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THE ARCTIC  
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Faculty of Law

# **Port State Measures to combat IUU Fishing, from the Law of the Sea Convention to the FAO Port State Measures Agreement.**

*An executive analysis on port State measures in Norwegian national law*

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## **ABBREVIATIONS**

FAO	–	Food and Agriculture Organisation
UN	–	United Nations
RFMO	–	Regional fisheries management organisations
PSA	–	Agreement on Port State Measures
IPOA-IUU	–	International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
LOSC	–	United Nations Convention on the Law of the Sea
FSA	–	Fish Stocks Agreement
NEAFC	–	North East Atlantic Fisheries Commission
IUU	–	Illegal, Unreported and Unregulated fishing
VCLT	–	Vienna Convention on the Law of Treaties
ICJ	–	International Court of Justice
ECHR	–	European Convention on Human Rights
CCPR	–	International Covenant on Civil and Political Rights
CESCR	–	International Covenant on Economic, Social and Cultural Rights
SOLAS	–	International Convention for the Safety of Life at Sea
IMO	–	International Maritime Organisation
VMS	–	Vessel Monitoring System

# 1 Introduction

## 1.1 Theme, Objective and Topicality of the Thesis

People all over the world are dependent on the ocean and the ocean's living resources for food supplies, trade and economic growth. Due to this it should be in the interest of all States and their inhabitants to protect the marine environment, but time has shown that this is not the case.<sup>1</sup> Illegal, Unreported and Unregistered fishing (IUU-fishing) is one of today's greatest threats to the marine environment and the management of the marine living resources.<sup>2</sup> The United Nations Food and Agriculture Organisation (FAO) has estimated that approximately 15% of all caught fish is illegal caught. This can cause severe damage and threatens the fisheries industry.<sup>3</sup>

Sustainable use of our living resources is necessary for the future challenges humanity will meet. IUU fishing creates a significant threat to sustainable fisheries as well as to the conservation and management of fisheries resources and marine biodiversity, due to the amounts fish caught illegally every year.<sup>4</sup> Since the 1990s FAO has tried to find a solution to the increasing problem with IUU fishing in the world's oceans. This has led to several binding and non-binding international fisheries instruments to support the United Nations Convention on the Law of the Sea (LOSC)<sup>5</sup> in order to address IUU fishing, as will be discussed in chapter 4.

IUU-fishing has gained substantial international attention the recent years because of its extent on the global basis and the fact that it is a significant threat against fish stocks all over the world, marine ecosystems, fisheries management, coastal communities where fishing is an essential basis for living and settlement, and responsible fishing industry.

Due to the different interests on the high seas, regulating IUU fishing in these areas has shown to be difficult. First you have the high seas freedoms with freedom of fishing.<sup>6</sup> Article 87 in the LOSC is supplied by other articles in the LOSC, such as the duty to cooperate after

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<sup>1</sup> Doris König (2012), "The Enforcement of the International Law of the Sea by Coastal and Port States" p 1

<sup>2</sup> FAO. 2016 "Illegal, Unreported and Unregulated fishing" p 1

<sup>3</sup> FAO. 2016. "The State Of World Fisheries And Aquaculture" 2016. Contributing to food security and nutrition for all. Rome. p. III

<sup>4</sup> FAO (2013) Implementation of port state measures Volume 1, p 1

<sup>5</sup> 1982 United Nations Convention on the Law of the Sea

<sup>6</sup> LOSC art. 87(1)(e)

art 17 and 118, and principles of environmental law such as sustainable development. Freedom of the high seas is, based on this, not an absolute freedom, but a freedom moderated by different principles and articles in LOSC, other international agreements and RFMOs. However, non-parties to other agreements, e.g. RFMOs are free to conduct their freedom of the high seas. On this behalf port State measures has become an important tool to stop vessels which is not complying with international agreements from conducting IUU fishing.

The topic is relevant and pertinent because of the increased focus on combating IUU fishing, and the increased legislation on IUU fishing. The FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSA)<sup>7</sup> entered into force in 2016 and is the only globally binding agreement with focus on port State measures.

## **1.2 The Scope of the Thesis**

The thesis will focus on port State measures to combat IUU fishing on the high seas. The different agreements which has regulated port State measures through the time will be the primary focus and research area with the main focus given to the PSA. Flag and coastal States regulation and technical aspects of different agreements will not be interpreted and evaluated more than necessary from a legal point of view.

Art. 91 of LOSC defines “flag State” as “the State in whose territory a ship is registered”. The term “Port State” and “coastal State” does not have any official definitions in LOSC or other global instruments. The term “coastal State” is not defined in the LOSC, but art. 2(1) describes the area of sovereignty of the coastal State as an area which “extends, beyond its land territory and internal waters and, (...) to (...) the territorial sea” the coastal State has also exclusive jurisdiction over the exclusive economic zone (EEZ) for the purpose of fisheries resources, cf. art. 56. When “port State” is used in the international law of the sea context, it should be assumed to relate to foreign vessels entering another States port. The term should be distinct from the term “coastal State”. Molenaar uses the term “port State” “in connection with foreign vessels in its (another States) ports in the context of compliance with conservation and management measures whose spatial scope is not exclusively limited to the maritime zones of the port State”.<sup>8</sup> For the rest of the thesis this will be the basis as well.

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<sup>7</sup> The 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

<sup>8</sup> Molenaar, E. J. (2010) “Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement”, In “Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles” p 370

The thesis will concentrate on IUU fishing on the high seas, this is due to IUU fishing in these areas is a subject to flag State measures, and as a basis, other States cannot enforce measures on IUU fishing vessels on the high seas. In cases where the flag State does not comply with their duty, the international community has developed port State measures as a last defensive wall. The intention of the PSA is to address responsibility to states to prevent, deter and eliminate illegal, unreported and unregulated fishing.<sup>9</sup> The agreement contains minimum measures “to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems”.<sup>10</sup>

The objective of the thesis is to give an account of international agreement which regulates port State measures to combat IUU fishing, with focus on the PSA. International agreements need to be implemented into national law to be legally binding. I will use Norway as an example and see whether or not Norway has fulfilled their obligations in implementing the PSA and other regulations on port State measures. The value and main objective of this master thesis will be to account for three main questions. Firstly “in which degree is port State measures regulated in international agreements”, the second “in which degree do the PSA regulate port State measures to prevent, deter and eliminate IUU fishing on the high seas?”, third “Is Norway’s port State measures on IUU Fishing consistent with the measures outlined in the PSA to combat IUU fishing?”. The thesis will be demarcated against criminal prosecution and enforcement.

### **1.3 Fighting IUU Fishing with Various Jurisdictions**

Throughout the times the international community have had success with regulating States rights regarding the sea. The LOSC regulates the different maritime zones and the States sovereign rights regarding each zone. Following the LOSC art 2, the sovereignty of the coastal State extends beyond the internal waters to the territorial sea. This sovereignty is only limited by other States right of innocent passage thorough the territorial sea cf. part 2 section 3. The contiguous zone is regulated in art. 33, which states that the coastal State may exercise control necessary to “prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea”. The EEZ is the area outside the territorial sea and contiguous zone, and here the coastal State has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether

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<sup>9</sup> PSA Preamble and art 2

<sup>10</sup> PSA Article 2

living or non-living”. In the EEZ the coastal States sovereignty is limited by other States “freedoms (...) of navigation and overflight and of the laying of submarine cables and pipelines”. On the high seas the LOSC art. 87 regulates freedom of the high seas and states that, among other things, the vessels have freedom of fishing on the high seas. But the States are bound to cooperate and the vessels are a subject to flag State jurisdiction.

The conflict between international agreements and the freedom of the high seas makes the regulation of IUU fishing difficult. The State party and the ships flying the flag of one State party is obliged to comply with the fisheries regulation in RFMOs where they are member States. The high seas freedoms in the LOSC makes it hard to enforce laws and regulations on vessels in breach of the regulations set by RFMOs on non-member States.

Ports lie within the territory of a State and is a subject to its territorial sovereignty, a States discretion in exercising jurisdiction over its ports is acknowledged in customary international law. This is verified in the *Nicaragua case*, the International Court of Justice (ICJ) ruled that it is “by virtue of its sovereignty that the coastal state may regulate access to its ports,”<sup>11</sup> and implicitly in LOSC art. 25(2) which states “coastal states are empowered to set conditions regarding the admission of foreign vessels to their ports and internal waters and have the right to take steps to prevent the breach of these conditions” this is supported by art. 211(3), and 255 of LOSC. Conversely customary international law does not give foreign vessels a general right of access to ports.<sup>12</sup>

The extent of the state's sovereignty at sea depends on where the vessels are located. The content of a States sovereignty can be considered to be deepened through principles of international law, principles which govern the right of states to exercise jurisdiction by regulating behavior and enforcing its regulations.

The principles of jurisdiction help determine the scope of a state's enforcement powers. The two most basic principles of jurisdiction are the territorial principle and the nationality principle. Both principles are deeply rooted in international law and require a clear link between the State and the situation in which it exercises jurisdiction.<sup>13</sup> The norm is the

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<sup>11</sup> ICJ, (1986), Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Merits, Judgment of 27 June 1986, para. 213

<sup>12</sup> Molenaar E. J (2010), n 8, p 376

<sup>13</sup> Lowe, Vaughan, (2006). “Jurisdiction” (in: Malcolm D. Evans (red.), International Law, Oxford University Press, Oxford, s. 342

stronger the connection, the clearer basis for jurisdiction. Through the years' customary international law has made flag and coastal States responsible for ensuring that ships comply with internationally accepted rules and standards, such as fisheries regulation, this has also been codified by international law.<sup>14</sup>

Coastal State jurisdiction is based on the territorial principle. This principle reflects the sovereignty of a state over its territory.<sup>15</sup> The state, therefore, has the competence to regulate behavior and enforce violations of its laws against acts that have taken place in the territory.<sup>16</sup> This principle is considered to be the most fundamental principle for jurisdiction.<sup>17</sup> It provides an adequate basis for the exercise of jurisdiction.<sup>18</sup> As a basis the territorial principle only applies in internal waters, ports and the maritime zones of the coastal state, this is due to the fact that these areas constitute the areas where the coastal State has sovereignty.

Accordingly, LOSC confers upon the coastal State the obligation to effectively exercise its jurisdiction and control to cooperate with other states directly or through RFMOs "to agree upon the measures necessary for the conservation of these stocks in the adjacent area".<sup>19</sup> The coastal state has the main obligation to ensure a lawful utilisation of the fish stocks in its area which is also migrating to the high seas. This means that the coastal State has to take the measures necessary to secure a sustainable utilisation of its fish stocks. The problem with coastal States is that they do not have enforcement jurisdiction on the high seas or against illegal activity conducted on the high seas. Therefore, the international community has relied upon flag States to combat illegal activity on the high seas. This can be read through the whole of chapter VII in LOSC where flag States is given enforcement responsibility over vessels flying their flag on the high seas.

The second principle which is deeply rooted in international law is the nationality principle. The core of this principle is the state's undisputed right to apply its laws to its nationals, regardless of where they may be.<sup>20</sup> The flag State responsibility can be considered as an expression of the nationality principle. The nationality of ships is regulated in the LOSC art.

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<sup>14</sup> LOSC articles 56, 58 and 92, FSA articles 5 and 18

<sup>15</sup> Lowe, Vaughan, (2006), n. 13, p 338-39

<sup>16</sup> Brownlie, Ian, (2008), "Principles of public international law" Oxford University Press, p 301.

<sup>17</sup> Shaw, Malcom N., (2008) "International law" Cambridge University Press, p 654.

<sup>18</sup> Molenaar, Erik J., (2006), "Port State Jurisdiction: Towards Mandatory and Comprehensive Use" in "The Law of the Sea - Progress and Prospects", Oxford University Press, p 196.

<sup>19</sup> LOSC art. 63

<sup>20</sup> Lowe, Vaughan, (2006), n. 13, p 345.

91. A consequence of being a flag state is that this state is responsible for "effectively exercising its jurisdiction and control in administrative, technical and social matters over ships flying its flag" cf. LOSC art. 94(1). In the case of fishing on the high seas, flag State responsibility is regulated in the FSA art. 18.

The flag State has exclusive jurisdiction and the primary enforcement responsibility in cases of IUU fishing on the high sea cf. LOSC art 92. The nationality principle also has a bearing on the jurisdiction over fishing vessels, and the flag State has primary responsibility to ensure that its fishing vessels do not engage in IUU fishing. Unfortunately, the time has shown that several flag States do not fulfill their obligations under international agreements. There has grown a practice of IUU fishing vessels using flags of States which often show an inability or unwillingness to effectively exercise control over their fishing vessels, such states are known as "flags of convenience".<sup>21</sup> These are States where operators register their ships because they know that these States will not require full compliance with international standards.<sup>22</sup>

RFMOs are dependent on the good faith efforts of their member States to comply with the fisheries restrictions, but the ship owners of IUU fishing vessels are free to re-flag to a non-member of the RFMO in order to circumvent internationally agreed conservation and management measures.<sup>23</sup> Flag State control has shown to have too many shortcomings to be a useful instrument to eliminate IUU fishing and coastal State jurisdiction is limited to the maritime zones of a coastal State, therefore, the search for better measures to combat IUU fishing has led to increased development in port State control.

Territorial, Quasi-territorial and extra-territorial jurisdiction is legal basis for port State jurisdiction outside the territory of the state. While quasi-territorial regulates fishing in the EEZ and the continental shelf, extra-territorial jurisdiction relates to activities conducted outside the States maritime zones. It can be on the high seas, in the maritime zones of other states or the area.<sup>24</sup> PSA regulates extra-territorial jurisdiction in two provisions, namely art 4(1)(b) and 18(3).<sup>25</sup>

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<sup>21</sup> Swan, J. (2002) "Fishing Vessels operating under open registers and the exercise of flag State responsibilities". p 11

<sup>22</sup> König, Doris, (2002). "The Enforcement of the International Law of the Sea by Coastal and Port States" p. 4

<sup>23</sup> Sodik D. M., (2009), "Post-LOSC Legal Instruments and measures to address IUU Fishing", in Asian Yearbook of International Law, p 76

<sup>24</sup> Area: The seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, LOSC art. 1

<sup>25</sup> Molenaar E. J (2010), n 8, p 379

The growing importance of port State control measures in the global fight against IUU fishing stems from the failure by flag States and coastal States to exercise effective control and jurisdiction over vessels in their jurisdiction. Port State control is considered to be an important tool in the fight against IUU fishing because it ensures that IUU vessels, which escape sanctions from the flag and coastal State and are about to enter a port, can be held liable by the port State.<sup>26</sup>

Extra-territorial port State jurisdiction can accordingly be a suitable method of counteracting IUU fishing on the high sea. Such jurisdiction may be directed against the fishing activity effectively, e.g. by a landing ban as requested by the FAO in IPOA-IUU art. 56 and the PSA in art. 18(1)(b), although the actual fishing activity on the high seas may remain unpunished. The development in the treaties agreed upon the latter years, e.g. through RFMO, FSA and PSA, where port states have a duty to use their territorial jurisdiction,<sup>27</sup> supports the territorial principle as the basis for port state jurisdiction. The exercise of this competence can be considered as a supplement to the non-flag State enforcement applicable to the high sea. Since the competence applies to all foreign fishing vessels that are voluntarily in the port of another State, the weaknesses of non-flag State competence on the high sea can be counteracted.

#### **1.4 The Loophole, the Banana Hole and Central Arctic Ocean**

Fish can be shipped over enormous distances, but this is expensive due to the fact that frozen fish requires much energy to remain frozen, and it is difficult due to the fact that fresh fish need to be landed immediately to keep the freshness. Landing of IUU caught fish often appears in the ports close to the high seas areas where the IUU fishing has been conducted. Due to the theme of the thesis high seas areas outside the coast of Norway is the focus area. Norway has two close high seas areas where IUU fishing can be conducted, namely the loophole and the banana hole, in this chapter I will give an account for these.

The so-called “Loophole” refers to a high sea area located between the Norwegian economic zone, the fishery protection zone around Svalbard and the Russian economic zone.<sup>28</sup> The same applies to the so-called “Banana Hole”, which is an ocean area surrounded by the EEZ

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<sup>26</sup> Palma, Mary Ann, et. al. “Promoting Sustainable Fisheries”, p 157

<sup>27</sup> PSA art. 3(2) and FSA art. 23.

<sup>28</sup> Stokke, Olav Schram (2010) «Barents Sea Fisheries – the IUU Struggle” in Arctic Review on Law and Politics, Vol 1, 2/2010, p 212

of Norway, the Faroe Islands, Iceland and Greenland, as well as the fishery protection zone around Svalbard and the fishery zone around Jan Mayen, this area is also high seas.<sup>29</sup>

The basis in these high Sea areas is that the flag state has exclusive jurisdiction. States that fish in the area, however, have a duty to cooperate to ensure the conservation and sustainable use of the resources.<sup>30</sup> The most relevant body in the region are the The North East Atlantic Fisheries Commission (NEAFC). The central arctic ocean is another area of great concern for Norway. This large high seas area is completely covered with ice, and there are no IUU fishing there as of today. Due to the climate change and ice melting these areas will be of great concern in the wery near future.

## **1.5 Structure of the Thesis**

The two first chapters are the introduction chapter and the methodology chapter. The third chapter of this thesis aims to clarify the meaning of the term “IUU fishing”. It will describe the historical context of the rest of the thesis, interpret the definition of the different factors of the word and account for the consequences of IUU fishing in a global perspective. It will also address IUU fishing as a transnational crime. By doing so, it will clarify the problems associated to IUU fishing for the purposes of this thesis. In this chapter I will try to set IUU fishing in context.

The fourth chapter will reflect on the different agreements regulating port State measures on combating IUU fishing before the PSA. It will draw upon how the regulation of port State control has developed through time, from single articles in different agreements to chapters on port State control and to the PSA. Several global agreements which cover port State measures when it comes to IUU fishing will be discussed, hence, FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement)<sup>31</sup>, The UN 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

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<sup>29</sup> BarentsWatch “The Loophole and the Banana Hole”

<sup>30</sup> LOSC art. 118

<sup>31</sup> The 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

Fish Stocks (FSA),<sup>32</sup> FAO Code of Conduct for Responsible Fisheries (Code of Conduct),<sup>33</sup> the International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (IPOA on IUU)<sup>34</sup>, the Model Scheme on Port State Measures to Combat IUU Fishing (FAO Model Scheme),<sup>35</sup> RFMOs and the PSA. In this chapter I will answer the first legal question raised in chapter 1.2.

The fourth chapter will focus on the PSA and the different aspects of the global agreements on port State measures. Further, the objectives and core elements of IUU fishing and port State measures to combat IUU fishing is discussed. In this chapter the second legal question raised in chapter 1.2 will be answered.

Finally, the fifth chapter is about Norway's regulation of IUU fishing, and the implementation of the PSA is elucidated. In this part, Norway's national legislation on port State measures to combat IUU fishing is discussed and compared to the regulation in the PSA. This chapter will answer the third legal question raised in chapter 1.2.

## **2 Legal Sources and Methodology**

### **2.1 Interpretation of International Treaties**

The 1969 Vienna Convention on the Law of Treaties (VCLT)<sup>36</sup> entered into force in 1980 and is the basis for interpreting treaties. Section 3 contains the main articles regulating interpretation. The ICJ stated in the "*Case concerning Kasikili/Sedudu Island*" that the VCLT is customary international law".<sup>37</sup>

Article 31(1) expresses an objective interpretation of the Treaty as a basis. Art. 31(1)(a), states that a treaty shall be interpreted in "good faith in accordance with the ordinary meaning (...) in their context and in the light of its object and purpose". This means that the wording of the treaty shall be interpreted as it is most naturally understood.

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<sup>32</sup> The 1995 UN 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

<sup>33</sup> The 1995 FAO Code of Conduct for Responsible Fisheries

<sup>34</sup> The 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

<sup>35</sup> The 2007 FAO Model Scheme on port State measures to combat illegal, unreported and unregulated fishing.

<sup>36</sup> The Vienna Convention on the Law of the Treaties (1969)

<sup>37</sup> "*Case concerning Kasikili/Sedudu Island*", (Namibia v. Botswana), I.C.J. Reports 1999, p. 1045

The natural understanding shall be determined in the light of the "object and purpose" of the treaty. The wording of the treaty must, therefore, be interpreted with a general glance on whether the purpose of the treaty is being realised by the interpretation in question. The purpose is derived from the preamble of the treaty or an objects clause.<sup>38</sup> The "context" of the treaty includes the text of the treaty as a whole, and also the preamble and the appendices, cf. art. 31 nr. 2.

Further art. 31(3)(c) states that "any relevant rules of international law in the relations between the parties" shall be taken into account "together with the context". The wording in "rules" coincide with the concept of the sources of international law as listed in ICJ art. 38(1),<sup>39</sup> including "international conventions", "custom", "general principles", and "judicial decisions and the teaching of the most highly qualified publicists". Also, the "rules" should be "applicable in the relations between the parties" cf. VCLT art. 31(3)(c), this means that the rules should be binding on all the treaty parties. Therefore, the wording in "applicable" states that the VCLT does not cover soft law instruments.

Art. 32 states that "Recourse may be had to supplementary means of interpretation", although this formulation is a bit diffuse it has not attracted much attention. It seems to be unanimity that the wording does not indicate anything other than that the legal sources specified by the provision may be relevant in the interpretation of the treaty.<sup>40</sup> Relevant sources of law according to article 32 are firstly "preparatory work of the treaty", including draft treaty texts and negotiating reports.<sup>41</sup> Also "circumstances of its (the treaty's) conclusion" are relevant legal sources. This includes interpretative statements issued by the member States.<sup>42</sup> The wording states that these sources may be taken into consideration to confirm the understanding of a treaty in accordance with interpretation according to art. 31, cf. art. 32.

In the preparation of the VCLT, it was stated that article 32 does not prevent legal scholars from referring to the preparatory work and circumstances of the adoption of a convention. The legal significance of these sources will depend on the extent to which they provide proof of a common understanding between the parties about the content of the wording.<sup>43</sup> To

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<sup>38</sup> Mark E. Villiger, (2009) "Commentary on the 1969 Vienna Convention on the Law of Treaties", p. 428

<sup>39</sup> Mark E. Villiger, (2009), n. 38, p. 433

<sup>40</sup> Gardiner, Richard (2008) "Treaty interpretation", Oxford, p 310.

<sup>41</sup> Villiger, 2009, n. 38, p. 445

<sup>42</sup> Villiger, 2009, n. 38, p. 449

<sup>43</sup> Rapport fra Sir Humphrey Waldock p. 58 paragraph 20–21.

interpret art. 32 so that it expresses the weight of supplementary sources, is thus most consistent with what was meant achieved by the provision. It seems like this understanding is also used as the basis for the application of the VCLT.<sup>44</sup>

Art. 34 contains the general rule regarding third States, according to the article a “treaty does not create either obligations or rights for a third State without its consent”. The parties of the treaty cannot impose the treaty upon other States which is not a party to the treaty, unless the State expressly consent to be bound by the treaty even though it is not a State party.

We can divide international legal agreements regulating fisheries into two categories the first one is legally binding multilateral agreements and the second non-binding instruments (soft law instruments). Particular focus is in this thesis given to the applicable international instruments, in particular, the provisions of the LOSC; agreements regulating port State measures in particular PSA, IPOA on IUU, compliance Agreement, FSA, and Code of Conduct. Although the wording in VCLT art. 31 does not include soft-law instruments, these instruments play an important role in the interpretation of the legal status between the parties.

Due to the conflicting interests on the high seas with freedom of the high seas on one side and other states wish for a better fisheries management on the other I have not been able to detect any case law regulating the theme as such. This might be because high seas fishing is a freedom given by LOSC art. 87(1)(e) and therefore not a breach of international commitments, international tribunals can judge on the basis of.

The writings of legal scholars are used to inform and support the interpretations, arguments and proposals made by the author. The VCLT is applied in this thesis to direct the relationship between Norwegian legislation and the global legal framework for IUU fishing. Two different legal regimes and their application to one area are explored, and therefore primary legal sources are studied from both the international law of the sea framework and the Norwegian framework. In this thesis Norwegian national law is used as an example on State implementation of the PSA, it is therefore also necessary to use Norwegian legal method.

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<sup>44</sup> Gardiner (2008), n. 41, p 323

## **2.2 Norwegian Methodology**

Norway is not a party to the VCLT, but article 31 to 33 is customary international law. A fundamental obligation of States is to bring domestic legislation in conformity with requirements under international law.<sup>45</sup> The Norwegian legal system is based on dualism, which states that Norwegian law and international law are two independent systems, this requires that international law to be incorporated into the national legal system for it to have effect. There are three ways to make international agreements a part of national law, through active or passive transformation or through incorporation.

Incorporation means that Norwegian law refers to international agreements and states that these shall apply as Norwegian law.<sup>46</sup> Incorporated conventions are included in Norwegian law as they are, and apply as Norwegian law. This means that Norwegian courts can enforce the provisions of the Convention directly. Active transformation means that rules will be determined in Norwegian law which intend to comply with those particular international obligations.<sup>47</sup> Passive transformation implies that it is stated that national legislation already are in accordance with the convention Norway agrees upon.<sup>48</sup> Unlike incorporation, transformation does not turn the convention into Norwegian law as such. PSA for example is made a part of Norwegian law through passive transformation.

In chapter 6 Norwegian legal methodology is used. The most important sources in this part will be the Norwegian “havressursloven” (for this thesis named “The Marine Resources Act”), the preparatory work of this law and secondary legislation. Very few legal scholars have written about the theme, and there does not exist any case law.

## **3 IUU Fishing and the Law of the Sea.**

### **3.1 Definition of IUU Fishing**

#### **3.1.1 Introduction**

The fight against IUU fishing on the high seas has developed from the focus on flag and coastal State measures towards more enforcement responsibility on port States, as shown in

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<sup>45</sup> Brownlie Ian (2008), n. 16, p 35, and IPOA-IUU, para III number 9.1

<sup>46</sup> Morten Ruud og Geir Ulfstein, *Innføring i folkerett*, 4. utgave, Oslo 2011 s. 59

<sup>47</sup> Ruud og Ulfstein (2011), n. 46, p 59.

<sup>48</sup> Ruud og Ulfstein (2011), n. 46, p 61

chapter 1.3. Port State control is today considered one of the most important tools in the fight against IUU Fishing. This chapter will give an account on the definition of IUU fishing.

PSA is the latest instrument which aims to combat IUU fishing, but the agreement does not contain a general definition of the term “IUU fishing”, instead it has regulated in art. 1(e) that “for the purpose of this agreement (...) ‘Illegal, unreported and unregistered fishing’ refers to the activities set out in paragraph 3 of the 2001 FAO” IPOA-IUU.<sup>49</sup> IUU fishing is broadly defined in the IPOA-IUU art. 3.1, however, the IPOA-IUU is a non-binding soft law instrument. On the other hand, the definition of IUU fishing in the IPOA-IUU is made to hard law through the PSA, and it is also adopted by the European Council Regulation 1005/2008 establishing a Community system to prevent, deter and eliminate IUU fishing.<sup>50</sup>

### **3.1.2 Illegal Fishing**

The first term in IPOA-IUU Article 3.1 is “illegal fishing”, and the IPOA defines “illegal fishing” as fishing:

*3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;*

*3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or*

*3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.*

“Illegal fishing” takes place where vessels operate in violation of fisheries legislation. It can, based on the law text, cover several types of fishing vessels without permission to fish in that area. The definition can cover both national and foreign vessels, and also vessels flying the flag of a party to an RFMO in those areas, but only when the vessel is conducting fisheries activities. Illegal fishing on the high seas covers mainly breach of the conservation and management measures of an RFMO, primarily by the member states of the RFMO, but also non-members which is bound to cooperate under the RFMO by for example the FSA.<sup>51</sup> Illegal

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<sup>49</sup> PSA art. 1(e)

<sup>50</sup> Council Regulation (EC) No. 1005/2008 of 29 September 2008.

<sup>51</sup> FAO (2016) “The State Of World Fisheries And Aquaculture”, p 97

fishing includes harvesting prohibited species; using banned fishing gear; catching more than the set quota, and fishing without a license.<sup>52</sup> The owner and company can be registered in one State, flag the vessel in another, hire a multi-national crew, and fish in international waters. This demonstrates both the transnational nature of IUU fishing and the level of advanced planning that lies behind organized IUU fishing to protect the illegality.<sup>53</sup>

### **3.1.3 Unreported Fishing**

Article 3.2 of the IPOA-IUU refers to “unreported” fishing which is described as fishing:

*3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or*

*3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.*

“Unreported fishing” refers to fishing activities “which have not been reported or have been misreported” in contravention of national laws and regulations, or in contravention of the reporting procedures of an RFMO.<sup>54</sup> Unreported fishing is often related to activities that are distinct yet associated with fishing, which often occurs after or during a fishing act, for example when a vessel needs to cut the trawl net.<sup>55</sup> It can also be done with fishers keeping two logs with information about the fish caught, one official log for the inspectors and one secret log for the owner. This can have huge consequences for the sustainable development in the ocean, as the quotas is set by the reported numbers of the fish caught, over time this can lead to overfishing of different species and extinction in extreme cases. Unreported fishing can also be done by fishers falsely record vessels location or by offloading the fish at ports with low regulatory and inspections standards, ports of convenience.<sup>56</sup>

### **3.1.4 Unregulated Fishing**

Further IPOA-IUU article 3.3 refers to “unregulated fishing” which is a broader term, and the article states that “unregulated fishing” applies to fishing:

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<sup>52</sup> PEW, 27. August 2013

<sup>53</sup> Phelps Bondaroff, et. al. (2015). “The Illegal Fishing and Organized Crime Nexus: Illegal Fishing as Transnational Organized Crime.” The Global Initiative Against Transnational Organized Crime, p 30

<sup>54</sup> IPOA-IUU at 3.2.2

<sup>55</sup> Greenpeace International, “Definition of IUU fishing” (2010)

<sup>56</sup> Alexey, V. “Trawling in the Mist: Industrial Fisheries in the Russian Part of the Bering Sea”, Traffic International, Cambridge, p 55.

*3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or*

*3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law*

“Unregulated fishing” relates largely to the activities of “vessels without nationality”, vessels flying the flag of non-parties to RFMOs, or by a fishing entity, “in a manner that is not consistent with or contravenes the conservation and management measures” of an RFMO.<sup>57</sup> It also relates to “fish stocks (..) to which there are no applicable conservation or management measures and where such fishing activities are conducted (..) inconsistent with State responsibilities for the conservation of living marine resources (..).<sup>58</sup> Further, it covers States failure to regulate certain fishing activities, such as activities not easy to monitor and account e.g., fish stocks in which is not regulated at all, e.g. new and exploratory fisheries.<sup>59</sup> Not all unregulated fishing is in contravention with the law, but it is typically carried out in order to circumvent the law. Also, IPOA-IUU affirms that “notwithstanding paragraph 3.3, certain unregulated fishing may take place (..) not in violation of applicable international law and may not require the application of measures envisaged” under the IPOA-IUU.<sup>60</sup>

### **3.1.5 Grey Areas**

Despite this broad definition there exist several grey areas and overlapping situations in these three components. Some authors argue that the terms are so closely related that “unregulated” and “unreported” are subcategories of illegal fishing.<sup>61</sup> The grey areas arise “due to the diversity in governance frameworks, national legislation, fishing operations throughout the globe, and the conservation and management measures of RFMOs”.<sup>62</sup>

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<sup>57</sup> IPOA-IUU art. 3.3.1

<sup>58</sup> IPOA-IUU art. 3.3.2

<sup>59</sup> FAO (2016) “The State Of World Fisheries And Aquaculture” p. 97

<sup>60</sup> IPOA on IUU art. 3.4.

<sup>61</sup> Baird, R., (2004), “Illegal, Unreported and Unregulated Fishing: An Analysis of the legal, economic and historical factors relevant to its development and persistence”, in Melbourne Journal of International Law part II second paragraph.

<sup>62</sup> FAO (2016) “The State Of World Fisheries And Aquaculture” p. 97

For example, unreported fishing contains both a part of illegal fishing and unregistered fishing, this can be shown by the fact that the definition of the term “unreported fishing” includes “non-reporting, misreporting or under-reporting in contravention of laws and RFMO conservation and management measures (illegal) and reporting that is not required by law or an RFMO conservation and management (unregulated) but is advisable”.<sup>63</sup>

### **3.2 Consequences of IUU Fishing**

In the latter chapter it was stated that IUU fishing in big scale consists of illegal acts, in this chapter the consequences of these acts will be explained. Due to the big scale IUU fishing conducted each year, the IUU industry has become a serious global threat and leads to negative effects on marine ecosystems, global food security,<sup>64</sup> and local economies, state governance, local communities and legitimate fishers.<sup>65</sup> The consequences of destabilising marine ecosystems are far-reaching, extending well beyond global oceans, which cover 71% of our planet.<sup>66</sup>

In 2011 a joint statement by EU and USA described IUU fishing as a “global phenomenon with devastating environmental and socio-economic consequences, particularly for coastal communities in developing countries who rely on fisheries for their livelihoods or for protein”.<sup>67</sup> In 2014 the FAO described the phenomenon in similar terms, stating that IUU fishing “remains a major global threat to the long-term sustainable management of fisheries and the maintenance of productive and healthy ecosystems as well as to the stable socio-economic condition of many of the world’s small-scale and artisanal fishing communities”.<sup>68</sup> These statements showed the concern that had been developing over the threat of IUU fishing to the long-term conservation and socio-economic goals of fisheries governance.<sup>69</sup>

It is challenging to give a precise picture of the magnitude of IUU fishing due to the fact that the activities are often illegal and therefore tried hidden. Various studies have attempted to address the hidden numbers and other consequences of IUU fishing. A study from 2008

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<sup>63</sup> FAO (2016) “The State Of World Fisheries And Aquaculture” p. 97

<sup>64</sup> FAO 2010-2018. International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing - Web site.

<sup>65</sup> AO contribution UN SG OLOS report Part 1 p. 9

<sup>66</sup> FAO (2002), Garibaldi, L.; Limongelli, L.

<sup>67</sup> Damanaki, M., & Lubchenco, J. (2011), U.S.-EU joint statement on combating IUU fishing, page 1

<sup>68</sup> Christensen J. (2016) “Illegal, Unreported and Unregulated Fishing in Historical Perspective”. In Schwerdtner Máñez K., Poulsen B. (eds) Perspectives on Oceans Past. Springer, Dordrecht, p 134

<sup>69</sup> Christensen J. (2016), n. 68, p. 134

estimated that the annual global IUU fishing catch was “between 11 – 26 million tonnes”, or between \$10 and \$30 billion<sup>70</sup>. Also, it is estimated that “\$1.6 billion in seafood enters Europe annually, and that approximately 50% of all seafood sold in Europe has illegal origins”.<sup>71</sup> Further, a study from 2010 found that 30% of assessed ocean fisheries were over-exploited and another 57% fully exploited.<sup>72</sup> In a report from 2015 FAO found that 33.1% of the ocean's fisheries were classified as overfished. Since it takes two to three times the species lifespan to recover, it seems unlikely that this will happen in the near future.<sup>73</sup> In a study from 2006, the National Oceanic and Atmospheric Administration in the U.S stated that IUU fishing increased with 108% in a five years’ period in the north-eastern U.S. These numbers are in line with numbers presented in studies from the coast of Africa and Asia, and show a devastating picture.<sup>74</sup>

The first baseline estimate of the scale of IUU fishing was produced in 2009, and found that losses which applied to IUU fishing accounted for between US \$10 billion and US \$23,5 billion each year.<sup>75</sup> Estimates shows that the IUU fishing industry, between 1980 and 2003, may have accounted for 20% of the world’s harvested fisheries resources. Also, the study showed that developing nations had a bigger risk for being a victim of IUU fishing activity than developed nations.<sup>76</sup>

One of the main impacts of IUU fishing is lost fishing opportunities in coastal states. Also, IUU fishing makes an enormous loss in socio-economic value due to the lost fishing opportunities.<sup>77</sup> IUU fishing creates negative impacts on food security and nutrition, existing and potential employment opportunities, local livelihoods, safety and security, women and gender relations and human rights.<sup>78</sup> Some also argue that there is a link between IUU fishing and other violation of the law such as not complying with shipping and labor regulations.<sup>79</sup>

The devastating numbers listed above shows the impacts IUU fishing has on the marine environment and the world society in general. To overcome the threat IUU fishing constitutes

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<sup>70</sup> PEW, (2013), p. 1,

<sup>71</sup> Phelps Bondaroff et. al. (2015), n. 53, p 14

<sup>72</sup> Phelps Bondaroff et. al. (2015), n. 53, p 15

<sup>73</sup> FAO. 2018. P. 46

<sup>74</sup> Phelps Bondaroff et. al. (2015), n. 53, p 15

<sup>75</sup> Christensen J. (2016), n. 68, p 134

<sup>76</sup> Christensen J. (2016), n. 68, p 134

<sup>77</sup> High Seas Task Force (2006). P. 20

<sup>78</sup> AU-IBAR 2016. P. XIII

<sup>79</sup> FAO, “Links between IUU Fishing and other crimes”

port State measures was developed as a substitute to coastal and flag State measures in the fight against IUU fishing.

### **3.3 IUU Fishing as a Transnational Organised Crime**

IUU fishing does not just create economic and social consequences. As shown in the definition of IUU fishing the majority of this activity violates or contravenes some law, regulation or agreement. IUU fishing has been categorized as an environmental crime, but it is also often related to other organized crimes, such as smuggling of narcotic substances, corruption, and economic crimes.<sup>80</sup> Fisheries crime has, the last couple of years, gained increased attention and is on its way to get the status as a transnational organised crime. In this chapter it will be discussed how IUU fishing can contribute to other transnational organised crimes such as smuggling of narcotic substances, corruption, and economic crimes.

The wording in “transnational organised crime” constitutes of several factor which has to be interpreted separately. “Transnational” refers to the coordinated activity of a cross-border nature. The UN has defined crime as “transnational” if it is “committed in more than one State; (..) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (...) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State, or (...) It is committed in one State but has substantial effects in another State”.<sup>81</sup>

Criminologist Jay Albanese and Philip Reichel have defined organised crime as “a continuing criminal enterprise that rationally works to profit from illicit activities that are often in great public demand. Its continued existence is based on the use of force, threats, monopoly control and the corruption of public officials”.<sup>82</sup>

The UN defines “Organized criminal group” as a “structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”.<sup>83</sup>

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<sup>80</sup> UNDOC “fisheries crime” p 4

<sup>81</sup> Convention against Transnational Organised Crime art. 3(2) litra a-d

<sup>82</sup> OECD Miraglia, Paula, et. al. (2012) p 5

<sup>83</sup> Convention against Transnational Organised Crime art. 2 litra a

The 2013 ‘Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa’ listed IUU fishing as a “transnational organized crime in the maritime domain”. This is of big impact when it is listed along with many well-established transnational criminal activities, e.g. “money laundering, human trafficking, illegal dumping, maritime terrorism and hostage taking”.<sup>84</sup>

A report from the European Union and the Southern African Development Community stated that drugs are smuggled into the country when South African abalone is shipped out, this is only “one component in a crime-based chain of events stretching from the (..) poaching to theft and prostitution to pay for the drugs when they reach the streets of South Africa”.<sup>85</sup>

Large-scale IUU fishing results in a less secure maritime environment, and the fact that Some SOLAS vessels<sup>86</sup> play a huge role in IUU fishing demonstrates how important cooperation between IMO<sup>87</sup> and FAO is. International police cooperation is also crucial to combat IUU fishing as a transnational crime.<sup>88</sup>

In December 4, 2009 United Nations General Assembly Resolution 64/72 on sustainable fisheries, draw out the link between IUU fishing and transnational organised criminal groups, and encouraged States “to study the causes and methods of and contributing factors to illegal fishing to increase knowledge and understanding of those possible connections, and to make the findings publicly available, bearing in mind the distinct legal regimes and remedies under international law applicable to illegal fishing and international organized crime”.<sup>89</sup>

IUU fishing has gained low priority by enforcement which is a tempting factor for associated activities, due to its low risk. IUU fishers often target vulnerable stocks that are subject to strict management controls or moratoria, efforts to rebuild those stocks to healthy levels has proven to be difficult, this constitutes a severe threat to the marine ecosystem.<sup>90</sup> IUU fishers

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<sup>84</sup> Phelps Bondaroff et. al. (2015), n. 53, p 38

<sup>85</sup> Stølsvik, Gunnar, (2008) “Transnational organised fisheries crime as a maritime security issue” Panel presentation at the ninth meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea. p 1

<sup>86</sup> International Convention for the Safety of Life at Sea (SOLAS) vessel is any ship to which the International Convention for the Safety of Life at Sea 1974 applies; namely: a passenger ship engaged on an international voyage, or. a non-passenger ship of 500 tons’ gross tonnage or more engaged on an international voyage.

<sup>87</sup> International Maritime Organization

<sup>88</sup> Stølsvik, Gunnar, (2008) n. 85, p 3

<sup>89</sup> Stølsvik, Gunnar, (2010) “Cases and materials on illegal fishing and organized crime” in The Norwegian national advisory group against organized IUU fishing, p 3

<sup>90</sup> FAO, “Illegal, Unreported and Unregulated (IUU) fishing”

employ sophisticated and coordinated strategies to launder money and fish and avoid taxes. Also, IUU fishers enable their activities through the violation of labor and environmental standards, corruption, bribery and violence. The fact that IUU fishing is not just an environmental crime, but also contributes to other transnational organised crimes is one of the reasons why IUU fishing need to be dealt with expeditiously and transparently. To do this the international community has to agree upon international agreements which are regulating measures to combat IUU fishing, these agreements is the theme for the next chapter.

## **4 International Obligations on Port State Measures**

### **4.1 Introduction**

In this chapter I intend to unravel in which degree port State measures are regulated in international agreements. The evolution of the legal foundation for port State measures started with the LOSC where it was addressed in art. 218. The article states that port States can enforce "applicable international rules and standards", against a foreign vessel "in respect of any discharge" on the high seas.<sup>91</sup> Although the article relates to marine pollution rather than fisheries-related issues is it the first article in a global agreement which mentioned port State enforcement, and it laid the foundation for the following conventions.

In the decades following the LOSC, port State measures became more and more common in international agreements. Throughout the 1990s and in early 2000 the work with eliminating IUU fishing through port State control got increased attention in several agreements, e.g. in the FSA where art 23(1) establishes a general duty for port states to take measures to promote subregional, regional and global conservation and management measures for sustainable fisheries. The IPOA-IUU supports this general duty in art. 52 – 64.

In late 2017 the Arctic states agreed upon a preliminary proposal on the "Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean".<sup>92</sup> The agreement is not finally agreed upon yet, but in the draft, the States has not regulated any port State responsibility. The preamble, however, states that it "recalling the principles and provisions of treaties and other international instruments relating to marine fisheries that already apply to the high seas portion of the central Arctic Ocean, including those contained in" the LOSC,

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<sup>91</sup> LOSC art. 218(1)

<sup>92</sup> See appendix 1

FSA and the Code of Conduct as well as “other relevant instruments adopted by the Food and Agriculture Organization of the United Nations”. PSA is an example of an agreement in which can be interpreted here. The lack of regulation on port State measures makes the PSA also applicable in these areas. Due to the lack of regulation on port State measures in the agreement and the fact that it is not finally agreed upon yet the agreement will not be discussed further.

In this chapter, I will focus on the major fisheries related agreements which regulates port State control in international law, namely the LOSC, the Compliance agreement, the Code of Conduct, FSA and the precursor to the PSA namely the FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing.<sup>93</sup> I will also discuss some RFMOs.

## **4.2 International Agreements and Obligations**

### **4.2.1 1982 United Nations Convention on the Law of the Sea**

The LOSC defines the rights and responsibilities of nations concerning their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources. LOSC was concluded in 1982 and entered into force in 1994.

The LOSC sets down the regime of freedom of the high seas, with freedom of fisheries in art. 87(e). Also, the agreement lays down the duty to cooperate on the conservation and management of living resources in areas of the high seas as an essential principle in the law of the sea.<sup>94</sup> It also requests for cooperation on the management of straddling stocks,<sup>95</sup> highly migratory species,<sup>96</sup> anadromous stocks,<sup>97</sup> and catadromous species.<sup>98</sup> This kind of duty to cooperate lay the foundation for the establishment of RFMOs, as will be discussed in 4.2.7.

When the LOSC was agreed upon, flag and coastal State responsibilities got a strong position through the whole agreement, in fact, port State measures were only mentioned once, namely in art. 218. Even though LOSC only mentions port State measures once, it was an important milestone for port State regulations. Where the LOSC lacks regulations, one has seen the

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<sup>93</sup> 2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing

<sup>94</sup> LOSC art. 118

<sup>95</sup> LOSC art. 63

<sup>96</sup> LOSC art. 64

<sup>97</sup> LOSC art. 66

<sup>98</sup> LOSC art. 66

necessity to complement it with other agreements. LOSC has the status as a framework agreement, and in the decades following more detailed agreements on fisheries management and conservation was concluded. In direct link to LOSC, the FSA was agreed upon, but also the Compliance Agreement, the Code of Conduct, the IPOA-IUU, the PSA and several RFMOs does complement LOSC in cases of port State measures to combat IUU fishing.

#### **4.2.2 1993 FAO Compliance Agreement**

The FAO Compliance agreement was adopted in 1993 within the framework of the FAO, and it entered into force in 2003 signed by 42 participants including the EU,<sup>99</sup> which shows that it is far reaching. The agreement started as an effort to solve the problem of reflagging, and it was one of the first agreements which mentioned port State measures.<sup>100</sup>

The agreement reiterates the provisions of the LOSC concerning the effective control of fishing vessels on the high seas. The international conservation and management measures laid down in the agreement not only pertain to fisheries, but also all necessary measures to conserve and manage one or more species of living marine resources in accordance with the LOSC and other relevant rules of international law.<sup>101</sup>

The Compliance Agreement regulates port State measures in article V(2) and states that when a fishing vessel is voluntarily in a port, the port State can “make arrangements regarding the undertaking by port States of such investigatory measures as may be considered necessary to establish whether the fishing vessel has indeed been used contrary to the provisions of this Agreement”. Further, the article states that the port State needs to “notify the flag State accordingly”. This means that when a fishing vessel voluntarily is in the port of another state, and there are “reasonable grounds” for believing that the vessel has conducted IUU fishing, which undermines international conservation and management measures, the flag State shall be notified. The flag and port State shall cooperate and could enter into an agreement which gives the port State jurisdiction to conduct investigations.<sup>102</sup>

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<sup>99</sup> The UN treaty site for the Compliance agreement

<https://treaties.un.org/pages/showDetails.aspx?objid=080000028007be1a>

<sup>100</sup> FAO “Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas, abstract”

<sup>101</sup> Compliance Agreement art. 1(b)

<sup>102</sup> Compliance Agreement art. V(2)

One of the goals of the Compliance agreement was to put a stop to IUU fishing by, *inter alia*, tighter regulations for the flag States enforcement over vessels flying their flags, while the agreement also require that the port State coordinate with the flag State in case of violation.<sup>103</sup> The Compliance agreement defines “fishing vessels” in art. 1(a), it states that a “fishing vessel” is “any vessel used or intended for use for the purposes of the commercial exploitation of living marine resources, including mother ships and any other vessels directly engaged in such fishing operations”. It is not clear whether this article applies to factory ships, transportation, support and charter vessels undermining conservation and management measures, which was a major shortcoming because e.g. support vessels is one of the most difficult unreported fishing activities to deal with.<sup>104</sup>

The Compliance agreement was one of the first agreements to regulate port State jurisdiction, but despite the fact that it covered investigation of vessels suspected for IUU fishing, it did not regulate any other measures to be taken to combat IUU fishing. On the other hand did States like the U.S. adopt the port State measures of the agreement in its domestic legislation.<sup>105</sup> Which shows that the agreement in fact was a step in the right direction because States made it national law, although it did not resulted in any specific regulation to combat IUU fishing on the high seas. Also, the wording in “fishing vessels” was a major shortcoming because IUU vessels often need the help from such vessels to be able to fulfil the IUU activity, this made the agreement less adequate. Although the Compliance agreement contains port State regulations, the focus remained on flag States throughout the bulk of the agreement, which merely encourages port States to assist flag States in their duties

### **4.2.3 1995 Code of Conduct for Responsible Fisheries**

The 1995 Code of Conduct was adopted after a request from the International Conference on Responsible Fishing in 1992. This was based on the wish to promote long-term conservation and sustainable use of fisheries resources.<sup>106</sup> The purpose of the Code of Conduct is to maintain the marine living resources in a more responsible manner.<sup>107</sup> The adoption of the code was done to strengthen the international legal framework, to do this the Code established

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<sup>103</sup> Kuemlangan, Blaise et. al.(2010) “Preventing, Deterring and Eliminating IUU Fishing – Port State Measures”, in Environmental Policy and Law, 40/6, United Nations Activities p 262

<sup>104</sup> Sodik, D. M., (2009), n. 22, p 88

<sup>105</sup> 16 U.S.C.A §5504. United States Code Annotated Currentness, Title 16, Conservation. Chapter 75, High Seas Fishing Compliance, §5504.

<sup>106</sup> FAO (2018) “Implementation of the 1995 FAO Code of Conduct for Responsible Fisheries”

<sup>107</sup> Code of Conduct art. 2

regulations on more effective conservation, management, and sustainable exploitation.<sup>108</sup> The Code emphasises the need to, among other things, establish an appropriate institutional framework to achieve the sustainable and integrated use of fisheries resources.<sup>109</sup>

The Code is a voluntary soft law instrument,<sup>110</sup> and it shall be “interpreted and applied in conformity with (...) international law”,<sup>111</sup> the provisions of which form an integral part of the Code. The relationship with “other international instruments” is regulated in article 3 of the Code. The article implies a hierarchy in international instruments with “the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea, 1982” on the top.<sup>112</sup> The instruments mentioned in *litra* (a) to (c) in article 3.2, regards the interpretation and application of the Code, forms the rest of the hierarchy, and shall be affected “in a manner consistent with” the FSA, cf. *litra* (a). “In accordance with other applicable rules of international law, including the respective obligations of States pursuant to international agreements to which they are parties”, cf. *litra* (b). And “in light of the 1992 Declaration of Cancun, the 1992 Rio Declaration on Environment and Development, and Agenda 21 (...), in particular Chapter 17 of Agenda 21, and other relevant declarations and international instruments” cf. *litra* (c).

The expression in the different letters confirms the steps in the hierarchy. The phrase “in light of” in *litra* (c), referred to non-binding instruments is weaker than “in a manner consistent with” in *litra* (a) which refer to the FSA and the expression “in conformity with” which refer to LOSC in art 3.1. Both of the latter expressions is being used with regard to binding instruments which puts these on top of the hierarchy. Further, *litra* (b) gives more legal significance to the applicable rules of international law, as “in accordance with” is stronger than “take into account”.

Port State duties in the Code of Conduct is regulated in article 8.3 in the convention which states that the “port States should take, (...) measures as are necessary to achieve and to assist other States in achieving the objectives of this Code”. This should be established national legal framework “in accordance with international law”. This is a non-discriminatory rule

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<sup>108</sup> FAO (2018) “Implementation of the 1995 FAO Code of Conduct for Responsible Fisheries”

<sup>109</sup> Code of Conduct art 10.1.1

<sup>110</sup> Code of Conduct art. 1.1

<sup>111</sup> Code of conduct art. 3.1

<sup>112</sup> Code of Conduct art. 3.1.

which means that the measures regulating national vessel shall be at least as effective as the ones regulating foreign vessels. The code further encourages port States to assist flag States “as appropriate, in accordance with the national law (...) and international law” when the flag State “request the port State for assistance in respect of non-compliance with subregional, regional or global conservation and management measures”.<sup>113</sup>

Although the Code of Conduct contains port State regulations, the focus remained on flag States as in the Compliance agreement. Code of conduct is an example of an voluntarily instrument which have had big success in the situation of State implementation, but such instruments cannot force States to muster political will in order to address IUU fishing, this is a shortcoming which will continue to hamper voluntary instruments.<sup>114</sup>

#### **4.2.4 1995 Fish Stocks Agreement, FSA**

The Agreement which was adopted in 1995, and entered into force in 2001, is a multilateral treaty created by the UN to enhance the cooperative management of fisheries resources. FSA generally applies to the high seas, and it aims to simplify the implementation of the provisions of the LOSC about straddling fish stocks and highly migratory species.<sup>115</sup> To make sure that there are effective compliance and enforcement mechanisms for the conservation and management of fish stocks on the high seas the FSA outlines international standards.<sup>116</sup>

A significant aspect of the agreement is the provisions on cooperation among States to conserve and manage straddling and highly migratory fish stocks, these provisions seek to address the legal problems associated with the application of treaties to non-parties under the Vienna Convention art. 34 which states that “a treaty does not create either obligations or rights for a third State without its consent”. After this a non-member to an RFMO cannot be bound by the regulations of the RFMO without its express consent, however, FSA art. 17(1) states that a party to the FSA which is not a member of the RFMO “is not discharged from the obligation to cooperate” under the agreement “in the conservation and management of the relevant (...) fish stocks”. Due to this, the party would need to become a member of,

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<sup>113</sup> Code of Conduct 8.3.2

<sup>114</sup> Kuemlangan, Blaise et. al.(2010), n.103, p 267

<sup>115</sup> FSA art. 3(1)

<sup>116</sup> Palma, Mary Ann et. al.(2014) “Promoting Sustainable Fisheries : The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing”, BRILL, 2014 p 61

participate in the RFMO or apply the conservation and management measures adopted by RFMOs in their area of competence.<sup>117</sup>

FSA contains a few provisions on port State control related to fishing vessels, located in art. 23. In recognising the potential for port States to contribute to combat IUU fishing, FSA acknowledges States sovereignty in their ports and states that “a port State has the right and the duty to take measures” these measures shall be non-discriminatory and promote the effectiveness of “regional and global conservation and management measures”.<sup>118</sup> The agreement recognises port States right to inspect vessels in their ports and their right to “prohibit landings and transshipment” of fish where they suspect that IUU fishing has been conducted.<sup>119</sup> A port State is also given the right to “inspect documents, fishing gear and catch on board fishing vessels” when the fishing vessel is in its ports or offshore terminals.<sup>120</sup> The FSA further attempts to avoid the issue of IUU fishing in their area by allowing member states of the RFMO to board and inspect ships of non-members to the RFMO.<sup>121</sup>

An essential difference between LOSC art. 218 and FSA art. 23 is that FSA does not explicitly mention the right of port States to institute proceedings or to impose penalties. Some uncertainty is on the other hand caused by paragraph 4, which reads “Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law”, but there seem to be no States that either take the view that such a right is covered by this article or that have actually imposed such more onerous enforcement measures.<sup>122</sup>

The FSA states that port States have “the right and the duty” to promote “global conservation and management measures”.<sup>123</sup> In carrying out this duty, the FSA states that port States “may” take action against foreign fishing vessels including by inspections,<sup>124</sup> and denial of port access,<sup>125</sup> by these provisions the FSA recognises the importance of the port State in controlling IUU fishing. Art. 23(1) contains the general duty to take measures, while 23(2) and (3) contains regulation on how this general duty can be fulfilled, but because of the

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<sup>117</sup> Palma, Mary Ann et. al. (2014), n. 116, p. 62

<sup>118</sup> FSA art. 23(1)

<sup>119</sup> FSA art. 23(3)

<sup>120</sup> FSA art. 23(2)

<sup>121</sup> FSA art. 21(1)

<sup>122</sup> Molenaar, E. J. (2015). “Port and Coastal States”. In “The Oxford Handbook of the Law of the Sea” p 290-91

<sup>123</sup> FSA art. 23(1)

<sup>124</sup> FSA art. 23(2)

<sup>125</sup> FSA art. 23 (3) and (4)

wording in art. 23(2) and (3) which states that the States “may” do, it is open for the States to consider in which way they are most suited to comply with the general duty.

With art. 23 FSA goes a step further in the fight against IUU fishing than earlier agreements had done before, with recognising the States possibility to take in port measures, not only their right of inspection. However, as with the Code of Conduct and Compliance agreement, the focus in the FSA remained on flag State measures.

#### **4.2.5 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, IPOA-IUU**

In 2001 the IPOA-IUU was agreed upon. The IPOA-IUU was inspired by the practice of several RFMOs, the inclusion of detailed provisions on port States was an example of this practice. The agreement provides elements of a step-by-step approach for vessels to enter the port,<sup>126</sup> including by requiring fishing vessels to give notice of entry and request authorisation,<sup>127</sup> and to enter and submit to inspections.<sup>128</sup> The IPOA-IUU was also a first step in creating global minimum standards, even though IPOA-IUU was only a soft law instrument.<sup>129</sup>

The purpose of the agreement was to combat IUU fishing, by several different State measures, including by port State measures. The agreement contains guidelines for port State access and information to be collected from fishing vessels prior to port access<sup>130</sup> and a process for actions to be taken where IUU fishing has been conducted<sup>131</sup>. Also, this convention contains only a few provisions on port state measures, such as the before mentioned conventions.

In IPOA-IUU art. 52-64 FAO requests the port states to implement a series of measures to combat IUU fishing. When a port State is suspecting a fishing vessel to conduct IUU fishing, and the port State has granted the vessel access to port, “the port State should not allow the vessel to land or transship fish in ports”.<sup>132</sup> The port States are also encouraged to report to the flag State when it has clear evidence that a vessel flying the flag of the State has

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<sup>126</sup> IPOA-IUU at 52 - 64

<sup>127</sup> IPOA-IUU at 55

<sup>128</sup> IPOA-IUU at 57

<sup>129</sup> Molenaar, E. (2015). n. 121, p 292

<sup>130</sup> IPOA-IUU at 55

<sup>131</sup> IPOA-IUU at 56.

<sup>132</sup> IPOA-IUU at 56

conducted IUU fishing beyond the jurisdiction of the coastal state. After the port State has reported to the flag State, it can take actions with the flag States consent or request.<sup>133</sup> If the vessel has engaged in IUU fishing as defined by a relevant RFMO, however, the port State has no obligation to report to the flag State.<sup>134</sup> These measures are based on territorial port State jurisdiction, which is of significance because the territorial jurisdiction gives the port State full sovereignty if the vessel has breached international obligations.

This is stated in Article 55, after which the port State should require fishing vessels calling for a port, to apply for a permit in advance. It appears even more clearly from article 59, which states that if an inspection has revealed that a fishing vessel is conducting IUU fishing on the high seas, the port State is requested to report the affairs to the flag State. It is further stated that the port State may take other measures after permission or request from the flag State.<sup>135</sup>

Additionally, the IPOA-IUU encourages States to develop relevant port State measures inside RFMOs.<sup>136</sup> The port State measures developed “may prohibit landings and transshipment of catch unless the identified vessel can establish that the catch was taken in a manner consistent with the conservation and management measures”<sup>137</sup> of the RFMO, the measures should address factors affecting all capture fisheries. Similar to the IPOA-IUU, the LOSC, FSA, and the Code of Conduct provide for the application only of non-discriminatory port State measures to vessels.<sup>138</sup>

All of these measures are soft law, based on the wording in all of the articles in the “port State” chapter of the IPOA with everyone states that parties “should” which is a term that states that a thing is recommendatory. Which is also stated in art. 4 which reads “The IPOA is voluntary”. IPOA-IUU is soft-law on the different port State measures.

The IPOA-IUU encourages all states to “ratify, accede to, accept”, and “implement fully and effectively all relevant international fisheries instruments” such as the “UN Fish Stocks Agreement (..) the FAO Compliance Agreement”, and the “FAO Code of Conduct”.<sup>139</sup> The IPOA-IUU invites States to implement a broad array of port State measures, including

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<sup>133</sup> IPOA-IUU at 59

<sup>134</sup> Swan, Judith. (2006) “Port State Measures to Combat IUU Fishing: International and Regional Developments.” Sustainable Development Law & Policy, p 41

<sup>135</sup> IPOA-IUU at 59

<sup>136</sup> IPOA-IUU at 63

<sup>137</sup> IPOA-IUU at 63

<sup>138</sup> LOSC art. 25(3), FSA art. 23(1), Code of Conduct, para 8.3.1 Se also LOSC art 119(3) and 227.

<sup>139</sup> IOPA-IUU, para 10-14

refusing port access to fishing vessels which is accused to be engaged in IUU fishing, and inspection of vessels which is voluntarily in a port of another State. Even though the increased focus on port State measures, the voluntary nature of the IPOA-IUU considerably limits the instrument's potency. Despite its voluntary nature, the IPOA-IUU paved the way towards the legally-binding Port State Measures Agreement.

#### **4.2.6 2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing**

The FAO Model Scheme is a voluntary non-binding instrument which was adopted by the FAO in 2004, and in 2005 the FAO Committee on Fisheries endorsed it. The FAO Model Scheme built upon the preceding international agreements which regulates port State measures and it paved the way for the development of the binding PSA which was agreed upon in 2009.

The Model Scheme outlines principles and guidelines for States to use as a reference for the negotiation and adoption of resolution within RFMOs, or measures to be adopted at the national level.<sup>140</sup> The FAO Model Scheme includes elements of the IPOA-IUU which is based on the other agreements. The FAO Model Scheme contains guidelines for port State access, which information States should collect from fishing vessels, and if IUU fishing is suspected it contains a process for actions to be taken.<sup>141</sup>

The Model Scheme provides for minimum standards which should support the adoption of measures by States so that the State can monitor, control and inspect foreign fishing vessels which seeks access to port.<sup>142</sup> The imposition of port State measures can result in denial of port access, prohibition of landing, transshipment, and processing of catch, the impounding and confiscation of catch, and cooperation with the flag State or members of an RFMO on enforcement or deterrence.<sup>143</sup> The guidelines set out in the Model Scheme contains a list of information that should be provided by vessels in advance to port State before entry,<sup>144</sup> inspection measures,<sup>145</sup> and actions following an inspection.<sup>146</sup> The FAO Model Scheme also

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<sup>140</sup> Palma, Mary Ann et. al (2014), n. 116, p 71

<sup>141</sup> Swan, Judith.(2006), n. 135, p 38

<sup>142</sup> Swan, Judith.(2006), n. 135, p 38

<sup>143</sup> Swan, Judith.(2006), n. 135, p 38

<sup>144</sup> FAO Model Scheme appendix A

<sup>145</sup> FAO Model Scheme pkt. 3

<sup>146</sup> FAO Model Scheme pkt. 4 and 5

provides details on, among other things, reporting requirements,<sup>147</sup> port State inspection procedures of foreign fishing vessels,<sup>148</sup> training of port State inspectors,<sup>149</sup> and information sharing system among port States.<sup>150</sup> The Model Scheme is in accordance with the measures adopted under the IPOA-IUU and other relevant rules of international law.<sup>151</sup>

At the time the Model Scheme was adopted, the States was aware of the shortcoming the soft law nature of the agreement constituted. Due to this it only served as a departure point for the work with a global binding agreement on port State measures. In 2006, the UN recommended through its General Assembly's resolution 61/105, FAO to compose a globally binding agreement on port State measures to combat IUU fishing. This was the precursor to the 2009 PSA which will be discussed in chapter 5.

#### **4.2.7 Regional Fisheries Management Organisations, RFMOs**

Global cooperation between port States is necessary to conserve fish stocks and to meet the challenges IUU fishing creates. IUU fishing is first and foremost a problem to be solved through regional agreements between states with shared stocks. The amount of RFMOs has increased in the latter years and is more relevant today than ever. This is caused by the increased relevance RFMOs was given in the 1995 FSA and through the fight against IUU fishing.<sup>152</sup>

In 2005 the UN General Assembly requested States to apply the FAO Model Scheme, in particular through RFMOs.<sup>153</sup> There exist several different RFMOs, and many of them are regulating port State measures. The NEAFC is an RFMO which have adopted a strict port State control regime and is, therefore, an essential RFMO on this behalf. Because of the vast amount of RFMOs in the world, this part will focus on the NEAFC system, due to this organisations success with its regulation on port State measures. Also Norway is used as a case study, and since the State is a member to the RFMO and the NEAFC regulates the high seas areas outside Norwegian maritime zones, it is natural to use this RFMO as an example.<sup>154</sup>

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<sup>147</sup> FAO Model Scheme appendix B(6)

<sup>148</sup> FAO Model Scheme appendix B

<sup>149</sup> FAO Model Scheme appendix D

<sup>150</sup> FAO Model Scheme appendix E

<sup>151</sup> Palma, Mary Ann et. al.(2014), n. 116, p 72

<sup>152</sup> Fiskeri- og Kystdepartementet (2011) «Norsk Fiskeriforvaltning». p. 13

<sup>153</sup> Swan, Judith. (2006), 135, p 41

<sup>154</sup> Submission by the North East Atlantic Fisheries Commission (2012), p. 2

The NEAFC was established under the 1959 North-East Atlantic Fisheries Convention, which entered into force in 1963, the 1959 Convention was replaced by a new convention adopted in 1980, which entered into force in 1982. The NEAFC covers the North East Atlantic, one of the most abundant fishing areas in the world. The area covered by the RFMO stretches from the southern tip of Greenland, east to the Barents Sea, and south to Portugal. The NEAFC Convention was further amended in 2004 and 2006.<sup>155</sup>

The objective of the NEAFC is to “ensure the long-term conservation and optimum utilization of the fishery resources in the Convention Area, providing sustainable economic, environmental and social benefits”<sup>156</sup>, and “the Commission shall perform its functions in order to fulfill this objective”.<sup>157</sup> The NEAFC has adopted measures to ensure that the different parts of the marine ecosystem are protected from negative impacts of fisheries.<sup>158</sup>

NEAFC has prioritised IUU fishing since the beginning, which has led to wide control and enforcement regulations, *inter alia*, port State control measures. The NEAFC was one of the first agreements to regulate port State measures.<sup>159</sup> In May 2007 a new regime for control and enforcement of port state measures for frozen pelagic fish was introduced in the NEAFC.<sup>160</sup> At the annual meeting in 2014, it was decided by the commission to extend the NEAFCs range of application on port State measures. This is in line with the regulations in the PSA.<sup>161</sup>

The NEAFC Port State Measures were based on the 2005 FAO Model Scheme. The measures were established in May 2007 and intended to combat IUU fishing in the NEAFC area.<sup>162</sup> The NEAFC Scheme of Control and Enforcement requires that all foreign fishing vessels with catch on board which have been caught in the NEAFC area and which have not been previously landed or transhipped at a port shall forward a prior notification of entry into

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<sup>155</sup> Takei, Yoshinobu.(2014) “Filling Regulatory Gaps in High Seas Fisheries : Discrete High Seas Fish Stocks, Deep-Sea Fisheries and Vulnerable Marine Ecosystems”, BRILL

<sup>156</sup> NEAFC Convention art. 2

<sup>157</sup> NEAFC Convention art. 4

<sup>158</sup> NEAFC “About the Work of NEAFC”

<sup>159</sup> NEAFC “About Port-State Control”

<sup>160</sup> Stokke, Olav Schram “Barents Sea Fisheries – the IUU Struggle”, p 219

<sup>161</sup> St.Meld nr. 9 2017 – 2018 p 44

<sup>162</sup> FAO, Geirsson, Gylfi and Arnór Snæbjörnsson (2016), “Port State Measures in Iceland” p 2

port.<sup>163</sup> Before the requirements applied to frozen catch only, but the scope of the port state measures is now expanded to apply to all fisheries resources whether fresh or frozen.<sup>164</sup>

The main elements of the NEAFC port State control are, the duty of prior notifications of entry into port,<sup>165</sup> the list of designated ports,<sup>166</sup> where landings or transshipment may take place,<sup>167</sup> and the mandatory flag State verification.<sup>168</sup> The mandatory flag State verification states that the things listed in *litra* (a) to (d) must be verified. *Litra* (a) states that “the fishing vessels declared to have caught the fish had sufficient quota for the species declared” must be confirmed, after *litra* (b) “the quantities of fish on board have been duly reported and taken into account for the calculation of any catch or effort limitations that may be applicable” must be verified, after *litra* (c) it must be verified that “the fishing vessels declared to have caught the fish had authorisation to fish in the areas declared” and *litra* (d) “the presence of the vessel in the area of catch declared has been verified according to VMS<sup>169</sup> data”.<sup>170</sup> If the flag State cannot verify the detail listed above, the port State shall deny landing or transshipment.

If a vessel is “intending to call into a port” it “shall notify the competent authorities (...) at least 3 working days before the estimated time of arrival”.<sup>171</sup> But if it is a contracting party it “may make provisions for another notification period, taking into account *inter alia*, catch product type or the distance between the fishing grounds and its ports”.<sup>172</sup>

Blacklisting of vessels is a tool used by several States and RFMOs to get keep control with the IUU fishing vessels, so that these vessels does not get access to port. Because vessels conducting IUU fishing often operate globally, and the catch is likely to land outside the area where the fish is caught, some has argued that different RFMOs need to accept each other's IUU blacklists. The NEAFC, for example, blacklists a vessel if Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Northwest Atlantic Fisheries Organisation (NAFO) or the South East Atlantic Fisheries Organisation (SEAFO)

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<sup>163</sup> NEAFC art. 20 cf. Art 22

<sup>164</sup> FAO, Geirsson, Gylfi and Arnór Snæbjörnsson (2016), n. 163, p 2

<sup>165</sup> NEAFC art. 22

<sup>166</sup> NEAFC art. 21

<sup>167</sup> NEAFC art. 23

<sup>168</sup> NEAFC art. 23(1)

<sup>169</sup> VMS: The vessel monitoring system (VMS) is a satellite-based monitoring system which at regular intervals provides data to the fisheries authorities on the location, course and speed of vessels.

<sup>170</sup> NEAFC art. 23 (1)(a) to (d)

<sup>171</sup> NEAFC art. 22(1)

<sup>172</sup> NEAFC art. 22(1)

can confirm that the vessel has been involved in UUU fishing.<sup>173</sup> The NEAFCs port State measures, together with strengthening of the rest of the NEAFC Scheme of Control and Enforcement, did result in a reduction of IUU fishing in the area, and that this reduction has continued thanks to the cooperation among the member States.<sup>174</sup>

While the FSA commits the parties to comply with RFMO regulations,<sup>175</sup> the PSA recognises relevant measures adopted under RFMOs to combat IUU fishing, but a party does not become bound by measures or decisions of any RFMO of which it is not a member.<sup>176</sup> Although voluntary instruments cannot oblige States to contribute with resources or muster the political will to adequately address IUU fishing, some RFMOs have had success with its fight against IUU fishing, including the NEAFC. But the RFMOs is dependent on goodwill from the States fishing in the RFMO area, and international agreements regulating high seas fisheries.<sup>177</sup>

## **5 The 2009 FAO Port State Measures Agreement**

### **5.1 Introduction**

The theme for this chapter is to clarify the PSA regulation on port State measures to prevent, deter and eliminate IUU fishing on the high seas. The PSA was a culmination of a process begun at FAO in 2002 with the 2005 FAO Model Scheme on Port State Measures. In 2006, the General Assembly recommended, the FAO to compose a globally binding agreement on port State control in the fisheries, and in 2007 the FAO Committee on Fisheries called for such an agreement to be developed by 2009.<sup>178</sup> The technical consultation to “Draft a Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing” commenced its work in June 2008, after that three further sessions were necessary; one in January 2009, the second in May 2009 and the last in August 2009. 22 November 2009 the FAO Conference adopted the PSA and 5 June 2016 the

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<sup>173</sup> St.Meld nr. 9 2017 – chapter 2.4

<sup>174</sup> FAO, Geirsson, Gylfi and Arnór Snæbjörnsson (2016), n. 163, 2

<sup>175</sup> FSA art.

<sup>176</sup> PSA art. 4(2)

<sup>177</sup> Kuemlangan, B. et. al.(2010), n. 103, p 267

<sup>178</sup> FAO (2016) “Implementation of Port State Measures: Legislative Template, Framework for Procedures, Role of Regional Fisheries Management Organizations” p. 2

agreement entered into force signed by thirty parties, today PSA is ratified by 51 states and organisations.<sup>179</sup>

The approval of the PSA was an important milestone in the fights against IUU fishing, not only because it laid down some necessary measures but because it represented decades of difficult negotiations and strong efforts from several different organisations and States to combat IUU fishing, as shown in chapter 4.<sup>180</sup>

Just like the FSA and the IPOA-IUU, the PSA is a part of the global response driven by the international community's wish for satisfactory regulations and success with the fight against IUU fishing.<sup>181</sup> The PSA is a codification of the port State measures in the before mentioned agreements, and therefore the most important international agreement to combat IUU fishing by port State measures. The PSA covers the actual taking or harvesting of fish along with fishing-related activities. This includes "any operation in support of, or in preparation for, fishing, including the processing, transshipment or transport of fish that have not been previously landed and offloaded at a port, as well as the provision of personnel, fuel, gear and other supplies at sea".<sup>182</sup>

PSA sets the minimum requirements for entry into port, inspection, and enforcement actions on foreign fishing vessels and encourages the port States to adopt stricter regulations under the national law.<sup>183</sup> States may adopt more stringent measures in accordance with international law when exercising sovereignty over their ports.<sup>184</sup> The PSA also recognises that RFMOs can adopt relevant measures to combat IUU fishing.<sup>185</sup> However, it provides that a party to the PSA which is not a member to the RFMO does not become bound by the measures the RFMO adopts.<sup>186</sup>

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<sup>179</sup> Molenaar E. J (2010), n. 8, p. 372-3

<sup>180</sup> Molenaar E. J (2010), n. 8, p. 370-1

<sup>181</sup> Vanhoutte, Annick and Kuemlangan, Blaise, (2017) "A Global Movement to Protect Ocean Resources"

<sup>182</sup> PSA art. 1(d)

<sup>183</sup> FAO, Agreement on Port State Measures (PSMA) "Background"

<sup>184</sup> PSA preamble

<sup>185</sup> PSA art 4(2)

<sup>186</sup> PSA art 4(2)

## 5.2 Objectives and Core Elements of the PSA

The PSA lays down global minimum standards for the port State to apply on before and after foreign fishing vessels enter the port to land fish or use other services.<sup>187</sup> In 2007 the Assistant Director-General Nomura of FAO's Fisheries and Aquaculture Department stated that “until and unless we are able to neutralize the impacts of IUU fishing we will not be in a position to ensure that fisheries are exploited in a responsible and long-term sustainable manner”.<sup>188</sup> Further, she stated that IUU fishing should be viewed as an "environmental crime, not simply as an administrative offence"<sup>189</sup>. This made the foundation for the PSA art. 2, which describes the objective as to “prevent, deter and eliminate IUU fishing through the implementation of effective port State measures”. In doing this the agreement shall “ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems”. One of the goals of the agreement is “to clarify States’ jurisdiction and to require States – authorized by customary international law – to take appropriate action within their ports to aggressively deter IUU fishing”<sup>190</sup>.

Art. 1 of the PSA contains definitions, and some definitions are broader in the PSA than in other agreements. For example the definition of “vessel” in the PSA which is broader than the definition of “fishing vessel” in the compliance agreement. In the PSA “vessel” “means any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities”, this definition covers any vessel “used for (...) fishing related activities” and do also applies to factory ships, transportation, support and charter vessels undermining conservation and management measures. “Fishing related activities” applies to “any operation in support of, or in preparation for, fishing, including (...) the provisioning of personnel, fuel, gear and other supplies at sea” this is actually an extension of the term by PSA.<sup>191</sup> The term “port” includes “offshore terminals and other installations for landing, transshipping, packaging, processing, refueling or resupplying”.<sup>192</sup>

The PSA imposes a stringent and regulatory regime that restricts “port shopping”, and also imposes stricter penalties when authorities apprehend IUU fishers. Port shopping is a practice

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<sup>187</sup> Molenaar, E. (2015), n. 122, p 293

<sup>188</sup> FAO. “Report of the Expert Consultation to Draft a Legally-binding Instrument on Port State Measures”. Washington D.C., United States of America, 4–8 September 2007. FAO Fisheries Report. No. 846. Rome. p 8

<sup>189</sup> FAO (2007), Report of the “Expert consultation to draft a legally binding instrument on port State measures”,

<sup>190</sup> Kuemlangan, B. et. al.(2010), n. 103, p 264.

<sup>191</sup> PSA art. 1 (d)

<sup>192</sup> PSA art.1(g)

where IUU fishers try to avoid ports which impose strict port State measures in favor of ports of convenience. Without an international agreement regulating port State measures, the port State can be reluctant in exercising inspection and control over high seas fishing vessels entering the port. Ports play a vital role in the fight against IUU fishing because the fish need to enter the market through ports. Therefore inspections in port have the possibility to be one of the best equipments in the fight against IUU fishing.<sup>193</sup> If all States apply uniform port State measures, ports of convenience will cease to exist. When IUU fishers cannot land their fish in the ports, this will deprive IUU fishers of the profit necessary to continue operating.<sup>194</sup>

PSA provides a list of information which shall be required by port States from foreign fishing vessels prior to their entry into ports, this includes “details related to the identity of the vessel, purpose of port access, details on fishing authorisation, information about the trip, and information on species caught”.<sup>195</sup> Several port States has adopted a general term on prior notification from fishing vessels in their national legislation, for example New Zealand, Canada and turkey.<sup>196</sup> Molenaar has stated that “the threat of the denial of the use of ports and their services is a key thread that runs throughout the PSA”,<sup>197</sup> this is due to that ports of convenience will continue to exist if the port States cannot deny IUU vessels the use of ports.<sup>198</sup>

The role of port States is strengthened through the PSA in three main areas. Firstly PSA provides a list which contains uses of the ports that should be denied in cases of IUU fishing, including “landing, transshipping, packaging and processing of fish that have not been previously landed and other port services including, *inter alia*, refuelling and re-supplying, maintenance and dry docking”.<sup>199</sup> Second it calls for the ports to deny use before entering port if the vessel is on an IUU vessel list of an RFMO,<sup>200</sup> upon entry into port if the authorisation required by the flag State or coastal State lacks,<sup>201</sup> and after inspection if the port State has clear grounds to believe that the vessel has engaged in IUU activities.<sup>202</sup> Lastly, the PSA

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<sup>193</sup> Kuemlangan, B., et al.(2010), n. 103, p 264.

<sup>194</sup> Kuemlangan, B., et al.(2010), n. 103, p 264.

<sup>195</sup> Palma, Mary Ann et. al. (2014), n. 116. p 162

<sup>196</sup> Palma, Mary Ann et. al. (2014), n. 116, p 162

<sup>197</sup> Vanhoutte, Annick and Kuemlangan, Blaise, (2017), n. 183

<sup>198</sup> Kuemlangan, B., et al., (2010), n. 103, p 266.

<sup>199</sup> PSA Article 9(6)

<sup>200</sup> PSA Article 9(4)

<sup>201</sup> PSA Article 11

<sup>202</sup> PSA Article 18

defines the role of flag States,<sup>203</sup> to strengthen the cooperation between flag and port States, the agreement also “recognizes that measures to combat (IUU) fishing should be built on the primary responsibility of flag States”.<sup>204</sup>

## 5.3 Port State Measures to Combat IUU Fishing

### 5.3.1 Advanced Notice of Port Entry and Designation of Ports

The basic premise of the international law is that regarding port State sovereignty, foreign vessels do not have an automatic right to enter the port, they can only enter when authorised by the port State, or exceptionally when they are in distress or a *force majeure* situation.

PSA art. 4(1) confirms States sovereignty over their ports and stipulates that “nothing in this agreement shall be construed to affect: (...) (b) the exercise by Parties of their sovereignty over ports in their territory in accordance with international law, including their right to deny access thereto as well as to adopt more stringent port State measures than those provided in this Agreement”. The only exception to the above-mentioned sovereignty is a ship in distress or a *force majeure* situation.<sup>205</sup>

There are two exceptions for fishing vessels in which the PSA is not applicable. Firstly PSA does not apply to “vessels of a neighboring State that are engaged in artisanal fishing for subsistence provided that the port State and the flag State cooperate to ensure that those vessels” do not engage in IUU fishing.<sup>206</sup> And secondly it does not apply to “container vessels that are not carrying fish or, (...) only fish that have been previously landed” if it is not clear grounds to suspect that the vessel has engaged in IUU fishing.<sup>207</sup>

As the IPOA-IUU the PSA require fishing vessels and other vessels involved in fishing-related activities to provide a reasonable advance notice of their entry into port.<sup>208</sup> Once the information has been provided to the port State, it needs adequate time to review the information and make a decision. This is based on the fact that when a vessel is in port, it should not be unduly delayed.<sup>209</sup> What constitutes a reasonable advance notice of entry is left

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<sup>203</sup> PSA Article 20

<sup>204</sup> PSA Preamble paragraph 3

<sup>205</sup> Molenaar E. J (2010), n. 8, p 377

<sup>206</sup> PSA art. 3(1)(a)

<sup>207</sup> PSA art. 3(1)(b)

<sup>208</sup> IPOA-IUU, para 55, PSA art. 8

<sup>209</sup> PSA art. 13(2)(f)

to the individual port States do determine. For example, Canada, Fiji, and India require at least 24 hours advanced notification of entry for foreign fishing vessels before arrival while New Zealand and Gambia require a 72hour notice.<sup>210</sup>

When a vessel seeks entry into port the port, States shall request information about the vessel and the catch as listed in Annex A to be provided before the vessel can enter the port.<sup>211</sup> This includes information about the vessels name, flag State, certificate of registry ID, IMO and RFMO ship ID if available, relevant fishing authorisations and total catch on board including catch areas. The port State shall use this information to ensure that the vessel has not been conducting IUU fishing before the vessel gets permission to enter the Port.<sup>212</sup>

The port State needs rapid communication with other States, RFMOs, and international organisations to ask if there are reasonable grounds for suspecting IUU fishing and to verify the rest of the information given by the fishing vessel to make quick decisions. The information can further contribute to reveal information about whether the vessel has the authorisation to fish in the area and to see if the catch on board is in line with the relevant authorisation, this is given by using a common or harmonised information base. Here port States can find information such as the IMO number of the vessel, which has been useful in tracking vessels on RFMO IUU blacklists.<sup>213</sup>

### **5.3.2 Inspection of Fishing Vessels**

A port State shall carry out inspections of foreign fishing vessels. The different elements of the inspection include “inspection procedures”, “which vessels to inspect”, “information to be provided in advance” a port entry, and information necessary in the “report of the results of the inspection”, “transmittal of inspection results” to relevant authorities, and safeguarding and confidentiality of information.<sup>214</sup>

The PSA requires that several precautions need to be taken during inspection. PSA Art. 12 to 15 covers the minimum elements for a port State inspection regime. Art. 12(1) states that the

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<sup>210</sup> Palma, Mary Ann et. al.(2014), n. 116, p 162

<sup>211</sup> article 8 cf. Annex A,

<sup>212</sup> St.Meld nr. 9 2017 – 2018 p 23

<sup>213</sup> Doulman, D.J. and Swan, J (2012) “A guide to the background and implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing” FAO Fisheries and Aquaculture Circular No. 1074, p 43

<sup>214</sup> PSA annex B; PSA art. 12(3); PSA annex A; PSA Annex C; PSA art. 15; PSA art. 16

parties are required to inspect “the number of vessels in its ports required to reach an annual level of inspections sufficient to achieve the objective of this Agreement”.<sup>215</sup> And the parties are required to seek “the minimum levels for inspection of vessels” through RFMOs.<sup>216</sup> When a port state is determining which vessels to inspect they shall follow the list in art. 12(3).

What constitutes “the minimum level” and the “number of vessels (...) required to reach an annual level of inspections (..) to achieve the objective” is not stated in the agreement itself. Some RFMOs have on the other hand agreed on different levels for inspection of landings and transshipments in port by the Contracting Parties. While the Indian Ocean Tuna Commission (IOTC) has adopted a level where 5% of the fishing vessels have to be inspected, the NEAFC and the NAFO have adopted a level of 15%.<sup>217</sup> The PSA took a more flexible approach as it obligates each Party to “inspect the number of vessels in its ports required to reach an annual level of inspections sufficient to achieve the objective of this Agreement”.<sup>218</sup> In other words, PSA art. 12 require that the ports assess their capacity to inspect vessels, in order to achieve compliance with the PSA and set priorities as to what vessels should be inspected, the emphasis should be on vessels suspected of IUU activity.<sup>219</sup> PSA contains weaker regulation than the RFMO due to the fact that it leaves it up to the States to decide what level is “sufficient to achieve the objective of this Agreement”. This is noteworthy because PSA was supposed to be a groundbreaking agreement on port State measures, but already by the time of the signing in 2009 several other agreement already had stricter regulations.

In carrying out the inspections in ports, the parties should follow the guiding in art. 13(2) *litra* (a) to (i), and also Annex B. It follows from these measures that the inspections, *inter alia*, shall be conducted on “all the relevant areas of the vessel, the fish on board, the nets and any other gear, equipment, and any documents (..) that is relevant to verifying compliance with relevant conservation and management measures”.<sup>220</sup> In addition to the fishing authorisation, inspectors may, *inter alia*, review the fishing logbook, vessel monitoring reports, stowage plans, drawings or descriptions of fish holds<sup>221</sup>. The fish, fishery products, and fishing gear have to be inspected in order to determine that they have been harvested and used in

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<sup>215</sup> PSA art. 12(1)

<sup>216</sup> PSA art. 12(2)

<sup>217</sup> Doulman, D.J. and Swan, J (2012), n. 213, p 50

<sup>218</sup> PSA art. 12(1)

<sup>219</sup> Kuemlangan, B., et al., (2010), n. 103, p 265.

<sup>220</sup> PSA art. 13(2)(c)

<sup>221</sup> PSA Annex B *litra* d

accordance with the fishing authorisation.<sup>222</sup> Such inspection is necessary to ensure that the information the vessel gave on request of the port State in its prior notice of entry into port and data collected during the inspection, corresponds.

PSA art. 13 *litra* (d) and (f) state that inspectors shall be presented with “all necessary assistance and information, (...) relevant material and documents as may be required”,<sup>223</sup> without unduly interfering with the vessel’s operations or its crew. This regulation is necessary to prevent vessels from suffering minimum “interference and inconvenience” and prevent degradation of “the quality of the fish”.<sup>224</sup> As an example do Canada grant its inspectors the authority to inspect fishing vessels or cargo vessels suspected for carrying fish. The inspectors shall be given full access to cargo, containers and relevant documents.<sup>225</sup>

As a further requirement, the information in Annex C shall be included as a minimum standard in the inspector's written report from the inspection.<sup>226</sup> The parties shall also “transmit the result of the inspection to” appropriate parties, these include concerned states, RFMOs, FAO and other relevant international organisations.<sup>227</sup> A similar regime is found in Australia as they have a detailed inspection regime which also extends beyond Australia’s sovereign zones to the high seas, both Australian fishing vessels and foreign vessels are subject to inspection.<sup>228 229</sup> This strict and comprehensive regulation can contribute to reveal IUU fishing in a much bigger scale and is a necessary in the fight against IUU fishing.

### **5.3.3 Port State Measures Following an Inspection**

The port State may take several enforcement actions against a vessel if it has reasonable grounds for suspecting the vessel for engaging in IUU fishing activity. Following an inspection, the port State can deny the vessel to enter the port, and it can also prohibit landing and transshipment of fish. The PSA refers back to the IPOA-IUU to define what may be considered as IUU fishing, as shown in chapter 3.1 of this thesis.<sup>230</sup> The PSA art. 4 regulates the relationship with “international law and other international instruments” and restricts port

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<sup>222</sup> PSA Annex B *litra* e and g

<sup>223</sup> PSM art. 13(d)

<sup>224</sup> PSM art. 13(f)

<sup>225</sup> Coastal Fisheries Protection Act 1985 (C-33), section 7, 7(b) (Can.)

<sup>226</sup> PSM art. 14

<sup>227</sup> PSM art. 15 and 18(1)(a)

<sup>228</sup> Fisheries Management Act 1991

<sup>229</sup> Kuemlangan, B., et al., (2010), n. 103,

<sup>230</sup> Palma, Mary Ann et. al.(2014), n. 116, p 165

States jurisdiction to prescribe regulations for access to port by several factors, *inter alia*, the principle of non-discrimination, diplomatic immunities and internal affairs on the ship which do not affect the port State. This is known as the “residual” jurisdiction and is confirmed in PSA.<sup>231</sup> The PSA does not define “port State jurisdiction” but nothing implies that it is limited to prescriptive jurisdiction and that it does not also encompass enforcement jurisdiction as shown in chapter 1.3 of the thesis.

Two aspects are crucial for the legality of extra-territorial port State jurisdiction under international law, the first one is the sufficient jurisdictional basis and the second one is the type of enforcement measures taken.<sup>232</sup> The adequate jurisdictional basis could be provided by a treaty or by jurisdictional principles such as the universality principle or the security principle. Port States can deny IUU vessels port access, they can refuse the landing or use of other port services, for example refueling, re-supplying, making repairs, changing crew and transshipment or processing of cargo.

Article 11(1) sets out five situations cf. *litra* (a) to (e), where a port State is required to deny the use of its port to a vessel. *Litra* (b) contains provisions on fishing activity in the coastal States territorial waters, so does *litra* (c), and these will therefore not be discussed further.

*Litra* (a) states that use should be denied when “the vessel do not have a valid and applicable authorisation to engage in fishing or fishing related activities required by its flag State”. Here the flag State requirements for vessel authorisation, this can differ from State to State, must be identified. International instruments, such as some RFMOs and the FSA, requires that States authorises relevant vessels for fishing on the high seas. But not all States requires that vessels flying their flag holds an authorisation for fishing on the high seas. It is essential for such requirements to be established by the flag States and by RFMOs to combat IUU fishing.

If an authorisation is required by the flag State it should be checked in order to verify whether the conditions have been met or not, this includes that it is “valid for the time period(s) and location(s) in which fishing or related activities took place; as appropriate, applicable for the species that have been caught; as appropriate, applicable for the related activities that have been undertaken; and applicable to the vessel”<sup>233</sup>.

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<sup>231</sup> PSA art. 4(1)(b)

<sup>232</sup> Molenaar E. J (2010), n. 8, p 379

<sup>233</sup> Doulman, D. J. et. al. (2012), n. 213, p 48

*Litra* (d) states that the port State can deny the use of port if “the flag State does not confirm within a reasonable period of time, on the request of the port State, that the fish on board was taken in accordance with applicable requirements” of an “relevant” RFMO. The content in “reasonable time” may vary from time to time but it has to be made in advance by the port State, and the flag State has to be informed about this at the time of the request. Where the flag State refuses to give such information, or the information is not given “within a reasonable(..) time” the port State must deny the use of port.<sup>234</sup>

The wording in “relevant RFMO” does not bind parties by measures or decisions of, or recognise, any (RFMOs) of which it is not a member”<sup>235</sup>, nor are the parties obliged (...) to give effect to measures or decisions of a (RFMO) if those measures or decisions have not been adopted in conformity with international law”.<sup>236</sup> There are, however, exemptions from the requirement that a flag State need to confirm that the catch is taken in conformity with RFMO measures including “parties in their role as flag States where they are not members of an RFMO, and parties in their role of flag States where they claim that an RFMO measure or decision was not taken in accordance with international law”.<sup>237</sup> This regulation is weaker than in the FSA, and can lead to that IUU fishing vessels is not met with any sanctions. In the FSA the States is bound to comply with all RFMOs, the fact that this does not apply to the PSA weakens its relevance.

There is a possibility that a flag State may declare that an RFMO is not “relevant” because it is not a member or a cooperating non-member, and therefore refuses to give a confirmation. However, if a port State have implemented this requirement into national law in a fair and transparent manner, with a definition of “relevant” RFMO, and the refusal of the flag State is not in conformity with those regulations, the port State may deny the vessel the use of port, this is because of the state Sovereignty.

*Litra* (e) is made to cover situations not covered by the other provisions, and refer to situations where “the Party has reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or fishing related activities in support of such fishing, including in support of a vessel referred to in” art 9(4). Such cases is accepted where the vessel can

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<sup>234</sup> Doulman, D. J. et. al. (2012), n. 213, p. 48

<sup>235</sup> PSA art. 4(2)

<sup>236</sup> PSA art. 4(3)

<sup>237</sup> Doulman, D. J. et. al. (2012), n. 213, p 48

establish “that it was acting in a manner consistent with relevant conservation and management measures; or in the case of provisioning personnel, fuel, gear and other supplies at sea, that the provisioned vessel was not, at the time of provisioning, a vessel that had been denied entry into port” under Article 9(4).<sup>238</sup>

While art. 18 (1)(b) requires that “following an inspection, there are clear grounds for believing that a vessel has engaged in IUU fishing or fishing related activities in support of such fishing,” the port State shall “deny the vessel the use of its port”. When this happens, both articles requires that the port State “promptly notify the flag State and, as appropriate, relevant coastal States, (RFMOs) and other relevant international organizations”<sup>239</sup>.

Denial of the use of ports is probably the most important port State measure under the PSA, due to the fact that if the vessels cannot land their catch they will not make money either, which is the motivation for conducting IUU fishing. Also, it is impossible to carry fresh fish, and expensive to carry frozen fish, over big areas on the search for a port willing to let the vessel land the catch.

### **5.3.4 Cooperation With Flag States**

Through the years the international community has increasingly recognised that the flag States are responsible for ensuring that ships flying their flag comply with internationally accepted rules and standards, such as fisheries regulation. Unfortunately, the time has shown that several flag States do not fulfill their obligations under international agreements, as discussed in chapter 1.3. As a result, recent international instruments have progressively broadened the role of port States, as shown in chapter 1.3, and chapter 4. On the other hand, it is recognised in the PSA that the vessels may not cooperate with the port State, and that flag States on behalf of this have an important supportive role to play. In this regard, the flag States are bound to take a number of actions in fulfilling their purpose.

The PSA defines the role of flag States to strengthen the cooperation between flag States and port States in article 20(1), and also through the Preamble which recognises that measures to combat IUU fishing “should be built on the primary responsibility of flag States”.<sup>240</sup> When denial of use occurs, both PSA art. 11 and 18 require that the port State “promptly notify the

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<sup>238</sup> PSA art. 11(1)(e)(i) and (ii)

<sup>239</sup> PSA art. 11(3)

<sup>240</sup> PSA Preamble paragraph 3

flag State and (...) relevant coastal States (...) and other organizations (...) of its findings”.<sup>241</sup> Art. 20 holds the flag States responsible for IUU vessels entitled to fly their flag.

Flag States shall require its vessels “to cooperate with the port State in inspections carried out pursuant to the Agreement”.<sup>242</sup> If a vessel seek entry into port and the flag State suspects it of IUU fishing based on, for example, information from VMS reports, a coastal State or an RFMO, the flag State “shall, (...), request that (port) State to inspect the vessel or take other measures consistent with the Agreement”.<sup>243</sup> This is useful for the sake of cooperation in enforcement and in prevention of IUU fishing. It can also be useful in assisting developing country flag States which is not able to take proper enforcement actions against its vessels.

The PSA encourages identification of port States that is not “acting in accordance with, or in a manner consistent with, the Agreement”. The flag States shall also encourage their ships to use “port services, in ports that are acting in accordance with (...) this agreement”.<sup>244</sup> The flag State shall investigate inspection reports received from a port State that indicate that one of its vessels has been conducting IUU fishing. Further, it shall take enforcement action in accordance with national laws and regulations, it can also seek assistance of the port State.<sup>245</sup>

Art. 20 of the PSA holds flag States responsible for IUU fishing vessels flying their flag, the article requires that the flag State shall be notified and that it shall follow-up when a vessel is denied access to a port. The States also has to treat national vessels similarly to foreign vessels and make them a subject to the same laws.<sup>246</sup> Because of “flag shopping” the FAO endorsed the 2014 FAO Voluntary Guidelines for Flag State Performance to complement the PSA. These guidelines are a set of international instructions that holds States more accountable for the activities of fishing vessels flying their flags.

Cooperation between port and flag States to combat IUU fishing is important. This is due to the fact that port States often discovers the IUU activity, but the flag State is the one which is held liable for the activity. The port State can refuse the use of port but the flag State has the enforcement responsibility. Communication between the States is based on this important.

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<sup>241</sup> PSA art. 11(3) and 18(1)(a)

<sup>242</sup> PSA art. 20(1)

<sup>243</sup> PSA art. 20(2)

<sup>244</sup> PSA art. 20(3)

<sup>245</sup> PSA art. 20(4)

<sup>246</sup> Kuemlangan, B., et al., (2010), n. 103,

## 6 Norway's Regulation on Port State Measures to Combat IUU Fishing in National Law

### 6.1 Introduction

In this chapter I will try to figure out whether Norway's port State measures on IUU Fishing is consistent with the measures outlined in the PSA to combat IUU fishing. International relations and cooperation are necessary to maintain fish stocks in a sustainable manner and ensure that the set quotas are complied with. Almost all of Norway's fish stocks are shared with other States, or stocks on the high seas where Norway is a party to an RFMO.<sup>247</sup>

Norway has signed several bilateral and multilateral agreements on combating IUU fishing for example with the UK, Faro island, Sweden, Denmark, Netherlands, Germany, Canada, Russia, Portugal and the EU-commission. The agreements are administered by the Directorate of Fisheries.<sup>248</sup> Norway is also a party to the FAO agreements and a number of RFMOs.<sup>249</sup> The PSA is an important instrument, and Norway was one of the first States to ratify it. Today Norway has stated that it is in the States interest to reduce IUU fishing not only in their surroundings but also at a global level.<sup>250</sup> Cooperation to combat IUU fishing is necessary to protect the marine environment. Norway needs to be a trustworthy and constructive partner in the fight against the cross-border problem IUU fishing constitutes.

In the early 2000, Norway had big challenges with the increased IUU fishing activity on the Norwegian-arctic cod in the Barents Sea. Estimates from the Directorate of Fisheries has shown that between the year 2002 and 2005 100.000 tonnes of cod were estimated unreported caught each year. After the year 2005, the problem with IUU fishing on cod has gradually been reduced. Regional and global collaboration was essential to achieve this, important was also the fact that Norway implemented port State measures into national law.<sup>251</sup>

In this chapter I will give an account for port State measures in Norwegian legislation. Chapter 6.2 will cover the implementation of the PSA into Norwegian national legislation. In

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<sup>247</sup> The Norwegian Government (2011) «Norges forvaltning av havets levende ressurser»

<sup>248</sup> Nærings- og fiskeridepartementet (2017) «Om ulovlig, urapportert og uregulert (UUU) fiske»

<sup>249</sup> Fiskeri- og kystdepartementet 2011 «Norsk fiskeriforvaltning», p 9

<sup>250</sup> Prop. 54 S (2010–2011), p 2

<sup>251</sup> Nærings- og fiskeridepartementet (2017) «Om ulovlig, urapportert og uregulert (UUU) fiske»

chapter 6.3 I will try to detect whether or not Norwegian legislation is consistent with the PSA. At the very end chapter 6.4 will contain the concluding remarks.

## 6.2 Implementation of the PSA

This chapter is about how Norway has included the provisions from the PSA into Norwegian national law. Although many states ratify international instruments quickly this is just the start of addressing IUU fishing. Many State faces the real challenge when the provisions of the agreement is being implemented into national law. When defined measures to ensure detection and investigation of the IUU fishing is implemented, the PSA ensures that fish caught in IUU fishing activities should not be able to enter the market. The agreement also ensures that RFMOs and states are made aware of the IUU fishing incident.<sup>252</sup>

The Norwegian constitutional law(grl.) § 26 states that the Norwegian parliament needs to ratify agreements which are seen as particularly important. In Prop. 54 S (2010–2011) the Standing Committee on Business and Industry concluded, on the basis of grl. § 26 second paragraph that the PSA had to be ratified by the Norwegian parliament due to its importance.<sup>253</sup> The ratification was done by the Storting in “Prop. 54 S (2010–2011)”.

In “Prop. 54 S (2010–2011)” the Standing Committee on Business and Industry also concluded that the measures laid down by the PSA did not require legislative amendments since the necessary change was done when the NEAFC port State regime was implemented into national law. These measures were decided to coincide with the measures that become global through the PSA. This is a case of passive transformation, which means that it is stated that national legislation already are in accordance with the convention Norway agrees upon, as shown in chapter 2.2.<sup>254</sup> The relevant provisions from the NEAFC regime, was implemented in the “Marine Resources Act” of 6. juni 2008.<sup>255</sup> The only subsequent amendments which was done after Prop. 54 S (2010–2011) was in secondary law.

Older regulation is the basis for the conclusion when an agreement is presumed to be in accordance with national law through passive transformation, in such cases it can be hard to detect the provisions which is presumed to be in accordance with the agreement. In the

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<sup>252</sup> FAO, Agreement on Port State Measures (PSMA) “Background”

<sup>253</sup> Prop. 54 S (2010–2011) p 1

<sup>254</sup> Ruud og Ulfstein (2011) p 61

<sup>255</sup> Prop. 54 S (2010–2011) p 1

following I will try to give an account for the provisions in Norwegian national law which covers the provisions set out in the PSA.

## 6.3 Port State Measures in Norwegian legislation

### 6.3.1 Introduction

In this chapter I intend to unravel the most important measures in Norwegian legislation and also discuss whether the individual measure is in accordance with the PSA. IUU fishing is regulated in the “Marine Resources Act” chapter 8. Which currently provides the basis for port State measures to combat IUU fishing.<sup>256</sup> These provisions were adopted to provide permission for the port State control regime established in the NEAFC cooperation.<sup>257</sup>

Port State measures are regulated in Norwegian law through The Marine Resources Act §50, §51 and §52. §50 of the law provides, on specific terms, a ban on the landing of fish in port by foreign fishing vessels. §51 provides, *inter alia*, authorisation for landing, transshipment, and production of catch, and for port supply and support services in Norwegian ports and territorial waters. The marine resources act §52 states that the Department of Fisheries to prevent IUU fishing can forbid activity which is contrary to national management measures and regulations from RFMOs.

There has also been made secondary law on prohibition on landing of fish and other measures on IUU fishing through Norwegian law. The Marine Resources Act §50 and §51 is the legal foundation for the the “Forskrift om forbud mot landing av fisk og andre særskilte tiltak mot ulovlig, urapportert og uregulert fiske” (for this thesis named “regulation on banning against landing of fish and other extraordinary measures against IUU fishing”).<sup>258</sup> The regulation entered into force in august 1993 and has been changed several times after that, latest in December 2013. The regulation applies to areas outside of Norwegian jurisdiction cf. §1.

The Marine Resources Act §52 is the legal foundation for the “Forskrift om utlendingers fiske og fangst mv. i Norges økonomiske sone og landinger til eller annen bruk av norsk havn” (for

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<sup>256</sup> Ot prp nr 20 (2007-2008) p 217

<sup>257</sup> Ot prp nr 98 (2005-2006) point 5

<sup>258</sup> Ministry of fishery and industry Forskrift om forbud mot landing av fisk og andre særskilte tiltak mot ulovlig, urapportert og uregulert fiske», FOR-1993-08-06-802

this thesis named “regulation on fishing and catching etc. by foreigners in Norway's economic zone and landing or other use of Norwegian ports”).<sup>259</sup>

### **6.3.2 Inspection of Fishing Vessels**

The marine resources act §52 states that the Department of Fisheries can forbid activity which is contrary to national management measures and regulations from RFMOS, to prevent IUU fishing. The provision is meant for the government to make necessary regulations to combat IUU fishing, this article was made to cover things not thought about in §50 and §51.<sup>260</sup>

The “Regulations on fishing and catching etc. by foreigners in Norway's economic zone and landing or other use of Norwegian ports” is issued with legal basis in §52 of the marine resources act. This regulation regulates primarily fishing activity in Norwegian EEZ, but §13 contains regulation on port State control on vessels with fish on board caught in the NEAFC area, which is on the high seas. §13(1) states that such vessels need to give prior notice at least 24 hours before entry into port if the fish is frozen and 4 hours before entry into port if the fish is fresh. The same applies if the vessel is given permission to tranship the fish in port or in the territorial sea.

Some ships need to give prior notice for entry into port three days before entry cf. §13(2), (3) and (5). This includes vessels flagged in a State which is not a member State to the NEAFC, if the vessel is carrying fish on board which it intends to land in a Norwegian port. It also includes vessels flagged under a member State to the NEAFC which has fish on board caught outside the NEAFC area, and vessels with fish on board which it intends to land in Norwegian port, caught in the NAFO area.

The requirement on reasonable advance notice of entry into port is in accordance with the PSA art. 8. PSA require fishing vessels and other vessels involved in fishing-related activities to provide a reasonable advance notice of their entry into port.<sup>261</sup> Once the information has been provided to the port State, it needs adequate time to review the information and make a decision. It is not stated in the PSA nor Norwegian national law how long adequate time is, but it is safe to conclude that it does not extend beyond the amount of time the vessel has to

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<sup>259</sup> Ministry of fishery and industry, (1977), «Forskrift om utlendingers fiske og fangst mv. i Norges økonomiske sone og landinger til eller annen bruk av norsk havn» .

<sup>260</sup> Ot.prp.nr.20 (2007-2008) p. 217

<sup>261</sup> PSA art. 8

give prior notice before entering the port. This is based on the fact that when a vessel is in port, it should not be unduly delayed.

§13 section (1) to (3) does not include which measures to be given other than that these is regulated in Section 9 of §13, which states that the vessels need to fill in a form named PSC 1 or PSC 2. PSC 1 is for vessels carrying fish caught by the vessel itself. If the vessel is carrying fish transhipped from not Norwegian vessels, it need to fill in the PSC 2 for each vessel it has received fish from. If the vessel is carrying both fish caught by the vessel and fish received from other vessels it need to fill in both forms. Both of the forms contains three parts, part A is to be filled by the vessel itself and concerns the fish on board the vessel, part B shall contain a confirmation from the flag State and part C shall contain an approval from the port State. I've not been able to get the forms, because one needs to login to the NEAFC net site to get them.

This is in accordance with PSA annex A. PSA states that when a vessel seeks entry into port the port State shall request information about the vessel and the catch as listed in Annex A<sup>262</sup> to be provided before the vessel can enter the port. Although I have not been able to get the forms it is safe to conclude that they are in accordance with PSA annex A. Therefore is section 9 §13 of the regulation is in accordance with the inspection regime in the PSA, which states that the port States shall request information about the vessel and the catch before the vessel gets permission to enter the port.<sup>263</sup>

Although this provision is in accordance with the inspection regime regulated in the PSA, the regulations §13 is hard to find and is not regulated with the rest of the port State measures in Norwegian legislation. It is, actually, regulated along with regulation on fishing in the Norwegian EEZ.

### **6.3.3 Cooperation with Flag States**

After the vessel has given a reasonable advanced notice of entry into port, and it has reported activities in accordance with PSC1 and 2. The port State shall contact the flag State of the vessel in order to get an confirmation that the catch is legally caught.

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<sup>262</sup> article 8 cf. Annex A

<sup>263</sup> PSA article 8 cf. Annex A,

The Marine Resources Act §50 *litra* (c) states that when the flag State, upon request, cannot confirm that the catch has been taken in accordance with a desirable taxation or fishing pattern, or violates rules on fishing activity agreed with a foreign state, the Ministry may prohibit landing of the catch, if it is caught by non-Norwegian vessels.

*Litra* (c) states that the authorities need to contact the flag State of the vessel to check that the catch has not been taken as part of IUU fishing activities.<sup>264</sup> If the flag State cannot confirm that the vessel has not been conducting IUU fishing, the catch can be refused landed in port. This applies regardless of whether the catch has been transshipped before landing. The provision is primarily intended to provide a legal basis for carrying out the measures for landing in Norwegian ports. This implies that States may establish a ban on the landing of fish from foreign vessels before the flag State has confirmed that the catch is legally caught, reported and settled in any allocated quotas.

The provision applies to the landing of all fish and fish products either by landing by the fishing vessel itself or a transport vessel after a transshipment. All transshipment activity shall be reported to the flag States of both the fishing vessel and the freight vessel. In all cases, the provision could be used to deny landing until the shipping vessel's flag State has confirmed that the requested transshipment reports have been received.

The provision does not require any prior degree of suspicion to request the flag State for confirmation. The suspicion could be based on general criteria, such as the species tried landed, the amount tried landed, whether the flag State of the vessel is generally considered to have good control of the individual vessel's catch etc., or in case of specific circumstances, the authorities find reason to check that the catch is not taken as part of IUU fishing.<sup>265</sup>

The Marine Resources Act §50(c) is supplied by the “regulation on banning against landing of fish and other extraordinary measures against IUU fishing” §5 and §10 which requires that a port State need to collect information about the catch from the flag State and make sure that the fish is not caught in a manner inconsistent with international conservation and management measures, the port State shall notify the flag State if the vessel is refused to enter

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<sup>264</sup> Ot.prp.nr.98 (2005–2006) p. 10

<sup>265</sup> Ot.prp.nr.98 (2005–2006) p. 10

the port. If the flag State does not give such authorisation the port State can deny the use of port.

This measure is in accordance with PSA art 11(1) *litra* (a) which regulates fish caught without a valid and applicable authorisation from the flag State. *Litra* (d) states that the port State can deny the use of port if “the flag State does not confirm within a reasonable period of time, (.), that the fish on board was taken in accordance with applicable requirements” of a relevant RFMO. However, the Norwegian legislation goes a bit further than the PSA. This is based on that the flag State, in accordance with Norwegian law, need to confirm that the vessel has not been conducting any IUU fishing activities, while the flag State in accordance to the PSA only has to confirm that the fish on board was taken in accordance to RFMO regulations. When this happens, the port State shall “promptly notify the flag State and, as appropriate, relevant coastal States, (RFMOs) and other relevant international organizations” cf. PSA art. 11(3).

#### **6.3.4 Prohibition of Landing**

The Marine Resources Act §50 contains regulations against landing of fish caught contrary to the regulation set in *litra* (a) to (c), where the latter two is the most important ones. The Marine Resources Act §50 states that the Ministry may prohibit the landing of marine resources caught by non-Norwegian vessels.<sup>266</sup>

The legal background of the rules in the first paragraph is to ensure responsible management of fishery resources in areas outside Norwegian jurisdiction and fish stocks migrating between Norwegian zones and other States, their zones or international waters. Situations in which a ban on landing of catch may be adopted is listed in *litra* (a) to (c).<sup>267</sup> *Litra* (a) regulates situations where the catch is from a fish stock of common interest with other states that are not managed jointly. *Litra* (b) is aimed primarily at catch taken in areas outside Norwegian jurisdiction and has three options.<sup>268</sup>

The first two options seems to be regulating IUU fishing inside the fisheries jurisdiction of the flag State, port State or another State and not on the high seas which is the theme for the thesis.<sup>269</sup> The third option states that Norway can prohibit landing of fish in port if the catch

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<sup>266</sup> Havressurslova §50

<sup>267</sup> Ot.prp.nr.20 (2007-2008) p 216

<sup>268</sup> Ot.prp.nr.20 (2007-2008) p 216

<sup>269</sup> Ot.prp.nr.20 (2007-2008) p 217

violates international agreements. This option addresses the cases where there are coastal state agreements or regional agreements on the management of fish stocks. Capture that is in violation of international agreements will in most cases also be contrary to different quota adjustments.<sup>270</sup>

The marine resources act §51 states that the ministry may prohibit landing, transshipment and production of catch in Norwegian ports by non-Norwegian vessels following *litra* (a) and (b) in two circumstances. Firstly cf. *litra* (a), when the vessel has participated in fishing activities that clearly contradicts a desirable taxation or fishing pattern, or clearly violates rules on fisheries that have been agreed with a foreign state.

*Litra* (a) concerns ban on landing from vessels which clearly violates rules on fisheries that have been agreed with a foreign state. The ban can be directed both against the vessel concerned and against those who assist the vessel with port services. IUU fishing vessels blacklisted by an RFMO is considered to clearly violate rules set out in *litra* (a). Breach of the rules of an RFMO or other sub regional fisheries organisations is also in contradiction with this regulation. When deciding whether or not the activity clearly contradicts fisheries regulations some factors need to be taken into consideration, e.g. which fish stock was fished, whether or not the relevant vessel or one of the company's vessels has taken part in IUU fishing earlier, if the vessel has not complied with requirements or warnings from the authorities, and the extent of the IUU fishing. A requirement of general preponderance of the evidence must be used as a basis for the assessment.<sup>271</sup>

The “Regulation on prohibition against landing of fish and other measures on IUU fishing” §4 contains regulation on ban against landing of fish caught by non-members of an RFMO contrary to the RFMOs fisheries legislation. This is supplied with §6 which states that the Department of Fisheries can prohibit landing of fish caught in an IUU fishing activity. §8 of the regulation states that the Directorate of Fisheries can establish prohibitions as mentioned in §§6 and 7 of the regulation if a vessel is listed on a IUU blacklist of an RFMO. §11 regulates publication of Norwegian blacklists of IUU fishing vessels.

These provisions are in accordance with PSA art. 18 (1)(b) which states that “following an inspection, there are clear grounds for believing that a vessel has engaged in IUU fishing or

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<sup>270</sup> Ot.prp.nr.20 (2007-2008) p 217

<sup>271</sup> Ot.prp.nr.98 (2005-2006) p. 10 to 12

fishing related activities in support of such fishing”, the port State shall “deny the vessel the use of its port”. The provisions also meet the requirements on blacklisting set out in the PSA and NEAFC. PSA calls for the ports to deny use before entering port if the vessel is on an IUU vessel list of an RFMO.<sup>272</sup>

Second *litra* (b), applies to situations where the owner of the vessel is a legal entity who has participated in fishing activity that is clearly contrary to a desirable taxation or fishing pattern, or clearly violates rules on fisheries agreed with a foreign state. The purpose of *litra* (b) is to prevent the owners with simple steps from circumventing the measures that are given in *litra* (a). This regulation also ensures that other vessels in the company’s fleet might be affected by the measures. This may stop the owner from the opportunity to use new ships in the IUU business and sell the blacklisted vessel.<sup>273</sup> There is no such provision in the PSA, but the provision is anyhow covered by the blacklisting provision of PSA art. 9(4).

The Marine Resources Act *Litra* (c) states that the ministry may prohibit loading, unloading and port, supply and support services in Norwegian ports to and from vessels subject to prohibition under *litra* (a) or (b). This means, among other things, port call, bunkering, provisioning, crew exchanges, repairs, spare parts delivery, assistance, etc.<sup>274</sup> The PSA calls for the States to deny use before the vessel enters the port if the vessel is on an IUU vessel list of an RFMO,<sup>275</sup> upon entry into port if the authorisation required by the flag State or coastal State lacks,<sup>276</sup> and after inspection if the port State has clear grounds to believe that the vessel has engaged in IUU activities.<sup>277</sup> Also the provisions on landing is in accordance with the PSA as shown in the latter review.

### **6.3.5 Port, Supply and Support Services**

The marine resources act §51 *litra* (d) allows for the prohibition of transshipments, as well as supply and support services to and from IUU vessels in areas subject to the law. This means that the ban can follow the vessels outside the ports. Otherwise, the vessels could easily avoid the disadvantages of the measures taken and get supply offshore from supply ships near a port, which would undermine the purpose and efficiency of the measures. Measures can not,

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<sup>272</sup> PSA Article 9(4)

<sup>273</sup> Ot.prp.nr.98 (2005–2006) p. 13

<sup>274</sup> Ot.prp.nr.98 (2005–2006) p. 13

<sup>275</sup> PSA Article 9(4)

<sup>276</sup> PSA Article 11

<sup>277</sup> PSA Article 18

however, contradict the right of foreign vessels to innocent passage through the territorial sea.<sup>278</sup>

The Marine Resources Act §51 further states in *litra* (e) and (f) that the ministry may prohibit supply and support services to and from other vessels with Norwegian vessels, when the first-mentioned vessel is not permitted under subparagraphs (a) to (d), and prohibition in accordance with *litra* (a) to (e) on vessels blacklisted by RFMOs as IUU vessels.

The rule authorises the banning of supply and support services to and from other vessels with Norwegian vessels when there exists a ban on the vessel in accordance with the regulations in §51 (a) to (d). It is also granted a legal basis to prohibit support services in port. *Litra* (f) establish an legal basis for a prohibition as mentioned in *litra* (a) to (d) for vessels blacklisted by an RFMO.

Following the “regulation on banning against landing of fish and other extraordinary measures against IUU fishing” §6 the Directorate of Fisheries can forbid landing, transshipment and processing of fish in Norwegian ports from foreign vessels if the vessel has conducted IUU fishing. §7 states that the Directorate of Fisheries can prohibit loading, unloading and port services and other supply and support services in Norwegian ports against vessels comprised by §6.

These measures are in accordance with PSA art 9(6) which provides a list which contains uses of the ports that should be denied in cases of IUU fishing, including “landing, transshipping, packaging and processing of fish that have not been previously landed and other port services including, *inter alia*, refuelling and re-supplying, maintenance and dry docking”.

## 6.4 Concluding Remarks

LOSC was the first global agreement which covered the whole law of the sea area. Among other things the LOSC regulated freedom of fishing in art. 87 which might be the basis for the problem of IUU fishing. It was not necessary for the states to include fishing in the high seas freedoms, but at the time of the adoption of the LOSC the States did not have the same information about the marine ecosystem as we have today. Since the high seas areas already was confined with the 200 nautical mile EEZ the States was not likely to restrict the freedoms

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<sup>278</sup> Ot.prp.nr.98 (2005–2006) p. 13

of the high seas, and therefore the freedom of fishing was included. This freedom was especially important for the land locked and geographical disadvantaged States.

Although the number of agreement regulating port State measures to combat IUU fishing has developed over time, and several States has begun to include such regulation into national law, IUU fishing still constitutes huge challenges globally. IUU fishing has been categorised as an environmental crime, and it could lead to extinction of species as shown in chapter 3.2, but it is also often related to other organised crimes, such as smuggling of Narcotic substances, corruption, and economic crimes as shown in chapter 3.3. The PSA was the first global agreement to only regulate port State measures in the fight against IUU fishing, and the international community hopes that this agreement will contribute to combat IUU fishing.

Several States has signed the PSA agreement and other international agreements regulating port State measures to combat IUU fishing, including Norway which implemented it into national law in 2011.

Norwegian national law is unstructured and hard to manoeuvre in. Because of the different types of law instruments and that the regulations are issued with legal basis in different articles in the Marine Resources Act, it is hard to get an overview on all measures in one area. But when you have established an overview it is clear that the Norwegian legislation is in accordance with the minimum measures in the PSA, and that Norway do an important job to combat IUU fishing. For the case of Norwegian legislation, I believe that it would be helpful for the State to have a single law regulating port State measures, or maybe a bigger chapter in a law. If one thing is clear is it that the fragmented legislation Norway has today is not durable.

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## Appendix

### AGREEMENT TO PREVENT UNREGULATED HIGH SEAS FISHERIES IN THE CENTRAL ARCTIC OCEAN

**Draft Text**  
**30 November 2017**

The Parties to this Agreement,

Recognizing that until recently ice has generally covered the high seas portion of the central Arctic Ocean on a year-round basis, which has made fishing in those waters impossible, but that ice coverage in that area has diminished in recent years;

Acknowledging that, while the central Arctic Ocean ecosystems have been relatively unexposed to human activities, those ecosystems are changing due to climate change and other phenomena, and that the effects of these changes are not well understood;

Recognizing the crucial role of healthy and sustainable marine ecosystems and fisheries for food and nutrition;

Recognizing the special responsibilities and special interests of the central Arctic Ocean coastal States in relation to the conservation and sustainable management of fish stocks in the central Arctic Ocean;

Noting in this regard the initiative of the central Arctic Ocean coastal States as reflected in the Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean signed on 16 July 2015;

Recalling the principles and provisions of treaties and other international instruments relating to marine fisheries that already apply to the high seas portion of the central Arctic Ocean, including those contained in:

the United Nations Convention on the Law of the Sea of 10 December 1982 (“the 1982 United Nations Convention on the Law of the Sea”);

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 of 4 December 1995 (“the 1995 Agreement”); and

the 1995 Code of Conduct for Responsible Fisheries and other relevant instruments adopted by the Food and Agriculture Organization of the United Nations;

Underlining the importance of ensuring cooperation and coordination between the Parties and the North-East Atlantic Fisheries Commission, which has competence to adopt conservation and management measures in a portion of the high seas area of the central Arctic Ocean, and other relevant mechanisms for fisheries management that are established and operated in accordance with international law, as well as with relevant international bodies and programs;

Believing that commercial fishing is unlikely to become viable in the high seas portion of the central Arctic Ocean in the near future and that it is therefore premature under current circumstances to establish any additional regional or subregional fisheries management organization or arrangement for the high seas portion of the central Arctic Ocean;

Desiring, consistent with the precautionary approach, to prevent the start of unregulated fishing in the high seas portion of the central Arctic Ocean while keeping under regular review the need for additional conservation and management measures;

Recalling the 2007 United Nations Declaration on the Rights of Indigenous Peoples;

Recognizing the interests of Arctic residents, including Arctic indigenous peoples, in the long-term conservation and sustainable use of living marine resources and in healthy marine ecosystems in the Arctic Ocean and underlining the importance of involving them and their communities;

Desiring to promote the use of both scientific knowledge and indigenous and local knowledge of the living marine resources of the Arctic Ocean and the ecosystems in which they occur as a basis for fisheries conservation and management in the high seas portion of the central Arctic Ocean;

Have agreed as follows:

## **Article 1 Use of Terms**

For the purposes of this Agreement:

- (a) “Agreement Area” means the single high seas portion of the central Arctic Ocean that is surrounded by waters within which Canada, the Kingdom of Denmark in respect of Greenland, the Kingdom of Norway, the Russian Federation and the United States of America exercise fisheries jurisdiction;
- (b) “fish” means species of fish, molluscs and crustaceans except those belonging to sedentary species as defined in Article 77 of the 1982 United Nations Convention on the Law of the Sea;
- (c) “fishing” means searching for, attracting, locating, catching, taking or harvesting fish or any activity that can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish;
- (d) “commercial fishing” means fishing for commercial purposes;
- (e) “exploratory fishing” means fishing for the purpose of assessing the sustainability and feasibility of future commercial fisheries by contributing to scientific data relating to such fisheries;
- (f) “vessel” means any vessel used for, equipped to be used for, or intended to be used for fishing.

## **Article 1 bis Objective**

The objective of this Agreement is to prevent unregulated fishing in the high seas portion of the central Arctic Ocean through the application of precautionary conservation and management measures as part of a long-term strategy to safeguard healthy marine ecosystems and to ensure the conservation and sustainable use of fish stocks.

## **Article 3 Interim Conservation and Management Measures Concerning Fishing**

1. Each Party shall authorize vessels entitled to fly its flag to conduct commercial fishing in the Agreement Area only pursuant to:
  - a. conservation and management measures for the sustainable management of fish stocks which are adopted by one or more regional or subregional fisheries management organizations, or arrangements, that have been or may be established and are operated in accordance with international law to manage such fishing in accordance with recognized international standards, or
  - b. interim conservation and management measures which may be adopted by the Parties pursuant to Article 5(1)(c)(ii).
- 1bis. The Parties are encouraged to conduct scientific research under the framework of the Joint Program of Scientific Research and Monitoring established pursuant to Article 3(bis) and under their respective national scientific programs.
2. A Party may authorize vessels entitled to fly its flag to carry out exploratory fishing in the Agreement Area only pursuant to conservation and management measures established by the Parties on the basis of Article 5(1)(d).
3. The Parties shall ensure that their scientific research activities involving the catching of fish in the Agreement Area do not undermine the prevention of unregulated commercial and exploratory fishing and the protection of healthy marine ecosystems. The Parties are encouraged to inform each other about their plans for authorizing such scientific research activities.
4. The Parties shall ensure compliance with the interim measures established by this Article, and with any additional or different interim measures they may establish pursuant to Article 5(1)(c).
5. Consistent with Article 7 of the 1995 Agreement, coastal States Parties and other Parties shall cooperate to ensure the compatibility of conservation and management measures for fisheries resources that occur in areas both within and beyond national jurisdiction in the central Arctic Ocean in order to ensure conservation and management of those resources in their entirety.

6. Other than as provided in paragraph 3 above, nothing in this Agreement shall be interpreted to restrict the entitlements of Parties in relation to marine scientific research as reflected in the 1982 United Nations Convention on the Law of the Sea.

**Article 3 bis**  
**Joint Program of Scientific Research and Monitoring**

1. The Parties shall facilitate cooperation in scientific activities with the goal of increasing knowledge of the living marine resources of the central Arctic Ocean and the ecosystems in which they occur. The Parties agree to establish, within 2 years of the entry into force of this Agreement, a Joint Program of Scientific Research and Monitoring with the aim of improving their understanding of the ecosystems of the Agreement Area and, in particular, of determining whether fish stocks might exist in the Agreement Area now or in the future that could be harvested on a sustainable basis and the possible impacts of such fisheries on the ecosystem(s) of the Agreement Area. The Parties shall guide the development, coordination and implementation of the Joint Program of Scientific Research and Monitoring.
2. The Joint Program of Scientific Research and Monitoring shall take into account the work of relevant scientific and technical organizations and programs, as well as indigenous and local knowledge.
3. As part of the Joint Program of Scientific Research and Monitoring, the Parties shall adopt, within 2 years of the entry into force of this Agreement, a data sharing protocol and shall share relevant data, directly or through relevant scientific bodies and programs, in accordance with that protocol.
4. The Parties shall hold joint scientific meetings, in person or otherwise, at least every two years and at least two months in advance of the meetings of the Parties that take place pursuant to Article 5 to present the results of their research, to review the best available scientific information and provide timely scientific advice to meetings of the Parties. The Parties shall adopt, within two years of the entry into force of this Agreement, terms of reference and other procedures for the functioning of the joint scientific meetings.

**Article 5**  
**Review and Further Implementation**

1. The Parties shall meet every two years or more frequently if they so decide. At their meetings, the Parties shall, *inter alia*:
  - a. review implementation of this Agreement and, when appropriate, consider extending the Agreement in accordance with Article X(2)(a);
  - b. review all available scientific information developed through the Joint Program of Scientific Research and Monitoring, from the scientific programs of the Parties, and from any other relevant sources, including indigenous and local knowledge;
  - c. on the basis of the scientific information derived from the Joint Program of Scientific Research and Monitoring, from the scientific programs of the Parties, and from other relevant sources, and taking into account relevant fisheries management and ecosystem considerations, including the precautionary approach and potential adverse impacts of fishing on the ecosystem, consider, *inter alia*, whether the distribution, migration and abundance of fish in the Agreement Area would support a sustainable commercial fishery and, on that basis, determine:
    - i. whether to commence negotiations to establish one or more additional regional or subregional fisheries management organizations or arrangements for managing fishing in the Agreement Area; and
    - ii. whether, once negotiations have commenced pursuant to paragraph (i) above and the Parties have agreed on mechanisms to ensure the sustainability of fish stocks, to establish additional or different interim conservation and management measures in respect of those stocks in the Agreement Area.
  - d. establish, within three years of the entry into force of this Agreement, conservation and management measures for exploratory fishing in the Agreement Area and may amend such measures from time to time thereafter. These measures shall provide, *inter alia*, that:
    - i. exploratory fishing shall not undermine the objective of this Agreement;
    - ii. exploratory fishing shall be limited in duration, scope and scale to minimize impacts on fish stocks and ecosystems and shall be subject to standard requirements set forth in the data sharing protocol envisioned in Article 3(bis)(3);
    - iii. a Party may authorize exploratory fishing only on the basis of sound scientific research and when it is consistent with the Joint Program of Scientific Research and Monitoring and its own national scientific program(s);
    - iv. a Party may authorize exploratory fishing only after it has notified the other Parties of its plans for such fishing and provided other Parties an opportunity to comment on those plans; and

- v. a Party must adequately monitor any exploratory fishing that it has authorized and report the results of such fishing to the other Parties.
2. To promote implementation of this Agreement, including with respect to the Joint Program of Scientific Research and Monitoring, and other activities undertaken pursuant to Article 3 of this Agreement, the Parties may form committees or similar bodies in which representatives of Arctic communities, including Arctic indigenous peoples, can participate.

#### **Article 5 bis Decision-Making**

1. Decisions of the Parties on questions of procedure shall be taken by a majority of the Parties casting affirmative or negative votes.
2. Decisions of the Parties on questions of substance shall be taken by consensus. For the purpose of this Agreement, “consensus” means the absence of any formal objection made at the time the decision was taken.
3. A question shall be deemed to be of substance if any Party considers it to be of substance.

#### **Article 5 ter Dispute Settlement**

The provisions relating to the settlement of disputes set forth in Part VIII of the 1995 Agreement apply, *mutatis mutandis*, to any dispute among Parties relating to the interpretation or application of this Agreement, whether or not they are also Parties to the 1995 Agreement.

#### **Article 4 Non-Parties**

1. The Parties shall encourage non-parties to this Agreement to take measures that are consistent with the provisions of this Agreement.
2. The Parties shall take measures consistent with international law to deter the activities of vessels entitled to fly the flags of non-parties that undermine the effective implementation of this Agreement.

## **Article 6 Signature**

1. This Agreement shall be open for signature at [location] from [date] by Canada, the People's Republic of China, the Kingdom of Denmark in respect of the Faroe Islands and Greenland, Iceland, Japan, the Republic of Korea, the Kingdom of Norway, the Russian Federation, the United States of America and the European Union and shall remain open for signature for twelve (12) months following that date.
2. For signatories to this Agreement, this Agreement shall remain open for ratification, acceptance or approval at any time.

## **Article 7 Accession**

1. For the States listed in Article 6, paragraph 1 that have not signed the Agreement, and for the European Union if it has not signed the Agreement, the Agreement shall remain open for accession at any time.
2. After the entry into force of this Agreement, the Parties may invite other States with a real interest to accede to this Agreement.

## **Article 8 Entry into Force**

1. This Agreement shall enter into force 30 days after the date of receipt by the depositary of instruments of ratification, acceptance, or approval of, or accession to, this Agreement by those States and the European Union listed in Article 6.
2. After the requirements for entry into force of this Agreement have been met, this Agreement shall enter into force for each State that has deposited an instrument of ratification, acceptance, approval or accession, 30 days after the date of deposit of that instrument.

## **Article 7bis Withdrawal**

Any Party may at any time withdraw from this Agreement by sending written notification of its withdrawal to the depositary through diplomatic channels, specifying the effective date of its withdrawal, which shall be at least six months after the date of notification. Withdrawal from this Agreement shall not affect its application among the remaining Parties or the duty of a withdrawing Party to fulfill any obligation in this Agreement to which it otherwise would be subject under international law independently of this Agreement.

## **Article X**

## **Duration of the Agreement**

1. This Agreement shall remain in force for an initial period of 16 years following its entry into force.
2. Following the expiration of the initial period specified in paragraph 1, this Agreement shall remain in force for successive period(s) of 5 years each unless any Party:
  - a. presents a formal objection to any such extension of the Agreement at the last meeting of the Parties that takes place prior to expiration of the initial period or any subsequent extension; or
  - b. sends a formal objection to any such extension to the Depositary in writing no later than six months prior to the end of the expiration of the respective period.
3. The Parties shall provide for an effective transition between this Agreement and any potential new agreement establishing an additional regional or subregional fisheries management organization or arrangement for managing fishing in the Agreement Area so as to safeguard healthy marine ecosystems and ensure the conservation and sustainable use of fish stocks in the Agreement Area.

## **Article 9 Relation to Other Agreements**

1. The Parties recognize that they are and will continue to be bound by their obligations under relevant provisions of international law, including those reflected in the 1982 United Nations Convention on the Law of the Sea and the 1995 Agreement, and recognize the importance of continuing to cooperate in fulfilling those obligations even in the event that this Agreement terminates in the absence of any agreement establishing an additional regional or subregional fisheries management organization or arrangement for managing fishing in the Agreement Area.
2. Nothing in this Agreement shall prejudice the positions of any Party with respect to its rights and obligations under international agreements and its positions with respect to any question relating to the Law of the Sea, including with respect to any position relating to the exercise of rights and jurisdiction in the Arctic Ocean.
3. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of any Party under relevant provisions of international law as reflected in the 1982 United Nations Convention on the Law of the Sea or the 1995 Agreement, including the right to propose the commencement of negotiations on the establishment of one or more additional regional or subregional fisheries management organizations or arrangements for the Agreement Area.
4. This Agreement shall not alter the rights and obligations of any Party that arise from other agreements compatible with this Agreement and that do not affect the enjoyment by other Parties of their rights or the performance of their obligations under this Agreement. The Agreement shall neither undermine nor conflict with the role and mandate of any existing international mechanism relating to fisheries management.

**Article 10**  
**Depositary**

1. The Government of Canada shall be the depositary for this Agreement.
2. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.
3. The Depositary shall inform all Signatories and all Parties of the deposit of all instruments of ratification, acceptance, approval or accession and perform such other functions as are provided for in the 1969 Vienna Convention on the Law of Treaties.

Done at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 201X, in the Chinese, English, French and Russian languages, each text being equally authentic.