body.

5.7.2. Distributed administrations and the market state

The global administrative landscape is not only made up by international organisations. It is diverse and "complex network", and it is likely that new forms will develop.[855] Other forms of global administration 'out there' include global administration by hybrid intergovernmental-private administrations, such as the Codex Alimentarius Commission.[856] Hybrid forms of governance are often formalised partnerships created by states or international organisations with private commercial or civil society entities.[857] Again, these are instances of public authority; executive rather than legislative in nature; and concerned with the making of rules – here, in tandem with private parties. Private (non-governmental) bodies can also play an important role, such as the International Organization for Standardization, some NGOs, and even certain business organisations carry out very effective regulatory functions that could be considered (albeit cautiously, according to the authors) as a form of global administration.[858] These bodies are often intertwined with hybrid administrations.[859] It remains questionable however whether decisions taken by private

of/within RFMOs, see Erik J Molenaar (supra note 355), p. 221; Ted L McDorman (supra note 355), p. 427, and further below in this chapter.

[854] Sabino Cassese (supra note 195), p. 699.

[855] Richard B Stewart (supra note 194), p. 467.

[856] Benedict Kingsbury, Nico Krisch and Richard B Stewart (supra note 193), p. 22.

[857] Ibid. p. 475.

[858] Lorenzo Casini (supra note 820), p. 23.

[859] Benedict Kingsbury, Nico Krisch and Richard B Stewart (supra note 193)

bodies should be seen as a form of global administration, or whether they pursue private interests. Considering them an exercise of quasi-public authority is practical, however. Clearly such entities are not capable of creating law proper, and considering them as administrative would justify subjecting them to administrative law-type standards. Furthermore, global administration can be based on collective action by transgovernmental networks and other informal cooperation arrangements, which can exist within or outside a treaty framework.[860] Anne-Marie Slaughter defines transgovernmental networks as "all the different ways that individual government institutions are interacting with their counterparts either abroad or above them, alongside more traditional state-to-state interactions."[861] Kingsbury, Krisch and Stewart give as an example of this type of global administration obligations of mutual recognition, which exist under WTO law, and as a result of which states establish a strong form of horizontal cooperation.[862] Whilst less rule-oriented than the abovementioned categories, such networks are a form of public authority with a strong executive character, being concerned with the effective operationalization of laws at the global level – through for example the mutual recognition of laws.

What is particularly relevant here to explain the role played by the market state is the category of national regulatory agencies that act as a type of "distributed administration".[863] Kingsbury, Krisch and Stewart argue that administration is distributed when national regulatory agencies take decisions on issues of foreign or global concern, for example when exercising "extraterritorial" regulatory jurisdiction, "in which one state seeks to regulate activity primarily occurring elsewhere".[864] This is a way for states to respond to globalization. The authors maintain that even in the absence of immediate extraterritorial effects, domestic administration can be global. This is so where national administration is charged with implementing an international governmental regime.[865] By way of example, they argue that domestic regulatory agencies concerned with biodiversity conservation or greenhouse gas emissions are responsible for implementing international environmental law for the achievement of common objectives, which makes their decisions of concern to other

[860] Lorenzo Casini (supra note 820), p. 21.
[861] Anne-Marie Slaughter (supra note 821), p. 14.
[862] Lorenzo Casini (supra note 820), p. 21.
[863] Ibid.
[864] Benedict Kingsbury,Nico Krisch and Richard B Stewart (supra note 195), p. 21.
[865] Ibid.

states, as well as to the international environmental regime.[866] The latter subtype builds on the "basic observation" that governments, including their ministries and regulatory agencies, are essential to give operational effect to international regulatory schemes through rule-making, decision-making, and enforcement.[867] Other entities too can play an important part in this, such as companies specialised in certification, verification, inspection or audit.

Distributed administration can be organised in multiple and complex ways.[868] Distributed administrations are not limited to domestic regulatory agencies carrying out global functions but can involve other entities, such as private actors certifying compliance with global standards. They are often linked to an international institution or regime, the standards and decisions of which they implement and give effect to. This is the most 'obvious' form of distributed administration, often referred to in the literature. But even in the absence of such an international institution or regime, domestic regulatory agencies can partake in global administration where their decisions have effects abroad. It is in particular this kind of global administration that is of interest here, and to which I now turn in more detail below in the context of market conditionality.

Before casting market state action as described in this thesis as a type of global administration, I observe that the abovementioned categories of global administration are not rigid. For instance, mutual recognition between particular national regulators may overlap with that of distributed administration, which itself is a category of actions that may be organised in many different ways.[869] Similarly, Casini suggests that distributed administration should be classified alongside transgovernmental and transnational networks as one "type" of global administration, since all these administrative structures "transcend the concepts of

[866] Ibid. p. 22.
[867] Ibid.
[868] Benedict Kingsbury 'Three Models of "Distributed Administration": Canopy, Baobab, and Symbiote' (2015) 13 International Journal of Constitutional Law 478, envisaging the following three models. First, the canopy model, which envisages different, existing "distributed" entities, usually national, which reach out to each other and together form a new, global institution. Second, the baobab model, which is the reverse. It relies on the prior existence of a global governance institution which seeks "to promote the establishment of new special-purpose territorially defined entities, typically one in each (member) country, whose identity and activities are tied to and often quite dependent on the identity and work of the international institution". In particular when these entities grow and start pursuing agendas of their own, this then strengthens the international institution, thus leading to its longevity. Third, the symbiote model, which concerns the relationship between non-members of an international institution (such as other institutions or indeed commercial and certification bodies) and the institution itself. Kingsbury describes this relationship as symbiotic when the institution relies for the implementation of its standards on these other bodies, and when these bodies "become invested in the standards they are certifying, and become dependent on the market those standards and associated product labels generate" (p. 478-491).
[869] Benedict Kingsbury,Nico Krisch and Richard B Stewart (supra note 195), p. 22.

institution and network", and involve several actors at both international and domestic levels.[870] According to Casini, this type of administration denotes the fulfilment of public functions through the creation of a set of principles, rules, and institutions operating both internationally *and* national – making it also, in his opinion, the most sophisticated type of global administration.

Market conditionality mechanisms as described in this thesis contribute to the global administration of fisheries by further operationalising the obligations set out in international fisheries instruments, and by giving effect to the standards and guidelines adopted by the FAO and the conservation and management decisions adopted by RFMOs. I have previously said that market measures, including country blacklists, can and have been adopted by RFMOs (multilateral market measures). The preceding section already discussed the administrative nature of measures adopted by RFMOs to give effect to international law. The same is true where such measures are adopted by individual market states, such as the ones examined in this thesis. They are a form of public authority, in the example of the EU exercised by the European Commission and national authorities in EU member states. They first of all give effect to EU law (the EU IUU and Non-Sustainable Fisheries Regulations), but also indirectly to international fisheries norms and obligations (through encouraging compliance abroad), including decisions and practices by the FAO and RFMOs (global administrative practice in fisheries).

I recall that Kingsbury, Krisch, and Stewart describe distributed administration as an instance in which a national regulatory agency takes decisions on issues of foreign or global concern, for example when exercising extraterritorial regulatory jurisdiction, in which one state seeks to regulate activity primarily occurring elsewhere.[871] The authors also observe that even in the absence of immediate extraterritorial effects, domestic administration can be global where a national administration is charged with implementing an international governmental regime. Though chapter 6, section 6.3 demonstrates that market conditionality mechanisms are not truly extraterritorial but rather operate by territorial extension (because there is a territorial connection, but the conduct that is being regulated has occurred abroad),[872] the point stands that they operationalise international norms and effectively

[870] Ibid. p. 476.
[871] Benedict Kingsbury, Nico Krisch and Richard B Stewart (supra note 193), p. 21.
[872] This is based on the views put forward by Joanne Scott (supra note 41), p. 89-90.

regulate issues of foreign and global concern. Their effects abroad are significant, and they should be captured by the definition of distributed administration. This is also in line with Kingsbury, Krisch, and Stewart's views, which is that what makes domestic regulation of global issues particularly global is ultimately the *nature of the problem* that is being regulated, and the *effects* of that regulation which are felt abroad.[873] They give the example of the scenario in which an international governmental regime or institution relies on national administrations (or other actors) to give effect to its standards and decisions. The implementation of these standards and decisions may not have extraterritorial effects, yet Kingsbury, Krisch and Stewart argue that this is a form of global administration. In practice, however, it can be observed that doing so would almost always give rise to at least *some* degree of regulation by territorial extension. The implementation of internationally agreed standards or decisions presupposes a level of (indirect) interaction between domestic administrations, or between domestic administrations and an international institution. For example, in the case of the EU's regulation of emissions from flights landing or departing from the EU, the EU takes into account whether a third country has in place an equivalent mechanism, or whether a multilaterally agreed scheme exists, to which the EU would defer.[874] This is a type of regulation by territorial extension rather than extraterritoriality, since it only concerned flights landing in or departing from the EU.[875] The territorial connection serves as a springboard for taking into account behaviour abroad. The mechanism was deemed not to be extraterritorial in a dispute before the Court of Justice of the EU (CJEU),[876] yet its significant effects abroad are undisputed.[877]

[873] Benedict Kingsbury, Nico Krisch and Richard B Stewart (supra note 195), p. 21.

[874] The EU required inbound and outbound flights to surrender emissions allowances for the entire stretch of the flight – including any parts the voyage that took place outside EU airspace unless the departing country in question had in place an equivalent scheme (Directive 2008/101 [2009] OJ L8/3 and Directive 2003/87 [2003] OJ L275/3; for an account of the EU's then-proposal to incorporate international aviation in the EU emissions trading scheme and its consequences see Daniel B Reagan 'Putting International Aviation into the European Union Emissions Trading Scheme: Can Europe Do It Flying Solo?' [2008] Boston College Environmental Affairs Law Review 349).

[875] Benedict Kingsbury, Nico Krisch and Richard B Stewart (supra note 195). p. 97.

[876] Note that all references to an EU court in this thesis are written as references to the CJEU, without distinguishing between the European Court of Justice and the General Court, its two main courts.

[877] Foreign industry and third countries protested to this ostensibly extraterritorial assertion of jurisdiction by the EU, eventually leading to a case before the CJEU (C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755.) The Court decided in favour of the EU, concluding that the physical presence of the aircraft in the EU provided a sufficient territorial link for there to be territorial jurisdiction – despite its geographically wide reach. For an interesting discussion of the court's decision see Sophia Kopela (supra note 396). For an insight into the EU's decision to take 'responsibility' for other states' failure to account for their emissions allowances, and states' moral responsibilities to do so in general, see Joanne Scott (supra note 169). Jurisdiction and extraterritoriality is discussed further in chapter 6.

Kingsbury, Krisch, and Stewart note that "national environmental regulators concerned with biological diversity or greenhouse gas emissions are today part of a global administration, as well as part of a purely national one: they are responsible for implementing international environmental law for the achievement of common objectives, and their decisions are thus of concern to governments (and publics) in other states, as well as to the international environmental regime."[878]

To accommodate for this diversity, I conclude the following. Even if the origin of a norm that a domestic administration gives effect to is not clearly international (but rather is its own), and the domestic administration does not directly implement an international standard or decision, if so doing has a global reach, then it should still be viewed as a form of global administration. This global reach can for instance be observed when a state acts extraterritoriality, or by way of territorial extension.[879]

Rather, what matters is whether or not administrative action has significant global effects – through extraterritoriality or regulation by territorial extension. This includes the case where domestic regulatory agencies (or other entities) give effect to international decisions and standards, but goes beyond this, encapsulating any unilateral state action with a global reach.

Explaining market conditionality in fisheries as a type of global administration casts an additional light on their role. Chapter 3, section 3.11.2 cautiously suggested that market states may be acting out of a moral duty (second-order responsibility) to protect and preserve the marine environment when they seek to ensure compliance with international fisheries norms by 'laggard' states. This fits well with the view put forward here, namely that in so doing, market states engage in the global administration of fisheries, alongside other bodies like the FAO and RFMOs. The institutional framework for fisheries governance thus consists of an array of interconnected bodies with public authority that carry out more or less administrative functions, referring to one another and enforcing each other's decisions, each geared towards making international fisheries law operational through the adoption and implementation of rules and decisions that can be described as administrative in nature. More importantly perhaps, it highlights the need to think about the implications of this and the call for fairness.

[878] Benedict Kingsbury, Nico Krisch and Richard B Stewart (supra note 193), p. 22.
[879] Other ways in which states can have a global reach can be imagined. For literature on the global reach of EU law, see supra note 80.

GAL helps think about the administrative law-type standards and mechanisms that can ensure this. I turn to this next.

5.8. Standards and mechanisms that can promote regard

GAL has been broadly defined as "the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies".[880] It thereby takes as its starting point "the assumption that discourse concerning the application of public law principles beyond the nation state is meaningful".[881] The application of this to the regulation of administrative decision-making process (which I refer to as administrative law-type standards, as explained in chapter 2, section 2.5.1.3) serves two main goals: first, that of promoting the public interest through an inclusive and well informed process; and second, that of providing due process for those whose rights may be adversely affected by the decision and a fair opportunity to challenge that decision.[882]

It has been suggested that bodies should meet adequate standards of transparency, consultation, participation, rationality and legality, and provide effective review of the rules and decisions they make.[883] The list is not set – partly, as explained in chapter 2, section 2.5.1.3, because of the different methodological approaches. It therefore said that GAL cannot yet be regarded as a single system of well-defined norms and practices; rather, these norms and practices are still evolving and apply quite unevenly in different components of the global administrative space.[884] Nor would each and every standard that emerges at the global level be accorded the status as administrative law in some domestic administrative law traditions. Whilst the principle of legality (according to which the administration must act within its powers) appears central to all administrative systems and all administrations are generally required to observe principles of due process, this does not mean that these

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[880] Nico Krisch and Benedict Kingsbury 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 European Journal of International Law 1, p. 4.
[881] Ruth W Grant and Robert O Keohane 'Accountability and Abuses of Power in World Politics' (2005) 99 The American Political Science Review 29, p. 568.
[882] Eyal Benvenisti (supra note 804), p. 161-162.
[883] Nico Krisch and Benedict Kingsbury (supra note 880), p. 4.
[884] Richard B Stewart and Michelle Ratton Sanchez Badin 'The World Trade Organization: Multiple Dimensions of Global Administrative Law' (2011) 9 International Journal of Constitutional Law 556, p. 558; Benedict Kingsbury (supra note 191), p. 29.

principles have the same shape or scope in every legal system.[885] Carol Harlow gives a thorough overview of this, showing for instance that participation is "strongly protected" in the US tradition, but weakly elsewhere, and noting that accountability and transparency mostly derive from the 'good governance' agenda championed by institutions such as the World Bank.[886]

Scepticism aside about the coherence of GAL (or indeed about its merit as a normative project), the following can be observed. The problem remains that the interests and concerns of weaker groups, or those who are targeted by certain global decisions and measures (like market conditionality determinations), are often not sufficiently protected. I align myself with Richard Stewart in saying that, absent an overarching global institution that could regulate global administrative bodies and thereby improve their fairness, the best approach is to focus instead on reforming and using existing institutional mechanisms and arrangements.[887] Various practices can be envisaged to constrain, direct, or otherwise influence the exercise of public power.[888] Once a decision is made, and in particular when it is "not feasible to provide the disregarded with decisional authority", the resulting lack of regard may be corrected after the fact, by enabling those affected by the decisions to hold those wielding power accountable.[889]

The following conditions appear both central and imperative to ensure sufficient procedural fairness when engaging in market conditionality in fisheries. First, there is the overarching need for transparency, and I therefore begin this section by introducing this. I then unpack the regard-promoting mechanisms of participation and accountability. Finally, I briefly consider the importance of broad transparency also to keep the system open to revision through continuous scrutiny. In so far that this is relevant, I will draw links with the conditions I identified earlier for interactional law making.

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[885] Carol Harlow (supra note 202), p. 192.
[886] Ibid. p. 193 and 199.
[887] Richard B Stewart (supra note 194), p. 213.
[888] An overview is given in Ruth W Grant and Robert O Keohane (supra note 881).
[889] Richard B Stewart (supra note 194), p. 244.

5.8.1. Transparency

A necessary element to ensure both accountability and participation – and in fact essential to "virtually all the foundations of legitimacy" of decision-making – is transparency.[890] In essence, transparency is what can be described as what I call an 'enabling principle'. It *enables* participation, and is a necessary element for scrutinising the exercise of power after the fact. Without transparency of some kind, it is impossible to gauge whether market conditionality (or any other exercise of power) fulfils whatever standards of appropriateness have been agreed upon (for instance, whether they are procedurally fair). It is what Buchanan and Keohane call an "epistemic virtue" without which neither participation nor accountability is possible.[891]

Transparency can be understood as the decision to make visible the resources (legal basis, information, expertise, normative values related to decisions, and so on) on which the exercise of (public) power is based, as well as the actual process of exercising power itself.[892] This may include giving reasons for why decisions have been taken in a particular way. Kingsbury, Krisch, and Stewart note that reasons are sometimes given to "strengthen the acceptability of their actions to affected interests," though this does not yet appear to be common practice across the board. [893] It was seen earlier in this chapter that giving reasons for decisions is also an important element of law making. Argument and persuasion, or 'justificatory processes', are an important element of collectively engaging with underlying norms. Giving reasons is imperative to this, and allows for informed interaction.

However, while transparency "tends to be perceived as overarching, non-interventionist, and straightforward in its application", the implementation and application of a transparency standard is "anything but".[894] It requires answering questions such as what information should be made available, when, where, and who to. The answers depend on other substantive choices, such as who may participate in decision-making, how, at what point in time, and through what mechanism might accountability be ensured. These choices depend

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[890] Daniel C Esty (supra note 788), p. 1490.
[891] Allen Buchanan and Robert O Keohane 'The Legitimacy of Global Governance Institutions' (2006) 20 Ethics & international affairs 405, p. 429. For an account of the "hideous complex" nature of transparency and an overview of these different elements (what; to whom; when; how; etc), see Elizabeth Fisher (supra note 837)
[892] Elizabeth Fisher (Ibid.), p. 274.
[893] Benedict Kingsbury, Nico Krisch and Richard B Stewart (supra note 193), p. 39.
[894] Elizabeth Fisher (supra note 837), p. 273.

on which regard-promoting mechanisms are adopted, and what they should look like. I turn to this next.

5.8.2. Accountability

Accountability has been called a "buzzword of modern governance" and "one of those golden concepts that no one can be against",[895] yet at the same time "much contested" and "elusive".[896] There appears to be a "bewildering and ever growing variety of overlapping and competing conceptions" of accountability in modern scholarship, straddling the schools of political science, international relations, and constitutional law.[897] One of the reasons for this is no doubt that, as Mark Bovens explains, accountability can be seen as both a virtue – variably referred to "as a synonym for many loosely defined political desiderata, such as good governance, transparency, equity, democracy, efficiency, responsiveness, responsibility, and integrity" – and as a more narrowly described mechanism.[898] Accountability as a virtue has no distinct meaning. The relevance of accountability for the purpose of enhancing fairness in decision-making lies in it being a mechanism through which actors can be held to account. It is that what I look at here.

For Keohane and Grant, the mechanism of accountability implies three separate elements, namely 1) the right by some actors to hold others to a set of standards, 2) the right to judge whether they have fulfilled their responsibilities in light of these standards, and 3) the right to impose sanctions if they determine that these responsibilities have not been met.[899] This is similar to how Mark Bovens defines accountability as a mechanism; namely as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences."[900] Accountability mechanisms thus operate predominantly *after* the fact, though their effects may be felt at earlier stages.[901]

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[895] Mark Bovens 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 European Law Journal 447, p. 448.
[896] Mark Bovens, Thomas Schillemans, and Robert E. Goodin 'Public Accountability', in Mark Bovens, Robert E. Goodin, and Thomas Schillemans (eds.) *The Oxford Handbook of Public Accountability* (OUP, 2014), p. 2.
[897] Ibid. p. 4.
[898] Mark Bovens 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33 West European Politics 946
[899] Ruth W Grant and Robert O Keohane (supra note 881), p. 29.
[900] Mark Bovens (supra note 895), p. 467.
[901] A somewhat exceptional accountability scenario that operates *ex ante* is contemplated by Katrin Auel 'Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs' (2007) 13 European Law Journal 487, who deals with holding governments to account *ex ante* for the

Accountability presupposes a recognised relationship between those wielding power and those holding power-wielders to account, and an agreement on applicable standards of accountability.[902] It is thereby different from other mechanisms to constrain power, such as the unilateral use of force by states and economic coercion (for example, market conditionality).

Different accountability mechanisms are appropriate in different contexts.[903] The question of *how* accountability should be ensured itself depends on another substantive choice: namely *who* should hold *whom* to account. At the global regulatory level, and in particular in the global administration of fisheries, there is often no clear and common understanding of this. To understand the different options, it is useful to follow Keohane and Grant's broad distinction between two models of accountability, which can be summarised as follows:[904] One, a "delegation" model of accountability, which focuses on the behaviour of political agents and their relationship with voters – essentially, justifying a need for accountability on the basis of ownership, or the basis of political or financial support. The underlying logic is one of delegating power to those deemed more 'able' to govern, where representatives are being held accountable by those delegating powers through a variety of other mechanisms. Second, a model that focusses on affected rights and interest, whereby one party determines the choices of another party, through the impact of its decisions. This focus on "external" accountability can be called a "participation" model of accountability. The underlying logic is that of a high degree of direct democracy.

Market conditionality has important transboundary effects on those *not* part of the internal system of accountability of that market state. An important impediment to the procedural fairness of those measures is thus the *external* accountability gap. Thinking about enhancing accountability in such a scenario subscribes to Keohane and Grant's participation model. The issue is all the more important given the power imbalances between actors. I have shown that market conditionality predominantly affects developing countries, which are most vulnerable to illegal and unsustainable fishing practices. These countries do not have the financial and technical capacity to cooperate with a powerful market state on equal terms,

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position that a government is planning to adopt in European negotiations, "as this is the only stage of European decision making at which national parliaments can become involved and have effective instruments in order to sanction their government".

[902] Ruth W Grant and Robert O Keohane (supra note 881), p. 29.

[903] Mark Bovens, Thomas Schillemans, and Robert E. Goodin (supra note 896), p. 6.

[904] Ruth W Grant and Robert O Keohane (supra note 881), p. 31.

thereby exacerbating the need to have access to a mechanism that corrects these imbalances after the fact.

Of course, the challenge is where to draw the line: if everyone affected by a decision should have a legitimate claim to answerability, the effectiveness of decision-making would suffer. The question of who can hold power-wielders to account in any particular context is notoriously difficult, even after subscribing to a particular accountability model.[905] The question of who can hold market states to account and who can participate in their decision-making is discussed further in chapter 8, section 8.4.

I have said that accountability can be ensured in different ways, and Keohane and Grant identify several mechanisms that currently operate in world politics, and which can form a basis for improved accountability mechanisms: hierarchical accountability, supervisory accountability, fiscal accountability, legal accountability, market accountability, peer accountability, and public reputational accountability.[906] The most familiar to lawyers is legal accountability. This refers "to the requirement that agents abide by formal rules and be prepared to justify their actions in those terms, in courts or quasi-judicial arenas".[907] For example, accountability before the WTO dispute settlement mechanism, or the ITLOS, is a form of legal accountability. Legal accountability does not have to operate through binding dispute settlement. Brunnée and Toope give the example of the Kyoto Protocol's compliance procedure, which is highly interactional (information exchanges; justificatory process; transparent; etc.) and inclusive (includes non-state actors), despite the fact that it does not generate decisions that are binding on the parties to the dispute. They suggest that "a compliance assessment and even an 'enforcement' process can operate effectively without being formally binding (…) and enmesh [parties] in a compelling justificatory discourse, and will give decisions of the Enforcement Branch a quality of genuinely collective enforcement, consisting in powerful collective disapprobation rather than penalty."[908]

Also familiar is the idea of market accountability, whereby consumers refuse to buy certain products with bad standards (such as non-dolphin friendly), leading to a financial loss

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[905] Ibid. p. 33.
[906] Ibid. p. 37-38.
[907] Jutta Brunnée 'International Legal Accountability through the Lens of State Responsibility' (2005) XXXVI Netherlands Yearbook of International Law 21, who considers how legal accountability can be ensured through the doctrine of state responsibility, one of many 'modes' of international legal accountability.
[908] Jutta Brunnée and Stephen Toope (supra note 159), p. 204.

if particular behaviour persists. This is similar to the mechanism of supervisory accountability, mostly present within multilateral organisations such as the World Bank and the International Monetary Fund, which are essentially supervised by states and their courts, e.g. demanding due process.

Accountability mechanisms can be complemented by other regard-promoting mechanisms. Even where such 'other' mechanisms do not correspond to the narrowly described definition of accountability given above, these mechanisms can still allow those affected to voice their concerns and demand the regulating body to give reasons (and thereby, promote regard). This is often necessary where existing accountability mechanisms underperform. For instance, disputes only rarely appear before international dispute settlement bodies, are lengthy and costly, and the issue of standing remains problematic. And even when a dispute is settled and the affected party has had its voice heard, the result may be disappointing. This is exemplified by the recent *South China Sea* dispute, in which China failed to participate in the arbitration or implement the ruling.[909]

In practice, it is therefore important not to evaluate regard-promoting mechanisms in isolation from each other. Whilst the distinctive character of accountability mechanisms should be maintained, other mechanisms that promote regard exist that may be just as effective.[910] They may hold somewhere between *ex post* accountability and a form of participation in decision-making (below in this section) and can exist as part of the day-to-day work of international bodies. As much of global governance, such mechanisms may not be clearly visible at first sight – or at least not as visible as an international court or tribunal. Andrew Lang and Joanne Scott describe in detail how the administrative and technical "hinterland" of the WTO allows for a great deal of exchange of information, and even contributes to norm development through the work of its committees.[911] In particular, they describe the accountability enhancing function of the WTO's Committee on Sanitary and Phytosanitary (SPS) measures (SPS committee) through its complaints procedure, which allows specific trade concerns to be raised by members, thereby corresponding to the

[909] Isaac B Kardon 'China Can Say "No": Analyzing China's Rejection of the South China Sea Arbitration' (2018) 13 University of Pennsylvania Asian Law Review 1, p 3.
[910] Richard B Stewart (supra note 194), p. 255.
[911] Andrew Lang and Joanne Scott 'The Hidden World of WTO Governance' (2009) 20 European Journal of International Law 575, p. 576.

participation model of accountability given by Keohane and Grant.[912] Whilst the complaints procedure of the SPS committee does not itself entail sanctions of any kind, it is a cooperative forum through which affected parties can voice their concerns, and requires the regulating state to justify its measures (give reasons). Operating against a backdrop of agreed upon international norms (accountability standards) and in the shadow of the WTO dispute settlement body (sanctions), the complaints procedure appears to have resolved many a conflict before it could end up in 'court'.[913]

5.8.3. Participation

Participation of natural and legal persons in the making of global regulation provides another mechanism through which the interests of those affected can be given sufficient regard. Participation ensures regard for the interests of those affected *during* the decision-making process. Participation is different from accountability in so far that it lacks the elements of justification, judgement and consequences that constitute accountability.[914] It operates *ex ante*, by requiring the cooperation of actors with different interests, so as to ensure a (more) legitimate decision.

It is generally agreed that an inclusive and informed process through transparency and participation promotes the public interest by enhancing control over the decision-makers, and allows those affected the opportunity to provide input on matters that affect them.[915] Eleanor Kinney writes that "[i]n conventional administrative law theory, the availability of public participation in administrative proceedings is a great source of democratic legitimacy for administrative processes," compensating for concerns about democratic legitimacy in the absence of political election or judicial appointment.[916] It is a "classic" feature of administrative law and thereby both a cornerstone and a possible benchmark to evaluate the maturity of GAL.[917]

Participatory rights are particularly complex at the global level, where such rights can be granted to either domestic authorities or to private individuals, and where relations exist not

[912] Ibid. p. 607.
[913] Ibid. p. 592-595.
[914] Ruth W Grant and Robert O Keohane (supra note 881), p. 452.
[915] Eyal Benvenisti (supra note 804), p. 162.
[916] Eleanor D Kinney 'The Emerging Field of International Administrative Law: Its Content and Potential' (2002) 54 Administrative Law Review 415, p. 429.
[917] Joana Mendes 'Administrative Law Beyond the State: Participation at the Intersection of Legal Systems' in Edoardo Chiti and Bernardo Giorgio Mattarella (eds) (supra note 842), p. 114.

only between these two dimensions but also between global bodies. Recent years have seen several participation mechanisms being put in place by different international organisations; as Joana Mendes writes, this is certainly a "noteworthy development".[918] But Mendes also observes that participation at the global level happens in an unstructured way, no doubt due to the lack of institutional unity and fragmentation between sectors, and due to the difficulties related to ensuring participation at the point of decision-making at the global level.[919] The unfortunate truth of this statement is showcased by Sabino Cassese, who identifies various categories of participatory rights at the global level, but notes that strong asymmetries remain between different regimes, which each have their own principles.[920] However, and despite the rudimentary nature of participation as a principle at the global level, Cassese concludes that is "no longer at a primitive stage of development" either.[921]

One of the barriers to ensuring successful participation at the point of global decision-making is a lack of accessibility of information about this process to individuals.[922] Eleanor Kinney writes that information about foreign proceedings and unfamiliar bodies is often difficult to get hold of (geographical accessibility), and more importantly perhaps, the highly technical nature of much international regulation is often difficult to grasp (cognitive accessibility).[923] With reference to Buchanan and Keohane, Richard Stewart provides a similar view that merely providing information to the public will do little to promote informed criticism and debate; rather, "global authorities must secure an adequate degree of "epistemic-deliberative quality" by making available "reliable information needed for grappling with normative disagreement and uncertainty concerning its proper functions.""[924] This is why transparency is such an important prerequisite to ensure effective participation. Moreover, even where those affected by decisions are given an avenue through which to participate in decision-making processes, this does not guarantee successful influence. Eyal Benvenisti warns "decision-makers can abuse the requirement of transparency by providing information selectively; at the end of the deliberations, decision-makers could simply ignore all the public comments and complaints."[925]

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[918] Ibid. p. 115.
[919] Ibid. p. 116.
[920] Sabino Cassese (supra note 806).
[921] Ibid.
[922] Eleanor D Kinney (supra note 916), p. 429.
[923] Ibid.
[924] Richard B Stewart (supra note 194), p. 259; Allen Buchanan and Robert O Keohane (supra note 891), p. 425.
[925] Eyal Benvenisti (supra note 804), p. 164.

Therefore, effective participation would require more than setting up avenues for those affected to provide comments (opportunities to participate). Some may argue that it requires there to be a *right* to participation for a certain effected group; a right which is protected by law.[926] Richard Stewart describes this as a form of *decisional* participation, whereby the law grants identified persons the right to vote on or otherwise play a role in the making of authoritative decisions by a body – a right often limited to members of that body, officials, or other "insiders".[927] It may be distinguished from *non-decisional* participation, which is broader, and may include attendance at meetings where upcoming decisions are discussed, consultation processes, membership on advisory or expert bodies, etc.[928] Decisional participation clearly provides a stronger, protected position to the affected party. However, at the global level this is often not feasible, and not only is non-decisional participation in the form of consultation or submission of comments very valuable; granting rights to participate has been shown to not necessarily solve problems of disregard.[929]

That participation in decision-making should be meaningful is bolstered by the above discussion on interactional law making. In exploring the why and how of transparency in the context of international environmental institutions, Jutta Brunnée and Ellen Hey highlight that resilient shared understandings (essential to interactional law making) "can only emerge through meaningful participation of all relevant actors, when all actors have the same information, and when they do in fact understand what is at stake and what others are concerned with."[930] To ensure genuine interaction, the mere existence of avenues for providing input is not enough. In this sense, the GAL perspective and the interactional account complement each other.

It was discussed earlier in this chapter that participation is meaningful, from the point of view of interactional law, where it allows all relevant actors to collectively engage with underlying international norms through a justificatory process of argument and persuasion (a two-way transmission belt). Furthermore, so as to be fair, it must also allow those affected to be heard and their views to be taken into account. This calls for formalised opportunities to influence the decision-making process, even where this may not culminate in actual

[926] This distinction is made by Joana Mendes (supra note 917), p. 117.
[927] Richard B Stewart (supra note 194), p. 235.
[928] Ibid. p. 261.
[929] Ibid. p. 236.
[930] Jutta Brunnée and Ellen Hey 'Transparency and International Environmental Institutions' in Andrea Bianchi and Anne Peters (eds) *Transparency in International Law* (CUP, 2013), p. 29.

participation in adopting the decision (a right to vote). Combining these perspectives, I posit that market conditionality should be built around a formalised interactive dialogue process with relevant stakeholders, which at least includes those affected by the measures. As previously mentioned, a prerequisite for this is a great degree of transparency. Actors must have the same information, and understand what is at stake and what others are concerned with.[931] It also requires the underlying reasons for a decision to be transparent; in other words, it requires (adequately) reasoned decisions.[932]

5.8.4. Reflexivity

It is evident from the sections above that the existence and content of administrative law-type standards depends on certain conceptual choices (whether made consciously or not) about who should be able to influence power, and how. These choices may change over time, and it is therefore important that any system which has as its purpose to limit the arbitrary exercise of power through a set of administrative law-type standards and mechanisms allows for them to be revisited, and thus to evolve. It is therefore necessary to stimulate critical reflection on these standards and mechanisms themselves; reflection on the appropriateness of standards of appropriateness.

In their analysis of the WTO SPS committee, mentioned above, Andrew Lang and Joanne Scott also take note of its critical self-awareness about its own role and operation and suggest endorsing such "reflexivity" as a "new candidate norm" of GAL.[933] The appeal of doing so is, *inter alia*, that it may facilitate awareness of – and if necessary resistance to – the standards that form established (and possibly unfair) benchmarks of accountability.[934] Given the difficulty for any one body to carry out a more systematic evaluation, Lang and Scott acknowledge that any reflexivity norm should "operate at different levels of analysis" so as to maintain an overarching rather than discrete institutional viewpoint.[935]

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[931] Ibid.
[932] Eyal Benvenisti (supra note 804), p. 166. See also Mercedes Rosello (supra note 669), p. 310. Similar to the arguments advanced in this thesis, Rosello considers that the Regulation affords "a unique platform to harness the normative potential implicit in the harmonisation of State practices that results from implementation", though in order to succeed at this, the Commission must underpin its decisions with "adequate international legal rationale."
[933] Andrew Lang and Joanne Scott (supra note 911), p. 609.
[934] Ibid. p. 609-610.
[935] Ibid. p. 610.

A necessary condition for this is that sufficient information is available, not only to accountability holders to assess a particular governing body's performance but also, as Buchanan and Keohane point out, to those who 'reflect', namely those who may contest the terms of accountability themselves.[936]

Whilst reflexivity may thus come from within a body or an institution itself and may be more or less institutionalised, it is usually carried out by external actors. Buchanan and Keohane identify external agents such as "NGOs and other actors in transnational civil society" as relevant actors for carrying out this critical reflection.[937] Being external, they are not affected by the decisions themselves; yet they are in a good position to question not only a body's performance but also its general aim and role, and the standards against which its performance is being measured. They are more easily adapt to adopting an overarching viewpoint and could reflect at the "macro level" upon the relevance of appropriateness standards for market conditionality in light of the fisheries regime as a whole.

5.9. Conclusion

This chapter has drawn on interactional law and GAL to see under what conditions market conditionality in fisheries can promote compliance with international fisheries norms and obligations and help further develop them, and do so in a way that is procedurally fair. It has called for congruence with existing international fisheries norms and obligations; an interactional approach, so as trigger collective engagement with the underlying norms in question; and respect for accepted legal limits on the behaviour of market states in international relations (compliance with international law), as well as a general need for transparency, non-discrimination and fairness in the implementation of market measures (in so far that this is not already required by law).

Fairness is thereby important both because it may help promote compliance and norm development, and because avoiding arbitrary decisions it is important in its own right. There is a substantive and (most importantly) a procedural aspect to this. First of all, the evolving duties under the law of the sea regime should be interpreted as imposing an obligation on market states to consider a country's development status when determining to blacklist.

[936] Allen Buchanan and Robert O Keohane (supra note 891), p. 427-428.
[937] Ibid. p. 428.

Second of all, blacklisting decisions should be implemented following a fair procedure, so as to limit arbitrariness.

Market conditionality in fisheries can be usefully described as a type of global administration. This offers a solution: namely, administrative law-type standards and mechanisms to enhance fair procedure and thereby ensure sufficient regard to those affected by a market state's decisions. Regard-promoting mechanisms principally centre around participation (*ex ante*) and accountability (*ex post*). So as to bring about procedural fairness, these mechanisms will generally require a high degree of transparency, reasoned decisions, opportunities to consult, timely notifications, and so on.

Considerable overlap exists between the conditions under which market conditionality can be deemed appropriate. Market conditionality in fisheries must not only comply with international law because we believe this to be important, but also because not doing so weakens its possibility to support international normative efforts in fisheries. Transparency and a high degree of participation in decision-making are not only principles of fair process, but elements without which there can be no collective engagement with norms, or meaningful interactions between actors. And not only would broad transparency allow for reflexivity about the relevance of current standards of appropriateness; it would generate broader discussion and engagement over the interpretation of the underlying norms, which this chapter has shown to be an important element in shaping and maintaining law.

Chapter 8 expands on these theoretical 'ideal conditions' and asks concretely what this means for market conditionality in fisheries. It puts flesh on their bones by reference to international law and jurisprudence, non-binding instruments such as the Code of Conduct, and practice by other global administrative bodies (namely, RFMOs). In doing so it builds on chapters 6 and 7, which together give a complete and detailed overview of the standards with which market conditionality must comply so as to be deemed appropriate from all three angles discussed in this thesis.

6. The appropriateness of market conditionality: jurisdiction and the law of the sea

6.1. Introduction

This chapter is the first out of three chapters to examine more closely what it means for market conditionality in fisheries to be appropriate, starting with the first criteria: compliance with international law (legality). The previous chapter explained that compliance with international law is necessary not only because we believe it to be important *per se*, but also because not complying with international law will likely affect the contribution of such measures to international normative efforts towards sustainable fishing. This chapter focuses on international law *outside* the context of WTO law, namely, limitations that arise from the law of the sea regime and general international law principles on jurisdiction.

Section 6.2 begins by introducing the *Swordfish* dispute between Chile and the EU (EC at the time), which – though never adjudicated upon – provides inspiration where to look for grounds for dispute, and grounds for defence. By regulating circumstances that occur abroad, including how fishing activities should be conduct elsewhere, the market state may frustrate (or at least overlap with) the flag state's jurisdiction over its fishing vessels. This is best understood by first looking at general accepted bases of jurisdiction (and in particular that of territoriality) (section 6.3), and then, by reference to the recent ruling in *Norstar*, the question whether market measures risk affecting other states' flag state jurisdiction (section 6.4). To find the right balance between any potential overlapping jurisdictional claims, some limiting principles have been suggested, and these are examined in section 6.5. This section looks at the relevance of the principle of non-intervention, which would likely prohibit extreme economic coercion, and the need to act in good faith, not constitute an abuse of right, and the relevance of Art. 194(4) LOSC (refrain from unjustifiable interference with the activities of other states). Moreover, it is strongly suggested that market conditionality in fisheries should not discriminate, and section 6.6 identifies normative bases for this in the law of the sea regime. There is also the risk that, where market access is made conditional upon the particular management of a transboundary stock also exploited by the market state, this frustrates the duty to cooperate (section 6.7). This should clearly be avoided. Finally, section 6.8 considers the possibility that, *even if* states are found in breach of international law by conditioning market access in fisheries thus, this can be justified under the rules of state responsibility as valid countermeasures. Section 6.9 concludes.

6.2. The Swordfish dispute

The *Swordfish* dispute between Chile and the EU presented a case of market conditionality similar to that of the EU Non-Sustainable Fishing Regulation, except that the roles were reversed and the EU was disputing Chile's decision to block EU vessels from its ports. The *Swordfish* dispute was the result of years of controversy over the conservation and management of swordfish, a valuable and declining highly migratory species (Art. 64 LOSC/Annex I). Marcos Orellana gives a detailed account of its factual and legal background. Chile, the coastal state, adopted various decrees for the purpose of conserving swordfish and associated species. In 1991, a consolidated fisheries law was passed (Ley General de Pesca y Acuicultura), granting authority to the administration to establish conservation and management measures for various transboundary stocks found both in the EEZ and the high seas, to prohibit the landing of catches that did not comply with these measures, and to prohibit those vessels to be serviced in Chilean ports.[938] A decree was then passed on the basis of this, extending existing Chilean conservation measures for certain migratory species in the EEZ to the whole range of the stock.[939] Chile thus effectively operated a ban on landing and transit of highly migratory species (such as swordfish) caught inside or outside the Chilean EEZ, when these catches were made in contravention of Chilean conservation measures, including catches made on the high seas.

As a result, Spanish (EU) flagged vessels fishing for swordfish on the high seas were denied access to Chilean ports, in so far that the Chilean Fisheries Agency considered them to be undermining the swordfish fishery. Many years of negotiations later, including a failed attempt to set up a bilateral scientific and technical commission for the conservation of the stock, the positions of both parties (the need for conservation measures vs. port access) had become "entrenched" and "irreducible".[940]

On 26 May 1998, the Asociación Nacional de Armadores de Buques Palangreros de Altura (ANAPA, the Spanish national association of owners of deep-sea longliners) complained to the European Commission.[941] It alleged *inter alia* that Chile maintained a

[938] Marcos A Orellana 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71 Nordic Journal for International Law 55, p. 60.
[939] Ibid. p. 60.
[940] Ibid. p. 62.
[941] The complaint was made pursuant to Arts. 3 and 4 of Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the

prohibition on transhipment and transit of swordfish catches in Chilean ports inconsistent with WTO law. In particular, Art. V GATT (on the freedom of transit), since Chile had effectively prevented it from accessing the US market (which sources its swordfish in Chilean ports), and had rendered it impossible to expand EU fishing capacity in the region.[942] The Commission investigated the matter and agreed this was indeed the case, concluding on various breaches of the rules of the GATT, namely Art. V (transit) and XI (quantitative restrictions on trade), and suggesting other provisions might be breached as well .[943] It also challenged Chile's requirement for a health certificate to accompany all fish that enter Chilean territory, even for transit. This aspect of the dispute is not relevant for the purpose of drawing a comparison with market conditionality, and is not considered further here. The Chilean authorities had always justified the alleged violation of the GATT on the basis of the general exceptions under Art. XX GATT, in particular paragraphs (b) and (g), but Commission found that this could not be the case.[944] The scope of these exceptions is looked at in some detail in chapter 7, section 3.

The report following the investigation advocated several alternative courses of action, namely opening bilateral negotiations with Chile on the immediate question of transit, to be followed by a long term, multilateral, agreement on the conservation and management measures for swordfish in the South East Pacific area; opening a dispute settlement procedure in the framework of the WTO; or alternatively resorting to the ITLOS for an interpretation of the LOSC.[945] The first option being unsuccessful, tensions reached a high point, and the EU quickly initiated consultations through the WTO; the first step in a dispute as part of the WTO dispute settlement mechanism. The dispute before the WTO is discussed in chapter 7.[946] Chile reacted by inviting the EU to engage in formal arbitration under a LOSC Annex

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exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, 31 December 1994, OJ L349/71 (now repealed by Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the WTO (codification), 16 October 215, OJ L 272.

[942] European Commission, Notice of initiation of an examination procedure concerning an obstacle to trade, within the meaning of Council Regulation (EC) No. 3296/94, consisting of trade practices maintained by Chile in relation to the transit and transhipment of swordfish in Chilean ports, OJ C215/2.

[943] Commission Decision under the provisions of Council Regulation (EC)No 3286/94 concerning the Chilean prohibition on unloading of swordfish catches in Chilean ports, 5 April 2000, OJ L96/67, paras. 13-14.

[944] European Commission (supra note 956).

[945] Answer to the Written Question E-1946/99 by Daniel Varela Suanzes-Carpegna (PPE-DE) to the Commission (Ban on unloading EU catches in Chile), 1 October 2000, OJ C219 E/50.

[946] *Chile – Swordfish*, 26 April 2000, Request for Consultations (WT/DS193/1, G/L/367).

VII Tribunal, and it was eventually agreed upon to establish a five judge Special Chamber of the ITLOS (the EU not being favourable to bringing the dispute before the ITLOS).[947] The ITLOS agreed to this on 20 December 2000.[948]

Chile presented four claims, which essentially argued that the EU had failed its obligations to conserve swordfish; had failed to cooperate with Chile as the coastal state; had challenged Chile's sovereign rights to conserve the living resources in its EEZ by bringing a claim before the WTO Dispute Settlement Body; and asking whether the EU had fulfilled the requirements for disputes under the LOSC.[949] In response, the EU argued *inter alia* that Chile had violated the EU's freedom to fish on the high seas, and affected future cooperation. The dispute was settled at an early stage, before the parties even presented their (counter) memorials to shed light on their claims.

Whilst the *Swordfish* dispute did not result in a decision which could be used here as guidance, I will now draw on the EU's two claims (frustrating cooperation and breach of high seas freedoms), and inspect to what extent they could limit market conditionality in fisheries as described here in this thesis. Chile's claims will be looked at only in so far they provide a justification for engaging in market conditionality. They are therefore considered in the section on countermeasures, which is discussed below.

6.3. A jurisdictional nexus?

States express their sovereignty *inter alia* by regulating certain conduct and the consequences of certain events (such as the conditions under which fish entering their markets was caught), which is structured by international law through the concept of jurisdiction.[950] The EU's central claim concerned a breach of its high seas freedoms enshrined in Art. 87 LOSC. This is directly linked to the issue of exclusive flag state jurisdiction on the high seas (Art. 92), which may be frustrated by particular action in port/by a market state against foreign flagged fishing vessels. So as to provide the necessary legal context, this section first introduces

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[947] Marcos A Orellana (supra note 938), p. 67.

[948] ITLOS, Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Order 2000/3) 20 December 2000.

[949] Ibid.; discussed in detail in John Shamsey 'ITLOS vs. Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute' (2002) 1 Transnational Law and Contemporary Problems 513.

[950] Robert Y. Jennings and Lassa F. L. Oppenheim *Oppenheim's International Law* (Longman, 1992), p. 456.

international law principles of jurisdiction, and examines general limitations on market state regulation of behaviour that has occurred abroad.

A first and important point to make is that it matters what market (or port) measures we are talking about. In the context of port state enforcement measures, Erik Molenaar distinguishes between two main groups of more or less onerous measures, that can also be applied here. On the one hand, a state can adopt prohibitive measures, the principle aim of which is "to withhold benefits to which foreign vessels have no entitlement under general international law".[951] On the other hand, it can adopt measures with a "punitive element", such as boarding and inspecting; detention; and penalties.[952] The reason why this distinction is important, is that there is *no general right of access* to another country's market, or ports. Back in 1797, Emmer de Vattel wrote that, cases of extreme necessity aside, every state has "a right to prohibit the entrance of foreign merchandise; and the nations that are affected by such prohibition have no right to complain of it, as if they had been refused an office of humanity."[953] Market access can therefore be lawfully withheld by a state, typically to protect its own market or society or to influence other states to (not) act in a particular way. This was confirmed in the *Nicaragua* case, where the ICJ declared that, absent a treaty commitment or other specific legal obligation, "a state is not bound to continue particular trade relations longer than it sees fit".[954] For the same reasons, there exists a generally accepted presumption that vessels have no right under international law to access to port. Ports are part of a state's internal waters, and thereby part of its territory and subject to territorial sovereignty.[955] States' therefore enjoy a sovereign right to restrict or condition access to their port, except in cases of distress, so as to render assistance, and where this is provided for by agreement. [956]

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[951] Erik J Molenaar 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use' (2007) 38 Ocean Development & International Law, p. 229.
[952] Ibid.
[953] Emmer de Vattel *The Law of Nations, or, Principles of The Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (London, printed for G. G. and J. Robinson Paternoster-Row, 1797), p. 39.
[954] *Nicaragua* (supra note 275), para. 276.
[955] Art. 2(1) LOSC (sovereignty over land territory, internal waters, and territorial sea); Art. 8 LOSC (definition of internal waters); Art. 11 LOSC (definition of where the port ends and territorial waters begin). See also the judgment in *Nicaragua* (supra note 275), that it is "by virtue of its sovereignty that the coastal State may regulate access to its ports", and elaborating further on the right of passage through the territorial sea that "*any State which enjoys a right of access to ports* for its ships also enjoys al1 the freedom necessary for maritime navigation", implying that such a right is not a given, paras. 213-214 (emphasis added).
[956] Louise de La Fayette 'Access to Ports in International Law' (1996) 11 International Journal of Marine and Coastal Law 1 (setting out the historical debate and concluding that no right of free access exists, or arguably ever existed for fishing vessels); Erik J. Molenaar Coastal State Jurisdiction Over Vessel-Source Pollution

The discussion could end there. Though the EU IUU Regulation provides measures such as confiscating and discarding catch; detaining a vessel; or fining an operator that has committed a serious violation, this thesis is focused on withholding market access, *not* punitive measures.[957] Market conditionality (in general) may run the gauntlet of WTO law, and this is discussed in chapter 7. This aside, states appear sovereign to make market access conditional upon whatever they please. It is, after all, their territory. Though a state is not allowed to enforce its laws outside its territory without consent except "by virtue of a permissive rule derived from international custom or from a convention",[958] trade measures are enforced at the border. This leads some authors to conclude that trade measures can never be *extra*territorial (and therefore difficult to justify), because they can be avoided if so desired.[959]

(Kluwer Law International, 1998), p. 101; Sophia Kopela (supra note 396), p. 94, referencing *inter alia* G. C. Kasoulides *Port State Control and Jurisdiction: Evolution of the Port State Regime* (Martinus Nijhoff, 1993), p. 2–22; and Arron N Honniball 'Extraterritorial Port State Measures: The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing' [2019] Thesis submitted for the degree of Ph.D., p. 143-144 (advancing arguments for and against and concluding that no such right exists). I observe that in the context of the EU's dispute with Chile over swordfish in 2000 (discussed in some detail in chapters 3 and 7) the Commission concluded that "the prevailing legal opinion in this matter accepts a presumption of free access to ports, but does not go as far as to consider there to be a legal obligation for the coastal State to allow unconditional access to its ports." (European Commission, Report to the Trade Barriers Regulation Committee: proceedings concerning Chilean practices affecting transit of swordfish in Chilean ports (March 1999), p. 48). Evidently, the EU now makes extensive use of their *not* being a presumption of free access to port and widely denies port entry in order to combat IUU fishing through the EU IUU and Non-Sustainable Fishing Regulations.

[957] A vessel's catch may be confiscated and destroyed, disposed of or otherwise sold in the scenario where its catch certificate appears to be invalid (Art. 18(2)). An EU member state will first seek a vessel's flag state's assistance in the verification of a catch certificate, but will proceed to confiscate and dispose of the catch where the flag state confirms there has been fraud, but also where the flag state fails to provide information within a given deadline or gives a reply which does not provide pertinent answers to the questions raised in the request. A decision to refuse importation and/or confiscate products is subject to appeal (Art. 18(3)). Similarly, gear prohibited by an RFMO will be confiscated of blacklisted vessels that are granted access to port, as well as their catch, even in cases of force majeure or distress (Art. 37(5)). In practice, Palin and others note discrepancy between EU member countries in what to do when a catch certificate is refused, whereby some countries (Spain, the UK) send back or forward rejected products to another destination, despite the fact that this is not foreseen by the Regulation (Carlos Palin and others (supra note 40), p. 113.

[958] *Affaire du "Lotus"* (Government of the French Republic v. Government of the Turkish Republic) (Judgment), 7 September 1927, Publications of the PCIJ, Collection of Judgments, Series A. – No. 10, p. 18-19; Cedric Ryngaert (supra note 576), p. 29.

[959] Lorand Bartels 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36 Journal of World Trade 353, p. 376, who gives a long list of examples of authors who hold this view, including Steve Charnovitz 'Dolphins and Tuna: An Analysis of the Second GATT Panel Report' (1994) 24 Environmental Law Reporter 10567; Andre Nollkaemper 'Rethinking States' Rights to Promote Extra-territorial Environmental Values' in Friedl Weiss, Erik Denters and Paul de Waart (eds) *International Economic Law with a Human Face* (Kluwer Law International, 1998), p. 188; Belinda Anderson 'Unilateral Trade Measures and Environmental Protection Policy' (1993) 66 Temple Law Review 751, p. 754-755.

But as Lorand Bartels explains, this wrongly assumes that an exercise of prescriptive jurisdiction (e.g. regulating fishing activities abroad) is "only problematic when it is enforced by means of sanctions", which he argues to be an unduly narrow point of view.[960] Even if denying market access is not necessarily punitive in the sense that detention and penalties are, the question whether exercising prescriptive jurisdiction over (fishing) activities that have occurred abroad is problematic *in and of itself* warrants a closer look. Since, by making market access conditional upon circumstances and behaviour abroad, the market state effectively regulates this foreign behaviour; it exercises prescriptive jurisdiction over it.

It must therefore be examined whether there is a sufficient jurisdictional nexus between the regulating (market) state, and the behaviour that is being regulated. Unlike enforcement jurisdiction, prescriptive jurisdiction is not necessarily and not always territorially bound. So when can prescriptive jurisdiction be asserted over particular conduct or circumstances (abroad)? Two alternative theoretical starting points can be envisaged. *Either* a state *has* the right to assert jurisdiction, unless prohibited to do so; or it does not, unless a rule permits it. In the *Lotus* case, the Permanent Court of International Justice (PCIJ) famously concluded the following on the matter:

> "Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable."[961]

Prescriptive (and adjudicatory) jurisdiction could, at the time the *Lotus* case was decided, thus seemingly be projected freely beyond the territory of the regulating state (unless prohibited otherwise). But this *laissez faire* approach of an alleged presumption of freedom taken in the *Lotus* case is now much debated.[962] Often argued as being out of date, others – such as Christopher Staker – posit that the PCIJ's wording is probably misunderstood. Staker contends that "a moment's thought will indicate that it is extremely improbable" that the Court really meant to say that prescriptive jurisdiction can be exercised *unless* prohibited by

[960] Lorand Bartels (supra note 959), p. 377.
[961] *Lotus* (supra note 958.), p. 18-19.
[962] See for instance *Pulp Mills* (supra note 436) (in particular footnote 6, citing various opinions discussing the matter).

an international rule.[963] In any event, there appears to be a consensus nowadays that "requires States to justify their jurisdictional assertion in terms of a permissive international law rule".[964] This means there must be a "clear connecting factor, of a kind whose use is approved by international law, between the legislating state and the conduct it seeks to regulate".[965]

Though debated, the following bases on which states claim the right to assert prescriptive jurisdiction can be identified: territoriality, nationality, universality, and the protective principle. The principle of territoriality (as understood broadly) provides the strongest jurisdictional nexus for market conditionality in fisheries.[966] The only other plausible candidate could be the protective principle, which has been used to justify jurisdiction where foreign conduct may prejudice an essential interest of the regulating state. The list of essential interests is not closed, and has been used to regulate the counterfeiting of currency, to suppress illegal drug trafficking, and in the case of espionage. This *could* be relevant also to market conditionality, in so far that IUU fishing is increasingly linked to transboundary crime, because of the scale and complexity of certain illegal fishing operations and the fact that many illegal fishing operations are interrelated with drug smuggling and human trafficking.[967] However, Christopher Staker however warns against the "overblown rhetoric with which governments from time to time describe their attempts to combat various 'threats' to the State, or to civilised values or to the world order or whatever, must take their toll. The pressure to expand the use of this principle, and the danger of unshackling it from the

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[963] Christopher Staker 'Jurisdiction' in *International Law* (ed. Malcolm D. Evans) (OUP, 2018), p. 295.
[964] Cedric Ryngaert (supra note 576), p. 29.
[965] Christopher Staker (supra note 963), p. 295.
[966] The principle of nationality allows a state to assert jurisdiction over its nationals, though it is relatively infrequently used. The principle of nationality moreover stretches to jurisdiction over aircraft and vessels, and depending on the country, to companies (Christopher Staker (supra note 963), p. 299; *Barcelona Traction* (supra note 469)). The nationality principle could for instance justify the assertion of jurisdiction over domestic operators and fishermen and deny them the purchase of foreign fishing vessels that were previously flagged to a blacklisted country; the reflagging of vessels to a blacklisted country; and the entering into chartering arrangements with nationals from such a country. Universal jurisdiction is granted in specific cases, e.g. in cases of piracy (Art. 105 LOSC).
[967] Teale N Phelps Bondaroff *et al* 'The Illegal Fishing and Organized Crime Nexus: Illegal Fishing as Transnational Organized Crime' (2015); United Nations Office on Drugs and Crime 'Transnational Organized Crime in the Fishing Industry'; UN General Assembly Resolution of 24 February 2008, A/RES/63/112 and all subsequent annual UN General Assembly Resolutions on Fisheries (*inter alia* nothing "the concerns about possible connections between international organised crime and illegal fishing in certain regions of the world(...)" and since 2011 taking note of the UN Office on Drugs and Crime report); and for a practical overview of cases and other types of materials suggesting that there exists links between fishing and various types of organised crime, see G Stølsvik 'Cases and Materials on Illegal Fishing and Organized Crime' [2010] Norwegian National Advisory Group against Organized IUU-Fishing.

protection of truly vital interests and of permitting its use for the convenient advancement of important interests, is clear."[968]

The argument that there is a territorial connection between the regulating state and the regulated conduct can be – and has been – taken quite far, so as to effectively regulate conduct that occurs (partly) abroad. For instance, states have regulated conduct which starts in their territory but is completed outside their territory, or has its primary effects abroad (also referred to as subjective territoriality).[969] Whilst this is not very controversial, states have also considered there to be a territorial nexus where foreign conduct originates abroad but is completed within the regulating state's territory (objective territoriality).[970] The latter has proven more difficult to justify. It has given rise to what is sometimes called the effects doctrine.[971] On this basis, jurisdiction has been asserted over foreign conduct that was intended to affect the regulating country, though without physical acts actually being committed on its territory.[972] Whether this is a form of extraterritoriality or not is a much-debated matter, and is treated differently in the US than in the EU. There is some jurisprudential evidence that the effects-doctrine may provide an acceptable basis for jurisdiction provided that the territorial effects of the regulated conduct are substantial (US), as well as foreseeable and immediate (EU).[973]

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[968] Christopher Staker (supra note 963), p. 301-302.

[969] Ibid. p. 297; James Crawford (supra note 279), p. 458.

[970] Christopher Staker (Ibid.).

[971] Ibid. p. 298.

[972] Ibid. referring *inter alia* to *United States v. Aluminium Co of America* (1945) 148 F.2d 416 and *Rio Tinto Zinc Corp v. Westinghouse Electric Corp* [1978] 1 All ER 435 (HL).

[973] Joanne Scott (supra note 41), p. 92-93, pointing *inter alia* to the Restatement (Third) of Foreign Relations Law of the US (recently replaced by a fourth Restatement), §402(1)(c), that "a state has jurisdiction to prescribe law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory", and T-102/96 *Gencor* [1999] ECR II-00753, in which the EU's Court of First Instance held it to be in line with international law that the territorial scope of the Merger Control Regulation extends to conduct occurring abroad (namely, a proposed concentration notified by undertakings whose registered offices and mining and production operations were located are outside the EU) where it is foreseeable that this conduct has an immediate and substantial effect in the EU (para. 90). It then went on to examine whether the three criteria (immediate, substantial and foreseeable effect) were satisfied (para. 92). However, Scott identifies that jurisdiction under the Regulation is not asserted *only* on the basis of effects. In order for the Merger Regulation to apply, a certain volume of EU sales are required – but once the threshold is met, foreign conduct is appraised as well. There is thus *some* territorial connection. Scott concludes that, in fact, it is "virtually unprecedented for the EU to found its jurisdiction exclusively on a finding of EU-felt effects" (p. 95). Most recently, the issue came to the fore in Case C-413/14 P *Intel Corp. v Commission* (2017). The case was an appeal, and one of the reasons for the appeal was that Intel considered the court to have wrongly accepted the qualified effects doctrine as a ground for the European Commission's jurisdiction. On appeal, the Court considered the effects doctrine to be a lawful base, under public international law, for the application of EU competition law taking place partly or wholly outside EU territiory. This is "a a major development" whereby the Court "aligned the reach of the system of enforcement of EU competition rules to that of several other countries, and in particular of the [US]" (Luca Prete 'On Implementation and Effects: The Recent Case-Law on the Territorial (or Extraterritorial?)

The effects doctrine could possibly provide a basis for regulating foreign fishing behaviour. However, there is a significant risk of getting caught up in a detailed analysis of the effects of damaging one part of the marine ecosystem on other parts – which is notoriously difficult to prove. From the one hand, this can be solved in turn by widening the effects doctrine so as to take into account the fact that "the problems of ocean space are closely interrelated and need to be considered as a whole", as stated in the LOSC Preamble. As previously mentioned in chapter 3, the ITLOS has therefore adopted a broad view of states' duty to cooperate over living resources that takes into account a stock's migratory patterns and geographical distribution. A holistic view would give every state an interest in marine environmental protection and the conservation of marine resources in general. It would presume there to be a sufficient jurisdictional nexus between the regulating market state and the conduct. This would be more in line with the *erga omnes* nature to protect and preserve the marine environment, as per Art. 192 LOSC. Chapter 7 briefly returns to this question in the context of justifying market conditionality mechanisms under Art. XX GATT.

A problem with this argument is that it casts the net very wide. The risk is to allow jurisdiction to be prescribed over any environment-related behaviour, anywhere, anytime, since in the end the entire environment (marine or terrestrial) is interrelated (and why stop at planetary boundaries?). Perhaps a more useful approach than trying to infinitely widen the category of territoriality by way of an overzealous effects doctrine is to consider Joanne Scott's 'mid-way category' of regulating by way of territorial extension.[974] Scott highlights that measures (in her research, EU law) are often wrongly classified as truly extraterritorial. Rather, they may give rise to territorial extension; measures whose "application depends upon the existence of a relevant territorial connection, but where the relevant regulatory determination will be shaped as a matter of law, by conduct or circumstances abroad."[975] So doing has enabled the EU at many instances to govern activities that are not centred upon its territory and to shape the focus and content of third country and international law.[976] With 'true' extraterritoriality, a measure imposes obligations without there being a territorial connection with the regulating state; the application of a measure is triggered by something

Application of EU Competition Rules' (2018) 9 Journal of European Competition Law & Practice 487, p. 492-493).

[974] Joanne Scott (Ibid.), p. 89-90.

[975] Ibid.

[976] *Joanne Scott (supra note 41)Joanne Scott (supra note 41)Joanne Scott (supra note 41)Joanne Scott (supra note 41)Joanne Scott (supra note 41)*Ibid. p. 89.

other than a territorial connection.[977] Similarly, port- and market-based enforcement measures are predominantly triggered by vessels seeking access to port/fish being placed on the market. This means there will often be 'a' territorial connection. Yet, the regulatory determination (having engaged in IUU/non-sustainable fishing) and the subsequent enforcement measures (e.g. denial of market access) depend upon conduct and circumstances abroad. Though arguably sufficient to establish a territorial connection, it may of course be insufficient to avoid political backlash.[978]

6.4. Competing flag state jurisdiction

The situation becomes more complicated within the legal framework of specific regimes. The law of the sea contains clear restrictions on the extent of state's jurisdiction over vessels depending on the zone in which the behaviour occurs. Lawful activity on the high seas is protected by Arts. 87 and 92 LOSC from enforcement as well as prescriptive jurisdiction of states other than the flag states. This could significantly limit the geographical reach of market (and port) state prescriptive jurisdiction over behaviour that has occurred abroad. Though punitive enforcement measures are more likely to be problematic that denying the benefit of market access, the argument is worth exploring.

The EU argued in *Swordfish* that Chile's port closures to Spanish vessels fishing for swordfish breached Art. 87 LOSC. Absent a court decision or even a memorial detailing the EU's argumentation, this section tries to reconstruct the argument here, aided by the recent decision in *Norstar*.[979] The *Norstar* case concerned Italy issuing a Decree of Seizure and a Request to Spain for assistance in its execution, which led to the arrest in the port of Palma de Mallorca of a Panamanian flagged vessel (the M/V Norstar) that had been engaged in supplying gasoil to mega yachts on the high seas (high seas bunkering). The Decree was drawn up in exercise of Italy's criminal jurisdiction and application of its customs laws,

[977] Ibid. p. 89-90.

[978] Nico Krisch 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 American Journal of International Law 1 offers three examples of challenges to classical, territorially based boundaries of jurisdiction and the growing non-consensual nature of regulating global public goods (e.g. by including extraterritorial considerations related to a global public good in domestic regulation). Krisch concludes, at p. 20, that the backlash against the EU's decision to include international aviation in its emissions trading scheme (discussed at supra note 874) highlights both the significance of this shift and its highly unsettled character. Cedric Ryngaert (supra note 576), p. 97, takes this to mean that, noting also their democratic unfairness and the hurdles they pose on developing countries, the lawfulness of territorial extension under international law remains unsettled.

[979] *M/V "Norstar"* (supra note 475).

targeting alleged crimes of tax evasion and smuggling on Italian territory, as well as the vessel's offshore bunkering activities on the high seas.

The dispute predominantly revolved around whether the Decree of Seizure, the Request for its execution and the arrest and detention of the M/V Norstar constituted a violation of Art. 87 LOSC (Panama's enjoyment of the freedom of navigation). Examining the scope of the Decree of Seizure, the Tribunal concluded that, whilst the Decree also concerned violations on Italian territory and was enforced in internal waters, the bunkering activities of the M/V Norstar on the high seas constituted *not only an integral part, but also a central element*, of the activities targeted by the Decree of Seizure and its execution.[980] The Decree effectively regulated bunkering activities on the high seas, and bunkering activities were found to fall within the scope of the freedom of navigation.[981]

The Tribunal confirmed its earlier findings in *Louisa* that vessels do not have a right to *leave* a port in which they are detained to gain access to the high seas, since states are sovereign in their internal waters and vessels therefore do not enjoy the freedom of navigation.[982] *However*, this does not mean that a vessel can be detained in port on any basis. The Norstar was not subject to Italian jurisdiction when bunkering on the high seas, yet this was one of the reasons for its arrest and detention. The Tribunal held that, "[a]s no State may exercise jurisdiction over foreign ships on the high seas, in the view of the Tribunal, any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the [LOSC] or other international treaties."[983] Because of the legal status of high seas (open to all states; no part thereof is subject to the sovereignty of any state), "any act which subjects activities of a foreign ship on the high seas to the jurisdiction of States other than the flag State constitutes a breach of the freedom of navigation, save in exceptional cases expressly provided for in the Convention or in other international treaties".[984] This is a "corollary of the open and free status of the high seas is that, save in exceptional cases, no State may exercise

[980] Ibid. para. 186 (emphasis added).
[981] Ibid. para. 219.
[982] Ibid. para. 221; *M/V "Louisa"* (Saint Vincent and the Grenadines v. United Kingdom of Spain), 28 May 2013, ITLOS Reports 2013, p. 4, para. 109.
[983] *M/V "Norstar"* (Ibid.), para. 222.
[984] Ibid. paras. 215 and 224.

jurisdiction over a foreign ship on the high seas"; a principle that is "clearly reflected" in Art. 92 LOSC.[985]

The Tribunal noted that Art. 87 LOSC "prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State *but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas*."[986] This is so, "even if the State refrained from enforcing those laws on the high seas"; "even when enforcement is carried out in internal waters, [Art. 87] may still be applicable and be breached if a State extends its criminal and customs laws extraterritorially to activities of foreign ships on the high seas and criminalises them" and "[t]his is precisely what Italy did in the present case".[987] It therefore concluded that Italy had breached the freedom of navigation pursuant to Art. 87.

The Tribunal's reasoning has been contested, mostly by reference to the Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge ad hoc Treves.[988] The Dissenting Opinion made a compelling case to the contrary, disputing the majority's finding of a breach of Art. 87. The judges argued *inter alia* that the high seas bunkering activities *themselves* were not unlawful or criminal in Italy or that the Decree and the Request, issued in the exercise of Italian criminal jurisdiction, criminalised or targeted them as such; rather, they were relevant for the criminal case investigated by the Italian authorities.[989] The point was made that, in any case, the bunkering activities were merely an element of the alleged crime which took place on Italian territory; there was a sufficiently strong territorial nexus *and* effect.[990] It was not however disputed that states may not exercise

[985] Ibid. paras. 216 and 217. Such an "exceptional case" can be found in the Fish Stocks Agreement, for example. By becoming party to the Fish Stocks Agreement, flag states consent to their vessels being boarded and inspected on the high seas by other state parties in certain circumstances (Art. 21).
[986] Ibid. para. 224 (emphasis added).
[987] Ibid. paras. 225 and 226.
[988] Richard Collins 'Delineating the Exclusivity of Flag State Jurisdiction on the High Seas: ITLOS issues its ruling in the M/V "Norstar" Case', posted on 4 June 2019, Blog of the European Journal of International Law, available at: http://www.ejiltalk.org/delineating-the-exclusivity-of-flag-state-jurisdiction-on-the-high-seas-itlos-issues-its-ruling-in-the-m-v-norstar-case/; Arron Honniball 'Freedom of Navigation Following the M/V "Norstar" Case', posted on 4 June 2019, Blog of the K. J. Jebsen Centre for the Law of the Sea, available at: http://site.uit.no/jclos/files/2019/06/JCLOS-Blog_4.6.2019_Honniball_Norstar_Freedom_of_Navigation.pdf.
[989] Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge ad hoc Treves in *M/V Norstar* (supra note 475), para. 26.
[990] Ibid. para. 32, stating the following: "Even if Italy exercised its prescriptive criminal jurisdiction in respect of this conduct on the high seas, this was exercised in respect of an integral part of the alleged crime (tax evasion), which commenced in its territory (purchase of fuel for falsely stated purposes in Italian ports), was completed in its territory (reintroduction of non-declared fuel into Italian internal waters) and had effects in the Italian

enforcement or prescriptive jurisdiction over vessels on the high seas flagged to another states.[991]

Whilst the case did not concern fishing vessels, the reading of the majority has significant consequences. The judgment suggest that, where a state extends prescriptive jurisdiction over fishing activities abroad that are lawful under international law, and in particular where these take place on the high seas, this clashes with the exclusive jurisdiction of the flag state – even where this is enforced in port. The unfortunate side effect of such a reading is that in the absence of proper flag state control, it becomes very difficult to regulate high seas behaviour by fishing vessels. On the other hand, a broad understanding of what lawful high seas behaviour entails could still allow port/market states to intervene in cases of flagrant abuses.

The findings of the majority would appear to safeguard against a situation in which the port/market state exports its own standards and applies them to foreign fishing vessels when they operate on the high seas. It raises the complicated question whether port/market states can regulate fishing by a foreign vessel in non-compliance with RFMO conservation and management measures, in the event that the flag state cannot be said to be bound by them. This is unregulated fishing (IUU), but might also be a lawful high seas activity where this has been conducted in a manner that does not denote a breach of any international obligations of that state. Its flag state may have tried unsuccessfully to obtain a quota from a 'closed club' RFMO, but cannot be said to have failed its duty to cooperate (as discussed in chapter 3, section 3.10.2). Market-based measures that impose sanctions on foreign flagged vessels for having engaged in such activities would therefore breach Art. 87, whether or not these regulations are enforced in the regulating state's own territory (its ports). Similarly, measures like those adopted against vessels under the Non-Sustainable Fishing Regulation where they lawfully operate in the EEZ of a blacklisted country, would constitute a breach.[992] The judgment in *Norstar* suggests that such (lawful) fishing activities will be protected from prescriptive and enforcement jurisdiction by any state other than the flag state by virtue of

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territory (financial damage from non-payment of taxes). Since the alleged crime was initiated and completed in Italian territory, there is no doubt that its location was Italy and not the high seas."

[991] Ibid. para. 16.

[992] Whilst this is not a form of IUU fishing, the situation may arise under the EU Non-Sustainable Fishing Regulation. However, it may be observed that this Regulation provides only for market restrictions, port closures, and restrictions on EU operators in their dealings with such vessels – not sanctions, as under the EU IUU Regulation. This comes back to the question whether 'less onerous' enforcement measures (market access denial) are problematic from the point of view of jurisdiction.

Arts. 87 and 92 LOSC. The answer would have to be that jurisdiction *cannot* be exercised over this by any state other than the flag state.

A breach of Art. 87 would be avoided if an exception is expressly provided for in the LOSC or another agreement. A candidate for providing such an exception is the Port State Measures Agreement, which requires port states to take action against foreign flagged vessels that have engaged in IUU fishing as defined in the IPOA-IUU. In so far that the Port State Measures Agreement allows port state jurisdiction to be extended over IUU fishing, it does so without clearly distinguishing between lawful and unlawful activities on the high seas, since it simply refers back to the definition of IUU fishing found in the IPOA-IUU. As discussed in chapter 3, section 3.6, unregulated high seas fishing is often *not* (or not necessarily) contrary to international law, but in fact lawful.

The Port State Measures Agreement tries to walk the line between preserving flag state jurisdiction, and allowing port states to act. Beyond denial of port entry and restrictions on port services, the Agreement stipulates that port states may allow a vessel entry to port in order to subject it to "other appropriate actions in conformity with international law which are at least as effective as denial of port entry in preventing, deterring and eliminating IUU fishing and fishing related activities in support of such fishing" (Art. 9(5)). If, following an inspection, it appears that a vessel has engaged in IUU fishing, a port state is moreover not prevented from "taking measures that are in conformity with international law (...) including such measures as the flag State of the vessel has expressly requested or to which it has consented" (Art. 18(3)). Whilst the port state can thus in theory extend its jurisdiction over fishing activities on the high seas by other vessels and for instance apply criminal sanctions to such activities, it can only do so in conformity with international law. The Agreement therefore does not bestow any new rights upon states in that regard.

When conditioning market access, states should evidently be aware not to overly exert jurisdiction over behaviour and concerns abroad, even where the presence of a vessel in port or products on a country's market provides "a" territorial nexus. The most obvious geographical limitation on asserting jurisdiction comes from the specific legal character of the high seas regime, which protects vessels from the prescriptive and enforcement jurisdiction of other states, in so far that this concerns lawful activities. Jurisdiction should therefore not be exerted over lawful fishing on the high seas, including where this may fall within the definition of IUU fishing, *except* in cases *expressly* provided for in the LOSC or

other international treaties.[993] This would likely prevent a state from detaining a vessel, confiscating catch, and imposing sanctions on the vessel's owner/operator for IUU fishing on the high seas, except where the fishing can be clearly deemed unlawful under international law.

Examining the EU measures on these grounds, I observe the following. The EU IUU Regulation shows restraint when adopting punitive measures for fishing activities that have occurred abroad, under a non-EU flag. Whilst IUU fishing and related business activities are a serious infringement and subject to enforcement measures in the EU, also where they have taken place abroad, Art. 11(4) contains the following safeguard (emphasis added):

> "Where the suspected breach has taken place in the high seas, the port Member State shall cooperate with the flag State in carrying out an investigation into it and, where appropriate, shall apply the sanctions provided for by the legislation of that port Member State, under the condition that, in accordance with international law, *that flag State has expressly agreed to transfer its jurisdiction*. In addition, where the suspected breach has taken place in the maritime waters of a third country, the port Member State shall also cooperate with the coastal State in carrying out an investigation into it and, where appropriate, shall apply the sanctions provided for by the legislation of that port Member State, under the condition that, in accordance with international law, that coastal State has expressly agreed to transfer its jurisdiction."

However, no restraint is visible in the provision allowing catch to be confiscated and disposed of upon finding that a catch certificate is invalid (e.g. because the flag state in question is blacklisted, or because the EU member state requested assistance from the flag state in verifying the catch certificate and got a slow or "not pertinent" response) (Art. 18(2)). Similarly, no such safeguard exists for the confiscation of catch and fishing gear prohibited by an RFMO when a vessel that appears on an RFMO blacklist finds itself in an EU port – even in case of distress (Art. 37(5)). Yet, as explained in chapter 3, section 3.6 and 3.10.2, the fact that a vessel appears on an RFMO blacklist does *not* necessarily mean it engaged in unlawful activity (although it may have).

Punitive enforcement measures adopted by the market/port state, such as sanctions, thus risk undermining the flag state's exclusive jurisdiction, in particular where they are imposed to discourage what is essentially lawful behaviour (certain types of unregulated high seas fishing). But the question remains: what of restricting market/port access? There is an important difference between the issue at stake in the *Norstar*, and market conditionality in

[993] *M/V Norstar* (supra note 475), para. 224.

fisheries as delimited in this thesis. The *Norstar* concerned the exercise of criminal and customs jurisdiction. It concerned the infliction of punitive measures on foreign vessels, whereby the regulatory determination was shaped by conduct or circumstances abroad (here, on the high seas). The situation looks different when market- or port states adopt what Erik Molenaar refers to as 'less onerous' enforcement measures: denial of market/port access.[994] When denying market/port access, the entrance of a fishing vessel into a foreign port and it seeking to land and sell its catch certainly creates "a" territorial connection. The regulatory determination (having engaged in IUU; being compliant) and the subsequent consequences (such as market denial/access) depends upon conduct and circumstances abroad (of the legality catch in question; of the non-blacklisted status of the vessel in question; and, with country-level market conditionality, of the behaviour of the flag state in question). The market/port state operates by way of territorial extension rather than actual extraterritoriality, and there would appear to be a sufficient (territorial) nexus to regulate. However, I suggest that where the market state effectively prescribes how to carry out fishing activities abroad, in particular where these are deemed lawful under international law (e.g. lawful unregulated fishing), this can be seen as encroaching upon the flag state's exclusive jurisdiction over its vessels. The situation is arguably best seen as one of balancing interests between the market/port state's sovereign right not to grant access, and the flag state's exclusive jurisdiction over fishing vessels flying its flag (or any other competing jurisdictional claims that may arise). I turn to this next.

6.5. Balancing overlapping jurisdictional claims

The literature makes various suggestions on how to limit or allocate jurisdiction in complex situations, such as those of overlapping jurisdiction, including by a 'rule of reason'.[995] This was suggested by the Restatement (Third) of US Foreign Relations Law (now superseded by the Fourth Restatement), which operated a two-tier test: first, a determination whether a sufficient jurisdictional basis exists, and second whether the exercise of jurisdiction is reasonable.[996] The latter was to be determined "by evaluating all relevant factors", a non-exhaustive list of which includes the importance of the regulation of the international

[994] Erik J Molenaar (supra note 951), p. 229.
[995] Cedric Ryngaert (supra note 576), p. 148; see also Barbara Cooreman (supra note 579), p. 99.
[996] Restatement (Third) of Foreign Relations Law of the US, §403.

political, legal or economic system; consistency with international traditions; and other states' interest in regulating the activity.[997]

Whilst the third Restatement considered the need for reasonableness to be a matter of international law, scholars were and remain divided on the subject – and most appear to believe this not to be the case.[998] The recently published fourth Restatement also does not continue this position. As the reporters' notes explain, "state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law."[999] Indeed, Cedric Ryngaert argues that, whilst various international law principles that have been developed and applied in other fields of international law may *inform* a jurisdictional rule of reason as a legal principle, reasonableness does not in and of itself qualify as a norm of customary law.[1000]

Non-intervention and abuse of right are named as two of those principles, and discussed below for their particular relevance in the context at hand. Refusing to embrace a defeatist approach, however, Ryngaert supports the "quest for reasonableness" and proposes ways in which a rule of reason could work in practice.[1001] In an ideal world, agreements would spell out the maximal reach of state's laws in different areas of law (e.g. antitrust; human rights courts; securities; etc.).[1002] But given the impossibility to foresee every possible situation of conflict, though, a reasonableness test could help delimit jurisdiction in the absence of agreed upon rules.

I recall that Ryngaert encourages jurisdictional assertions that increase global welfare and justice, whereby states with the strongest nexus retain the primary right to exercise their

[997] Ibid. See also Judge Fitsmaurice's Separate Opinion in *Barcelona Traction* (supra note 469), para. 105 concerning reasonableness in overlapping adjudicatory jurisdiction, in which he wrote that "It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction (…) but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits – though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State."

[998] Cedric Ryngaert (supra note 576), p. 153, who at footnote 38 a long list of authors debating the subject.

[999] Restatement (Fourth) of Foreign Relations Law of the US, reporters comments to §407, though the new Restatement does contain a section on 'Reasonableness in Intepretation' (William S. Doge 'The Customary International Law of Jurisdiction in the Restatement (Fourth) of Foreign Relations Law', posted on 8 March 2018, Opinio Juris blog, available at: http://opiniojuris.org/2018/03/08/the-customary-international-law-of-jurisdiction-in-the-restatement-fourth-of-foreign-relations-law/).

[1000] Cedric Ryngaert (supra note 576), p. 163.

[1001] Ibid. p. 185-186.

[1002] Ibid. p. 209.

jurisdiction but, where they fail to do so, others that are harmed by this may step in on the basis of subsidiarity, provided this is in the interest of the global community.[1003] He explains that "unilateral jurisdiction then in fact becomes an internationally cooperative exercise, with States stepping in where other States unjustifiably fail to establish their jurisdiction".[1004] Ryngaert furthermore argues for more democratic legitimacy in decision-making with extraterritorial effects, which can be achieved through consultations with relevant actors (state and private) so as to be fully informed of foreign concerns, before asserting jurisdiction.[1005]

Enhancing the fairness of market conditionality mechanisms (chapters 5 and 8) may thus also have a restraining effect on market state action. More concretely, the principles of non-intervention, abuse of right, good faith, and the need to refrain from unjustifiable interference with the activities of other states will shape when and how market conditionality is exercised, in so far that it regulates behaviour also regulated by others. These are considered in turn.

6.5.1. Non-intervention

The principle of non-intervention "involves the right of every sovereign State to conduct its affairs without outside interference" and is "part and parcel of customary international law."[1006] It *predominantly* pertains to the prohibition of the use of force, which can be justified only in cases of self-defence (collective or individual) against an armed attack.[1007] The prohibition of the use of force is enshrined in the UN Charter, which requires members to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[1008] This provision has been interpreted in the Friendly

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[1003] Ibid. p, 217-220.
[1004] Ibid. p, 229.
[1005] Ibid. p. 211-212. Ryngaert envisages that this can take place through transnational frameworks and fixed points of contacts and the like, where foreign regulators and courts can address their concerns and questions. In fact, Ryngaert argues that transnational governance and judicial cooperation can even "spontaneously" trigger a degree of reasonableness and restraint.
[1006] *Nicaragua* (supra note 275), para. 202; also that it is "without doubt an autonomous principle of customary law" (Diss. Op. Jennings, p. 524).
[1007] D Porotsky 'Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba' (1995) 28 Vanderbilt Journal of Transnational Law 958; Art. 51 Charter of the United Nations of 24 October 1945 (UN Treaty Series, XVI, p. 1); *Nicaragua* (supra note 275), para. 193.
[1008] Art. 2(4) UN Charter.

Relations Declaration (referred to by Oscar Schachter as "the international lawyer's favourite example of an authoritative UN resolution")[1009] as relating to *military* force.[1010]

The principle can also be applied more generally, including in relation to economic interference. This can be explained as follows. The UN General Assembly, which adopted the Friendly Relations Declaration in 1970, has generally been very actively engaged with the topics of non-intervention and non-interference. They do not clearly define the difference between the two concepts, and they can be considered as related – possible denoting a sliding scale of intrusiveness. Very few of the texts adopted by the UN General Assembly are binding, and many were adopted by a heavily divided vote, which undermines their role also as soft law.[1011] Two other noteworthy texts are the 1965 Declaration on the Inadmissibility of Intervention,[1012] and the 1981 Declaration on the Inadmissibility of Intervention and Interference.[1013] The 1965 Declaration on the Inadmissibility of Intervention stipulates that "every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state", and that "no state may use or encourage the use of *economic*, *political or any other type of measures to coerce another state* in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."[1014] The 1981 Declaration on the Inadmissibility of Intervention and Interference subsequently added to this the following:

> "The principle of non-intervention and non-interference in the internal and external affairs of States comprehends the following rights and duties: ((...)) The duty of a State, in the conduct of it international relations in the economic, social, technical and trade fields, to refrain from measures which would constitute interference or intervention in the internal or external affairs of another State, thus preventing it from determining freely its political, economic and social development; this includes, *inter alia*, the duty of a State not to use its external economic assistance programme or adopt any multilateral or unilateral economic reprisal or blockade and to prevent the use of transnational and multinational corporations under its jurisdiction and control as instruments of political pressure or coercion against another State, in violation of the Charter of the United Nations."[1015]

[1009] Oscar Schachter 'United Nations Law' (1994) 88 The American Journal of International Law 1, p. 3.
[1010] UN General Assembly Resolution 25/2625 of 24 October 1970, A/RES/25/2625; discussed in Maziar Jamnejad and Michael Wood 'The Principle of Non-Intervention' (2009) 22 Leiden Journal of International Law 345.
[1011] Maziar Jamnejad and Michael Wood (supra note 1010), p. 351.
[1012] UN General Assembly Resolution 20/2131 of 21 December 1965, A/RES/20/2131
[1013] UN General Assembly Resolution 36/103 of 9 December 1981, A/RES/36/103
[1014] UN General Assembly Resolution 20/2131 (supra note 1012), para. 5 and 2 (emphasis added); Preamble of the UN General Assembly Resolution 25/2625 (supra note 1010).
[1015] Annex, para. 2(I)(k) UN General Assembly Resolution 36/103 (supra note 1013).

The General Assembly Declarations (and the latter's description in particular) allude to a wide scope for the principle of non-intervention. Whilst it is highly questionable whether this reflected customary law at the time of their adoption, it is generally accepted that the principle non-intervention is wider in scope than the prohibition of forcible intervention (use of force).[1016] This is reflected in the ICJ's judgment in *Nicaragua*. The Court held that the principle of non-intervention "prohibits all states or groups of states to intervene directly or indirectly in internal or external affairs of other State (...) bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy".[1017] The ICJ furthermore explained that it is the "element of coercion which defines, and indeed forms, the very essence of prohibited intervention", and that coercion is "particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State".[1018] That the intervention can be with or without armed force was subsequently confirmed in *Armed Activities in the Congo*.[1019]

Coercion is particularly obvious to establish when force is used, but states may coerce one another by other means, and thereby breach the principle of non-intervention. Maziar Jamnejad and Michael Wood argue that there is nowadays no reason to exclude economic measures from the types of intervention that may be prohibited under the principle.[1020] Support for this can also be found in one of the UN General Assembly's calls to bring US economic sanctions against Cuba to a halt, in which it called *inter alia* upon the principle of non-intervention for support.[1021] The line should however be drawn at anything less than

[1016] This is evident from the many descriptions of the principle of non-interference, both within and outside the UN system. For instance, the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe contains a Declaration with wording similar to the Friendly Relations Declaration that, as per the principle of non-intervention, states will "in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind". However, Jamnejad and Wood consider that the broad description of non-intervention in UN General Assembly Resolution 36/103 (Ibid.), a description which goes beyond the paragraph copied in the text, does *not* reflect customary law, *inter alia* because it was adopted by 102 votes to 22 with 6 abstentions. (Maziar Jamnejad and Michael Wood (supra note 1010), p. 355).
[1017] *Nicaragua* (supra note 275), para. 205.
[1018] Ibid.
[1019] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo vs. Uganda), 19 December 2005, ICJ Reports 2005, p. 168, para. 164.
[1020] Maziar Jamnejad and Michael Wood (supra note 1010), p. 380.
[1021] UN General Assembly Resolution of 24 November 1992, A/RES/47/19.

intentionally changing the policy of the target state.[1022] But herein also lays the difficulty in proving that economic measures contravene the principle of non-intervention. What economic measures may be shown to overbear the sovereign will of a state?[1023] In *Nicaragua*, the ICJ was asked to examine whether the cessation of economic aid, a reduction in sugar quotas, and a trade embargo imposed by the US on Nicaragua added up to a systematic violation of the principle of non-intervention. The Court found that the economic actions taken by the US did *not* constitute such a breach, though the Court did not elaborate further on its reasoning.[1024]

In principle, economic coercion could thus constitute a prohibited intervention. But a lack of clear criteria for determining *when* this is so, is currently lacking. At various instances, the UN has called upon panels of experts to consider approaches to eliminate economic coercion. In 1989, such an expert group took note of a lack of a "clear consensus in international law as to when coercive economic measures are improper".[1025] Two decades later, no such consensus appears to have been reached.

Whilst in theory, economic coercion is thus discouraged (arguably even as a matter of law) by the international community, states frequently engage in it. The Secretary-General monitors the use of unilateral coercive economic measures against developing countries that are not authorised by the UN, that are inconsistent with the principles of international law, and that contravene the basic principles of the multilateral trading system.[1026] The information obtained can be found in biennial reports to the General Assembly.[1027] These include a summary of their impact on the affected countries, including the impact on trade and development, and comments received from states. In can also be observed that thus far, measures adopted pursuant to country blacklisting have not figured in these reports, despite the EU having blacklisted and blocked imports in fish products from six countries since March 2014. This would suggest that such measures, though coercive, are not perceived as sufficiently problematic to offend against the principle of non-intervention.

[1022] Muge Kinacioglu 'The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate' 15, p. 371.
[1023] Maziar Jamnejad and Michael Wood (supra note 1010), p. 371.
[1024] *Nicaragua* (supra note 275), paras. 202, 244, 245.
[1025] D Porotsky (supra note 1007), p. 930.
[1026] UN General Assembly Resolution of 21 December 2009 (supra note 102).
[1027] Available at: https://www.un.org/development/desa/dpad/tag/unilateral-economic-measures/.

Finally, the case if somewhat different for *multilateral* economic sanctions. These are at times decided upon in a collective context by international bodies to react to gross breaches of international law.[1028] Engaging in collective action may provide an alternative avenue for action to lawfully instigate economic pressure. The possibility for the Security Council to adopt sanctions to give effect to its decisions is enshrined in Art. 41 of the UN Charter.[1029]

Let us presume for a moment that market conditionality determinations, where they block market access to fish products, are the kind of economic coercion that runs counter to the principle of non-intervention. A state wishing to impose such sanctions could overcome the principle of non-intervention by acting through an international organisation. I have shown that some RFMOs are competent, as per their own constituting treaty, to recommend that their members adopt market measures against an identified country (member or non-member). RFMOs are however only *regional* organisations rather than truly international bodies, and membership is not always open to all.[1030] At the same time, White and Abass note that it matters not what number of states were involved in the decision to impose sanctions, but that what is important is rather the competence of the international organisation to do so – though at what point an international organisation is legitimately competent is unclear.[1031] *If* RFMOs could play such a role, this would revive the importance of the unilateral/multilateral distinction for the evaluation of the appropriateness of market conditionality. It would mean that blacklisting countries under EU IUU and EU Non-

[1028] Nigel D White and Ademola Abass (supra note 92), p. 538. However, and referring back to chapter 5, there is a discussion to be had about the lack of democratic legitimacy and 'fairness' of international bodies doing so, in particular where their decisions directly affect individuals who do not dispose of the means to challenge the decision. An example is the well-known *Kadi* case (Cases C-402 and 415/05 *P. Kadi & Al Barakaat International Foundation v. Council and Commission* [2008] ECR i-6351). The backdrop to the decision was a Security Council's Resolution to freeze certain assets, which was implemented by the EU. Security Council determinations cannot be directly reviewed. Upholding the right to be heard as a general principle of EU law, the CJEU found that by giving effect to the Security Council determination, Mr. Kadi's rights had been violated, and annulled the EU Regulation. For a discussion of the case in the context of the democratic legitimacy of global governance, see for instance Eyal Benvenisti (supra note 804), p. 221-222 and Paul Craig (supra note 195), p. 617.

[1029] Note that this was not meant to provide sanctions for enforcing international legal obligations as such (Oscar Schachter (supra note 1009), p. 12).

[1030] Erik J Molenaar 'Participation in Regional Fisheries Management Organizations' in Erik J. Molenaar and Richard Caddell (supra note 24), p. 121-123. See also the discussion in chapter 7 on international standardising bodies under the TBT Agreement, where I discuss the (lack of) openness of RFMOs.

[1031] Nigel D White and Ademola Abass (supra note 92), p. 538.

Sustainable Fishing would *more likely* be appropriate if the economic sanctions upon market conditionality directly implements an RFMO's decision to do so.[1032]

Economic coercive measures thus remain somewhat of a grey area in international law. Jamnejad and Wood warn that "care is needed not to overstate the scope of the non-intervention principle", but at the same time argue that this "should not detract from the fact that it may be a positive tool for the regulation of diplomacy, international relations, and our growing interdependence."[1033] It can be observed that the EU Non-Sustainable Fishing Regulation contains a clause that would appear to prevent extreme effects abroad – possibly of the kind that might trigger a debate on non-intervention, or at least that could harm political relations). Namely, on "duly justified imperative grounds of urgency relating to unforeseen economic or social disruption, the Commission shall adopt immediately applicable implementing acts (...) to decide that the measures adopted [in respect of blacklisted countries] are to cease to apply" (Art. 7(2)). The EU IUU Regulation does not contain such an explicit clause. This does not mean that the Commission *would* use the Regulation in a way that could lead to extreme circumstances. However, a provision to the same effect as that under the Non-Sustainable Fishing Regulation is perhaps recommendable so as safeguard against it as a matter of law. This would help convince other states of the legality of the action.

6.5.2. Abuse of right, good faith, and unjustifiable interference

It has been suggested that unreasonable or discriminatory conditions on port (and thereby market) access may amount to an abuse of rights.[1034] The question of discrimination is examined as a separate issue below. This section examines the conditions under which market conditionality in fisheries constitutes an abuse of right, violates the principle of good faith, and/or risks interfering with the activities of other states under the LOSC.

Art. 300 LOSC stipulates that states parties shall fulfil in good faith the obligations assumed under the LOSC, and shall exercise the rights, jurisdiction and freedoms recognised

[1032] Though RFMOs infrequently resort to country-level market measures, chapter 1 gave the examples of conservation and management measures adopted by ICCAT for its members to restrict trade in fish products from certain countries (supra note 45).
[1033] Maziar Jamnejad and Michael Wood (supra note 1010), p. 349, 381.
[1034] Erik J Molenaar (supra note 951), p. 228, referring also to Robin Churchill and Alan Vaughen Lowe (supra note 286), p. 63.

in the LOSC in a manner which would not constitute an abuse of right. This is relevant as a limitation in and of itself, also without there existing overlapping jurisdictional claims. However, as this section shows, the content of these duties is somewhat unclear, and good faith has mostly been discussed in parallel with the duty to have due regard and not unjustifiable interfere with the activities of others (competing claims).

Abuse of right is a "well-established rule of international law".[1035] However, it has no "independent normative charge of its own" but directs "the manner in which competing or conflicting norms that do have their own normativity should interact in practice", thus setting the threshold for the interaction between rights where this is undefined.[1036]

The *travaux préparatoires*, as embodied by the Virginia Commentaries, reveal little about the meaning of the wording of Art. 300, but for the fact that it is "rare (...) for a provision of this kind to be included in an international treaty", and that "it would be idle to speculate on the possible interpretation and application of this article".[1037] The doctrine of abuse of right was initially introduced as a counterweight to the exclusion of the EEZ regime from compulsory dispute settlement.[1038] The final wording was adopted under the "obscurely worded understanding article 300 was to be interpreted as meaning that the abuse of rights was in relation to those of other states", which "presumably means the abuse of a State's own rights to the disadvantage of another State or States".[1039] This is a narrower understanding of the concept of abuse of right than that given by Michael Byers, who argues for a role of the abuse of right doctrine *beyond* situations of normative conflict, in situations where a countervailing right is absent.[1040] This is of particular relevance to regulating behaviour that affects the global commons. Byers suggests that a state's right to extract resources could be "weighed against international society's interest in a clean, sustainable environment" and let the doctrine of abuse of right determine the balance between states' freedoms and the amount of degradation that the community is willing to tolerate.[1041] He does not indicate what

[1035] Judge Weeramantry in *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia) (Judgment), 25 September 1997, ICJ Reports 1997, para. 22.
[1036] Michael Byers 'Abuse of Rights: An Old Principle, a New Age' (2002) 47 McGill Law Journal 389, p. 421-422, referring to Alan Vaughen Lowe 'The politics of Law making: are the method and character of norms creation changing?' in Michael Byers (ed) *The Role of Law in international Politics: Essays in International Relations and International Law* (OUP, 2000), p. 212-21.
[1037] 'Art. 300' in *Virginia Commentaries* (supra note 237), p. 152.
[1038] Ibid. p. 151.
[1039] Ibid.
[1040] Michael Byers (supra note 1036), p. 423 and following pages.
[1041] Michael Byers (supra note 1036), p. 428.

standard this could be. In practice, the standard is likely a high one, since "courts have rarely held that a good faith or other related standard is breached."[1042] When they do, though, states can be held responsible under the doctrine of state responsibility.[1043]

Since there is little reference in the case law to the concept of abuse of right, the Virginia Commentaries give the definition found in the *Dictionnaire de la terminologie du droit international* (1960, S.v. Abus de droit), which goes as follows:

> "The exercise by a State of a right in such a manner or in such circumstances as indicated that it was for that State an indirect means of avoiding an international obligation imposed upon that State, or was carried out with a purpose not corresponding to the purpose for which that right was recognised in favor of that State."[1044]

A similar formulation can be found in *US – Shrimp*, where the Appellate Body held as follows:

> "One application of [the general principle of good faith], the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a member of its own treaty right thus results in a breach of the treaty rights of the other members and, as well, a violation of the treaty obligation of the member so acting."[1045]

Killian O'Brien argues on the basis of this that the concept of abuse serves to balance the interests of parties where the usage of a right (e.g. freedom to fish) hinders another state's legitimate usage of that right, causing it injury. It may also extend to a situation where this injures another state, but without necessarily violating its rights.[1046] Furthermore, a right which is used for a purpose other than for which it was created constitutes an abuse of right.[1047]

Abuse of right is thus a general expression of the broader principle of good faith. Indeed, Patricia Birnie and Alan Boyle argue that abuse of rights is merely a method of interpreting rules concerning matters such as the duty to negotiate and consult in good faith, or another

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[1042] *ConocoPhillips Petrozuata B.V. ConocoPhillips Hamaca B.V. ConocoPhillips Gulf of Paria B.V.* and *ConocoPhillips Company v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2010), para. 275.

[1043] Michael Byers (supra note 1036), p. 411, 421.

[1044] 'Art. 300' in *Virginia Commentaries* (supra note 237), p. 152.

[1045] *US – Shrimp*, Appellate Body report (supra note 123), para. 158.

[1046] Killian O'Brien 'Art. 300', in Alexander Proelss (supra note 416), nm. 13, p. 1932.

[1047] Ibid.

way of formulating a doctrine of reasonableness or a balancing of interests.[1048] However, since neither abuse of right nor good faith are defined in the LOSC and both are included in the same provision, this sheds no further clarification on the practical distinction between the two.

Art. 300 LOSC is not a stand-alone provision, but rather an overarching duty that comes into play when a state engages in the rights and obligations set out in the LOSC. This was acknowledged in the dispute before the ITLOS over the *Louisa*, a vessel flagged to St. Vincent and the Grenadines and which had been conducting operations in the territorial and internal waters of Spain to locate oil and gas, on the basis of a permit for that purpose.[1049] Whilst docked in a Spanish port, the vessel was boarded, searched, and detained by Spanish authorities. Assault rifles (deemed weapons of war) and undersea archaeological findings were found on board, both of which in breach of Spanish criminal law, and several members of its crew arrested and detained.[1050] St. Vincent and the Grenadines contested both the detention of the vessel and crew, as well as their treatment by the Spanish authorities. In relation to this second claim, St. Vincent and the Grenadines relied on Art. 300 LOSC. The conditions in which the arrested crew were held had been dismal, and St. Vincent and the Grenadines argued therefore that the Spanish authorities had been acting in abuse of right and good faith.[1051] Since St. Vincent and the Grenadines had brought this argument into the proceedings at too late a stage, the Tribunal did not entertain the argument further. It did however feel compelled to take note of the human rights issues described by the detained crew, and observed that "[s]tates are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances."[1052] The ITLOS confirmed that Art. 300 cannot be invoked on its own; it only becomes relevant only when 'the rights, jurisdiction and freedoms recognised' in the LOSC are exercised in an abusive manner.[1053] This is true for all 'balancing provisions' in the LOSC, including the many references to due regard (chapter 3, section 3.10.4). This has recently been confirmed in *Norstar*, where Panama alleged that Italy (the port state) failed to have due regard to its interests by seizing its vessel in breach of Art.

[1048] Patricia Bimie and Alan Boyle *International Law and the Environment* (Clarendon Press, 1992), p. 126.
[1049] *M/V "Louisa"* (supra note 982).
[1050] Ibid. in particular at paras. 48, 54, 59, 62, 64.
[1051] Ibid. para. 132.
[1052] Ibid. para. 155.
[1053] Ibid. para. 137.

87(2). But since the dispute did not concern Italy's exercise of its high seas freedoms but rather Panama's, it was Panama who was under a duty to have due regard to Italy – not the other way around.[1054]

Unfortunately, the ITLOS left it at that, and missed out on the opportunity to interpret Art. 300 in more detail. In a Separate Opinion, Judge Kateka expresses his regret that the Tribunal failed to bring clarity to this provision, and did not expand on the fact that Art. 300 cannot be invoked on its own.[1055] He opined as follows:

> "The Tribunal should have examined questions such as whether there is another provision in the [LOSC] that could have been invoked together with [Art. 300] to establish jurisdiction. The Tribunal should also have interpreted the meaning of the phrase ". . . shall exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right". This phrase is compact and full of meaning and would have needed elucidation, especially when the examination of the *travaux préparatoires* of [Art. 300] does not shed much light on this matter."[1056]

The difference between good faith and abuse of right thereby remains somewhat obscure.

Importantly, since good faith/abuse of right become relevant only when exercising the rights, jurisdiction and freedoms recognised in the LOSC, this raises the question whether market conditionality is such a right, jurisdiction, or freedom recognised in the LOSC. I recall the discussion earlier in chapter 3, section 3.11.2. By reference to Simon Caney's distinction between first- and second order responsibilities and Ryngaert's new theory of jurisdiction, it was proposed that market conditionality in fisheries *could* be seen as an expression of the duty to protect and preserve the marine environment. The LOSC regime is therefore relevant for exploring at what point a market state acts in bad faith, and abuses its (territorial) jurisdiction.

In a similar vein, it is relevant to point at Art. 194(4). I recall that the provision stipulates that, in taking measures to prevent, reduce or control pollution of the marine environment, states shall refrain from unjustifiable interference with activities carried out by other states in the exercise of their rights and in pursuance of their duties in conformity with the LOSC. The ITLOS has held this to be "functionally equivalent" to the obligation to give due regard and

[1054] *M/V Norstar* (supra note 475), paras. 231, 293.
[1055] Separate Opinion of Judge Kateka in Ibid. p. 129.
[1056] Ibid.

to act in good faith; it also "requires a balancing act between competing rights, based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue."[1057] The only different is that Art. 19(4) only applies to activities that are presently being carried out by states pursuant to their rights, rather than their rights themselves, and is not prospective in nature.[1058] Similar to Art. 300, the provision of unjustifiable interference becomes relevant *in the implementation* of the provisions of the LOSC. Here, this means that Art. 194(4) becomes relevant when "taking measures to prevent, reduce or control pollution of the marine environment", and must not interfere with currently ongoing activities by other states.

The question is therefore whether market conditionality can be said to be a "measure to prevent, reduce or control pollution of the marine environment". Again, chapter 3, section 3.7 already noted that whilst Part XII LOSC (including Art. 194) is explicitly oriented towards issues of pollution and dumping rather than fisheries, this should no longer be read so narrowly. This was most recently confirmed by the Arbitral Tribunal in *South China Sea*, which explicitly rejected "the suggestion that (…) Part XII (is) limited to measures aimed at controlling marine pollution. While the control of pollution is certainly an important aspect of environmental protection, it is by no means the only one".[1059] The duty to protect and preserve the marine environment is a "fundamental principle",[1060] and marine living resources are an "integral element" of this.[1061] Casting market conditionality in fisheries as an expression of the need to protect and preserve the marine environment (though without implying that such a duty necessarily exists) would thereby also bring it within the scope of Art. 194(4).

6.5.3. Balancing (the EU's) interests

Following the argument further would mean that market states should refrain from unjustifiable interference with (ongoing) activities by other states in the exercise of their rights and in pursuance of their duties in conformity with the LOSC. They should act in good faith, and their actions should not constitute an abuse of right. The *Chagos* ruling discussed in

[1057] *Chagos* (supra note 238), para. 540.
[1058] Ibid.
[1059] *South China Sea* (supra note 226), para. 945, referring with approval to in *Chagos* (supra note 264), para. 320.
[1060] *Advisory Opinion to the SRFC* (supra note 83), para. 216.
[1061] Ibid. paras. 120 and 219.

some detail in chapter 3, section 3.10.4 instructs that where a "significant right" is at stake (such as the freedom to fish on the high seas), the regulating state is under a heavy procedural burden. There will be a need a need for timely consultations; information must be provided to the potentially affected party; and there must be a reasoned exchange between them.[1062] These assessments and consultations must allow the market state to "internally balance" the competing rights, which is to be done based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue.[1063] The actual balancing point that must be achieved is of course contextual, and therefore must be decided on a case by case basis. Nevertheless, I now suggest some of the possible rights that may be at stake and that will have to be balanced against one another, by reference to the arguments put forward in the *Swordfish* dispute and the EU IUU and Non-Sustainable Fishing Regulations.

As mentioned, the most obvious competing rights at stake are, on the one hand, the market state's sovereign right to grant or deny market (or port) access, and on the other hand, the (fundamentally important) freedom to fish on the high seas (Art. 87 LOSC). Prohibiting to land catch in port or to use port services poses a geographical limitation on how far out fishermen can go. This *de facto* restricts access to high seas resources. This was one of the arguments pursued in the Spanish complaint by ANAPA, which contended that the prohibition to land in Chilean ports lengthened their journey (to other regional ports) and therefore added to the operational costs.[1064] The Commission estimated the total loss (including the loss of access to the US markets, which sources its swordfish in Chile) at around €7 million annually.[1065] ANAPA concluded that without Chile's restrictions, "it is quite probable that a great number of ANAPA's vessels as well as other Spanish and Community vessels would start fishing activities in the South Pacific."[1066]

At the same time, the right to fish on the high seas is not granted *for the purpose of* gaining market access. Rather, it is a right that states have *for their nationals* (Art. 116

[1062] *Chagos* (supra note 238), paras. 519, 534.
[1063] Ibid. para. 540.
[1064] European Commission, Notice of Initiation of an Examination Procedure against Chile (supra note 942), para. 5.
[1065] Available at: http://europa.eu/rapid/press-release_IP-00-397_en.htm.
[1066] European Commission, Notice of Initiation of an Examination Procedure against Chile (supra note 942), para. 7.

LOSC), and the possibility of nationals to fish on the high seas is not taken away by the lack of market opportunities in foreign countries.

Other rights that may compete with that of the market state are those of the coastal state in the exercise of its sovereign rights over the living resources in its EEZ. This is particularly relevant in the context of the EU Non-Sustainable Fishing Regulation. The Regulation conditions market access on a third country's cooperation in the management of transboundary resources under international law, but arguably to the benefit of the EU's own fishing activities. The coastal state's duty to ensure that the maintenance of living resources in the EEZ is not endangered by overexploitation, and the requirement to ensure optimum utilization, is also increasingly brought within the remit of the EU IUU Regulation. This was the case in the previously mentioned example of Vietnam, where the Commission concluded that its failure to sustainably manage its fisheries contributed to the finding that it had failed the duties incumbent upon it under international law to prevent, deter, and eliminate IUU fishing.[1067] Whilst denying market access does not physically interfere with the exercise of coastal state activities, there is once more the argument of economic coercion to the point of amounting to unjustifiable interference, as already suggested above in the context of non-intervention.

Finally, the most important elements of balancing these interests are in fact the procedural requirements (consultations and so on) that the market state will have to fulfil. These complement similar requirements that exist under the WTO regime, and will therefore be discussed in more detail in chapter 8.

6.6. Non-discrimination and differentiation

Even in the absence of competing claims, market state action is limited as a matter of law. I now turn to the duty not to discriminate, cemented in the LOSC. Non-discrimination forms part of the discussion in the next chapter in so far that it is a fundamental principle of WTO law. Here, I underscore its applicability to market conditionality also *outside* the context of the WTO, as part of the law of the sea regime.

[1067] Annex 1, Vietnam yellow card, p. 6; Tuvalu yellow card, p. 26.

Non-discrimination is "widely recognised" in the LOSC and fisheries law more generally.[1068] It is *inter alia* part of provisions on the suspension of innocent passage (Arts. 24 and 52); transit passage (Art. 42); the conservation of living resources on the high seas, whereby conservation measures and their implementation may not discriminate in form or in fact against the fishermen of any state (Art. 119(3)); equal treatment in maritime ports between vessels (Art. 131); and the sharing of benefits from resources in the Area (Art. 140). The Preamble furthermore recognises the desirability of a legal order which will the equitable and efficient utilization of marine resources, the conservation of living resources, and the study, protection and preservation of the marine environment, as well as a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.

Art. 227 instructs states not to discriminate against vessels of any other state in exercising their rights and performing their duties under Part XII. If market conditionality can be seen as an exercise of the duty to protect and preserve the marine environment, set out in Art. 192 of Part XII, then the LOSC imposes on the market state a duty not to discriminate against foreign vessels.

That market conditionality determinations should not discriminate against foreign vessels is supported by the Fish Stocks Agreement and Port State Measures Agreement. In so far that such measures result in a prohibition to enter port (e.g. vessels flagged to a blacklisted state), they directly implement the Port State Measures Agreement. Port restrictions are also in line with the Fish Stocks Agreement's requirement that the port state has the right and the duty to take measures to promote the effectiveness of global or regional (RFMO) conservation and management measures. Both instruments contain a clear duty not to discriminate in the exercise of such rights and duties. The Fish Stocks Agreement stipulates that "a port state shall not discriminate in form or in fact against the vessels of any state."[1069] The Port State Measures Agreement stipulates that the implementation of the Agreement, inspections of vessels in port, the identification of non-compliant states, and measures vis-à-vis states that undermine the Agreement, must be made and carried out in a "fair, transparent and non-

[1068] Erik J Molenaar (supra note 951), p. 228, noting that this limits the discretion of port states to condition access to port.
[1069] Art. 23(1) Fish Stocks Agreement.

discriminatory manner".[1070] The Code of Conduct contains a similar provision, though worded a little differently. It provides that port states should take such measures as are "necessary to achieve and to assist other states in achieving the objectives of this Code", and that when taking such measures, "a port state should not discriminate in form or in fact against the vessels of any other state."[1071]

The duty not to discriminate arguably goes beyond that of foreign vessels alone, extending also to a duty not to discriminate against third countries. Limiting non-discrimination to their enforcement in port against foreign vessels would allow market conditionality to be discriminatory in every other sense. Yet one of the risks that market conditionality poses is the arbitrary choice of targeted countries, and the unfair distribution of responsibilities to ensure sustainable fishing. I therefore inquire further whether the duty not to discriminate in the application of Part XII is not of a more general nature, and suggest that it is.

That the duty not to discriminate under the LOSC is of a more general nature was alluded to y the ITLOS in the *Louisa* case, which concerned the detention of a vessel flagged to St. Vincent and the Grenadines and some of its crew by Spanish authorities. St. Vincent and the Grenadines *inter alia* cited as relevant Art. 227 LOSC, together with Art. 226, which regulates the inspection of foreign vessels in the case of dumping, discharge, and pollution from vessels. It argued that, whilst these provisions are confined to the marine environment, they "reflect values in international law that should be given consideration in this case, specifically freedom from undue seizure and inspection, and freedom from discrimination."[1072] Since the Louisa had been detained not in the context of the protection of the marine environment but in the context of criminal proceedings relating to weaponry and harm to cultural heritage, the ITLOS did not consider this argument further, nor did it pronounce itself on non-discrimination.[1073]

St. Vincent and the Grenadines did not clearly stipulate what legal weight should be given to the freedom to discriminate, or what the ITLOS meant by it being a relevant "value of international law". However, in light of the many references to non-discrimination and the

[1070] Arts. 3(4), 13(2)(h), 20(3) and 23(2) Port State Measures Agreement.
[1071] Para. 8.3.1 Code of Conduct.
[1072] *M/V "Louisa"* (supra note 982), para. 111.
[1073] Ibid. para. 113.

Preamble of the LOSC, it would be in line with the context, object and purpose of the LOSC to interpret Art.192 as implying that measures taken to fulfil the duty to protect and preserve the marine environment should not discriminate in general, *including* against vessels of any other state as per Art. 227, but also against third countries and their nationals. Such a broad reading would be in line with earlier drafts of Art. 227, which at some point during the negotiations stipulated more generally that in exercising their rights and carrying out their duties under the LOSC, states should not discriminate in form or in fact against the vessels of another state (and even, at an earlier drafting stage still, against persons and aircraft).[1074]

That market measures should not discriminate, whether against vessels or countries, is furthermore supported by the Code of Conduct and IPOA-IUU. The Code of Conduct contains the general requirement that "fish trade measures adopted by states to protect human or animal life or health, the interests of consumers or the environment, *should not be discriminatory* and should be in accordance with internationally agreed trade rules" (para. 11.2.4)

In implementing the Code of Conduct, the IPOA-IUU furthermore requires non-discrimination when implementing internationally agreed market-related measures to combat IUU fishing (para. 65); when identifying vessels engaged in IUU fishing (whether by RFMOs or states) and adopting trade-related measures vis-à-vis such vessels (paras. 66, 73. 74); and when implementing multilateral catch documentation schemes and import and export controls and prohibitions (para. 69). It also confirms that port state control of fishing vessels in order to combat IUU fishing must be implemented in a non-discriminatory manner (para. 52). Finally, though specific to CDS, the FAO Guidelines on that matter state in para. 4.2 that "a CDS should be applied on a non-discriminatory basis."

To summarise the above, there exists a duty not to discriminate when engaging in market conditionally in fisheries under the abovementioned law of the sea instruments. This duty pertains in any case to foreign vessels in port, though I argue that Art. 192 should be interpreted as implying a general duty not to discriminate when adopting measures in fulfilment of the duty to protect and preserve the marine environment, of which market measures in fisheries are part.

[1074] 'Art. 227' in *Virginia Commentaries* (supra note 237), p. 346-347.

The *content* of the duty not to discriminate against foreign vessels in port, or even third countries and nationals, is more difficult to determine. It will entail some procedural obligations to ensure that the procedures for identifying vessels or countries that have engaged in IUU fishing are non-discriminatory. The rules of the WTO may be used for guidance. Indeed, the rationale for a reference to non-discrimination in the Code of Conduct and IPOA-IUU is likely the same as under the law of the WTO, namely, avoiding unnecessary barriers on trade. Both the Code of Conduct and the IPOA-IUU refer to the duty not to discriminate in direct context of the requirement that international fish trade be conducted in accordance with the principles, rights and obligations established in the WTO.[1075]

I offer a final though brief observation on the weight given to developing country status when blacklisting countries, as far as the law of the sea regime is concerned. Chapter 3, section 3.7.2 alluded to the fact that states may be under differentiated standards to ensure sustainable fishing, because of the flexible nature of the standard of due diligence.[1076] This was then elaborated upon in chapter 5, section 5.5, arguing that this implies a degree of substantive fairness in market conditionality in fisheries. There, I concluded that concern for developing country status could *also* inform the weighing and balancing of interests that states must undertake as part of the duty to act in good faith/not constitute unjustifiable interference with the rights and activities of other states. It should also be taken into account when evaluating whether a country has fulfilled its international obligations to ensure sustainable fisheries, and has fulfilled its due diligence obligations. In light of this, the scope of the duty not to discriminate in the application of measures taken pursuant to Art. 192 would not have the same scope as under the rules of the WTO. It would carve out a 'special' requirement to take into account developing country status when blacklisting other state parties to the LOSC.[1077]

[1075] Para. 3.2 and 4.2 CDS Guidelines; Para.6.14 and 11.2.1 Code of Conduct; paras. 66 and 68 IPOA-IUU.
[1076] Nele Matz-Lück and Erik van Doorn (supra note 445), p. 171.
[1077] A parallel can be drawn with the EU's decision to extend the EU emissions tradiing scheme to international aviation (supra note 978). It can be observed that the EU uses its market power to engage third countries in reducing their greenhouse gas emissions, thus coercing them to fulfil their international climate responsibilities. In discussing the theoretical possibility that states may even be under a second-order responsibility to do so, Joanne Scott also suggests that states should take into account the principle of common but differentiated responsibilities as a possible safeguard for an unfair distribution of (climate) responsibilities (Joanne Scott 'How Far (Geographically) Should the EU Climate Change Responsibilities Reach?', p. 18-19).

Issues of burden-sharing justice are notoriously difficult to solve, but they remain a key issue for debate in the context of sustainable fishing. Considering developing country status and differentiated responsibilities as a matter of law is of particular importance for developing countries. Developing countries exceedingly bear the brunt of IUU fishing activities in their waters, as evidenced by the recently developed IUU Fishing Index.[1078] The Index depicts both countries' vulnerability to illegal and unsustainable fishing practices, and their responsibilities and response to problems. Whilst it only gives a snapshot in time, namely the situation in 2017 when the research was carried out, it illustrates the high vulnerability of predominantly developing countries to such fishing practices.[1079] But developing countries *also* bear the brunt of (EU) market conditionality in fisheries. Thus far the EU has not yet targeted a developed country.[1080] The economic effects this has on developing countries, in particular those whose economy is much dependent on fish exports to the EU, are significant.[1081] There is a heavy administrative burden and cost attached to implementing catch certification requirements, and to responding to an EU yellow or red card,[1082] yet countries have thus far only received limited formal support from the Commission in the implementation of the Regulation's requirements.[1083]

A relatively significant amount of fish from small-scale fisheries in third countries enters trade with the EU.[1084] As previously mentioned, small-scale fisheries are often unregulated and therefore captured by the definition of IUU fishing, though without necessarily posing the same problems of sustainability. Where small-scale fisheries export to other markets, they could suffer from market measures that hamper this export entirely (if a country is

[1078] Supra note 62.
[1079] There are some exceptions, notably France (due to its overseas territories and therefore the combined size of its EEZ, one of the indicators used to assess vulnerability) and the US (also a large EEZ).
[1080] Though as mentioned in chapter 1, the US has often identified EU countries under its own scheme, which have subsequently made the necessary changes to be positively certified soon thereafter. Developed countries like EU member states are moreover subject to strict national requirements. In this respect, they share the burden to react to unsustainable and illegal fishing with developing countries.
[1081] Oceanic Developpement and MegaPesca Lda (supra note 54), p. 111-112; U Rashid Sumaila (supra note 59), p. 7, 9.
[1082] Martin Tsamenyi and others 'Fairer Fishing? Trade and Fisheries Policy Implications for Developing Countries of the European Community Regulation on Illegal Fishing' [2009] Commonwealth Economic Paper Series, Economic Paper 86, p. 66.
[1083] Carlos Palin and others (supra note 40), noting that "training and support to third country competent authorities has been erratic and incomplete" (p. 90), and that no training has been provided by the Commission to third countries since the entry into force of the EU IUU Regulation, though some financial assistance was provided by Europeaid for developing countries, in 2011 and 2012 concerning the implementation of the EU IUU Regulation, but this has long finished (p. 118). The study compares this to the long-standing programme to help countries comply with EU food safety requirements, noting that no such programme exists under the EU IUU Regulation, despite the Commission's promises (p. 14).
[1084] Oceanic Développement (supra note 59), p. 105.

blacklisted) or make it too costly (operator-level requirements, such as CDS). Whilst other operators would quickly relocate to different markets, vulnerable small-scale fishing communities could be disproportionally harmed. Moreover, blacklisting a developing country for its failure to regulate small-scale fisheries can be deemed discriminatory, regardless of any effects this may have on its small-scale fishing communities. Whilst they may constitute instances of IUU fishing they are not necessarily harmful to the marine environment – possibly even less harmful than legal large-scale operations. They should therefore not be seen as undermining a state's conservation and management obligations under the LOSC, and thereby not trigger market measures for failing to fulfil international obligations.[1085]

Finally, a duty not to discriminate would alleviate concerns over power politics. The EU's choice of countries to target give rise to such concerns – in particular under the EU IUU Regulation, since the Non-Sustainable Fishing Regulation has only been made use of once. Imports of fish and fish products from China, for example, are valued at over €1.5 billion, and China's compliance with its international obligations regarding fishing are highly questionable.[1086]

6.7. An obstacle to further cooperation?

I now turn to the concern that market conditionality in fisheries obstructs cooperation. What this duty entails has been extensively discussed in chapter 3, section 3.10, and I therefore only briefly recall the main findings here.

The duty to cooperate is fundamental to fisheries conservation and management; "when it comes to conservation and management of shared resources, the [LOSC] imposes the obligation to cooperate on each and every state Party concerned."[1087] Arts. 63 and 64 LOSC set out a duty to cooperate on states whose nations fishing for stocks straddling the EEZ and

[1085] The need to differentiate and to allow developing countries to regulate small-scale fisheries differently from other fishing operations is evident from current negotiations at the WTO over an agreement to end harmful fisheries subsidies. It has been suggested that a threshold should be imposed to exclude minor fishing offences which, whilst technically labelled IUU fishing, should not immediately trigger a prohibition to subsidise that activity. Small-scale fisheries often depend on subsidies for their existence.
[1086] EUMOFA (supra note 48); see also the Tribunal's findings in *The South China Sea Arbitration* (Republic of the Philippines v. People's Republic of China) (Award), 12 July 2016, PCA Award Series that China failed to fulfil its international obligations with regard to illegal fishing by vessels flying its flag, on several occasions even escorting such vessels with government vessels, paras. 755-757; and similarly that China failed to fulfil its international obligations with regard to unsustainable fishing by vessels flying its flag, including through the harvesting of endangered species and destructive fishing practices at great scale, paras. 960-966.
[1087] *Advisory Opinion to the SRFC* (supra note 83), para. 215.

high seas, or highly migratory species listed in Annex I. Regarding the latter, Art. 64(2) furthermore requires that states cooperate to establish an RFMO where none exists, and participate in its work. These are obligations of conduct, and require a high degree of due diligence.[1088] To discharge their duty to cooperate (in this particular case, with regard to shared stocks) states must "consult with one another in good faith, pursuant to [Art. 300 LOSC]. The consultations should be meaningful in the sense that substantial effort should be made by all states concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks."[1089] What exactly meaningful consultations, substantial effort, and effective measures are will depend on the facts of the case. It should be read in light of the mutual duty between states of due regard and, as per the Preamble to the LOSC, the peaceful use of the seas and oceans. Moreover, the geographical range of the obligation to cooperate is wide. The ITLOS noted that, to be effective, all states that share the same stocks along their migrating routes should cooperate with a view to ensuring conservation and sustainable management of these stocks in the whole of their geographical distribution or migrating area.[1090]

In other words, to determine a breach of the duty to cooperate, it must be examined whether the market state had been sufficiently diligent in taking all the necessary procedural steps (meaningful consultations and so on) before imposing market measures. Moreover, whether market conditionality amounts to a breach of the duty to cooperate may be related to the measure's effect, and whether its imposition is capable of frustrating further cooperation. The reasoning would be somewhat similar to the reasoning behind Arts. 74(3) and 83(3) LOSC, which deal with the delimitation over overlapping boundary claims in the EEZ and on the continental shelf. Whilst the situation is surely different (those provisions concern a dispute over sovereign boundaries), they provide provide that, pending an agreement, "States shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement". Blacklisting a third country may similarly jeopardise successful cooperation over the issues at stake (the conservation of living resources; flag state responsibilities; the extent of cooperation required; and so on).

[1088] Ibid. para. 210.
[1089] Ibid.
[1090] Ibid. para. 215.

In *Swordfish*, the EU also argued that Chile had breached the duty to cooperate. Though it did not do so in relation to its market measures but rather the exclusion of the EU in the design of the Galapagos Agreement,[1091] the Commission made some pertinent points at an earlier point in the dispute.[1092] It concluded that the prohibition to land catches in Chilean ports effectively diminished EU presence in adjacent high seas waters, thus weakening its position for the purpose of future cooperation in the region of transboundary stocks.[1093] Whilst it did not elaborate further, the reasoning that underpins the Commission's conclusion is likely that only those states with a "real interest in the fisheries concerned" may become members of an RFMO (Art. 8 Fish Stocks Agreement). As previously discussed in chapter 3, section 3.4.2, this is not defined, yet in practice often established on the basis of historical catch.[1094] It is thus important for states to establish or maintain a fishing presence. This argument must be distinguished from the argument that market measures in and of themselves violate the duty to cooperate. The duty to cooperate would be breached where it exists between the market state and the targeted state, where both exploit a transboundary stock, and where the imposition of market measures frustrates further cooperation. The Commission's argument here was rather that in balancing the sovereign right to close markets/ports against the legal right to fish, the latter should also consider that diminished presence on the high seas will have long-term consequences for the flag state, including in relation to future negotiations. In weighing and balancing the interests involved, this could help tip the scales more in favour of the flag state.

More importantly, denying market access for a failure to cooperate with the regulating market state in the management of a stock of common interest (as under the EU Non-Sustainable Fishing Regulation) would likely put an end to any further serious attempts at solving the issue. Whilst EU market access is not denied without having gone through a long period of negotiation, these negotiations take place under the threat of market denial, which puts in question their 'good faith' nature. This would again frustrate the duty to cooperate, in so far that meaningful consultations should be carried out in good faith.

[1091] *Swordfish* (supra note 948). The Galapagos Agreement was discussed at supra note 730 and surrounding text.
[1092] Commission Decision (supra note 943)
[1093] Ibid. p. 68 (para. 19).
[1094] Erik J Molenaar (supra note 18), p. 518.

6.8. Countermeasures

Market conditionality that is consistent with international obligations is, by definition, not problematic. Such measures can be categorised as actions of lawful retaliation or retorsion.[1095] The International Law Commission explains this as follows:

> "(...)unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it, even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State.[1096]

Where measures are *inconsistent* with a state's international obligations, for instance because they breach the principle of non-intervention, non-interference (LOSC), or another obligation found in international law, they may however still be justified under the doctrine of state responsibility. This is the case where the measures are a response to another state's wrongful act. In this case, the doctrine of state responsibility allows for the adoption of otherwise illegal, peaceful self-help measures – also called countermeasures.[1097] Non-peaceful self-help measures (belligerent reprisals) are however not lawful.[1098] The International Law Commission's draft articles on State Responsibility for International Wrongful Acts (ARSIWA) are the most extensive work on that topic, and are generally considered as representing the current state of the law.[1099]

The International Law Commission recognises that, "like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States".[1100] The ARSIWA therefore aims to "establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate

[1095] James Crawford S*tate Responsibility* (CUP, 2013), p. 676.
[1096] Draft articles on the Responsibility of States for Internationally Wrongful Acts and Commentary, see International Law Commission (supra note 416), p. 128.
[1097] James Crawford (supra note 1095), p. 684.
[1098] Ibid. p. 685.
[1099] Ibid.
[1100] Draft articles on the Responsibility of States for Internationally Wrongful Acts and Commentary, see International Law Commission (supra note 416), p. 128.

conditions and limitations, that countermeasures are kept within generally acceptable bounds".[1101]

The essential premise of the doctrine on state responsibility is found in Art. 1 ARSIWA, namely that every internationally wrongful act of a state entails its international responsibility. However, Art. 22 ARSIWA states that "the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State." Conditions for and limitations on taking countermeasures are set out subsequently in Arts. 49 to 55 ARSIWA. Whilst the wrongfulness of a countermeasure is thus precluded, it must be adopted *in response* to a prior, internationally wrongful act (Art 49(1)). In other words, a first prerequisite of a valid countermeasure is an internationally wrongful act, which is described in Art. 2 as a breach of an international obligation that is attributable to the state.

The question of a breach of law and attribution to the state in the area of fisheries has already been discussed in this thesis. Chapter 3 examined the level of conduct required of states to discharge their various obligations under the law of the sea in their capacity as flag and coastal state, and more generally to protect and preserve the marine environment. For instance, whilst states are not directly responsible for illegal fishing, it was said that they are under a high degree of due diligence to ensure that vessels flying their flag do not undermine their responsibilities under the LOSC.

Market conditionality as discussed in this thesis targets countries for their perceived failure to live up their international obligations, although the EU also puts great weight on the degree of bilateral cooperation that a targeted country engages in. To the extent that states targeted by market conditionality indeed do not discharge their due diligence obligations, which would require a case by case analysis, they have committed a wrongful act. The Regulation itself considers it to be so, though. The Regulation's Preamble stipulates that "…the establishment of a list of non-cooperating States should entail trade counter-measures in respect of the States concerned" (rec. 32). To compare, it will also be easier to establish that the EU is specifically affected where a third country 'mal manages' a stock of common interest (EU Non-Sustainable Fishing Regulation) than under the EU IUU Regulation. Moreover, in personal communication with the Commission, it was explained that the aim of

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[1101] Ibid.

the yellow card was "to induce the third country to put an end to its internationally wrongful behaviour without further restrictive countermeasure."[1102]

However, only *injured* states may lawfully engage in countermeasures vis-à-vis the state that committed a wrongful act (Art. 49(1) ARSIWA). The question arises whether a market state responding to another state's failure to perform their responsibilities with regard to sustainable fisheries is truly an "injured state", for the purpose of valid countermeasures. The definition of an "injured state" is set out in Art. 42. Where the targeted state breaches an obligation which it owed towards the retaliating state individually (the one doing the blacklisting), the latter can be deemed injured. The same holds where the targeted state breaches an *erga omnes* obligation, and the retaliating state is specifically affected by that breach. It should be noted that "injury" need not be material, and includes "any damage, whether material or moral, caused by the internationally wrongful act of a State" (Art. 31(2)). I discuss each situation in turn.

First, fisheries related obligations such as the duty to exercise flag state responsibility or to ensure the sustainable exploitation of the living resources in one's EEZ are not obligations that states hold towards each other. They exist not under a bilateral agreement between two parties, but under a multilateral agreement. However, the International Law Commission acknowledges that duties may be owed "individually" to another state under a multilateral treaty as well, provided the performance of an obligation under a multilateral treaty or customary international law is owed to one particular state.[1103] Examples of this can be found in the LOSC. For instance, the duty to have due regard towards the rights or interests of affected states, which arises under various provisions of the LOSC, and the duty to cooperate over transboundary fish stocks, where this is required by law. In such circumstances, one state will owe a particular obligation towards another state, individually. The ITLOS has rightly held that the duty to cooperate therefore also entails a right to request cooperation in certain circumstances.[1104] In so far that a state fails to do so, and remembering that the standard of responsibility is one of conduct, and of due diligence, such a state commits a wrongful act. The state who was owed cooperative efforts or whose rights were not given due

[1102] Letter from the European Commission (supar note 616).
[1103] Draft articles on the Responsibility of States for Internationally Wrongful Acts and Commentary, see International Law Commission (supra note 416), p. 118.
[1104] *Advisory Opinion to the SRFC* (supra note 83), p. 67.

regard would be injured by this internationally wrongful act, and could adopt countermeasures in peaceful retaliation.

Second, recalling the discussion in chapter 3, section 3.7, the duty to protect and preserve the marine environment, and by corollary the more specific obligations to ensure the sustainable conservation and management of living resources in the EEZ and on the high seas, should be considered as *erga omnes*.[1105] *Erga omnes* obligations are those that a state has towards the international community as a whole, and therefore any state has a legal interest in their protection.[1106] Any state could therefore adopt countermeasures in retaliation, provided it can establish it is 'specifically affected' by the breach. The International Law Commission explains that the latter should be examined on a case-by-case basis. It gives the example of marine pollution in breach of Art. 194 LOSC, which "may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed."[1107]

Given the well-documented impact of bad fisheries management on the health of marine resources, all parties to the LOSC would have a general interest in this. Moreover some state might be able to establish injury. Candidates include: states with an important conservation interest in the same stock (e.g. RFMO members vis-à-vis non-members); developing countries, or landlocked or geographically disadvantaged states with a specific reliance on fish (Arts. 69 and 70 LOSC); or states with an important market share of the fish product industry. In this respect, it is interesting to look at the US definition of IUU fishing. It is more restrictive than that found in the IPOA-IUU and thereby limits the US analysis, for the purpose of blacklisting countries, *inter alia* to other states' breaches of RFMO measures *of which the US is a member*.[1108] As a result, it may be easier for the US to establish that it is specifically affected by a targeted state's breach of an *erga omnes* obligation to protect and preserve the marine environment, than under the EU IUU Regulation. The EU IUU Regulation concerns fishing activities all over the world, including on stocks which are in no way of interest to the EU. The need to be specifically affected puts in question whether any

[1105] Supra note 416.
[1106] *Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, para. 33.
[1107] Draft articles on the Responsibility of States for Internationally Wrongful Acts and Commentary, International Law Commission (supra note 416), p. 118.
[1108] NOAA, Final Rule 50 CFR Part 300, 16 January 2013, 78 Federal Register, p. 3338-3346, para. 300.201.

measures adopted in response to bad fisheries practices abroad could be justified as countermeasures.

Countermeasures must furthermore aim to induce the targeted state to comply with its international obligations (Art. 49(1) ARSIWA). They must be necessary to terminate the violation or prevent future violations.[1109] As the ICJ has explained in *Gabcikovo-Nagymaros,* the counter-measure must therefore be directed *at* the state which committed the wrongful act, and moreover be reversible (once the targeted state complies with its obligations).[1110] The latter is linked with another important requirement, namely that countermeasures must be proportionate. Art. 51 ARSIWA stipulates they must be "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". Countermeasures must thus be *necessary* and *proportionate*, but they need not be *reciprocal*, and they need not be limited to suspension of performance of the same or a closely related international obligation.[1111]

The Court had a closer look at the proportionality requirement in *Gabcikovo-Nagymaros*, where it considered that Czechoslovakia went too far by diverting the Danube river – a shared, common resource, to which all riparian states had the right to an equitable and reasonable share.[1112] Essentially, the question is once again one of balancing interests. Finally, certain due process requirements must be followed (Art. 52). Counter-measures are a last resort, and can only be adopted after the other state has been notified, and negotiations to solve the issue otherwise have failed.[1113] This mirrors the requirements that are stipulated more clearly in the law of the WTO (chapter 7), and further bolsters the call in this thesis for procedural fairness (chapter 8).

6.9. Conclusion

This chapter has shown that any state other than the flag state that subjects activities of a foreign ship on the high seas to its jurisdiction (even when enforced in port) breaches the

[1109] *Fisheries Jurisdiction* (United Kingdom v. Iceland) (supra note 312), p. 55-56. The US blacklisting mechanism is explained at supra note 64.
[1110] *Gabcikovo-Nagymaros Project* (supra note 1035), paras. 83, 87.
[1111] Draft articles on the Responsibility of States for Internationally Wrongful Acts and Commentary, see International Law Commission (supra note 416), p. 129; James Crawford (supra note 1095), p. 685. On the substantive limitations to countermeasures, see Art. 50 ARSIWA and Crawford, p. 688-700.
[1112] *Gabcikovo-Nagymaros Project* (supra note 1035), paras. 85-87.
[1113] James Crawford (supra note 1095), p. 700-702.

freedom of navigation under Art. 87 LOSC.[1114] It was concluded that this is relevant also for market conditionality in fisheries. This means that the market state should not regulate lawful high seas fishing activities by vessels not flagged to it, even where it does so by way of territorial extension, enforcing these measures at the point of market access. This is particularly relevant when adopting punitive measures (e.g. fining operators). The case of denying market access is somewhat more complicated, as doing so corresponds to a sovereign right of the market state.

There appear to be overlapping jurisdictional claims, namely, of the flag state and of the market state. These will have to be balanced against one another, and this chapter suggested thinking about the reasonableness of engaging in market action, as informed by the principle of non-intervention, the doctrine of abuse of right and good faith, and the LOSC's call for refraining from unjustifiable interference with the activities of others. Moreover, market conditionality should not be discriminatory, and, in evaluating other countries' compliance with their law of the sea related obligations, there is reason to argue that market states should take into account their capacity/level of development. Furthermore, it is important to avoid frustrating further cooperation over the exploitation of transboundary fish stocks, where this is required. This is a strong argument against the lawfulness of measure taken pursuant to the EU Non-Sustainable Fishing Regulation.

At the same time, the argument can be made that *some* forms of market conditionality in fisheries, if this is found to be in breach of international law, could nevertheless be justified as a legitimate countermeasure. The duty to protect and preserve the marine environment is arguably an *erga omnes* obligation. Where other states fail to sustainably conserve and manage living resources in accordance with the LOSC, any other state that is specifically affected by this may engage in peaceful retaliation. The need to be specifically affected makes it however questionable whether measures under the EU IUU Regulation could be justified as countermeasures.

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[1114] *M/V Norstar* (supra note 475), para. 224.

7. The appropriateness of market conditionality: substantive WTO law

7.1. Introduction

Market restrictions adopted as part of a state's mechanism to make market access conditional upon compliance with international fisheries norms and obligations risk non-compliance with WTO law on various accounts. Since WTO law kicks in when trade is affected, this chapter specifically examines measures that restrict market access (market restrictions), rather than the general mechanism of market conditionality in fisheries as a whole. The distinction between market conditionality as a mechanism and market measures (such as import and export restrictions) that are adopted as part of this mechanism has been explained in chapter 2, section 2.3.1. The appropriateness of the yellow card therefore falls outside the scope of this chapter. Furthermore, this chapter only discusses the substantive aspects of WTO law. The procedural aspects are examined in chapter 8, where the yellow card *will* be examined in so far it constitutes a prelude to market restrictions.

The most relevant substantive obligations in the GATT that market measures in fisheries may breach are examined in section 7.2, and include the following: Art. I, Art. III:4; Art. V; and Art. XI. Where a measure violates a provision of the GATT, there is no need to establish whether it also violates other provisions.[1115] In the event that a breach of one of these provisions of the GATT can be found, the measure may still be justified under Art. XX, which I discuss in section 7.3. As for the TBT Agreement, this is relevant in particular for the EU CDS. As chapter 4 explained, the EU CDS operationalises import restrictions adopted upon blacklisting, in so far that a CDS will not be accepted as valid where the flag state which is tasked with validating the certificate has been put on the third country blacklist. The most important question here is whether a CDS would fall in the scope of the TBT Agreement as a technical regulation, and subsequently whether it fulfils Arts. 2.1, 2.2, and 2.4. This is examined in section 7.4. Section 7.5 concludes.

[1115] *US – Wool Shirts and Blouses*, 15 April 1997, Appellate Body report (WT/DS33/Appellate Body/R), para. 18; Barbara Cooreman (supra note 579), p. 30.

7.2. Breaching the GATT?

7.2.1. Most favoured nation-treatment

Art. I:1 GATT contains the most favoured nation (MFN) principle, a "cornerstone of the GATT",[1116] as follows:

> "With respect to (...) all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

The essence of the MFN principle is to extend the same import and export opportunities to all WTO members, and not to discriminate between them.[1117] For a measure to be inconsistent with Art. I:1, it must thus fall within the scope of Art. I:1 (e.g. be a rule or formality of import and export); the imported products must be "like" products; the measure must confer an "advantage, favour, privilege or immunity"; and this must not be extended "immediately" and "unconditionally" to "like" products from other WTO members.[1118] It covers both *de facto* and *de jure* discrimination, namely, measures which discriminate based on origin *and* measures which appear origin-neutral but where it appears that they treat the product from one WTO member less favourably than the like product from another.[1119]

Where the market state lays down rules related to the import and export of fish, it adopts measures that fall within the scope of Art. I:1 (these measures are a rule or formality in connection with import and export). They also confer an advantage, in so far that they regulate (and restrict) market access. In *US – Poultry (China)*, the Panel observed that "(…) the opportunity to export poultry products to the United States after successful completion of [certain procedures] is an advantage within the meaning of Article I:1 of the GATT 1994 because it creates market access opportunities and affects the commercial relationship

[1116] *EC – Tariff Preferences*, 7 April 2004, Appellate Body report (WT/DS246/Appellate Body/R), para. 101, referring to *Canada – Autos*, 31 May 2000, Appellate Body report (WT/DS139/Appellate Body/R; WT/DS142/Appellate Body/R), para. 69.

[1117] Peter van den Bossche and Werner Zdouc *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (CUP, 2017), p. 308.

[1118] *EC – Seal Products*, 22 May 2014, Appellate Body reports (WT/DS400/Appellate Body/R; WT/DS401/Appellate Body/R), para. 5.86.

[1119] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 309, referring *inter alia* to *Canada – Autos*, Appellate Body report (supra note 1116), para.78.

between products of different origins".[1120] Using the example of EU IUU, the EU grants the advantage of (*inter alia*) market access to fish caught in accordance with applicable law (as proven by a valid catch certificate), that is carried into port by a non-blacklisted vessel, and that is not coming from a blacklisted country. This falls within the scope of Art. I:1.

By regulating market access, states also regulate the use of ports and port services. This can also be deemed an advantage for the purpose of Art. I:1. This was confirmed in *Colombia – Ports of Entry*. Colombia had adopted a measure whereby textiles, apparel and footwear of non-Panamanian origin could enter at any of 11 ports, as long as the goods did not transit through Panama, while identical goods arriving from Panama could only enter at two ports. Panama therefore argued that access to additional ports was an advantage that was not immediately and unconditionally extended to imports from Panama.[1121] The claim was found non-admissible for other reasons, and was therefore not considered. The Panel did however consider that Colombia's requirement to present an advance import declaration and legalization requirements under the ports of entry measure was an advantage. By subjecting certain imports arriving from *some* countries to an advance import declaration requirement but not others, Colombia conferred advantages to like products in a discriminatory manner.[1122]

Market restrictions adopted under both the IUU and Non-Sustainable Fishing Regulations risk falling foul of Art. I:1. This constituted one of the grounds of the Faroe Islands challenge of the EU's ban on mackerel and Atlanto-Scandic herring, adopted pursuant to the EU Non-Sustainable Fishing Regulation.[1123] The Faroe Islands argued that the EU breached Art I:1 by prohibiting (1) the introduction of specified Atlanto-Scandian herring and Northeast Atlantic mackerel products into the territory of the EU, and (2) the use of EU ports by certain vessels flying the flag of the Faroe Islands and certain third-country vessels transporting specified fish or fishery products.[1124] The *EU – Herring* dispute was withdrawn following a mutually agreed solution on 21 August 2014 before a decision was rendered.

[1120] *US – Poultry* (China), 29 September 2010, Panel report (WT/DS392/R), paras. 7.416-7.417; Similarly, the Panel in *EC – Seal Products* held that "access to the EU market" is an advantage under Art. I:1 that, unless immediately and unconditionally extended to like products, "detrimentally affects the conditions on the market" for foreign products, *EC – Seal Products*, 25 November 2013, Panel report (WT/DS400/R; WT/DS401/R), para. 7.597.

[1121] *Colombia – Ports of Entry*, 27 April 2009, Panel report (WT/DS366/R), para.7.294.

[1122] Ibid. para. 7.335.

[1123] *EU – Herring*, Request for consultations (supra note 741).

[1124] Ibid. para. 18.

The discriminatory nature of market restrictions in fisheries under Art. I:1 hinges on whether fish or fish products that is denied market/port access is like fish or fish products that is allowed access. Generally speaking, so as to determine likeness, all relevant criteria must be examined. Whilst there is no one appropriate approach, the Appellate Body generally looks at (1) the properties, nature, and quality of products; (2) the end use of the products; (3) consumer tastes and habits in respect of the products; and (4) the tariff classification of the products.[1125] These are not a closed-list, and in any event must be considered as a whole, and not in isolation from one another.[1126]

Fish and fish products can clearly be distinguished per category (e.g. tuna, swordfish, herring) on account of their different tariff rates and characteristics. But *within* those categories, delimiting the groups of products that need to be compared is not straightforward. In the case of the EU, fish products which are accompanied by a correctly filled out catch certificate attesting to the legality of the catch, which has been validated by a non-blacklisted country, and which is not brought into port by a blacklisted vessel, are treated differently from fish products where one of these criteria is lacking. The question is whether the regulatory circumstances in which the fish was caught make it unlike. It can be observed that the question is not whether legally caught fish is like illegally caught fish, though this may lead to the same conclusion. As mentioned in chapter 2, one of the reasons for focusing on country-level measures is that they exclude all fish products from a particular country, irrespective of the legality of the individual catch. This touches upon a much debated issue. Environmental regulations may often want to accord more favourable conditions to products that are produced in an environmentally-friendly way. The question that often arises is therefore whether process and production methods (PPMs) matter for determining likeness, even where these methods do not impact the characteristics of the product (non-product related PPMs, or npr-PPMs). Christiane Conrad calls measures unrelated to the physical aspects of a product more generally 'non-physical aspect' measures.[1127] Non-physical aspect measures are those whose objective or factual elements are characterised by non-physical aspects of a product. They may include npr-PPMs as well as measures which relate to the

[1125] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 318, 384; *EC – Asbestos*, Appellate Body report (supra note 1132), para. 101.
[1126] Peter van den Bossche and Werner Zdouc (Ibid.), p. 385; *EC – Asbestos*, Appellate Body report (supra note 1132), para. 103.
[1127] See Christiane R. Conrad *Processes and Production Methods (PPMs) in WTO Law* (CUP, 2011), p. 12, 62.

producer rather than the process by which a product is produced (such as the EU Seal Ban, described below, or country blacklisting in fisheries).

It is unlikely that regulatory circumstances matter for the purpose of likeness. Historically, npr-PPMs are irrelevant for determining likeness.[1128] In other words, a product will not be unlike *only* because it was produced differently, but where this does not affect its characteristics. But likeness is a complex, and the question whether regulatory circumstances can affect likeness is an important one. This is in particular so because likeness appears not only in Art. I:1 but at various instances in the GATT. It is an important consideration whether a product is like another, since if it is not, then differential treatment between those products would not result in discrimination. It is generally accepted that the scope or width of what is like will depend on the context of the provision in which it is found.[1129] Nevertheless, the limited jurisprudence on likeness in the context of Art. I:1 invites a look at the Appellate Body's views on likeness elsewhere.[1130] An appropriate candidate is Art. III:4. Both Art. I:1 and Art. III:4 are concerned with prohibiting discriminatory measure and ensuring equality of competitive opportunities between products that are in a competitive relationship.[1131] Whilst the same can be said about III:2, this paragraph differs in wording from Art. III:4 by referring to both "like products" in a first sentence *and* in a second sentence to "imported or domestic products", which has been interpreted as products that are "directly competitive or substitutable". As the Appellate Body explained in *EC – Asbestos*, "(...)given the textual difference between Articles III:2 and III:4, the accordion of likeness stretches in a different way in Article III:4."[1132] Likeness in the context of Art. III:4 is *broader* than in Art. III:2 (first sentence), and this is also how likeness in the context of Art. I:1 should be understood. Continuing its interpretation of "likeness" in the context of Art. III:4 GATT, though without ruling on its precise content, the Appellate Body explained that like products usually share a number of identical or similar characteristics or qualities, and that determining their likeness is essentially a determination about the nature and extent of some competitive relationship

[1128] For a discussion on the definition and appropriateness of the distinction between npr-PPMs and pr-PPMs, see Gracia Marin Duran 'NTBs and the WTO Agreement on Technical Barriers to Trade: The Case of PPM-Based Measures Following US – Tuna II and EC – Seal Products' (2015) 6 European Yearbook of International Economic Law 87, p. 91.

[1129] *Japan – Alcoholic Beverages II*, Appellate Body report (supra note 225), para. 114.

[1130] Though Peter van den Bossche and Werner Zdouc point out that this must be done with caution, see Peter van den Bossche and Werner Zdouc (supra note 1117), p. 318.

[1131] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.82.

[1132] *EC – Asbestos*, 12 March 2001, Appellate Body report (WT/DS135/Appellate Body/R), para. 96.

between them.[1133] Because there is a whole spectrum of degrees of competitiveness of products in the marketplace, though, it is "difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word 'like' falls."[1134] Essentially, the Appellate Body held that it includes more than only products that are in a direct competitive relationship with one another, though it also acknowledges that not all products that are in some competitive relationship are necessarily like.[1135]

Because of the relevance of likeness for both Art. I:1 and III:4, and because non-physical aspect measures have mostly been discussed in the context of III:4, I continue this discussion below. Presuming for now that fish and fish products will be deemed to be like regardless of the regulatory circumstances in which they are caught, one final determination must be made to determine compliance with Art. I:1. The advantage of market access must be given "immediately and unconditionally" to "like" products. This is reflective of the role of Art. I:1 (like Art. III:4), namely to ensure that like products enjoy the same conditions of competition in a country's market.[1136] It does *not* mean that no conditions may be imposed whatsoever. In *Canada – Autos,* the Panel explained more fully that "there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded 'unconditionally' to the like product of all other members".[1137] It decided that the latter "cannot be determined independently of an examination of whether it involves discrimination between like products of different countries" and that "the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO members without discrimination as to origin".[1138]

Notwithstanding the possibility that regulatory conditions may make fish products 'unlike' and therefore excuse any differential treatment, (EU) market access restrictions in fisheries will likely breach Art. I:1.

[1133] *EC – Asbestos* (supra note 1132), paras. 91, 99.
[1134] Ibid. para. 99.
[1135] Ibid.
[1136] *US – Tuna II (Mexico) (Art.21.5)*, Appellate Body report (supra note 793), para. 7.338.
[1137] *Canada – Autos*, 11 February 2000, Panel report (WT/DS139/R; WT/DS142/R), paras. 10.24.
[1138] Ibid. para. 10.22.

Arguably, a CDS that does *not* have a country-level dimension to it, could be compliant with Art. I:1. A CDS as it is a rule or formality related to the importation and exportation of fish products, and falls within the scope of Art. I:1. A validated certificate bestows the advantage of market access. A CDS will apply to particular groups of fish products that can be differentiated based on their tariffs (e.g. halibut, tuna, mackerel), and within those groups, applies in the same way wherever the fish is coming from. The same advantage of market access is bestowed immediately and unconditionally to any like product with a valid certificate. In the context of a CDS, all like (fish) products are treated the same way, without discrimination as to origin; though the effect is of course that only certified products (legally caught fish) have access to the market. A CDS might therefore be able to comply with Art. I:1.[1139] At the same time, in practice, CDS risk being so designed that in fact they impose a lighter burden on certain imports of fish than on others. It may be much easier for certain fish products to fulfil the substantive requirements of a CDS, depending on the conditions attached to a valid catch certificate. Art. I applies to *de jure* and *de facto* discrimination, and a lighter burden in practice on certain imports over other like products could amount to *de facto* discrimination. This all depends on the circumstances of the case.

7.2.2. National treatment

The second main non-discrimination principle of the GATT can be found in Art. III, which sets out the principle of national treatment. It prohibits discrimination between domestic products and those coming from abroad (whereas Art. I concerns discrimination between foreign products). Of relevance here is Art. III:4, which stipulates as follows:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. (…)"

The objectives of Art. III are to avoid protectionism, provide equal competitive conditions, and protect *expectations* of equal competitive relationships.[1140] Inconsistency with Art. III:4 requires demonstrating that the imported and domestic products are "like" products; the measure at issue is a "law, regulation, or requirement affecting the internal sale, offering for

[1139] Robin Churchill (supra note 24), p. 344-345.
[1140] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 344; *EC – Asbestos*, Appellate Body report (supra note 1132), para. 98.

sale, purchase, transportation, distribution, or use" of the products at issue; and the treatment accorded to imported products is less favourable than that accorded to domestic products.[1141] As for Art. I, Art. III covers both *de jure* and *de facto* discrimination.[1142] It does not also require a separate demonstration that the measure affords protection to domestic products.[1143] In fact, a measure may not apply to domestic products at all. Art. III:1 – which sets out the general principle of the provision and informs the other paragraphs[1144] – refers to the application of measures "to imported *or* domestic products", which according to the Panel in *India – Autos* suggests that application to both is not necessary.[1145] It explained that "a product standard conditioning the sale of the imported but not of the like domestic product, could nonetheless "affect" the conditions of the imported product on the market and could be a source of less favourable treatment. Similarly, the fact that a requirement is imposed as a condition on importation is not necessarily in itself an obstacle to its falling within the scope of Article III:4."[1146] It added, in a footnote, that the "advantage" to be obtained could thus consist in a right to import a product. Internal measures may therefore well be enforced or collected at the border, without thereby amounting to "border measures" (which are covered by Art. II or XI GATT).[1147] Art. III may thereby overlap with the prohibition on quantitative restrictions on trade (Art. XI GATT, examined below), and this was also acknowledged by the Panel in *India – Autos*.[1148] It should however be kept in mind that the two provisions *are* different, in so far that there is a distinction between measures affecting the importation of products, (Art. XI:1), and those affecting imported products (Art. III).[1149] The key question under Art. III is whether the measure implements an internal regulatory requirement, whether this is applied at the border or internally.

[1141] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.99, referring to *Thailand – Cigarettes (Philippines)*, 17 June 2011, Appellate Body report (WT/DS371/Appellate Body/R), para. 127, and referring to *Korea – Various Measures on Beef*, 11 December 2000, Appellate Body report (WT/DS161/Appellate Body/R; WT/DS169/Appellate Body/R), para. 133.

[1142] An example of *de jure* discrimination can be found in *Korea – Various Measures on Beef*, Appellate Body report (surpra note 1141); an example of *de facto* discrimination (lower taxes on shochu, whether domestic or imported, than other strong alcohols, whether domestic or imported) can be found in *Japan – Alcoholic Beverages II*, Appellate Body report (supra note 225).

[1143] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 377.

[1144] *Japan – Alcoholic Beverages II*, Appellate Body report (supra note 225), para. 111.

[1145] *India – Autos*, 21 December 2001, Panel report (WT/DS146/R, WT/DS175/R), para. 7.306.

[1146] Ibid.

[1147] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 346; Note *Ad* Article III.

[1148] Ibid.; *India - Autos,* Panel report (supra note 1145), para. 7.306.

[1149] *India – Autos* (Ibid.), para. 7.220, referring with approval to the pre-WTO Panel report in *Canada – FIRA*, 7 February 1987, Panel report (L/5504), para. 5.14.

The requirement on the import of fish or fish products in the form of a valid catch certificate from a non-blacklisted country and which is not brought into port by a blacklisted vessel, thus providing proof of the legality of that catch as well as proof of the favourable regulatory circumstances in its flag state, could be categorised as an internal regulation for the purpose of Art. III:4.

The question of likeness is discussed separately below. As for the requirement to accord "no less favourable treatment" to imported and domestic like products, the emphasis is – as with Art:I:1 – not on whether imported and domestic products are *formally* regulated differently. Formally different regulation may be compatible with Art. III:4 if that treatment results in maintaining conditions of competition for the imported product that are "no less favourable" than those of the "like" domestic products.[1150] The test for "no less favourable treatment" was recently captured in *EC – Seal Products*, where the Appellate Body summarised its case law on the matter as follows:

> "First, the term "treatment no less favourable" requires effective equality of opportunities for imported products to compete with like domestic products. Second, a formal difference in treatment between imported and domestic like products is neither necessary, nor sufficient, to establish that imported products are accorded less favourable treatment than that accorded to like domestic products. Third, because Article III:4 is concerned with ensuring effective equality of competitive opportunities for imported products, a determination of whether imported products are treated less favourably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products. If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is "less favourable" within the meaning of Article III:4. Finally, for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products."[1151]

Denying market access to fish products on grounds that the state that validated the accompanying catch certificate is blacklisted (or, for that matter, because the vessel carrying the products has been blacklisted) would clearly constitute less favourable treatment. The same can be said for denying market access to fish products on grounds that the flag state is blacklisted for allowing non-sustainable fishing. It would deny equal opportunities to foreign fish products as compared to domestic products. Using the example of the EU, fish products

[1150] *US – Gasoline*, 29 January 1996, Panel report (WT/DS2/R), para. 6.25.
[1151] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.101(footnotes omitted).

caught by EU flagged vessels would be treated more favourably, since EU members cannot be blacklisted under either the EU IUU or Non-Sustainable Fishing Regulations, and fish products may therefore not be denied market access on those grounds. Market restrictions in fisheries in general, and those adopted upon EU country blacklisting in particular, would have a clear detrimental impact on the conditions of competition of imported products. The genuine relationship between blacklisting and those impacts is not to be doubted either.

Following the same analysis as in relation to Art. I:1, above, a CDS without a country-level dimension could fairly easily comply with Art. III:4, if it applied equally to imported and domestic products.[1152]

7.2.3. Non-physical aspect measures and likeness

I recall that market restrictions under the EU IUU Regulation differentiate between products depending on the regulatory circumstances in the flag state validating a catch certificate. Namely, where those circumstances are sufficiently unfavourable that a flag state is blacklisted, it can no longer validate catch certificates, and these products will be denied market access. Like npr-PPMs, such market restrictions regulate the non-physical aspects of a product. Historically, it has been argued by the Panel that npr-PPMs fall outside the scope of Art. III *per se*. Interesting in this regard is the dispute over US labelling requirements for tuna. It is well known that the harmful practice of catching tuna with purse-seine nets by 'setting on' dolphins causes a high mortality rate among dolphins. Yet, until the mid-80s, this was a common fishing practice in the Eastern Tropical Pacific (ETP), where dolphins habitually follow schools of tuna, making the tuna easy to locate by looking for the dolphins above them. It was estimated that this caused the death of over one hundred thousand dolphins annually. The US started regulating this practice by its own vessels, and called for comparably effective measures from countries that import tuna into the US.[1153] Observing that Mexico had not adopted such measures, the US imposed an import ban in 1991 on tuna coming from Mexico. The US measures clearly distinguished between tuna products, but not because of their product characteristics, tariff classifications, end uses, or consumer preferences. The measures distinguished based on *fishing methods*; an npr-PPM. The GATT

[1152] Robin Churchill (supra note 24), p. 344-345.
[1153] Gregory Shaffer 'United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products' (2013) 107 The American Journal of International Law 192, p. 193.

Panel observed that this was irrelevant for determining likeness, since "it could not possibly affect tuna as a product".[1154]

Shortly thereafter, the EU brought a similar case again the US concerning tuna. The Panel followed the same reasoning, arguing that Art. III calls for a comparison between the treatment accorded to domestic and imported *products,* not between the *policies or practices* of the country of origin with those of the country of importation which did not affect the inherent character of the product as such.[1155] The Panel found that Art. III "could not apply to the enforcement at the time or point of importation of laws, regulations or requirements that related to policies or practices that could not affect the product as such, and that accorded less favourable treatment to like products not produced in conformity with the domestic policies of the importing country."[1156]

In both cases, the GATT Panel thus determined that npr-PPMs simply do not fall under Art. III:4 GATT and examined the measures instead under Art. XI, as an import prohibition (discussed below).[1157] Art. XI is subject to a conflict rule, whereby a measure that falls within the scope of Art. III will be subject to this provision, rather than Art. XI.[1158] This has very practical consequences for environmental-oriented measures, including market restrictive measures in fisheries. Art. XI imposes a blanket ban on import restrictions, whereas Art. III allows for the adoption of measures that treat products differently, if it can be shown that they are not like. It would therefore be more beneficial for environmental npr-PPMs and other non-physical aspect measures to be considered under Art. III:4.

It is submitted that the findings above no longer reflect the current state of the law. The GATT Panel decisions predate the WTO, and were never adopted. Non-physical aspect measures such as npr-PPMs may however be relevant for determining likeness. The recently revived dispute over 'dolphin safe' tuna provides some clarity on this. The case is relevant for its similarities to market measures in fisheries as described in this thesis. It is also relevant for shedding light on the role of RFMOs as potential standard setting bodies, and I refer back to this when analysing the TBT Agreement below.

[1154] *US – Tuna I (Mexico)*, 3 September 1991, Panel report (DS21/R - 39S/155), para. 5.15.
[1155] *US – Tuna (EEC)*,16 June 1994, Panel report (DS29/R), paras. 5.8-5.9.
[1156] Ibid.
[1157] Ibid. para. 5.10; Barbara Cooreman (supra note 579)), p. 29, also explaining that the provisions may not simultaneously apply.
[1158] Note ad Art. III.

In the years that followed the original dispute over the US ban on Mexican tuna, the US and Mexico entered in negotiations with other countries involved in tuna fishing in the ETP. This gave rise to a series of agreements on dolphin conservation. Most notable is the International Dolphin Conservation Program adopted under the auspices of IATTC, the relevant RFMO for the area.[1159] Subsequently, the US adopted the Dolphin Protection Consumer Information Act (DPCIA). The DPCIA strictly regulates the use of the 'dolphin safe' label or analogous claims. Tuna caught on the high seas by a vessel engaged in driftnet fishing may under no circumstance be labelled as 'dolphin safe'. Purse-seine caught tuna outside the ETP in an area with a known regular and significant tuna-dolphin association (similar to the ETP) may only be labelled 'dolphin safe' upon provision of a written testimony from the captain and an IDCP-approved observer on board that (1) no purse seine net was intentionally deployed on or to encircle dolphins, and (2) no dolphins were killed or seriously injured during the sets in which the tuna was caught. A statement as to the first point is the only requirement to be provided for tuna caught outside the ETP in a fishery that has not been the subject of a specific determination as to its vulnerability. Statements as to both points are required for tuna caught with a large purse seiner (over 363 metric tonnes) operating within the ETP, which must furthermore be endorsed in writing by the exporter, importer, and processor of the product. As an additional requirement, there is a need to provide a written statement executed by the Secretary of Commerce (or designee), a representative of the IATTC or an authorised representative of a participating nation whose national program meets the requirements of the IDCP that an IDCP-approved observer was on board the vessel during the entire trip and provided the certification required.

The label carries great weight on the US market, where canneries and processors almost exclusively buy 'dolphin safe' tuna.[1160] Mexico disputed the requirements for granting it. At the time of the dispute, no fishery outside the ETP had been determined to have a regular and significant association between tuna and dolphins similar to the association in the ETP, and no determination has been made that any non-purse seine tuna fishery has regular and significant dolphin mortality. The requirements applicable to the ETP were therefore considerably stricter than in any other fishery or geographical area. To compare, the AIDCP Resolution to Adopt the Modified System for Tracking and Verification of Tuna, adopted in

[1159] Available at: https://www.iattc.org/idcpeng.htm.
[1160] Gregory Shaffer (supra note 1153)

2001, defines 'dolphin safe' as "tuna captured in sets in which there is no mortality or serious injury of dolphins". This is a much lighter burden than that set by the US.

Mexican vessels fish almost exclusively in the ETP for yellowfin tuna, and follow the AIDCP standards. Mexico therefore argued that it had "maintained a sound and environmentally sustainable method for fishing for tuna and participated in all multilateral initiatives to protect dolphins while fishing for tuna".[1161] Yet, because of the strict US requirements, "Mexican tuna products are prohibited by the US measures from using a 'dolphin safe' label, while tuna caught in other fisheries that have not adopted comparable measures to protect dolphins are able to benefit from a 'dolphin safe' label."[1162] This, so Mexico believed, was in breach of the TBT Agreement, as well as Arts. I:1 and III:4 GATT. The Panel found a breach of the TBT Agreement, but exercised judicial economy and did not extend its argument to Arts I:1 and. III:4 GATT. Nevertheless, the case is relevant for the discussion of likeness under the GATT, since Mexico had concluded that it would be appropriate for the term likeness under the TBT Agreement to be given same meaning under Art. III:4. The Panel indeed drew on case law related to likeness under both Art. III:4 and Art. 2.1 of the TBT Agreement to make its points.[1163]

The labelling requirements clearly did not depend on the characteristics of the product but on the fishing method. They constituted an npr-PPM, as discussed above. Though the Panel did not make any observations on the relevance of npr-PPMs, this is likely due to the way the parties presented the dispute. The parties had been asked whether the comparison for the likeness analysis was between US and Mexican tuna in general; between Mexican tuna caught in the ETP by setting on dolphins, and US tuna caught by different means; or between US 'dolphin safe' tuna, and Mexican 'dolphin safe' tuna. Mexico had responded to this "that the method of fishing and geographic region in which the tuna are caught are unincorporated PPMs that are not relevant to the like products determination".[1164] The US also clarified that the like products analysis under Article III:4 should compare US tuna products in general and imported tuna products in general. The Panel therefore "completely sidelined the fact that the US 'dolphin safe' label was based on npr-PPM criteria that were not traceable in the final

[1161] *US – Tuna II (Mexico)*, 15 September 2011, Panel report (WT/DS381/R), para. 4.3.
[1162] Ibid.
[1163] Ibid. para. 7.216 and subsequent paragraphs.
[1164] Ibid. para. 7.231-7.232.

tuna products".[1165] The implications of this for the analysis of the TBT Agreement are discussed further below.

On appeal, the Appellate Body found the Panel's judicial economy to be inconsistent with the requirement to conduct an objective examination (Art. 11 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)),[1166] and opined that the nature of the obligations laid down in Art. 2.1 TBT, on the one hand, and Art. I:1 and III:4 GATT, on the other hand, are not the same.[1167] This was notwithstanding the fact that there is much overlap between these provisions, and the Appellate Body also subsequently acknowledged that "the inquiry under these provisions hinges on the question of whether the measure at issue modifies the conditions of competition in the responding Member's market to the detriment of products imported from the complaining Member vis-à-vis like domestic products or like products imported from any other country".[1168] The difference lies in the fact that Art. 2.1 TBT requires an additional consideration of whether any detrimental impact nevertheless stems exclusively from a legitimate regulatory distinction.[1169]

The US measures were found to be a mandatory labelling requirement, effectively prohibiting any mention of dolphin safety on cans of tuna that do not meet US regulatory requirements, and therefore fell in the scope of the TBT Agreement.[1170] Since Mexico had not asked the Appellate Body to complete the legal analysis concerning the GATT provisions, the Appellate Body did not do so. But in Mexico's subsequent challenge under Art. 21.5 DSU to the US implementing measures, the issue of compatibility under Art. I:1 and Art. III:4 arose once more, and this time both provisions were considered. Unfortunately, in its analysis of Arts. I:1 and III:4 in *US – Tuna II (Mexico) (Art. 21.5)*, the compliance Panel sidestepped the issue of npr-PPMs and likeness once again. Recalling the original proceedings, it noted that the parties to the dispute did not question that Mexican tuna products and tuna products from the US and elsewhere were like.[1171] Therefore, denying access to the 'dolphin safe' label to

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[1165] Gracia Marin Duran (supra note 1128), p. 102. The question of npr-PPMs could also have been addressed as part of *US – Shrimp*, but in this dispute a violation of the GATT (Art. III:4 or XI) was assumed and the Appellate Body spent its energy rather on their justification under Art. XX (*US – Shrimp*, Appellate Body report (supra note 123), para. 121; Barbara Cooreman (supra note 579), p. 29).
[1166] Understanding on Rules and Procedures Governing the Settlement of Disputes (UN Treaty Series,1869, p. 401) (hereafter: DSU).
[1167] *US – Tuna II (Mexico)*, 16 May 2012, Appellate Body report (WT/DS381/Appellate Body/R), para. 405.
[1168] *US – Tuna II (Mexico) (Art. 21.5)*, Appellate Body report (supra note 793), para. 7.278.
[1169] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.93
[1170] *US – Tuna II (Mexico)*, Appellate Body report (supra note 1167), para. 199.
[1171] *US – Tuna II (Mexico) (Art. 21.5)*, Panel report (supra note 792), para. 7.447.

tuna caught by setting on dolphins by imposing more onerous conditions meant denying to certain tuna and tuna products a valuable market advantage (namely, access to the label). The amended tuna measure did not accord immediately and unconditionally to all like products the benefit embodied in the US 'dolphin safe' labelling regime, and was deemed inconsistent with Art. I:1. The same reasoning led to the conclusion that the US measures breached Art. III:4.[1172]

The back-and-forth between the compliance Panel and the Appellate Body over the US implementing measures shows the difficulty of how to categorise the group of products that is to be compared (which products are like), even though all parties in the case at hand agreed from the outset that the issue concerned Mexican tuna products, and tuna product from the US and other countries.

In analysing whether the various conditions to obtain a 'dolphin safe' label were unconditionally granted to like products, the compliance Panel adopted a segmented approach. This was criticised on appeal by the Appellate Body, which then proceeded to compare the eligibility conditions for access to the label as follows.[1173] On the one hand, products derived from tuna caught by setting on dolphins (by Mexico; difficulty to access the label). On the other hand, products derived from tuna caught by other fishing methods (by the US and other fleets; access to the label). The Appellate Body argued that the Panel had not sufficiently taken into account the US requirements for tuna caught *outside* the ETP large purse-seine fishery, which could also exclude some tuna products from US or other origin from the label.[1174] Moreover, the Appellate Body considered that the Panel had mistakenly compared 'subsets' of the relevant product groups, rather than the product groups themselves.[1175] The Appellate Body noted that the Panel should rather have compared the treatment accorded to the following groups, in a holistic manner. On the one hand, label access for the group of Mexican tuna products. On the other hand, label access to like tuna products from the US and other countries. Finishing the legal analysis, the Appellate Body nevertheless came to the same conclusion, namely, that the US measure had discriminated between like products.[1176] By excluding most Mexican tuna products from the 'dolphin safe' label whilst

[1172] Ibid. para. 7.504.
[1173] *US – Tuna II (Mexico) (Art. 21.5)*, Appellate Body report (supra note 793), para. 7.280.
[1174] Ibid.
[1175] Ibid. para. 7.281.
[1176] Ibid. para. 7.340.

giving conditional access to tuna products from the US and other countries, the US had provided an advantage to tuna products from other countries that was not accorded immediately and unconditionally to like products from Mexico. This was found to be inconsistent with Art. I:1. The US had moreover accorded less favourable treatment to Mexican tuna products than that accorded to US like products, which was inconsistent with Art. III:4.

The following two observations can be made. First, the Appellate Body's recent findings in the dispute over 'dolphin free' tuna show that measures that regulate non-physical aspects of a product (here, fishing methods for tuna) can, in principle, fall within the scope of Art. III:4. This supports the view put forward by Robert Howse and Donald Regan, who make a compelling case (both normative and moral) not to exclude npr-PPMs from the scope of Art. III:4 *per se*.[1177] Such an exclusion would lead to a situation in which certain protective process-based measures that also do not fall under Art. XI would be left totally unregulated and thereby always WTO-compliant, which seems against the intention of the GATT. Howse and Regan observe that "[t]he root of the problem lies in the claim that physically identical products that differ only in their processing histories are 'like' products," a point with which they moreover disagree.[1178]

This leads to my second observation. From the Panel and Appellate Body views set out above, it is still unclear whether non-physical aspect measures affect likeness. At first glance, it would appear that they do not. Tuna products are tuna products, whether the tuna is caught with a purse-seiner by setting on dolphins; with a purse-seiner *without* setting on dolphins; through high seas driftnet fishing; or in a different manner altogether. At the same time, by acknowledging that these constitute 'subsets' of the group of tuna products, the Appellate Body theoretically left the door open for considering non-physical aspects in the characterisation of products. Fishing methods were clearly relevant for distinguishing between groups of products, though in the case at hand, only 'subsets' of products. Other scenarios may be envisaged where non-physical aspects play an even more significant role. Likely, they become relevant where they affect consumer preferences to a sufficient degree that they affect the competitive relationship between products.

[1177] Robert Howse and Donald Regan 'The Product/Process Distinction - an Illusory Basis for Disciplining "unilateralism" in Trade Policy' (2000) 11 European Journal of International Law 249, p. 256-257. Further support for a broad reading of Art. III:4 can be found in Christiane R. Conrad (supra note 1127), p. 155-156.
[1178] Ibid. p. 260.

A final word can be said on the not dissimilar *EC – Seal Products* case. The question arose whether, for the purpose of Art. 2.1 TBT, seal products from Canada were like seal products of other origin (Greenland).[1179] The Panel found that the seal products belonging to these different groups were like products, irrespective of whether they conformed or not to the requirements under the EU Seal Regime. The EU Seal Regime consisted of an overall ban on the import of seal products, but allowed for three exemptions.[1180] First, seal products caught for the subsistence of indigenous communities could be imported and/or placed on the EU market (the IC exception). Second, products derived from small-scale, occasional hunts conducted with the purpose of managing marine resources (culling) could be placed on the market on a not for profit basis and not for commercial reasons (MRM exception). Third, seal products for personal use of travellers or their families could be imported for non commercial reasons, but not placed on the market (the Travellers' exception). The Panel decided it shared the EU's view "that the type or purpose of the seal hunt does not affect in any way the final product's physical characteristics, end-use, or tariff classification," nor that there was proof that consumer habits showed any preference for seal products hunted one way or another.[1181] The Panel followed the same interpretation of likeness for the purpose of its analysis of Arts. I:1 and III:4.[1182] The issue was not further examined by the Appellate Body, which upheld the Panel's findings of a breach of these provisions.[1183]

EC – Seal Products is a missed opportunity to examine in more detail whether non-physical aspects could make a product unlike another, in particular where the regulatory distinction relates to the circumstances in which production (hunting/fishing) takes place rather than the actual process or method of production. Nevertheless, the door was once again held open for non-physical aspects to be taken into account by way of a distinction based on consumer habits and preferences. The Panel did not rule out that these may be relevant. Rather, it considered that in the case at hand, consumers did not distinguish between seal products based on the type or purpose of the hunt.[1184] It accepted Canada's argument that consumers (e.g. producers of seal oil, tanners, or manufacturers of garments and accessories

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[1179] *EC – Seal Products*, 25 November 2013, Panel report (WT/DS400/R; WT/DS401/R), para. 7.3.2.1.
[1180] Ibid. para. 7. 42; Art. 3 of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products, 16 September 2009, OJ L 286/36 (hereafter: EU Seals Regulation).
[1181] Ibid. para. 7.138-7.139.
[1182] Ibid. para. 7.594, 7.600, 7.607, 7.609;
[1183] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.130.
[1184] *EC – Seal Products*, Panel report (supra note 1179), para. 7.139.

made of seal fur skins) valued the quality of the seal input rather than the way in which it had been hunted and by whom.

Howse and Regan argue in favour of taking into account non-physical elements (specifically, npr-PPMs) when distinguishing between products. They suggest that regulatory distinctions could be made, but "must have a rational relation to some non-protectionist regulatory purpose; and therefore products must be treated the same (they are 'like'), if and only if they do not differ in any respect relevant to an actual non-protectionist regulatory policy. This gives us the meaning of 'like' in Article III."[1185] This is somewhat similar to the EU's argument in *EC – Seal Products* that the Panel should conduct an *additional* inquiry under Art. III:4 that the detrimental impact on competitive opportunities for like imported products does not stem exclusively from a legitimate regulatory distinction – as is the case under Art. 2.1 TBT – though the Appellate Body rejected this view.[1186] Howse and Regan's argument is more compelling however than the EU's, which tried to 'copy paste' the language of Art. 2.1 TBT into the GATT. Following the VCLT rules on treaty interpretation, Howse and Regan contend that the ordinary meaning of the word 'like', given its context, would amount to "not differing in any respect relevant to an actual non-protectionist regulatory policy".[1187] If this view is upheld, then physically identical products that differ only in their processing histories may be unlike where the processing differences are relevant to such a policy.[1188]

To summarise, the regulatory circumstances in which fish is caught (by a vessel flagged to a blacklisted country) is unlikely to make that product unlike fish caught by a vessel whose flag state is not blacklisted. Consumer habits and preferences could theoretically account for the difference in treatment, but this is unlikely. Though it is widely noted that consumers have become more sensitive to environmental issues, which could explain the growing success of ecolabels like the Marine Stewardship Council (MSC) label for sustainable fish products, this view is oversimplistic. The view that the development and proliferation of the MSC and other ecolabels is largely driven by consumer demand has been challenged. Lars Gulbrandsen observes that "consumer demand for eco-labelled forest and fish products has

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[1185] Robert Howse and Donald Regan (supra note 1177), p. 260.
[1186] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.100.
[1187] Robert Howse and Donald Regan (supra note 1177), p. 260.
[1188] Ibid.

generally been quite low, as has readiness to pay a price premium for labelled products."[1189] The underlying interactions that are at the origin of their development are much more complex, he argues, in which social movement organisations and states also play an important role. In the case of the EU, there is generally insufficient evidence that there is a notable consumer preference for fish-from-non-blacklisted-countries over fish-from-blacklisted-countries. And even if such a demand could be identified, this would be based on a lack of understanding and information, given the complexity of the EU's country blacklisting determinations under both the EU IUU or the Non-Sustainable Fishing Regulations.

The question will thus likely be whether, for every particular category of fish products that can be distinguished on the basis of their tariffs, the advantage of market access is accorded immediately and unconditionally to that group of products from all foreign importers/that group of products is accorded treatment no less favourable than that accorded to the group of like products of national origin. For example, do tuna products from country A have the same equal opportunities to access the market of country B as tuna products from country C/as national tuna products from country B? The answer is that they do not. Market restrictions adopted upon country blacklisting pursuant to both the EU IUU and Non-Sustainable Fishing Regulations differentiate between like products. This confirms the conclusion in the previous two sections that it will likely constitute a breach of Arts. I:1 and III:4 GATT.

7.2.4. Freedom of transit

I briefly turn to Art. V GATT, which regulates the freedom of transit. It stipulates that there shall be no discrimination "based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport" (Art. V:2). Moreover, the following paragraphs may be of relevance to market restrictions in fisheries. Traffic in transit may not be subject to any unnecessary delays or restrictions (Art. V:3), and products which have been in transit through the territory of another WTO member must be treated no less favourably than if they had come straight from their place of origin (Art. V:6).

[1189] Lars H Gulbrandsen 'Creating Markets for Eco-Labelling: Are Consumers Insignificant?' (2006) 30 International Journal of Consumer Studies 477, p. 485-486.

Art. V:1, V:2, and V:3 were brought up by the EU in the *Chile – Swordfish* dispute, for which the law of the sea related claims were discussed in chapter 6, section 6.2.[1190] V:2 was brought up by the Faroe Islands' challenge to the EU's ban on mackerel and Atlanto-Scandic herring, discussed in chapter 2, section 4.5.1.[1191] In the dispute with the Faroe Islands, the EU prohibited the introduction of specified Atlanto-Scandian herring and Northeast Atlantic mackerel products, both directly and indirectly through the denial of access to EU ports for certain vessels flying the flag of the Faroe Islands and certain third-country vessels transporting the specified fish and fish products.[1192] The Faroe Islands claimed that this denied freedom of transit through the EU, in a discriminatory manner.[1193]

In *Chile – Swordfish*, the Commission argued that Chile's closure of ports to vessels that did not fish in compliance with Chile's rules on fishing swordfish prevented EU flagged vessels from exporting their fish onwards to the US, the largest swordfish market in the world, and which had a "close commercial relationship in this field" with Chile.[1194] The lack of access to Chilean ports and port services also lengthened EU flagged vessels' journey (having to use other regional ports) and therefore added to the operational costs, which negatively affected transit.[1195]

Whilst neither dispute was adjudicated upon, *Colombia – Ports of Entry* confirms that refusing access to ports for the purpose of (un)loading goods for import or export or transit can constitute a breach of Art. V (or XI, discussed below) – in the case at hand, a breach of both Art. V:2 and V:6.[1196]

Import restrictions such as those put in place upon country blacklisting under either the EU IUU or Non-Sustainable Fishing Regulations would clearly impede the transit of goods coming from that state. Because of its discriminatory nature based on vessels' flag (vessels flagged to a blacklisted state but not others), this likely amounts to a breach of Art. V.[1197] Any discriminatory delays in transit (for instance more stringent inspections of vessels whose flag state has received a yellow card) might amount to a breach of Art. V:3.

[1190] *Chile – Swordfish*, Request for consultations (supra note 946).
[1191] *EU – Herring,* Request for consultations (supra note 741).
[1192] Ibid. para. 18.
[1193] Ibid. para. 18.
[1194] European Commission, Decision on Chileon Swordfish (supra note 943), para. 17.
[1195] Ibid.
[1196] *Colombia – Ports of Entry*, Panel report (supra note 1121), paras.7.431, 7.481.
[1197] Robin Churchill (supra note 24).

7.2.5. Quantitative restrictions on trade

Art. XI GATT prohibits quantitative restrictions on trade. A quantitative restriction can take the form of a prohibition (import or export ban), a quota, a licensing requirement, or other.[1198] The prohibition is very comprehensive, and applies to *all measures* instituted or maintained prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes, or other charges.[1199] The most notable exception is the conflict rule, mentioned in the context of Art. III GATT above, whereby a measure that falls within the scope of Art. III GATT will be treated under that provision instead.[1200] As previously mentioned, this could provide a way out for environmental-oriented measures (such as regulatory distinctions related to the circumstances in which a product was produced), provided they do not discriminate between imported and domestic like products, and provided that non-physical aspect measures fall within the scope of Art. III.[1201]

The provisional conclusion was reached that non-physical aspect measures such as those regulating the regulatory circumstances in which fish is harvested do not fall outside the scope of Art. III *per se*, but that fish products within a given tariff category are like regardless of those circumstances. This means that import restrictions adopted upon country blacklisting under the EU IUU and Non-Sustainable Fishing Regulations will likely be in breach of Art. III anyway.

Considering the possibility that such measures *do* fall outside the scope of Art. III, then they will have to be considered under Art. XI. It is widely accepted in the literature that a ban on imports – whether a landing prohibition or by other means – is a quantitative restriction and violates Art. XI. [1202] A prohibition to land catch, for instance because the flag state validating the catch certificate that accompanies the catch is blacklisted, is an import ban. An interesting observation is made by Robin Churchill that the situation in which a landing prohibition constitutes an import ban depends on the rules of origin applicable to fish caught

[1198] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 480.
[1199] *India – Quantitative Restrictions*, 6 April 1999, Panel report (WT/DS90/R), para. 5.128.
[1200] Note ad Art. III.
[1201] Christiane R. Conrad (supra note 1127), p. 37.
[1202] Robin Churchill (supra note 24); Margaret A. Young (supra note 265).

at sea, since such rules have not yet been harmonised by the WTO.[1203] Both the rules of origin and CITES treat the flag state as equivalent to the state of export, even where the fish is caught in the EEZ of a coastal state. He therefore refers to the EU's rules as an example on this. Fish caught in the territorial sea and internal waters will be deemed to originate in the coastal state, whereas fish caught in the EEZ and high seas will originate in the flag state of that vessel.[1204] In the case of processing fish (and particular processing at sea), the question is further complicated still. EU rules dictate that the state of origin will be the one on whose territory or on whose vessel the fish underwent its last, substantial modification.[1205] As a consequence of this, fish caught on the high seas or in the EEZ of a coastal state by a vessel not flagged to that coastal state, and which is subsequently landed in that coastal state's port, constitutes an import into that state.[1206] A prohibition to land such fish in thus also an import ban.

In both *Chile – Swordfish* and *EU – Herring* disputes, Chile's and the EU's respective landing prohibitions were challenged on this basis.[1207] The Faroe Islands argued that the EU breached Art. XI not only be directly prohibiting the introduction of specified fish products into its territory, but also by the use of its ports by certain vessels flying the flag of the Faroe Islands and certain third country vessels transporting specified fish products.[1208]

In June 2012, the Council of Trade in Goods under the WTO adopted a decision whereby members to the WTO should notify the quantitative restrictions they have in place under the GATT (referred to as 'QR notifications').[1209] The EU has duly notified the import restrictions against blacklisted countries under the category 'prohibitions except under defined circumstance'. The EU has variably listed its reasons for these restrictions as "protection of

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[1203] Robin Churchill (Ibid.), p. 323; Andrew Serdy 'Law of the Sea Aspects of the Negotiations in the WTO to Harmonise Rules of Origin' (2007) 22 International Journal of Marine and Coastal Law 235.

[1204] Ibid.; Arts. 31(e) and (f), 44(f) and (h), and 60(f) and (g) of Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, 29 December 2015, OJ L343/1.

[1205] Robin Churchill (Ibid.); Arts. 41(b) and 59(1)(b) of Regulation 2015/2446 (Ibid.); Art. 60(2) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, 10 October 2013, OJ L269/1.

[1206] Robin Churchill (Ibid.).

[1207] *EU – Herring,* Request for consultations (supra note 741); Request for Consultations by the European Communities, Chile – Measures Affecting the Transit and Importation of Swordfish.

[1208] *EU – Herring,* Request for consultations (Ibid.), para. 18.

[1209] Council of Trade in Goods, Decision on Notification Procedures for Quantitative Restrictions, 3 July 2012, G/L/59/Rev.1.

environment *inter alia*"[1210], "protection of animal life and of environment *inter alia*",[1211] and "protection of animal life and health and the environment, and conservation of natural resources, *inter alia*",[1212] apparently thinking of an additional justification with every new notification. The next section turns to the salience of these justifications in the context of Art. XX GATT.

7.3. Art. XX (substantive requirements)

Art. XX permits measures that are otherwise found to be in breach of the substantive provisions of the GATT (such as those discussed in the previous section) for a limited list of purposes. Compliance with the GATT for market restrictions in fisheries in general, and the EU's market restrictive measures in particular, will thereby hinge on Art. XX.

Art. XX is essentially a balancing provision, whereby the restriction that a measure poses to trade is balanced against a societal value or interest. It requires an evaluation of both the measure itself (its design, architecture, and structure), and the manner in which it is applied in practice.[1213] It projects both substantive and procedural standards.[1214] Procedural requirements are discussed in the next chapter. It should be noted that the commitments of free trade and the policies and interests embodied in Art. XX can be given meaning within the framework of the GATT and its objective and purpose "only on a case-to-case basis, by careful scrutiny of the factual and legal context in a given dispute."[1215] This complicates a thorough evaluation of the legality of measures adopted under the EU IUU and Non-Sustainable Fishing Regulation, in so far that every incident is different.

There are two important elements to justifying a measure on the basis of Art. XX. One, whether the measure can be justified on one of the grounds listed therein. Two, whether the measure fulfils the requirements of the chapeau. I will begin by examining the grounds (legitimate objectives) which may provisionally justify an otherwise inconsistent market-

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[1210] In the case of blacklisting Belize, Cambodia, and Guinea, see Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions, 9 October 2014, G/MA/QR/N/EU/2.

[1211] Maintaining the restrictions on Cambodia and Guinea, see Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions, 31 January 2017, G/MA/QR/N/EU/3.

[1212] Maintaining the restrictions on Cambodia and introducing the restrictions on Comoros and St. Vincent and the Grenadines, see Notification Pursuant to the Decision on Notification Procedures for Quantitative Restrictions, 28 September 2018, G/MA/QR/N/EU/4.

[1213] *US – Shrimp*, Appellate Body report (supra note 123), para. 119; *Japan – Alcoholic Beverages II*, Appellate Body report (supra note 225), p. 29; *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.302.

[1214] *US – Shrimp*, Appellate Body report (supra note 123), para. 160

[1215] *US – Gasoline*, 29 April 1996, Appellate Body report (WT/DS2/AB/R), p. 18.

related measure such as an import restriction. These are set out in its paragraphs, ranging from (a) to (j). It is helpful to note from the outset that the nexus required between a measure that seeks justification on the basis of Art. XX and the objective it pursues (one of the paragraphs) is different depending on the objective it pursues ("necessary"; "relating to"; "involving", etc.).[1216] This will be explained more fully where relevant.

I recall that the EU's motives for import restrictions under the EU IUU Regulation generally concern protection of animal life and health and the environment, and the conservation of natural resources. This invites a look at Art. XX(g). Nevertheless it would also be possible to consider the objective of protecting public morals (Art. XX(a)) and protecting animal life (Art. XX(b)) as justifications for important restrictions. I consider each of these in turn.

7.3.1. Protecting public morals

Art. XX(a) allows for measures necessary to protect public morals. What constitutes public morals under Art. XX(a) was set out by the Panel in *US – Gambling*, and has been reiterated since in subsequent cases. It "denotes standards of right and wrong conduct maintained by or on behalf of a community or nation".[1217] The Panel built on previous Appellate Body reports to argue that "Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate", and that "members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values".[1218] The content of public morals can thus be "characterized by a degree of variation", and in *EC – Seal Products* the Appellate Body found it therefore difficult to accept the argument that a panel is required to identify the exact content of the public morals standard at issue.[1219]

Practical examples of what may constitute an issue of public morals include the following. In *EC – Seal Products*, the EU had argued that its ban on seal products (which allowed exceptions only under specific circumstances set out in the EU Seal Regime) was justified because it was necessary to protect public morals regarding animal (seal) welfare,

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[1216] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 557; see *EC – Seal Products*, Appellate Body report (Ibid.) in which the Appellate Body explained that there must be a "sufficient nexus between the measure and the interest protected", para. 5.169.

[1217] *US – Gambling*, 10 November 2004, Panel report (WT/DS285/R), para. 6.465.

[1218] Ibid. para. 6.461.

[1219] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.199.

which the Panel accepted.[1220] Similarly, in *Colombia – Textiles*, the measures (compound tariffs on certain products) were argued to be necessary for the policy objective of combating money laundering, which is a type of criminal conduct in Colombia.[1221] Given this deferential approach to the definition of 'public morals', public morals on illegal and or unsustainable fishing could be called upon to justify market restrictions in fisheries.

However, though WTO members may determine their own subjective moral concern, some evidence would still have to be put forward that such a moral concern exists. It *could* perhaps be argued that a moral concern exists over IUU fishing, which would explain the EU's sense of responsibility as a market power, and therefore a destination for IUU caught products, to do something about it.[1222] Ample evidence exists from the NGO sector that IUU fishing is perceived as 'morally wrong', in so far that it is equated with other moral wrongs like piracy, and 'unfair' fishing practices.[1223] This moral concern – if one exists at all – is likely fuelled by a misunderstanding of what IUU fishing is, and a lack of appreciation of the harmful effects of some types of *legal* fishing.[1224] But the point stands. IUU fishing is generally perceived as bad, and the EU could argue that, on moral grounds, it does not want to contribute to it by allowing IUU-caught fish on to its market. The same argument could be made for unsustainable management under the EU Non-Sustainable Fishing Regulation, though given the limited scope of the Regulation to stocks of *EU* interest only it might be more difficult to argue that the underlying concerns are moral, rather than economic.

It is questionable whether market restrictions in fisheries under either Regulation should be justified on the basis of a concern for IUU fishing or unsustainability. Assuming though that such a moral concern can be substantiated, the next question is whether the measures in question are "designed" to protect these public morals (*Colombia – Textiles*) or, in an alternative phrasing, "adopted and enforced" to do so (*EC – Seal Products*)[1225] This criterion

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[1220] *EC – Seal Products*, Panel report (supra note 1179), para. 7.410.

[1221] *Colombia – Textiles*, 7 June 2016, Appellate Body report (WT/DS461/Appellate Body/R); and latest in *Brazil – Taxation and Charges*, 13 December 2018, Appellate Body report (WT/DS472/AB/R, WT/DS497/AB/R).

[1222] European Commission (COM(2007) 602 (supra note 569), p. 3. The EU's 'sense of responsibility' is in line with Joanne Scott's theory that the EU often acts out of a sense of complicity (Joanne Scott (supra note 41)).

[1223] For a list of NGO references see supra note 401; European Commission, SEC(2007) 1336 (supra note 19), p. 17, listing the environmental and socio-economic impacts of IUU fishing (including "unfair practices").

[1224] Robin Churchill (supra note 24), p. 338. For instance, over-subsidised fleets may just as well lead to overfishing/unsustainability. Yet no measures are adopted against subsidising states (possibly because of the EU's own prominent role in this).

[1225] *Colombia – Textiles*, Appellate Body report (supra note 1221), para. 6.20; *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.169.

appears to be fairly easily fulfilled, since a measure will be deemed to be designed or adopted and enforced to protect public morals if it "not incapable" of doing so.[1226] Assuming that these criteria are fulfilled, the real difficulty with justifying market restrictions in fisheries under Art. XX(a) is the necessity test. This relates to the measures themselves; not the necessity of the concern to be protected, which countries are more or less free to determine for themselves.

The necessity test entails "a holistic analysis of the relationship between the inconsistent measure and the protection of public morals".[1227] The importance of the interests at stake may influence the necessity of the measure, and the more "vital" their importance, the easier it will be to justify necessity.[1228] In *China – Publications and Audiovisual Products*, the Panel engaged in a test that is similar to the necessity tests to be undertaken for measures justified on the basis of paragraphs (b) or (d), as explained below.[1229] It identified the importance of the interests at stake; the contribution they made to the objective of public morals; their trade-restrictiveness; and then weighed and balanced these issues against one another, taking into account the existence of alternative measures.[1230]

As for the measure's contribution to the objective pursued, this must be a "material contribution", though there is no predetermined threshold for this and the focus is on the *extent* of the measure's contribution to the end pursued.[1231] A measure contributes to the objective pursued if there is a "genuine relationship of ends and means between the objective pursued and the measure at issue", though the approach for analysing whether this is the case may be either in qualitative or quantitative terms.[1232] There clearly appears to be some

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[1226] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 580; *Colombia – Textiles*, Appellate Body report (Ibid.), paras. 6.21, 6.30.
[1227] Peter van den Bossche and Werner Zdouc (Ibid).
[1228] *Colombia – Textiles*, Appellate Body report (Ibid,), para. 5.71 and 5.103, citing *Korea – Various Measures on Beef*, Appellate Body report (surpra note 1141), para. 162.
[1229] *China – Publications and Audiovisual Products*, 12 August 2009, Panel report (WT/DS363/R), paras. 7.788-7.868; Peter van den Bossche and Werner Zdouc (supra note 1117), p. 584.
[1230] Ibid; the same elements were identified to be part of the necessary weighing and balancing in *EC – Seal Products*, Appellate Body report (supra note 1118), paras. 5.169, 5.214; and *Colombia – Textiles*, Appellate Body report (supra note 1221), para. 6.53.
[1231] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.213-5.216; *Colombia – Textiles*, Appellate Body report (supra note 1221), para. 6.25.
[1232] *Brazil – Tyres*, Appellate Body report (supra note 1306), para. 145.

flexibility in this regard.[1233] In a similar fashion, what must be examined is the *degree* of trade-restrictiveness.[1234]

Finally, where a measure is particularly trade-restrictive or does not achieve its objective, the complaining WTO member may suggest that possible alternative measures existed that was less trade restrictive.[1235] It will have to demonstrate the availability of a WTO-consistent alternative measure that the defending WTO member state could "reasonably be expected to employ", or demonstrating that a less WTO-inconsistent measure is "reasonably available".[1236] 'Reasonably available' means the alternative measure must be at least an equivalent contribution to the end pursued; they must not be theoretical in nature; and must not impose undue burdens on the defending WTO member, such as prohibitive costs or technical difficulties.[1237] In order to qualify as a "genuine alternative", the Appellate Body has held that the proposed measure must be not only less trade restrictive than the original measure at issue, but should also be able to achieve the desired level of protection.[1238] It follows from *Brazil – Tyres* that the search for alternatives merely *confirms* the preliminary finding of necessity, though in *EC – Seal Products* the Appellate Body contended that "in most cases" alternative measures will have to be examined.[1239]

It could be argued that blacklisting countries that do not comply with their international obligations and consequently imposing an import ban on products coming from that country contributes to the chosen moral objective of preventing IUU caught fish from entering the EU market. However, blacklisting and country-level import restrictions do not appear to be a reliable way to avoid IUU-caught fish from entering the EU market. First, import restrictions only affect flag states (that as a result of blacklisting can no longer validate catch certificates). It does not affect processing and transit countries. It is therefore difficult to determine whether there is actually a reduction in IUU-caught fish on the EU market as a result of import restrictions on flag states, or whether IUU-caught fish still gets there, but through

[1233] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 586-587.
[1234] *Colombia – Textiles*, Appellate Body report (supra note 1221), para. 6.26.
[1235] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.169, 5.214, referring to *US – Tuna II (Mexico)*, Appellate Body report (supra note 1167).
[1236] *Korea – Various Measures on Beef*, Appellate Body report (surpra note 1141), para. 166; *EC – Seal Products*, Appellate Body report (Ibid.), para. 5.261; Peter van den Bossche and Werner Zdouc (supra note 1117), p. 559-563.
[1237] *EC – Seal Products* (Ibid.); *Brazil – Tyres*, Appellate Body report (supra note 1306), para. 156.
[1238] Ibid.
[1239] *Brazil – Tyres*, Appellate Body report (supra note 1306), para. 178; *EC – Seal Products*, Appellate Body report (Ibid.), para. 5.169.

different channels. Second, even if this were the case, the contribution of the EU's blacklisting mechanism to the objective of not having IUU-caught fish on the EU market is undermined by its selective approach to choosing *which* countries will be targeted next (in particular, by avoiding China).[1240] The measures seem unduly trade restrictive on targeted countries compared to the objective pursued. What is more, reasonable alternatives already exist. As explained in chapter 4, section 4.2.1, the EU already has in place a targeted and comprehensive system that denies market access to products that have not been harvested in line with relevant laws; the EU CDS. If the EU CDS were actually effective, there would not be a need for imposing country-wide import restrictions altogether. A reasonably available alternative to blacklisting entire countries (which is particularly trade restrictive, and affects also non-IUU caught fish) would be to improve the EU CDS in line with recommendations that have been suggested by critics in the past few years – perhaps most importantly, to make the EU CDS fully electronic.[1241] This would achieve the objective of no IUU-caught fish on the EU market, in a less trade restrictive manner. Given that the EU CDS is already up and running, improving it is unlikely to pose an undue burden on the EU.

Finally, Barbara Cooreman suggests that the necessity requirement is directly linked to the degree of international support for the concern at hand, in so far that measure based on, or suggested by, an international instrument, may more easily find support for being the least trade restrictive in order to achieve the goal at hand.[1242] This does not bode well for country-level market restrictions in fisheries, however, given the lack of international support for this, and in particular, for *unilateral* measures.[1243]

I conclude with an alternative suggestion on the choice of the moral objective that the EU pursues (if any such moral objective can be determined in the first place). Chapter 4, section 4.5.3 concluded that the aim of blacklisting countries under both Regulations is to get them to comply with international fisheries norms and obligations more generally. Say that states' non-compliance is the true moral concern behind market restrictions in fisheries. This means that what must be determined is whether market restrictions can actually contribute to improving compliance. As shown in chapter 5, this is a complicated question, which

[1240] Supra note 1086.
[1241] Gilles Hosch and Francisco Blaha (supra note 565), p. 5; Carlos Palin and others (supra note 40), p. 110; Long Distance Advisory Council (supra note 59).
[1242] Barbara Cooreman (supra note 579), p. 208.
[1243] Para. 66 IPOA-IUU. See also the discussion in chapter 2, section 2.3.3.

according to this research will depend on various elements, including whether the whole mechanism of making market access conditional upon compliance with international fisheries norms and obligations is sufficiently interactional. It can reasonably be argued that an available alternative to unilateral market restrictions would be to make use of the LOSC's compulsory dispute settlement mechanism. However, as explained in chapter, section 3.8.4, the coastal state is exempt from compulsory dispute settlement. This can provide an argument in favour of the necessity of trade restrictive measures pursuant to the Non-Sustainable Fishing Regulation, namely as the only option available to promote compliance with coastal state obligations.

7.3.2. Protecting human, animal or plant life or health

For measures to be justified under Art. XX(b), they must be necessary to protect animal, human, or plant life or health. Again, two elements must be established. First, whether measures are designed to protect animal life or health. Second, whether they are necessary to protect animal life or health.

Depending on their design, market restrictions in fisheries can arguably be justified as having as their policy objective the protection of animal (marine) life or health. Panels and the Appellate Body "have shown a significant degree of deference in accepting that the policy objective of a measure is to protect the life or health of humans, animals or plants".[1244] Though the EU IUU Regulation is concerned with a host of activities and not simply protecting marine life, the Regulation contains the following statements in its Preamble that could be used to argue that this is nevertheless an important underlying policy objective. It explains that international fisheries-related instruments "predominantly set out the principle that all states have a duty to adopt appropriate measures to ensure sustainable management of marine resources and to cooperate with each other to this end" (rec. 1) and that the objective of the EU Common Fisheries Policy is to "ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions" (rec. 2). It then explains that IUU fishing "constitutes one of the most serious threats to the sustainable exploitation of living aquatic resources", jeopardises the very foundation of the Common Fisheries Policy

[1244] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 557-558, referring *inter alia* to *Brazil – Tyres*, 12 June 2007, Panel report (WT/DS332/R). This does not mean that every argument will always be accepted, and Van den Bossche and Zdouc also refer to *China – Raw Materials*, 5 July 2011, Panel report (WT/DS394/R, WT/DS395/R, WT/DS398/R), para. 7.499, where it was argued that China's articulation of a health concern was merely a post hoc rationalisation developed solely for the purpose of the dispute.

and international efforts to promote better ocean governance, and is a major threat to marine biodiversity (rec. 3). Finally, it reiterates that IUU fishing "seriously undermines the attainment of the objectives of the violated rules and jeopardises the sustainability of the stocks concerned or the conservation of the marine environment" (rec. 41).

Market restrictions under the EU Non-Sustainable Fishing Regulation are explicitly concerned with situations in which third countries jeopardise the sustainability of a stock, and fail to cooperate with other countries (including the EU) in its management. They can therefore be more easily justified as having as their policy objective the protection of marine life.

Notwithstanding the fact that not all non-compliance with international fisheries norms and obligations leads to unsustainability, and the fact that many lawful activities do, the following can be argued. Countries that allow their fleet (or foreign fleets operating in their waters) to engage in particular unsustainable fishing practices, or that provide market access to products harvested in an unsustainable way, harm marine living resources. As argued in chapter 3, section 3.11.2, market restrictions that are adopted in response to these failures can be seen as an expression of the duty to protect and preserve these resources as provided in Art. 192 LOSC. Similarly, market restrictions under both EU Regulations can be said to have as their policy objective the protection of marine life as provided in Art. XX(b) GATT. For market measures under the two EU Regulations to be justified on this ground, though, the term 'protect animal life' has to be understood broadly, since neither Regulation aims to *stop* killing fish. The term 'protect' can be understood in line with how Art. 192 LOSC is understood as protecting from future damage.[1245] Sustainably managed fisheries should not harm the (living) marine environment, and both Regulations ultimately aim to achieve this.

Again, whether the measures are necessary will require a holistic weighing and balancing exercise, with a focus on the interests and values at stake; the extent of the contribution to the achievement of the objective; the measure's trade restrictiveness; and what reasonably available alternatives exist that would achieve the same objective but be less trade restrictive.[1246]

[1245] In line with how Art. 192 LOSC is understood (*South China Sea* (supra note 226), paras. 941-942).

[1246] *EC – Asbestos*, Appellate Body report (supra note 1132), para. 172; *Brazil – Tyres*, Appellate Body report (supra note 1306), para. 308.

I recall that is difficult to prove that market restrictions in fisheries contribute to a reduction in IUU fishing/can ensure sustainability to the extent that this protects animal life and health. First of all, markets risk simply being displaced when market access is cut by a single market state, which would not actually contribute to more sustainable fishing practices worldwide.[1247] Furthermore, less trade restrictive alternatives clearly exist, and are reasonably available. Market states have a variety of tools at hand to prevent, deter, and eliminate IUU fishing, as set out in the IPOA-IUU. Cooperation through RFMOs remains the preferable option to unilateral market restrictions, which are explicitly discouraged by the IPOA-IUU (para. 66). This would undermine the argument that such measures are truly necessary.

Similarly, an obvious alternative to market restrictions under the Non-Sustainable Fishing Regulation which would achieve the same level of sustainability would be for the EU to further lower its own quota – though whether this is reasonable can be debated. Alternatives can include cooperation through RFMOs, or simply relying on the framework already put in place through CITES. However, the Commission ruled out these alternative approaches as being insufficiently effective.[1248] Cooperation through RFMOs was deemed inadequate because of their limited geographical and regulatory scope, which would not necessarily coincide with the area where the problem is found. Moreover, measures adopted pursuant to CITES could not constitute an alternative because CITES "allows trade restrictions only when the danger is imminent and very serious, which may be too late when the threat is just overexploitation and not necessarily complete depletion of the stock".[1249]

7.3.3. Conserving exhaustible natural resources

Whilst market restrictions in fisheries will struggle to meet the necessity test under Art. XX(b), they may more readily be justified under Art. XX(g). Art. XX(g) allows for measures to be provisionally justified where they "relate to" the conservation of exhaustible living resources. This has to be made effective in conjunction with restrictions on domestic production and consumption (even handedness).

The *US – Shrimp* dispute provides useful guidance to Art. XX(g). The case was brought by India, Malaysia, Pakistan, and Thailand, challenging the US's import ban on shrimp and

[1247] Oceanic Développement, MegaPesca Lda (supra note 59), p. 115; U Rashid Sumaila (supra note 59), p. 1, 7.
[1248] European Commission, SEC(2011) 1576 (supra note 119), p. 50.
[1249] Ibid.

shrimp products from countries that were not certified pursuant to section 609 of Public Law 101. Section 609 made it obligatory for countries to have in place a comparable marine turtle conservation program and comparable rate of turtle bycatch when trawling for shrimp, which in its application was held to require not just comparable measures but rather essentially the same as those applied to US trawler vessels.[1250] In essence, certification was only provided where the exporting country had a regulatory program in place requiring the use of turtle excluder devices, "or one that comes within one of the extremely limited exceptions available to [US] shrimp trawl vessels."[1251] section 609 also required the negotiation of international agreements to protect sea turtles with the relevant foreign countries. This is discussed further in chapter 8.

In *US – Shrimp*, Appellate Body held that "exhaustible natural resources" for the purpose of Art. XX(g) include marine living resources.[1252] The Appellate Body reached this conclusion by interpreting the text "in light of contemporary concerns of the community of nations about the protection and conservation of the environment".[1253] It referred to the Preamble of the WTO Agreement which acknowledges the objective of sustainable development as well as the provisions of the LOSC concerning the exploitation of living resources.[1254]

Notwithstanding the fact that not all non-compliance with international fisheries norms and obligations leads to unsustainability, and the fact that many lawful activities does, the following can be argued. Countries that allow their fleet (or foreign fleets operating in their waters) to engage in particular unsustainable fishing practices, or that provide market access to products harvested in an unsustainable way, harm marine living resources. If the EU adopts market restrictions in response, these restrictions can be said to relate to the protection of these resources. This raises the question whether they relate to their *conservation* as such. The aim of market restrictions in fisheries is unlikely to ever only be conservation. By fostering compliance with international fisheries norms and obligations, the EU contributes to

[1250] *US – Shrimp*, Appellate Body report (supra note 123), para. 163. For a case report, see Gregory Shaffer 'United States-Import Prohibition of Certain Shrimp and Shrimp Products' (2019) 93 507; and for the follow up dispute over the US's implementing measures, see Louise De La Fayette 'United States-Import Prohibition of Certain Shrimp and Shrimp Products-Recourse to Article 21.5 of the DSU by Malaysia' (2002) 96 The American Journal of International Law 685.

[1251] *US – Shrimp*, Appellate Body report (supra note 123), para. 162.

[1252] Ibid. paras. 128 -134.

[1253] Ibid. paras. 129-132.

[1254] Ibid. paras. 129 and 130.

the sustainable *exploitation* of living resources. This this falls within the scope of Art. XX(g). In *China – Rare Earths*, the Panel found the following in relation to China's own sovereign resources:

> "(...) conservation as used in Article XX(g) does not simply mean placing a moratorium on the exploitation of natural resources, but includes also measures that regulate and control such exploitation in accordance with a Member's development and conservation objectives. In this connection, we agree with China that "conservation" as used in Article XX(g) is not limited to mere preservation of natural resources. In recognition of the permanent sovereignty that every Member exercises over its natural resources, WTO law recognises the right of Members to adopt conservation measures should they wish to do so, in the light of their own objectives and policy goals, including economic and sustainable development. In other words, resource-endowed WTO Members are entitled to design conservation policies that meet their development needs, determine how much of a resource should be exploited today and how much should be preserved for the future, including for use by future generations, in a manner consistent with their sustainable development needs and their international obligations".[1255]

Though market restrictions in fisheries helps conserve (sustainably exploit) fish *abroad*, the same logic applies. The most obvious problem, and I return to this when examining the chapeau of Art. XX, is whether measures may seek to protect societal value outside their own territorial jurisdiction. Whilst WTO members clearly can regulate the sustainable exploitation of its *own* natural resources for future generations, it is questionable whether they can do so where these resources are not theirs to begin with.

As for the requirement that the measure must relate to the objective of conservation, the text of Article XX(g) does not prescribe a specific analytical framework for assessing whether a measure satisfies the component requirements of that provision.[1256] The Appellate Body in *China – Rare Earths* did however note that the analysis must focus on the design and structure of that measure.[1257] This has been consistently emphasised by the Appellate Body throughout its jurisprudence. There must be a substantial relationship between the measure and the objective.[1258] An example is *US – Shrimp*, in which the Appellate Body's assessment of the design and structure of section 609 led it to determine as follows:

[1255] *China – Rare Earths,* 26 March 2014, Panel reports (WT/DS431/R, WT/DS432/R, WT/DS433/R), paras. 7.266-7.267.

[1256] *China – Rare Earths*, 7 August 2014, Appellate Body report (WT/DS431/Appellate Body/R, WT/DS432/Appellate Body/R, WT/DS433/Appellate Body/R), para. 5.111.

[1257] Ibid. para. 5.108, 5.111.

[1258] *US – Gasoline*, Appellate Body report (supra note 1215), p. 19.

> "(...) it is not a blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that section 609, cum implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends."[1259]

The question remains whether, to determine a substantial relationship, it is moreover necessary to also evaluate the actual effects of the measure concerned.[1260] In *China – Rare Earths*, the US pointed out on appeal that to make actual effects in the marketplace a touchstone for determining whether a measure relates to conservation would render the task meaningless.[1261] The US argued that the "vagaries of the market place" would mean that measures that might at one point in time appear, based on empirical effects, to relate to conservation might, at a different point in time with different data, appear not to relate to conservation, and would also raise difficult questions of causation."[1262] A requirement to document the effectiveness of market restrictions in fisheries on the conservation of marine living resources would be difficult to satisfy, as mentioned above. The Appellate Body in *China – Rare Earths* did not disagree, but held that a panel is not precluded either from considering evidence relating to the actual operation of a measure.[1263]

It may moreover be relevant that the policy objective of the measure is shared more widely by the international community. In *US – Shrimp*, the Appellate Body highlighted that "[it] is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants and third participants in this appeal, indeed, by the vast majority of the nations of the world."[1264] It found evidence of this global common policy in the fact that sea turtles are protected by Annex I to CITES, which is a widely ratified instrument. In the case of market restrictions in fisheries, the objective of preventing, deterring, and eliminating IUU fishing is evidently shared by the vast majority of states. Presumably the same can be said for the general objective of promoting the long-term sustainability of fish stocks, and the general objective of compliance with international fisheries norms and obligations. This would support reliance on Art. XX(g) to justify any

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[1259] *US – Shrimp*, Appellate Body report (supra note 123), para. 141.
[1260] *China – Rare Earths*, Panel report (supra note 1255), para. 7.418. where the Panel found that it was not.
[1261] *China – Rare Earths*, Appellate Body report (supra note 1256), para. 97.
[1262] Ibid.
[1263] Ibid. para. 5.114.
[1264] *US – Shrimp*, Appellate Body report (supra note 123), para. 135.

breach of the GATT as a result of market restrictions imposed under the EU IUU and Non-Sustainable Fishing Regulations, despite their questionable effectiveness.

Finally, a state seeking to justify an import ban under paragraph (g) also has to show that the ban had been made effective in conjunction with restrictions on its domestic fishing industry. This relates to the even handedness of the restrictions.[1265] Though it not require that the burden of conservation be evenly distributed, the Appellate Body has noted that it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers and that could still be shown to satisfy all of the requirements of Art. XX(g).[1266]

Even handedness may provide a significant hurdle for market restrictions in fisheries under both EU Regulations. First of all, the lack of clarity *why* a country is being blacklisted by the EU (the reasons for market restrictions), in particular under the EU IUU Regulation, makes it difficult to determine whether similar burdens are being imposed in the EU at all. As shown in chapter 4, a country may be blacklisted for a whole host of shortcomings. To determine even handedness, all the reasons for blacklisting and for adopting market restrictions would have to be considered. For example, in the case of a ban on imports because a third country allows unregulated fishing, the importing state (the EU) would have to show that its own vessels were also prevented from fishing in the area concerned in a manner contrary to its international responsibilities.[1267] In the case of a ban on imports because a third country does not sufficiently punish violations by its vessels with coastal state laws (e.g. fishing in a foreign EEZ without permission), it must be looked at whether EU flagged vessels are sufficiently punished for doing so. But whilst the EU generally has in place stringent requirements for its own fleet, chapter 4, section 4.4 pointed to a documented lack of effective implementation of these requirements.[1268]

[1265] *US – Gasoline*, Appellate Body report (supra note 1215), p. 19-21.

[1266] *China – Rare Earths*, Appellate Body report (supra note 1256), referring to *US – Gasoline* and prior caselaw, para. 5.133.

[1267] Robin Churchill (supra note 24), p. 338.

[1268] Various shortcomings were identified, including a lack of dissuasive sanctions, leading to the conclusion that (as of 2016) the EU did not have in place a sufficiently effective system for fisheries controls in place to support the success of the Common Fisheries Policy (in European Court of Auditors (supra note 646), para. 95). See also the allegations that many foreign flagged vessels engaged in IUU fishing off the coast of West Africa have EU beneficial ownership (Environmental Justice Foundation *Pirate Fishing Exposed: The Fight Against Illegal Fishing in West Africa and the EU* (2012), p. 31; Ifesinachi Okafor-Yarwood 'Illegal, Unreported and Unregulated Fishing, and the Complexities of the Sustainable Development Goals (SDGs) for Countries in the Gulf of Guinea' (2019) 99 Marine Policy 414, p. 418).

Furthermore, the EU has a tainted reputation when it comes to fisheries sustainability in general, in particular when it comes to monitoring its external fleet and negotiating fisheries access in foreign EEZs. Though the coastal state ultimately has the sovereign right to grant or deny access to its resources, the EU has been critiqued in the past for having knowingly negotiated unsustainable quota with governments who did not have sustainable interest at heart.[1269] There have moreover been many cases of EU flagged vessels fishing illegally in foreign (in particular West African) EEZs.[1270] This happens despite the fact that EU law foresees sanctions for serious violations (of which this is one), as seen in chapter 4, section 4.4.4. Having in place the necessary laws and regulations but without sufficient enforcement constitutes a reason for blacklisting third countries, and therefore (for the Commission) justifies market restrictions. This means that, where market restrictions are the consequence of a lack of implementation of third country law, the EU will have to show that a lack of implementation at home has similar consequences. Where EU member states they do not implement EU law, they can be challenged by the Commission before the CJEU. This may be seen as even handedness from the point of view of *countries*, but not from the point of view of *operators.* That an EU member flag state is being challenged before the CJEU for non-compliance has no direct consequences on vessels flying their flag, who can continue selling their catch on the EU market – although the Commission can choose to close a fishery if it believes this to be warranted.[1271] On the contrary, law abiding foreign operators flagged to a blacklisted country are under the onerous burden of having to reflag to a non-blacklisted country if they still want to export to the EU.

Similarly, the EU's external fisheries policy has been critiqued for "repeatedly deviating from the principles of sustainability and precaution" because of the EU's attitude within several RFMOs (inflating its own quotas unilaterally; proposing unsustainable catch limits;

[1269] Vlad M Kaczynski and David L Fluharty (supra note 448), p. 78, taking note of EU flagged vessels' high levels of by-catch, a general underpayment of tuna license fees, and al almost complete lack of statistical information sent to the coastal state. The authors conclude that the declining strength of coastal fishery resources in West Africa, continuing dependence of West African states on EU fishery compensation and inability to introduce more effective resource conservation measures are effectively the EU's fault. However, fisheries access agreements have been reformed since, which should substantively address these shortcomings (supra note 606; for an overview of these changes see Emma Witbooi (supra note 448)).

[1270] Vanya Vulperhorst *et al*, 'Fishing the Boundaries of Law: How the Exclusivity Clause in EU Fisheries Agreements was Undermined' (Oceana, 2017), which presents data from Oceana showing that many EU member states had unlawfully authorised vessels to fish in the Gambia and Equatorial Guinea between 2011 and 2015, in breach of the rules of the Common Fisheries Policy (because there had been a fisheries access agreement in place which prohibits simultaneous private agreements). Moreover, the paper demonstrates that nineteen EU vessels fished with permits granted unlawfully for more than 31,000 hours in West African EEZs.

[1271] Art. 36 Control Regulation.

and so on).[1272] Though some of these allegations may no longer hold true given the EU's continued reforms of its external fisheries policy, these issues would have to be considered in order to determine even handedness, in particular where the case concerns market restrictions under the Non-Sustainable Fishing Regulation (for not agreeing on sustainable quota).[1273] The EU's reputation for poorly managing its fisheries precedes it, and it has been said that the EU Common Fisheries Policy has "singularly failed" to achieve its stated intention to secure stocks against over-fishing in EU waters.[1274] Art. 5(1)(b) EU Non-Sustainable Fishing Regulation states that measures must be "made effective in conjunction with restrictions on fishing by [EU] vessels, or on production or consumption within the [EU], applicable to fish and fishery products made of or containing such fish of the species for which the measures have been adopted". This provision clearly has WTO compatibility in mind. In the only case in which market restrictive measures were adopted, the Commission argued that even handedness had indeed been considered. The EU had followed the International Council for the Exploration of the Seas (ICES) recommendations and reduced its own catches accordingly by 26%, whereas the Faeroe Islands had *not* followed ICES recommendations, which the EU considered would have been the appropriate course of action.[1275] Yet, the bigger picture described above suggests the risk of double standards and a general lack of even handedness.

A final issue that remains to be examined here is the potential lack of a territorial nexus when justifying market restrictions that bear on environmental issues abroad. I turn to this next.

7.3.4. Jurisdictional nexus

There has been some confusion regarding the jurisdictional reach of measures justified on the basis of one of the grounds of Art. XX(b) and (g), in particular where a measure has a strong coercive effect.[1276] In *US – Shrimp*, the Appellate Body had to decide whether the US could

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[1272] Tobias Belschner 'Not so Green after All? The EU's Role in International Fisheries Management: The Cases of NAFO and ICCAT' (2014) 1763 Journal of European Public Policy 1, p. 987.

[1273] The EU recently undertook major reforms of its external fleet which should alleviate many of the problems highlighted until now (Regulation (EU) 2017/2403 of the European Parliament and of the Council of 12 December 2017 on the sustainable management of external fishing fleets, and repealing Council Regulation (EC) No 1006/2008)).

[1274] Jill Wakefield *Reforming the Common Fisheries Policy* (Elgar, 2016), p. 52.

[1275] Commission Implementing Regulation (EU) 793/2013 (supra note 740), para. 27.

[1276] *US – Shrimp*, Appellate Body report (supra note 123), para. 161; GATT Panel, US – Tuna (EEC), para. 5.39; discussed i.a. in Barbara Cooreman (supra note 579), p. 69 – 72 and Sarah H Cleveland (supra note 98).

rely on Art. XX(g) to effectively regulate the conservation of sea turtles, over which it had no sovereign rights. The Appellate Body got out of the conundrum by noting the following:

> "The sea turtle species here at stake, i.e., covered by section 609, are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat -- the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)."[1277]

The jurisdictional nexus between the market state and the regulated behaviour has been examined in chapter 6. By virtue of there being a market connection, market restrictions are generally not considered to be extraterritorial, because they benefit from *some* territorial connection: they operate by territorial extension. Alternatively, a nexus between the behaviour and the regulating market state can fairly easily be identified where this concerns transboundary stocks that regulating state is also committed to conserve, for instance by virtue of its membership to an RFMO that has competence to regulate that stock. It has been argued that, in the case of shared resources of a shared environment, a sufficient interest on the part of the state adopting market restrictions can be established.[1278] Where measures target a third country's fishing efforts more generally, such as in the case of EU IUU, this nexus is harder to be found.

Sandford Gaines considers that "PPM-based measures should be broadly allowed where they address shared resources", but not so where they address localised wildlife that is not "shared".[1279] Gaines briefly refers to *Gourmetterie Van Den Burg* to substantiate the latter conclusion, noting that "there seems little persuasive reason to advocate a different outcome in the WTO".[1280] But there are some significant differences here which are worth pointing

[1277] *US – Shrimp*, Appellate Body report (Ibid.), para. 133.
[1278] Sanford Gaines 'Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade' (2002) 27 Columbia Journal of International Environmental Law 383, p. 429-430; Christiana R. Conrad (supra note 1127), p. 307.
[1279] Sanford Gaines (Ibid.), p. 429-430.
[1280] Ibid. p. 430.

out. *Gourmetterie Van Den Burg* is a preliminary ruling brought before the CJEU,[1281] which revolved around a Dutch law prohibiting red grouse (a species which did not occur in the Netherlands) to be bought or sold on the Dutch market, regardless of whether it has been lawfully killed in the country of origin.[1282] The measure was effectively a quantitative restriction on trade, and thereby in breach of what used to be Art. 30 Treaty of the European Economic Community (EEC Treaty) (now Art. 34 TFEU), which can only be justified on certain grounds similar to Art. XX GATT (including to protect the health and life of animals, as per Art. 36 EEC Treaty, now Art. 36 TFEU). In interpreting Art. 36, the CJEU opined that red grouse do not benefit from any particular special protection. The EU had exhaustively regulated the protection of birds in the form of Council Directive 79/409/EEC on the Conservation of Wild Birds. The Directive allowed EU member states to adopt more stringent measures for certain migratory species and particularly endangered ones, as per Annex I, but red grouse were deemed to be neither. Nor were red grouse listed as a particularly endangered species in EU law implementing CITES. Reading Art. 36 EEC Treaty in light of the Wild Birds Directive, the CJEU therefore opined that Dutch law could not afford red grouse more stringent protection than that provided by the legislation of the member state in whose territory it occurs, which in the case at hand meant that if the UK allowed the killing of red grouse, so should the Netherlands.[1283]

The difference between the red grouse case and market restrictions in fisheries is that, in the case at hand, the EU had exhaustively regulated the protection of wild birds. The Directive *would* have allowed the Netherlands to put more stringent rules on red grouse even though they were not a migratory species (shared resource) *if* the bird had had a specific conservation status. This construction of the exhaustive regulation of a particular area of law at a supranational level (the EU) does not exist in general international law. In so far as fisheries are concerned, states are perfectly allowed to set stringent requirements on how fish are caught, whether or not those criteria are more stringent than those imposed there where the fish actually occurs. Any limits to doing so may stem from the scope of Art. XX itself; not from the way that fisheries protection is regulated by the LOSC and related instruments. The analogy with the red grouse case is therefore somewhat misleading, and Gaines'

[1281] Art. 267 TFEU gives the European Court of Justice (one of the two courts of the CJEU) the power to accept preliminary rulings on the validity and interpretation of EU law.
[1282] Case C-169/89 *Criminal Proceedings against Gourmetterie Van Den Burg* [1990] ECR 2143.
[1283] Ibid. para. 16.

conclusion that "there seems little persuasive reason to advocate a different outcome in the WTO" is overly simplistic.

In similar fashion to Gaines, Barbara Cooreman argues that the rules of the WTO (should) limit states to *only* adopt market restrictions which can be justified on the basis of the effects-based doctrine.[1284] Namely, where one of the concerns that are listed in Art. XX GATT (and which can be legitimately be used to justify market restrictions) directly affects the regulating state.[1285] In so doing, she separates out two jurisdictional aspects of a measure. On the one hand, measures that target conduct and consequences abroad. Because states frequently reosrt to such measure, she does not consider this to be particularly problematic.[1286] On the other hand, measures whose *justification* (the legitimate concern on which the measure is based) is extraterritorial or "outward looking".[1287] In such cases, she argues that the existence of "direct, substantial and foreseeable effects" could establish a sufficient nexus between the concern and the regulating state.[1288] Additionally, Cooreman points out that the wider the recognition of a norm, the easier it will be to justify a weak territorial connection – such as where the concern in question is both inward and outward looking.[1289] Given the difficulty of proving effects in an environmental context, she suggests a liberal use of international soft and hard law to substantiate the need to adopt trade restrictive measures.[1290] Yet, where a concern is *entirely* outward looking, she considers that extraterritorial effects cannot be permitted, and that the measure cannot be justified on the basis of Art. XX – irrespective of any international support for the concern in question.[1291]

It is not clear that the inward/outward looking dimension is recognised by Art. XX. Nor are Cooreman's views easy to reconcile with the reality of market restrictions in fisheries. The societal concern of protecting the environment or its living resources is necessarily neither wholly territorial, nor wholly extraterritorial. Her suggestion to resort to the effects-doctrine could possibly provide an avenue for justifying extensive prescriptive jurisdiction over third country behaviour. But as explained in chapter 6, section 6.3, effects are difficult to

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[1284] Barbara Cooreman (supra note 579), p. 109.
[1285] Ibid. p. 109.
[1286] Ibid. p. 54.
[1287] Ibid. pp. 54-55.
[1288] Ibid. p. 109 and 135, referring to the effects-doctrine as set out in the Restatement of the Law (Third) on Foreign Relations Law and the US.
[1289] Ibid. pp. 138 – 151.
[1290] Ibid. p. 173.
[1291] Ibid. p. 173.

demonstrate in environmental cases, including in fisheries. It would be unwise to cast the net be cast too wide, since this would might give every state an interest in regulating any environmental (fisheries) matters anywhere, resulting in chaos.

7.3.5. Art. XX (chapeau)

Art. XX not only lists societal needs that may justify an otherwise incompatible measure with the GATT. It also contains general requirements in its chapeau that must be satisfied. Having provisionally justified a measure under one of the grounds listed above, a measure must still not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. In practice, this has proven to be a heavier task than that involved in showing that the measure can be provisionally justified on the basis of one of the grounds of Art. XX.[1292]

In *US – Gasoline*, the Appellate Body held that the three substantive elements of the chapeau (arbitrary discrimination, unjustifiable discrimination, and a disguised restriction on trade) must be read "side-by-side; they impact meaning on one another."[1293] As for the difference between discrimination and a disguised restriction, this lies in the word 'disguised', since any measure that requires justifying under Art. XX will necessarily be a trade restriction.[1294]

Generally, it can be observed that most disputes concern whether a measure amounts to arbitrary and unjustifiable discrimination. Discrimination plays an important role in the chapeau. It is separate from any analysis of discrimination that has already been carried out to find a breach of a provision of the GATT, though the same elements may be considered again in light of the chapeau. In *US – Gasoline*, the Appellate Body held that it must necessarily and logically be different from the discrimination addressed in other provisions of the GATT.[1295] The logic of having to establish discrimination *again* as part of the chapeau, and that this is a different test from the discrimination addressed in other provisions of the GATT, has been questioned. Grainne de Búrca and Joanne Scott suggest that an equally plausible

[1292] *US – Gasoline*, Appellate Body report (supra note 1215), p. 23.
[1293] Ibid. p. 25.
[1294] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 604.
[1295] *US – Gasoline*, Appellate Body report (supra note 1215), p. 23; confirmed in *US – Shrimp*, Appellate Body report (supra note 123).

interpretation is that Art. XX exists to exempt measures which have been found to discriminate, "but that the scope of the exemption is exhausted where the discrimination in question becomes arbitrary and unjustifiable."[1296] This would avoid having to determine (again) that a measure is discriminatory and puts the focus on limiting the arbitrary exercise of that power. The view that this is the real contribution of the chapeau is appealing, and this aspect is examined in more detail in chapter 8. At the same time, the measures that breach Art. XI GATT have never yet had to be examined for their discriminatory nature, so in that respect the question of discrimination would be examined afresh.

It will be necessary to consider whether a measure discriminates between countries where the same conditions prevail. This means that the state adopting the measure needs to take into consideration the different conditions that exist abroad. In *US – Shrimp*, this meant that the US had to examine the appropriateness of imposing a particular regulatory program on countries that exported shrimp to its market.[1297] One of the main reasons why the US measure was found to be both arbitrary and unjustifiable was because of the rigidity of the certification requirements it had in place. The US did not take into account any specific policies and measures that other countries might have adopted for the protection and conservation of sea turtles when harvesting shrimp.[1298] The US used "an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program (...) without taking into consideration different conditions which may occur in the territories of those other Members."[1299] It operated a de facto ban on imports of shrimp caught in the waters of a non-certified country, regardless of whether the actual vessel was using a turtle excluder device comparable in effectiveness to those requirements in the US.[1300]

This can mean different things for EU market restrictions. I recall that the circumstances that bring about the discrimination within the meaning of the chapeau may include, but are not limited to, the circumstances that led to the finding of a violation of a substantive provision of the GATT (e.g. Art. I or III).[1301] This chapter already determined that market restrictions adopted upon country blacklisting pursuant to both the EU IUU and Non-

[1296] Grainne De Búrca and Joanne Scott 'The Impact of the WTO on EU Decision-Making' [2000] Harvard Jean Monnet Working Paper 06/00, p. 16 (footnote 45).
[1297] *US – Shrimp*, Appellate Body report (supra note 123), para. 164-165.
[1298] Ibid. para. 163.
[1299] Ibid. para. 164.
[1300] Ibid. para. 165.
[1301] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.316.

Sustainable Fishing Regulations differentiate between like products, affecting competitive opportunities conditions between imported and like domestic products, and between foreign like products. Moreover, market restrictions under both Regulations affect all or a group of fish products from the targeted country alike, irrespective of how the fish was caught. This means that legitimate operators (not engaging in IUU fishing/fishing within what would have been a sustainable quota) will be discriminated against. Though the EU Non-Sustainable Fishing Regulation allows market restrictions to apply only to the specific vessels or fleets of that country to which certain measures are to apply, and though the EU IUU Fishing Regulation allows for only certain species to be affected by market measures, these nuances have so far not been applied.

Examining further whether the EU measures discriminate between countries where the same conditions prevail, the following can be observed. It is evident from the discussion in chapter 4 that many countries in the world (including the EU) struggle to comply with international fisheries norms and obligations, which may lead to IUU fishing-related activities by their fleet, in their waters, IUU-caught fish coming into their ports and their markets, or unsustainable harvesting practices more generally. In this respect, similar conditions prevail across the board, yet only some get blacklisted. But what must be considered to find discrimination is "the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail," which requires looking at both substantive and procedural requirements under the measure at issue.[1302] The nature of EU country blacklisting is such that it is entirely dependent on the specific policies and measures adopted by third countries, and the level of cooperation that the targeted country engaged in with the EU throughout the pre-identification period. Whether or not a country is blacklisted under either the EU IUU or Non-Sustainable Fishing Regulation is a reflection of their specific situation. This speaks in favour of EU blacklisting under both Regulations *not* being discriminatory, as between WTO members, for the purpose of the chapeau. The IUU Regulation confirms in its Preamble that the aim is to adopt non-discriminatory, legitimate and proportionate measures (rec. 31), and as mentioned above, developing country status is explicitly taken into account. In theory this allows for a tailored approach. In practice, however, chapter 4 showed that the Commission

[1302] Ibid. para. 5.302; *US – Shrimp*, Appellate Body report (supra note 123), para. 160.

enjoys too much discretion in choosing target countries, and in determining the conditions that prevail there and whether blacklisting is warranted. Despite the relatively flexible blacklisting process, it is therefore unlikely that the EU measures would be found as *not* discriminatory for the purpose of the chapeau.

Having determined that the EU measures likely discriminate between countries where the same conditions prevail, the following step is the examine the nature of the discrimination. This should focus on the cause of the discrimination, or the rationale put forward to explain its existence.[1303] The Appellate Body has held that deliberate (foreseen) instead of merely inadvertent or unavoidable discrimination will be seen as unjustifiable and arbitrary.[1304] Similarly, where discrimination is “capricious” or “random”, this will be arbitrary for the purpose of the chapeau.[1305] There must also be a rational connection between the reasons for the discrimination in the application of the measure, and its legitimate objective (one of the grounds listed in Art. XX).[1306] A measure will be arbitrary or unjustifiable where it bears no rational connection to the objective, or goes against that objective.[1307] Though in *US – Shrimp*, the rational connection-test was only *one* element in a cumulative assessment of unjustifiable discrimination,[1308] Van den Bossche and Zdouc emphasise, by reference to *EC – Seal Products*, that this is actually *one of the most important factors* in the assessment of arbitrary or unjustifiable discrimination.[1309]

The question is thus whether there is a rational connection between the reasons for the discrimination in the application of EU blacklisting and the legitimate objective that is being pursued. As seen in the previous sections, this could either be addressing an internal moral concern (e.g. with IUU-caught fish entering the EU market/the EU contributing to unsustainable fishing), protecting marine/fish life and health, or conserving marine living resources. The reasons for the discrimination are presumably practical. It could be difficult to distinguish between IUU-caught fish and non-IUU caught fish where a flag state is deemed to have failed its international obligations and its flag state validation of a catch certificate

[1303] *EC – Seal Products* (Ibid.) para. 5.303.
[1304] *US – Gasoline*, Appellate Body report (supra note 1215), p. 28-29.
[1305] *Brazil – Tyres* Panel report (supra note 1244), para. 7.294.
[1306] *Brazil – Tyres*, Appellate Body report (supra note 1306), paras. 225-228; *EC – Seal Products*, Appellate Body report (supra note 1118), paras. 5.306.
[1307] *Brazil – Tyres*, Appellate Body report (Ibid.), para. 227.
[1308] *US – Shrimp*, Appellate Body report (supra note 123), para. 176.
[1309] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 602; *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.306.

cannot be trusted. Imposing a blanket prohibition on the import of fish products coming from that country is easier than adopting a more tailored approach, determining the legality for each individual consignment. Similarly, it is difficult to determine who to apply partial market restrictions to (only certain foreign fleets but not to others, or only up to a quota that is deemed sustainable, and so on). If the objective is a moral concern with IUU-caught fish or unsustainably caught fish coming onto the EU market, than a blanket prohibition on countries that cannot ensure no-IUU or sustainability bears at least some rational connection to the objective pursued. It is less clearly related to the objective of protecting fish life/conserving marine resources. In particular in case of the IUU Regulation, an individual operator could presumably still advance proof of the source of its individual catch. Import prohibitions on all products from some countries (despite many other countries also allowing IUU/non-sustainable fishing and despite the questionable effectiveness of market restrictions in the first place) does not bear a rational connection with the objectives of Art. XX(b) and (g). The situation is somewhat similar to that in *US – Shrimp*, where the Appellate Body highlighted that the measure treated "shrimp caught using methods identical to those employed in the [US]" differently from shrimp caught in the US or other certified countries "solely because they have been caught in waters of countries that have not been certified by the [US]" – a situation that the Appellate Body found "difficult to reconcile with the declared policy objective of protecting and conserving sea turtles."[1310]

To summarise the previous sections, (EU) country-level market restrictions in fisheries breach the substantive provisions of the GATT (Art. XI GATT being the most likely candidate). However, the measures may fulfil the substantive requirements of Art. XX in so far that they can be justified under Art. XX(g) and, though this will be more difficult to argue, Art. XX(a) and (b). The main issue here is to prove that there has been even handedness (Art. XX(g)), or necessity (Art. XX(b)). Necessity will also be difficult to determine in the event that a moral concern can be identified and the measures can be justified under Art. XX(a). Presuming nevertheless that (EU) country-level market restrictions can be so justified, and that the potential lack of a territorial nexus does not cause problems, the question remains whether measures are adopted following the right procedures so as to avoid arbitrariness. This is examined further in chapter 8.

[1310] *US – Shrimp*, Appellate Body report (supra note 123), para. 165.

7.4. TBT Agreement

The TBT Agreement concerns a limited group of measures. Of these, technical regulations, as defined in Annex 1.1; are the most relevant here. For the purpose of the TBT Agreement, market restrictions in fisheries must be examined through the lens of the EU CDS. It has been explained that the EU CDS helps put into effect market restrictions and has a country-level dimension, in so far that a certificate will not be accepted where the flag state who validated the certificate has been blacklisted. The non-acceptance of a catch certificate is thus a way of enforcing the EU country-level blacklist. An EU catch certificate can be examined under the TBT Agreement. The TBT Agreement treats mandatory requirements and voluntary standards differently. The CDS is a mandatory requirement, and may therefore fall within the scope of the TBT Agreement as a technical regulation. I first turn to the definition of a technical regulation, before examining the requirements with which technical regulations must comply.

7.4.1. Technical regulations

Annex 1.1 defines a technical regulation as a:

> "[d]ocument which lays down product characteristics or their related process and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking and labelling requirements as they apply to a product, process or production method."

In *EC – Seal Products*, the Appellate Body observed that in order to determine whether a measure is a technical regulation, "the most weight" must be given to the design and operation of a measure, while seeking to identify its "integral and essential" aspects.[1311] However, the "ultimate conclusion as to the legal characterization of the measure must be made in respect of, and having considered, the measure as a whole".[1312] Moreover, measures may be considered together, holistically. In the case at hand, the Appellate Body decided to treat an EU Regulation pertaining on seal products and its Implementing Regulation together as being one "regime".[1313] This is important for thinking about the characterisation of the EU CDS. The CDS and country blacklisting can also be examined

[1311] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.19.
[1312] Ibid.
[1313] Ibid. para. 5.20.

together as one regime. A CDS is the mandatory use of a document that certifies the conditions under which fish may be caught. It concerns an identifiable product or group of products,[1314] namely in the case of the EU CDS those listed in Annex I to the Regulation. The question that arises is: does a CDS lay down product characteristics, or PPMs related to product characteristics? The question of non-physical aspect measures (and in particular npr-PPMs) becomes relevant again. Though the answer is that a CDS likely does not, the question can be examined by look at the following examples. I turn first to the question of product characteristics, which has been interpreted fairly broadly. On the contrary, the meaning of the phrase 'their related PPMs' in the definition of a technical regulation has not yet been examined in a WTO dispute.[1315]

In *EC – Seal Products* the Panel and Appellate Body came to "diametrically opposed conclusions" as to whether the EU measure was a technical regulation or not.[1316] I recall that the EU Seal Regime (the measure at stake) defined conditions to allow and prohibit the placing of seal products on the market. It consisted of an overall ban on the import of seal products, but allowed for three exemptions.[1317] First, seal products caught for the subsistence of indigenous communities could be imported and/or placed on the EU market (the IC exception). Second, products derived from small-scale, occasional hunts conducted with the purpose of managing marine resources (culling) could be placed on the market on a not for profit basis and not for commercial reasons (MRM exception). Third, seal products for personal use of travellers or their families could be imported for non commercial reasons, but not placed on the market (the Travellers' exception). The EU Seal Regime moreover concerned pure seal products as well as products containing seal (mixed products).

The Panel concluded that the EU measure related to product characteristics. It reached this conclusion by putting great weight on the Appellate Body ruling in *EC – Asbestos*. In *EC – Asbestos*, the Appellate Body had explained that "product characteristics" include any objectively definable features, qualities, attributes, or other distinguishing mark of a product, and may include "not only features and qualities intrinsic to the product itself, but also related 'characteristics', such as the means of identification, the presentation and the appearance of a

[1314] This was important in *EC – Sardines*, 26 September 2002, Appellate Body report (WT/DS231/Appellate Body/R), para. 178 and from there.
[1315] As acknowledged in *EC – Seal Products*, Panel report (supra note 1120), para. 7.103.
[1316] Robin Churchill (supra note 24), p. 343.
[1317] *EC – Seals*, Panel report (supra note 1179). para. 7. 42; Art. 3 EU Seals Regulation.

product."[1318] The measure in question at the time of the dispute prohibited the use of asbestos fibre in products. The prohibition on asbestos fibres "as such" was held not to be a measure that lays down product characteristics because it simply bans asbestos fibres in their natural state.[1319] However, the Appellate Body concluded that there was more to the measure. Since asbestos fibres have no other known use, the Appellate Body argued that the regulation of asbestos could only be achieved through the regulation of products that contain asbestos fibres. Indeed, the Decree in question actively prohibited products containing asbestos fibres in some of its provisions. A prohibition on asbestos-containing products was held to be a measure that lays down product characteristics, since it effectively provides that all products must not contain asbestos fibres.[1320]

Building on this, the Panel creatively argued that the EU Regime laid down the product characteristic that "all products must not contain seal".[1321] This was notwithstanding the fact that the prohibition of seals "in their natural state" might not, in itself, prescribe or impose any characteristics.

The Appellate Body disagreed with this. It held that the Panel had compartmentalised the regime, and that its conclusion only rested on *part* of the EU Seal Regime (namely, the part that bans seal products).[1322] This failed to take into account the regime's permissive elements, which allowed certain seal products onto the market in defined circumstances – which the Panel had evaluated separately as being "administrative provisions" of the technical regulation laying down product characteristics.[1323] The Panel had not properly analysed the weight and relevance of the essential and integral elements of the measure as an integrated whole.[1324] The regime also regulated pure seal products, which unlike the dispute in *EC – Asbestos* was not deemed to prescribe or impose any product characteristics.[1325] As for the Panel's substantive argument, the Appellate Body admitted that "a measure that comprises, among other elements, a prohibition of seal-containing products may include a component that appears to prescribe product characteristics", but this is only one input of the regime as a

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[1318] *EC – Asbestos*, 12 March 2001, Appellate Body report (WT/DS135/Appellate Body/R), para. 67.
[1319] Ibid. para. 71.
[1320] Ibid. para. 72.
[1321] *EC – Seal Products*, Panel report (supra note 1120), para. 7.106.
[1322] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.28.
[1323] *EC – Seal Products*, Panel report (supra note 1120), para. 7.108.
[1324] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.29.
[1325] Ibid. para. 5.35.

whole.[1326] The Appellate Body agreed that a prohibition on seal-containing products as such may be seen as imposing certain "objective features, qualities or characteristics" on all products by providing that they may not contain seal.[1327] *However,* the Appellate Body was not persuaded that this was a main feature of the EU Seal Regime. The prohibition on seal-in-products was not based "merely on the basis that such products contain seal as an input", as was the case in *EC – Asbestos*. Rather, the prohibition was imposed subject to conditions based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. The prohibition on the products containing seal was only a derivative of the permissive component of the measure (the exceptions under which seal could be allowed).[1328] These exceptions (under which seal products could be allowed on the market) were not deemed to lay down product characteristics either. The Panel had argued that only seals obtained from the specific type of hunter and/or the qualifying hunts may be used in making final products, and that these criteria constitute "objectively definable features" of the seal products that are allowed to be placed on the EU market.[1329] Consequently, the Panel found that they lay down particular characteristics of the final products.[1330] Again, the Appellate Body disagreed. It concluded this was wrong in this regard, and saw no basis in the TBT Agreement or prior Appellate Body reports to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as a product characteristic.[1331]

On the whole, the Appellate Body concluded that the EU Seal Regime was not concerned with banning the placing on the EU market of seal products as such. Whilst *some* of its features could be seen as laying down product characteristics, the rest (and therefore the measure as a whole) did not.[1332]

The Panel had not explored the alternative line of reasoning: that the Seal Regime laid down PPMs related to product characteristics (included in the scope of a technical regulation).[1333] The Panel merely concluded that the measure at hand laid down product characteristics. Being asked to complete the legal analysis and upon finding that the Seal

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[1326] Ibid.
[1327] Ibid. para. 5.39.
[1328] Ibid. para. 5.41.
[1329] *EC – Seal Products*, Panel report (supra note 1120), para. 7.110.
[1330] Ibid.
[1331] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.45.
[1332] Ibid. para. 5.58.
[1333] *EC – Seal Products*, Panel report (supra note 1120), para. 7.112.

Regime did *not* lay down product characteristics, the Appellate Body deplored that it lacked the benefit of sufficient elaboration by the parties of their arguments on whether or not the Seal Regime set out PPMs that could fall within the scope of the TBT Agreement. Whilst the Appellate Body said to have explored the issue with the participants, more argumentation and exploration in questioning would have been required, and it therefore did not complete the legal analysis.[1334] It did however agree that "the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues."[1335]

The case can be compared to *US – Tuna II (Mexico)*, described above in section 7.2.3. There, the Panel simply sidestepped the issue. Clearly, the measure was an npr-PPM, yet the respondent agreed from the outset that it was a labelling requirement within the meaning of the second sentence of Annex 1.1 TBT. The Panel therefore did not find it necessary to consider in addition whether the labelling requirements fell within the scope of the first sentence of Annex 1.1 as product characteristics or related PPMs. There was no dispute over the fact that the measure was a technical regulation.[1336] This was upheld on appeal.

On the basis of the Appellate Body views in *EC – Seal Products*, Robin Churchill considers it unlikely that a CDS could constitute a technical regulation, since "fish will have the same characteristics howsoever caught".[1337] This is in with the discussion above on whether the regulatory circumstances of a flag state make fish caught by vessels flying its flag unlike other fish. However, I will – as does Churchill – entertain the possibility that the CDS constitutes a technical regulation, and now turn to the provisions that apply to technical regulations.

7.4.2. Legitimate regulatory distinction (Art. 2.1)

Pursuant to Art. 2.1 TBT, members shall ensure that in respect of technical regulations, products imported from the territory of any member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country. Presuming that a CDS is a technical regulation, it must therefore treat like products the same: may not accord less favourable treatment. Important parallels exist between Art. 2.1 of the TBT Agreement and Arts. I:1 and III:4 GATT. The

[1334] *EC – Seal Products*, Appellate Body report (supra note 1118), paras. 5.67-5.69.
[1335] Ibid.
[1336] *US – Tuna II (Mexico) (Art. 21.5)*, Panel report (supra note 792), para. 7.78.
[1337] Robin Churchill (supra note 24), p. 343.

question of likeness and differential treatment have already been extensively discussed in that context. It was concluded that CDS treat like products differently; some more favourably than others.

In addition, however, Art. 2.1 TBT requires an examination whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction. This is important, since whilst a breach of Arts. I and II GATT may be justified under Art. XX, the TBT Agreement does *not* contain such a clause. It is herein that the third tier of the test (treatment no less favourable) differs from what has already been said above. While a detrimental impact on the competitive conditions between like products may be sufficient to establish a breach of Art. III:4 GATT, the existence of such a detrimental impact is *not* sufficient to establish a breach of Art. 2.1 TBT. It must further be analysed whether "the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products".[1338]

Whether or not this is so will depend on "the circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and in particular, whether the regulation is even handed."[1339] In *US – Tuna II (Mexico)*, the detrimental impact of the strict 'dolphin safe' labelling requirements were deemed not to stem exclusively from a regulatory distinction, because of the lack of even handedness in addressing the risks to dolphins. I recall that, under the DPCIA provisions that were applicable at the time, all tuna products containing tuna caught in a non-ETP fishery using a method *other* than setting on dolphins were eligible to be labelled 'dolphin safe' without certifying that no dolphin was killed or seriously injured in the set. This was because the US had not yet determined at the time that other fishing methods or fishing in other areas also posed a threat to dolphins, which by law would trigger stricter requirements to access the label. Moreover, whilst high seas driftnet fishing for tuna could not access the 'dolphin safe' label, the law did not regulate access to the label for driftnet fishing for tuna in the EEZ.[1340] This left a clear loophole in the law. There was moreover "strong evidence that regular and

[1338] *US – Clove Cigarettes*, 4 April 2012, Appellate Body report (WT/DS406/Appellate Body/R), para. 182; *EC – Seal Products*, Appellate Body report (supra note 1118), paras. 5.93 and 5.105; and Appellate Body report, *US-Tuna III (Mexico) (recourse to Art. 21.5 of the DSU)* para. 7.277.
[1339] *US – Clove Cigarettes*, Appellate Body report (Ibid).
[1340] *US – Tuna II (Mexico)*, Appellate Body report (supra note 1167), para. 270.

significant mortality and serious injury of dolphins also exists outside the ETP."[1341] All in all, the Appellate Body did not find the US measure to be "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. Evidently, there were high risks to dolphin mortality also when tuna was fished by other fishing methods, yet these had not been as strictly regulated. Therefore, the US could not justify that the difference in treatment between tuna caught by setting on dolphins in the ETP and tuna caught by other fishing methods outside the ETP stemmed exclusively from a legitimate regulatory distinction.[1342] The requirement that a measure must be "designed and applied in an even handed manner" has been confirmed since.[1343]

The test is similar, but not identical to the chapeau of Art. XX. It follows from *US – Tuna II (Mexico) (Art. 21.5)* that even handedness under Art. 2.1 TBT is *broader* than the chapeau's requirement that the detrimental impact of a measure is rationally connected to the objective pursued – though this may be a useful element in the analysis.[1344] Unlike the chapeau, the even handedness analysis is not limited to analysing whether a measure is designed in a manner that constitutes arbitrary or unjustifiable discrimination.

Does discrimination under the EU CDS stem from a legitimate regulatory distinction? Arguably, yes. However, when the EU CDS is examined holistically, taking into account the reasons for denying a certificate where a flag state is blacklisted, the picture looks different. This comes down to the choice of targeting certain (small developing) countries rather than others, such as China.[1345] Though the measure itself may be designed so as to be even handed, these arbitrary policy choices undermine a finding that the scheme is applied in an even handed manner.

7.4.3. Legitimate objectives (Art. 2.2)

Art. 2.2 TBT prohibits technical regulations that are more trade restrictive than necessary to fulfil the legitimate objective. It gives a list of examples of legitimate objectives that may be pursued. This is similar to the societal values set out in Art. XX, but for the fact that they are not an exhaustive list, and do not serve as a justification for a breach of any of the other

[1341] Ibid. para. 266.
[1342] Ibid. para. 296-297 and foregoing paragraphs.
[1343] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 908, who refers in detail to *US – COOL*.
[1344] *US – Tuna II (Mexico) (Art. 21.5)*, Appellate Body report (supra note 793), para. 7.95.
[1345] These policy concerns surrounding EU country blacklisting were mentioned in the context of non-discrimination and the law of the sea, supra note 1086.

provisions of the TBT Agreement. Whether an objective is legitimate will have to be assessed for every case, but it can be noted that the non-exhaustive list of legitimate objectives includes *inter alia* the protection of animal life, and the protection of the environment. For the same reasons as set out in the context of the GATT, these would likely also provide justifications for the EU CDS.

Trade restrictiveness has been interpreted as a "limiting effect on trade".[1346] The EU CDS must therefore not be limiting trade more than necessary to fulfil the legitimate objective of the protection of the marine environment, and/or the protection of animal life.

In *US – Tuna II (Mexico)*, the Appellate Body held that what matters is the *degree* of contribution to the legitimate objective; not so much whether that objective is "fulfilled" as such.[1347] The degree of contribution will weigh in the analysis whether or not a measure is more trade restrictive than necessary. Again, the degree to which a measure contributes to the legitimate objective can be discerned from its design, structure, and operation, as well as from evidence relating to its application (the effects it has in practice).[1348] It was explained above that the it is difficult to prove that prohibiting market access to certain fish products contributes to the objective of protecting animal life or the (marine) environment. Markets risk simply being displaced, making effects difficult to quantify.[1349] However, unlike a country-wide import ban, a CDS *per se* is not very trade restrictive, and CDS benefit from widespread international support. I therefore conclude that a CDS in and of itself could likely be justified. However, if the EU CDS is considered holistically, including its country-level dimension (denial of all catch certificates from a particular flag state regardless of the legality of individual catch), it will be more difficult to justify under Art. 2.2 TBT for the same reasons as set above in the context of Art. XX GATT.

7.4.4. International standards

Art. 2.4 TBT obliges states to base technical regulations on international standards where these exist, except where these standards would be ineffective or inappropriate to fulfil the legitimate objective pursued. Art. 2.5 moreover creates the rebuttable presumption that a

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[1346] *US – Tuna II (Mexico)*, Appellate Body report (supra note 1167), para. 319.
[1347] Ibid. para. 315.
[1348] Ibid. para. 317.
[1349] Oceanic Développement, MegaPesca Lda (supra note 59), p. 115; U Rashid Sumaila (supra note 59), p. 1, 7.

technical regulation based on such an international standard is not an unnecessary obstacle to international trade.

The question of standards is particularly interesting for CDS, since it can provide a justification for CDS adopted pursuant to an RFMO decision. This raises the question whether RFMOs are standardising bodies. Similarly, when CDS are adopted they should be based on the FAO CDS Guidelines (chapter 3, section 3.11.1), provided that the FAO is a standardising body. I examine each in turn.

A "standard" is defined in Annex 1.2 to the TBT Agreement as a "document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory." What makes a standard depends, in practice, on whether the body adopting it is a recognised international standardising body.

A "body" for the purpose of Art. 2.4 is a "legal or administrative entity that has specific tasks and composition", including recognised activities of standardization – something which merely appears to require that WTO members had "reason to expect" that it engages in such activities.[1350] For it to be an *international* body, its membership must be "open" to the relevant bodies of all WTO members.[1351] This is a somewhat complex issue, and highly relevant for the question whether or not RFMOs can constitute international standardising bodies. Guidance can be – and has been – found in the TBT Committee Decision of November 2000, which sets out several principles that "should be observed" when international standards, guides, and recommendations are elaborated "to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries".[1352] The Decision stipulates *inter alia* that "Membership of an international standardising body should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members. This would include openness without discrimination with respect to the participation at the policy development level and at every stage of standards development" (para. 6). The Decision was adopted by consensus by all WTO members, and the Appellate Body in *US – Tuna II (Mexico)* considered that it plays the

[1350] *US – Tuna II (Mexico)*, Appellate Body report (supra note 1167), paras. 360-362.
[1351] Annex 1.4 TBT Agreement; Ibid. paras. 351, 359-374.
[1352] Committee on Technical Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/9, 13 November 2000.

role of a subsequent agreement for the purpose of treaty interpretation, as per the VCLT (see chapter 2, section 2.5.2.1).[1353]

The Appellate Body drew on the Guidelines to inform its interpretation and application of the term 'open' in relation to international standardising bodies. It argued the following. A body will be open if membership to the body is not restricted. It will not be open if membership is *a priori* limited to the relevant bodies of only *some* WTO members. It is not sufficient that a standardising body has been open "in a particular point in time"; rather it must be open "at every stage of standards development".[1354] Moreover, and most importantly for the status of RFMOs, a standardising body must be open "on a non-discriminatory basis". The Appellate Body held that provisions for accession that *de jure* or *de facto* disadvantage the relevant bodies of some members as compared to other members would tend to indicate that a body is not an *international* standardising body for the purposes of the TBT Agreement.[1355] Whilst it may not matter that, for instance, a member can only join upon invitation (which is common for RFMOs), this must merely be a formality and not hamper discrimination. In the case at hand, the AIDCP (the previously mentioned international Dolphin Agreement agreed upon under the auspices of IATTC, the RFMO in the area) required an invitation to join, which was more than just a formality. The decision to accept a new member was made by consensus. It was therefore deemed not sufficiently open so as to constitute a standardising body/organisation.[1356]

The FAO would likely fulfil the above requirements. This strengthens the point that CDS should be adopted based on the FAO CDS Guidelines. Whether the same can be said for RFMOs is questionable. Whilst the Fish Stocks Agreement clearly prohibits discrimination, only a state with a real interest has the right to join.[1357] As Erik Molenaar as recently shown, the rules contained in the constitutive documents of RFMOs and their practices concerning participation reveal significant differences on what this entails.[1358] Molenaar examines this relative openness in some detail, and highlights many interesting examples concerning RFMO eligibility criteria. Of particular interest here is that some RMFOs allow 'flag states engaged in fishing' to join; something which would automatically exclude non-coastal states

[1353] *US – Tuna II (Mexico)*, Appellate Body report (supra note 1167), para. 372.
[1354] Ibid. para. 374, referring to the text of the TBT Committee Decision.
[1355] Ibid. para. 375.
[1356] Ibid. para. 396.
[1357] Art. 8(3) Fish Stocks Agreement, discussed in chapter 3, section 3.4.2.
[1358] Erik J Molenaar (supra note 1030), p. 121-123.

since most RFMOs would dedicate fishing by outsiders as IUU fishing. Moreover, Molenaar takes note of the differences between accessiom procedures, whereby many RFMOs require approval before new members can join, either by qualified majority, consensus or unanimity, and some using the 'invitation by consensus/unanimity' approach. The practical difficulties of joining and cooperating in RFMO decision-making (standard setting) appear particularly difficult when the managed stocks are already fully exploited.[1359]

These criticisms of RFMOs are *in particular* relevant because the Appellate Body made a point of highlighting that the "obligations and privileges associated with international standards" pursuant to Arts. 2.4 and 2.5 TBT "further underscore the imperative that international standardising bodies ensure representative participation and transparency in the development of international standards".[1360] Many RFMOs should therefore not be considered as being international standardising bodies.[1361] This is not to say that RFMOs *could* not constitute such bodies upon improvement of the openness of their decision-making processes. Where a body follows the procedures and principles contained in the TBT Committee Decision, it could be presumed to be having recognised activities in standardisation.[1362] RFMOs that fulfil these procedures and principles could constitute such bodies for the purpose of Art. 2.4 TBT Agreement.

This means that when a CDS is adopted it *should* be based on the FAO CDS Guidelines, which creates a rebuttable presumption that such CDS may not be an obstacle to trade and fall foul of the TBT Agreement. The EU CDS was adopted before the FAO CDS Guidelines came into being, and as the next chapter shows it is questionable to what extent they comply with the Guidelines' requirements on clarity and transparency.

It should be emphasised that Art. 2.4 TBT qualifies the obligation to base technical regulations on international standards by allowing for an exception where these standards

[1359] See also Erik J Molenaar (supra note 18); Ted L McDorman (supra note 355); Andrew Serdy (supra note 353), and the discussion in chapter 8, section 8.3.2 on performance reviews of RFMOs.
[1360] *US – Tuna II (Mexico)*, Appellate Body report (supra note 1167), para. 379.
[1361] The analysis in this section can be contrasted with current negotiations at the WTO on harmful subsidies seem to suggest that RFMOs can play a standardising role – albeit in a different context. As previously mentioned, the negotiators are looking towards RFMOs (and potentially coastal states) for a determination of whether a vessel has engaged in IUU fishing, thereby triggering a prohibition to subsidise the vessel, or to determine when a stock is overfished. As discussed below, however, much of the current discussions turn around the dangers this poses in terms of due process (Margaret A Young (supra note 338); Carl-Christian Schmidt (supra note 37)).
[1362] *US – Tuna II (Mexico)*, Appellate Body report (supra note 1167), para. 376.

would be ineffective or inappropriate to fulfil the legitimate objective pursued (e.g. the protection of the marine environment). That the CDS Guidelines are ineffective or inappropriate to achieve this might be difficult to determine, give that they were adopted with the specific purpose in mind of assisting states when developing and implementing a CDS in order to help prevent, deter and eliminate IUU fishing (Art. 1.2, 1.3). It makes it explicitly clear that the principles it sets out are to be applied in line with the rules of the WTO and the provisions of the LOSC (and taking into account the Code of Conduct) (Art. 4.1). If these Guidelines were not to be followed when designing and implementing a CDS, a state would clearly have a higher burden at justifying compliance with the TBT Agreement.

Finally, CDS adopted pursuant to an RFMO decision do not in and of themselves benefit from a presumption that they are not an unnecessary obstacle to international trade – though of course for the same reasons they may still be compatible with the TBT Agreement.

7.5. Conclusion

This chapter has examined the substantive requirements that can be found in the GATT and the TBT Agreement, and which are applicable to market restrictions adopted as part of a state's mechanism to make market access conditional upon compliance with international fisheries norms and obligations. It has found that market restrictions in general, and restrictions pursuant to the IUU and Non-Sustainable Fishing Regulations in particular, likely breach Arts. I:1 and III:4 GATT. It has argued that measures that prescribe non-physical aspects of a product should not be excluded from the scope of Art. III:4 per se, but that this bears upon the question of likeness. Market restrictions will often negatively affect the transit of goods (Art. V GATT) and, if they are not examined under Art. III:4, lead to quantitative restrictions on trade and therefore breach Art. XI GATT.

Market restrictions may or may not be justified under one of the legitimate objectives set out in Art. XX. The Appellate Body has observed that an import prohibition is seen as the "heaviest weapon" in a country's armoury of trade measures, and such a weapon may only be deployed in narrowly described circumstances.[1363] Moreover, Peter van den Bossche and Werner Zdouc warn that a narrow interpretation of Art. XX is as inappropriate as a broad

[1363] *US – Shrimp*, AB report (supra note 123), para. 171.

one.[1364] It has been shown that the EU measures may be justified under Art. XX(a) and (b), though this requires an plausible moral concern to be identified, which is not straightforward (Art. XX(a)), and it will be difficult to establish that such measures are necessary – in particular to protect fish life (Art. XX(b)). It may be easier to show that they relate to the conservation of marine living resources (Art. XX(g)), though this requires a degree of even handedness that does not appear to be present in the EU at the moment. The chapeau of Art. XX GATT moreover provides a significant hurdle in so far that the measures appear to discriminate between countries where the same conditions prevail, and this discrimination appears arbitrary and unjustifiable. This is all the more so for the procedural requirements that the chapeau entails, to which I turn in the next chapter.

Finally, this chapter considered the relevance of the TBT Agreement. It concluded that a CDS such as that in place in the EU (which may have a country-level dimension to it) may constitute a technical regulation. A CDS would therefore likely have to be based on the FAO CDS Guidelines, in so far that these constitute international standards.

I observe that market conditionality in fisheries as a general tool has not been extensively discussed in the context of the WTO, but some references can be found. The Committee for Trade and Environment briefly concluded the following in relation to the various existing RFMO CDS and ICCAT's previously mentioned country-level import restrictions from the late 1990s:[1365]

> "Although ICCAT and CCAMLR, for example, contain trade-related provisions, these agreements (…) provide examples of appropriate and WTO-consistent (i.e. non-discriminatory) use of trade measures in multilateral environmental agreements. ICCAT has made several presentations in the MEA Information Sessions of the CTE that have highlighted the strict conservation measures imposed with respect to illegal fishing by non-contracting parties, entities and fishing entities, which are considered to be undermining the effectiveness of its stock management programme."[1366]

This suggests that measures that originate in multilateral environmental agreements (as opposed to unilateral measures such as that examines in this thesis) benefit from a presumption of WTO compliance. This is in line with the view that they are the "best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements are

[1364] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 548.
[1365] Supra note 45.
[1366] WTO Committee on Trade and Environment 'Environmental Benefits of Removing Trade Restrictions and Distortions: The Fisheries Sector' 16 October 2000, WT/CTE/W/167, p. 9.

representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them, due respect must be afforded to both."[1367] However, the analysis in this chapter has shown that though multilateral support may help support the argument that a measure that breaches the GATT can nevertheless be justified under Art. XX, this is not sufficient in and of itself to secure WTO compatibility. Similarly, if a CDS were to be examined under the TBT Agreement as a technical regulation, it is unconvincing that a measure based on an RFMO CDS should benefit from the presumption that it is TBT compatible, since RFMOs are insufficiently open to be considered international standardising bodies. Indeed, many countries do not share the feeling that such market measures, whether country-level or not, and whether multilateral or not, are necessarily WTO compliant. It has already been mentioned that the EU tried to empower CCAMLR to recommend market measures against countries whose vessels undermine CCAMLR conservation measures (both CCAMLR members and non-members). This received mixed reviews, with Argentina, South Africa, Brazil, Namibia, and Uruguay in particular opposed to it, variably referring to the ineffectiveness, inappropriateness, and unlawfulness of such measures.[1368] The draft CCAMLR CDS was similarly debated for its WTO compatibility, mostly because of the fear that it would impose a heavier regultory burden on non-members, and it can be observed that only few fully fledged RFMO CDS exist (CCAMLR scheme for *Dissostichus spp*; the ICCAT Bluefin tuna Catch Documentation Program; and the CCSBT CDS). It has similarly been mentioned that "trade-related measures have not been implemented by NAFO, for fear of contravening WTO regulations."[1369]

However, the WTO compatibility of market restrictions in fisheries is not excluded, and should not be used as an excuse for the market state not to act. As the next chapter will show, the rules of the WTO can in fact help ensure that it does so fairly, and stimulate meaningful interactions.

[1367] Committee on Trade and Environment, 12 November 1996, WT/CTE/l, para. 171, at section V11 of the Report of the General Council t o the 1996 Ministerial Conference, 26 November 1996, WT/MIN(96)/2.
[1368] CCAMLR-XXXI of 23 October-1 November 2012, Meeting Report, paras. 3.13-3.19; CCAMLR-XXXII of 23 October-1 November 2013, Meeting Report, paras. 141-143; CCAMLR-XXXIII of 20-31 October 2014, Meeting Report, paras. 3.72. 3.74, 3.75.
[1369] Péter D Szigeti and Gail L Lugten (supra note 44), p. 47.

8. The appropriateness of market conditionality: A fair and interactive process

8.1. Introduction

Chapter 5 concluded that market conditionality in fisheries can promote compliance with, and the further development of, international fisheries norms, under the following conditions. When making market access conditional upon compliance with international fisheries norms and obligations, the market state should take stock of these norms and build on them, and not stretch their interpretation too far beyond what is reasonable. The market state must practice congruence. The extent to which the EU practices congruence was already examined in chapter 4. The legal limits on the behaviour of market states in international relations should also be respected. This means that market states should themselves comply with international law. The extent to which the EU does so was therefore examined in chapters 6 and 7, in so far as substantive standards are concerned.

This chapter now turns to the requirement that market conditionality in fisheries should be interactional, and fair. This means that market conditionality mechanisms should trigger collective engagement with the underlying norms and obligations in question. Moreover, chapter 5 concluded that market states will likely be more effective at promoting compliance and norm development where their decisions are transparent, non-discriminatory, and implemented in a fair manner. Non-discrimination (which may also contribute to substantive fairness) was examined as an important legal principle of the law of the sea regime (chapter 6) and the WTO regime (chapter 7), and will not be considered further here. The reference to fairness is mostly understood in this thesis as a call for procedural fairness. Chapter 5 argued that market conditionality in fisheries can be described as a type of global administration, and that administrative law-type standards and mechanisms can be called on to help ensure procedural fairness. Such mechanisms principally centre around participation (*ex ante*) and accountability (*ex post*). So as to bring about procedural fairness, these mechanisms will generally demand a high degree of transparency, clear criteria on which decisions are based, timely notifications of decisions, providing reasons, review, and so on. These procedural standards not only promote fairness. They are also fundamental for allowing interaction to take place.

This chapter sets out the normative sources that support the application of such procedural standards to market conditionality in fisheries. As explained in chapter 2, it is informative not only to consider traditional sources of law in which these procedural standards can be found, but also to examine the practice of RFMOs, which like individual market states engage in the global administration of fisheries. RFMOs are increasingly being called upon, and respond to calls, to respect procedural standards of transparency, participation, and review, when engaging in the global administration of fisheries, including when adopting market measures.

Procedural standards can be derived from the rules and jurisprudence of the WTO (section 8.2). They are also reflected in various instances in the law of the sea, and RFMO practice (section 8.3). I give an overview of each area, in turn. Section 8.4 analyses in more detail what degree of transparency is required; who should participate in the decision-making process; how fair implementation and review can be ensured; and reflects on whether this is sufficient to trigger collective engagement with the underlying fisheries norms and obligations that market conditionality mechanisms try to promote compliance with. Whether EU market conditionality corresponds to these standards is examined throughout the analysis. Section 8.5 concludes.

8.2. Procedural standards under WTO law

8.2.1. Art. X GATT

As a rule-of-law-based system for promoting multilateral trade and commerce, the WTO imposes extensive administrative law-type requirements (transparency, participation, a duty to give reasons, and review) on decision making by administrative bodies of WTO member states. These requirements constitute “what is probably the most highly developed and profoundly transformative administrative law program of any global regime”.[1370] A full analysis of how the WTO transforms its members’ domestic administration is beyond the scope of this research, but I will highlight those requirements that are of direct relevance when a WTO member conditions market access on compliance fisheries norms and obligations.

[1370] Richard B Stewart and Michelle Ratton Sanchez Badin (supra note 884), p. 570.

Of primary importance is Art. X GATT, entitled the 'Publication and Administration of Trade Regulations'. Art. X has three paragraphs which together set minimum standards for both transparency and procedural fairness. Laws, regulations, judicial decisions, and administrative measures of general application must be promptly published and administered "uniformly, impartially and reasonably". Administrative measures of general application are a category of measures that has been interpreted liberally by the Appellate Body and Panels to include a wide range of measures that have the potential to affect trade and traders.[1371] For a measure to fall within the scope of Art. X:1 it must possess a "degree of authoritativeness", and be "issued by certain legislative, administrative or judicial bodies", though this does not mean that they have to be "binding under domestic law".[1372] This is important for market measures in fisheries in so far that some of the guidance material or the general law (e.g. the EU IUU Regulation) *would* be measures of general application, though an individual decision (e.g. to blacklist a country) would likely not be so. Though the fact that a measure is country-specific also does not *preclude* the possibility that it may be an administrative ruling of general application.[1373]

Since the creation of the WTO in 1994, Art. X GATT has emerged to become a prominent regulatory norm.[1374] In *US – Underwear*, the Appellate Body observed that Art. X:2 embodies a principle of "fundamental importance".[1375] Art. X:2 prohibits the enforcement of a measure of general application that imposes new or more burdensome requirement (e.g. import restrictions) before it has been officially published. It promotes full disclosure of governmental acts affecting members and private persons and enterprises, whether of domestic or foreign nationality, so that they have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.[1376] Violations of Art. X have

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[1371] Padideh Ala'I 'From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance' in Debra P Steger (ed) *Redesigning the World Trade Organization for the Twenty-first Century* (CIGI and Wilfrid Laurier University Press, 2009), p. 174; *EC – IT Products*, 16 August 2010, Panel report (WT/DS375/R, WT/DS376/R, WT/DS377/R), para. 7.1026.
[1372] *EC – IT Products*, Panel report (supra note 1371), p. 7.1027.
[1373] *US – Underwear*, 10 February 1997, Appellate Body report (WT/DS24/Appellate Body/R), p. 29.
[1374] Padideh Ala'I (supra note 1371), p. 165; Richard B Stewart and Michelle Ratton Sanchez Badin (supra note 884), p. 570.
[1375] *US – Underwear*, Appellate Body report (supra note 1373), p. 21; confirmed recently in *US — Countervailing and Anti-Dumping Measures (China)*, 7 July 2014, Appellate Body report (WT/DS449/Appellate Body/R), para. 465-466.
[1376] Ibid.

been claimed in many disputes, and its due process requirements are regularly enforced by dispute settlement panels and the Appellate Body.[1377]

The need for transparency plays a dual role. First, Art. X:1 GATT states clearly that measures must be published *so as to* enable governments and traders to become acquainted with them. It allows trade partners to make the necessary changes to adapt. This was confirmed in *US – Underwear*, which highlighted that the prior publication of measures allows affected parties to seek a modification of these measures. Publication will mean more than, for example, merely posting a measure on a website.[1378] Measures must be published promptly; for instance, the publication of measures in the Official Journal of the EU eight months after they are made effective was considered to be too late.[1379] Second, transparency helps evaluate whether a WTO member's measures comply with the regime's substantive requirements. I recall that transparency is primarily an 'enabling principle'. The EU illustrated this in its communication on reviewing and improving Art. X GATT following the Doha Declaration:

> "Transparency is a cornerstone of the multilateral system. Without transparency of trade rules and trade policy, other fundamental principles of non-discrimination, proportionality, and special and differential treatment are of less practical use, the value of members' liberalisation commitments may remain theoretical, and members' rights and obligations cannot be properly exercised (…) At a very practical level, traders need full knowledge of other members' trade rules and practices (…) Transparency also renders governments more accountable (…)"[1380]

As well as requiring the publication of measures of general application, Art X:3 provides *inter alia* for the uniform, impartial, and reasonable administration of national trade measures. In *Argentina – Hides and Leathers* the Panel noted, regarding the proper scope of Art X:3, that the relevant question is "whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994".[1381] This was reiterated in *US – COOL*.[1382] The provision thereby clearly regulates the '*administration* of measures rather than the substantive content of a measure itself, which if discriminatory would likely fall foul of Arts.

[1377] A list of disputes is given in Richard B Stewart and Michelle Ratton Sanchez Badin (supra note 884), p. 571.
[1378] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 500, referring to the Panel report in *EC – IT Products*.
[1379] Ibid.
[1380] Available at: http://trade.ec.europa.eu/doclib/docs/2003/june/tradoc_113131.pdf.
[1381] *Argentina – Hides and Leather*, Panel report (supra note 1427), para. 11.70.
[1382] *US – COOL*, Panel report (supra note 839), 7.821.

I:1 and III:4 GATT, discussed in the previous chapter.[1383] "To administer" in this context means "putting into practical effect or applying a legal instrument", and providing guidance on the meaning of specific requirements of a measure.[1384] Examples of measures that fall within the scope of Art. X:3 include the process used to assure the proper classification of products;[1385] and the system for the allocation of export quotas.[1386] The substantive content of a legal instrument regulating the application or implementation of that measure may also be examined under Art. X:3.[1387]

The transparency required under Art. X:3 is with respect to individual traders. The question is *not* whether there has been discriminatory treatment in favour of exports to one member relative to another, which falls within the scope of Art. I:1 GATT.[1388] For a measure to be challenged under Art. X:3, it must have "a significant impact on the overall administrative of the law, and not simply on the outcome in the single case in question."[1389] In the example of country blacklisting pursuant to the EU IUU or Non-Sustainable Fishing Regulations, the Regulations themselves would first of all be a law that must be duly published under Art. X:1. Though the Regulations' substance may be justified under Art. XX GATT, their application and implementation in individual cases may be challenged under Art. X:3. The substance of the EU IUU Implementing Regulation,[1390] which lays down detailed rules for the implementation of the IUU Regulation, could also be challenged under X:3.

Moreover, a justification under Art. XX would examine in detail the application of measures that have been found to breach any of the other provisions of the GATT. Art. XX also projects important procedural requirements that help ensure fair process, to which I turn next.

[1383] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 505.
[1384] Ibid. p. 507, by reference to *US – COOL*, Panel report (supra note 839), paras. 7.821-7.823.
[1385] *Argentina – Hides and Leather*, Panel report (supra note 1427), para. 11.94.
[1386] *China – Raw Materials*, Panel report (supra note 1244), para. 7.752.
[1387] *EC – Selected Customs Matters*, 13 November 2006, Appellate Body report (WT/DS315/Appellate Body/R), para. 200.
[1388] Ibid.; *Argentina – Hides and Leather*, Panel report (supra note 1427), para. 11.76.
[1389] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 508, by reference to *US – Hot Rolled Steel*.
[1390] Regulation No. 1010/2009 (supra note 588).

8.2.2. The chapeau of Art. XX GATT

The Appellate Body developed due process dimensions further in the previously mentioned *US – Shrimp* dispute, which has become almost canonical on this point.[1391] After having found that the US measures could *prima facie* be justified on the basis of one of the exceptions in Art. XX GATT, the Appellate Body then had to evaluate the US measures' compliance with the provision's chapeau. I recall that the chapeau requires that the application of a measure may not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. Not only must the operating provisions of a measure not prescribe arbitrary or unjustifiably activity, but the application of a measure may not be arbitrary or unjustifiable either.[1392] The previous chapter already looked at these substantive requirements. They demand an investigation of the effects of the measure and the rationale for the discrimination in the application of the measure, as well as a rational connection between the reasons for the discrimination and the ground on which it is being justified (one of the paragraphs of Art. XX). I now turn to the important due process requirements that are inherent to the chapeau.

Two procedural dimensions can be identified. One, the need to involve affected parties *during the planning stage of a proposed measure* (requirements of consultation and negotiation). Two, the need for due process *in its administration*. I discuss each in turn. It should be noted that these dimensions are independent from the need for due process as part of the settlement of a dispute itself, which is regulated by the DSU. States must use the WTO dispute settlement proceedings in good faith, and are entitled to due process before the Panels and Appellate Body.[1393] Art. 3.7 DSU moreover favours disputes to be settled by amicable means, and proceedings therefore always begin with consultations and the search for a mutually agreeable solution.[1394]

First, I consider the need for due process in the planning stage. In *US – Shrimp*, the Appellate Body had to establish *inter alia* whether the US requirements on catching shrimp amounted to unjustifiable discrimination. In so doing, the Appellate Body showed great

[1391] *US – Shrimp*, Appellate Body report (supra note 123).
[1392] Ibid. para. 160.
[1393] Art. 3.10 DSU; Peter van den Bossche and Werner Zdouc (supra note 1117), p. 264-265.
[1394] Peter van den Bossche and Werner Zdouc (Ibid.), p. 266-267.

concern for the US' lack of engagement with shrimp-exporting countries and its failure to conduct "serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members".[1395] The Appellate Body made three observations in this respect. First, that the US Congress had expressly recognised the importance of securing international agreements for the protection and conservation of the sea turtle species.[1396] Second, that the protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the US measure on harvesting shrimp, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations.[1397] The Appellate Body based this conclusion on a variety of international instruments and declarations which have been referred to by the WTO on a number of occasions, including the Rio Declaration and the CBD. And third, that the US had previously negotiated a Convention for the Protection and Conservation of Sea Turtles with five other countries, which contained more flexible wording on the type of gear to be used to prevent turtle bycatch and which emphasised the need for consensual and multilateral procedures to turtle conservation.[1398] The latter proved to the Appellate Body that such alternative, consensual procedures had been reasonably available and feasible, and the US did not have to have recourse to a unilateral, non-consensual import prohibition. It had not made similar efforts to engage in a multilateral solution with other shrimp-exporting countries, nor did it attempt to have recourse to existing international mechanisms to achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban. In a footnote, the Appellate Body explained that international mechanisms could include the CITES Standing Committee, in which the US could have brought up the issue of sea turtle mortality due to shrimp trawling.[1399] The Appellate Body also took note in this context of the fact that the US has not signed the Convention on the Conservation of Migratory Species of Wild Animals or the LOSC, and has not ratified the CBD. These effects were cumulative, and together led to a finding that the US had engaged in unjustifiable discrimination.

[1395] *US – Shrimp*, Appellate Body report (supra note 123), para. 166.
[1396] Ibid. para. 167.
[1397] Ibid. para. 168.
[1398] Ibid. paras. 169-171.
[1399] Ibid. para. 171, footnote 174.

The Appellate Body moreover reemphasised that US policies on the harvesting of shrimp and their operating details were all shaped *unilaterally*, by the Department of State, *without the participation of the exporting countries*.[1400] Similarly, it noted that the system and processes of certification were established and administered by the US agencies alone. The unilateral character of the decision-making involved in the grant, denial or withdrawal of certification to exporting countries was deemed to "further heighten the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability."[1401]

Finally, different countries had been given significantly different phase-in periods for the use of turtle excluder devices, and far greater efforts had been made to transfer the necessary technology to certain exporting countries than to others. This lack of even handedness was also found to amount to unjustifiable discrimination.

The second dimension involved the lack of due process in the administration of the measure. Looking at whether the measures in *US – Shrimp* constituted a form of arbitrary discrimination, the Appellate Body made note of the lack of transparency and predictability in the certification process.[1402] It ascertained with disapproval that there was no formal opportunity for a country applying for a certificate to export to be heard, or to respond to any arguments that may be made against it, in the course of the certification process, before a decision to grant or to deny certification was made. Moreover, no formal written, reasoned decision whether of acceptance or rejection, was given. Countries which were granted certification were included in a list of approved applications published in the Federal Register; however, they were not notified individually. Countries whose applications were denied also did not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial. No procedure for review of, or appeal from, a denial of an application was provided. This led the Appellate Body to conclude that the certification processes were "singularly informal and casual", and that there was no way one could be certain whether they were being applied in a fair and just manner by the appropriate governmental agencies.[1403] Exporting countries applying for certification whose

[1400] Ibid. para. 172 (emphasis added).
[1401] Ibid.
[1402] Ibid. para. 180.
[1403] Ibid. para. 181.

applications are rejected were thus being “denied basic fairness and due process, and [were] discriminated against.”[1404]

The Appellate Body took a creative turn in *US – Shrimp*. The procedural standards it elaborated do not always appear to be predicated upon an assessment of any *discriminatory* behaviour, but rather a general assessment of the US' behaviour, mostly independent of any discrimination threshold. This is explained by Grainne de Búrca and Joanne Scott, who also point to various inconsistencies in the Appellate Body's reasoning.[1405] They observe that, “[h]ad the US treated all Members with the same high-handed disrespect, negotiating with none rather than some” or “had the US denied basic due process to *all* applicants (...) thus pursuing an entirely consistent, though fundamentally procedurally flawed, approach, few would argue that this ought to attenuate as opposed to exacerbate the legal position of the US”.[1406] In other words, in order to fulfil the chapeau's requirements, there appeared to be a need for procedural fairness independently from the substantive requirement that there must not be unjustifiable or arbitrary discrimination, or a disguised restriction on trade. This affects both the planning phase and the administration of a measure. The next sections investigate in some more detail why such independent procedural standards might arise, drawing a parallel with the doctrine of due regard and the law of the sea regime.

8.2.3. A parallel with the doctrine of abuse of right, good faith, and due regard

I begin by explaining the role that the chapeau plays. The chapeau's purpose is essentially to ensure that a measure is not applied in a way that would constitute a misuse or an abuse of one of the grounds for exception listed in the provision.[1407] It embodies the recognition of the need to maintain a balance of rights and obligations between the right of the WTO member which invokes Art. XX, on the one hand, and the substantive rights of the other members under the GATT, on the other hand.[1408] In *US – Shrimp*, the Appellate Body therefore concluded as follows:

[1404] Ibid.
[1405] Grainne De Búrca and Joanne Scott (supra note 1296), p. 16.
[1406] Ibid. p. 18 (emphasis added).
[1407] *US – Gasoline*, Appellate Body report (supra note 1215), p. 22; *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.287; Peter van den Bossche and Werner Zdouc (supra note 1117), p. 593-594.
[1408] *US – Shrimp*, Appellate Body report (supra note 123), para. 156.

> "The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."[1409]

I recall that the doctrine of abuse of right has no "independent normative charge of its own" but directs "the manner in which competing or conflicting norms that do have their own normativity should interact in practice", thus setting the threshold for the interaction between rights where this interaction is undefined.[1410] For instance, Art. 300 LOSC, which calls for no abuse of right, is said to balance the interests of parties where the usage of a right (e.g. freedom to fish) hinders another state's legitimate usage of that right, causing it injury.[1411] It may also extend to a situation where this injures another state, but without necessarily violating its rights.[1412] Furthermore, a right which is used for a purpose other than for which it was created constitutes an abuse of right.[1413] Art. 300 LOSC cannot be invoked on its own, but comes into play when exercising the rights and fulfilling the obligations set out in the LOSC.[1414] This is similar to the chapeau of Art. XX, which comes into play when relying on a legitimate objective to justify a breach of the provisions of the GATT.

The Appellate Body similarly understood the meaning of the chapeau as being one of balancing rights. It explained that the task of interpreting and applying the chapeau is "essentially the delicate one of locating and marking out a line of equilibrium" between member states' rights, so as not the "distort and nullify or impair the balance of rights and obligations" under the GATT.[1415] The Appellate Body moreover found that the "location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up

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[1409] Ibid. para. 158.
[1410] Michael Byers (supra note 1036), p. 421-422. For a discussion of this interpretation of the doctrine of abuse of right and its (lack of) relevance for the purpose of delimiting the chapeau of Art. XX GATT see Lorand Bartels 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 American Journal of International Law 95, p. 104.
[1411] Killian O'Brien 'Art. 300', in Alexander Proelss (supra note 416), nm. 13, p. 1932.
[1412] Ibid.
[1413] Ibid.
[1414] *M/V "Louisa"* (supra note 982), p. 137.
[1415] *US – Shrimp*, Appellate Body report (supra note 123), para. 159.

specific cases differ".[1416] The view that the chapeau requires finding equilibrium between competing rights has been confirmed in *Brazil – Tyres* and *EC – Seal Products*.[1417]

The call for a line of equilibrium and balancing rights is reflective of the discussion in chapter 3, section 3.10.4 and chapter 6, section 6.5.2 on the duty to act in good faith, and to have due regard/not unjustifiably interfere with the rights of other states, or with activities in the exercise of the rights and obligations of the LOSC.[1418] Good faith and due regard/no unjustifiable interference were held to be functionally equivalent. But what does this mean for the chapeau of Art. XX GATT? The chapeau is concerned with the doctrine of abuse of right rather than that of due regard/good faith. It was explained that the doctrine of abuse of right is only one of the ways in which good faith may be expressed. Therefore, having due regard to the rights and activities of other states when exercising one's rights under the LOSC may mean more than not abusing these rights. On the other hand, it appears from *US – Gasoline* that the call for no abuse of right is equivalent to a need for good faith/due regard. The reference to abuse of right in *US – Shrimp* built on *US – Gasoline*. There, the Appellate Body established that the exceptions in Art. XX "are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, *with due regard* both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned."[1419]

I posit that the chapeau pursues the same general objective as the duty to act in good faith/have due regard/no unjustifiable interference that permeates the LOSC: namely, the reconciliation of diverging rights and interests that are protected by law. This shared objective may give reason to believe that the legal regimes of the WTO and of the LOSC also follow the same general orientation on this point,[1420] and that a parallel can be drawn with the jurisprudence on due regard. Doing so provides clarifications on *how* balancing competing rights may be achieved, and helps to understand why the Appellate Body put such emphasis on involving affected states prior to adopting an import ban. It also further blurs the

[1416] Ibid.
[1417] *Brazil – Tyres*, Appellate Body report (supra note 1306), para. 224; *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.297.
[1418] The wording varies between the provisions on due regard and on unjustifiable interference, as explained in chapter 3, section 3.10.4, and chapter 6, section 6.5.2.
[1419] *US – Gasoline*, Appellate Body report (supra note 1215), p. 22.
[1420] Matthuas Forteau argues this when comparing different expressions of due regard and reasonable regard across jurisprudence, though he makes no mention of WTO case-law. Mathias Forteau (supra note 546), p. 31-32.

conceptual distinction between abuse of right, good faith, and due regard, if ever there was one.

In a manner very similar to the Appellate Body in *US – Shrimp*, the Arbitral Tribunal in *Chagos* found that the duty to have due regard did not give rise to a universal rule of conduct, but will depend on the rights at stake and the circumstances of the case. However, in the majority of cases, it was held that it will necessarily involve at least some consultation with the rights-holding state (affected party).[1421] The Arbitral Tribunal in *South China Sea* furthermore determined that, in the context of having due regard to the rights of the coastal state under Art. 58(3) LOSC, "anything less than due diligence (...) would fall short of the regard due".[1422] In so doing, the Tribunal equated the duty of due regard with "at least one of due diligence", which means a state to make the best possible efforts (see chapter 3, section 3.10.4). In *Chagos*, the Tribunal did not shy away from imposing important procedural requirements on the acting party (UK). Where a planned activity risks interfering with a significant right, such as fishing rights, this will affect the level of regard that is due, and therefore influence what is required in terms of consultations and so on. In the case at hand, the Tribunal found that the UK had not "fulfilled the basic purpose of consulting, given the lack of information actually provided to Mauritius and the absence of a reasoned exchange between the Parties."[1423] Furthermore, the UK's statements and conduct had created reasonable expectations on the part of Mauritius that there would be further opportunities to respond and exchange views, which were frustrated when the UK just carried out its planned activities (declared a marine protected area).[1424]

The purpose of consultations in this context is to allow the state which is planning the interference to "internally balance" the rights and interests at stake.[1425] Consultations would therefore have to be conducted in a timely manner, and information must be provided to the potentially affected party.[1426] It is difficult to see how anything less than meaningful consultations could suffice. The same can be said about the chapeau of Art. XX GATT. Without meaningful consultations with the affected state in the planning stage of a measure, it would be virtually impossible to find an informed line of equilibrium. They are necessary

[1421] *Chagos* (supra note 238), para. 519.
[1422] *South China Sea* (supra note 226), paras. 743-744.
[1423] *Chagos* (supra note 238), para. 534.
[1424] Ibid.
[1425] Ibid.
[1426] Ibid. para. 528.

to ensure that any proposed measure walks the fine line between restricting trade and protecting a legitimate objective, and find the right equilibrium.

The *outcome* (the actual line of equilibrium) must be guided by the substantive requirements set out in the chapeau.[1427] Whilst the line of equilibrium can only be drawn in an informed fashion after have consulted states that may be affected, the outcome (the line) should therefore take into account that no deliberate and foreseeable discrimination occurs,[1428] and that there is a rational connection between the reasons for the discrimination in the application of the measure, and its legitimate objective (one of the grounds listed in Art. XX).[1429] Where alternative solutions are available and the discrimination is avoidable, the line of equilibrium will be deemed to have been drawn too much in favour of the state adopting the measure.

It should be kept in mind, however, that the Appellate Body's focus on across-the-board negotiations in *US – Shrimp* may have been circumstantial, rather than the result of a due regard-inspired reading of the chapeau. I recall that the issue at stake was the protection of a common resource (turtles). The US had previously entered into a multilateral agreement (the Inter-American Convention) for the purpose of turtle conservation, with various countries. The Appellate Body considered the following:

> "The Inter-American Convention demonstrates the conviction of its a conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles. Moreover, the Inter-American Convention emphasises the continuing validity and significance of Article XI of the GATT 1994, and of the obligations of the WTO Agreement generally, in maintaining the balance of rights and obligations under the WTO Agreement among the signatories of that Convention."[1430]

Therefore, consensual and multilateral procedures instead of a unilateral imposition of an import ban constituted the line of equilibrium.[1431] The obligation to carry out across-the-board negotiations with the objective of entering into a bilateral or multilateral agreement

[1427] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 594.
[1428] *US – Gasoline*, Appellate Body report (supra note 1215), p. 28-29; *Argentina – Hides and Leather*, 19 December 2000, Panel report (WT/DS155/R), para. 11.324.
[1429] Peter van den Bossche and Werner Zdouc (supra note 1117), p. 601; *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.306.
[1430] *US – Shrimp*, Appellate Body report (supra note 123), para. 170.
[1431] However, the US had not engaged in across the board negotiations with other shrimp exporting countries to establish such consensual and multilateral procedures. Despite this option having been available, it adopted a unilateral import ban. The resulting discrimination could therefore have been avoidable, and the chapeau was not complied with.

was therefore a consequence of the line of equilibrium *in that particular case*. It is thereby different from the need to enter into prior consultations with affected states, which derives from the need to balance rights and interests and informs the decision of where to draw the line. The Appellate Body confirms this understanding of the situation in *Brazil – Tyres*, where it explains its reasoning in *US – Shrimp.* It held that its assessment of the factors that had led it to pronounce on the unjustifiable and arbitrary nature of the discrimination in *US – Shrimp*, namely the rigidity of the measure and the fact that the US had not engaged in across-the-board negotiations, was in fact part of an analysis directed at the rationale behind the discrimination (the substantive test).[1432]

To summarise, when exercising the rights and obligations of the GATT, including when relying on one of the exceptions in Art. XX, states must not abuse these rights. The role of the chapeau of Art. XX is a particular expression of this duty. States must not abuse the right to justify a breach of the GATT pursuant to one of the legitimate objectives of Art. XX. When relying on one of these objectives, states must have due regard to the rights of other states under the GATT. The exercise of one of the exceptions in Art. XX will necessarily impinge on another state's rights to free trade, and these rights must therefore be balanced so as to find a line of equilibrium. Drawing a parallel to the good faith/due regard discussions in the context of the law of the sea supports the Appellate Body's finding that a requirement to balance rights entails both substantive and procedural aspects. The substantive aspects of the chapeau relate to the *content* of the conflicting rights and the result of the balance between them. Namely, to not cause discrimination that could have been avoided, and for there to be a rational connection between the discriminatory measure and the legitimate objective for which it was adopted, as discussed earlier in this chapter. The procedural aspects are to engage in meaningful consultations with those affected (including actually giving information, in a timely manner, carrying out a reasoned exchange, internally "weighing and balancing" the rights at stake, and considering alternative measures).

The obligation to enter into prior negotiations, taking into account the position of other states involved, is typical of the international fisheries regime.[1433] This would support a conclusion that the line of equilibrium between a market state relying on an exception of Art. XX and another state's right to free trade under the GATT always demands prior across-the-

[1432] *Brazil – Tyres*, Appellate Body report (supra note 1306), para. 225.
[1433] Tullio Scovazzi (supra note 544), p. 65, and as reflected in the *Chagos* jurisprudence.

board negotiations to achieve a multilateral solution, *as well as* meaningful consultations with those affected prior to adopting a measure. Meaningful consultations with affected states and *in particular* a quest for a consensual multilateral alternative (if appropriate) would moreover promote deliberation and discussion (two-way interactions). Whilst the extent to which the rules of the WTO prescribe a truly interactive approach remains a matter of debate, this is a step towards it.

8.2.4. Due process in the administration of a measure

There is also a need to observe due process requirements in the administration of a measure that is provisionally justified under Art. XX. Evidence that procedural requirements to this effect exist independently of the non-discrimination requirement can be found in the Appellate Body's reference to Art. X GATT in *US – Shrimp*. The Appellate Body highlighted that the US measure falls within the scope of a measure of general application, described in Art X:1. Therefore, it concluded the following:

> "Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members."[1434]

The non-transparent nature and *ex parte* nature of the internal procedures applied by the US throughout the certification process; the lack of a formal notice for the denial of certification, the absence of reasons for such a denial; and the lack of a formal legal procedure for review of, or appeal from, a denial of an application, were all deemed "contrary to the spirit, if not the letter, of Article X:3."[1435] The certification process had generally not been sufficiently "predictable".[1436] The Appellate Body thus identified the general existence of norms of regulatory due process as part of the chapeau of Art. XX GATT. I recall the discussion in chapter 5 over the emergence of a body of administrative-law type norms across international law and practice. Richard Stewart and Michelle Badin call the Appellate Body's approach in

[1434] *US – Shrimp*, Appellate Body report (supra note 123), para. 182.
[1435] *US – Shrimp*, Appellate Body report (supra note 123), para. 183.
[1436] Ibid. para. 180.

US – Shrimp a "vivid illustration of the potentially expansive juris-generative role of the DSB in the continuing emergence of global administrative law".[1437]

The need for due process in the administration of a measure arose again recently in *EC – Seal Products*. This time not because fair procedure had not been followed, but because the measure in question (the EC Seal Regime) was designed in such a way that due process could not be ensured when applying the measure. The Appellate Body found that bodies tasked with evaluating whether seal products could or could not be imported into the EU lacked sufficiently precise criteria to make their determination.[1438] The Appellate Body found there to be considerable ambiguity in the administration of the exception to the seal product import ban.[1439] Although the bodies determining whether the criteria for the exceptions were fulfilled were subject to a third party audit, the Appellate Body was unconvinced that the auditor would be able to reliably assess whether the recognised body has diligently applied the criteria of the exception.[1440] The EU Seal Regime was therefore found to be designed in such a way that it *could* be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination.[1441] In other words, the lack of clear criteria on which to base an import prohibition and the lack of transparency of the decision-making process gives rise to a presumption that a measure will be applied in a manner that amounts to unjustifiable and arbitrary discrimination. For a measure not to amount to arbitrary discrimination, it must be administered fairly. Evidently, it follows from *EC – Seal Products* that this requires there to be in place a framework to ensure that it *will* be administered fairly (through clarity and transparency).

US – Shrimp and *EC – Seal Products* both call for a transparent and procedurally fair implementation of market measures. Moreover, *EC – Seal Products* supports a finding that market conditionality mechanisms should not be open to broad discretion, but rather be based on clear criteria concerning the conditions in which certain products will be subject to market restrictions. Recalling chapter 5, transparency and clarity concerning the criteria on which decisions are based are prerequisites for accountability, and for actors to be able to engage with the underlying norms on which decisions are based. They are necessary both for

[1437] Richard B Stewart and Michelle Ratton Sanchez Badin (supra note 884), p. 571.
[1438] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.327.
[1439] The seal ban and its exceptions were explained in the text at supra note 1180.
[1440] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.327.
[1441] Ibid, para. 5.328.

ensuring procedural fairness, and for allowing interaction to take place. The extent to which EU market conditionality corresponds to this is concluded on below. First, I show that the law of the sea also provides a normative grounding for these requirements.

8.3. Procedural standards in the law of the sea

8.3.1. Calls for broad transparency and participation

The LOSC, Fish Stocks Agreement, and related jurisprudence contain procedural requirements of relevance to market conditionality in fisheries. This has been discussed in chapter 6, section 6.5, as well in the previous section, since these requirements flow from the duty to act in good faith, not constitute an abuse of right, and to refrain from unjustifiable interference. This section turns to specific calls for procedural fairness in relation to market measures. These can predominantly be found in soft law and the Port State Measures Agreement, since as explained port restrictions will constitute market measures where they affect trade in fish (transit, imports, exports). The need for procedural fairness when adopting market measures has also arisen in the context of RFMOs, to which I turn below.

Specific calls for the transparency of market measures in fisheries can be found in the Port State Measures Agreement, though the instrument does not extend to country-level measures, and the wording is explicitly framed around port (rather than market/trade) measures. It stipulates that the implementation of the Agreement, inspections of vessels in port, the identification of non-compliant states (so as to avoid using their ports), and measures vis-à-vis states that undermine the Agreement, must be made and carried out in a "fair, transparent and non-discriminatory manner".[1442]

Furthermore, the Code of Conduct provides that changes to legal requirements affecting trade in fish should be notified so as "to allow the states and producers affected to introduce, as appropriate, the changes needed in their processes and procedures" (para. 11.3.4). The Code of Conduct and IPOA-IUU clearly embrace the need for more inclusive decision-making, and therefore broad transparency. Para. 6.13 of the Code of Conduct sets out the following:

> "States should, to the extent permitted by national laws and regulations, ensure that decision making processes are transparent and achieve timely solutions to urgent

[1442] Arts. 3(4), 13(2)(h), 20(3) and 23(2) Port State Measures Agreement.

> matters. States, in accordance with appropriate procedures, should facilitate consultation and the effective participation of industry, fish workers, environmental and other interested organisations in decision–making with respect to the development of laws and policies related to fisheries management, development, international lending and aid."

In subsequent provisions, the Code specifies that both states and RFMOs should ensure transparency in the mechanisms for fisheries management and in the related decision-making processes (para. 7.1.9). The Code also provides that states should generally ensure that measures affecting international trade in fish and fishery products are transparent (para. 11.2.3). More specifically, the Code specifies that laws, regulations and administrative procedures applicable to international fish trade must be transparent and as simple as possible (para. 11.3.1); that states should facilitate consultation and participation both in the development and implementation of laws related to fish trade (para. 11.3.2); that states should collect, disseminate and exchange statistical information on fish trade (para. 11.3.7); and that changes in administrative procedures and rules regarding fish trade must be notified to interested parties (para. 11.3.8).

The IPOA-IUU puts an emphasis on transparency and participatory rights in general by stating, in para. 9.5 of its section headed "Objectives and Principles", that the IPOA should be implemented in a transparent manner in accordance with the abovementioned para. 6.13 of the Code of Conduct. This need for transparency is moreover reiterated at various points throughout the text, such as in relation to port state control of fishing vessels to combat IUU fishing (which, as mentioned earlier, may include market measures such as prohibiting the landing or transshipment of catch) (para. 52); all internationally market measures to combat IUU fishing in general (para. 65); the identification by RFMOs or coastal states of IUU vessels (blacklisting) and the adoption of trade-related measures by states vis-à-vis such vessels (paras. 66, 73, 74); measures on international trade in fish and fishery products (para. 67); the implementation of multilateral catch documentation schemes and import and export controls and prohibitions (para. 69); and finally in relation to markets themselves, so as to allow for the traceability of products (para. 71).

The recently adopted FAO CDS Guidelines also put much emphasis on the need for transparency, listing it as one of the Guidelines basic principles. The Guidelines furthermore underscore the importance of participatory rights by stating that any proposed measure "should be publicised and a reasonable time for comments should be given before the

measure is adopted. Adopted measures should be made available on relevant websites. Such notice should include an explanation of how domestic and imported products are treated to ensure even handedness" (para. 4.5). This mirrors the due process requirements of the WTO regime discussed above.

8.3.2. Procedural standards applicable to, and generated by, RFMOs

Procedural principles of transparency, participation, and review have also emerged as a tool to reduce arbitrariness in RFMO decision-making, including when adopting market measures. These principles have grown out of a mixture of treaty, soft law, and RFMO practice, and are being applied by and to RFMOs. In keeping with GAL, I recall that RFMOs can be described as engaging in the global administration of fisheries. Though not directly applicable to market state action as a matter of law, I have suggested that these procedural standards may usefully be explained as embodying (growing) shared understandings that adherence to procedural standards is important in the administration of fisheries, including when adopting market measures.

Many of the standards against which RFMOs are evaluated are procedural in nature, and have a strong administrative law-type character. The main source of these standards is first and foremost the Fish Stocks Agreement, which defines the desirable institutional characteristics of an effective RFMO by obliging state parties to agree on various issues in the implementation of their duty to cooperation through RFMOs (Art. 10). These include the obligation to agree on the following: decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner; promote the peaceful settlement of disputes; ensure the full cooperation of their relevant national agencies and industries in implementing the recommendations and decisions of the organisation or arrangement; and give due publicity to the conservation and management measures established by the RFMO. The Fish Stocks Agreement moreover demands transparency in the decision-making processes and other activities of RFMOs (Art. 12). Art. 12(2) bestows a right upon representatives from international organisations and NGOs to take part in meetings of RFMOs as observers or otherwise, as appropriate, in accordance with the procedures of the RFMO concerned. The provision explicitly stipulates that such procedures shall not be unduly restrictive in this respect, and that "timely access" must be given to the

records and reports of an RFMO – though this is subject to the procedural rules on access to documents of that organization.

The need to improve the transparency of RFMO decision-making has continuously been highlighted. RFMOs are being criticised for failing to achieve their increasingly broad objectives. The failure of RFMOs worldwide to achieve the long-term conservation and management of fish stocks is an issue of concern, and RFMO performance has been recognised as a "major challenge facing international fisheries governance".[1443] Therefore, the international community is now calling for RFMO performance reviews and subsequent revisions of RFMOs' mandates through amendments to their constitutive instruments, as evident from discussion in the UNGA,[1444] the FAO,[1445] and Fish Stocks Review Conference.[1446] Performance reviews thereby help evaluate RFMO decision-making from the outside, but are also a means of promoting the transparency and legitimacy of RFMO decision-making.[1447]

Whilst there has been limited progress in the elaboration of best practice guidelines for performance assessment of RFMOs, practice shows convergence over some common themes. These common themes are heavily influenced by what are called the Kobe criteria. In 2006, Japan (with the support of FAO COFI) hosted a joint meeting of tuna RFMOs, which discussed the review of the current situation of RFMOs and markets, and proposed an action plan and Recommendations to further harmonise tuna conservation and management measures among RFMOs.[1448] This gave rise to a series of joint meetings of tuna RFMOs in Kobe (2007) (Kobe I), San Sebastian (2009) (Kobe II), and La Jolla (2011) (Kobe III), all intended to further coordinate the activities of the five tuna RFMOs.[1449] One of the things that came out of this interactive process is a recommended common set of criteria and a

[1443] FAO 'Strengthening Regional Fisheries Management Organizations and Their. Performances Including the Outcome of the 2007 Tuna RFMOs Meeting' [2007] COFI/2007/9 Rev. 1 1, para. 8.
[1444] E.g. the 2005 UNGA Resolution on Sustainable Fisheries (UNGA 60/31).
[1445] FAO Report of the Twenty-sixth Session of the Committee on Fisheries Rome, 7?11 March 2005, FAO Fisheries Report No. 780. Rome.FAO 2005. 88 p.
[1446] Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. New York, 22?26 May 2006.
[1447] As recognised by the Fifth Meeting of Fishery Body Secretariats, Marika Ceo and others (supra note 599), p. 6.
[1448] FAO (supra note 1443), para. 46.
[1449] The meeting documents of the Kobe process are available at: http://www.tuna-org.org/meetingspast.htm.

methodology for performance reviews of RFMOs. This has influenced the review of non-tuna RFMOs as well.

A growing number of RFMOs engage in periodic performance reviews nowadays, and it has been observed that the methodology of these reviews has stayed relatively stable throughout.[1450] In giving an overview of the evolution of independent performance reviews in international fisheries management, a FAO circular identified various categories of criteria that currently reflect global best practices – mostly drawing on the Kobe criteria:[1451] Of particular interest here are the categories that the Kobe process labelled 'decision-making' and 'international cooperation'. In a recent performance review of ICCAT these were merged into single category of 'governance' standards.[1452] These governance standards are mostly administrative in nature. Performance reviewers are tasked with evaluating an RFMO's transparency in decision-making, including the extent to which the RFMO's decisions, meeting reports, scientific advice upon which decisions are made, and other relevant materials are made publicly available in a timely fashion. This seeks to ensure compliance with Art. 12 Fish Stocks Agreement and the Code of Conduct, as mentioned above. The discussion of RFMO decision-making has moreover led to performance reviews questioning the overall fairness of some RFMO decisions, including with regard to market measures. Governance standards also require looking at whether RFMOs have established adequate dispute settlement mechanisms.

The next sections discuss relevant aspects that have come out of these performance reviews with regard to general transparency in RFMO decision-making, the adoption of market measures, and the question of review.

8.3.2.1. A general need for transparency

RFMO transparency is generally approached from the following two angles: participation of observers in meetings and timely public availability of relevant information and documents, both within the RFMO and in cooperation with other bodies. Reviews have examined and observed a general lack of data collection and sharing among members and other RFMOs

[1450] Péter D Szigeti and Gail L Lugten (supra note 44), p. 2-3; Regional Fishery Body Secretariat's Network 'Analytical Compilation of the Performance Review Reports: Methods, Content, and the Way Forward (Sixth Meeting, Rome, 9 and 15 July 2016)' RSN/2016/5, para. 7.
[1451] éter D Szigeti and Gail L Lugten (Ibid.), p. 5.
[1452] John Spencer,Jean-Jacques Maguire and Erik J Molenaar 'Report of the Second Independent Performance Review (ICCAT)' [2016] PLE-103/2016, Annex 2.

regarding fishing data and fishing vessel data (lack of broad transparency).[1453] With regard to the transparency of the actual meetings, some RFMOs (e.g. ICCAT) have been critiqued for their tendency to hold meetings behind closed doors, which "could lead to decisions that are not well understood or well considered and could also decrease accountability".[1454] The 2008 ICCAT Panel therefore recommended preparing a discussion paper on transparency, fairness and equity within ICCAT, something which to date has not yet been done. The Panel also recommended that ICCAT review its policy on NGO attendance, since NGO observers are currently being charged a participation fee. The need to ensure NGO participation was deemed important "given the broader role these groups have in representing special interest groups of importance."[1455] This lack of broad transparency and non-decisional participation in decision-making is not however universal among RFMOs, and other bodies showed rather a high degree of involvement of observers (e.g. CCAMLR and CCSBT).[1456]

Interestingly, some of the recommendations show a strong support for increased interactions and dialogue with non-complying actors as opposed to sanctions – even calling for country-level interaction to promote compliance. The 2008 review of CCAMLR considered that there to be "greater virtue" in allowing an IUU vessel into port than to deny access, since the former could lead to a "subsequent dialogue with the vessel's flag state" where the latter would simply move the trade elsewhere.[1457]

Some progress has been noted regarding the abovementioned issues. A recent follow-up performance review of ICCAT noted on the abovementioned points that, whilst ICCAT still has not prepared a discussion paper on transparency, fairness and equity within ICCAT, progress has nevertheless been made towards clear, timely and effective decision-making.[1458] Another example is that the 2015 IOTC performance review noted "vast" improvements in the information available on the IOTC website, where there is now "a plethora of vessel and scientific data publicly available", albeit subject to the confidentiality rules and requirements.[1459] IOTC also established a specific funding mechanism to facilitate scientists

[1453] Marika Ceo and others (supra note 599), p. 50.
[1454] Ibid. p. 70.
[1455] Ibid.
[1456] Ibid. p. 73.
[1457] Ibid. p. 58.
[1458] John Spencer, Jean-Jacques Maguire and Erik J Molenaar (supra note 1432), p. 48.
[1459] IOTC 'Report of the 2nd IOTC Performance Review' [2015] IOTC-PRIOTC02 2016, para. 181.

and other representative from developing members to attend meetings.[1460] Whilst plenty of work remains to be done, RFMOs are – slowly – not only performing better, but also contributing to a growing mass of administrative practices concerning decision-making in global fisheries conservation and management.

8.3.2.2. Procedural fairness in market measures

As far as procedural fairness in the adoption of market measures is concerned, the following can be observed. Reviews have thus far not addressed in detail procedural standards for *country*-level market measures in the context of RFMOs. This is likely the case because such measures have only been adopted by ICCAT in the 1990s,[1461] and this was many years before performance reviews became common. Nevertheless, the most recent ICCAT performance review notes that the ICCAT Commission has done well when adopting these measures in the past, since they were carefully enacted through multilaterally-agreed procedures, and applied in a fair, transparent and non-discriminatory manner, and in a manner consistent with WTO rules.[1462] Most RFMOs are only competent to adopt non-country level market measures, and this has therefore been the main issue of review. It has been explained that this predominantly involves the establishment of lists of vessels that have engaged in IUU fishing, so that they can be denied entry to port (vessel blacklists); the establishment of lists of vessels that are exclusively allowed to fish in a particular area (vessel whitelists); and CDS, to trace catches through the supply chain by way of catch- and trade documentation schemes. Thirteen RFMOs currently operate IUU vessel negative lists, which are variably directed at members and/or non-members.[1463]

It has been observed that most (if not all) RFMOs have in place an established procedure for investigating a vessel that has been sighted as engaging in IUU fishing, or for discussing the submitted sighting and its associated information. This procedure "*usually* involves an opportunity for comments by contracting members and the flag state of the vessel assumed to have been engaged in IUU activities".[1464] *Most* of the RFMOs have subsequent procedures

[1460] Ibid. para. 190.
[1461] Supra note 45.
[1462] Marika Ceo and others (supra note 599), p. 66.
[1463] compiles the data on the different processes by which these RFMOs draw up their lists, Carl-Christian Schmidt (supra note 36), p. 7-8 and Annex I at p. 22.
[1464] Ibid. p. 7 (emphasis added).

for informing the flag states concerned and will request the flag state to submit information.[1465]

However, performance reviews have highlighted important impediments that stand in the way of achieving a non-discriminatory and fair process. IUU vessel lists and listing procedures often concern only vessels flagged to the contracting parties. This may be due to the fact that a decision to (de)list a vessel is usually carried out by unanimity, or the fact that alternative compliance procedures exist for infractions by an RFMO's own member vessels.[1466] Moreover, the decision to (de)list usually only takes place once a year, in connection with the RFMO annual meetings. As for the degree of due process that is followed, Carl-Christian Schmidt observes the following:

> "It appears that for the RFMOs reviewed, procedures with at least some degree of due process have been developed, including procedures for information sharing with the flag state of the IUU vessel, strict timetables, and transparency in allowing affected parties to engage in the decision to place vessels on an IUU list. Moreover, the processes and procedures are publicly available and the procedures and consequences of being listed are transparent and available through RFMO websites".[1467]

If true, this constitutes significant improvement from the situation at the turn of the century. In 2002, the European Commission observed in a damning critique the following:

> "(…) in some cases, lists are drawn up on the basis of information from a few states and are not verified before being adopted [by RFMOs], thus undermining their legitimacy. The management procedures (enrolment, striking off) are not transparent. In addition, the consequences associated with listing are not spelled out. It is crucial therefore to clarify the procedures and criteria for identifying IUU activities in order to achieve standardization within [RFMOs]." [1468]

[1465] Ibid. (emphasis added).

[1466] Ibid. p. 8.

[1467] Ibid.

[1468] European Commission, COM(2002) 180 (supra note 580), para 3.3. In a recent article, Zoe Scanlon also observes that though the risks of an unwarranted RFMO vessel listing are relatively low, greater attention is required to elements of due process. Drawing a comparison with *inter alia* the EU IUU Regulation's vessel blacklist, she points out that this provides greater due process – see chapter 4. Zoe Scanlon 'Safeguarding the Legitimacy of Illegal, Unreported and Unregulated Fishing Vessel Listings' (2019) 68 International and Comparative Law Quarterly 369, p. 381-387. Scanlon makes the general observation that international organisations are increasingly taking on "quasi-state like functions", including law making functions and judicial and administrative decision-making, which increases the need for adequate controls of their powers. Drawing a parallel with RFMOs leads her to call for greater due process also in the decision-making process of RFMOs when blacklisting vessels. She draws inspiration from the literature on enhancing accountability in environmental governance, legitimacy, and effectiveness (p. 381-382, 384, 396) to suggest a number of "mechanisms" that could ensure due process. Whilst acknowledging that "comparisons between other international organisations and RFMOs and the appropriateness of such" require further scrutiny (p. 389) and without setting out a clear analytical framework or methodology for identifying any principles in particular, she suggests there is a need for the following: reasoned-decisions, which she argues RFMOs already sufficiently

Whilst principles and mechanisms to improve procedural fairness have thus and are being developed through RFMO practice, this is work in progress. For example, the 2008 performance review of CCAMLR expressed concern at learning that effective implementation of CCAMLR's measure to blacklist member vessels was being impaired by certain members vetoing decisions that would see their own flag vessels so listed.[1469] It also suggested that a review of the process, timing and frequency with which vessels are added or removed from the IUU list should be established, and proposed wider dissemination of information.[1470] Similarly, the 2008-2009 performance review of the IOTC noted with disapproval that its IUU vessel list applied to non-members only.[1471]

That there is a need for more procedural fairness when adopting market measures is evident also from the action brought by the owner and operator of the vessel Marta Lucia R and the purchaser of caught fish against the EU, seeking the annulment of the EU's decision to blacklist the Marta Lucia R.[1472] I recall that the EU vessel blacklist automatically incorporates RFMO vessel blacklists (chapter 4, section 4.2.2). This led to the Marta Lucia R, which had previously been listed by IATTC, to also appear on the EU vessel blacklist. The applicants (Seatech International) submitted that the vessel had been included in the IATTC IUU list without procedural requirements being observed to ensure that the party concerned was heard. They moreover argued that there had been no supporting evidence to justify the placing of this vessels on the IATTC list, and that in fact, IATTC was not even competent to draw up blacklists and had exceeded its powers. The applicants moreover argued that, by copying this list (fraught with procedural unfairness) the EU had discriminated against Seatech International and failed to give it a right to defend itself. Whilst the case was never decided and was removed from the registry following a decision from IATTC (and therefore also the EU) to delist the vessel, the case raises important questions. Not only does it highlight procedural unfairness within RFMO decision making, it raises the question

give when blacklisting vessels (p. 391); evidential standards and publication (p. 392); clarity over what activity led to the listing, so as to avoid politicised decisions (p. 393); the right for the vessel owner to be heard (p. 395); and review (p. 396). Though Scanlon does not explicitly mention or situate herself within the context of global administrative law, her approach (both descriptive and normative, drawing on practice by other global bodies as well as evoking the moral justification of a need for fairness) and the principles she ultimately identifies are reflective of this body of scholarship. This is in particular so since she acknowledges that "IUU listing processes more closely resemble administrative than judicial decisions" (p. 390)

[1469] Marika Ceo and others (supra note 599), p. 63.

[1470] Ibid.

[1471] Ibid. p. 30.

[1472] T-337/10 *Seatech International and Others v Council and Commission* (Action brought on 17 August 2010), 23 October 2010, OJ C288/46.

whether, by giving effect to these decisions without further due process, this "hollows out" EU standards.[1473]

Most recently, the need to ensure due process in RFMO decision-making, and in particular when blacklisting vessels for IUU fishing, has come to the fore in the negotiations at the WTO on harmful subsidies. As previously mentioned, the negotiators are also looking towards RFMOs (and potentially coastal states) for a determination of whether a vessel has engaged in IUU fishing, thereby triggering a prohibition on subsidising the vessel. Much of the current discussions turn around the dangers this poses. A recent proposal suggests that a WTO member should recognise IUU vessel blacklists of RFMOs even where it is itself not a member to that RFMO, providing standards of due process have been respected in drawing up the list, "including a procedure for appeal or review, transparency, and the principle of non-discrimination," and provided the RFMO itself is in conformity with international law and open to all WTO members in a non-discriminatory fashion.[1474] This confirms once more that the process of developing procedural standards for and by RFMOs to reduce arbitrariness in decision-making, including in the context of market measures, is still ongoing.

8.3.2.3. Review

A determination made by an RFMO is not easily challenged. Though this concerns multilateral market conditionality and is not the focus of this thesis, the issue is revealing. I recall that Art. 30(2) of the Fish Stocks Agreement incorporates Part XV of the LOSC (its provisions on obligatory dispute settlement) including for any dispute over the interpretation or application of an RFMO, including any dispute concerning the RFMO's conservation and management of such stocks. Only parties which are a member of that RFMO appear to have standing to bring such as dispute. This means that neither a foreign operator, nor its flag state, if it wanted to challenge the RFMO's determination on behest of its vessel, dispose of a clear avenue to challenge an RFMO decision. Even if a foreign flag state could do so, there is the question whether the Court or Tribunal hearing the case would have jurisdiction over an RFMO decision to blacklist a vessel. This issue of jurisdiction over measures adopted by an

[1473] For a broader discussion on this topic, though not in the conext of fisheries specifically, see Joana Mendes 'EU Law and Global Regulatory Regimes: Hollowing out Procedural Standards?' (2012) 10 International Journal of Constitutional Law 988.

[1474] Proposal for Disciplines on Fisheries Subsidies, Communication from Argentina, Colombia, Costa Rica, Panama, Peru, and Uruguay (Revision), 24 July 2017, TN/RL/GEN/187/Rev.2, para. 2.11.

RFMO arose in the *Southern Bluefin Tuna* cases.[1475] Whilst this decision was made before the entry into force of the Fish Stocks Agreement, the Arbitral Tribunal, in holding it did not have jurisdiction, emphasised the relevance of Art. 281(1) LOSC. This provision stipulates that if parties have agreed to settle their dispute by peaceful means, Part XV LOSC applies only where no settlement has been reached, and when the agreement between the parties does not exclude any further procedure. The latter sentence prevented the Arbitral Tribunal from finding jurisdiction, since it considered that the CCSBT does "not expressly and in so many words exclude the applicability of any procedures, including the procedures of section 2 of Part XV", and that the CCSBT "intends to remove proceedings under [Art. 16 CCSBT Convention] from the reach of the compulsory procedures" of Part XV.[1476] If an RFMO chose to remove disputes over its decisions from the remit of Part XV of the LOSC, it could do so.

Where a state incorporates an RFMO vessel blacklist into its own domestic blacklist (or in the case of the EU, the EU list), this could provide another opportunity for hearing the aggrieved parties and thereby mitigate the accountability gap that currently exists within RFMOs. Though, as the claims by *Seatech International* show, this is not yet the case in practice.[1477]

8.4. Analysis

I now turn to the following questions. What is it that should be made transparent when engaging in market conditionality in fisheries? Who benefits from participatory rights at the planning stage, and to what extent does this allow a decision to be shaped? Who can review a measure, and in which forum? And is all this sufficient to trigger collective interaction with underlying fisheries norms? I discuss each aspect in turn.

8.4.1. General transparency

Transparency concerns both the planning state and the implementation stage. It also includes documents that must be created so as to provide sufficient insight into the reasoning behind these measures (sufficient so as to be able to evaluate the measures). This is supported by Art.

[1475] *Southern Bluefin Tuna* (New Zealand v. Japan; Australia v. Japan) (Award), 4 August 2000, Reports of International Arbitral Awards, Vol. XXIII, p. 1-57.
[1476] Ibid. paras. 56-57.
[1477] *Seatech International and Others v Council and Commission* (supra note 1472).

X GATT and the previously mentioned *US – Shrimp* dispute. But transparency of *everything* is hardly ever required, often for sound reasons of privacy, commercial confidentiality, national security or other.[1478] Such deference to the public interest and to commercial interests can be observed in Art. X:1 GATT, which stipulates that "the provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private".

Market restrictions adopted as part of a market conditionality mechanism will also be determined by sensitive commercial details pertaining to another state's harvest and trade in fish products. This is evident from the EU country blacklisting decisions, on which it is notoriously difficult to obtain information. Chapter 4 already noted that there is no list available of the countries that have been visited by the Commission (pre-yellow card missions), and that none of the relevant documentation is published, except for the yellow card, red card, and blacklisting decisions, which appear in the EU Official Journal. Personal experience shows that *some* of these documents *may* be made available upon request if they are found not to contain confidential information, but not of countries that are still being evaluated by the Commission (ongoing (pre) yellow card or red card), and the process is altogether slow and complex.[1479] The Commission explains the reasons for keeping this information confidential as follows:

> "The [EU's] main interest is to encourage these countries to comply with the relevant international obligations in a smooth and peaceful manner without recourse to more onerous international dispute settlement procedures and without any further interference that might aggravate the dispute. In this vein, an atmosphere of trust and confidentiality is a prerequisite for a successful completion of the dialogue with each one of the third countries concerned in the perspective of inducing them to comply with their conservation and cooperation obligations. This is a matter of trust - a breach may jeopardise the relations between the [EU] and these countries. Disclosure of the action plans would compromise the [EU]'s objective of resolving this matter with these countries in a cooperative manner and in a climate of mutual trust."[1480]

[1478] Elizabeth Fisher (supra note 837), p. 278, 289.
[1479] This is further hampered by the difficulty of knowing what documents to request access to.
[1480] Letter from the European Commission to the author (supra note 616).

Though some confidentiality is indeed necessary to build trust, greater transparency in the carding process and in particular opening up to stakeholder engagement throughout the carding process would allow the process to be evaluated, and ensure fair treatment.[1481]

Confidentiality is also common within RFMOs, though performance reviews of RFMOs have increasingly highlighted the need for greater transparency *even* in areas that are commercially sensitive, such as the allocation of quotas.[1482] This is likely a consequence of the nature of the problem dealt with: namely, shared resources. All states take an interest in the management of fisheries resources. Compared to the trade regime, there is a greater sense of 'entitlement' to information where this concerns the management of the commons. Indeed, the LOSC is riddled with requirements to notify other states and to make information publicly available. This includes information regarding pollution danger, as is generally the case in international environmental law; as well as activities in the Area; marine scientific research; and the erection of platforms and the laying of cables. This requirement to make data available to others who are involved in fisheries governance is growing, as is evident from the ongoing work at FAO on a Global Record for Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels, which would make available certified data from state authorities about vessels and vessel-related activities.[1483]

Generally, these various requirements support the 'ideal conditions' identified in chapter 5 of broad transparency, including clear criteria and a duty to give reasons, although particularly sensitive information may arguably be left out to a broader audience. Broad transparency is needed both during the consultation phase, which is part of planning phase and shaping the decision, and during the implementation phase (e.g. a decision to blacklist a particular country). This is in particular important for market conditionality determinations, which are based on empirical evidence and complex legal reasoning. Only if these reasons are made transparent can the final decision (e.g. the decision to blacklist) be understood, and can the underlying norms be questioned and engaged with. Yet, chapter 4 showed that the

[1481] This was also recognised in a meeting between the Commission, NGOs, and stakeholders on the implementation of the EU IUU Regulation's third country blacklisting mechanism, which noted the "sensitivities of finding a balance between enabling stakeholder engagement in the carding process while maintaining the necessary confidentiality of the dialogue" ("Understanding the EU's carding process to end illegal, unreported and unregulated (IUU) fishing", 6 October 2015, available at: http://www.iuuwatch.eu/wp-content/uploads/2015/07/Conclusions_Event_6-October.pdf).

[1482] Marika Ceo and others (supra note 599).

[1483] More information about this ongoing process is availabla at: http://www.fao.org/global-record/en/.

Commission lacks clear criteria to blacklist countries under both the EU IUU and Non-Sustainable Fishing Regulations, and that it enjoys too much discretion.

Finally, the timing of transparency is important. Fisher notes there is a great deal of variation between regimes.[1484] Those affected by trade measures require adequate timing to adapt to the new situation – an important rationale for requiring transparency in the WTO regime. I recall the need for "prompt" notification as per Art X GATT. Inclusivity and the possibility for participation by stakeholders in decision-making requires transparency also earlier in the process; before and during, rather than after, the decision-making has occurred. This is supported both by the provisions and jurisprudence of the GATT, and the consultation requirements that flow from the duty to act in good faith/have due regard under the LOSC. It is also reflected in the CDS Guidelines with regard to the adoption of CDS (non-country level market measures). The Guidelines require that proposed CDS must be "published at a reasonable time *so that comments can be given before the measure is adopted*".[1485] Clearly, there must be sufficient time for comments to be given and be able to *shape* the decision in question, since the acting state must weigh the rights of other states against the benefit of its planned decision. Timing was also an issue in *Chagos*, though without much specificity. The Tribunal noted with approval the UK's "timely" provision of information and consultation of the US as rights-holding state, saying that this should be a "yardstick" for the significant level of due regard owed in the case at hand.[1486]

As for the way in which information must be made transparent, there is no one-size-fits-all. Whether or not broad notification is actually feasible in practice depends on the institutional apparatus; namely, how transparency should be effectuated. It also depends on the matters to be made transparent. Various transparency mechanisms have already been mentioned throughout this thesis, such as the publication of decisions in the Official Journal of the EU; the notification of decisions directly to affected parties; the notification of measures to RFMOs and the FAO; and the growing practice of RFMO performance reviews – the reports of which can be found on relevant websites.

[1484] Elizabeth Fisher (supra note 837), p. 290.
[1485] Art. 4(5)(b) CDS Guidelines (emphasis added).
[1486] *Chagos* (supra note 238), para. 528.

In the example of the EU, both the decision to warn a third country of blacklisting and the reasons for it, as well as the decision to blacklist, are published in the Official Journal of the EU. Every interested party (and even those not interested, for that matter) has access to it.

8.4.2. A procedurally fair planning stage

8.4.2.1. Alternative measures

In so far that states are under an obligation to carry out an impact assessment of their planned interfering activities so as to examine alternative measures, both the EU IUU and Non-Sustainable Regulation have done so before adopting the Regulations themselves.[1487] The adequacy of some of the alternative measures that the EU considered prior to adopting the Regulations was examined in chapter 7, section 7.3.1, in the context of necessity. The Non-Sustainable Fishing Regulation moreover provides for impacts to be evaluated in individual blacklisting decisions, following a proportionality test (in Art. 5(4), see chapter 4). Since there is only one case in which market measures were established pursuant to the Regulation, there is limited proof of what this means in practice. In adopting measures against the Faroe Islands, the Commission indeed analysed the effects and examined whether alternative measures other than a total ban of imports made from or containing herring or mackerel could be envisaged as more proportionate measures.[1488] However, the Commission's real concern was the impact on the *EU* rather than on the targeted country (Faroe Islands). Joanne Scott observes that the Commission actually viewed the potential high economic losses of blocking market access in a positive light rather than as a reason for limiting its interference: significant economic impact would enhance the effectiveness of the EU's measures.[1489] To compare, the EU IUU Regulation does not explicitly provide for the impacts of blacklisting to be taken into account in individual decisions, despite the potentially severe economic and social effects of blacklisting, and the administrative burden of implementing the EU's requirements.

[1487] Studies were carried out prior to adopting the EU IUU Regulation (European Commission, SEC(2007) 1336 (supra note 19); Oceanic Developpement and MegaPesca Lda (supra note 54)) and prior to adopting the EU Nosystem and pn-Sustainable Fishing Regulation (European Commission, SEC(2011) 1576 (supra note 119)).
[1488] Commission Implementing Regulation on Atlanto-Scandian herring (supra note 740).
[1489] European Commission, SEC(2011) 1576 (supra note 119), p. 26-27; Joanne Scott (supra note 41), p. 60.

8.4.2.2. Meaningful consultations

It has been shown that the first point at which participatory rights are granted is during the process of shaping a particular decision. Chapter 5, section 5.8 drew a distinction between decisional and non-decisional forms of participation, whereby the former gives participants a formal right to decide (e.g. to vote) and the latter does not, but can still allow participants to influence the decision by expressing their opinion (e.g. consultation). Neither the WTO regime nor international fisheries law grant decisional participatory rights to those affected. Formal participation remains the prerogative of domestic voters. Nevertheless, it can be observed that the degree of non-decisional participation that is called for is significant. I have mentioned calls for "effective participation"[1490] and "meaningful consultations".[1491] This leads to the next question: who should be involved in the participation?

A distinction can be made here between the involvement of private stakeholders (fishermen, industry) and NGOs, on the one hand, and affected states, on the other. Participatory rights are clearly bestowed upon foreign countries, namely, states whose rights under the WTO may be affected, and/or whose activities under the LOSC may be unjustifiably interfered with. Beyond affected states, the Code of Conduct and IPOA-IUU strongly encourage the effective participation of affected and interested parties in decision–making. The Code of Conduct specifically tasks coastal states with identifying "relevant domestic parties having a legitimate interest in the use and management of fisheries resources" in areas under national jurisdiction, and to "establish arrangements for consulting them to gain their collaboration in achieving responsible fisheries".[1492] With regard to areas outside national jurisdiction, the Code requires that representatives from "relevant" organisations, both government and NGO, "concerned with fisheries" should have the opportunity to partake in meetings.[1493] This would suggest the need for wider consultation than only with directly affected states, involving also other stakeholders in the planning stage of market measures in fisheries.

Who are these parties having a legitimate interest, and who are relevant organisations? A parallel can be drawn with the 1998 Aarhus Convention on Access to Information, Public

[1490] Para. 6.13 Code of Conduct.
[1491] *Advisory Opinion to the SRFC* (supra note 83), para. 211.
[1492] Para. 7.1.2 Code of Conduct (emphasis added).
[1493] Para. 7.1.6 Code of Conduct (emphasis added).

Participation and Access to Justice in Environmental Matters (Aarhus Convention).[1494] The Convention does not concern fisheries, but has 47 ratifications from within and beyond Europe. It is an influential treaty in so far that it is frequently referred to in administrative law decisions of domestic European courts, and has been suggested as a 'model' for other regions in the world as well.[1495]

The Aarhus Convention provides *inter alia* for the notification and involvement of the "public concerned" in planning decisions of particularly harmful activities (Art. 6(2)), as well as the participation of the "public" more generally during the preparation of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment (Art. 8). Without going into its operational details, the Convention defines the "public concerned" as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest" (Art. 2(5)). This is to be distinguished from "the public" which "means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups" (Art. 2(4)). It thus adopts a very wide definition of the public concerned; including those not necessarily affected by a decision but likely being affected or simply having an interest in it. This wording is very close to that of the Code of Conduct, which would suggest that parties having a legitimate interest goes *beyond* those directly affected or likely to be affected by a decision.

The Code's call for inclusivity is not surprising, given that much of the decision-making in fisheries governance (by states and RFMOs) concerns shared resources – both shared between countries and between different groups (e.g. commercial fishers, small scale fisheries, and indigenous peoples).[1496] The EU consulted widely before adopting the EU IUU

[1494] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (UN Treaty Series, 2161, p. 447) (hereafter: Aarhus Convention).
[1495] Karl-peter Sommermann 'Transformative Effects of the Aarhus Convention in Europe' (2017) 77 Heidelberg Journal of International Law 321, p. 322.
[1496] There has been a growing awareness in the past few decades on the importance of public involvement in environmental decision-making. E.g. Maria Lee and Carolyn Abbot 'The Usual Suspects? Public Participation under the Aarhus Convention' (2003) 66 Modern Law Review 80, p. 80; see also Principle 10 of the 1992 Rio Declaration on Environment and Development, which was adopted only a few years before Code of Conduct, and which states that "[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in

and Non-Sustainable Fishing Regulations, allowing for input from all interested stakeholders.[1497]

Finally, there appears to be international support to involve external (non-affected) actors in the process – if not as participants than as observers. The Fish Stocks Agreement stipulates that representatives from NGOs and other international organisations shall be afforded the opportunity to take part in RFMO meetings as observers, and have timely access to reports and records.[1498] These external actors are not affected by the decisions themselves. Yet, they are in a good position to pose questions and help promote reflexivity. The EU has also specifically organised seminars for NGOs in the context of implementing the EU IUU Regulation, with "the aim of intensifying the dialogue on the fight against IUU fishing".[1499]

Examining EU market conditionality in fisheries in light of this, I observe the following. Country blacklisting under both the EU IUU and Non-Sustainable Fishing Regulations is preceded by lengthy consultations with the states that will be affected. Decisions regarding them are reasoned, and they benefit from the opportunity to respond and have their case heard before a decision regarding them is made. This is clearly reflected in the EU Non-Sustainable Fishing Regulation, which in its Preamble notes that "it is necessary to define the conditions upon which a country can be considered to be a country allowing non-sustainable fishing and subject to measures under this Regulation, including a process granting the countries concerned the right to be heard and allowing them an opportunity to adopt corrective action"

their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." The Aarhus Convention mentioned above builds on this.

[1497] Prior to the EU IUU Regulation, a consultation paper was published on the Europa web site (DG Fisheries and Maritime Affairs and Your Voice in Europe) on the 15 January 2007. Interested parties were invited to send their contributions by post or e-mail by 12 March 2007. Stakeholders were made "fully aware" of the on-line consultation through different channels. Moreover, the consultation also included several meetings between the Commission services and key stakeholders (European Commission COM(2007) 602 (supra note 569), p. 81); prior to the EU Non-Sustainable Fishing Regulation, a consultation was launched on 22 March 2011, though rather than an open consultation it was targeted to the main consultation bodies for the common fisheries policy: the Advisory Committee for Fisheries and Aquaculture (ACFA), the seven Regional Advisory Councils (RACs), and the authorities of Member States. It is interseting to note that few replies were received, and only from those directly affected (European Commission, SEC(2011) 1576 (supra note 119), p. 39 and 41).

[1498] Art. 12(2) Fish Stocks Agreement.

[1499] For example, soon after the EU IUU Regulation entered into force in 2010, the European Commission organised a seminar that was attended by the Archipelagos Institute of Marine Conservation, Coalition for Fair Fisheries Arrangements, European Bureau for Conservation and Development, Environmental Justice Foundation, Greenpeace, OCEANA, Pew Environment Group, Seas at Risk, TRAFFIC and WWF (Brussels, 15 February 2011).

(rec. 4). Art. 6(3) of the Regulation furthermore stipulates that a country concerned will be given a "reasonable opportunity to respond to the notification in writing and to remedy the situation within one month of receiving that notification." This is similar to the EU IUU Regulation, though contains a shorter time limit. Art. 32(4) EU IUU Regulation stipulates that the third country concerned will be given "adequate time to answer the notification and a reasonable time to remedy the situation".

What this process entails in practice was discussed in some detail in chapter 4. However, it was also shown that whilst the Commission argues to be operating "through dialogue, cooperation, and technical and development aid",[1500] affected countries and objective independent observers do not always experience it as such. Though the Commission clearly engages in a reasoned exchange, the process is criticised for its opacity.[1501] Though the entire procedure leading up to blacklisting is flexible and thereby allows for a tailored approach, it also raises the suspicion that not all countries are consulted to the same extent, and provided the same opportunities for a truly reasoned exchange. Carlos Palin *et al* observe that as long as the Commission's missions abroad (pre-yellow card stage under the IUU Regulation) are carried out with no standard methodology and the results are not made public, the system's legitimacy with respect to fighting IUU will be open to accusations of technical barriers to trade (see chapter 7), and of arbitrary judgement.[1502] The fact that consultations take place under the threat of market access denial moreover makes it difficult to assess whether there truly exists an *exchange* between parties, or rather whether the Commission imposes its views and the affected country can 'take it or leave it'. Though chapter 4 identified examples where countries have objected to the EU's demands, it also observed that *in practice* it is the European Commission that drafts an Action Plan on what they must do, and it is unclear how much a third country can realistically contest the EU's demands.

Finally, this chapter concluded that before adopting market restrictions in fisheries, the market state will likely have to engage in across-the-board negotiations to achieve a multilateral solution, as was the case in *US – Shrimp*. Whether the EU has fulfilled this requirement would have to be examined on a case-by-case basis. Where a country that is blacklisted under the EU IUU Regulation is a member of an RFMO to which the EU is also a

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[1500] European Commission, COM(2015) 480 (supra note 47), p. 5.
[1501] Carlos Palin and others (supra note 40), p. 119
[1502] Ibid. p. 156.

member, it might have to be examined to what extent the EU used that forum to discuss the issues at stake. In the case of the application of the Non-Sustainable Fishing Regulation to the Faroe Islands, this criterion may be seen as fulfilled. In the case at hand, the EU had (in its opinion) exhausted all multilateral possibilities to negotiate lower quotas, since the relevant RFMO (NEAFC) was not competent to regulate the stock concerned in the Faroe Islands' EEZ, and the Faroe Islands no longer honoured the multilateral sharing agreement that the EU had engaged in with the Faroe Islands and other coastal states.[1503] Similarly, the reasons for the adoption of the Regulation had been the fact that the EU considered itself to be "suffering the consequences of too long and unsuccessful consultations and negotiations" at the multilateral level, namely in the context of NEAFC.[1504] As previously mentioned, the Appellate Body in *US – Shrimp* pointed at the CITES Standing Committee, the Convention on the Conservation of Migratory Species of Wild Animals, the LOSC, and the CBD. It was also mentioned above that the EU had indeed considered relying on further RFMO cooperation or going through the multilateral framework of CITES, but had concluded this to be insufficiently effective.[1505] Other relevant forums to discuss potential market measures in fisheries could include the Fish Stocks Review Conference, the UN Convention for Trade and Development (UNCTAD) meetings, and of course the FAO. At the FAO, it is in particular the COFI that functions as the main forum for fisheries issues. At COFI, government officials from specialised state ministries (rather than diplomats) meet on a biennial basis, and the meetings are usually observed by representatives from industry, NGOs, the Word Bank, the WTO, the IMO and numerous RFMOs.[1506]

8.4.3. Fair implementation

A second point at which participatory rights need to be granted so as to ensure procedural fairness is during the implementation phase. This is in particular supported by *US – Shrimp* and *EC – Seal Products*. Important here is the need for clear criteria and an absence of broad discretion, which as chapter 4 has shown in some detail is one of the main criticisms against EU country blacklisting under both Regulations.[1507] Though the EU aims to adopt measures that "equitable, cost-effective and compatible with international law (…) based on objective

[1503] Commission Implementing Regulation (EU) 793/2013 (supra note 740), rec. 7.
[1504] European Commission, SEC(2011) 1576 (supra note 119), p. 7.
[1505] Ibid. p. 50.
[1506] Jürgen Friedrich 'Legal Challenges of Non-Binding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries' (2008) 9 German Law Journal 1539, p. 1546.
[1507] Steve Dunn (supra note 95), p. 7, 33; Shelley Clarke and Gilles Hosch (supra note 597).

criteria" (rec. 5 EU Non-Sustainable Fishing Regulation) and "non-discriminatory, legitimate and proportionate (…) on the basis of transparent, clear and objective criteria relying on international standards (…) after giving them adequate time and to respond to a prior notification" (rec. 31 EU IUU Regulation), chapter 4 showed that it is highly questionable whether this is being achieved. The Commission's discretion to decide when a third country has failed the threshold under the IUU Regulation (to get carded/listed) is exacerbated by the complexity of the concept of IUU fishing. I recall that the Commission identifies a third country as non-cooperating "if it fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market State, to take action to prevent, deter and eliminate IUU fishing" (Art. 31). These duties are not delimited in the Regulation itself, and neither are the sources in which they can be found. As shown in some detail in chapter 3, it is not easy to determine what a state's duty is to "to take action to prevent, deter and eliminate IUU fishing." What a country has to do to "prevent, deter, and eliminate IUU fishing" is dictated by the law of the sea regime's general obligations on flag, coastal, and port states (to act as responsible flag states; to manage the resources in their EEZ; to cooperate; etc.). These are general obligations and mostly obligations of conduct, not result, and therefore highly circumstantial. Moreover, as I have repeatedly alluded to, what a particular country should be doing as a matter of due diligence logically also depends on its capacity to act; an argument in favour of a differentiated threshold for developing countries. Chapter 4 explained that the Regulation provides only limited guidance for the Commission on how to interpret the blacklisting threshold. The Commission also generally fails to provide clear reasons for its decisions or mixes legal arguments, as demonstrated in the haphazard nature of the reasoning provided in the yellow cards. Furthermore, there has been a notable lack of training and support to third countries to help them implement the Regulation's requirements.[1508]

8.4.4. Review

Turning to the question of review, I observe the following. *Countries* whose rights are affected by the denial of market access benefit from the possibility of bringing a case before the dispute settlement mechanisms of either the WTO, or the LOSC, on the grounds discussed throughout chapters 6, 7, and earlier sections in this chapter. Examples of such attempts are the previously mentioned *Chile – Swordfish* and *EU – Herring* disputes. As far as the WTO is concerned, there is moreover the possibility to solve disputes behind closed

[1508] Carlos Palin and others (supra note 40), p. 119.

doors through the many WTO Committees, which provides a cooperative forum through which affected parties can voice their concerns.[1509]

In the example of the EU, a decision to blacklist and the subsequent denial of market access could be challenged by the targeted third country before the CJEU, to request its annulment.[1510] Grounds for review are set out in Art. 263(2) TFEU and include: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, and misuse of powers. Of particular relevance here is the possibility to challenge a measure on procedural grounds, and possibly, misuse of powers. The former would allow an affected party to challenge a (blacklisting) decision if the right procedures were not followed. For instance, it could be used to challenge the fact that a targeted country did not have the opportunity to be heard. This is only possible however where a procedural requirement exists in the first place, and where this requirement is essential, but so far the court has held that the requirement to give reasons and to consult are indeed essential.[1511] The "misuse of powers" argument can moreover be used in cases of bad faith, where there is proof that the EU intended to use its power to achieve an improper purpose – though the threshold for proving this is high, and this may therefore not be a likely ground for review.[1512]

The Commission Decision to issue a yellow card, an EU peculiarity, is unlikely to be reviewed before the WTO dispute settlement mechanism, unless it can be shown that its reputation consequences have actual or potential implications for trade. It is moreover questionable whether it could be challenged before the CJEU. The EU is based on the rule of law, and neither its member states nor its institutions can avoid judicial review of their

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[1509] See the discussion in chapter 5 on accountability and Andrew Lang and Joanne Scott (supra note 911), p. 592-595.

[1510] Though the standing requirements that third country governments would have to fulfil are strict (Art. 263(4) TFEU provides that "any natural or legal person may (…) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures") it is considered that third country governments are *not* in principle excluded from bringing a claim, and in any case, EU carding decisions specifically name the targeted country (Ioanna Hajiyianni *The EU As A Global Regulator For Environmental Protection* (Hart, 2019), p. 151).

[1511] Trevor Hartley *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community* (OUP, 2007), p. 401; Jurgen Schwarze 'Judicial Review of European Administrative Procedure' (2004) 68 Law and Contemporary Problems 85 , p. 91
Ioanna Handjiyianni (Ibid), p. 169, referring also to Takis Tridimas *The General Principles of EU Law* (OUP, 2006), chapter 8. Hadjiyiani gives a detailed overview of the requirements and complexities of third actors' standing before the EU courts and different grounds for review that can be used to challenge EU environmental measures with extraterritorial implications, and generally the possibility to review such measures, in chapter 4.

[1512] Trevor Hartley (Ibid.), p. 425.

actions to determine whether those actions are in conformity with EU law.[1513] However, this does not mean that actions undertaken by the EU institutions are open to judicial review *at every stage.* Though a yellow card decision directly names the affected country, suggesting that this country has standing to review the measure,[1514] only measures that have legal effects can be challenged before the court. Legal effects will be determined based on the substance of a measure, not its form.[1515] Though there is some precedent that soft law and other non-binding decisions (communications, guidelines and notices) can be reviewed before the CJEU,[1516] the yellow card is technically only a warning, with reputational and thereby economic effects, and a challenge before the CJEU is an unlikely avenue for review.[1517]

A more detailed discussion on the possibility to review a carding decision (yellow card or blacklisting) before the CJEU falls outside the scope of this research, as it would be particular only to EU law and does not impart meaning on the question under what conditions unilateral, country-level, market conditionality in fisheries is appropriate. I simply take note of the difficulty that this issue brings, and therefore emphasise once more the need for procedural fairness *ex ante*, *also* in the process of adopting a yellow card decision and not only in the process of final blacklisting under the EU IUU Regulation. This was highlighted in particular by Papua New Guinea, which strongly felt that it had been "denied the opportunity to present a case to the European Commission before the decision [to issue a yellow card] was made."[1518]

As far as potential review by the industry and in particular vessel owners/operators is concerned, the lack of foreseeable channels of dispute settlement to protect the private interests of the fish industry has been highlighted as a matter of concern.[1519] Where market measures are *punitive* (e.g. the arrest in port of a vessel, or the confiscation of catch), there is a strong call for a formal legal procedure for review. In this context, the ITLOS has at various occasions confirmed that "considerations of due process of law must be applied in all

[1513] Case C-294/83 *Les Verts v. Parliament* [1986] ECR 1357, para. 23; Jurgen Schwarze (supra note 1511), p. 85.
[1514] Ioanna Handjiyianni (supra note 1510), p. 151, footnote 24.
[1515] Case C-57/95, *France v. Commission (Pensionfunds),* [1997] ECR 1-1627, para. 7 (and repeated in many other cases).
[1516] As examined in Joanne Scott 'In Legal Limbo: Post-Legislative Guidance for European Administrative Law' (2011) 48 Common Market Law Review 329.
[1517] Ibid. p. 339, noting also that "factual as opposed to legal effects will not suffice to transform a measure into an act susceptible to judicial review".
[1518] Steve Dunn (supra note 95), p. 5.
[1519] Juan He (supra note 64), p. 192.

circumstances."[1520] Furthermore, the Appellate Body in *US – Shrimp* moreover noted the importance of a formal legal procedure for the review of, or appeal from, the denial of a certification application (and consequently market access) by a foreign operator, which it considered to be part of the due process requirements enshrined in Art. X GATT.[1521] Where measures are *not punitive* but deny access to a right (port/market access), the matter is less clear-cut. Though the Port State Measures Agreement must be applied in a fair, transparent, and non-discriminatory manner in general (Art. 3(4)), it contains no minimum requirements for review of decisions to refuse port access or the use of other port services. Instead, the Agreement leaves the question of recourse to port state measures (in general, so this may include punitive measures as well) up to the coastal state, if it has any rules in place for this, in accordance with its national laws and regulation (Art. 19). This chapter has however shown that, in the context of RFMOs, there is a growing call for due process when placing vessels on an IUU vessel list (including the possibility to review such decisions), alongside a general need to improve dispute settlement over RFMO decisions.

The EU is exemplary in this respect. Chapter 4 has shown that the EU allows for the master of a vessel or the operator to participate in any decision that is made against him, and to be heard. Before a vessel is blacklisted, the owner and, where appropriate, the operator have the right to provide additional information and they have the right to be heard and defend their case (Art. 27(2) IUU Regulation). Though it was shown above that the EU skips certain important procedural requirements where it directly incorporates blacklisting decisions made by RFMOs without examining if due process has been followed, affected parties can still challenge this decision before the CJEU (including for its lack of following these procedural requirements).[1522] A refusal of importation of fish products into the EU may furthermore be appealed by any person if that decisions concerns him, in accordance with the laws of the relevant EU member state (Art. 18(4) IUU Regulation). This includes the situation in which market access is denied on the ground that a vessel's flag state has been identified by the Commission as a non-cooperating third country (red card prior to blacklisting by the Council) (Art. 18(1)(g)). Presumably, this could also lead to an indirect evaluation of whether a third country was blacklisted for the wrong reasons, or whether it is

[1520] *"M/V Louisa"* (supra note 1049), para. 155.
[1521] *US – Shrimp*, Appellate Body report (supra note 123) para. 183.
[1522] An example of a claim before the CJEU against a Commission decision to blacklist a vessel is *Seatech International and Others v Council and Commission* (supra note 1472).

fair to deny market access to operators who can nevertheless guarantee the legality of their catch. Because the case requires the interpretation of EU law, a national court would likely reach out to the CJEU for a preliminary ruling (Art. 267 TFEU), thereby ensuring a degree of consistency in how these provisions are interpreted across the different EU member states.

To summarise, affected third countries will be able to review a blacklisting decision both before international and EU courts, but a yellow card likely falls outside the scope of review. Though private operators lack standing before international courts,[1523] directly affected parties (whose catch is denied access; whose vessel is blacklisted) have access to review under EU mechanisms. Yet, where a private person is not directly but indirectly affected by a decision, for example does not own/operate a vessel but partakes in another way in the supply chain of products that are denied access to the EU market, legal accountability is very limited. It could perhaps persuade his/her country to lodge a case before the WTO or LOSC's dispute settlement mechanism, or directly before the court of the relevant market state (e.g. the CJEU).[1524]

8.4.5. Interactions

I recall from chapter 5 that for market conditionality in fisheries to promote compliance and help further develop international fisheries norms, the market state must contribute to a practice of legality. Two aspects of this were examined: the need for congruence with underlying norms (chapter 5, section 5.3) and the need for meaningful interactions (chapter 5, section 5.4). It has already been examined whether EU market conditionality is congruent, both in terms of not interpreting international fisheries norms in a wholly unrelated way (chapter 5, section 5.3, building on chapter 4, sections 4.4 and 4.5.2) and in terms of the EU acting within the boundaries set by international law (chapters 6 and 7). I now ask whether the procedural standards that exist in international law, soft law, and that are emerging through RFMO practice, as examined in this chapter, are enough for market conditionality in fisheries to also constitute meaningful interactions. This means, as concluded in chapter 5,

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[1523] For a more detailed discussion on how affected industry can challenge measures in the context of WTO, see Gregory Schaffer *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press, 2003).

[1524] Alternatively, in the case of the EU, issues of maladministration by the Commission or Council falls within the mandate of the European Ombudsman. Though the Ombudsman cannot normally deal with complains from non EU citizens unless they are a resident in an EU member country, it can decide to open an own-initiative inquiry. Anyone can fill out the complaint form online. This *could* provide a way to investigate a yellow card, or for an indirectly affected private party to prompt the investigation of a blacklisting decision that its government is not ready to challenge.

that market conditionality should be structured around justificatory processes. Even without going as far as to demand decisional participation (voting rights), non-decisional participation can and should allow for all relevant actors to collectively engage with the underlying fisheries norms through a process of argument and persuasion. It was concluded that market conditionality should be built around a formalised interactive dialogue process with at least affected parties and ideally a broader group of stake holders. This requires broad transparency, in particular concerning the conditions for market access and the reasons for denying it.

The procedural standards that this chapter looked at are certainly a step in the right direction. In particular if *US – Shrimp* is followed and market states should try and seek a multilateral solution prior to adopting market restrictions.[1525] Similarly, the Tribunal in *Chagos* put an emphasis on the need for a reasoned exchange and, in the case at hand, the affected party should have had further opportunities to respond and exchange views.[1526] This all points at a need to stimulate dialogue. It moreover follows from *EC – Seal Products* that market conditionality in fisheries should be based on clear criteria concerning the conditions in which certain products will be subject to market restrictions, rather than broad discretion.[1527] That this is important for fairness and accountability has already been highlighted. It is also important to allow affected parties to understand the reasons for market conditionality (what international fisheries norms require), and thereby, engage with these underlying norms.

But through these standards *can* be interpreted as stimulating meaningful interactions, they do not require a formalised dialogue. To create dialogue, countries must have the opportunity to contest and reason with the issues at hand. The closest we get to such a standard is the need for a reasoned exchange, advocated in *Chagos*, where the UK had moreover given the reasonable expectation of more follow up with the country to be affected (Mauritius), and where not doing so was deemed to be contrary to the law.[1528] Stronger normative support is needed for a formalised procedure that can stimulate dialogue between the market state and the affected state. This could perhaps be achieved by having a defined

[1525] *US – Shrimp*, Appellate Body report (supra note 123), paras. 169-171.
[1526] *Chagos* (supra note 238), para. 534.
[1527] *EC – Seal Products*, Appellate Body report (supra note 1118), para. 5.327
[1528] *Chagos* (supra note 238), para. 534.

period in which interactions can take place between the regulating market state and the country that will be affected by a decision.

As far as the EU's measures are concerned, their main shortcomings towards achieving meaningful interactions have already been addressed. But progress is being considered. In 2015, representatives from the European Commission, national governments, industry, and NGO came together to discuss the methodology for carding third countries under the EU IUU Regulation and to generate constructive dialogue between the Commission and stakeholders on key issues.[1529] One of the things that came out of this meeting was a call for increased consideration for the reputation risks for third countries, in particular considering the risk of collateral damage to legitimate operators whose businesses may be jeopardised by the poor practice of others. Importantly, though the representatives in the room concluded that third country experience of the EU carding process has been largely positive, they also called for further transparency in the carding process and fairness in its application. It was said that dialogue and cooperation are the cornerstones of the EU's IUU fishing policy in relation to third countries, and participants encouraged greater collaborative engagement and informative exchange between government officials, NGOs, and stakeholders in third countries to ensure that these activities are mutually reinforcing. In so doing, participants highlighted different elements that would contribute to meaningful interactions, and to a fair process. This is an encouraging step.

8.5. Conclusion

This chapter has drawn on trade law, international fisheries norms and obligations, and RFMO practice to support the finding that a great deal of transparency is required in global fisheries governance in general, and in particular in the adoption of market measures in compliance with the rules of the WTO. When a state relies on one of the exceptions in Art. XX GATT to justify market restrictions, it must not abuse this right. The market state must have due regard to the legal rights of others under the GATT. This has procedural implications similar to those under the law of the sea regime. Chapter 6, section 6.5.2 likewise concluded that market restrictions adopted as part of a market conditionality mechanism may fall within the scope of Art. 194(4) LOSC and therefore may not unjustifiably interfere with the activities of other states in the exercise of their rights and

[1529] Supra note 42.

obligations of the LOSC, and will have to be adopted in good faith, and not constitute an abuse of right (Art. 300 LOSC).

The implications of this are similar for both the WTO regime and the law of the sea. The market state will have to engage in meaningful consultations with the affected state, which as confirmed in *Chagos*, implies a reasoned exchange between the parties. This will likely mean that sufficient information is given to affected countries, in a timely manner. Moreover, the regulating market state will have to consider alternative measures, and internally weigh and balance the rights and interests at stake. Market measures must then be administered fairly, in so far that market conditionality in fisheries should be transparent, not open to broad discretion, but rather based on clear criteria concerning the conditions in which certain products will be subject to market restrictions. A decision *not* to grant market access should be reasoned. International soft law in fisheries moreover supports a finding that a wide range of stakeholders should be included in decision-making processes in global fisheries. In the context of decision-making in RFMOs, Art. 12 Fish Stocks Agreement provides a clear legal basis for this for NGOS and international organisations.

Though they are a step in the right direction, these standards still fall short of requiring meaningful interactions. There is a need for formalised dialogue, allowing for clear opportunities to contest and reason with decisions. In order to be perceived as procedurally fair and truly promote compliance and norm development, these requirements should be respected throughout all the stages of dialogue. In the case of the EU IUU Regulation, this means that the yellow card should not only be seen as a means to make the blacklisting process more transparent. The yellow card plays a much more important role in practice, and the process leading up to a yellow card decision should also be procedurally fair and interactional.

9. Conclusion: the good, the bad, and the fishy

When making market access conditional upon compliance with international fisheries norms and obligations, as under the EU IUU and Non-Sustainable Fishing Regulations, the market state may be seen as acting out of a moral duty to protect and preserve the marine environment. This thesis suggested that, in so doing, the market state engages in the global administration of fisheries, alongside bodies like the FAO and RFMOs. It helps operationalise international fisheries norms, and has the potential to promote compliance with them. However, this also raises questions. By flexing its "market muscles" through the EU IUU and Non-Sustainable Fishing Regulations, the EU greatly affects third country law and policy, as well as the livelihoods of many people.[1530] In making decisions on when a third country has failed to comply with international norms and obligations, the EU enjoys a great deal of discretion. The risk exists that its determinations are made in an arbitrary manner, without giving regard to the interests of those affected. There is an inherent danger of bias in a single market state like the EU deciding on when others have fulfilled their international (fisheries) obligations, in the absence of a workable international benchmark.[1531] There is the risk that the market state acts as a "surrogate regulator", and puts an unjustifiably heavy burden on others, in particular on developing countries, or even shift responsibilities so as to benefit itself.[1532] These and other concerns over the EU's behaviour have triggered a growing scholarly interest in the topic, to which this thesis has contributed further.[1533]

This thesis asked under what conditions such market conditionality in fisheries can nevertheless be 'appropriate', and evaluated whether the EU IUU and Non-Sustainable Fishing Regulations fulfil these conditions. Three separate though overlapping angles of 'appropriateness' were examined: the legality of market conditionality in fisheries, the extent to which it can promote compliance and norm development, and under what conditions (procedural) fairness can be ensured.

[1530] Arron N Honniball (supra note 59), p. 3, capturing the phrase that "the EU flexes its market and port state muscles" through the EU IUU country blacklisting mechanism.

[1531] Joanne Scott (supra note 169), p. 9, building on the first- and second order responsibility distinction developed by Simon Caney (Simon Caney (supra note 571)), in the context of the EU using its market power to encourage third countries to live up to their responsibilities in the context of climate change.

[1532] Ibid.

[1533] Martin Tsamenyi and others (supra note 1082), p. 52; Antonia Leroy, Florence Galletti and Christian Chaboud (supra note 87) ; Eva R. van der Marel (supra note 24); Juan He (supra note 64).

Thinking of market conditionality mechanisms as part of a global administration in fisheries helped to think about the procedural standards and mechanisms that can promote fair decision making processes. An interactional law approach was moreover applied to understand under what conditions market state action can truly promote compliance and norm development. The position was developed that they can do so by being congruent with underlying fisheries norms and complying with international law, and by creating meaningful interactions. It was shown that treaties, soft law, and jurisprudence developed in WTO law and the law of the sea all contain standards that can contribute to this. Moreover, a look at RFMOs (other global administrative bodies in fisheries) revealed a growing call for, and application of, standards that can help ensure fair decision-making, including in the specific context of adopting market measures. Whether or not these standards found in law and practice sufficiently reflect the conditions under which market conditionality in fisheries can be deemed appropriate, remains a matter of debate. It was concluded that they are a step in the right direction, but that clear normative support for a formalised dialogue process between the market state and affected states remains lacking.

The EU makes market access conditional upon compliance with fisheries norms and obligations that arise from general framework treaties and soft law. It examines this through the lens of states' duties as flag-, coastal-, port- or market state to prevent, deter, and eliminate IUU fishing (IUU Regulation), on the one hand, and to cooperate over the sustainable exploitation of transboundary stocks shared with the EU (Non-Sustainable Fishing Regulation), on the other. When third countries fail to comply, they are eventually blacklisted, and denied various economic benefits, the most important being market access.

It was shown that the mechanisms under these two Regulations may fall short of WTO law, but could (with some amendments) likely be constructed in such a way as to be compliant. They also harbour true potential to support compliance and norm development in international fisheries law, and to do so fairly. However, this potential is not yet fully realised. This is in particular evident from the implementation of the EU IUU Regulation's country blacklisting mechanism, which has grown into a powerful tool that is increasingly frequently being put in practice.

The process under the EU IUU Regulation leading up to country blacklisting is both exemplary of how to stimulate meaningful interactions, and how the exercise of global

administrative action in this area could benefit from improvements. This is partly due to the dual role of the yellow card.

Seen from one perspective, the yellow card is a step towards ensuring fair process when restricting market access by way of blacklisting. A yellow card decision is published in the Official Journal, publicly available, and sent to the affected country. It is transparent, in so far that it contains various pages of reasoning to justify the Commission's decision, by reference to criteria set out in the Regulation. Since the yellow card is formally only a warning, it effectively gives timely insight into the Commission's reasoning, and allows the carded country to respond, and to rectify the situation. This process was described as one of close cooperation with the Commission, though it is questionable how much carded countries can truly contest the Commission's views, given the risk of market restrictions. It was also shown that some improvements are needed. There is a documented lack of clarity over the criteria that are used to decide whether or not a country has failed its international obligations, which has repeatedly been mentioned as being a major flaw of the IUU Regulation.[1534] Though the Commission's reasoning in the yellow card is generally lengthy and heavy on factual evidence, this thesis also criticised it for lacking clear legal analysis in various respects. Clear criteria would invite a more prepared and informed discussion from both sides. Nevertheless, if the yellow card and surrounding dialogue process are only seen as *part* of the procedure towards blacklisting and market measures, then it is a good step in the direction of meaningful interactions and a fair process.

However, this is only part of the picture. There is the possibility that the yellow card stage may be skipped in the case of repeat infringements. The Commission told Papua New Guinea upon the removal of their yellow card that the "next time round" they would be blacklisted *without* going through the yellow card process.[1535] Of course, this may simply have been an incorrect and inappropriate statement by a single Commissioner, and not be representative of official EU policy. But if this were to be implemented in practice, this would take an important interactional element out of blacklisting, and moreover deny a blacklisted country due process. The issues for which Papua New Guinea or indeed any third

[1534] Steve Dunn (supra note 95), p. 7, 33, 25 (also noting that throughout the yellow card process with Papua New Guinea, the EU's goal posts kept shifting, which prevented a good understanding of what the discussion was about); Shelley Clarke and Gilles Hosch (supra note 597).

[1535] Steve Dunn (supra note 95), p. 34, who points out that whilst this may be EU policy, it does not appear supported by the text of the IUU Regulation itself.

country would be blacklisted in the case of repeat infringements would necessarily be new issues, even if they repeated previous offences. A determination that a country has failed its international obligations is always circumstantial. If previous issues have been satisfactorily solved (the yellow card was lifted), any new determination would be based on new facts that merit a new, fair, process.

More importantly, it does not reflect reality to think of the yellow card as only part of the process towards blacklisting. The yellow card is commonly perceived as 'punishment' in and of itself. It is effectively a determination by the biggest fish market in the world that a country does not comply with international law. This thesis pointed to the significant reputational consequences that follow from a yellow card determination, both directly and indirectly, because the EU's carding determinations are increasingly seen as a yardstick for evaluating a country's level of compliance.[1536] The risks of being issued a yellow card must be taken seriously.[1537] I posit that the yellow card should be examined as a stand-alone measure, and not only a prelude to blacklisting. This invites a reform of the pre-yellow card process, which is currently not formalised, and is neither perceived as fair nor always stimulates meaningful interactions. As demonstrated, it is first of all unclear which countries are targeted and why. The concern has been voiced that the choice of who to target and whether or not to lift or grant a yellow card appears (at least appeared) to be driven by a single Commissioner, and to be politically motivated.[1538] There is no set timeline for the pre-yellow card process (from the first questionnaire and mission(s) abroad to the point of issuing a yellow card), nor is there a transparent procedure of the steps that will be undertaken. Yellow card determinations are sometimes applied too hastily, without there being the opportunity to contest the Commission's claims and address the concerns at hand.[1539] On the whole, there is a documented lack of transparency concerning the pre-yellow card process, both to outsiders (documents are not publicly available and are difficult to obtain, even on request) and to affected countries themselves.[1540] For instance, the concern has been raised that the Commission uses reports produced by private consultants for other purposes (such as direct support to third countries to comply with EU legislation) to inform its carding decisions,

[1536] Supra notes 63, 95 and surrounding text.
[1537] Steve Dunn (supra note 95), p. 5.
[1538] Ample anecdotal evidence exists. See also interviews with Richard Banks (Advisor, MFMR and FFA consultant) and Francisco Blaha (supra note 609).
[1539] Steve Dunn (supra note 95), p. 5, 6, that Papua New Guinea was denied the opportunity to present its case prior to the yellow card.
[1540] Carlos Palin and others (supra note 40), p. 156.

creating a situation of mistrust that is not conducive to meaningful interactions.[1541] This mistrust is not helped by Europe's colonial history, and generally, the EU's poor reputation in monitoring and managing its own external fleet, and its poor track record in sustainably managing its own fisheries.[1542]

The dialogue process itself could benefit from improvement. According to some observations, meetings between EU and third country officials were "definitely not" perceived as a cooperative environment; rather, "meetings were very confrontational, with EU passing value judgement."[1543] It has however also been observed by some that the Commission recognises the challenges that targeted countries face, and that it "appreciates dialogue".[1544] In any event, this thesis demonstrated that the length and depth of the Commission's dialogue varies wildly, in some cases organising video conferences, meetings in Brussels, and so on, but not in others.

Applying the standards of appropriateness identified in this thesis (to ensure fair decision-making and to allow the market state to truly promote compliance and norm development) also to the pre-yellow card process would go a long way towards addressing the issues set out above. It can make the carding process procedurally fairer, and thereby alleviate some of the concerns that the yellow card itself cannot be brought before a court. Absent clear, direct implications on international trade, the yellow card falls outside the scope of WTO dispute settlement, nor is it likely that it can be challenged before another international court or the CJEU. Applying these standards would also emphasise the need to seek a multilateral approach prior to issuing a yellow card, and to engage in a reasoned exchange with the country to be affected *before* a decision is made. Clarity over the criteria used by the Commission (what it believes international fisheries norms to require) would

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[1541] Richard Banks (supra note 1538), Francisco Blaha (supra note 609), and Gilles Hosch (private communication) suggesting that visits to South-East Asia and Pacific countries in 2011, and the resulting reports submitted by consultants under the EU Europaid/129606/D/SER/Multi. "Assist Third Countries in the Implementation of the EU-IUU Fishing Regulation (EC 1005/2008)", became an integral part of the Commission's yellow card strategy, although this was not officially made known, and despite the fact that the Commission had provided assurances to the same consultants that it would not use the information provided for the purpose of carding. Consultants under the program were assisting the countries in question; not auditing them. Yet in practice, the reports provided were (unofficially) used to prepare for pre-yellow card missions, and to draft yellow card decisions.

[1542] Vlad M Kaczynski and David L Fluharty (supra note 448), p. 78; Tobias Belschner (supra note 1272), p. 987; Vanya Vulperhorst *et al*, 'Fishing the Boundaries of Law: How the Exclusivity Clause in EU Fisheries Agreements was Undermined' (Oceana, 2017).

[1543] Richard Banks (supra note 1538).

[1544] Interview with Jope Tamani (FFA trade development advisor) (4 May 2015) (on file with author).

moreover address both the feeling of arbitrary decision making and allow for discussion to take place over how international fisheries norms should be interpreted (collective engagement with fisheries norms).[1545]

However, to allow EU market conditionality to truly encourage compliance and help develop international fisheries norms further, there is a need for more. Meaningful interactions have to be a two-way street. Both the pre- and post-yellow card dialogue process should be formalised, with a clear timeline, and with clear opportunities for the country to be affected to contest decisions and to reason with the issues at hand. Contestation should take place not only after the fact (either directly under the regulating country's dispute settlement or through international litigation).[1546] Affected countries must also be able to contest a decision before it is made, *including* where this concerns the yellow card. The lack of an opportunity to exchange views and contest the yellow card determination before it was issued has been noted as an issue of concern. Officials from Papua New Guinea felt that the EU should have communicated to them that a yellow card was going to be issued, so as to "allow them to prepare for this potential occurrence, and to make submissions to Commissioners".[1547] The fact that this did not occur was considered a serious weakness in the procedure.

The problems that the EU IUU Regulation give rise should not be seen as discouragement. The "hard work" of maintaining and building compliance with international law is never done.[1548] Without it, the future of the world's fisheries looks bleaker still. I emphasise once more that the market state has an important role to play alongside the flag-, coastal-, and port state. That market states are taking up this responsibility, is encouraging. The main drive for the EU's actions does not appear to be just 'pointing fingers' at laggard states (although it certainly does, and it is perceived this way). Many of the countries targeted by the EU do not (yet) export fish or fish products to the EU, but are important supply chain countries for fish that ends up on the EU market. By cleaning up the supply chain, the EU thus takes responsibility for its contribution to illegal fishing and other unsustainable fishing

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[1545] The feeling that some countries got off the hook very easily compared to others is widespread (e.g. Jope Tamani (Ibid.); Richard Banks (supra note 1538); Francisco Blaha (supra note 609)).
[1546] The need for a formal legal procedure for review of, or appeal from, a denial of market access was highlighted in *US – Shrimp*, Appellate Body report (supra note 123), para. 183.
[1547] Steve Dunn (supra note 95), p. 5.
[1548] Jutta Brunnée and Stephen Toope (supra note 159), p. 352.

practices.[1549] However, encouraging non-exporting countries to comply with their obligations by leveraging market access is only effective if these countries risk significant reputational damage, or want to seek market access in the future. This further underscores the need to focus on creating meaningful interactions that can lead targeted countries to engage and reason with the market state's decisions, and thereby, to collectively engage with international fisheries norms. If the market state truly wants to effect long term change, its main focus should be on creating a fair and interactional process through which to cooperate with other countries, in line with international law.

[1549] Which is why market states can be considered as acting out of a moral duty to protect and preserve the marine environment. This is in line with Joanne Scott's theory that the EU often acts out of a sense of complicity (Joanne Scott (supra note 41)).

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Fisheries Jurisdiction (United Kingdom v. Iceland) (Judgment), 25 July 1974, ICJ Reports 1974, p. 3

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M/V "Louisa" (Saint Vincent and the Grenadines v. United Kingdom of Spain), 28 May 2013, ITLOS Reports 2013, p. 4.

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M/V "Saiga" (Saint Vincent and the Grenadines v. Guinea) (Judgment), 4 December 1997, ITLOS Reports 1997, p. 16

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Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment), 20 April 2010, ICJ Reports 2010, p. 14

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US — Countervailing and Anti-Dumping Measures (China), 7 July 2014, Appellate Body report (WT/DS449/AB/R)

US – Gasoline, 29 April 1996, Appellate Body report (WT/DS2/AB/R)

US – Gasoline, 29 January 1996, Panel report (WT/DS2/R)

US – Shrimp, 12 October 1998, Appellate Body report (WT/DS58/AB/R)

US – Shrimp, 15 May 1998, Panel report (WT/DS58/R)

US – Tuna (EEC), 16 June 1994, Panel report (DS29/R)

US – Tuna I (Mexico), 3 September 1991, Panel report (DS21/R - 39S/155)

US – Tuna II (Mexico) (Art. 21.5), 14 April 2015, Panel report (WT/DS381/RW)

US – Tuna II (Mexico) (Art. 21.5), 20 November 2015, Appellate Body report (WT/DS381/AB/RW)

US – Underwear, 10 February 1997, Appellate Body report (WT/DS24/AB/R)

Western Sahara (Advisory Opinion), 16 October 1975, ICJ Reports 1975, p. 12

Annex I

Country	Commission Decision Notifying of possibility to be identified as a non-cooperating third country (yellow card)	Notice of end of demarches (yellow card lifted)	Commission Decision identifying as a non-cooperating third country (red card) & Council Implementing Decision to add country to list of non-cooperating third countries (blacklist)	Council Implementing Decision to Remove from blacklist
Belize	Commission Decision of 15 November 2012 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 17 November 2012, OJ C354/1		Commission Decision of 26 November 2013 on notifying the Third Countries that the Commission considers as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 27 November 2013, OJ C346/2 Council Implementing Decision of 24 March 2014 establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate	Council Implementing Decision of 15 December 2014 amending Implementing Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing as regards Belize, 17 December 2014, L360/53

			illegal, unreported and unregulated fishing, 27 March 2014, OJ L91/43	
Cambodia	Commission Decision of 15 November 2012 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 17 November 2012, OJ C354/1		Commission Decision of 26 November 2013 on notifying the Third Countries that the Commission considers as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 27 November 2013, OJ C346/2 Council Implementing Decision of 24 March 2014 establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 27 March 2014, OJ L91/43	
Comoros	Commission Decision of 1 October 2015 on notifying a Third Country of the possibility of being identified as non-cooperating third country in fighting illegal, unreported and unregulated fishing, 2 October 2015, OJ C324/7		Commission Implementing Decision (EU) 2017/889 of 23 May 2017 identifying the Union of the Comoros as a non-cooperating third country in fighting illegal, unreported and unregulated fishing, 24 May	

			2017, OJ L135/35 Council Implementing Decision (EU) 2017/1332 of 11 July 2017 amending Implementing Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting illegal, unreported and unregulated fishing, as regards the Union of the Comoros, 18 July 2017, OJ L185	
Curacao	Commission Decision of 26 November 2013 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 27 November 2013, OJ C346/26	Notice of information of the termination of the demarches with a third country notified on 26 November 2013 of the possibility of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 24 February 2017, C60/5		
Fiji	Commission Decision of 15 November 2012 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a	Notice of information of the termination of the demarches with third countries notified on 15 November 2012 of the possibility of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a		

	Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 17 November 2012, OJ C354/1	Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 15 October 2014, OJ C 364/2		
Ghana	Commission Decision of 26 November 2013 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 27 November 2013, OJ C346/26	Notice of information of the termination of the demarches with third countries notified on 26 November 2013 of the possibility of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 2 October 2015, OJ C 324/15		
Guinea	Commission Decision of 15 November 2012 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 17 November 2012, OJ C354/1		Commission Decision of 26 November 2013 on notifying the Third Countries that the Commission considers as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 27 November 2013, OJ C346/2 Council Implementing Decision of 24 March 2014 establishing a list of	Council Implementing Decision (EU) 2016/1818 of 10 October 2016 amending Implementing Decision 2014/170/EU to remove the Republic of Guinea from the list of non-cooperating third countries in fighting illegal, unreported and unregulated fishing, 14 October 2016, OJ L 278/46

			non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 27 March 2014, OJ L91/43	
Kiribati	Commission Decision of 21 April 2016 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing, 23 April 2016, C 144/4			
Liberia	Commission Decision of 23 May 2017 notifying the Republic of Liberia of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing, 30 May 2017, C 169/11			
Panama	Commission Decision of 15 November 2012 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter	Notice of information of the termination of the demarches with third countries notified on 15 November 2012 of the possibility of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter		

	and eliminate illegal, unreported and unregulated fishing, 17 November 2012, OJ C354/1	and eliminate illegal, unreported and unregulated fishing, 15 October 2014, OJ C 364/2		
Philippines	Commission Decision of 10 June 2014 on notifying a Third Country that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 17 June 2014, C185/17	Notice of information of the termination of the demarches with a third country notified on 10 June 2014 of the possibility of being identified as non-cooperating third country pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 29 April 2015, C 142/6		
PNG	Commission Decision of 10 June 2014 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 17 June 2014, OJ C185/2	Notice of information of the termination of the demarches with a third country notified on 10 June 2014 of the possibility of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 2 October 2015, C 324/16		
Sierra Leone	Commission Decision of 21 April 2016 on notifying a third country of the possibility of being identified as a non-cooperating third			

	country in fighting illegal, unreported and unregulated fishing, 23 April 2016, C 144/9			
Solomon Islands	Commission Decision of 12 December 2014 notifying a third country that the Commission considers as possible of being identified as non-cooperating third country pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing	Notice of information of the termination of the demarches with a third country notified on 12 December 2014 of the possibility of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 24 February 2017, C 60/6		
South Korea	Commission Decision of 26 November 2013 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 27 November 2013, OJ C346/26	Notice of information of the termination of the demarches with third countries notified on 26 November 2013 of the possibility of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 29 April 2015, OJ C 142/5		
Sri Lanka	Commission Decision of 15 November 2012 on notifying the Third Countries that the Commission considers as		Commission Implementing Decision of 14 October 2014 identifying a third country that the Commission	Council Implementing Decision (EU) 2016/992 of 16 June 2016 amending Implementing

	possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 17 November 2012, OJ C354/1		considers as a non-cooperating third country pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 15 October 2014, OJ L 297/13 Council Implementing Decision (EU) 2015/200 of 26 January 2015 amending Implementing Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing as regards Sri Lanka, 10 February 2015, OJ L 33/15	Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing as regards Sri Lanka, 21 June 2016, OJ L 162/15
St Kitts and Nevis	Commission Decision of 12 December 2014 notifying a third country that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate			

	illegal, unreported and unregulated fishing, 13 December 2014, C 447/16			
St Vincent and the Grenadines	Commission Decision of 12 December 2014 notifying a third country that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 17 December 2014, OJ C 453/5		Commission Implementing Decision (EU) 2017/918 of 23 May 2017 identifying Saint Vincent and the Grenadines as a non-cooperating third country in fighting illegal, unreported and unregulated fishing, 30 May 2017, OJ L 139/70 Council Implementing Decision (EU) 2017/1333 of 11 July 2017 amending Implementing Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting illegal, unreported and unregulated fishing, as regards Saint Vincent and the Grenadines, 18 July 2017, OJ L 185/41	
Taiwan	Commission Decision of 1 October 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing, 2 October 2015, OJ C324/17	Notice of information on the termination of the demarches with a third country notified on 1 October 2015 of the possibility of being identified as a non-cooperating third country pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated		

		fishing, 2 July 2019, OJ C 221/2		
Thailand	Commission Decision of 21 April 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing 29 April 2015, OJ C142/7	Notice of information of the termination of the demarches with a third country notified on 21 April 2015 of the possibility of being identified as a non-cooperating third country pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 9 January 2019, OJ C 6/6		
Togo	Commission Decision of 15 November 2012 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 17 November 2012, OJ C354/1	Notice of information of the termination of the demarches with third countries notified on 15 November 2012 of the possibility of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 15 October 2014, OJ C364/2		
Trinidad and Tobago	Commission Decision of 21 April 2016 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated			

	fishing, 23 April 2016, OJ C144/14.			
Tuvalu	Commission Decision of 12 December 2014 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing, 13 December 2014, OJ C 447/23	Notice of information of the termination of the demarches with a third country notified on 12 December 2014 of the possibility of being identified as a non-cooperating third country pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 19 July 2018, OJ C 253/28		
Vanuatu	Commission Decision of 15 November 2012 on notifying the Third Countries that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 17 November 2012, OJ C354/1	Notice of information of the termination of the demarches with third countries notified on 15 November 2012 of the possibility of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, 15 October 2014, OJ C 364/2		
Vietnam	Commission Decision of 23 October 2017 notifying the Socialist Republic of Vietnam of the possibility of being identified as non-cooperating third country in fighting			

	illegal, unreported and unregulated fishing, 27 October 2017, OJ C364/3			

Annex II

The following is a list of Action Plans obtained from the European Commission upon request over the course of this research (on file with author).[1550]

Country	Date	Reference
Fiji	17 December 2014	Ares(2014)4257754
Panama	17 December 2014	Ares(2014)4257754
Sri Lanka	17 December 2014	Ares(2014)4257754
Togo	17 December 2014	Ares(2014)4257754
Vanuatu	17 December 2014	Ares(2014)4257754
Belize	29 April 2015	Ares(2015)1821356
Cambodia	29 April 2015	Ares(2015)1821356
Guinea (Republic of)	29 April 2015	Ares(2015)1821356
Korea	29 April 2015	Ares(2015)1821356
Philippines	29 April 2015	Ares(2015)1821356
Papua New Guinea	29 April 2015	Ares(2015)4868164
Ghana	5 November 2015	Ares(2015)4868164

[1550] Action Plans for countries subject to a yellow or red card that has not yet been lifted are kept confidential. Action Plans for countries whose card has been lifted can be requested following an official request for documentation (available at: https://www.consilium.europa.eu/en/documents-publications/public-register/request-document/). The process is generally slow, and takes a few months.

Ref. Ares(2014)4257754 - 17/12/2014

The following Plan contains the suggested actions which Fiji should undertake in order to rectify the shortcomings identified in Commission Decision in order to avoid being proposed for formal listing as a non-cooperating third State, within the meaning of Article 33 of the Union's IUU Regulation and to the effects of Article 38 of the same Regulation.

Action	Description
Review of the Fiji fisheries legal framework in order to address the specific issues of the fight against illegal, unreported and unregulated (IUU) fishing activities and in order to comply with Fiji international obligation concerning the management of fishing activities conducted in international waters by vessels flagged to Fiji.	The Fiji Fisheries legislation should be revised to make it consistent with Fiji international obligations. The new legislation should make clear reference to the main international legal texts, to which the country has signed, acceded or ratified, addressing the international management of fisheries i.e.: -the United Nation Convention on the Law of the Sea (UNCLOS); -the United Nation Fish Stocks Agreement (UNFSA). The new Fiji fisheries legislation should include, in particular, specific legal measures aiming at preventing, deterring or eliminating the IUU fishing activities. This may be achieved by referring directly to the UNFSA, to the Food and Agriculture Organization (FAO) International Plan of Action against IUU fishing activities or by including provisions similar to the provisions provided in these international instruments. The licences attribution regime should be renewed in order to make clear that any IUU fishing activities would prevent from obtaining a new licence and will automatically result in a definite withdrawing of the licence. The Competent Fiji authorities should ensure that, in line with the provisions of Article 119 of the UNCLOS, the number of fishing vessels flagged to Fiji fulfil to the fishing capacity objectives defined by the regional organizations responsible for the area where Fiji flagged vessels operate. The Competent Fiji authorities should complement the above action with a set of criteria permitting to prioritise the registration of new fishing vessels. The new legislation should also include a dedicated part with specific management rules applying to the management of the off shore fleet fishing outside the Fiji Exclusive Economic Zone (EEZ). This chapter should include a specific authorisation and control system and should

	define all the applicable rules for the certification of catches and landings.
Compliance with the international rules applying to the management of fishing resources.	Fiji should revise, in line with Article 117 of the UNCLOS, Articles 18 and 19 of the UNFSA, its legislation in order to integrate the conservation and management measures deriving from the Regional Fisheries Management Organizations (RFMOs) from which Fiji is a member and in the area of which Fiji flagged vessels are operating, essentially the Western and Central Pacific Fisheries Commission (WCPFC).
Compliance with the flag States obligations regarding the registration and control of fishing vessels.	Fiji should define, Article 94 of the UNCLOS and Article 18 (2) and (3) of the UNFSA, in its legislation specific criteria applicable to the registration of fishing vessels, in order to avoid the registration of vessels having or suspected to have committed IUU activities. Fiji should set a procedure, prior to registration of new fishing vessel, aiming at ensuring that these vessels have not been involved in illegal fishing activities in the past. Fiji should also set up rules for the de-listing of fishing vessels having committed illegal fishing activities. Fiji should also correlate the number of fishing vessels registered (size of fleet) with it's actual control capacities of its Competent authorities. This action should take into consideration the international obligations of Fiji as well as the management measures for the limitation of the fishing capacity put in place in areas where the vessels are supposed to operate.
Compliance with the obligation to control fishing vessels activities and with the obligations relying on port States.	Fiji should fulfil its flag State obligation (in line with Article 18 (3)(g) of the UNFSA) to control the fishing activities realised by vessels fishing under its flag as well as its port State control obligation (in line with Article 23 of the UNFSA). The Competent Fiji authorities should carry on systematic crosschecking of logbooks with offloading data. Fiji should adopt an appropriate implementing act including, *inter alia*, a program of random physical controls realised at port, even when realised abroad. Fiji should introduce an electronic reporting obligation schemes (e-logbook, prior notification) in the national legislation in order to improve the quality and level of control. An electronic system would permit control "on real time" and not in a one month delay as currently occurring, which is not consistent with an efficient control policy of catches. The Competent Fiji authorities should realise controls at the moment of the landing, at least for part of them, following a random or risk based program, in order to deter false declarations and in order to limit the level of approximation in landings evaluations. The level of control of the long distance fleet should be increased with more frequent catching declarations (once a week, or even daily if electronic reporting would be introduced) and in

	applying a program of controls at sea. Fiji should increase its participation in regional cooperation for the control at sea in order to compensate its lack of naval means. To facilitate the physical control operations, Fiji should instruct its vessels to land their catches in a limited number of designated harbours where Fiji is effectively able to carry out landing controls, by itself or in the framework of a cooperation agreement.
Compliance with the obligations made to flag State and coastal States to regulate transhipments.	Fiji should not authorize, in line with Articles 18 and 23 of the UNFSA, transhipment operation in absence of effective controls and should improve the cooperation with third countries, at a regional level, to increase its capacity to control the transhipments at sea and carry out systematic prosecutions when such operations are signalled in absence of control and authorization.
Strengthening the effective implementation of international rules and management measures through an adequate regime of sanctions.	Fiji should, in line with Articles 19 and 21 of the UNFSA, review its legislation to increase significantly the level of sanctions, in particular in case of repetitive infringement to RFMOs Conservation and Management Measures. Fiji should also set a deterrent regime of administrative sanctions where the level of administrative sanctions in the form of fines/fees decided by the Fisheries Department should be in proportion with the level of incomes generated by the illegal activities at stake.
Improving the fishing products traceability.	The Competent Fiji authorities should make sure that the Fiji regulations ensure the fulfilment of rules as set out under Chapter III of the EU IUU Regulation. In particular the Competent Fiji authorities: should improve the requirements for operators on traceability between landings and processing or between landing and re-loading on carrier vessels in order to permit a precise identification of the origin of the fishing products (vessel, fishing area, period of catch). should set a procedure ensuring that when validating catch certificates, it makes sure that the weight of catches declared is in conformity with the weight of the consignment. should make sure that when validating catch certificates, the conservation and management measures referring to the fishing products exported are clearly indicated in the box 4 of the catch certificate and the transport details are presented by using the appendix 1 of the template of the catch certificate notified by Fiji.

Ref. Ares(2014)4257754 - 17/12/2014

The following Plan contains the suggested actions which Panama should undertake in order to rectify the shortcomings identified in Commission Decision in order to avoid being proposed for formal listing as a non-cooperating third State, within the meaning of Article 33 of the Union's IUU Regulation and to the effects of Article 38 of the same Regulation.

Action	Description
Correction of the administrative procedures in place for ensuring the reliability of the catch certification scheme, in particular by conducting verifications and crosschecking of information contained in the catch certificates.	The Competent Panamanian authorities should revise the existing legislation in line with Articles 94 of United Nation Convention on the Law of the Sea (UNCLOS) and Article 18 (3) (a) (b) (f) and (h) of the 1995 UN Fish Stocks Agreement (UNFSA) in order to have reliable sources of information for ensuring the efficient validation of catch certificates, set out under Chapter III of the EU IUU Regulation, by crosschecking of the information indicated by the economic operator in the catch certificates. These sources are among others: catch data, fishing licenses delivered by coastal States (in line with Article 18 (3) (b) (iv) of the 1995 UN Fish Stocks Agreement), Vessels Monitoring System (VMS) positions, transhipments and landing declarations.
Rectification of shortcomings identified regarding the activity of the Fisheries Monitoring Centre (FMC) in the framework of the catch certification scheme as well as in the framework of Regional Fisheries Management Organizations (RFMOs) of which the Republic of Panama is a Contracting Party or cooperating Non Contracting party.	The Competent Panamanian authorities should revise the existing legislation in line with Article 18 (2) (e) (g) (iii) and 18 (4) of the UNFSA order to correct the deficiencies identified in terms of human resources, in terms of availability of data on the fishing vessels positions in real time or historic data, in terms of methods used and training of the officials in charge. In addition, the FMC should be more closely involved in the catch certification scheme set out under Chapter III of the EU IUU Regulation.
Revision of the legal framework to remedy the insufficient empowerment of officials of the Competent Panamanian authorities to conduct actual administrative investigations and to require information from legal and natural person.	The Competent Panamanian authorities should revise the existing legislation in line with Article 19 (1) (b) (c) of the UNFSA in order to address the lack of empowerment of the fisheries administration that seriously undermines the efficiency of both the catch certification procedure set out under Chapter III of the EU IUU Regulation and the necessary verifications regarding compliance with the conservation and management measures concerned (e.g. absence of powers for requiring information from the economic operator, no access to the information on the identification of the beneficial owners of the vessels, no powers for conducting inspections on board or for carrying out administrative

	investigations).
Revision of the legal framework to remedy the legal constraints preventing the officials of the Competent Panamanian authorities from having prompt access to information on beneficial owners of vessels beyond companies registered under the Panamanian Registry of companies.	The Competent Panamanian authorities should revise the existing legislation in line with Article 18 (1) (2) and 19 (c) of the UNFSA. In particular, the legal framework should be modified for allowing prompt identification of beneficial owners of fishing vessels which can reply on the real fishing activities of the vessels. In addition, the officials of the Competent Panamanian authorities should be allowed to issue direct request for information to the beneficial owners.
Revision of the legal framework to remedy that lack of sufficient operational means to effectively monitor the long distance fishing fleet operating under the Panamanian flag.	The Competent Panamanian authorities should revise the existing legislation in compliance with Articles 94, 117, 118 UNCLOS and Article 18 (3) (a) and 19 (1) of the UNFSA in order to effectively control the vessels flying the flag of Panama in the High Seas. In particular, by ensuring effective monitoring of fishing vessels that can be engaged in IUU fishing activities.
Revision of the legal framework and efficient enforcement of the existing legal provisions in order to put in force a deterrent sanction system	The Competent Panamanian authorities should revise the existing legislation in line with Article 19 (1) (d) (e) of the UNFSA in order to establish effective and deterrent sanction system for the vessels flying the flag of the Republic of Panama in the High Seas. The new legislation should ensure an efficient recovery of the fines applied for depriving offenders of the benefits accruing from their illegal activities in line with the Article 19 (2) of the UNFSA.
Awareness raising on the implementation of the catch certification scheme	
Creation of reliable inspection scheme, observer programme, unloading reports, supervision of transhipment and monitoring of landing catches of the Panamanian flagged vessels operating in High Seas and third country fishing grounds or conducting landing activities outside the Exclusive Economic Zone (EEZ) of Panama.	The Competent Panamanian authorities should create in line with Article 18 (3) (f) and (g) of the UNFSA a reliable inspection scheme and an observer programme, unloading reports, supervision of transhipment and monitoring of landing catches in order to ensure an effective control on the activities of economic operators outside Panamanian EEZ and the control of the vessels flying the flag of Panama in the High Seas and third country EEZs.
Ensure compliance with reporting and recording obligations within RFMOs.	In line with Article 118 and 119 of UNCLOS and with Article 18 (e) of the UNFSA, the Competent Panamanian authorities should ensure the effective fulfilment of its reporting and recording obligations to the respective RFMOs.

Strengthening and improvement of cooperation with other States in the framework of RFMOS and bilaterally.	In line with Article 118 of UNCLOS and Article 20 of the UNFSA, the Competent Panamanian authorities should reinforce their cooperation in enforcement actions.
Registration of fishing vessels in the Registry of Vessels	The Competent Panamanian authorities should ensure that in line with the provisions of Article 91 of UNCLOS the conditions for granting of Panama nationality to fishing ships, for the registration of fishing vessels in its territory and for the right of fishing vessels to fly its flag ensure that there is a genuine link between Panama and the fishing vessels having its nationality.

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The following Plan contains the suggested actions which Sri Lanka should undertake in order to rectify the shortcomings identified in Commission Decision in order to avoid being proposed for formal listing as a non-cooperating third State, within the meaning of Article 33 of the Union's IUU Regulation and to the effects of Article 38 of the same Regulation.

Action	**Description**
Adopt a national plan of action for the fight against Illegal, Unreported and Unregulated (IUU) fishing.	The Competent Sri Lankan authorities should develop a national plan of action for the fight against IUU in line with the Food and Agriculture Organization (FAO) international plan of action on the same subject.
Adjustment of the administrative procedures in place for ensuring the reliability of the catch certification scheme, in particular by conducting verifications and crosschecking of information contained in the catch certificates.	The Competent Sri Lankan authorities should revise the existing legislation in line with Articles 94 of the United Nation Convention on the Law of the Sea (UNCLOS) and Article 18 (3) (a) (b) (f) and (h) of the 1995 UN Fish Stocks Agreement (UNFSA) in order to have reliable sources of information for ensuring the efficient validation of catch certificates, set out under Chapter III of the EU IUU Regulation, by crosschecking of the information indicated by the economic operator in the catch certificates. These sources are among others: log books, conditions in *fishing licenses,* Vessel Monitoring System (VMS) positions, transhipments and landing declarations.
Development of a vessel monitoring system for Sri Lankan vessels fishing in the convention area of Indian Ocean Tuna Commission (IOTC), outside the Sri Lankan Exclusive Economic Zone (EEZ), in the framework of the catch certification scheme as well as in the framework of IOTC of which Sri Lanka is a Member.	The Competent Sri Lankan authorities should revise the existing legislation in line with Article 18 (2) (e) (g) (iii) and 18 (4) of the UNFSA in order to correct the deficiencies identified in terms of availability of data on the fishing vessels positions in real time or historic data, in terms of methods used and training of the official in charge. An FMC (Fisheries Monitoring Centre) could be closely involved in the catch certification scheme set out under Chapter III of the EU IUU Regulation.
Revision of the legal framework to ensure compliance with international obligations in relation to high seas fisheries, in particular to authorise its vessels to fish outside its EEZ.	The Competent Sri Lankan authorities should revise the existing legislation in line with Article 18 (3) (a) (b) of the 1995 UNFSA in order to address the lack of control of its vessel in relation to both the catch certification procedure set out under Chapter III of the EU IUU Regulation and the necessary verifications regarding compliance with the conservation and management measures concerned.
Revision of the legal framework to remedy that lack of sufficient operational means	The Competent Sri Lankan authorities should revise the existing legislation in compliance

to effectively monitor the long distance fishing fleet operating under the Sri Lankan flag.	with Articles 94, 117, 118 of the UNCLOS and Article 18 (3) (a) and 19 (1) of the UNFSA in order to effectively control the vessels flying the flag of Sri Lanka in the High Seas. In particular, by ensuring effective monitoring of fishing vessels that can be engaged in IUU fishing activities.
Revision of the legal framework and efficient enforcement of the existing legal provisions in order to put in force a deterrent sanction system.	The Competent Sri Lankan authorities should revise the existing legislation in line with Article 19 (1) (d) (e) of the 1995 UNFSA in order to establish effective and deterrent sanction system for the vessels flying the flag of Sri Lanka in the High Seas. The new legislation should ensure an efficient recovery of the fines applied for depriving offenders of the benefits accruing from their illegal activities in line with the Article 19 (2) of the UNFSA.
Awareness raising on the implementation of the catch certification scheme.	
Creation of reliable inspection scheme, observer programme, unloading reports, supervision of transhipment and monitoring of landing catches by Sri Lankan flagged vessels operating in high seas and third country fishing grounds or conducting landing activities outside the EEZ of Sri Lanka as well as for third country fishing vessels landing in Sri Lanka.	The Competent Sri Lankan authorities should create in line with Article 18 (3) (f) and (g) of the UNFSA a reliable inspection scheme and a observer programme, unloading reports, supervision of transhipment and monitoring of landing catches in order to ensure an effective control on the activities of economic operators outside Sri Lankan EEZ and the control of the vessels flying the flag of Sri Lanka in the High Seas and third country EEZs. Full implementation of FAO Port State Measures Agreement in order to ensure proper monitoring of third country vessels landing in Sri Lankan and exchange of information with flag States of the third country vessels.
Ensure compliance with reporting and recording obligations within IOTC.	In line with Article 118 and 119 of the UNCLOS and with Article 18 (e) of the UNFSA, the Competent Sri Lankan authorities should ensure the effective fulfilment of its reporting and recording obligations to the IOTC.
Strengthening and improvement of cooperation with other States in the framework of IOTC and bilaterally.	In line with Article 118 of the UNCLOS and Article 20 of the UNFSA, the Competent Sri Lankan authorities should reinforce their cooperation in enforcement actions.

Le plan ci-dessous comprend les actions proposées au Togo pour qu'il remédie aux lacunes constatées dans la décision de la Commission afin d'éviter qu'il soit proposé de l'inscrire officiellement sur la liste des pays tiers non coopérants, au sens de l'article 33 du règlement INN de l'Union et aux effets de l'article 38 dudit règlement.

Action	Description
Révision du cadre juridique en vue de garantir la conservation et la gestion des ressources vivantes en haute mer.	Les autorités togolaises compétentes doivent revoir la législation existante conformément aux articles 117 et 118 de la convention des Nations unies sur le droit de la mer (CNUDM) et l'article 18, paragraphe 3, point a), de l'accord des Nations unies de 1995 sur les stocks de poissons (UNFSA), afin de contrôler efficacement les navires battant le pavillon du Togo en haute mer.
Révision du cadre juridique relatif à l'immatriculation des navires de pêche.	Les autorités togolaises compétentes doivent revoir la législation existante relative à l'immatriculation des navires de pêche conformément à l'article 94 de la CNUDM et à l'article 18, paragraphe 3, points b) à e) de l'UNFSA. En particulier, la nouvelle législation devra empêcher l'immatriculation sous le pavillon togolais de navires ayant précédemment été impliqués dans des activités de pêche INN, à moins de présenter des preuves concrètes et indéniables attestant que le propriétaire a changé et que le nouveau propriétaire ne partage aucun intérêt juridique, effectif ou financier, ni le contrôle de ces navires avec le propriétaire antérieur.
Révision du cadre juridique en vue de mettre en vigueur un régime de sanctions dissuasif.	Les autorités togolaises compétentes doivent revoir la législation existante conformément à l'article 19 de l'UNFSA, afin de mettre en place un régime de sanctions efficace et dissuasif pour les navires battant le pavillon du Togo en haute mer. En outre, la législation existante doit être appliquée de manière plus efficace afin de sanctionner plus systématiquement les infractions et les manquements, en particulier en ce qui concerne les activités de pêche INN avérées.

Révision du cadre juridique en vue de garantir une habilitation adéquate permettant d'exiger des informations et d'enquêter sur les activités des opérateurs, des propriétaires enregistrés et des propriétaires effectifs des navires de pêche battant le pavillon du Togo.	Les autorités togolaises compétentes doivent revoir la législation existante, conformément aux articles 94 et 117 de la CNUDM et à l'article 18, paragraphe 3, point a), de l'UNFSA, afin de contrôler efficacement les navires battant le pavillon du Togo en haute mer. L'autorité compétente doit être valablement habilitée à exiger des informations et enquêter sur les activités des opérateurs, des propriétaires enregistrés et des propriétaires effectifs des navires de pêche battant le pavillon du Togo.
Élaboration d'un programme d'inspection fiable, d'un programme d'observation et de rapports de déchargement, surveillance des transbordements et du débarquement des captures.	Les autorités togolaises compétentes doivent élaborer, conformément à l'article 18, paragraphe 3, points f) et g), de l'UNFSA de 1995, un programme d'inspection fiable, un programme d'observation et des rapports de déchargement, surveiller les transbordements et le débarquement des captures afin de garantir un contrôle efficace des activités des opérateurs économiques en dehors du Togo et le contrôle des navires battant le pavillon du Togo en haute mer.
Formation des observateurs togolais et des agents responsables des débarquements.	Tous les observateurs et agents responsables des débarquements doivent recevoir des instructions sur le programme d'inspection approprié, afin d'assurer le contrôle effectif des navires battant le pavillon du Togo en haute mer.
Obligations en matière de rapports et d'enregistrement.	Les autorités togolaises compétentes doivent garantir que les navires battant leur pavillon et opérant en haute mer ou dans des zones économiques exclusives étrangères (ZEE) qui relèvent d'une organisation de gestion des pêches (ORGP) sont bien immatriculés auprès de l'ORGP concernée et/ou opèrent avec une licence de pêche valable. Le cas échéant, le Togo doit s'engager à devenir un membre ou non-membre coopérant de l'ORGP concernée, et assurer le bon respect des obligations en matière de rapports et d'enregistrement vis-à-vis des ORGP concernées. Le Togo doit assurer une correspondance régulière avec les ORGP compétentes pour ses navires de pêche et responsables de la surveillance de leurs obligations.

Obligations en matière de système de surveillance des navires (VMS)	Les autorités togolaises compétentes doivent assurer la conception et la mise en œuvre efficaces du système de surveillance des navires, conformément à l'article 18, paragraphe 3, point g), de l'UNFSA de 1995 et dans le respect des règles établies par les ORGP concernées. Un fonctionnement sans faille du VMS doit être garanti.
Plan d'action régional sur la pêche INN (RPOA- INN) du Comité des pêches pour le Centre-Ouest du golfe de Guinée (FCWC).	Le Togo doit transposer dans sa législation les dispositions du RPOA-INN et doit veiller à l'application de ces dispositions conformément au calendrier établi au sein du FCWC. En se fondant sur le RPOA-INN, le Togo peut élaborer un plan d'action national pour lutter contre les activités de pêche INN.

The following Plan contains the suggested actions which Vanuatu should undertake in order to rectify the shortcomings identified in Commission Decision in order to avoid being proposed for formal listing as a non-cooperating third State, within the meaning of Article 33 of the Union's IUU Regulation and to the effects of Article 38 of the same Regulation.

Action	**Description**
Review of the Vanuatu fisheries legal framework in order to address the specific issue of the fight against illegal, unreported and unregulated (IUU) fishing activities.	Vanuatu should revise its legislation with the aim of adopting specific legal measures in order to prevent, deter or eliminate the IUU fishing activities. This may be achieved by referring directly to international legal texts which the country has signed, acceded or ratified, the United Nation Convention on the Law of the Sea (UNCLOS) and the 1995 United Nations Fish Stocks Agreement (UNFSA), as well as, to the Food and Agriculture Organization (FAO) International Plan of Action against IUU fishing activities or by including provisions similar to the provisions provided in these international instruments. The licences attribution regime should be renewed in order to make clear that any IUU fishing activities would prevent from obtaining a new licence and will automatically result in a definite withdrawing of the licence.
Compliance with the international rules applying to the management of fishing resources.	Vanuatu should, in line with Article 117 of the UNCLOS and Article 18 and 19 of the UNFSA, revise its legislation in order to integrate the conservation and management measures deriving from the different Regional Fisheries Management Organizations (RFMOS) in which Vanuatu is member and in the areas of which Vanuatu flagged vessels are operating, i.e. Indian Ocean Tuna Commission (IOTC), International Commission for the Conservation of Atlantic Tunas (ICCAT), Western and Central Pacific Fisheries Commission (WCPFC), Inter-American Tropical Tuna Commission (IATTC).
Ensure compliance with reporting and recording obligations within RFMOs.	Vanuatu should, in line with Articles 118 and 119 of the UNCLOS and Article 14 of the UNFSA, provide promptly to the different RFMOs it is member of, the different data and reports it has failed to provide in the past two years and should ensure adequate reporting and recording in the future.
Comply with the flag State obligations regarding the registration and control of fishing vessels.	Vanuatu should ensure that, in line with Article 94 of the UNCLOS and Article 18 (2) and (3) of the UNFSA, actions related to effective management of the fishing fleet, including licensing, data collection and control operations, are not realised by a private entity but by an independent public authority, legally empowered by the government and provided with adequate means. Concerning the management of the fleet, Vanuatu should define in its legislation specific criteria applicable to the

	registration of fishing vessels, in order to avoid the registration of vessels having or suspected to have committed IUU activities. Vanuatu should also correlate the number of fishing vessels registered (size of fleet) with its actual control capacities of its Competent authorities. This action should take into consideration the international obligations of Vanuatu as well as the management measures for the limitation of the fishing capacity put in place in areas where the vessels are supposed to operate.
Compliance with the obligation to control fishing vessels activities and with the obligations relying on port States.	Vanuatu should fulfil its flag State obligation (in line with Article 18 (3)(g) of the UNFSA) to control the fishing activities realised by vessels fishing under its flag as well as its port State control obligation (in line with Article 23 of the UNFSA). The Competent Vanuatu authorities should carry on systematic crosschecking of logbooks with offloading data. Vanuatu should adopt an appropriate implementing act including, *inter alia*, a program of random physical controls realised at port, even when realised abroad. Vanuatu should introduce an electronic reporting obligation scheme (e-logbook, prior notification) in the national legislation in order to improve the quality and level of control. An electronic system would permit control "on real time" and not in a one month delay as currently occurring, which is not consistent with an efficient control policy of catches. Vanuatu should conclude systematic agreements with the different third countries in which its vessels are landing their catches in order to ensure accurate and complete control of the landing by public agents authorised to certify the quantities off loaded. To facilitate the physical control operations, Vanuatu should instruct its vessels to land their catches in a limited number of designated harbours where Vanuatu is effectively able to carry out landing controls, by itself or in the framework of a cooperation agreement.
Compliance with the obligations made to flag State and coastal States to regulate transhipments.	Vanuatu should not authorize, in line with Article 18 and 23 of the UNFSA, transhipment operation in absence of effective controls and should improve the cooperation with third countries, at a regional level, to increase its capacity to control the transhipments at sea and carry out systematic prosecutions when such operations are signalled in absence of control and authorization.
Strengthening the effective implementation of international rules and management measures through an adequate regime of sanctions.	Vanuatu should, in line with Articles 19 and 21 of the UNFSA, review the level of certain sanctions, in particular in case of non-compliance with the data collection obligations or in case of repetitive infringement to RFMOs CMM. Vanuatu should also set a deterrent regime of administrative sanctions where the level of administrative sanctions in the form of fines/fees decided by the Fisheries Department should be in proportion with the level of incomes generated by the illegal activities at

	stake.
Improving the fishing products traceability.	The Competent Vanuatu authorities should ensure that the Vanuatu regulations ensure the fulfilment of rules as set out under Chapter III of the EU IUU Regulation. In particular the Competent Vanuatu authorities should improve the requirements for operators on traceability between landings and processing or between landing and re-loading on carrier vessels in order to permit a precise identification of the origin of the fishing products (vessel, fishing area, period of catch).
Registration of fishing vessels in the Registry of Vessels	The Competent Vanuatu authorities should ensure that in line with the provisions of Article 91 of UNCLOS the conditions for granting of Vanuatu nationality to fishing ships, for the registration of fishing ships in its territory and for the right of fishing ships to fly its flag and ensure that there is a genuine link between Vanuatu and the fishing ships having its nationality.

ANNEX I

The following Plan contains the suggested actions which Belize should undertake in order to rectify the shortcomings identified in Commission Decision in order to avoid being proposed for formal listing as a non cooperating third State, within the meaning of Article 33 of the Union's IUU Regulation and to the effects of Article 38 of the same Regulation.

Action	Description
Revision of the legal framework in order to ensure conservation and management of living resources in the High Seas.	The Competent Belizean authorities should revise the existing legislation in compliance with Articles 117 and 118 of the United Nation Convention on the Law of the Sea (UNCLOS) and Article 18 (3) (a) of the 1995 UN Fish Stocks Agreement (UNFSA) in order to effectively control the vessels flying the flag of Belize in the High Seas.
Revision of the legal framework and efficient enforcement of the existing legal provisions in order to put in force a deterrent sanction system.	The Competent Belizean authorities should revise the existing legislation (Registration of Merchant Ships Disciplinary Regulations) Article 19 of the UNFSA in order to establish effective and deterrent sanction system for the vessels flying the flag of Belize in the High Seas. Furthermore, the existing legislation shall be enforced more efficiently in order to sanction in a more systematic way infringements and violations.
Revision of the legal framework in order to ensure a proper empowerment to require information and to investigate into the activities of the operators, registered owners and beneficial owners of the fishing vessels flying the flag of Belize.	The Competent Belizean authorities should revise the existing legislation in compliance with Articles 91, 94 and 117 of the UNCLOS and Article 18 (3) (a) of the UNFSA in order to effectively control the vessels flying the flag of Belize in the high seas. The Belize Fisheries Department should be properly empowered to require information and to investigate into the activities of the operators, registered owners and beneficial owners of fishing vessels flagged to Belize
Revision of the legal framework in order to ensure that the competent authority notified in accordance with Article 20 (4) of the IUU Regulation (Belize Fisheries Department) is properly empowered within the catch certification procedure under the EU IUU Regulation. Proper implementation of the catch certification scheme under the EU IUU Regulation.	The Competent Belizean authority should be properly empowered within its national structure to ensure the correct implementation of the catch certification scheme under the IUU Regulation. The Competent Belizean authority should improve on shortcomings identified during the Commission on-the-spot missions as regards the implementation of the catch certification scheme. In particular, ensure efficient validation of catch certificates, as set out under Chapter III of the EU IUU Regulation, and in particular that at the time of request for validation the competent authority has no conflicting information that the catch was not made in compliance with applicable conservation and management measures.

Awareness raising on the proper implementation of the catch certification scheme in line with the EU IUU Regulation health and safety standards.	The Competent Belizean authority should re-issue instructions on the proper implementation of the catch certification scheme to all officers in order to ensure the proper implementation of the catch certification scheme in line with the EU IUU Regulation
Training of Belize Fisheries Department personnel.	The Competent Belizean authority should conduct training courses in order to raise the awareness on the proper implementation of the catch certification scheme in line with the IUU Regulation. A training plan should be developed for each official, and technical training should be provided to all Belize Fisheries Department personnel in order to ensure the proper control of the vessels flying the flag of Belize in the High Seas.
Creation of a reliable inspection scheme, observer programme, unloading reports, supervision of transhipment and monitoring of landing catches.	The Competent Belizean authorities should create and implement in compliance with Article 18 (3) (f) and (g) of the UNFSA a relevant set of control and monitoring tool (reliable inspection scheme, observer programme, unloading reports, supervision of transhipment and monitoring of landing catches) in order to ensure an effective control upon the activities of economic operators outside Belize and the control of the vessels flying the flag of Belize in the High Seas. In particular, it should eliminate the cases of conflict of interest where the observers appointed by Belize are at the same time legal representatives of beneficial owners of vessels flying the flag of Belize.
Training of the Belizean observers and the landing officers.	All observers and landing officers should be instructed on the proper inspection scheme in order to ensure the proper control of the vessels flying the flag of Belize in the high seas.
Reporting and recording obligations.	The Competent Belizean authorities should ensure the effective fulfilment of its reporting and recording obligations to the respective Regional Fisheries Management Organisations (RFMOs).
Vessel Monitoring System (VMS) obligations.	The Competent Belizean authorities should ensure the effective development and implementation of the vessel monitoring system, in accordance with Article 18 (3) (g) of the UNFSA and in compliance with the rules set by the respective RFMOs. Flawless VMS operation shall be assured.
Registration of fishing vessels in the Registry of Vessels.	The Competent Belizean authorities should ensure that in line with the provisions of Article 91 of UNCLOS the conditions for the granting of Belize nationality to fishing vessels, for the registration of fishing vessels in its territory and for the right of fishing ships to fly its flag ensure that there is a genuine link between Belize and the fishing vessels having its nationality.

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ANNEX I

The following Plan contains the suggested actions which the Kingdom of Cambodia should undertake in order to rectify the shortcomings identified in Commission Decision in order to avoid being proposed for formal listing as a non-cooperating third State, within the meaning of Article 33 of the Union's IUU Regulation and to the effects of Article 38 of the same Regulation.

Action	Description
Revision of the legal framework in order to ensure conservation and management of living resources in the High Seas.	The Competent Cambodian authorities should revise the existing legislation in compliance with Articles 117 and 118 of the United Nation Convention on the Law of the Sea (UNCLOS), as well as with Article 18 (3) (a) of the 1995 UN Fish Stocks Agreement (UNFSA) in order to effectively control the vessels flying the flag of Cambodia in the High Seas. Similar provisions are included in the Regional Plan of Regional Plan of Action (RPOA) to promote responsible fishing practices including combating IUU fishing in the Asia-Pacific Fisheries Committee (APFIC) as well as the Regional Guidelines for responsible fishing operations (RGRFO-SEA) in Southeast Asian Fisheries Development Center (SEAFDEC).
Revision of the legal framework pertaining to registration of fishing vessels.	The Competent Cambodian authorities should revise the existing legislation regarding registration of the fishing vessels in compliance with Article 94 of the UNCLOS, as well as with Article 18 (3) (b)-(e) of the UNFSA. Similar provisions are included in the RPOA, as well as the RGRFO-SEA. In particular, the new legislation should prevent registration under Cambodian flag of vessels that have been previously involved in IUU fishing activities, unless clear and substantiated evidence is provided that a change in ownership occurred and the new owner has no legal, beneficial or financial interests or control over the vessel with the previous owner.

Revision of the legal framework in order to put in force a deterrent sanction system.	The Competent Cambodian authorities should revise the existing legislation in compliance with Article 19 of the UNFSA in order to establish effective and deterrent sanction system for the vessels flying the flag of Cambodia in the High Seas. Similar provisions are included in RGRFO-SEA Furthermore, the existing legislation should be enforced more efficiently in order to sanction in a more systematic way infringements and violations, particularly in what regards proven IUU fishing activities.
Revision of the legal framework in order to ensure a proper empowerment to require information and to investigate into the activities of the operators, registered owners and beneficial owners of the fishing vessels flying the flag of Cambodia.	The Competent Cambodian authorities should revise the existing legislation in compliance with Articles 94 and 117 of the UNCLOS and Article 18 (3) (a) of the UNFSA in order to effectively control the vessels flying the flag of Cambodia in the High Seas. The competent authority should be properly empowered to require information and to investigate into the activities of the operators, registered owners and beneficial owners of fishing vessels flagged to Cambodia.
Creation of a reliable inspection scheme, observer programme, unloading reports, supervision of transhipment and monitoring of landing catches.	The Competent Cambodian authorities should create in compliance with Article 18 (3) (f) and (g) of the 1995 UNFSA a reliable inspection scheme and an observer programme, unloading reports, supervision of transhipment and monitoring of landing catches in order to ensure an effective control upon the activities of economic operators outside Cambodia and the control of the vessels flying the flag of Cambodia in the High Seas.
Training of the Cambodian observers and the landing officers.	All observers and landing officers should be instructed on the proper inspection scheme in order to ensure the proper control of the vessels flying the flag of Cambodia in the High Seas.
Reporting and recording obligations.	The Competent Cambodian authorities should ensure that the vessels flying its flag that are operating in the High Seas or foreign Exclusive Economic Zones (EEZ) that are covered by an RFMO are properly registered in the respective RFMOs and/or operate under a valid fishing license.

	Where the case, Cambodia should seek to become a member or a cooperating non-member of the respective RFMO, as well as should ensure the effective fulfilment of its reporting and recording obligations to the respective RFMOs. Cambodia should ensure regular correspondence with RFMOs where its fishing vessels are operating for monitoring of its obligations.
Vessel Monitoring System (VMS) obligations	The Competent Cambodian authorities should ensure the effective development and implementation of the vessel monitoring system, in accordance with Article 18 (3) (g) of the UNFSA and in compliance with the rules set by the respective RFMOs. Flawless VMS operation should be assured.
FCWC's Regional Plan Action on IUU fishing (RPOA-IUU)	Cambodia should transpose into its legislation the provisions of the RPOA-IUU and should ensure that its provisions are implemented according to the schedule set-up in FCWC. Based on the RPOA-IUU, Cambodia may develop a National Plan of Action to combat IUU fishing activities.

ANNEXE I

Le plan ci-dessous comprend les actions proposées à la République de Guinée pour qu'elle remédie aux lacunes constatées dans la décision de la Commission afin d'éviter qu'il soit proposé de l'inscrire officiellement sur la liste des pays tiers non coopérants, au sens de l'article 33 du règlement INN de l'Union et aux effets de l'article 38 dudit règlement.

Action	**Description**
Maintenir la suspension de la certification des captures pour les navires de pêche guinéens jusqu'à ce que les normes conformes aux exigences du règlement INN et aux règles sanitaires de l'UE soient appliquées. Aucun certificat de capture ne pourra être délivré jusqu'à ce que les mesures sanitaires d'urgence imposées par la décision n° 2007/82/CE de la Commission du 2 février 2007 soient abrogées.	Les autorités guinéennes compétentes doivent remédier à toutes les lacunes qui ont amené la Commission à imposer des mesures sanitaires d'urgence par sa décision n° 2007/82/CE du 2 février 2007. Les autorités guinéennes compétentes, conformément à l'article 94 de la convention des Nations unies sur le droit de la mer (CNUDM) et à l'article 18 de l'accord des Nations unies sur les stocks de poissons (UNFSA) doivent engager les réformes nécessaires afin de garantir le suivi, le contrôle et la surveillance effectifs des navires guinéens, en particulier ceux opérant en haute mer. Ces réformes doivent garantir la fiabilité des sources d'information permettant d'assurer la validation efficace des certificats de capture, telle qu'établie au chapitre III du règlement INN de l'UE. À cette fin, il est proposé que le système de certification des captures soit plutôt placé sous la responsabilité du *Centre national de surveillance des pêches* qui est chargé du suivi, du contrôle et de la surveillance des activités de pêche.
Assurer le fonctionnement effectif du système de surveillance des navires (VMS), conformément aux mesures de conservation et de gestion de la CTOI et de la CICTA, afin de garantir la légalité des captures faisant l'objet de la certification.	Les autorités guinéennes compétentes, conformément à l'article 18, paragraphe 3, points e) et g), et à l'article 18, paragraphe 4, de l'UNFSA, doivent réexaminer la présente situation en ce qui concerne le système VMS et corriger les lacunes relevées en ce qui concerne les problèmes techniques du système VMS et la disponibilité des données relatives aux positions des navires de pêche en temps réel ou plus anciennes. Enfin, le système VMS

	doit être utilisé étroitement pour contrôler les informations figurant sur les certificats de capture.
Assurer l'application effective de toutes les dispositions du code des pêches guinéen.	Les autorités guinéennes compétentes, conformément à l'article 94 de la CNUDM et à l'article 18 de l'UNSFA, doivent assurer la mise en œuvre de toutes les obligations imposées par la loi aux opérateurs économiques: notamment présenter les journaux de bord à la fin de la campagne de pêche; interdire le transbordement en mer qui est actuellement autorisé en dépit du plan de pêche; autoriser le transbordement uniquement sous la surveillance des inspecteurs de pêche; appliquer toutes les dispositions prévues par l'accord d'État entre la Guinée et d'autres pays (en particulier dans les cas d'infraction); communiquer les informations sur l'entrée et la sortie de la zone économique exclusive (ZEE) de Guinée.
Assurer l'exécution proactive de toutes les obligations et sanctions en matière d'infraction, tel que le prévoient le code des pêches et le plan de pêche.	La République de Guinée en tant qu'État du pavillon, conformément à l'article 19 de l'UNSFA de 1995, doit remédier à la situation actuelle en ce qui concerne le respect et l'application des règles. Les autorités guinéennes compétentes doivent systématiquement notifier *a posteriori* aux opérateurs économiques les infractions décelées à la suite de contrôles des documents (informations figurant dans les rapports des observateurs à bord, dans les journaux de bord, dans les rapports de captures ou dans les données du VMS). Ce point est primordial dans la mesure où le code des pêches prévoit un délai d'un an à compter de la date de l'infraction pour notifier celle-ci. Faute de moyens pour mener des opérations d'inspection et de surveillance en mer, il y a lieu de mettre en œuvre une politique proactive d'exécution fondée sur des contrôles et des vérifications documentaires. À cet égard, toute infraction répétée aux règles relatives aux prises accessoires, commise par les navires de pêche, sera systématiquement sanctionnée.

	La République de Guinée en tant qu'État côtier, conformément aux articles 61 et 62 de la CNUDM, doit remédier à la situation actuelle en ce qui concerne la conservation et l'utilisation des ressources halieutiques. La République de Guinée en tant qu'État côtier, conformément à l'article 73 de la CNUDM, doit systématiquement notifier l'État du pavillon concerné lorsque des navires battant le pavillon de pays tiers commettent des infractions à l'intérieur de la ZEE guinéenne, sont saisis et se voient infliger une amende par les autorités guinéennes pour les infractions commises.
Renforcer les moyens pour mener des opérations d'inspection et de surveillance en mer.	La République de Guinée doit permettre l'utilisation des deux principaux navires de patrouille afin de mener des opérations en mer plus fréquentes. Les observateurs à bord doivent être en mesure de communiquer en temps réel les informations sur les positions et les activités des navires de pêche, afin d'optimiser l'utilisation des navires de patrouille. À cet égard, le statut juridique et les compétences des observateurs doivent être renforcés.
Renforcer le caractère dissuasif du régime de sanctions en procédant à la révision du décret D/97/017/PRG/SGG du 19.2.1977 et garantir l'exécution effective et adéquate du régime de sanctions.	La République de Guinée doit appliquer les sanctions prévues par le décret D/97/017/PRG/SGG du 19.2.1977, conformément aux exigences de l'article 19, paragraphes 1 et 2, de l'UNSFA de 1995, afin d'imposer des sanctions efficaces et dissuasives lorsque les navires battant le pavillon de la République de Guinée enfreignent les règles nationales et internationales (par ex. il faut sanctionner chaque infraction commise au lieu d'appliquer une amende pour des infractions répétées). La Guinée ayant récemment adopté une nouvelle législation (décret du 1er mars 2012), les autorités guinéennes doivent mettre en place une politique de contrôle de l'exécution et une pratique administrative visant à imposer de manière systématique des sanctions aux contrevenants, conformément à l'article 19, paragraphe 2, de l'UNSFA et à l'article 62 de la CNUDM.

Révision de la législation guinéenne et suppression dans le texte juridique de la possibilité de garder en permanence le «pavillon guinéen temporaire» pour les navires ayant recours aux dispositions de l'«immatriculation temporaire» sous le pavillon guinéen.	La République de Guinée doit revoir la législation existante conformément à l'article 94 de la CNUDM et modifier les conditions qui permettent à un opérateur de demander l'immatriculation temporaire de son navire, renouvelable tous les six mois de façon illimitée, sans être soumis au respect de la condition habituelle de la suppression de l'immatriculation sous le pavillon précédent et l'identification du propriétaire effectif. Cette procédure doit être réexaminée afin de décourager les opérateurs et les navires de pêche INN.
Résoudre la question des navires guinéens INN inscrits sur les listes INN des organisations régionales de gestion des pêches (ORGP).	La République de Guinée doit mener des enquêtes, prendre des sanctions et informer les ORGP concernées, conformément aux exigences pertinentes des ORGP. À cet égard, les autorités guinéennes doivent garantir la conformité avec les articles 94, 117 et 118 de la CNUDM, l'article 18, paragraphe 3, point a), l'article 19, paragraphes 1 et 2, et l'article 20 de l'accord des Nations unies de 1995 sur les stocks de poissons, afin d'assurer le contrôle effectif des navires battant le pavillon de la Guinée en haute mer.
Garantir un équilibre raisonnable entre les licences de pêche délivrées, les contrôles limités réalisés et les capacités d'exécution des autorités guinéennes.	La République de Guinée doit veiller à ce que les licences de pêche délivrées aux navires de pêche étrangers correspondent réellement à leurs capacités d'assurer le suivi, le contrôle et la surveillance des activités qui y sont liées. La République de Guinée en tant qu'État côtier, conformément aux articles 61 et 62 de la CNUDM, doit promouvoir l'exploitation optimale des ressources vivantes dans sa ZEE.
Veiller au respect des obligations incombant aux parties contractantes au sein des ORGP.	Conformément aux articles 118 et 119 de la CNUDM et aux articles 18 et 20 de l'accord des Nations unies de 1995 sur les stocks de poissons, la République de Guinée doit assurer le bon respect de ses obligations vis-à-vis des ORGP concernées.
Renforcer et améliorer la coopération avec d'autres États dans le cadre des ORGP et au niveau bilatéral.	Conformément à l'article 118 de la CNUDM et à l'article 20 de l'accord des Nations unies de 1995 sur les stocks de poissons, la

	République de Guinée doit renforcer sa coopération avec les pays tiers dans le cadre des mesures d'exécution prises à l'encontre les navires INN. À cet égard, la République de Guinée doit renforcer sa coopération avec l'UE dans le cadre des procédures établies par les articles 25, 26 et 27 du règlement INN de l'UE.

ANNEX I

The following Plan contains the suggested actions which the Republic of Korea should undertake in order to rectify the shortcomings identified in Commission Decision in order to avoid being proposed for formal listing as a non-cooperating third State, within the meaning of Article 33 of the Union's IUU Regulation and to the effects of Article 38 of the same Regulation.

Action	Description
Revision of the **legal framework** to remedy that lack of sufficient operational means to effectively monitor the long distance fishing fleet operating under the Korean flag.	The Competent Korean authorities should revise the existing legislation in compliance with Articles 62, 94 and 117 of the United Nations Convention on the Law of the Sea (UNCLOS) and Article 18 (3) (a) and 19 (1) of the United Nations Fish Stocks Agreement (UNFSA) in order to effectively control the vessels flying the flag of Korea in the High Seas as well as in third countries EEZs. Korea should ensure an effective monitoring of fishing vessels that can be engaged in IUU fishing activities, in particular, by developing a comprehensive VMS system and setting up an actual Fishing Monitoring Centre, in compliance with Article 18(3)e of the UNFSA. Korea should update its National Plan of Action against IUU fishing (NPOA) in line with recommendations set in recitals 25 to 27 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA IUU).
Revision of the **legal framework** and efficient enforcement of the existing legal provisions in order to put in force a deterrent sanction system.	The Competent Korean authorities should revise the existing legislation in line with Article 94 of UNCLOS, Articles 19 (1) (d) (e) and 21 (11) of the UNFSA, in order to establish effective and deterrent sanction system for the vessels flying the flag of the Republic of Korea in the High Seas and third countries EEZs. The new legislation should ensure an efficient recovery of the fines applied for depriving offenders of the benefits accruing from their illegal activities in line with the Article 19 (2) of the UNFSA. Inter alia, Korea should foresee provisions on nationals engaged in IUU fishing and provisions on responsibilities of the transformation industry on accepting fish stemming from IUU fishing activities. The Competent Korean authorities should review the existing legislation with respect to sanctions, typology of infringements and serious infringements taking into consideration the relevant international obligations and relevant RFMO's recommendations.

Action	Description
Ensure **implementation and enforcement of revised national legislation.**	The Competent Korean authorities should ensure implementation of its revised fisheries legislation (July 2013 Ocean Industry Development Act amending Korean Distant Waters Fisheries Act) through preparation of relevant clear and transparent implementing provisions. The competent Korean authorities should ensure enforcement of its revised fisheries legislation by its vessels in all waters, in compliance with article 94 of UNCLOS and 19 of the UNFSA.
Implementation of the existing national and regional **legal framework and measures.**	The Competent Korean authorities should ensure application of the existing provisions of the Korean Distant Waters Fisheries Act. The Competent Korean authorities should ensure compliance with CCAMLR, IOTC and ICCAT conservation and management measures by all Korean vessels in line with Article 18(3) of the UNFSA.
Ensure **efficient enforcement and follow-up of infringements of the existing legal provisions** in order to put in force a **deterrent sanction system for all vessels.**	The Competent Korean authorities should ensure efficient and effective enforcement and follow-up of infringements and deterrent sanctioning in relation to all Korean vessels, in compliance with Article 19 of the UNFSA, Article III (8) of the FAO Compliance Agreement and point 21 of the IPOA IUU.
Rectification of shortcomings identified regarding the **activity of the Fisheries Monitoring Centre (FMC)** in the framework of the catch certification scheme as well as in the framework of Regional Fisheries Management Organizations (RFMOs) of which the Republic of Korea is a Contracting Party or cooperating Non Contracting party.	The Competent Korean authorities should revise the existing legislation in line with Article 18 (3) (e) (g) (iii) and 18 (4) of the UNFSA in order to correct the deficiencies identified in terms of human resources, in terms of availability of data on the fishing vessels positions in real time or historic data, in terms of methods used and training of the officials in charge. In addition, the FMC should be more closely involved in the catch certification scheme set out under Chapter III of the EU IUU Regulation.
Creation of reliable **inspection scheme, unloading reports, supervision of transhipment and monitoring of landing catches** of the Korean flagged vessels operating in High Seas and third country fishing grounds or conducting landing activities outside the Exclusive Economic Zone (EEZ) of Korea.	The Competent Korean authorities should create in line with Article 18 (3) (f) and (g) of the UNFSA a reliable inspection scheme and unloading reports, supervision of transhipment and monitoring of landing catches in order to ensure an effective control on the activities of economic operators outside Korean EEZ and the control of the vessels flying the flag of Korea in the High Seas and third countries EEZs.

Action	Description
Strengthening of the administrative capacities in order to ensure effective monitoring of the vessels operating under Korea's flag.	The Competent Korean authorities should, having regard to Article 94 of UNCLOS, implement the necessary measures in order to strengthen administrative capacities necessary to fulfil Korea's international flag State duties, in particular, regarding resources and procedures.
Investigate and address effectively in term of sanctioning **illegal fishing activities and Korean nationals** operating in the High Seas and in the coastal States waters.	In line with Article 19 of the UNFSA, Korea should apply sanctions adequate in severity and effective in securing compliance and able to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities.
Correction of the administrative procedures in place for ensuring the reliability of the **catch certification scheme**, in particular by conducting verifications and crosschecking of information contained in the catch certificates.	The Competent Korean authorities should revise the existing legislation in line with Articles 94 of United Nation Convention on the Law of the Sea (UNCLOS) and Article 18 (3) (a) (b) (f) and (h) of the 1995 UN Fish Stocks Agreement (UNFSA) in order to have reliable sources of information for ensuring the efficient validation of catch certificates, set out under Chapter III of the EU IUU Regulation, by crosschecking of the information indicated by the economic operator in the catch certificates. These sources are among others: catch data, fishing licenses delivered by coastal States (in line with Article 18 (3) (b) (iv) of the 1995 UNFSA), Vessels Monitoring System (VMS) positions, transhipments and landing declarations, efficient traceability scheme (covering catch/transhipment/landing/transport/export/trading). The Competent Korean authorities should take measures to suspend temporary the catch certification for Korean flagged vessels that operate without fulfilling control and monitoring conditions (e.g. VMS) as set out by Korea, RFMOs and coastal States.
Ensure compliance with **reporting and recording obligations** within RFMOs.	In line with Article 118 and 119 of UNCLOS and with Article 18 of the UNFSA, the Competent Korean authorities should ensure the effective fulfilment of its reporting and recording obligations to the respective RFMOs.
Strengthening and improvement of **cooperation with other States** in the framework of RFMOS and bilaterally.	In line with Article 118 of UNCLOS and Article 20 of the UNFSA, the Competent Korean authorities should reinforce their cooperation in enforcement actions. The Competent Korean authorities should develop cooperation with coastal States ensuring exchange of information, control of operators and vessels actions and mutual assistance.

Ref. Ares(2015)1821356 - 29/04/2015

ANNEX I

The following Plan contains the suggested actions which the Philippines should undertake in order to rectify the shortcomings identified in Commission Decision in order to avoid being proposed for formal listing as a non-cooperating third State, within the meaning of Article 33 of the Union's IUU Regulation and to the effects of Article 38 of the same Regulation.

Action	Description
Revision of the **legal framework** in order to ensure the **compliance with the international and regional rules** applying to the conservation and management of fishing resources.	The Competent authorities of the Philippines should revise the existing legislation (Philippine Fisheries Code of 1998 (RA 8550); Fisheries Administrative Orders) to ensure compliance with the UNCLOS (in particular Articles 62-64, 91, 94, 117-119) to fulfil its obligation as coastal State to ensure responsible and long-term sustainable management of this resource and promote the objective of optimum utilisation of the living resources in its EEZ. The Philippines should ensure clear and transparent transposal of international and regional conservation and management measures in its national law, including municipal law. The Competent authorities of the Philippines are encouraged to take into consideration the Port State Measures Agreement of 2009 pertaining to the management of fishing resources as well as the 1995 UNFSA.
Revision of the **legal framework** in order develop and integrate **conservation and management measures in the Philippines archipelagic waters** compatible and in compliance with the international and regional rules applying to the conservation and management of fishing resources.	The Competent authorities of the Philippines should develop clear, transparent and compatible conservation and management for their archipelagic waters in compliance with Articles 62 (1) of the UNCLOS and the overall objective and relevant rules in the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (in particular Articles 2, 5, 7, 8) to fulfil its duty, responsibility and obligation of a coastal State to adopt measures compatible to those applying in the region and in high seas to ensure long term sustainability of straddling and highly migratory fish stocks and promote the objective of their optimum utilisation. The Competent authorities of the Philippines should ensure integration of such measures in their revised national law in a clear and transparent way and make them publically available.

Action	Description
Strengthening the effective implementation of international rules and management measures through an adequate regime of sanctions	The Competent authorities of the Philippines should finalise the revision of their legal framework to ensure that sanctions are deterrent, and should also ensure that the provisions adopted allow the sanction of vessels flying its flag and operating in the high seas or in waters under the jurisdiction of a third State.
Ensure **effective implementation and enforcement of revised national legislation**	The Competent authorities of the Philippines should finalise the revision of its outdated fisheries legislation, as well as ensure coherency and transparency in the conservation and management measures adopted by local government units. The Competent authorities of the Philippines should ensure implementation of its revised fisheries legislation through preparation of relevant clear and transparent implementing provisions. The Competent authorities of the Philippines should ensure enforcement of its revised fisheries legislation in all waters under the Philippines' jurisdiction and towards all vessels flying its flag.
Ensure the revision of legal provisions allowing for **effective enforcement and follow-up of infringements** by putting in force a **deterrent sanction system for all Philippines-flagged vessels operating in the EEZ of Philippines, RFMO area, high seas and third countries waters**.	The Competent authorities of the Philippines should review national legislation to ensure that the level of sanctions is dissuasive and effectively deprives the offenders from the benefits obtained from illegal activities, as foreseen in Article 94 of the UNCLOS and the IPOA IUU rules. The Competent authorities of the Philippines should ensure effective enforcement and follow-up of infringements and dissuasive sanctioning in relation to Philippine-flagged vessels operating in its waters (territorial, archipelagic, EEZ), high seas and EEZ of third countries.

Action	**Description**
Strengthening and improvement of **fishing licenses system and management**.	The Competent authorities of the Philippines should ensure a clear and transparent registration and licensing system, setting out all eligibility rules for all types of vessels under all types of license agreements. The Competent authorities of the Philippines should ensure that such eligibility criteria are publically available. The Competent authorities of the Philippines should ensure that the vessel register and the fishing licenses are updated and coherent with one another. The Competent authorities of the Philippines should ensure a balance between the number of vessel authorized to operate in waters under the Philippines jurisdiction and the necessary control capacity of its authorities, which should take into account all applicable national and regional conservation and management rules.
Rectification of shortcomings identified regarding the **Monitoring, Control and Surveillance (MCS) system** in the framework of the catch certification scheme as well as in the framework of the RFMOs for which the Philippines is a Contracting Party.	The Competent authorities of the Philippines should address the deficiencies identified regarding the MCS system: (such as catch reporting, landing declaration, increase the inspection capacity, observer coverage, VMS, *etc*). The Competent authorities of the Philippines should adopt relevant legislative framework to ensure transmission of VMS signal by all fishing vessels operating in the EEZ of the Philippines. The Competent authorities of the Philippines should ensure the proper enforcement of the rules regulating VMS requirements to Philippines flagged vessels operating in high seas and third countries in order to ensure a fully operational access to the necessary information or activities of its own vessels.

Action	Description
Strengthening of the **administrative capacities** in order to ensure effective monitoring of the vessels operating under the Philippines' flag and in the waters under the Philippines' jurisdiction.	The Competent authorities of the Philippines should, having regard to Article 94 of UNCLOS, implement the necessary measures in order to strengthen administrative capacities to fulfil the Philippines international flag State duties, in particular, regarding resources and procedures. The Competent authorities of the Philippines, having regard to Article 61 and 62 of UNCLOS, implement the necessary measures in order to strengthen administrative capacities to ensure optimum utilisation of the living resources in the waters under jurisdiction of the Philippines.
Improving traceability of fishery products.	The Competent authorities of the Philippines should ensure that its rules setting up a national traceability scheme: – guarantees that raw material imported into the Philippines for processing from countries whose products are not authorised to enter the EU market do not arrive in the EU; (neither as processed product or unprocessed); – provides assurance that all information contained in catch certificates validated and processing statements endorsed by the Philippines competent authorities is accurate; correct and verified by them (including information on conservation and management measures); – include provisions relating to e.g. implementation of controls of landings, assurance of traceability throughout the production chain, until export, audits of operators and/or relevant production processes, obligations of economic operators etc., as appropriate; – ensure reliable traceability of the fishery products from landing/import to export to the EU (*with or without processing*); – The Competent authorities of the Philippines should ensure implementation of such a traceability system, which requires the necessary control capacity (e.g. trained staff), including: – auditing of processing plants and their production process and consumption of raw material.

Action	Description
Strengthening and improvement of **cooperation with other States (in particular coastal States in the waters of which vessels flagged to the Philippines operate)** in **line with international obligations.**	The Competent authorities of the Philippines should ensure cooperation with third countries and, in particular and with immediate priority, coastal States in the waters of which vessels flagged to the Philippines operate to fulfil its obligations under international law to ensure effective conservation and management of its fish stocks. The Competent authorities of Philippines should ensure that bilateral agreements or organisational arrangements (e.g. MoU) with third country coastal states provide immediate access from these coastal states to all relevant data available which are required for an accurate and correct validation of EU catch certificates.
Improve and ensure reliability of the **catch certification scheme**.	The Competent authorities of the Philippines should take appropriate measures to ensure availability of accurate, correct and relevant information for a reliable and credible validation of Catch Certificates and endorsement of processing statements. The Competent authorities of the Philippines should ensure conducting verifications and crosschecking of information contained in the catch certificates (validated by flag states) and processing statements (as prepared by economic operators), in particular regarding weight, catch area, transhipments, applicable conservation and management rules and compliance with those. The Competent authorities of the Philippines should take measures to suspend and refuse endorsement of processing statements which contain incorrect information or accompanied by catch certificates validated by flag states containing incorrect information.
Ensure compliance with **reporting and recording obligations** within RFMOs.	In line with Article 118 and 119 of UNCLOS, the Competent authorities of the Philippines should ensure the effective fulfilment of its reporting and recording obligations to the respective RFMOs.

Ref. Ares(2015)4868164 - 05/11/2015

ANNEX I

The following Plan contains the suggested actions which PNG should undertake in order to rectify the shortcomings identified in Commission Decision in order to avoid being proposed for formal listing as a non-cooperating third State, within the meaning of Article 33 of the Union's IUU Regulation and to the effects of Article 38 of the same Regulation.

Action	Description
Revision of the **legal framework** in order to ensure the **compliance with the international and regional rules** applying to the conservation and management of fishing resources.	The Competent PNG authorities should revise the existing legislation (Fisheries Management Act, Fisheries Management Regulations) to ensure compliance with the UNCLOS (in particular Articles 61, 91, 94, 117 and 118), and Article 7 of the UNFSA to fulfil its obligation as coastal state to ensure responsible and long-term sustainable management of this resource and promote the objective of optimum utilisation of the living resources in its EEZ; and to ensure compliance of nationals of other States fishing in its EEZ with conservation and management measures. PNG should ensure clear and transparent transposition of international and regional conservation and management measures in its national law. The Competent PNG authorities are encouraged to take into consideration and comply with the Port State Measures Agreement of 2009 pertaining to the management of fishing resources. The Competent PNG authorities should adopt a national plan of action against IUU fishing (NPOA) in line with recommendations set in recitals 25 to 27 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA IUU).
Revision of the **legal framework** in order develop and integrate **conservation and management measures in PNG archipelagic waters** compatible and in compliance with the international and regional rules applying to the conservation and management of fishing resources.	The competent PNG authorities should develop clear, transparent and compatible conservation and management measures for PNG archipelagic waters in compliance with Articles 62 (1) of the UNCLOS, Articles 5, 7, 8, 9, 10 of the UNFSA and the overall objective and relevant rules in the WCPFC Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (in particular Articles 2, 5, 7, 8). This would appear necessary to fulfil its duty, responsibility and obligation of a coastal State to adopt measures compatible to those applying in the region and in high seas to ensure long term sustainability of straddling and highly migratory fish stocks and promote the objective of their optimum utilisation. The Competent PNG authorities should ensure integration of such measures in their revised national law in a clear and transparent way and make them publicly available. The Competent PNG authorities should ensure that conservation and management measures are based on best scientific advice and evidence and should apply the precautionary approach.

Action	Description
Revision of the PNG national tuna management plan	The Competent PNG authorities should take immediate action to revise the existing 1998 Tuna management plan, taking into account changes in the fisheries sector, including, amongst others, regional and sub-regional conservation and management measures. It should be in conformity with international and regional, provisions and obligations, such as Articles 61, 62, 117 and 118 of UNLCOS. The Competent PNG authorities should ensure that conservation and management measures are based on best scientific advice and evidence and should apply the precautionary approach. The Competent PNG authorities should ensure comprehensive collection of scientific data in all waters under its jurisdiction and make it available to WCPFC (and other competent interested bodies as appropriate).
Ensure **effective implementation and enforcement of revised national legislation**	The Competent PNG authorities should ensure implementation of its revised fisheries legislation (Fisheries management Act, Fisheries Management Regulation, Tuna Management Plans) through preparation of relevant clear and transparent implementing provisions. The competent PNG authorities should ensure enforcement of its revised fisheries legislation in all waters under PNG jurisdiction.
Ensure effective implementation of the existing national and regional **legal framework and measures, including for management and conservation** in all waters under PNG jurisdiction.	The Competent PNG authorities should ensure immediate application of the existing provisions of their national Fisheries Management Act and Regulation and Tuna management plan which are not fully implemented in all waters under PNG jurisdiction, in particular archipelagic (e.g. ban of transhipments at sea; control of landings; observer coverage; Fish Aggregating Device closure) The Competent PNG authorities should ensure implementation of WCPFC conservation and management measures in waters under its jurisdiction.
Ensure **effective enforcement and follow-up of infringements of the existing legal provisions** in order to put in force a **deterrent sanction system for all vessels operation in waters under PNG jurisdiction**.	The Competent PNG authorities should ensure effective enforcement and follow-up of infringements and dissuasive sanctioning in relation to all vessels operating in its waters. The Competent PNG authorities should ensure effective enforcement and follow-up of infringements and dissuasive sanctioning all waters under its jurisdiction (territorial, archipelagic, EEZ).

Action	**Description**
Strengthening and improvement of **fishing licenses system and management**.	The Competent PNG authorities should ensure a clear and transparent registration and licensing system, setting out all eligibility rules for all types of vessels under all types of license agreements. The Competent PNG authorities should ensure that such eligibility criteria are publically available. The Competent PNG authorities should ensure a balance between the number of vessel authorized to operate in waters under PNG jurisdiction and the necessary control capacity of its authorities, which should take into account all applicable national and regional conservation and management rules.
Rectification of shortcomings identified regarding the **Monitoring, Control and Surveillance (MCS) system** in the framework of the catch certification scheme as well as in the framework of WCPFC for which PNG is a Contracting Party.	The Competent PNG authorities should address the deficiencies identified regarding the MCS: (for instance in the fields of: catch reporting, landing declaration, increase the inspection capacity, adopt a national plan of fisheries inspections based on a port inspection scheme, observer coverage.).
Strengthening of the **administrative capacities** in order to ensure effective monitoring of the vessels operating under PNG's flag and in the waters under the PNG jurisdiction.	The Competent PNG authorities should, having regard to Article 94 of UNCLOS, implement the necessary measures in order to strengthen administrative capacities to fulfil PNG's international flag State duties, in particular, regarding resources and procedures. The Competent PNG authorities should, having regard to Article 61 and 62 of UNCLOS, implement the necessary measures in order to strengthen administrative capacities to ensure optimum utilisation of the living resources in the waters under jurisdiction of PNG.

Action	Description
Improving traceability of fishery products.	The Competent PNG authorities should finalise their rules relating to catch certification, so as to set up a national traceability scheme that: – guarantees that raw material imported into PNG for processing from countries whose products are not authorised to enter the EU market do not arrive in the EU; (neither as processed product nor unprocessed); – provides assurance that all information contained in catch certificates validated and processing statements endorsed by PNG competent authorities is accurate; correct and verified by them (including information on applicable conservation and management measures); – include provisions relating to e.g. implementation of controls of landings, assurance of traceability throughout the production chain, until export, audits of operators and/or relevant production processes, obligations of economic operators as appropriate; – ensure reliable traceability of the fishery products from landing/import to export to the EU (with or without processing); – The Competent PNG authorities should ensure implementation of such a traceability system, which requires the necessary control capacity (e.g. trained staff), including: – arrangements (e.g. Memoranda of Understanding (MoU)) with third country flag states having vessels operating in waters under PNG authorities and landing regularly catch in PNG; – arrangements (e.g. MoU) with other national PNG authorities involved in control, import and export of fishery products, particular customs; – auditing of processing plants and their production process and consumption of raw material.

Action	Description
Strengthening and improvement of **cooperation with other States (in particular flag states of vessels operating in waters under PNG jurisdiction) in line with international obligations.**	The Competent PNG authorities should ensure cooperation with third countries and, in particular and with immediate priority, with flag states of vessels operating in PNG waters, to fulfil its obligations under international law to ensure effective conservation and management of its fish stocks (in particular Article 7 (1a) of the UNFSA, Article 25 (10) of the WCPFC Convention). The Competent PNG authorities should conclude bilateral agreements or organisational arrangements (e.g. MoU) with third country flag states (in particular Philippines, Taiwan) of vessels operating in waters under PNG sovereignty or jurisdiction to ensure access to VMS data of respective vessels of each flag state and all other information necessary for these flag states to ensure efficient and effective control over the activities of their vessels (e.g. landing declarations, inspection reports). The Competent PNG authorities should ensure that such bilateral agreements or organisational arrangements provide immediate access for these flag states to all relevant data available in PNG which are required for an accurate and correct validation of EU catch certificates.
Improve and ensure reliability of the **catch certification scheme**.	The Competent PNG authorities should take appropriate measures to ensure availability of, accurate, correct and relevant information for a reliable and credible validation of PNG Catch Certificates and endorsement of processing statements. The Competent PNG authorities should ensure conducting verifications and crosschecking of information contained in the catch certificates (validated by flag states) and processing statements (as prepared by economic operators), in particular regarding weight, catch area, transhipments, applicable conservation and management rules and compliance with those. The Competent PNG authorities should take measures to suspend and refuse endorsement of processing statements which contain incorrect information or accompanied by catch certificates validated by flag states containing incorrect information.
Ensure compliance with **reporting and recording obligations** within RFMOs.	In line with Article 118 and 119 of UNCLOS, the Competent PNG authorities should ensure the effective fulfilment of its reporting and recording obligations to the respective RFMOs (WCPFC) for all waters under its sovereignty or jurisdiction.

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ANNEX I

The following Plan contains the suggested actions which Ghana should undertake in order to rectify the shortcomings identified in Commission Decision in order to avoid being proposed for formal listing as a non-cooperating third State, within the meaning of Article 33 of the Union's IUU Regulation and to the effects of Article 38 of the same Regulation.

Action	Description
Revision of the **legal framework** in order to ensure the compliance with the international rules applying to the management of fishing resources.	The Competent Ghanaian authorities should revise the existing legislation in compliance with the United Nations Convention on the Law of the Sea (UNCLOS) and in particular Articles 61, 62, 94 and 117or by including provisions similar to the provisions provided in the international instruments. Ghana should incorporate the rules (regulations, recommendations, schemes and measures) adopted under the International Commission for the Conservation of Atlantic Tunas (ICCAT) in compliance with Articles 64 and 117 to 119 of the UNCLOS. Ghana is encouraged to take in consideration the rules stipulated in the 1995 United Nations Fish Stocks Agreement (UNFSA) and to the Port State Measures Agreement of 2009 pertaining to the management of fishing resources. Ghana should adopt a national plan of action against IUU fishing (NPOA) in line with recommendations set in recitals 25 to 27 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA IUU).
Implementation of the existing **legal framework.**	The Competent Ghanaian authorities should take immediate measures to ensure application of the existing provisions of the Fisheries Act of 2002 and Fisheries Regulations of 2010 which are not implemented (e.g. ban of transhipments at sea; obligation to report vessel monitoring system (VMS) positions for Ghanaian vessels; creation of Fisheries Monitoring, Control, Surveillance and Enforcement Unit; adoption of an actual National Fisheries Management Plan).

Action	**Description**
Revision of the **legal framework** and effective enforcement of the existing legal provisions in order to put in force a deterrent sanction system.	The Competent Ghanaian authorities should revise the existing legislation in line with Article 94 of the UNCLOS and point 21 of the IPOA IUU in order to establish effective and deterrent sanction system for the vessels flying the Ghanaian flag or third country vessels operating in the Ghanaian EEZ. The Competent Ghanaian authorities should review the existing legislation with respect to sanctions, typology of infringements and serious infringements taking into consideration the relevant international obligations and relevant RFMO's recommendations. The Competent Ghanaian authorities should ensure that effective and dissuasive sanctions are applied to economic operators involved in IUU fishing activities.
Strengthening and improvement of **fishing licenses management**.	The Competent Ghanaian authorities should adopt a Fisheries Management Plan in conformity with the provisions of Articles 61, 62, 117 and 118 of the UNCLOS and in line with the features defined in Articles 42 to 45 of the Fisheries Act of 2002 (e.g. fishery plan based on the best scientific information available that ensures the optimum utilization of the fishery resources avoiding over exploitation of those resources). The Competent Ghanaian authorities should ensure that their fleet management and capacity and effort management goes in line with conservation and management rules in particular taking into consideration ICCAT recommendations (e.g. Bigeye quota). The Competent Ghanaian authorities should adopt relevant measures to ensure transmission of VMS signal by all industrial Ghanaian fishing vessels (including trawlers) and foreign vessels operating in the Ghanaian EEZ. The Competent Ghanaian authorities should ensure coherence within the National Register of vessels and the Register of fishing licenses/authorizations.

Action	**Description**
Rectification of shortcomings identified regarding the **Monitoring, Control and Surveillance (MCS) system** in the framework of the catch certification scheme as well as in the framework of ICCAT of which Ghana is a Contracting Party.	The Competent Ghanaian authorities should address the deficiencies identified regarding the MCS system: improve the fishing logbook, increase the inspection capacity, adopt a national plan of fisheries inspections incorporating the revised ICCAT port inspection scheme in line with ICCAT Recommendation 97-10, take measures to ensure physical checks and verifications during inspection activities, introduce entry/exit declarations scheme, adopt a model of inspection report (landing and transhipment) in line with ICCAT requirements, providing relevant training and resources to fisheries inspectors. The Competent Ghanaian authorities should implement MCS measures to control activities of Ghana flagged vessels operating in 3rd country waters in compliance with Article 94 of the UNCLOS and points 24 and 28 of the IPOA IUU.
Strengthening and improvement of a **VMS** for Ghanaian vessels fishing in ICCAT, in the framework of the catch certification scheme as well as in the framework of ICCAT of which Ghana is a Contracting Party.	The Competent Ghanaian authorities should revise the existing legislation in order to correct the deficiencies identified in terms of availability of data on the fishing vessels positions in real time or historic data, in terms of methods used and training of the official in charge. Ghana should ensure an effectively operational VMS system including all indispensable settings as well as technical and human capacity.
Revision of the legal framework in order to improve registration of fishing vessels in the **Registry of Vessels**	The Competent Ghanaian authorities should ensure that the vessel register is up-to-date, in line with Article 94 of the UNCLOS and points 34 to 41 of the IPOA IUU, and it contains sufficient safeguards to prevent registration of IUU fishing vessels under Ghanaian flag.

Action	**Description**
Ensure the reliability of the **catch certification scheme**, in particular by conducting verifications and crosschecking of information contained in the catch certificates and processing statements.	The Competent Ghanaian authorities should take the necessary measures to avoid that fishery products caught under illegal or doubtful conditions by Ghanaian vessels could be subject to catch certification. In this respect, the verification process should be strengthened until conditions of the reliability of the catch certification will effectively exist (e.g. reinforcing coordination of the Divisions in charge of the catch certification scheme; introducing an efficient traceability scheme covering catch/transhipment/landing/transport/export/trading, ensuring an efficient crosschecking of data available: VMS data with logbooks and catch returns forms for example; pursuing IUU fishing detected in the context of the catch certification). In line with Articles 94 of UNCLOS, Ghana should take appropriate measures in order to have reliable sources of information for ensuring a reliable and credible validation of catch certificates by crosschecking of the information communicated by the economic operators in the catch certificates. Ghana should also establish credible procedures to endorse processing statements and ensure credible traceability of the fishery products from landing to export to the EU after processing.
Strengthening of the **administrative capacities** in order to ensure effective monitoring of the vessels operating under the Ghanaian flag and in the waters of Ghana.	The Ghanaian authorities should, having regard to Article 94 of UNCLOS, implement the necessary measures in order to strengthen administrative capacities to fulfil Ghana international flag State duties, in particular, regarding its capacity to effectively control the activities of its fishing fleet. The Ghanaian authorities should, having regard to Article 61 and 62 of UNCLOS, implement the necessary measures in order to strengthen administrative capacities to ensure optimum utilisation of the living resources in the waters under jurisdiction of Ghana.
Ensure compliance with **reporting and recording obligations** within RFMOs.	In line with Article 118 and 119 of UNCLOS, the Competent Ghanaian authorities should ensure the effective fulfilment of its reporting and recording obligations to the respective RFMOs.

Action	**Description**
Ensure **effective compliance of its fishing fleet with conservation and management measures adopted under RFMOs.**	Ghana should take necessary measures to ensure effective compliance of its fishing fleet with all conservation and management measures adopted in the framework of the RFMOs for which Ghana is a contracting party. In particular under ICCAT, Ghana should improve its compliance with: ICCAT Rec. 97-10 (revised ICCAT port inspection scheme); ICCAT Rec. 03-14 (report of VMS position by vessels); ICCAT Rec. 06-11 (ban of transhipments at sea); ICCAT Rec. 04-01 (Multi-year conservation and management program for bigeye tuna); ICCAT Rec. 09-01, 10-01 and 11-01 (compliance with fleet capacity and payback plan for the overharvest of bigeye).
Strengthening and improvement of **cooperation with other States** in the framework of Regional Fisheries Management Organizations (RFMOs) and bilaterally.	In line with Article 118 of UNCLOS, the Competent Ghanaian authorities should reinforce their cooperation in enforcement actions. In particular, Ghana should take measures to reply to requests for verification sent by EU Member States in the context of Chapter III of the EU IUU Regulation. Ghana should also transmit systematically to all coastal and flag States concerned the IUU fishing activities detected. The Competent Ghanaian authorities should develop cooperation with coastal States ensuring exchange of information, control of operators and vessels and mutual assistance.

Errata (amended in text)

Placement	Submitted text	Changed to
Page 51, second paragraph	"…straitening…"	"…strengthening…"
Page 61, third paragraph	"…ITLOS…"	"…international courts and tribunals…"
Page 140, first paragraph	"…section 7."	"…Chapter 6."
Page 188, footnote 636	"Supra notes 47 to **Error! Bookmark not defined**. and surrounding text"	"Supra note 47 and surrounding text"
Page 244, first paragraph	"…in section **Error! Bookmark not defined**., d escribing…"	"…below, describing…"

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