



EXTRATERRITORIAL PORT STATE MEASURES

**The basis and limits of unilateral port state jurisdiction
to combat illegal, unreported and unregulated fishing**

Arron N. Honniball

EXTRATERRITORIAL PORT STATE
MEASURES: THE BASIS AND LIMITS OF
UNILATERAL PORT STATE JURISDICTION
TO COMBAT ILLEGAL, UNREPORTED AND
UNREGULATED FISHING

Arron N. Honniball

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**Extraterritorial Port State Measures: The basis and limits of
unilateral port state jurisdiction to combat illegal, unreported
and unregulated fishing**

Extraterritoriale Havenstaatmaatregelen: De basis en grenzen
van de unilaterale havenstaatjurisdictie ter bestrijding van
extraterritoriale illegale, ongemelde en ongereguleerde
visserij

(met een samenvatting in het Nederlands)

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1923 Ports Convention	Convention and Statute of the International Regime of Maritime Ports
1958 CSC	Convention on the Continental Shelf
1958 HSC	Convention on the High Seas
1958 TSC	Convention on the Territorial Sea and the Contiguous Zone
1978 Hague Memorandum	The Hague Memorandum of Understanding between Certain Maritime Authorities on the Maintenance of Standards on Merchant Ships
AIDCP	International Dolphin Conservation Program
ALC	Automatic Location Communicator
APFIC	Asia-Pacific Fishery Commission
BBNJ	Biodiversity in areas beyond national jurisdiction
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCBSP	Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
CMM(s)	Conservation and Management Measure(s) (binding decisions of an RFMO/A relating to conservation and management)
COFI	Committee on Fisheries (of the Food and Agriculture Organization of the United Nations)
COP	Conference of the Parties
CPCs	Contracting parties and cooperating non-contracting parties
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRFM	Caribbean Regional Fisheries Mechanism
Crim.	Criminal

CS	Continental shelf
CUP	Cambridge University Press
DAFF	Department of Agriculture, Forestry and Fisheries
DOALOS	Division for Ocean Affairs and the Law of the Sea
Doc	Document
EC	European Community (post 1 December 2009, see EU)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEZ	Exclusive economic zone
EJF	Environmental Justice Foundation
EU	European Union (prior 1 December 2009, see EC)
F Supp	(United States) Federal Supplement
FAO	Food and Agriculture Organization of the United Nations
FAOLEX	Food and Agriculture Organization of the United Nations FAOLEX Database
FFA	Forum Fisheries Agency
Fish Stocks Conference	United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks
FOC	Flag of convenience
FONC	Flag of non-compliance
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
GFCM	General Fisheries Commission for the Mediterranean
HQ	Headquarters (U.S. Customs and Border Protection)
IATTC	Inter-American Tropical Tuna Commission
ICC	International Criminal Court
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
ICJ Reports	International Court of Justice – Reports of Judgments, Advisory Opinions and Orders
ILC	International Law Commission

LIST OF ABBREVIATIONS

ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMO	International Maritime Organization
IOTC	Indian Ocean Tuna Commission
IPOA-IUU	International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing
ITLOS	International Tribunal for the Law of the Sea
IUU fishing	Illegal, unreported and unregulated fishing
LOSB	Law of the Sea Bulletin
MARPOL	International Convention for the Prevention of Pollution, as modified Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships
MCS	Monitoring, control and surveillance
MLC	Maritime Labour Convention
MoU	Memorandum of Understanding
MSY	Maximum sustainable yield
NAFO	Northwest Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization
NCP	Non-contracting party
NEAFC	North-East Atlantic Fisheries Commission
NGO	Non-governmental organization
NILOS	Netherlands Institute for the Law of the Sea
Nm.	Nautical mile
NOAA	National Oceanic and Atmospheric Administration of the USA
NOAA-NFMS	National Marine Fisheries Service of the USA
Non-CNCP	Non-cooperating non-contracting parties
NORMLEX	International Labour Organization Information System on International Labour Standards
NPAFC	North Pacific Anadromous Fish Commission
NPFC	North Pacific Fisheries Commission

NPOA-IUU	National Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal of the European Union
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
PCIJ Ser	Permanent Court of International Justice – Reports of Judgments of Advisory Opinions and Orders
PNG	Independent State of Papua New Guinea
PSC	Port state control (merchant shipping)
PSJ	Port state jurisdiction
PSM(s)	Port state measure(s) (fisheries)
PSMA	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
Rec	Recommendation
RECOFI	Regional Commission for Fisheries
Res	Resolution
RFB(s)	Regional fisheries body(ies)
RFMO/A	Regional fisheries management organisation/arrangement
RIAA	UN Reports of International Arbitral Awards
SADC	Southern African Development Community
SAMSA	South African Maritime Safety Authority
SANF	South African National Defence Force
SEAFO	South East Atlantic Fisheries Organisation
Sess	Session
SIOFA	South Indian Ocean Fisheries Agreement
SOLAS	International Convention for the Safety of Life at Sea
SPC	Secretariat of the Pacific Community
SPRFMO	South Pacific Regional Fisheries Management Organisation
SRFC	Sub-Regional Fisheries Commission

LIST OF ABBREVIATIONS

STCW-F	International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel
Supp	Supplement
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership Agreement
TS	Territorial sea
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNFSA	Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
UNGA	United Nations General Assembly
UNICPOLOS	United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
UNTS	United Nations Treaty Series
USA	United States of America
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
VMS	Vessel monitoring system
WCPFC	Western and Central Pacific Fisheries Commission
WECAFC	Western Central Atlantic Fishery Commission
WTO	World Trade Organization

TABLE OF CASES

INTERNATIONAL COURTS AND TRIBUNALS

Dispute Settlement Body of the World Trade Organization

Chile — Measures affecting the Transit and Importing of Swordfish WTO DSB DS193.

Chile — Measures affecting the Transit and Importing of Swordfish, Arrangement between the European Communities and Chile [2001] WTO DSB DS193, 01-1770.

Chile — Measures affecting the Transit and Importing of Swordfish, Joint Communication from the European Union and Chile [2010] WTO DSB DS193, 10-3069.

Chile — Measures affecting the Transit and Importing of Swordfish, Request for the Establishment of a Panel by the European Communities [2000] WTO DSB DS193, 00-4761.

Colombia - Indicative Prices and Restrictions on Ports of Entry, Request for the Establishment of a Panel by Panama [2007] WTO DSB DS366, 07-3903.

European Union - Measures on Atlanto-Scandian Herring, Request for the establishment of a panel by Denmark in respect of the Faroe Islands [2014] WTO DSB DS469, 14-0096.

International Court of Justice

Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua), Judgment [2009] ICJ 133, ICJ Reports 2009 213.

Fisheries Case, Judgment of December 18th, 1951 [1951] ICJ 5, ICJ Rep 1951 116.

Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment [1998] ICJ 96, ICJ Rep 1998 432.

Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment, Dissenting Opinion of Judge Bedjaoui [1998] ICJ 96, ICJ Rep 1998 516.

TABLE OF CASES

Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment, Separate Opinion of Judge Koroma [1998] ICJ 96, ICJ Rep 1998 486.

Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment, Separate Opinion of Judge Oda [1998] ICJ 96, ICJ Rep 1998 474.

Fisheries Jurisdiction (United Kingdom v Iceland), Interim Protection, Order of 17 August 1972 [1972] ICJ 55, ICJ Reports 1972 12.

Fisheries Jurisdiction (United Kingdom v Iceland), Merits, Judgment [1974] ICJ 55, ICJ Reports 1974 3.

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment 11 September 1992 [1992] ICJ 75, ICJ Reports 1992 351.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment [1986] ICJ 5, ICJ Reports 1986 14.

Nottebohm Case (second phase), Judgment [1955] ICJ 18, ICJ Reports 1955 4.

North Sea Continental Shelf, Judgment [1969] ICJ 51 & 52, ICJ Reports 1969 3.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Counter Memorial of the Kingdom of Belgium [2001] ICJ 121.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment [2002] ICJ 121, ICJ Reports 2002 3.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, Declaration of Judge Ranjeva [2002] ICJ 121, ICJ Reports 2002 54.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, Dissenting Opinion of Judge Oda [2002] ICJ 121, ICJ Reports 2002 46.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, Dissenting Opinion of Judge Van Den Wyngaert [2002] ICJ 121, ICJ Reports 2002 137.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal [2002] ICJ 121, ICJ Reports 2002 63.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, Separate Opinion of Judge Bula-Bula [2002] ICJ 121, ICJ Reports 2002 100.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, Separate Opinion of Judge Rezek [2002] ICJ 121, ICJ Reports 2002 91.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, Separate Opinion of President Guillaume [2002] ICJ 121, ICJ Reports 2002 35.

Certain Criminal Proceedings in France (Republic of the Congo v France), Provisional Measure, Order of 17 June 2003 [2003] ICJ 129, ICJ Reports 2003 102.

International Tribunal for the Law of the Sea

“ARA Libertad” (Argentina v Ghana), Provisional Measures, Order of 15 December 2012 [2012] ITLOS 20, ITLOS Rep 2012 332.

“ARA Libertad” (Argentina v Ghana), Provisional Measures, Order of 15 December 2012, Joint Separate Opinion of Judges Wolfrum and Cot [2012] ITLOS 20, ITLOS Rep 2012 363.

“ARA Libertad” (Argentina v Ghana), Provisional Measures, Order of 15 December 2012, Separate Opinion of Judge Lucky [2012] ITLOS 20, ITLOS Rep 2012 382.

“Arctic Sunrise” (Kingdom of the Netherlands v Russian Federation), Order of 22 November 2013, Joint Separate Opinion of Judge Wolfrum and Judge Kelly [2013] ITLOS 22, ITLOS Rep 2013 256.

“Arctic Sunrise” (Kingdom of the Netherlands v Russian Federation), Provisional Measures, Note verbale of the Embassy of the Russian Federation in Berlin, dated 22 October 2013 [2013] ITLOS 22.

TABLE OF CASES

Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community), Order of 20 December 2000 [2000] ITLOS 7, ITLOS Reports 2000 148.

Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union), Order of 16 December 2009 [2009] ITLOS 7, ITLOS Reports 2008-2010 13.

“Enrica Lexie” (Italy v India), Provisional Measures, Notification Instituting Arbitral Proceedings [2015] ITLOS 24.

“Enrica Lexie” (Italy v India), Provisional Measures, Order of 24 August 2015 [2015] ITLOS 24, ITLOS Rep 2015 182.

“Enrica Lexie” (Italy v India), Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Lucky [2015] ITLOS 24, ITLOS Rep 2015 268.

“Enrica Lexie” (Italy v India), Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Ndiaye [2015] ITLOS 24, ITLOS Rep 2015 246.

“Enrica Lexie” (Italy v India), Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Vice-President Bouguetaia [2015] ITLOS 24, ITLOS Rep 2015 232.

M/V “Louisa” (Saint Vincent and the Grenadines v Kingdom of Spain), Judgment [2013] ITLOS 18, ITLOS Rep 2013 4.

M/V “Louisa” (Saint Vincent and the Grenadines v Kingdom of Spain), Judgment, Declaration of Judge Paik [2013] ITLOS 18, ITLOS Rep 2013 49.

M/V ‘Norstar’ (Panama v Italy), Preliminary Objections, Judgment [2016] ITLOS 25.

M/V ‘Norstar’ (Panama v Italy), Preliminary Objections, Judgment, Declaration of Judge Cot [2016] ITLOS 25.

M/V ‘Norstar’ (Panama v Italy), Preliminary Objections, Judgment, Dissenting Opinion of Judge Ad Hoc Treves [2016] ITLOS 25.

M/V 'Norstar' (Panama v Italy), Preliminary Objections, Judgment, Joint Separate Opinion of Judges Wolfrum and Attard [2016] ITLOS 25.

M/V 'Norstar' (Panama v Italy), Preliminary Objections, Judgment, Separate Opinion of Judge Lucky [2016] ITLOS 25.

M/V 'Norstar' (Panama v Italy), Preliminary Objections, Judgment, Separate Opinion of Judge Ndiaye [2016] ITLOS 25.

M/V 'Norstar' (Panama v Italy), Written Preliminary Objections Under Article 294, Paragraph 3, of the United Nations Convention on the Law of the Sea [2016] ITLOS 25.

M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea), Judgment [1999] ITLOS 2, ITLOS Rep 1999 10.

M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea), Judgment, Dissenting Opinion of Judge Warioba [1999] ITLOS 2, ITLOS Rep 1999 195.

M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea), Judgment, Separate Opinion of Judge Anderson [1999] ITLOS 2, ITLOS Reports 1999 131.

M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea), Judgment, Separate Opinion of Judge Laing [1999] ITLOS 2, ITLOS Rep 1999 154.

M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea), Judgment, Separate Opinion of Judge Zhao [1999] ITLOS 2, ITLOS Rep 1999 113.

M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea), Judgment, Separate Opinion of Vice-President Wolfrum [1999] ITLOS 2, ITLOS Rep 1999 92.

M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea), Memorial Submitted by St Vincent and the Grenadines [1998] ITLOS 2, ITLOS Rep 1999 13.

M/V 'SAIGA' (Saint Vincent and the Grenadines v Guinea), Prompt release, Judgment [1997] ITLOS 1, ITLOS Rep 1997 16.

TABLE OF CASES

M/V 'SAIGA' (Saint Vincent and the Grenadines v Guinea), Prompt release, Judgment, Dissenting Opinion of Judge Anderson [1997] ITLOS 1, ITLOS Reports 1997 63.

M/V 'SAIGA' (Saint Vincent and the Grenadines v Guinea), Prompt release, Judgment, Dissenting Opinion of Judge Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye [1997] ITLOS 1, ITLOS Rep 1997 53.

M/V 'SAIGA' (Saint Vincent and the Grenadines v Guinea), Prompt release, Judgment, Dissenting Opinion of President Mensah [1997] ITLOS 1, ITLOS Rep 1997 39.

M/V 'SAIGA' (Saint Vincent and the Grenadines v Guinea), Prompt release, Judgment, Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto [1997] ITLOS 1, ITLOS Rep 1997 46.

M/V "Virginia G" (Panama/Guinea-Bissau), Judgment [2014] ITLOS 19, ITLOS Rep 2014 4.

M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, Declaration of Judge Gao [2014] ITLOS 19, ITLOS Rep 2014 134.

M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, Dissenting Opinion of Judge ad hoc Sérvulo Correia [2014] ITLOS 19, Case No 19 ITLOS Rep 2014 359.

M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, Dissenting Opinion of Judge Ndiaye [2014] ITLOS 19, ITLOS Rep 2014 230.

M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, Joint Declaration of Judges Kelly and Attard [2014] ITLOS 19, ITLOS Rep 2014 142.

M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, Joint Separate Opinion of Judges Cot and Kelly [2014] ITLOS 19, ITLOS Rep 2014 164.

"Tomimaru" (Japan v Russian Federation), Prompt Release, Judgment [2007] ITLOS 15, ITLOS Rep 2005-2007 74.

Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion [2015] ITLOS 21, ITLOS Rep 2015 4.

Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, Separate Opinion of Judge Lucky [2015] ITLOS 21, ITLOS Rep 2015 88.

Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, Separate Opinion of Judge Paik [2015] ITLOS 21, ITLOS Rep 2015 102.

Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan), Provisional Measures, Order of 27 August 1999 [1999] ITLOS 3–4, ITLOS Rep 1999 280.

Permanent Court of Arbitration (Registry)

Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom), Award [2015] PCA 2011-03 (Arbitral Tribunal (UNCLOS, Annex VII)).

Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom), Dissenting and Concurring Opinion Judge James Kateka and Judge Rüdiger Wolfrum [2015] PCA 2011-03 (Arbitral Tribunal (UNCLOS, Annex VII)).

Conciliation between Timor-Leste and Australia, Decision on Australia's Objections to Competence [2016] PCA Case N° 2016-10 (Conciliation Commission (UNCLOS, Annex V)).

Island of Palmas (or Miangas) (The Netherlands/The United States of America), Award of the Tribunal [1928] PCA Case No 1925-01 (Arbitral Tribunal (Special Agreement)).

Muscat Dhows (France/Great Britain), Award [1905] PCA 1904-01 (Arbitral Tribunal (Compromis)).

The ARA Libertad Arbitration (Argentina v Ghana), Termination Order [2013] PCA 2013-11 (Arbitral Tribunal (UNCLOS, Annex VII)).

The Arctic Sunrise Arbitration (Netherlands v Russia), Award on the Merits [2014] PCA 2014-02 (Arbitral Tribunal (UNCLOS, Annex VII)).

The Enrica Lexie Incident (Italy v India), Order on Request for the Prescription of Provisional Measures [2016] PCA 2015-28 (Arbitral Tribunal (UNCLOS, Annex VII)).

The Enrica Lexie Incident (Italy v India), Request for the Prescription of Provisional Measures under UNCLOS Article 290(1) [2015] PCA 2015-28 (Arbitral Tribunal (UNCLOS, Annex VII)).

TABLE OF CASES

The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China), Award (2016) PCA 2013-19 (Arbitral Tribunal (UNCLOS, Annex VII)).

Permanent Court of International Justice

Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921, Great Britain v France, Advisory Opinion [1923] PCIJ 4, PCIJ Ser B No 4.

The Case of the SS Lotus (France v Turkey), Judgment, Dissenting Opinion by M Loder [1927] PCIJ 9, PCIJ Series A No 10 34.

The Case of the SS Lotus (France v Turkey), Judgment, Dissenting Opinion of Lord Finlay [1927] PCIJ 9, PCIJ Series A No 10 50.

The Case of the SS Lotus (France v Turkey), Judgment [1927] PCIJ 9, PCIJ Series A No 10.

Other

Saudi Arabia v Arabian American Oil Company (Aramco), Award of 23 August 1958 [1963] 27 ILR 117 (Arbitration Tribunal (Arbitration Agreement of February 23, 1955, corresponding to 1 Rajab 1374, between the Government of Saudi Arabia, hereinafter referred to as "the Government", and the Arabian American Oil Company, hereinafter referred to as "Aramco"))).

NATIONAL CASE LAW

Commonwealth of Australia

Re the Maritime Union of Australia & Ors; Ex parte CSL Pacific Shipping Inc [2003] HCA 43 (High Court of Australia).

Court of Justice of the European Union

A Ahlström Osakeyhtiö and others v Commission of the European Communities [1988] CJEU Joined C-89, 104, 114, 116, 117 and 125-129/85, ECR 5233.

Air Transport Association of America and Others v Secretary of State for Energy and Climate Change [2012] CJEU C-366/10, ECR 13833.

Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp [1992] CJEU C-286/90, ECR 06019.

Colegio de Oficiales de la Marina Mercante Española v Administración del Estado [2003] CJEU C-405/01, ECR 10391.

Commission v France [2004] CJEU C-439/02, ECLI:EU:C:2004:380 unpublished.

Commune de Mesquer v Total France and Total International Ltd [2008] CJEU C-188/07, ECR 4501.

Opinion of Advocate General Kokott, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change [2011] CJEU C-366/10, ECR 13765.

Opinion of Advocate General Tesouro, Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp [1992] CJEU C-286/90, ECR 6034.

Opinion of Mr Advocate-General Darmon, A Ahlström Osakeyhtiö and others v Commission of the European Communities [1988] CJEU Joined C-89, 104, 114, 116, 117 and 125-129/85, ECR 5214.

The Queen, on the application of Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs [2018] CJEU C-266/16, ECLI:EU:C:2018:118 unpublished.

Kingdom of Spain

Guatemala Genocide Case [2005] Constitutional Tribunal of Spain (Second Chamber) STC No. 237/2005.

Kingdom of Sweden

Environmental Board of the Municipality of Helsingborg v HH-Ferries AB and Sundbusserne A/S [2006] Svea Court of Appeal M 8471-03, ILDC 634.

TABLE OF CASES

New Zealand

Sellers v Maritime Safety Inspector [1999] 120 ILR 585 (New Zealand, Court of Appeal).

Omunkete Fishing (Pty) Limited v Minister for Fisheries [2008] CIV 2008-485-1310 (High Court of New Zealand (Wellington Registry)).

Republic of South Africa

National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre [2013] Constitutional Court of South Africa CCT 02/14, ZACC 30 46.

United States of America

Alfa Intern Seafood v Ross [2017] 264 F Supp 3d 23 (US Dist Court of Columbia).

Complaint and Petition for Review: Alfa International Seafood v Ross [2017] US Dist Court of Columbia Case 1:17-cv-00031.

Hartford Fire Ins Co v California [1993] 509 US 764 (US Supreme Court).

Spector v Norwegian Cruise Line Ltd [2005] 545 US 119 (US Supreme Court).

Cunard SS Co v Mellon [1923] 262 US 100 (US Supreme Court).

US v Aluminum Co of America [1945] 148 F 2d 416 (US Court of Appeals, 2nd Circuit).

Us v Approximately 64,695 Pounds of Shark Fins [2007] 520 F 3d 976 (US Court of Appeals, 9th Circuit).

US v Bengis [2014] 783 F 3d 407 (US Court of Appeals, 2nd Circuit).

US v. Jho [2008] 534 F 3d 398 (US Court of Appeals, 5th Circuit).

US v McNab [2003] 331 F 3d 1228 (US Court of Appeals, 11th Circuit).

US v Pizzarusso [1967] 388 F 2d 8 (US Court of Appeals, 2nd Circuit).

US v Roberts [1998] 1 F Supp 2d 601 (US District Court, ED Louisiana).

US v Royal Caribbean Cruises, Ltd [1998] 11 F Supp 2d 1358 (US District Court, SD Florida).

United Kingdom of Great Britain and Northern Ireland (including British Overseas Territories)

Christian and Ors v The Queen [2006] PNPC 1 (UK Privy Council).

Joyce v DPP [1946] AC 347 (UK House of Lords).

Rio Tinto Zinc Corp v Westinghouse Electric Corp [1978] 1 ER 434 (UK House of Lords).

Treacy v Director of Public Prosecutions (1970) [1971] AC 537 (UK House of Lords).

TABLE OF LEGISLATION

Democratic Socialist Republic of Sri Lanka

Fisheries and Aquatic Resources Act (as amended 2016) (Act No 2 of 1996 as amended and consolidated until Act No 2 of 2016), consolidated version available within Department of Fisheries and Aquatic Resources, 'The Compendium of High Seas Fishing Legislations in Sri Lanka' (2016) <http://fisheriesdept.gov.lk/v3/wp-content/uploads/2016/08/compendium-of-Fisheries-act-2016.pdf>.

Implementation of Port State Measures to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing Regulations 2015 (The Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary, LDB 1/2012/ II, 26/03/2015).

Prohibition of Catching Thresher Shark Regulations 2012 (The Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary, No 1768/36, LDB 1/2012, 27/07/2012).

European Union

Commission Decision 2012/C 354/01 (OJ C 354, 17/11/2012, p 1–47).

Commission Decision 2013/C 346/03 (OJ C 346, 27/11/2013, p 26–49).

Commission Decision 2014/C 185/02 (OJ C 185, 17/6/2014, p 2–16).

Commission Decision 2014/C 185/03 (OJ C 185, 17/6/2014, p 17–31).

Commission Decision 2014/C 447/09 (OJ C 447, 13/12/2014, p 6–15).

Commission Decision 2014/C 447/10 (OJ C 447, 13/12/2014, p 16–22).

Commission Decision 2014/C 447/11 (OJ C 447, 13/12/2014, p 23–29).

Commission Decision 2014/C 453/04 (OJ C 453, 17/12/2014, p 5–10).

Commission Decision 2015/C 142/06 (OJ C 142, 29/4/2015, p 7–17).

Commission Decision 2015/C 324/07 (OJ C 324, 2/10/2015, p 6–14).

Commission Decision 2015/C 324/10 (OJ C 324, 2/10/2015, p 17–28).

Commission Decision 2016/C 144/05 (OJ C 144, 23/4/2016, p 4–8).

Commission Decision 2016/C 144/06 (OJ C 144, 23/4/2016, p 9–13).

Commission Decision 2016/C 144/07 (OJ C 144, 23/4/2016, p 14–18).

Commission Implementing Decision 2013/C 346/02 (OJ C 346, 27/11/2013, p 2–25).

Commission Implementing Decision 2014/715/EU (OJ L 297, 15/10/2014, p 13–22).

Commission Implementing Regulation (EU) 2017/2178 of 22 November 2017 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing (OJ L 307/14, 23/11/2017).

Commission Implementing Regulation (EU) No 793/2013 of 20 August 2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock (OJ L 223/1, 21/8/2013).

Commission Implementing Regulation (EU) No 896/2014 of 18 August 2014 repealing Implementing Regulation (EU) No 793/2013 establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock 2014 (OJ L 244/10, 19/8/2014).

Commission Notice 2014/C 364/02 (OJ C 364, 15/10/2014, p 2–2).

Commission Notice 2015/C 142/04 (OJ C 142, 29/4/2015, p 5–5).

Commission Notice 2015/C 324/08 (OJ C 324, 2/10/2015, p 15–15).

Commission Notice 2015/C 324/09 (OJ C 324, 2/10/2015, p 16–16).

Commission Notice 2017/C 60/04 (OJ C 60, 24/2/2017, p 5–5).

TABLE OF LEGISLATION

Commission Notice 2017/C 60/05 (OJ C 60, 24/2/2017, p 6–6).

Commission Regulation (EC) No 1010/2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 (as amended and consolidated 17/09/2013) (OJ L280/5, 27/10/2009).

Council Implementing Decision 2014/170/EU (OJ L 91, 27/3/2014, p 43–47).

Council Implementing Decision 2014/914/EU (OJ L 360, 17/12/2014, p 53–55).

Council Implementing Decision 2015/200 (OJ L 33, 10/2/2015, p 15–18).

Council Implementing Decision 2016/1818 (OJ L 278, 14/10/2016, p 46–47).

Council Implementing Decision 2016/992 (OJ L 162, 21/6/2016, p 15–17).

Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (as amended and consolidated 09/03/2011) (OJ L 286/1, 29/10/2008).

*Council Regulation (EC) No 1368/2006 of 27 June 2006 amending Regulation (EC) No 1035/2001 establishing a catch documentation scheme for *Dissostichus spp.** (OJ L 253/1, 16/9/2006).

Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ L 131, 28/5/2009, p 57–100).

Regulation (EC) No 782/2003 of the European Parliament and of the Council of 14 April 2003 on the prohibition of organotin compounds on ships (OJ L 115/1 of 9/5/2003).

Regulation (EU) No 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing (OJ L 316/34, 14/11/2012).

Regulation (EU) No 1380/2013 on the Common Fisheries Policy (as amended and consolidated 01/06/2015) (OJ L 354/22, 28/12/2013).

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269/1, 10/10/2013).

Iceland

Act on Fishing and Processing by Foreign Vessels in Iceland's Exclusive Fishing Zone (Act No 22, 8 April 1998 as amended by Act No 22/2007) <http://faolex.fao.org/docs/texts/ice89477.doc>.

Lög um breyting á lögum nr. 22/1998, um veiðar og vinnslu erlendra skipa í fiskveiðilandhelgi Íslands, með síðari breytingum (hafnríkisaðgerðir) [Unofficial: Act amending Act no. 22/1998, on Fishing and Processing by Foreign Vessels in Iceland's Exclusive Fishing Zone, as amended (port State measures)] (Act No 38 July 7, 2015), <https://www.althingi.is/altext/pdf/144/s/1499.pdf>.

Lög um veiðar og vinnslu erlendra skipa í fiskveiðilandhelgi Íslands [Unofficial: Act on Fishing and Processing by Foreign Vessels in Iceland's Exclusive Fishing Zone] (Act No. 22/1998 as amended and consolidated until Act No 38/2015) <http://www.althingi.is/lagasafn/pdf/145b/1998022.pdf>.

Independent State of Papua New Guinea

Fisheries Management Act 1998 (No 48 of 1998, as amended, *Fisheries Management (Amendment) Act 2015*, No 1 of 2015), <https://www.ecolex.org/details/legislation/fisheries-management-amendment-act-2015-no-1-of-2015-lex-faoc155772/>.

Kingdom of Thailand

Royal Ordinance on Fisheries B.E. 2558 (2015), <http://extwprlegs1.fao.org/docs/pdf/tha159730.pdf>.

Republic of Chile

Aplica artículo 165 de la ley general de pesca y acuicultura a la especie pez espada (D.S. No. 598, Diario Oficial No 36523, 25 Nov 1999), http://www.subpesca.cl/portal/615/articles-10854_documento.pdf.

TABLE OF LEGISLATION

Republic of China (Chinese Taipei)

Act for Distant Water Fisheries 2016 (Presidential Order Hua-Tsung (1) Yi-Tzu No 10500079291),

<http://law.coa.gov.tw/GLRSnewsout/PrintEngLawContent.aspx?Type=E&id=229>.

Act to Govern Investment in the Operation of Foreign Flag Fishing Vessels 2016 (Presidential Order Hua-Tsung (1) Yi-Tzu No 10500079291),

<https://www.fa.gov.tw/en/LegalsActs/content.aspx?id=4&chk=8e673d97-5589-4483-a986-8c2d26cd5607¶m=>.

Fishing Port Act, as amended and promulgated 27 January 2006 (Presidential Order Hua-Tsung (1) Yi-Tzu No 09500011661), <http://extwprlegs1.fao.org/docs/pdf/tw40378.pdf>.

Ordinance to Govern Investment in the Operation of Foreign Flag Fishing Vessels 2008 (Presidential Order Hua-Tsung (1) Yi-Tzu No 09700271591),

<http://extwprlegs1.fao.org/docs/pdf/tw156389.pdf>.

Regulations on the Implementation of Fishing Ports Act, as amended 15 March 2007 (Council of Agriculture Order Nung-Yu-Tsi No 0961340232),

<http://extwprlegs1.fao.org/docs/pdf/tw156388.pdf>.

Republic of Fiji

Offshore Fisheries Management (Amendment) Decree 2014 (No 4 of 2014, Government of Fiji Gazette, Vol 15 No 14 of 11 February 2014),

<http://extwprlegs1.fao.org/docs/pdf/fij138493.pdf>.

Offshore Fisheries Management Decree 2012 (No 78 of 2012, Government of Fiji Gazette, Vol 13 No 145 of 11 December 2012), <http://extwprlegs1.fao.org/docs/pdf/fij138492.pdf>.

Offshore Fisheries Management Regulations 2014 (Legal Notice No 18, Government of Fiji Gazette Supplement, No 12 of 6 June 2014),

<http://extwprlegs1.fao.org/docs/pdf/fij152681.pdf>.

Republic of Ghana

Fisheries (Amendment) Act 2014 (No 880),
<http://extwprlegs1.fao.org/docs/pdf/gha151988.pdf>.

Fisheries (Amendment) Regulations 2015 (LI 2217), <https://mofad.gov.gh/wp-content/uploads/2017/05/FISHERIES-AMENDMENT-REGULATIONS-2015-LI.-2217.pdf>.

Fisheries Act 2002 (as amended 2014) (No 625),
<http://extwprlegs1.fao.org/docs/pdf/gha34737.pdf>.

Republic of Guinea

Portant Code de la pêche maritime 2015 (Loi n°2015/26/AN),
<http://extwprlegs1.fao.org/docs/pdf/gui158572.pdf>.

Republic of Indonesia

Law No. 45/2009 Amending Law No. 31/2004 Concerning Fishery 2009 (Business News Nos 7910-7914, Jan-Feb 2010), <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC097600/>.

Republic of Kiribati

An Act for the Conservation, Management and Development of Kiribati Fisheries and Control of Foreign Fishing and for Connected Purposes, as amended 2015 (Act No 6 of 2010),
<http://extwprlegs1.fao.org/docs/pdf/kir109024.pdf>.

An Act to Amend the Fisheries Act 2010 (Act No 1 of 2015),
https://www.mfmr.gov.ki/?page_id=254#.

Republic of Korea

원양산업발전법 시행규칙 [unofficial: Distant Water Fisheries Development Act Enforcement Rules] 2014 (Ministry of Oceans and Fisheries Regulation No 67),
<http://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=150924#AJAX>, limited English provisions
<https://www.piclub.or.jp/wp-content/uploads/2014/02/3820-1.pdf>.

TABLE OF LEGISLATION

Distant Waters Fisheries Development Act (Act No 8626, 3 August 2007, as amended, Act No 13001, 6 January 2015), http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=33481&type=sogan&key=55.

The Ministerial Directive on Port State Inspections 2014 (Ministerial Directive No 2014-14 of the Ministry of Oceans and Fisheries), <https://www.piclub.or.jp/wp-content/uploads/2014/02/3820-1.pdf>.

Republic of Panama

Executive Decree No. 161 Which establishes the mechanisms for inspections, surveillance and control of capture and support fishing operations to the international service Panama flag vessels 2013, <https://www.segumar.com/wp-content/uploads/2013/08/Executive-Decree-No.161.pdf>.

Ley 43 Por la cual se aprueba el Acuerdo sobre Medidas del Estado Rector del Puerto Destinadas a Prevenir, Desalentar y Eliminar la Pesca Ilegal, No Declarada y No Reglamentada, hecho en Roma, el 22 de noviembre de 2009 2016 (28117-B Gaceta Oficial Digital, miércoles 14 de septiembre de 2016 82), http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/2010/2016/2016_626_2976.pdf.

Resolución ADM/ARAP No. 034 Por la cual se establecen los puertos de entrada autorizados a buques de pesca y de apoyo a la pesca de pabellón extranjero en la República de Panamá y se dictan otras disposiciones 2017 (28433 Gaceta Oficial Digital, miércoles 27 de diciembre de 2017 25), <http://extwprlegs1.fao.org/docs/pdf/pan175373.pdf>.

Republic of South Africa

Marine Living Resources Act (No 18 of 1998, 395 Government Gazette 18930, Notice 747, as amended and consolidated until Marine Living Resources Amendment Act 2014 (No 5 of 2014, 587 Government Gazette 37659, Notice 383)), https://cer.org.za/wp-content/uploads/2010/07/18-OF-1998-MARINE-LIVING-RESOURCES-ACT_8-Mar-2016-to-date.pdf.

National Ports Act 2005 (No 12 of 2005, 482 Government Gazette 27863, Notice 792).

Permit Conditions from Foreign Vessels Entering South African Exclusive Economic Zone (EEZ)
2011 (2012 Edition),

http://www.nda.agric.za/doadev/sidemenu/fisheries/21_HotIssues/April2010/FishingPermitsConditions2012/FOREIGN%20VESSEL%20EEZ.pdf.

Regulations in Terms of the Marine Living Resources Act 1998 2015 (Government Gazette 19205, Government Notice R1111 as amended and consolidated until Government Gazette 39391, Government Notice 1091), <https://cer.org.za/wp-content/uploads/2010/07/MLRA-Regulations-1.pdf>.

South Africa, 'Application for a Permit for a Foreign Vessel to Enter the Exclusive Economic Zone (EEZ)'

http://www.nda.agric.za/daaDev/sideMenu/fisheries/10_application_forms/docs/EEZ%20Apl.pdf.

South Africa, 'Application for a Permit for Prohibited Deepwater Species'

http://www.nda.agric.za/daaDev/sideMenu/fisheries/10_application_forms/docs/Prohibited%20Deep%20Water%20species.pdf.

Republic of the Philippines

Guidelines on Fish Transshipment 2000 (Fisheries Administrative Order (FAO) No 199).

Rules and Regulations implementing Republic Act No. 8550, as amended by Republic Act No. 10654 (Department of Agriculture Administrative Order No 10, Series of 2015), https://www.bfar.da.gov.ph/BFAR_ANNOUNCEMENT?id=70#post.

The Philippine Fisheries Code of 1998 as amended by Republic Act No. 10654, entitled 'An Act to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' 2015, https://www.bfar.da.gov.ph/BFAR_ANNOUNCEMENT?id=70#post.

TABLE OF LEGISLATION

Republic of the Marshall Islands

Fisheries Enforcement Act, P.L. 1997-60 as amended P.L. 2011-63 (codified, 51 Marshall Islands Revised Code 2014 ch 5), http://www.paclii.org/mh/legis/consol_act/fea1997217.pdf.

Fishing Access and Licensing Act, P.L. 1997-60 as amended P.L. 2011-63 (codified, 51 Marshall Islands Revised Code 2014 ch 4), http://www.paclii.org/mh/legis/consol_act/faala229.pdf.

Ports of Entry Act, TTC 1966, as numerous amendments and consolidated until P.L. 2013-10 (codified, 43 Marshall Islands Revised Code 2014 ch2), http://www.paclii.org/mh/legis/consol_act/poea200.pdf.

Title 51 (Fisheries) Amendment Act of 2011 (PL 2011-63), <http://extwprlegs1.fao.org/docs/pdf/mas155685.pdf>.

Republic of Mauritius

Fisheries and Marine Resources (Import of Fish and Fish Products) Regulations 2012 (Government Notice No 27 of 2012, Legal Supplement to the Government Gazette of Mauritius No 25 of 8 March 2012, 171-205).

The Fisheries and Marine Resources Act 2007 (Act No 27 of 2007), <http://extwprlegs1.fao.org/docs/pdf/mat85779.pdf>.

Solomon Islands

An Act to make provisions for the conservation, management, development and sustainable use of fisheries and marine resources of Solomon Islands, to monitor and control fishing vessels within and beyond the fisheries waters, to repeal the Fisheries Act 1998 and to make consequential amendments to the Provincial Government Act 1997 and the Town and Country Planning Act (Cap. 154) (No 2 of 2015), <http://extwprlegs1.fao.org/docs/pdf/sol153557.pdf>.

New Zealand

Fisheries Act 1996, Act No 88 1996 (Reprint as at 1 January 2016),
<http://www.legislation.govt.nz/act/public/1996/0088/131.0/096be8ed8123a0dc.pdf>.

Merchant Shipping Act 1876, reproduced, Authority (AU), 'Supplement to the Victoria Government Gazette of Friday, February 9, 1877' (1877) 1877 No 17.

Driftnet Prohibition Act 1991, Act No 18 of 1991 (Reprint as at 1 July 2013),
<http://www.legislation.govt.nz/act/public/1991/0018/latest/whole.html>.

United Kingdom of Great Britain and Northern Ireland

Crime (International Co-operation) Act 2003,
http://www.legislation.gov.uk/ukpga/2003/32/pdfs/ukpga_20030032_en.pdf.

The Sea Fishing (Illegal, Unreported and Unregulated Fishing) Order 2009 (SI 2009 No 3391),
<https://www.legislation.gov.uk/uksi/2009/3391/contents>.

The Sea Fishing (Penalty Notices) (England) Order 2011 (SI 2011 No 758),
<http://www.legislation.gov.uk/uksi/2011/758/made>.

Modern Slavery Act 2015,
http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf.

Modern Slavery Act 2015: Explanatory Notes 2015,
http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpgaen_20150030_en.pdf.

Protection of Trading Interests Act 1980,
<http://www.legislation.gov.uk/ukpga/1980/11/data.pdf>.

The Exclusive Economic Zone Order 2013 (SI 2013 No 3161),
<http://www.legislation.gov.uk/uksi/2013/3161/made>.

UK Criminal Justice Act 1988,
https://www.legislation.gov.uk/ukpga/1988/33/pdfs/ukpga_19880033_en.pdf.

TABLE OF LEGISLATION

War Crimes Act 1991, <https://www.legislation.gov.uk/ukpga/1991/13/section/1>.

United States of America

Bureau of Customs, *Marine Circular No. 124* 1953,
http://nmhcdigitalarchive.org/histdoc1960_1977/1974/1974%20January/1974%201-22%20Letter%20Re%20Documents%20for%20Foreign%20Vessels%20to%20Sell%20Fish%20in%20American%20Samoa%20-%20Tebeau,%20J.P.00.pdf

European Union Emissions Trading Scheme Prohibition Act of 2011 2012 126 STAT. 1477,
<https://www.congress.gov/112/plaws/publ200/PLAW-112publ200.pdf>.

United States Code [2017].

United States Code of Federal Regulations [2017].

An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States (1917) HR 10384, Pub L No 301 39 Stat 874,
<http://library.uwb.edu/Static/USimmigration/39%20stat%20874.pdf>.

INTERNATIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights, adopted 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on Co-operation in the Fishing Industry of 11 April 1975, 983 UNTS 7.

Agreement for the Establishment of the General Fisheries Council for the Mediterranean, 24 September 1949, 126 UNTS 237 (entered into force 20 February 1952) (last amended 20 May 2014).

Agreement for the Establishment of the Indian Ocean Tuna Commission, adopted 25 November 1993, 1927 UTS 329 (entered into force 27 March 1996).

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, adopted 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001) 1995.

Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, opened for signature 22 November 2009, I-54133 (entered into force 5 June 2016).

Agreement on the International Dolphin Conservation Program, 15 May 1998, 37 ILM 1246 (entered into force, 15 Feb 1999) (last amended July 2014).

Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003) 1993.

Asia-Pacific Fishery Commission (APFIC) Agreement, adopted 26 February 1948, 120 UNTS 59 (entered into force 9 November 1948), as last amended 1996 and approved 1997.

INTERNATIONAL INSTRUMENTS

Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol relating to the 1977 Torremolinos International Convention for the Safety of Fishing Vessels, adopted 11 October 2012, 2014 Tractatenblad 49 (not in force).

CCAMLR, Conservation Measure 10-03 (2015) *Port inspections of fishing vessels carrying Antarctic marine living resources* 2015.

CCAMLR, Conservation Measure 10-04 (2015) *Automated satellite-linked Vessel Monitoring Systems (VMS)* 2015.

CCAMLR, Conservation Measure 10-05 (2015) *Catch Documentation Scheme for Dissostichus spp.* 2015.

CCAMLR, Conservation Measure 10-06 (2008) *Scheme to promote compliance by Contracting Party vessels with CCAMLR conservation measures* 2008.

CCAMLR, Conservation Measure 10-07 (2016) *Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures* 2016.

CCSBT, *Resolution for a CCSBT Scheme for Minimum Standards for Inspection in Port* 2015.

CCSBT, *Resolution on a CCSBT Record of Vessels Authorised to Fish for Southern Bluefin Tuna* 2015.

CCSBT, *Resolution on action plans to ensure compliance with Conservation and Management Measures* 2009.

CCSBT, *Resolution on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities For Southern Bluefin Tuna (SBT)* 2014.

CCSBT, *Resolution on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities for Southern Bluefin Tuna (SBT)* 2017.

CCSBT, *Resolution on Establishing a Program for Transshipment by Large-Scale Fishing Vessels* 2014.

CCSBT, *Resolution on the Implementation of a CCSBT Catch Documentation Scheme* 2014.

Charter of the United Nations, signed 26 June 1945, 1 UNTS XVI (entered into force, 24 October 1945) 1945.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 21 February 2018 (not in force), <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/20.-Environment-Chapter.pdf>.

Consolidated version of the Treaty on the Functioning of the European Union, signed 25 March 1957, OJ C 326/47, 26/10/2012 (effective 1 January 1958).

Constitution of the Food and Agriculture Organization, adopted 16 October 1945, CTS 1945/32 (entered into force, 16 October 1945).

Convention (No. 147) concerning Minimum Standards in Merchant Ships, adopted 29 October 1976, 1259 UNTS 335 (entered into force 28 November 1981).

Convention (No. 188) concerning work in the fishing sector, adopted 14 June 2007, I-54755 (entered into force 16 November 2017).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, 1465 UNTS 85 (entered into force, 26 June 1987).

Convention and Statute of the International Regime of Maritime Ports, adopted 9 December 1923, 58 LNTS 285 (entered into force 26 July 1926).

Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, adopted 11 February 1992, TIAS 11465 (entered into force 16 February 1996).

Convention for the Conservation of Salmon in the North Atlantic Ocean, adopted 2 March 1982, 1338 UNTS 33 (entered into force 1 October 1983).

Convention For The Conservation Of Southern Bluefin Tuna, adopted 10 May 1993, 1819 UNTS 360 (entered into force, 20 May 1994).

INTERNATIONAL INSTRUMENTS

Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, adopted 24 November 1989, 1899 UNTS 3 (entered into force, 17 May 1991).

Convention For The Preservation Of The Halibut Fishery Of The Northern Pacific Ocean And Bering Sea, 2 March 1953, 222 UNTS 78 (entered into force 28 October 1953).

Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica, adopted 27 June 2003, OJ L 224, 16/8/2006, p. 24 (entered into force 27 August 2010).

Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation, adopted 10 March 1988, 1678 UNTS 221 (entered into force, 1 March 1992) (as amended, 2005 Protocol to the SUA Convention).

Convention on Cooperation in the Northwest Atlantic Fisheries, adopted 24 October 1978, 1135 UNTS 369 (entered into force 1 January 1979) (significant amendment, entered into force 18 May 2017).

Convention on Facilitation of International Maritime Traffic, adopted 9 April 1965, 591 UNTS 265 (entered into force 5 March 1967).

Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries, adopted 18 November 1980, 1285 UNTS 129 (entered into force 17 March 1982) (last amended 11 August 2006).

Convention on International Civil Aviation, adopted 7 December 1944, 15 UNTS 295 (entered into force, 4 April 1947).

Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1972, 993 UNTS 243 (entered into force 1 July 1975).

Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, adopted 26 Dec 1933, 165 UNTS 19 (entered into force 26 December 1934).

Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, adopted 20 April 2001, 2221 UNTS 189 (entered into force 13 April 2003).

Convention on the Conservation and Management of High Migratory Fish Stocks in the Western and Central Pacific Ocean, adopted 5 September 2000, 2275 UNTS 43 (entered into force 19 June 2004).

Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, adopted 24 February 2012, US Senate Treaty Doc. 113-2 (entered into force, 19 July 2015).

Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, adopted 14 November 2009, OJ L 67, 6/3/2012, p. 3 (entered into force 24 August 2012).

Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea, adopted 16 June 1994, 34 ILM 67 (entered into force 8 December 1995).

Convention on the Conservation of Antarctic Marine Living Resources, 20 May 1980, 1329 UNTS 48 (entered into force 7 April 1982).

Convention on the Continental Shelf, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

Convention on the High Seas, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted 14 December 1973, 1035 UNTS 167 (entered into force, 20 February 1977).

Convention on the Territorial Sea and the Contiguous Zone, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964).

INTERNATIONAL INSTRUMENTS

Covenant of the League of Nations, adopted 28 April 1919, 225 CTS 195 (entered into force, 10 January 1920).

Declaration of Panama (Governments of Belize, Columbia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, United States of America, Vanuatu and Venezuela), signed 4 October 1995, 1995 PITSE 7.

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, ETS 5 (entered into force 3 September 1953).

Federated States of Micronesia Arrangement for Regional Access, adopted 30 November 1994, IUCN TRE-154133 (entered into force, 23 September 1995).

Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific, adopted 14 August 2000, 45 LOSB 70 (not in force).

General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 308 (entered into force 1 January 1948).

GFCM, Recommendation GFCM/33/2009/6 *concerning the establishment of a GFCM record of vessels over 15 metres authorized to operate in the GFCM area amending the recommendation GFCM/29/2005/2* 2009.

GFCM, Recommendation GFCM/33/2009/7 *concerning minimum standards for the establishment of a Vessel Monitoring System (VMS) in the GFCM area* 2009.

GFCM, Recommendation GFCM/33/2009/8 *on the establishment of a list of vessels presumed to have carried out IUU fishing in the GFCM area repealing recommendation GFCM/30/2006/4* 2009.

GFCM, Recommendation GFCM/40/2016/1 *on a regional scheme on port State measures to combat illegal, unreported and unregulated fishing activities in the GFCM area of application* 2016.

GFCM, Recommendation GFCM/40/2016/4 *establishing a multiannual management plan for the fisheries exploiting European hake and deep-water rose shrimp in the Strait of Sicily (GSA 12 to 16)* 2016.

GFCM, Recommendation GFCM/41/2017/3 *on the establishment of a fisheries restricted area in the Jabuka/Pomo Pit in the Adriatic Sea* 2017.

GFCM, Recommendation GFCM/41/2017/7 *on a regional plan of action to combat illegal, unreported and unregulated fishing in the GFCM area of application* 2017.

IATTC, Resolution C-05-03 *On the Conservation of Sharks Caught in Association with Fisheries in the Eastern Pacific Ocean* 2005.

IATTC, Resolution C-11-05 *On the Establishment of a List of Longline Fishing Vessels over 24 Meters (LSTLFVs) Authorized to Operate in the Eastern Pacific Ocean* 2011.

IATTC, Resolution C-11-10 *On the Conservation of Oceanic Whitetip Sharks Caught in Association with Fisheries in the Antigua Convention Area* 2011.

IATTC, Resolution C-14-02 (Amended) *on the Establishment of a Vessel Monitoring System (VMS)* 2014.

IATTC, Resolution C-15-01 *Amendment to Resolution C-05-07 on Establishing a List of Vessels Presumed to Have Carried out Illegal, Unreported and Unregulated Fishing Activities in the Eastern Pacific Ocean* 2015.

IATTC, Resolution C-15-04 *On the Conservation of Mobulid Rays Caught in Association with Fisheries in the IATTC Convention Area* 2015.

IATTC, Resolution C-16-06 *Conservation Measures for Shark Species, with Special Emphasis on the Silky Shark (Carcharhinus Falciformis), for the Years 2017, 2018, and 2019* 2016.

IATTC, Resolution C-18-02 *Amendment to Resolution C-16-08 On a Long-Term Management Framework for the Conservation and Management of Pacific Bluefin Tuna in the Eastern Pacific Ocean* 2018.

INTERNATIONAL INSTRUMENTS

ICCAT, Recommendation 06-13 *Concerning Trade Measures* 2006.

ICCAT, Recommendation 07-10 *On an ICCAT Bluefin Tuna Catch Documentation Program* 2007.

ICCAT, Recommendation 11-18 *Further Amending Recommendation 09-10 Establishing a List of Vessels Presumed to Have Carried out Illegal, Unreported and Unregulated Fishing Activities in the ICCAT Convention Area* 2011.

ICCAT, Recommendation 11-20 *Amending Recommendation 09-11 on an ICCAT Bluefin Tuna Catch Documentation Program* 2011.

ICCAT, Recommendation 12-06 *On a Programme for Transshipment* 2012.

ICCAT, Recommendation 12-07 *For an ICCAT Scheme for Minimum Standards for Inspection in Port* 2012.

ICCAT, Recommendation 13-02 *Conservation of North Atlantic Swordfish* 2013.

ICCAT, Recommendation 13-04 *Management Measures for Mediterranean Swordfish in the Framework of ICCAT* 2013.

ICCAT, Recommendation 13-13 *Concerning the Establishment of an ICCAT Record of Vessels 20 Meters in Length Overall or Greater Authorized to Operate in the Convention Area* 2013.

ICCAT, Recommendation 14-01 *On a Multi-Annual Conservation and Management Program for Tropical Tunas* 2014.

ICCAT, Recommendation 14-04 *Amending the Recommendation 13-07 by ICCAT to Establish A Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean* 2014.

ICCAT, Recommendation 14-08 *To Support Effective Implementation of Recommendation 12-07 by ICCAT for an ICCAT Scheme for Minimum Standards for Inspection in Port* 2014.

ICCAT, Recommendation 15-10 *To Clarify and Amend Aspects of ICCAT's Bluefin Tuna Catch Documentation Program to Facilitate the Application of the EbCD System* 2015.

ICCAT, Recommendation 97-11 *On transshipments and vessel sightings* 1997.

ICCAT, Recommendation 98-11 *Concerning the ban on landings and transshipments of vessels from non-Contracting Parties identified as having committed a serious infringement* 1998.

ICCAT, Recommendation 16-18 *To Clarify and Supplement the Process for Seeking Capacity Building Assistance Pursuant to ICCAT Recommendation 14-08* 2016.

IDCP, Resolution A-04-07 *To Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the Agreement Area* 2004.

International Convention for the Conservation of Atlantic Tunas, 14 May 1966, 673 UNTS 63 (entered into force 21 March 1966; 5th Revision 2007).

International Convention for the Prevention of Pollution of the Sea by Oil, adopted 12 May 1954, 327 UNTS 3 (entered into force, 26 July 1956).

International Convention for the Prevention of Pollution, as modified Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, adopted 2 November 1943; 17 February 1978, 1340 UNTS 184 (entered into force, 2 October 1983).

International Convention for the Safety of Life At Sea, adopted 1 November 1974, 1184 UNTS 3 (entered into force 25 May 1980).

International Convention for the Suppression of Terrorist Bombings, adopted 15 December 1997, 2149 UNTS 284 (entered into force, 23 May 2001).

International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation, adopted 10 May 1952, 439 UNTS 233 (entered into force, 20 November 1955).

International Convention on Salvage, done 28 April 1989, 1953 UNTS 165 (entered into force, 14 July 1996).

INTERNATIONAL INSTRUMENTS

International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, adopted 7 July 1995, IMO Doc. STCW/CONF/10 (entered into force 29 September 2012).

International Convention on standards of training, certification and watchkeeping for seafarers, adopted 7 July 1978, 1361 UNTS 2 (entered into force 28 April 1984).

International Convention relating to intervention on the high seas in cases of oil pollution casualties, concluded 29 November 1969, 970 UNTS 211 (entered into force, 6 May 1975).

IOTC, Resolution 01/03 *Establishing a scheme to promote compliance by Non-Contracting Party vessels with Resolutions established by IOTC* 2001.

IOTC, Resolution 01/06 *Concerning the IOTC bigeye tuna statistical document programme* 2001.

IOTC, Resolution 05/03 *Relating to the Establishment of an IOTC Programme of Inspection in Port* 2005.

IOTC, Resolution 05/05 *Concerning the conservation of sharks caught in association with fisheries managed by IOTC* 2005.

IOTC, Resolution 10/11 *On port state measures to prevent, deter and eliminate illegal, unreported and unregulated fishing* 2010.

IOTC, Resolution 11/03 *Establishing a list of vessels presumed to have carried out illegal, unreported and unregulated fishing in the IOTC area of competence* 2011.

IOTC, Resolution 15/04 *Concerning the IOTC record of vessels authorised to operate in the IOTC area of competence* 2015.

IOTC, Resolution 16/05 *On vessels without nationality* 2016.

IOTC, Resolution 16/11 *On port state measures to prevent, deter and eliminate illegal, unreported and unregulated fishing* 2016.

IOTC, Resolution 18/03 *On Establishing a List of Vessels Presumed to Have Carried out Illegal, Unreported and Unregulated Fishing in the IOTC Area of Competence* 2018.

IOTC, Resolution 99/02 *Calling for actions against fishing activities by large scale flag of convenience longline vessels* 1999.

IPHC, *Pacific Halibut Fishery Regulations* 2017.

Maritime Labour Convention, adopted 23 February 2006, 45 ILM 792 (entered into force, 20 August 2013).

Memorandum of Understanding between certain Maritime Authorities on the Maintenance of Standards on Merchant Ships, adopted 2 March 1978, 1978 Tractatenblad 72 (not in force).

NAFO, *Conservation and Enforcement Measures (2016)* 2015 (NAFO FC Doc 16/1).

NAFO, *Conservation and Enforcement Measures (2018)* 2017.

NPFC, CMM 2016-04 *On Vessels Without Nationality* 2016.

NPFC, CMM 2017-02 *To Establish a List of IUU Vessels* 2017.

NPFC, CMM 2017-09 *For High Seas Boarding and Inspection Procedures for the North Pacific Fisheries Commission* 2017.

Paris Memorandum of Understanding on Port State Control, adopted 26 January 1982, 21 ILM 1 (entered into force, 1 July 1982); Including 40th Amendment, adopted 26 May 2017 (effective date, 1 July 2017).

Protocol amending the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, adopted 29 March 1979, TIAS 9855 (entered into force, 15 October 1980).

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, as amended Protocol adopted 14 October 2005, LEG/CONF.15/22 (entered into force, 28 July 2010).

INTERNATIONAL INSTRUMENTS

Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, adopted 11 November 1988, IMO Doc. HSSC/CONF/11 (entered into force, 3 February 2000).

Protocol Open for Signature by States Not Parties to the Convention for the Conservation of Salmon in the North Atlantic Ocean, adopted June 1992, CNL(92)53.

SADC Protocol on Fisheries, adopted 14 August 2001, IUCN TRE-001362 (entered into force 8 August 2003).

SEAFO, *System of Observation, Inspection, Compliance and Enforcement (2015)*, adopted 3 December 2015 (entered into force 15 February 2016).

SEAFO, *System of Observation, Inspection, Compliance and Enforcement (2017)* 2017.

SIOFA, CMM 2016/04 *On Vessels without Nationality (Vessels without Nationality)* 2016.

SIOFA, CMM 2017/07 *On Authorisation and Notification to Fish (Vessel Authorisation)* 2017.

SIOFA, CMM 2017/08 *Establishing a Port Inspection Scheme (Port Inspection)* 2017.

SIOFA, CMM 2018/06 *on the Listing of IUU Vessels (IUU Vessel List)* 2018.

SIOFA, CMM 2018/10 *For the Monitoring of Fisheries in the Agreement Area (Monitoring)* 2018.

Southern Indian Ocean Fisheries Agreement, adopted 7 July 2006, 2835 UNTS I-49647 (entered into force 21 June 2012).

SPRFMO, CMM 2.07 *Conservation and Management Measure on Minimum Standards of Inspection in Port* 2014.

SPRFMO, CMM 3.05 *Conservation and Management Measure for the Regulation of Transshipment and Other Transfer Activities* 2015.

SPRFMO, CMM 4.01 *For Trachurus murphyi* 2016.

SPRFMO, CMM 4.04 *Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing activities in the SPRFMO Convention Area* 2016.

SPRFMO, CMM 4.05 *For the establishment of the Commission Record of Vessels authorised to fish in the Convention Area* 2016.

SPRFMO, CMM 4.15 *On vessels without Nationality in the SPRFMO Convention Area* 2016.

Statute of the International Court of Justice, adopted 26 June 1945, 3 Bevans 1179 (entered into force, 24 October 1945).

Torremolinos International Convention for the Safety of Fishing Vessels, adopted 2 April 1977, 1980 Tractatenblad 139 (not in force).

Torremolinos Protocol Relating to the 1977 Torremolinos International Convention for the Safety of Fishing Vessels, adopted 2 April 1993, 2001 Tractatenblad 168 (not in force).

Trans-Pacific Partnership Agreement, 26 January 2016 (not in force), available at https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/TPP_All-Chapters.zip.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted 19 December 1988, 28 ILM 497 (entered into force, 11 November 1990).

United Nations Convention on Conditions for Registration of Ships, adopted 7 February 1986, UN Doc. TD/RS/CONF/19/Add.1 (not in force).

United Nations Convention on the Law of the Sea, Declarations and Reservations (MTDSG Vol 20 Ch XXI-6), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>.

United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

Uruguay, 'Declarations Made upon Signature and Confirmed upon Ratification' (1999) UNTS Declarations and Reservations (UNFSA),

INTERNATIONAL INSTRUMENTS

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-7&chapter=21&lang=en.

Vienna Convention on Diplomatic Relations, 24 April 1963, 500 UNTS 95 (entered into force 24 April 1964).

Vienna Convention on the Law of Treaties, signed 23 May 1969, 1155 UNTS 331 (entered into force 21 January 1980).

WCPFC, CMM 2009-06 *On the Regulation of Transshipment* 2009.

WCPFC, CMM 2009-09 *For Vessels Without Nationality* 2009.

WCPFC, CMM 2009-10 *To Monitor Landings of Purse Seine Vessels at Ports so as to Ensure Reliable Catch Data by Species* 2009.

WCPFC, CMM 2010-02 *For the Eastern High-Seas Pocket Special Management Area* 2010.

WCPFC, CMM 2010-06 *To Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the WCPO* 2010.

WCPFC, CMM 2013-04 *For WCPFC Implementation of a Unique Vessel Identifier (UVI)* 2013.

WCPFC, CMM 2013-07 *On Special Requirements of SIDS and Territories* 2013.

WCPFC, CMM 2013-10 *WCPFC Record of Fishing Vessels and Authorization to Fish* 2013.

WCPFC, CMM 2017-02 *On minimum standards for Port State Measures* 2017.

WCPFC, CMM 2017-05 *WCPFC Record of Fishing Vessels and Authorisation to Fish* 2017.

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1.1 Introduction

Simply put, attaining sustainable fisheries demands the eradication of illegal, unreported and unregulated (IUU) fishing (1.2.1). IUU fishing undermines global, regional and national efforts to regulate fisheries.¹ It is, by definition, unsustainable (or at least a threat to sustainability). Broader environmental, economic and social threats include the “detrimental effect upon fish stocks, marine ecosystems and the livelihoods of legitimate fishers, and the increasing need for food security on a global basis”.² In extreme cases, it may undermine the economies and stability of coastal communities, “ensuing malnutrition, poverty, and social unrest [...] increased migration, and in some cases, even piracy”.³

Political and legal commitments to combat IUU fishing are not geographically limited and require the implementation of effective measures by states in a variety of capacities, from flag and coastal states to port and market states. Some capacities are well-defined but

¹ “[IUU fishing] equivalent to at least 15% of world catches, making the economically, socially and environmentally sustainable management of the exploitation of the world’s marine resources impossible” European Parliament resolution of 17 November 2011 on combating illegal fishing at the global level - the role of the EU 2011 (OJ C 153E, 31/5/2013, p 148–157) para B.

² Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, opened for signature 22 November 2009, I-54133 (entered into force 5 June 2016) preamble.

³ Erik J Molenaar, ‘Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement’ in Dawn Russell and David VanderZwaag (eds), *Recasting Transboundary Fisheries Management Arrangements* (Martinus Nijhoff Publishers 2010) 369; IUU fishing has “incalculable social and economic repercussions on society as a whole” EP Res. 2013/C 153 E/20 (n 1) para. 2.

previously underutilised, such as the state of nationality. Others, notably port states, have broadened at great haste without their jurisdictional foundations and limitations under international law being adequately and clearly established. The first global voluntary instrument to focus upon combatting IUU fishing was the *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing* (IPOA-IUU). It included port state measures (PSMs) a state should take to combat IUU fishing, regardless of where it occurs.⁴ Subsequently, the implementation of port state measures became the focal point for the first legally-binding treaty at the global level to target IUU fishing, the *Port State Measures Agreement*.⁵ The question raised in this PhD is:

What are the international legal bases and law of the sea limitations of port state measures, given the influence of state practice which has directly, or indirectly, concerned foreign IUU fishing practice beyond the maritime zones of the coastal state in which the port is located?

This chapter defines the key concepts used throughout the PhD (1.2). A global concern for addressing IUU fishing (1.2.1) has resulted in the extraterritorial application of port state jurisdiction. In this context, an adequate answer to the above question and its sub-questions is sought (1.2.2). Next, it addresses the choice of methodology (1.3.1) and limitations imposed (1.3.2). It concludes with a summary of the research approach and non-legal factors that may equally influence port state practice (1.4). Port state measures to combat IUU fishing remain the focus of the case study, but many findings will have broader application for port state jurisdiction.

1.2 Port states, IUU fishing and the jurisdiction exercised

Jurisdiction governs a state's legal capacity to determine the law (prescription); to hear or settle legal disputes within its judicial forums (adjudication); and to uphold its laws with state institutions that compel compliance or punish non-compliance (enforcement) (2.2). As several terms are in use with respect to port state jurisdiction, and will be used throughout

⁴ FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2001) paras 9.3, 52–64.

⁵ PSMA (n 2).

this PhD thesis, it is worth defining them here for future reference. **Port state jurisdiction** (PSJ) is shorthand for the largely customary jurisdiction applied against visiting foreign vessels in or on their way to port. In practice, certain port state measures (PSMs) extend to those requesting entry at-sea. This jurisdiction is simultaneously expanded (3.3.4) and limited (ch 4) by treaty, be it general legal frameworks (e.g. *UNCLOS*, *GATT*),⁶ or specific provisions covering specific cases (e.g. *MARPOL*, Annex VI, art. 15(1)).⁷ **Extraterritorial PSJ** is a matter of prescriptive jurisdiction (enforcement, see 2.4.1);

“extraterritorial jurisdiction exercised by a port State relates to behaviour that occurs beyond its own maritime zones: on the high seas, in the Area, or in the maritime zones of other States [, or beyond its quasi-territorial functional jurisdiction within its sui generis maritime zones]”⁸

When extraterritorial PSJ is exercised, it will often be unilateral. **Unilateralism** is used broadly to denote where a state or group of states (e.g. a region) are acting individually. Individuality may be in the behaviour standards imposed for vessels from non-consenting flag states, or in the port state measures prescribed differing from those generally accepted. For the large part, the international law of jurisdiction is neutral towards unilateralism. An exception would be treaty-based jurisdiction, which may be limited to multilaterally agreed standards, only exercisable amongst contracting parties, and limited to multilaterally agreed measures. **Unilateral port state jurisdiction** is therefore the relevant term when states are individually, or collectively, asserting jurisdiction over foreign actors based upon customary law. This practice will be of great interest when interpreting the customary law basis or limits of PSJ, and any treaty-based limitations imposed.

⁶ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994); General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 308 (entered into force 1 January 1948).

⁷ International Convention for the Prevention of Pollution from Ships, as modified Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, adopted 2 November 1973; 17 February 1978, 1340 UNTS 184 (entered into force, 2 October 1983); Bevan Marten, ‘Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation’ in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 120 suggests treaty-based limitations are rare in a shipping context, and as will be seen for IUU fishing, mainly concerning ‘minimum’ standards.

⁸ Erik J Molenaar, ‘Port and Coastal States’ in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 289.

While primarily associated with oceans governance, PSJ is neither limited to maritime affairs, nor does it necessarily draw its authority from the law of the sea. Indeed, frequent references to ‘**residual jurisdiction**’ denotes the customary jurisdiction untouched by treaty law; i.e. neither treaty-based (2.3.4), nor treaty-obliged (ch 3) or treaty-limited (ch 4).⁹

Alternatively, PSJ may be distinguished thematically, **port state control** (PSC) referring to regimes applicable to maritime shipping, while **port state measures** (PSMs) is PSJ exercised in the context of fisheries conservation and management.¹⁰ PSMs are the focus of this case study, with PSC touched upon when inspirational for global and regional fisheries practice (4.2.2.2.1).

Certain PSMs prevent illegally caught fish entering the market *through ports*, resulting in overlap with **market state measures**. Market state measures are distinguishable by their scope. They address international trade more broadly,¹¹ including other market gateways, measures applicable after a vessel gains port access or services, and the regulation of exports.¹² Overlapping practices, e.g. catch documentation schemes, are examined insofar as their PSJ-based elements are relevant.

⁹ Describing the national-international law relationship, this terminology may also denote national-EU law’s relationship i.e. remaining discretion to adopt national rules and standards; Arnaud Nuyts, ‘Study on Residual Jurisdiction: Review of the Member States’ Rules Concerning the “Residual Jurisdiction” of Their Courts in Civil and Commercial Matters Pursuant to the Brussels I and II Regulations’ (EC) General Report JLS/C4/2005/07-30-CE)0040309/00-37 5 <http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf> accessed 21 May 2018.

¹⁰ FAO, ‘Report of the Second Session of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated (IUU) Fishing and Related Matters: Rome, 16-18 July, 2007’ (2015) FAO Fisheries and Aquaculture Report 1124 para 16.

¹¹ *Vice versa*, PSJ is broader in regulating ports i.e. standards or vessels unassociated with international trade.

¹² Nothing demands PSMs and market state measures being defined as mutually exclusive. Market-related measures are not defined in *IPOA-IUU*, meaning PSMs may or may not be included depending on the definition adopted, FAO, ‘Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (FAO 2002) FAO Technical Guidelines for Responsible Fisheries 9 48; e.g. PSMs included in progress report of market state measures, FAO, ‘Progress Made with Regard to Measures Against Illegal, Unreported and Unregulated (IUU) Fishing, Including Port State Measures, Flag State Performance, Market State Measures and Development of a Comprehensive Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels’ (COFI/2011/5 2010) Committee On Fisheries (Twenty-ninth Session, Rome, 31 January-4 February 2011) paras 16–29.

Finally, PSJ may be refined by its port-nexus for the law of jurisdiction (2.3, 2.5), or by its maritime zone(s) for law of the sea (3.2.1, 3.3). A fundamental precondition however is finding an answer to the question: what is a port?

As a descriptive term, 'port' is usually defined using synonym and common features,¹³ e.g. harbour ("any part of a body of water and the manmade structures surrounding it that sufficiently shelters a vessel from wind, waves, and currents, enabling safe anchorage or the discharge and loading of cargo and passengers"),¹⁴ wharf ("the place at which ships tie up to unload and load cargo"),¹⁵ or seaport ("a port or harbour accessible to seagoing vessels").¹⁶ This conjures up an image of facilities associated with shipping, but a fishing port's scope includes "landing places on the beach usually with a ramp or hoisting winch to haul boats onto the beach".¹⁷ The *Port State Measures Agreement* (PSMA) simply defines 'ports' to include analogous "offshore terminals and other installations"¹⁸ where services are available.

In this manuscript, **ports** are therefore defined as places equipped to enable vessel to visit and to access services, without prejudice to the infrastructure required or services provided. This definition is sufficient for international jurisdiction, whereby ports "form a convenient point at which to exercise control over vessels which [...] visit".¹⁹ Within international trade law ports are comparable to land-based ports of entry.²⁰ Finally *UNCLOS* refers to ports

¹³ A "place on the coast [or off the coast] which has facilities for boats or ships to call into", Editor, 'What Is the Difference Between a Port, Quay, Pier and Wharf?' (*The Shipping Law Blog*, 2011) <<http://www.theshippinglawblog.com/2011/10/what-is-difference-between-quay-pier.html>> accessed 29 December 2014.

¹⁴ John Holmes Jellett, 'Harbours and Sea Works' (*Encyclopedia Britannica*, 26 April 2017) <<https://www.britannica.com/technology/harbor>>; Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer 2014) 21 quoting Lloyd's Dictionary of Shipping Terms, "'port' as a 'harbour having facilities for ships to moor and load or discharge", with 'harbour' being defined as 'a natural or artificial shelter for ships'".

¹⁵ American Association of Port Authorities, 'Glossary of Maritime Terms' <<http://www.aapa-ports.org/advocating/content.aspx?ItemNumber=21500>>.

¹⁶ 'Seaport' <<http://www.thefreedictionary.com/seaport>>.

¹⁷ 'Country Report of Poland on the Occasion of the 6th Annual Meeting of the Baltic Fisheries Commission (BAFICO) on 8/9 June 2000 in Rostock', in Gunnar Lundqvist, *The Development of Fishing Ports and the Future Requirements Regarding the Tasks of Fishing Ports in the Baltic Sea* (Nordic Council of Ministers 2000) 55.

¹⁸ PSMA (n 2) art. 1(g).

¹⁹ Marten, *PSJ and Merchant Shipping* (n 14) 21 shortened because (4.2.3).

²⁰ A point of "access to the landmass of a State for persons and goods, and are therefore logical points of control", Erik J Molenaar, 'Port State Jurisdiction', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) para 1.

without definition.²¹ As the sole concern for this thesis is a port state's rights and obligations within the law of the sea, the broad definition above remains sufficient. A **port state** is one which can or does exercise jurisdiction over foreign vessels visiting one of its 'ports'.

1.2.1 Sustainable fishing and the threat of IUU fishing

Marine capture fisheries accounted for 79.3 million of the 90.9 million tonnes of global fisheries capture output in 2016.²² If states are involved in this capture, or are reliant upon the produce of fisheries, their continued output may be of vital economic, cultural or security importance. Thus, sustainable fisheries represent a global common interest of the international community. The ocean's legal order is consequentially founded upon (at least) the 168 state parties' desire to promote "equitable and efficient utilization of their resources, [and] the conservation of their living resources".²³

If nationals fish upon the high seas, states are under a duty to conserve the fishery and to cooperate in its management and conservation.²⁴ As a package deal, obligations are inseparable from rights bestowed. Thus, a coastal state's sovereign rights over adjacent resources are qualified by the same state's duties to prevent overfishing, to conserve and manage resources using the best scientific knowledge, and to promote optimum utilisation.²⁵

This global common interest shapes international law and policy across the spectrum of fisheries instruments.²⁶ Sustainable fisheries is a cornerstone of UN initiatives on sustainable development. Nothing short of global action is required. Spijkers and Jevglevskaia previously

²¹ UNCLOS (n 6) arts. 11 (despite only referring to delimiting), 18(1).

²² FAO, 'The State of World Fisheries and Aquaculture 2018 - Meeting the Sustainable Development Goals' (2018) 4 both down from 2014 statistics.

²³ UNCLOS (n 6) preamble; UN, *Status (09/08/2018): United Nations Convention on the Law of the Sea* (2018) <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>>.

²⁴ UNCLOS (n 6) arts. 116-120, high seas, 63-64 straddling and highly migratory stocks.

²⁵ *ibid* arts. 61-62. Coastal States have discretion in setting quotas, whereby national interests, economic and social issues or data availability may play their part. However, they should eventually ensure sustainable fisheries. States lack legal standing to question foreign quotas, but e.g. port states may deny vessel entry despite equipment used being perfectly legal under the coastal state's law. Through such jurisdiction, states may object to unsustainable coastal state practice.

²⁶ Be it international trade law, development assistance, international environmental law or the law of the sea; Mary Ann E Palma, Martin Tsamenyi and William R Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill 2010) ch 3.

charted sustainable development and high seas fisheries,²⁷ with *Our Common Future Report*,²⁸ *Agenda 21*,²⁹ *Millennium Development Goals*,³⁰ *Johannesburg Declaration*,³¹ *Johannesburg Plan of Implementation*,³² *Future We Want*,³³ and *Sustainable Development Goals*³⁴ all reflecting the global sustainable fisheries policy that underlies the practices discussed here.

A sustainable fisheries policy objective and related obligations are elaborated within the *Compliance Agreement*,³⁵ *Code of Conduct for Responsible Fisheries*,³⁶ *UNFSA*,³⁷ *IPOA-IUU*³⁸ and the *Reykjavik Declaration on Responsible Fisheries*,³⁹ to name a few.⁴⁰ Yearly UNGA resolutions reaffirm sustainable fisheries as a global interest, including combating major

²⁷ Otto Spijkers and Natalia Jevglevskaia, 'Sustainable Development and High Seas Fisheries' (2013) 9 *Utrecht Law Review* 24.

²⁸ World Commission on Environment and Development, 'Our Common Future' (Annex 1987) Development and International Co-operation: Environment UNGA A/42/427 paras 10(1), 10(24)-(30).

²⁹ United Nations Conference on Environment & Development, 'Agenda 21: Programme of Action for Sustainable Development' (1992) A/CONF151/26/Rev1/Voll ch 17.

³⁰ Goal 7 as later interpreted by the High-level Plenary Meeting of the General Assembly, Spijkers and Jevglevskaia (n 27) 27.

³¹ World Summit on Sustainable Development, 'Johannesburg Declaration on Sustainable Development' (2002) A/CONF199/20 (Res 1, Annex) para 13 depletion of fish stocks, included within the global challenges to sustainable development.

³² World Summit on Sustainable Development, 'Plan of Implementation of the World Summit on Sustainable Development' (2002) A/CONF199/20 (Res 2) paras 30–32.

³³ UNGA, 'Resolution 66/288: The Future We Want' (2012) A/RES/66/288 para 168.

³⁴ UNGA, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (2015) A/RES/70/1 goal 14.

³⁵ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003) 1993 preamble, arts. 3, 5.

³⁶ FAO, *Code of Conduct for Responsible Fisheries* (FAO 1995) arts. 2, 6-7.

³⁷ 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, adopted 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001) 1995 art. 2.

³⁸ FAO, *IPOA-IUU* (n 4).

³⁹ FAO, 'Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem' (Report of the Reykjavik Conference on Responsible Fisheries in the Marine Ecosystem 2001) FAO Fisheries Report 658.

⁴⁰ "Developments in the international law regulating fisheries may be characterised by a continuous pursuit of measures that were intended to effectively conserve and manage global fisheries resources" Mary Ann E Palma, Martin Tsamenyi and William R Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (BRILL 2010) 56.

inhibitors like IUU fishing,⁴¹ or unsustainable fishing practices such as large-scale pelagic driftnet fishing (3.2.2.2.2).⁴²

Yet, fisheries worldwide remain in a dire situation – perhaps with no improvement in sight.⁴³ Even assuming a fisheries’ status as maximum sustainably fished is merited,⁴⁴ only 66.9% of stocks are fished “within biologically sustainable levels”.⁴⁵ The optimistic estimate therefore puts overfished stocks at 33.1%.⁴⁶ The visible trend is not positive. “Based on FAO’s monitoring of assessed stocks [...] the fraction of fish stocks that are within biologically sustainable levels [...] has exhibited a decreasing trend from 90.0 percent in 1974 to 66.9 percent in 2015 [...] the percentage of stocks fished at biologically unsustainable levels increased from 10 percent in 1974 to 33.1 percent in 2015 [and] underfished stocks decreased continuously from 1974 to 2015”.⁴⁷ Additional factors including climate change, warming seas, acidification and pollution contribute to the forecast of further fisheries collapsing. Finally, from a social and economic perspective, overcapacity and subsidies reliance are equally unsustainable.⁴⁸

Within this disorder, a universal threat to sustainably and unsustainably managed stocks alike is non-state conduct grouped under the broad term **illegal, unreported and unregulated (IUU) fishing**. At the global level, the *IPOA-IUU* provides a description:

“3.1 **Illegal fishing** refers to activities:

⁴¹ Latest examples, IUU fishing, UNGA, ‘Resolution 72/72: Sustainable Fisheries [...]’ (2017) A/RES/72/72 paras 68–98, 103, 107–110, 119–120, 216; sustainable fisheries, UNGA, ‘Resolution 72/73: Oceans and the Law of the Sea’ (2017) A/RES/72/73 paras 1–5, 183–185, 233, 244, 331.

⁴² Non-binding efforts of the UNGA in particular, Palma, Tsamenyi and Edeson (n 40) ch 3 fn. 7.

⁴³ Cumulative effect of man-made effects “means that the ‘Ponzi bubble’ may burst sooner than we might expect” Tony J Pitcher and William WL Cheung, ‘Fisheries: Hope or Despair?’ (2013) 74 Marine pollution bulletin 506, 514; FAO, ‘SOFIA’ (n 22) 6 overfishing recovery unlikely in near future.

⁴⁴ Having abundance at or close to the level of maximum sustainable yield. Precautionary underfishing may be desirable, FAO, ‘SOFIA’ (n 22) 39.

⁴⁵ *ibid* based on “FAO’s monitoring of assessed stocks”.

⁴⁶ *ibid* 40.

⁴⁷ *ibid* 39–40.

⁴⁸ Pitcher and Cheung (n 43) 507 quoting Sumaila et al, World Bank and FAO; Human rights element, EJF, ‘All at Sea – The Abuse of Human Rights Aboard Illegal Fishing Vessels’ (Environmental Justice Foundation: London 2010).

CHAPTER 1

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.

3.2 **Unreported fishing** refers to fishing activities:

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.

3.3 **Unregulated fishing** refers to fishing activities:

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.

3.4 Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law⁴⁹

Furthermore:

“**[IUU] fishing related activities**’ means any operation in support of, or in preparation for, [IUU] fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at Sea⁵⁰

1.2.2 Port State Measures: Defining a jurisdiction to regulate the seas

The (re)distribution of jurisdictional capacity, and, if necessary, jurisdictional responsibility, is an essential element to any successful legal order, which must evolve continuously to meet societal needs. In a nutshell, current consensus on PSJ begins with the recognition that general international law does not provide a right to port entry for foreign vessels.⁵¹ This is especially so for fishing vessels, which are often excluded from bilateral access agreements (4.2.2). Building on practice, authors further defined port states as a distinct regulatory actor,⁵² noting the scope for extraterritorial influence and the largely unfettered potential to help shape global oceans governance.⁵³

However, upon the question of the international legal basis of extraterritorial PSJ practice and limits thereof, the PSJ field stagnated. Instead, legal scholars working on an assumption of port state rights made important advances in other respects, notably jurisdictional

⁴⁹ FAO, *IPOA-IUU* (n 4) para 3; repeated, PSMA (n 2) art. 1(e); “the closest thing to a definition that is available” Jens T Theilen, ‘What’s in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing’ (2013) 28 *The International Journal of Marine and Coastal Law* 533. Definition is equally used in unilateral practice (ch 5-6), and given application to unregulated fishing, PSMs would be an example whereby IUU fishing should not be reduced to illegal fishing *ibid* 550.

⁵⁰ PSMA (n 2) art. 1(d).

⁵¹ George C Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port State Regime* (Martinus Nijhoff Publishers 1993).

⁵² Erik J Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998) 185–194; Henrik Ringbom, *The EU Maritime Safety Policy and International Law* (Brill 2008) 203–382; Marten, *PSJ and Merchant Shipping* (n 14).

⁵³ Sophia Kopela, ‘Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons’ (2016) 47 *Ocean Development & International Law* 89; Marten, ‘PSJ, International Conventions, and Extraterritoriality’ (n 7).

responsibilities for fisheries.⁵⁴ It is arguable that the question of port state prescription and enforcement rights has remained stuck for a decade:

“room for research into the extra-territorial application of Port State jurisdiction or to identify, through international agreements, the specific types of enforcement action that can be taken by Port States for violations of applicable international rules and standards established through competent international organizations or general diplomatic conferences”⁵⁵

Historically, PSJ practice and analysis concerned static vessel conditions whereby territorial state jurisdiction provided a convincing legal basis regardless of whether a measure was prescribed as a condition of port access or as an in-port offence.⁵⁶ Questions of enforcement, be it denial of entry or more onerous measures, were questions of limitation given the straightforward application of territorial enforcement jurisdiction.⁵⁷ However:

“Territoriality, even in its extended version, will however not normally assist in the justification of assertions of prescriptive jurisdiction over activities that bear no relation to a state’s territory”⁵⁸

Combatting extraterritorial IUU fishing through PSMs has brought to the foreground the conflict between state practice on the one hand and current analysis of the limits of state jurisdiction on the other hand. Despite challenges,⁵⁹ port states may prescribe wholly extraterritorial conduct, denying entry, denying services or ejecting vessels suspected of

⁵⁴ Erik J Molenaar, ‘Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage’ (2007) 38 *Ocean Development & International Law* 225; Blaise Kuemlangan and Michael Press, ‘Preventing, Deterring and Eliminating IUU Fishing’ (2010) 40 *Environmental Policy & Law* 262; Judith Swan, ‘Port State Measures—from Residual Port State Jurisdiction to Global Standards’ (2016) 31 *The International Journal of Marine and Coastal Law* 395.

⁵⁵ Annick Vanhoutte and Blaise Kuemlangan, ‘A Global Movement to Protect Ocean Resources’ (*Impakter*, 11 January 2017) <<http://impakter.com/global-movement-protect-ocean-resources/>> accessed 28 February 2017.

⁵⁶ Robin Churchill, ‘Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships—What Degree of Extra-Territoriality?’ (2016) 31 *The International Journal of Marine and Coastal Law* 442, 447–450, 454–458.

⁵⁷ Denial is enforcement measure; EC, ‘Report to the Trade Barriers Regulation Committee: TBR Proceedings Concerning Chilean Practices Affecting Transit of Swordfish in Chilean Ports’ (1999) 32.

⁵⁸ Cedric Ryngaert and Henrik Ringbom, ‘Port State Jurisdiction: Challenges and Potential’ (2016) 31 *The International Journal of Marine and Coastal Law* 379, 383.

⁵⁹ Critiques of extraterritorial conduct-based entry conditions; Theilen (n 49) 548–550.

contravening “any” prescribed condition they see fit (ch 6). State jurisdiction appears inadequate in providing a coherent legal basis (ch 2), while references to ‘sovereignty’ suggest a different nature of right being exercised but without defining its legal basis, and its limitations, and without rationalizing how exercises of jurisdiction are not bound by the limits of state jurisdiction.⁶⁰

Difficulties are further found with the application of enforcement jurisdiction. Port state prescription classified as ‘**conditions of port privilege**’ is limited to denial of port entry and services. Prescription classified as ‘**port offences**’ however is subject to the classical discretion in choice of enforcement measures, and thus may encompass more onerous measures in practice. Neither state jurisdiction nor law of the sea provides any rationale for this distinction.

The ‘legal basis’ of PSMs therefore raises the following sub-questions:

What are the permissive grounds of prescriptive state jurisdiction, and are they sufficient to justify port state practice and the distinctions therein?

What are the permissive grounds of enforcement state jurisdiction, and are they sufficient to justify port state practice and the distinctions therein?

Alternatively, does ‘sovereignty’ encompass jurisdiction with a legal basis outside the limitations of state jurisdiction under international law, or must a new permissive ground be recognised?⁶¹

Furthermore, jurisdiction provides *prima facie* rights to act. It must be exercised in compliance with other rights and obligations. Globalisation intensifies the transnational

⁶⁰ Henrik Ringbom, ‘Global Problem - Regional Solution? International Law Reflections on an EU CO2 Emissions Trading Scheme for Ships’ (2011) 26 International Journal of Marine and Coastal Law 613, 625–626; the jurisdictional difficulties of offshore installations being solved through application of ‘sovereign rights’, Henrik Ringbom, ‘National Employment Conditions and Foreign Ships - International Law Considerations’, *Scandinavian Institute of Maritime Law Yearbook* (Marlus 2015) 139–142; Churchill (n 56) 457, 466 denial of entry as an exercise of sovereignty not enforcement jurisdiction.

⁶¹ Consistent and widespread port state practice excludes the possibility that jurisdiction is being exercised without a legal basis under international law.

nature of interests and problems such as IUU fishing, and so too the breadth and influence of international law guiding or confining the exercises of jurisdiction in response to IUU fishing.

Limitations may originate from a multitude of fragments of international law,⁶² from international environmental law to human rights.⁶³ If port services are refused by private actors, competition law issues may arise.⁶⁴ International trade law is the subject of significant literature and case law, with PSMs challenged in *Chile/EC Swordfish Dispute* (GATT, arts. V(1)-(3) and XI(1)),⁶⁵ *Measures on Atlanto-Scandian Herring* (GATT, arts. I(1), V(2) and XI(1)),⁶⁶ and *Indicative Prices and Restrictions on Ports of Entry* (GATT, arts. I(1), V(2), V(6), XI(1) and XIII(1)).⁶⁷ To be compatible or use the Article XX-based exceptions, PSMs should not be unduly restrictive, or discriminate against GATT parties.⁶⁸ Unfortunately for legal analysis, the previous two cases were settled without an appellant body decision. There is thus ample room for debate, but little the author of this thesis can add to the state of the art.⁶⁹

⁶² “[N]o regime is self-contained”, Martti Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (2006) Report of the Study Group of the International Law Commission A/CN.4/L.682 paras 191–194.

⁶³ E.g. obligations resulting from Appendix listed species, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1972, 993 UNTS 243 (entered into force 1 July 1975); human rights, Tullio Treves, ‘Human Rights and the Law of the Sea’ (2010) 28 Berkeley Journal of International Law 1; Irini Papanicolopulu, ‘Human Rights and the Law of the Sea’ in David Joseph Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law: The Law of the Sea*, vol 1 (OUP 2014); or practical problems raised by PSC and anti-piracy operations Alice Priddy, ‘The Use of Weapons in Counterpiracy Operations’ in Stuart Casey-Maslen (ed), *Weapons Under International Human Rights Law* (CUP 2014) 159.

⁶⁴ “In Italy most of the Competition Authority’s decisions concerning competition law infringements in the ports sector concern access to port infrastructure” OECD Competition Committee, ‘Competition in Ports and Port Services’ (OECD 2011) DAF/COMP(2011)14 JT03313551 12.

⁶⁵ *Chile — Measures affecting the Transit and Importing of Swordfish, Request for the Establishment of a Panel by the European Communities* [2000] WTO DSB DS193, 00-4761.

⁶⁶ *European Union - Measures on Atlanto-Scandian Herring, Request for the establishment of a panel by Denmark in respect of the Faroe Islands* [2014] WTO DSB DS469, 14-0096 [11].

⁶⁷ *Colombia - Indicative Prices and Restrictions on Ports of Entry, Request for the Establishment of a Panel by Panama* [2007] WTO DSB DS366, 07-3903 3. The designation of ports for foreign vessels, which was challenged in this case, is also a common PSM in practice (6.3.2.2).

⁶⁸ Robin Churchill, ‘Coastal Waters’ in David Joseph Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law: The Law of the Sea*, vol 1 (OUP 2014) 16–17; Gabriel Ibarra-Pardo, ‘The Challenge of Implementing Domestic Trade Policy Measures: The Colombia Ports of Entry Case’ (ICTSD 2010) ICTSD Information Note 3.

⁶⁹ Andrew Serdy, ‘See You in Port: Australia and New Zealand as Third Parties in the Dispute between Chile and the European Community over Chile’s Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas’ (2002) 3 Melbourne Journal of International Law 79; Molenaar, ‘Port State Jurisdiction (2007)’ (n 54); Antonia Leroy, Florence Galletti and Christian Chaboud, ‘The EU Restrictive Trade Measures against IUU Fishing’ (2016) 64 Marine Policy 82; Andrew Serdy, ‘The Shaky Foundations of the FAO Port State Measures Agreement:

Nonetheless, port states are an oceans power. Ports are one legal space within the law of the sea and port states one of many actors with overlapping rights or responsibilities within any maritime zone.⁷⁰ Prescriptive jurisdiction over foreign vessels in-port may have been deliberately excluded from *UNCLOS*,⁷¹ but in an extraterritorial context any extension into other maritime zones demands compatibility with principles applicable therein. Port state enforcement also raises disputes. Therefore, to clarify the ‘law of the sea limitations’, the following sub-questions raised are:

What is the nature and extent of PSJ within global instruments concerning the law of the sea?

Do treaty-based rights expand jurisdiction for PSMs combatting IUU fishing?

Do treaty-based responsibilities limit jurisdiction for PSMs combatting IUU fishing?

When exercising PSJ, does the law of the sea limit prescriptive jurisdiction?

When exercising PSJ, does the law of the sea limit enforcement jurisdiction?

Finally, the ‘influence of state practice’ is a vital consideration for any research attempting to present a statement of international law beyond theory and secondary sources:

What PSMs are port states prescribing to combat extraterritorial IUU fishing, and upon what legal basis?

Recent unilateral practice extending beyond those PSMs generally accepted at the global level, or unilateral practice of a controversial nature, has the greatest potential to demonstrate PSJ’s breadth and limits. It will provide evidence to support the previous

How Watertight Is the Legal Seal against Access for Foreign Fishing Vessels?’ (2016) 31 *The International Journal of Marine and Coastal Law* 422; Dobson Natalie L., ‘The EU’s Conditioning of the “Extraterritorial” Carbon Footprint: A Call for an Integrated Approach in Trade Law Discourse’ (2017) 27 *Review of European, Comparative & International Environmental Law* 75.

⁷⁰ Philip Allott, ‘Power Sharing in the Law of the Sea’ (1983) 77 *American Journal of International Law* 1, 28–30 Annex. The implementation of PSMs must be consistent with international law, PSMA (n 2) arts. 3(4), 4, 9(4)-(6), 10, 11(1), 13(2)(i), 18(3), 23(2).

⁷¹ Bevan Marten, ‘Port State Jurisdiction in New Zealand: The Problem with Sellers’ (2013) 2 *Victoria University College Law Review* 559, 561–562.

conclusions on the international legal framework, while equally highlighting where it needs readjusting.

1.3 Methodology in finding the contribution

Legal research ‘styles’⁷² define underlying theoretical assumptions, research methods, and international law’s conceptualisation.⁷³ The central question seeks to verify what the international law of jurisdiction is for PSJ concerning extraterritorial conduct – a quintessentially doctrinal question solved through doctrinal legal research.⁷⁴ Assuming law provides a coherent system,⁷⁵ a doctrinal two-stage approach is adopted throughout the thesis. The legal frameworks of jurisdiction and the law of the sea are established and are then re-assessed and reworked in light of port state practice. Practice is rationalised under law, while new elements are incorporated to ensure the statement of law remains valid.⁷⁶ International law is a body of rules that governs states yet remains flexible to evolution in the light of state practice.

1.3.1 Doctrinal research

A doctrinal synthesis, analysis and restatement of PSJ will remove current legal ambiguities that may be inhibiting law’s development.⁷⁷ Such research will also contribute to the body of knowledge on current PSJ in theory and practice. This is not purely a matter of assisting legal practice to complete its tasks but also defining law’s availability as a societal tool to combat

⁷² Borrowing the phrase cited; Paul Chynoweth, ‘Legal Research’ in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (2008) 28–29.

⁷³ Dawn Watkins and Mandy Burton, ‘Introduction’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor & Francis 2013) 2.

⁷⁴ Terry Hutchinson, ‘Doctrinal Research’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor & Francis 2013) 7–8. Doctrinal research at ‘its core consists in the interpretation and systematization of valid law’ Enrico Pattaro, ‘Legal Doctrine and Legal Theory’, *A Treatise of Legal Philosophy and General Jurisprudence Volume 4: Scientia Juris*, vol 4 (Springer 2005) 1.

⁷⁵ Hutchinson (n 74) 13.

⁷⁶ *ibid* 9–10; doctrinal research ‘is well suited to advocacy and finding solution to legal problems’ *ibid* 28.

⁷⁷ Rob Van Gestel, Hans-W Micklitz and Miguel Poiares Maduro, ‘Methodology in the New Legal World’ (2012) 2012/13 EUI Working Papers Law 13; doctrinal being descriptive and normative Pattaro (n 74) 5–6.

IUU fishing.⁷⁸ Any research of a critical or empirical nature would rely upon settling these doctrinal questions.⁷⁹

In trying to present an objective and neutral answer, the theoretical stance underpinning the methods employed is law as a social construct, i.e. legal positivism.⁸⁰ Therefore one assumption is that international law provides rules of behaviour “generally obeyed” by states. Another assumption is that a rule of recognition accepted by the international community provides validity by specifying the sources of law and its rules of change.⁸¹ Other theoretical underpinnings would result in vastly different findings, e.g. critical legal studies and the lack of any need for coherence resulting from conflicting or paradoxical practice.

The rule of recognition provides the sources, the *ICJ Statute* being declaratory.⁸² International treaties and customary law are the primary sources for work upon jurisdiction. The international law of jurisdiction is based upon permissive grounds (2.2.3), which implies a limited scope for ‘gaps’ and the application of general principles. The jurisdictional rights and obligations of port states are examined through the law of jurisdiction (*lex generalis*), as modified by implementation within the law of the sea (*lex specialis*). Flexibilities, ambiguities and disputes arise within both fields, and so subsidiary sources are used in interpretation of primary sources. This includes case law, legal scholarship, soft law, unilateral acts and resolutions by UN bodies. Decisions of intergovernmental organizations, whether in the form of conservation and management measures or otherwise, will equally be used in the interpretation of primary sources.

⁷⁸ Van Gestel, Micklitz and Maduro (n 77) 13; influence of legal doctrine, Pattaro (n 74) 5–8.

⁷⁹ Hutchinson (n 74) 7.

⁸⁰ Leslie Green, ‘Legal Positivism’ in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2003) 1 <<https://plato.stanford.edu/entries/legal-positivism/>>.

⁸¹ H.L.A Hart, 1994, quoted, Green (n 80).

⁸² Statute of the International Court of Justice, adopted 26 June 1945, 3 Bevans 1179 (entered into force, 24 October 1945) art. 38(1); M Payandeh, ‘The Concept of International Law in the Jurisprudence of H.L.A. Hart’ (2010) 21 *European Journal of International Law* 967, 989. ICJ jurisprudence, “consistently analysed international law in terms of Article 38” Hugh Thirlway, ‘The Sources of International Law’ in Malcolm Evans (ed), *International Law* (OUP 2010) 99.

In identifying and interpreting treaty law, the *Vienna Convention on the Law of Treaties* codifies the rules upon validity and interpretation.⁸³ Customary international law is identified via the two-element theory; “Not only must the acts concerned amount to a settled practice [*established, widespread and consistent practice including those specially affected*], but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it [*opinio juris*].”⁸⁴ This is ascertained through a mixture of inductive and deductive reasoning, but as scholarship, not assertion.⁸⁵

1.3.2 Structure and delimitation

The substantive chapters in this manuscript comprise of roughly two parts, (ch 2-4) digesting multilateralism whilst (ch 5-6) interpret unilateralism. The first part provides a doctrinal restatement, i.e. the author’s views upon the jurisdictional basis and limitations of extraterritorial PSMs under global instruments and general international law. The latter part contains the unilateral PSMs used as a basis for that restatement. After all, doctrinal research should be supported by authoritative data, drawn from appropriate sources and analysed with appropriate methods.⁸⁶

Jurisdiction in international law (ch 2) requires deductive, inductive and analogous reasoning to provide the legal bases available for prescription and enforcement of PSMs with an extraterritorial element. In verifying the authority of state jurisdiction as the frame of reference for legal basis, this is challenged and expanded to include exceptional domaine réservé-based jurisdiction (2.5).

⁸³ Vienna Convention on the Law of Treaties, signed 23 May 1969, 1155 UNTS 331 (entered into force 21 January 1980); “universally valid rules of treaty-making” Payandeh (n 82) 990; “the ‘treaty of treaties’” Stephan Wittich, ‘The PCIJ and the Modern International Law of Treaties’ in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Brill 2013) 89.

⁸⁴ *North Sea Continental Shelf, Judgment* [1969] ICJ 51 & 52, ICJ Reports 1969 3 [77]; further discussion and case law Thirlway (n 82).

⁸⁵ Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26 *European Journal of International Law* 417.

⁸⁶ Adilah Abd Razak, ‘Understanding Legal Research’ (2009) 4 *Integration & Dissemination* 19, 22–23.

With regards to law of the sea limitations, the nature and extent of PSJ within global instruments is first analysed (ch 3). The focus is upon globally applicable instruments, particularly those addressing fisheries. Nonetheless, many developments of port state rights and duties within the fisheries domain were inspired by preceding practice in respect of merchant shipping. Once PSJ was well-established, explicit references to PSMs were to impose soft and then binding obligations upon defined exercises of jurisdiction. Importantly however, space is left for continued residual port state unilateralism.

Integrating the evolution of PSMs within broader law of the sea is advanced through a systematic analysis of possible limitations within global instruments, namely *UNCLOS*, *UNFSA* *PSMA*, and customary law (ch 4). *UNCLOS* has codified, crystalized, and progressively developed the legal regime of the oceans applicable to states. It represents the “constitution of the oceans”⁸⁷ to which states first turn to assert international rights; to evaluate the claims of others; to cooperate through; and to settle “all issues relating to the law of the sea”.⁸⁸ Subsequent implementation agreements, soft law, regional agreements and the work of international organisations all build upon its framework. This chapter’s direction is taken from case law, literature and any *UNCLOS* provisions placing limitations or safeguards applicable to territorial or high seas prescription or territorial enforcement.

Chapter 5 examines unilateral practice at the regional level, i.e. PSMs agreed between a group of states and applied against non-contracting non-cooperating (non-CNCP) state party vessels. Unilateral practice would include standards of high seas behaviour imposed against non-CNCP vessels, or the port state measures prescribed differing from those generally accepted. The binding practice of RFMO/As is selected as the most relevant in terms of exercising jurisdiction and influencing international law. The research was largely undertaken up to **July 2016**. Many RFMO/As revise CMMs annually and the author does not have the time or resources to continuously rewrite to reflect changes adopted. However, major

⁸⁷ Tommy TB Koh, ‘A Constitution for the Oceans’ [1982] Remarks by President of the Third United Nations Conference on the Law of the Sea xxxiii <https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>; *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, Separate Opinion of Judge Lucky* [2015] ITLOS 21, ITLOS Rep 2015 88 [9].

⁸⁸ *UNCLOS* (n 6) preamble.

developments that have come to the attention of the author are highlighted where applicable. Upon finalising the PhD in **October 2018**, a reflection on the RFMO/A practice with the intermediate years has been added to the conclusion to demonstrate the continued applicability of the conclusions reached. In any event, the objective is not to produce a manual on current RFMO/A CMMs but rather provide evidence for the arguments presented on the legal basis and limits of extraterritorial PSJ.

Finally, unilateral state practice at the national level (ch 6) is similarly time-stamped as of **March 2017**. Three groups of states were selected, namely self-identified global leaders, port states targeted by the EU's *IUU Regulation* Ch. VI,⁸⁹ and independently identified cases using *FAOLEX* keyword searches or backtracking from media reports to the port state legislation at issue.⁹⁰ To live up to their claims, global leaders should be at the forefront of PSM practice. Targeted states have by and large adopted PSMs in response to notification/identification under the EU's *IUU Regulation*, while additional examples will avoid EU-focused bias. This selection of states should provide a relatively efficient method to canvas recent practice for the state of the art.

1.4 Conclusion

The IUU fishing threat facing fisheries governance is not a lack of rules and standards. The real threat is the avoidance of application resulting from the implementation failures of states of non-compliance and a general lack of enforcement by flag, coastal, port and market states, and states of nationality. PSJ is no panacea, but it can, in part, address both IUU fishing's root (unfulfilled foreign state obligations), and IUU fishing's symptoms (inadequate regulation of fishing and fishing-related conduct).

Of course, this assumes the region's or state's ports are sufficiently attractive to foreign vessels to trigger PSJ, be it because of port facilities, markets, geographic or social incentives. It is thus noticeable that the actors taking on global 'leadership', the EU and the USA, have

⁸⁹ Note post-March 2017 further states identified for inadequate PSMs, e.g. Liberia and Vietnam.

⁹⁰ A legislative database maintained by the FAO Legal Office, FAO, 'FAOLEX' <<http://www.fao.org/faolex/en/>>; being less user friendly, the PSMs database was not used, FAO, 'PORTLEX' <<http://www.fao.org/fishery/psm/collection/en>>.

the two largest markets for fish and fish products, which enables them to exert influence over foreign vessels and states.⁹¹ On the contrary, economic, social and political benefits accrued from visiting foreign vessels for a state's ports and related economies⁹² may push practice in the opposite direction, incentivising the development of ports of non-compliance. Non-compliant port states may also result from the combination of increased prescription and enforcement by other states or regions, and the high mobility of actors able to adjust or relocate operations.⁹³

Thus, to summarise, this manuscript is a doctrinal positivistic endeavour on jurisdiction within public international law. Port state measures at the global, regional and state level are collected and analysed through the lenses of state jurisdiction and the law of the sea regime. By examining the case of PSMs concerning (in-part) extraterritorial foreign vessel conduct, this manuscript demonstrates that emerging trends of 'territorial extension' found within the international law of jurisdiction are equally applicable to port offences.⁹⁴ The territorial element of in-port conduct is crafted as the offence for the question of jurisdiction, yet defined extraterritorial conduct remains an essential underlying element triggering the territorial offence. On the other hand, prescribing and enforcing conditions of port privilege must be separated into a *domaine réservé*-based exception to state jurisdiction if territoriality is to maintain any integrity as an ordering nexus (2.5). Both must be exercised in compliance with the rather specific, and therefore narrow, limits and safeguards of the law of the sea. The manuscript incorporates an example from the law of the sea into the debate on what the positive law of territorial jurisdiction is. Thus, it will be of interest to not only academics, scholars and practitioners within the fields of port state enforcement, fisheries regulation and the law of the sea, but more generally those concerned with the law of jurisdiction.

⁹¹ FAO, 'SOFIA' (n 22) 56.

⁹² E.g. processing states.

⁹³ E.g. "Percentage of visits to NCPs by NEAFC IUU-listed vessels doubled after stronger enforcement was introduced" The Pew Charitable Trusts, 'Port State Performance: Putting Illegal, Unreported and Unregulated Fishing on the Radar' (2010) 13 <<http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Report/iuu-port-state-performance-iuu-on-the-radar.pdf>>.

⁹⁴ Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 82; Joanne Scott, 'The New EU "Extraterritoriality"' (2014) 51 *Common Market Law Review* 1343 discussed (2.3.5).

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2.1. Introduction

Domestic legal orders are one tool available to combat IUU fishing. Law guides the conduct of subjects. Law provides predictability for compliant subjects, whilst dissuading subjects with conflicting intentions (preventative) or reprimanding non-compliance (punishment). With numerous equal states, all would be chaos if every state could tell everyone else what they can and cannot do - enforcing that opinion wherever necessary. International law and the law of state jurisdiction is tasked with settling which state(s) can or should “affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court”.¹ Beyond a state’s rights to jurisdiction acquired, and the obligations to exercise jurisdiction accepted, lays the realm of international comity. In exercising jurisdiction, a state may therefore demonstrate “deference to foreign states that international law does not mandate”,² i.e. exercise jurisdiction to a lesser degree than its rights entail.

Port states are bound by these rules of the game. The law of the sea contains the *lex specialis* of jurisdiction regarding oceans governance, but largely defers to the public international law of jurisdiction (*lex generalis*) for port states. It largely recognises but does not regulate the basis of PSJ; hence the concept, residual port state jurisdiction.³ Thus, state jurisdiction is defined, together with the objectives of its current allocation model (2.2). Delving deeper, grounds for prescriptive (2.3) and enforcement (2.4) jurisdiction are established with PSJ examples. When prescribing port state offences and enforcing more onerous measures, states must comply with state jurisdiction’s requirements. However, the well-known case of prescribing port entry and service conditions, enforced through the denial of port privileges, presents an anomaly. Widespread and accepted practice includes extraterritorial conduct without a sufficient nexus under state jurisdiction.

¹ Joseph H Beale, ‘The Jurisdiction of a Sovereign State’ (1923) 36 Harvard Law Review 241, 241.

² American Law Institute, *Restatement (Fourth) the Foreign Relations Law of the United States* (2018) 139 § 401 comment.

³ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) preamble ‘matters not regulated by this Convention continue to be governed by the rules and principles of general international law’.

A rethink of its jurisdictional basis is therefore required if the current interpretation of jurisdiction under customary international law is to reflect state practice upon PSJ. A valid legal basis for jurisdiction must still be found within international law, even if it is not within the principles of state jurisdiction. Exclusively concerning the legal basis of jurisdiction under international law, and thus without prejudice to other requirements or limitations imposed by international law, *domaine réservé* can re-establish a coherent legal order. Analogous application of *domaine réservé*-based jurisdiction to the port state's regulation of access to port privileges is thus the solution (2.5). It is international law which defines the very limited questions of *domaine réservé*, and therefore it remains international law which defines an exercise of jurisdiction as *domaine réservé*-based or state jurisdiction-based. The chapter concludes with a re-systematisation of extraterritorial PSJ within the international law of jurisdiction. PSJ may be exercised through the denial and conditioning of port privileges (*domaine réservé*-based jurisdiction), or port state offences (state jurisdiction) (2.6).⁴

2.2. Jurisdiction in international law

Jurisdiction is central to the functioning of international law. Its terminology is used in three instances, all of which, to a greater or lesser extent, rely upon territory as a starting point. Jurisdiction discussed here is state jurisdiction, i.e. the international legal capacity of a state to determine the law (prescription); to hear or settle legal disputes within its forums (adjudication); and to uphold its laws with state institutions that compel compliance or punish non-compliance (enforcement).

⁴ For clarity, texts often distinguish residual PSJ from treaty-based jurisdiction. Treaty-based jurisdiction, as an exercise of state jurisdiction will fall within the port state offences category, while residual PSJ may be *domaine réservé*-based or state jurisdiction-based.

2.2.1. State jurisdiction

State monopoly on the use of force ensures only states⁵ prescribe laws which may ultimately be enforced through the use or threat of criminal law sanctions.⁶ The necessity of an international legal authority to act constrains power:

“The creation of a legal right is an act of the law; and the law can act only in accordance with itself. The power of a sovereign, therefore, to affect legal rights depends upon the law; and upon the law must be based all sovereign jurisdiction”.⁷

Jurisdiction can also refer to the competence of international institutions of an adjudicatory,⁸ legislative, or executive nature.⁹ This is partially defined by state jurisdiction, given international bodies cannot be vested with rights (including jurisdiction) greater than their parties. However, jurisdictional disputes before adjudicatory bodies often revolve around the scope of consent expressed,¹⁰ a matter of treaty interpretation with little transferable argumentation for customary state jurisdiction.¹¹

⁵ Collective entities like the EU are equated to states for jurisdiction.

⁶ Anne-Marie Slaughter and William Burke-White, ‘The Future of International Law Is Domestic (or, The European Way of Law)’ (2006) 47 *Harvard International Law Journal* 327, 343. Private parties or international organisations prescribe and enforce rules over their membership, but this is incomparable given the differing foundations and functions. However, “community-based jurisdictional orders”; Cedric Ryngaert, ‘The Concept of Jurisdiction in International Law’ in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (2015) 52; Cedric Ryngaert and Mark Zoetekouw, ‘The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era’ in Uta Kohl (ed), *The Net and the Nation State: Multidisciplinary Perspectives on Internet Governance* (CUP 2017).

⁷ Beale (n 1) 241.

⁸ Shabtai Rosenne, ‘International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications’, *Max Planck Encyclopedia of Public International Law* (OUP 2006) para 4; of all shapes and sizes, Cesare PR Romano, ‘The International Judiciary in Context: A Synoptic Chart (Version 3.0)’ [2004] *The Project on International Courts and Tribunals* <http://www.pict-pecti.org/publications/synoptic_chart/synop_c4.pdf>.

⁹ E.g. UNSC jurisdiction to maintain international peace and security, Charter of the United Nations, signed 26 June 1945, 1 UNTS XVI (entered into force, 24 October 1945) 1945 art. 24; Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Martinus Nijhoff Publishers 2006) ch 2.

¹⁰ E.g. Russia, “Arctic Sunrise” (*Kingdom of the Netherlands v Russian Federation*), *Provisional Measures, Note verbale of the Embassy of the Russian Federation in Berlin, dated 22 October 2013* [2013] ITLOS 22.

¹¹ “The terms in which they are drafted determine the scope of jurisdiction of the court or tribunal” Luis Jardón, ‘The Interpretation of Jurisdictional Clauses in Human Rights Treaties’ (2013) 13 *Anuario Mexicano de Derecho Internacional* 99, 124–125.

Thirdly, jurisdiction terminology is used within human rights. This refers to who a state's commitments are guaranteed for, e.g. all persons "within its jurisdiction".¹² Failure to do so violates a treaty obligation, incurring state responsibility.¹³ Like state jurisdiction, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* has followed a territorial/extraterritorial dichotomy to define who falls within a jurisdiction.¹⁴ However, different extraterritorial principles founded upon judicial precedents of the ECtHR apply.¹⁵

2.2.2. Forms of state jurisdiction

Three distinct bundles of rights are evident, generally accepted definitions being:

Prescriptive jurisdiction: "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act, or order, by administrative rule or recognition, or by determination of a court".¹⁶

Adjudicative jurisdiction: "to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings".¹⁷

¹² Applicability and obligations being "framed – both in theory and practice – in jurisdictional terms" Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (OUP 2014) 110. E.g. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, ETS 5 (entered into force 3 September 1953) art. 1. No explicit jurisdictional scope; African Charter on Human and Peoples' Rights, adopted 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) art. 1.

¹³ Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 22.

¹⁴ Territorial obligations subject to extraterritorial exceptions; S Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20 *European Journal of International Law* 1223, 1232–1233.

¹⁵ I.e. when exercising a degree of public authority extraterritorially through state agents or effective control of an area, TW Bennett and J Strug, *Introduction to International Law* (Juta 2013) 53–56.

¹⁶ American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (1987) § 401(a).

¹⁷ *ibid* § 401(b).

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Enforcement jurisdiction: “to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action”.¹⁸

The forthcoming *Restatement (Fourth)* by the American Law Institute will likely include simplified, but substantively similar definitions as exemplified by the comments and reporters’ notes.¹⁹ Each form of jurisdiction has different tests and grounds for establishing the sufficient connection required. For example, conduct that may be the subject of a state’s prescriptive jurisdiction may involve actors or property not currently subjectable to enforcement jurisdiction,²⁰ or adjudicative jurisdiction.²¹ A valid basis for one form of jurisdiction cannot, in and of itself, justify another.

This is not to say that each type of jurisdiction is independent. A “state does not have jurisdiction to enforce a rule of law prescribed by it unless it had jurisdiction to prescribe that rule”.²² In practice, limitations upon prescription also limit enforcement.²³ For adjudicative jurisdiction, expansive prescriptive jurisdiction will bring more cases before the courts, increasing pressures to follow the legislature’s example.²⁴ Vice versa, adjudication produces state practice and *opinio juris* on prescriptive jurisdiction’s scope.

Adjudicative jurisdiction may play a prominent role in private international law.²⁵ Nevertheless, for PSJ within public international law, adjudicative jurisdiction is assimilated

¹⁸ *ibid* § 401(c). Inclusive of enforcement related activities, e.g. investigatory powers; Dan E Stigall, ‘Ungoverned Spaces, Transnational Crime, and the Prohibition of Extraterritorial Enforcement Jurisdiction in International Law’ (2013) 3 *Notre Dame Journal of International & Comparative Law* 1, 16–17; UNCLOS (n 3) art. 110(2).

¹⁹ American Law Institute (n 2) § 401, reporters’ note 4. Enforcement jurisdiction’s definition has been significantly simplified, but e.g. still concerns investigative powers. See discussion of inspections and searches under ‘compel compliance’, *ibid* § 431, comment a, reporters’ note 5; § 432, comment a, reporters’ note 1.

²⁰ Kathleen Hixson, ‘Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States’ (1988) 12 *Fordham International Law Journal* 127, 130.

²¹ Ryngaert, *Jurisdiction in International Law* (n 13) 10.

²² Hixson (n 20) 130 citing, *Restatement (Second) of Foreign Relations Law of the United States*, § 7(2).

²³ *ibid*.

²⁴ “[A]s the world flattens, and people and markets become more interconnected, courts are pressed to provide a forum for malfeasance wherever it occurs” Austen L Parrish, ‘Evading Legislative Jurisdiction’ (2012) 87 *Notre Dame Law Review* 1673, 1676.

²⁵ Disputed beyond treaty-based, “With the significant exception of various forms of immunity, modern customary international law generally does not impose limits on jurisdiction to adjudicate” American Law Institute (n 2) 217; Austen Parrish, ‘Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law’ (*Opinio Juris*, 6 September 2018)

to prescription or enforcement. A court/administrative tribunal's extension of laws to disputed scenarios or previous legislative gaps is a prescriptive act. When reaching a binding decision, or implementing punitive legislation, these acts are acts of enforcement.²⁶

2.2.3. A permissive grounds method for distributing jurisdiction

When distributing jurisdiction over persons, property or conduct, enforcement jurisdiction is largely settled as delineated in *Lotus*;

“[T]he first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State [or in an area beyond national jurisdiction]”²⁷

Obiter dicta within *Arrest Warrant* reiterated this as appropriate for enforcement.²⁸ Academic literature and codification attempts have followed suit.²⁹

In contrast, two dominant and diametrically opposite theories existed for prescriptive jurisdiction.³⁰ The court reasoned, in *dictum*, supporting the unlimited-unless-prohibited approach:

“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property

<<http://opiniojuris.org/2018/09/06/remaking-international-law-personal-jurisdiction-and-the-fourth-restatement-of-the-foreign-relations-law/>>.

²⁶ Similar reasoning; Richard K Gardiner, *International Law* (Pearson Education 2003) 304; AV Lowe and C Staker, ‘Jurisdiction’ in Malcolm Evans (ed), *International Law* (OUP 2010) 317.

²⁷ *The Case of the SS Lotus (France v Turkey)*, Judgment [1927] PCIJ 9, PCIJ Ser No 10 18–19.

²⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buerghenthal [2002] ICJ 121, ICJ Rep 2002 63 [49–58]; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, Dissenting Opinion of Judge Van Den Wyngaert [2002] ICJ 121, ICJ Rep 2002 137 [49]; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, Separate Opinion of President Guillaume [2002] ICJ 121, ICJ Rep 2002 35 [4]; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, Dissenting Opinion of Judge Oda [2002] ICJ 121, ICJ Rep 2002 46 [12–13]; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, Separate Opinion of Judge Bula-Bula [2002] ICJ 121, ICJ Rep 2002 100 [63–64].

²⁹ American Law Institute (n 16); ‘Draft Convention on Jurisdiction with Respect to Crime’ (1935) 29 *The American Journal of International Law* 439 arts. 14-16 (territorial focus of limits); discussing Council of Europe ‘Model Plan’, Lowe and Staker (n 26) 315–317.

³⁰ *SS Lotus* (n 27) 20.

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and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules”³¹

Whilst questioning applicability to criminal law,³² the court still asked whether states were restricted by international law and not whether a right first existed.³³ Some authors continue to apply an unlimited-unless-prohibited framework for prescription.³⁴ But Dixon, while supporting largely unlimited prescriptive jurisdiction, suggests states require a permissive rule to exercise territorial enforcement jurisdiction.³⁵ In practice, when enforcement occurs the result is similar. However, it ignores the potential of extraterritorial prescription alone to violate foreign state sovereignty.³⁶ Case law challenges prescriptive jurisdiction in and of itself.³⁷

As apparent from state practice, the permissive grounds approach correctly reflects the distribution of prescriptive jurisdiction.³⁸ The narrow *Lotus* decision to the contrary has, in general, not been followed.³⁹ International courts or tribunals have not provided further precedent on the customary distribution of prescription, but separate opinions to *Arrest Warrant* did look favourably upon a permissive grounds approach.⁴⁰ Developments post-1927

³¹ *ibid* 19.

³² *ibid* 20.

³³ *ibid* 21.

³⁴ Martin Dixon, *Textbook on International Law* (7th edn, OUP 2013) 149; Gardiner (n 26) 338. Critique to suggestions for unlimited civil prescriptive jurisdiction; Donald Francis Donovan and Anthea Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 *The American Journal of International Law* 142, 143 fn. 3.

³⁵ Dixon (n 34) 150–151.

³⁶ Maziar Jamnejad and Michael Wood, ‘The Principle of Non-Intervention’ (2009) 22 *Leiden Journal of International Law* 345, 372–373. The lack of a duty to keep abreast of all foreign enactments may explain why objections usually only occur upon enforcement of a foreign law. Vienna Convention on the Law of Treaties, signed 23 May 1969, 1155 UNTS 331 (entered into force 21 January 1980) arts. 27, 46.

³⁷ *States; M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea)*, Memorial Submitted by St Vincent and the Grenadines [1998] ITLOS 2, ITLOS Rep 1999 13 [114–138] (in particular 125–127); *M/V ‘Virginia G’ (Panama/Guinea-Bissau)*, Judgment [2014] ITLOS 19, ITLOS Rep 2014 4 [208–223]. Private parties; *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2012] CJEU C-366/10, ECR 13833 [43, 45].

³⁸ Similarly, “widely accepted” by jurists; authorities below and Noah Bialostozky, ‘Extraterritoriality and National Security: Protective Jurisdiction as a Circumstance Precluding Wrongfulness’ (2014) 52 *Columbia Journal of Transnational Law* 617, 619.

³⁹ Already circumspect at the time, whereby jurisdiction was usually limited to the outer state borders with narrow exceptions; Parrish (n 24) 1679–1680; Rynjaert, *Jurisdiction in International Law* (n 13) 34; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 77.

⁴⁰ *Arrest Warrant Judgment (Sep. Op. Guillaume)* (n 28) [4]; *Arrest Warrant Judgment (Sep. Op. Bula-Bula)* (n 28) [79]; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, Declaration of

have also emphasised territorial sovereignty, providing further support for a permissive grounds approach.⁴¹ Finally, it best expresses the consent of the territorial state to foreign extraterritorial prescription within its domain.⁴²

2.2.4. The objectives of state jurisdiction

State jurisdiction and its limited permissive grounds serve several often overlapping objectives. When a claim's validity is ambiguous or disputed, these objectives may assist in interpreting legal validity or acceptability. Given the breadth of state practice requiring application, the permissive grounds are purposively broad. This leaves a margin of ambiguity, whereby the 'sufficiency' of a nexus to grant jurisdiction is open to different interpretations. A "teleological interpretation can assist in clarifying the customary rule's content".⁴³

Thus, ambiguous PSJ promoting the objectives of state jurisdiction should have greater claims to validity than incompatible claims.⁴⁴ Equally, any claims to progressive development should be compatible with its objective, or at least demonstrate the development of a rationale justifying new content. The primary objectives of the international law of jurisdiction below will assist in resolving grey area cases. Jurisdiction is exercised - and necessarily restricted - within the confines of international law to demonstrate state sovereignty (2.2.4.1), express societal values (2.2.4.2), establish legal certainty (2.2.4.3), distribute authority amongst equal actors (2.2.4.4), and ensure that the actions of non-state actors are adequately subjectable to legal system(s) (2.2.4.5).

Judge Ranjeva [2002] ICJ 121, ICJ Rep 2002 54 [9–11]; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, *Separate Opinion of Judge Rezek* [2002] ICJ 121, ICJ Rep 2002 91 [91–94].

⁴¹ *Arrest Warrant Judgment (Sep. Op. Guillaume)* (n 28) [15].

⁴² Upholding sovereign equality and "restrictions on the independence of States cannot be presumed" *SS Lotus* (n 27) 18.

⁴³ Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) 265.

⁴⁴ Similarly, rejection of reservations or interpretive declarations for incompatibility with the object and purpose e.g. Latvia (21 October 2013) and Sweden (18 October 2013) to Ecuador's declaration upon accession to UNCLOS; United Nations Convention on the Law of the Sea, Declarations and Reservations (MTDSG Vol 20 Ch XXI-6); VCLT (n 36) arts. 19-20, 41(1)(b)(ii), 58(1)(b)(ii), 60(3)(b), (art. 18 acts prior to entry into force).

2.2.4.1. *Manifestation of sovereignty and statehood*

When exercised, jurisdiction expresses state sovereignty and its limits, demonstrating an attribute of statehood.⁴⁵ Defining the content of law is one function of statehood. Exhaustive criteria for statehood are unsettled, but the agreed minimum would include a defined territory, permanent population and government in effective control.⁴⁶ Valid state jurisdiction defines and establishes the link(s) of persons, property, and acts, to the legal system(s) in which they are situated.⁴⁷

This is evident in strict territorial jurisdiction, which mirrors territorial sovereignty's boundaries.⁴⁸ Foreign interference within a legal order is permissible only when a sufficient nexus to another public order is established (2.3-2.4). Extraterritorial grounds thus reflect other statehood criteria, defending a state's relationship to its nationals (2.3.2.1), or other vital state interests (2.3.2.2). Territorial sovereignty is preserved, with limited foreign exercises of governmental functions that will not question statehood.⁴⁹

PSJ clearly linked to an element of statehood will have greater acceptance than dubious, or novel nexus claims. Likewise, the exercise of PSJ without a valid jurisdictional basis under international law would, at the very least, question the statehood of the flag state. If the PSJ extended to persons aboard a foreign vessel, or to conduct within a foreign coastal state's

⁴⁵ Sovereignty "expressed both internally as the relationship between a government and its citizens, and externally as the idea that a government has notional control over all affairs within a geographic area" Bennett and Strug (n 15) 48; *Island of Palmas (or Miangas) (The Netherlands/The United States of America)*, Award of the Tribunal [1928] PCA Case No 1925-01 (Arbitral Tribunal (Special Agreement)) 838. The "indissoluble" link results in strong objections to unauthorised enforcement, Stigall (n 18) 18.

⁴⁶ Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, adopted 26 Dec 1933, 165 LNTS 19 (entered into force 26 December 1934) art. 1. Other proposals, John Dugard, *International Law: A South African Perspective* (4th edn, Juta 2011) ch 5; Bennett and Strug (n 15) ch 5; Malcolm Shaw, *International Law* (7th edn, CUP 2014) ch 9.

⁴⁷ Jurisdiction makes "sovereignty visible and describable in strictly legal (i.e., technical) terms" Yang Xiaodong, 'Jurisdiction', *Oxford Bibliographies* (2012); defines its functions Dugard (n 46) 146. Richard T Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 *Michigan Law Review* 843, 904; Anthony J Colangelo, 'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law' (2007) 48 *Harvard International Law Journal* 121, 126.

⁴⁸ "Territorial sovereignty is the natural consequence of two fundamental criteria for statehood: a defined territory and government" Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 208.

⁴⁹ UN authorised foreign executive action limited by purpose and ends; Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011) 39–40.

jurisdiction, the state of nationality's and the coastal state's sovereignty would be questioned. In such cases, port states are exercising a sovereign function within a foreign legal order without the latter's consent.

2.2.4.2. *Identification of values held by states and the international community*

Global, regional and domestic legal orders use law as “a tool to express and communicate the values of the society that created the law”.⁵⁰ Universal jurisdiction, premised on suppressing heinous international crimes (2.3.3.1), is heavily influenced by the values upheld.⁵¹ Jurisdiction can therefore structure legal orders, settling conduct so reprehensible it should be punished by all. In contrast, when balancing interests concerning other heinous crimes, universal jurisdiction is not provided.⁵²

Other jurisdictional grounds, including territoriality, provide space for states to pursue their own values through law. Unlike universal jurisdiction, the state may pursue values different from those held collectively by the international community. Exercising extraterritorial jurisdiction often expresses societal values,⁵³ with expansive or novel exercises being closely linked to values. Alternative jurisdictional arguments or interpretations highlight their benefits and the inadequacy of current state jurisdiction, often with regard to compliance with international standards.⁵⁴

Thus, global, regional and unilateral PSMs frequently reference regional CMMs and combatting IUU fishing as defined in international agreements. Unilateralism focus is upon compliance with multilaterally agreed standards (including by non-CNCP vessels (ch 5)) or *UNCLOS* recognised distribution,⁵⁵ not novel standards that garner greater protest.

⁵⁰ Dan Svantesson, ‘A Jurisprudential Justification for Extraterritoriality in (Private) International Law’ (2015) 13 *Santa Clara Journal of International Law* 517, 552.

⁵¹ Ryngaert, *Jurisdiction in International Law* (n 13) 192; Dugard (n 46) 156.

⁵² Sovereign equality and independence may take priority over suppression. Sovereignty as a limitation, Orford (n 49) 27.

⁵³ Svantesson (n 50) 556.

⁵⁴ Cedric Ryngaert, ‘Whither Territoriality? The European Union’s Use of Territoriality to Set Norms with Universal Effects’ in Cedric Ryngaert, Erik J Molenaar and Sarah Nouwen (eds), *What’s Wrong with International Law?* (Brill 2015) 441, the potential to protect ‘global’ public goods, achieve global objectives and improve global standards when territoriality and quasi-universality boundaries are blurred.

⁵⁵ E.g. foreign coastal state EEZ laws.

2.2.4.3. *Protection of individuals and legal certainty*

Historically, individuals were an object to be governed, not a subject of international law.⁵⁶ As state jurisdiction progressively developed over a significant time period, it is doubtful their interests played a direct role in the allocation of competence, by states, and for states. Nonetheless, individuals are among its beneficiaries. By settling the legal systems applicable to individuals, they have a significant interest in foreseeable application as a matter of legal certainty. The flip-side of individuals knowing applicable systems is protection from unreasonable jurisdiction.⁵⁷ Protection extends to the general disapproval of conflicting legal obligations or multiple prosecutions for the same conduct.⁵⁸

State interests in this could be twofold. First, states may shield their permanent population from unknown and unconnected legal systems. Equally, their own legal system should function efficiently, only prescribing rules to influence conduct or expending enforcement resources when necessary. This only occurs when subjects know the law. The very existence of multiple legal systems demands a field of international law, which could objectively determine what legal system(s), and thereby what law, applies.⁵⁹

Vessels interact with a multitude of jurisdictions, expecting upon port entry that the port state's legal regime applies. International law should provide further guidance and certainty for states/non-state actors upon how far back or forward into previous/future extraterritorial conduct PSJ extends (problematised, 2.5.1).

⁵⁶ Subjects; Malcolm Evans, *International Law* (OUP 2010) chs 8–10. A comparably recent timeframe for non-state actors' status compared to definition of state jurisdiction grounds.

⁵⁷ Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (Intersentia 2005) 18. Historically, greater role for protecting citizens; Bartram S Brown, 'The Evolving Concept of Universal Jurisdiction' (2001) 35 *New England Law Review* 383, 390–391.

⁵⁸ Territoriality and extraterritorial exceptions, as the most effective way to achieve consistency, predictability, and the avoidance of abuse in judicial process or denial of rights; M Cherif Bassiouni, *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms, Volume 2* (Brill 2008) 158–159. Furthermore, democratic deficit if not accepted by host state, Ryngaert, *Jurisdiction in International Law* (n 13) 193–195.

⁵⁹ Clear rules for legal certainty and reasonableness, Institute of International Law, 'Resolution: Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes' (2005) preamble.

2.2.4.4. Allocation of jurisdictional competence

As equal states interact, the distribution of jurisdictional rights is regulated to minimize disputes.⁶⁰ Permissive jurisdictional grounds:

“form the crux of [...] jurisdiction, as they provide a principled framework for the difficult but necessary exercise of allocating competence”⁶¹

Firstly, objective (or ‘near enough’ to objective) application of state jurisdiction, together with insight in the grounds it rests upon, will denote legitimacy and legal validity before foreign states. A corresponding duty is recognition and respect for reciprocal rights. In most cases, prescription, adjudication and enforcement occur without dispute.

Secondly, settling who may exercise authority necessarily excludes others, or at least for comity is discouraging.⁶² Legal competence is exclusively determined by international law:

“There is no more important way to avoid conflict than by providing clear norms as to which state can exercise authority over whom, and in what circumstances”⁶³

Denying jurisdiction to states with an insufficient nexus avoids conflict. When disputes do arise, an agreed starting point in state jurisdiction promotes settlement.⁶⁴ Secondary principles, e.g. reasonableness or comity, prevent further conflicts when jurisdiction overlaps. In contrast, the international legal order is destabilised by unresolvable disputes, interpreted

⁶⁰ International law is “established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims” *SS Lotus* (n 27) 18.

⁶¹ Gallagher and David (n 48) 211. See further, Mika Hayashi, ‘The Information Revolution and the Rules of Jurisdiction in Public International Law’ in Myriam Dunn, Sai Felicia Krishna-Hensel and Victor Mauer (eds), *The Resurgence of the State: Trends and Processes in Cyberspace Governance* (Ashgate Publishing Ltd 2007) 60; Miller (n 14) 1231; Bruno Simma and Andreas Th. Müller, ‘Exercise and Limits of Jurisdiction’ in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 135–136.

⁶² Positive and negative obligations, Ryngaert, ‘The Concept of Jurisdiction in International Law’ (n 6) 51–54.

⁶³ Higgins (n 39) 56.

⁶⁴ Domestic benefits beyond PIL; Cedric Ryngaert, *Unilateral Jurisdiction and Global Values* (Eleven International Publishing 2015) 24.

as usurping sovereignty and “seriously damaging relations between states, leading to breakdowns of diplomatic relations, trade boycotts, and armed conflict”.⁶⁵

One weakness is that opposition to excessive jurisdiction is infrequently framed in explicit jurisdictional terms.⁶⁶ Equally, states sometimes use *Lotus* to justify extraterritoriality, removing the agreed starting point and prolonging disputes.⁶⁷ This undermines searches for widespread practice and *opinio juris* to settle grey areas.

Finally, effective and non-confrontational international law requires rules on jurisdictional allocation. For example, the coastal state duty to adopt conservation and management measures for EEZ living resources,⁶⁸ or the duty for all states to cooperate in repressing piracy,⁶⁹ are linked to jurisdiction. Clear jurisdictional delimitation is a precursor to obligations, or even to the extent of cooperation available.⁷⁰ For all states, rules on allocation are necessary to assess if itself or another state has fulfilled or gone beyond its obligations.

Framework conventions, e.g. *UNCLOS*, may lessen uncertainty by setting out clear and concise allocation rules.⁷¹ PSJ in combatting IUU fishing is however largely residual. A clear and complete understanding of customary law grounds is necessary.

2.2.4.5. *Provision of sufficient and global jurisdictional competence*

Allocation of competence and avoidance of conflict would be better served by rigorous rules that reduce overlap. However, the permissive grounds exhibit flexibility and concurrency to address the opposite dilemma; no state exercising jurisdiction. Where “no state has

⁶⁵ Eugene Kontorovich, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’ (2004) 45 *Harvard International Law Journal* 183, 189.

⁶⁶ For fear of binding themselves to a restricted interpretation; Ryngaert, *Jurisdiction in International Law* (n 13) 197. Beyond formal complaint, see blocking legislation, European Union Emissions Trading Scheme Prohibition Act of 2011 2012 126 STAT. 1477 art. 2.

⁶⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, *Counter Memorial of the Kingdom of Belgium* [2001] ICJ 121 [3.3.29-3.3.33]; Higgins (n 39) 77 citing EU and US examples.

⁶⁸ *UNCLOS* (n 3) arts. 61-62; *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion* [2015] ITLOS 21, ITLOS Rep 2015 4 [96, 97, 104–106, 211–212].

⁶⁹ *UNCLOS* (n 3) art. 100.

⁷⁰ A precursor to RFMO/A PSMs cooperation is identification of port states used by vessels engaged within the Convention Area.

⁷¹ Simma and Th. Müller (n 61) 148–149.

jurisdiction or is prepared to exercise it [...] international law might thus have a tendency to err on the side of caution and to ‘over-jurisdictionalise’”.⁷² Treaty-based jurisdiction can further broaden jurisdiction or its implementation.⁷³

Unwillingness to exercise state jurisdiction necessitates universal jurisdiction over gross human rights violations. Perpetrators often commit violations within a state’s governmental apparatus,⁷⁴ making prosecution unlikely through other jurisdictional nexuses. Alternatively, in order to avoid a situation in which no state has jurisdiction, jurisdiction is allocated for areas beyond national jurisdiction. Despite a lack of any territorial sovereignty, at least the flag state has jurisdiction (2.3.2.1.2; 2.4.2).

The imposition of jurisdiction as a duty is also to ensure sufficient jurisdictional competence. Port state duties assist in implementing international fisheries law where other states are unwilling or unable to exercise jurisdiction (ch 3). PSMs fulfilling this function are more acceptable to the international community than extraterritorial unilateral measures.

2.2.5. Sub-conclusions

State jurisdiction is distinguishable from other concepts of jurisdiction within international law. Prescriptive and enforcement state jurisdiction must be assessed independently, with a permissive grounds approach adopted. Every exercise of state jurisdiction must therefore be based upon a demonstrable permissive ground. The multitude of state interests served demonstrate why novel expansions or radical proposals should be treated with caution.

⁷² *ibid* 148.

⁷³ Hayashi (n 61) 66.

⁷⁴ i.e. the *locus delicti* (place of the act), Michael P Scharf, ‘Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States’ (2001) 35 *New England Law Review* 363, 368–369.

2.3. Permissive grounds for prescriptive state jurisdiction

This section introduces generally accepted permissive grounds for prescriptive jurisdiction.⁷⁵ A territorial/extraterritorial dichotomy characterises state jurisdiction, with extraterritorial jurisdiction defined by deduction, i.e. cases other than territorial jurisdiction.⁷⁶

Where conduct is connected to and thereby of interest to state(s) other than those in whose territory it occurred, an **extraterritorial element** arises. This is broader than extraterritorial jurisdiction *per se*, as states incorporate extraterritorial elements within territorial prescriptive jurisdiction where a sufficient link exists. This manuscript concerns itself with PSJ with an extraterritorial element; most notable when extraterritorial conduct is included within prescription. As will be seen, expansive application of territorial jurisdiction has been the method of choice for states exercising PSJ (ch 5-6).

2.3.1. Territorial jurisdiction

Territoriality is the primary ordering factor amongst states.⁷⁷ A physical “sphere”⁷⁸ of territory provides the legal boundaries of prescription.⁷⁹ Relevant attributes are therefore (a) the legal territory of a state,⁸⁰ and (b) the location(s) of the offence.⁸¹

Interest in suppression is often strongest where behaviour occurs. Conduct and state interests can extend beyond one state, so extensions of territorial jurisdiction cover cross-frontier offences to “secure the application of their laws to all elements of offences that they wish to

⁷⁵ Not uniformly applied, but adaptable to legal fields; Ryngaert, ‘The Concept of Jurisdiction in International Law’ (n 6) 218; FA Mann, ‘The Doctrine of Jurisdiction in International Law Revisited After Twenty Years’ in Académie de Droit International (ed), *Recueil des Cours 1984-III* (Martinus Nijhoff Publishers 1985).

⁷⁶ Various similar definitions; Parrish (n 24) 1678–1679.

⁷⁷ Historically, greater role of nationality/personal allegiances; Ryngaert and Zoetekouw (n 6) 188; Shalom Kassin, ‘Extraterritorial Jurisdiction in the Ancient World’ (1935) 29 *The American Journal of International Law* 237; Simma and Th. Müller (n 61) 141–142.

⁷⁸ M Cherif Bassiouni, *International Extradition: United States Law & Practice* (OUP 2007) 352–353.

⁷⁹ “The term territory is often a dependable variable on the notion of jurisdiction; that is the power to exercise dominion and control over a determined physical area” *ibid* 355. “[A]n indispensable attribute of national sovereignty” Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (OUP 2003) 45.

⁸⁰ Jurisdiction ‘territory’ may extend beyond political borders through foreign state consent (e.g. Military Base Agreements), or result from military occupation; “Special Status Territories”, Bassiouni, *International Extradition* (n 78) 355–359.

⁸¹ ‘Introductory Comment: Draft Convention on Jurisdiction with Respect to Crime’ (1935) 29 *The American Journal of International Law* 443, 445.

prosecute”.⁸² Extensions avoid impunity, but mean that whilst territorial jurisdiction is well accepted, its extent in practice can sometimes be contested. Generally accepted applications include (a) subjective territorial jurisdiction, (b) objective territorial jurisdiction, (c) the effects doctrine and (d) quasi-territorial jurisdiction.⁸³

2.3.1.1. *Subjective territorial jurisdiction*

“[J]urisdiction to prescribe [...] conduct that, wholly or in substantial part, takes place within its territory”⁸⁴

Territorial jurisdiction may be based upon where conduct is legally defined as occurring or having been initiated.⁸⁵ As this concerns a state where a substantial part of a crime was physically conducted, subjective territorial jurisdiction offers little objection. For example, “[t]here was no principle of international comity to prevent Parliament from prohibiting [...] physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom”.⁸⁶ Territorial sovereignty and the right to prescribe conduct therewith is not limited by the mere fact that conduct’s effects are only felt abroad.⁸⁷

Extraterritorial elements and oceans governance policies are incorporated through subjective PSJ, a notable example being static vessel conditions. These conditions essentially remain unchanged during a voyage, including in-port.⁸⁸ Thus, one may prescribe an offence for vessels equipped with a driftnet in-port, or prohibit a vessel leaving port until a static

⁸² Lowe and Staker (n 26) 322. Cross-border offences are address through stretching territorial jurisdiction because of its comparatively uncontroversial nature and the lack of a requirement for special justifications, Cedric Ryngaert, ‘Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law’ (2009) 9 *International Criminal Law Review* 187, 208.

⁸³ Domestic use and terminology differs, e.g. English and Welsh courts’ “terminatory approach”; Hirst (n 79) 46; Ryngaert, ‘Territorial Jurisdiction over Cross-Frontier Offences’ (n 82) 190–193. If narrower than international law, this is their discretion.

⁸⁴ American Law Institute (n 16) § 402.

⁸⁵ Hirst (n 79) 46; Lowe and Staker (n 26) 321; Simma and Th. Müller (n 61) 140 ‘conduct’.

⁸⁶ *Treacy v Director of Public Prosecutions* (1970) [1971] AC 537 (UK House of Lords) 561–562 (quoted, Purdy v DPP [2009] UKHL 45 para. 22).

⁸⁷ Equally, of practice utility given the sometimes uncertainty of where an offence has been completed (objective), Ademola Abass, *Complete International Law: Text, Cases, and Materials* (2nd edn, OUP 2014) 244–245.

⁸⁸ Sophia Kopela, ‘Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons’ (2016) 47 *Ocean Development & International Law* 89, 94; Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer 2014) 59–60.

condition is met. Compliance is thereby required throughout the journey, including seaward of the outer limit of territorial jurisdiction.

This territorialisation is possible because the content of prescription, the offence, substantially occurs in-port.⁸⁹ Extraterritorial effects may result and are a policy objective. However, these remain incidental to jurisdictional analysis.⁹⁰

One should note however, that many texts deal with the prescription of static conditions for port entry and offences based upon static conditions without distinction. This analysis should be limited to port state offences. The necessity of *domaine réservé*-based jurisdiction for extraterritorial conduct entry conditions suggests that static entry conditions should also be *domaine réservé*-based jurisdiction (2.5).⁹¹

⁸⁹ Henrik Ringbom, *The EU Maritime Safety Policy and International Law* (Brill 2008) 337–355; Henrik Ringbom, 'National Employment Conditions and Foreign Ships - International Law Considerations', *Scandinavian Institute of Maritime Law Yearbook* (Marlus 2015) 121–122; Bevan Marten, 'Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 106–107; Henrik Ringbom, 'Global Problem - Regional Solution? International Law Reflections on an EU CO2 Emissions Trading Scheme for Ships' (2011) 26 *International Journal of Marine and Coastal Law* 613, 622; George C Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port State Regime* (Martinus Nijhoff Publishers 1993) 110; George C Kasoulides, 'Global and Regional Port State Regimes' in Henrik Ringbom (ed), *Competing Norms in the Law of Marine Environmental Protection* (Kluwer Law International 1997) 122; Rosemary Gail Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff Publishers 2004) 69–70.

⁹⁰ Erik J Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998) 102.

⁹¹ NILOS, 'Study on the Labour Market and Employment Conditions in Intra-Community Regular Maritime Transport Services Carried out by Ships under Member States' or Third Countries' Flags Aspects of International Law' (2008) TREN/G01/380-2006 14–15 proposes a clear distinction between territorial and extraterritorial jurisdiction, with the 'presumption' of the territorial principle being sufficient for territorial jurisdiction. In practice, many cases incorporating vessel conduct will be a mix of the two, demonstrating caution against such a presumption. A few authors argue the continuous nature of static conditions demonstrates conduct largely takes place extraterritorially, thereby *excluding* territorial jurisdiction, Tatjana Keselj, 'Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding' (1999) 30 *Ocean Development & International Law* 127, 134; Ahmed Adham Abdulla, 'Flag, Coastal and Port State Jurisdiction over the Prevention of Vessel Source Pollution in International Law: Analysis of Implementation by the Maldives' (University of Wollongong 2011) 172. This ignores the fact territorial jurisdiction includes both property and acts within a territory. Vessel conditions are property conditions.

2.3.1.2. *Objective territorial jurisdiction*

Despite conduct being initiated abroad, territorial jurisdiction may still be based upon where the effects or consequences of the conduct occurred.⁹² This is where an offence is completed or accomplished. Nonetheless, disagreements on scope arise due to the flexibility of ‘effect’ and the reality that this may be within numerous states.⁹³ For example, it is debated whether intent to produce effects in a country is sufficient.⁹⁴

The rationale of objective territoriality is that the place where a constituent element and its effects are felt ‘suffers’ from the non-compliance. It therefore has an interest in prosecution.⁹⁵ This is in keeping with criminal law’s emphasis upon territoriality, where evidence is frequently found, punishment is sought, ‘example’ setting is possible, and effects are felt.⁹⁶

Restraining principles are thus necessary. The consequences must be a “constituent element” of the crime and the effects “significantly” adverse. Remote, indirect, or minor effects are excluded, although notably, it is left to national law to define the offence, and therefore what ‘constituent’ elements are.⁹⁷

Objectivity was initially a limited extension, whereby effects were “so much a part of the act that produced them ‘that their separation renders the offence non-existent’”.⁹⁸ However, states take a liberal approach to defining offences and ‘constituent’ elements, significantly broadening objective territoriality. This increases jurisdictional overlap, without a generally

⁹² Hirst (n 79) 46; Lowe and Staker (n 26) 321–322; Simma and Th. Müller (n 61) 140 ‘result’; *SS Lotus* (n 27) 23 “if one of the constituent elements of the offence, and more especially its effects, have taken place there”; Ryngaert, ‘Territorial Jurisdiction over Cross-Frontier Offences’ (n 82) 188.

⁹³ “[W]herever an essential element of the crime is accomplished” Parrish (n 24) 1682.

⁹⁴ The USA, (drug smuggling offences), *US v Noriega*, discussed Bassiouni, *International Extradition* (n 78) 366–367. This is arguably a matter of domestic law as it would be counterintuitive if intentional, but unsuccessful, or yet to be instigated, conduct was excluded. Germany exercises jurisdiction when element ‘should have taken place’, Ryngaert, ‘Territorial Jurisdiction over Cross-Frontier Offences’ (n 82) 199 citing *Strafgesetzbuch*, s. 9. *SS Lotus* (n 27) 24 obiter dicta, a consideration of interpreting domestic law (although, reliance was placed on a lack of restrictions to state jurisdiction).

⁹⁵ Abass (n 87) 242.

⁹⁶ *Arrest Warrant Judgment (Sep. Op. Guillaume)* (n 28) [4].

⁹⁷ Hirst (n 79) 46–47; Ryngaert, ‘Territorial Jurisdiction over Cross-Frontier Offences’ (n 82) 208.

⁹⁸ Parrish (n 24) 1680 citing *Lotus*.

applicable ordering principle being incorporated as a legal obligation.⁹⁹ This manuscript will subsequently demonstrate that PSJ makes significant use of objective territorial jurisdiction to combat extraterritorial IUU fishing. Other PSJ cases are visible. For example, US practice on ship-source pollution, including extraterritorial pollution, defines an offence around the submission of false or incomplete oil record books during inspection,¹⁰⁰ or a failure to “maintain” an accurate record book in-port.¹⁰¹

2.3.1.3. *Effects doctrine*

“[J]urisdiction to prescribe [...] conduct outside its territory that has or is intended to have substantial effects within its territory”¹⁰²

A controversial variation of objective territorial jurisdiction is the effects doctrine, which, against European objections, initially developed in US anti-trust law.¹⁰³ As *Alcoa* famously laid out, “it is settled law [...] any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends”.¹⁰⁴

⁹⁹ “The attitude of the judiciary [...] to pursue a pragmatic course [...] the state that has physical custody has *de facto* priority” Bassiouni, *International Extradition* (n 78) 366.

¹⁰⁰ “Whether or not the United States had the authority to regulate [...] unauthorized discharge [...] or any attendant Oil Record Book violations at that time does not bear upon our inquiry [...] the commission of false statements made to a United States agency” *US v Royal Caribbean Cruises, Ltd* (1998) 11 F Supp 2d 1358 (US District Court, SD Florida) 1364; Asia Wright, ‘Beyond the Sea and Spector: Reconciling Port and Flag State Control over Cruise Ship Onboard Environ-Mental Procedures and Policies’ (2007) 18 *Duke Environmental Law & Policy Forum* 215, 222–224.

¹⁰¹ “In *Ionia Management*, the court recognized that the “gravamen” of the action was “not the pollution itself, or even the Oil Record Book violation occurring at that time, but the misrepresentation in port.” [...] the government’s indictment in this case [...] failing to maintain the oil record book while in port.” *US v Jho* (2008) 534 F 3d 398 (US Court of Appeals, 5th Circuit) 404; in general, National Oceanic and Atmospheric Administration (NOAA), ‘Seaward Limit of Laws’ (NOAA) <http://www.gc.noaa.gov/gcil_seaward.html> accessed 25 February 2018.

¹⁰² American Law Institute (n 16) § 402.

¹⁰³ Objections; Hirst (n 79) 47–48; Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Brill 2007) 8–9. Contra, as a subcategory of the protective principle, Simma and Th. Müller (n 61) 141.

¹⁰⁴ *US v Aluminum Co of America* (1945) 148 F 2d 416 (US Court of Appeals, 2nd Circuit) 443. Subsequent caselaw focused upon the reasonableness of exercising jurisdiction and not whether effects-based jurisdiction was a right, Arlene Daffada, ‘The Protection of Trading Interests Act of 1980– Britain’s Latest Weapon in the Fight Against United States Antitrust Laws’ (1980) 4 *Fordham International Law Journal* 341, 361; Geert van Calster, ‘Regulating the Internet: Prescriptive and Jurisdictional Boundaries to the EU’s “Right to Be Forgotten”’ [2015] *SSRN Electronic Journal* 9–10.

Where applied to-date, namely antitrust/competition law and cases concerning the internet, one immediately notices that previous restrictions upon objective territorial jurisdiction, i.e. that effects form a constituent element of the offence or an act being terminated in the state, no longer apply.¹⁰⁵ Jurisdiction is not reliant upon constructive presence of an individual, e.g. via completion of the offence in its territory, but merely upon the “intentional [or unintentional¹⁰⁶] production of economic ‘effects’” within the state.¹⁰⁷

Indeed, cases where remote, indirect, or unintended effects were felt, but for which a state nevertheless exercised jurisdiction, were followed by blocking legislation and strong resistance to its extraterritoriality.¹⁰⁸ In the commonly cited example of the 1980 UK *Protection of Trading Interest Act*, the act was adopted “to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us”.¹⁰⁹

Nonetheless, the fine line between characterising a result as an effect of extraterritorial planning and commission, or as an element of the crime (objective/subjective territorial jurisdiction), can be witnessed in the literature upon actors other than the USA.¹¹⁰ The “implementation doctrine”, applied by the CJEU, justifies jurisdiction “on the basis of the territorial implementation of a conspiracy, rather than its territorial effects”.¹¹¹ *Woodpulp* reasoned for jurisdiction being available (a) where an infringement was formed, and (b) where it was implemented.¹¹² Yet, “place of implementation” is where a “direct and immediate,

¹⁰⁵ Absence of a constituent element can be why recourse to effects doctrine is made, Abass (n 87) 246.

¹⁰⁶ E.g. foreign uranium producers bared from the US market engaged in price fixing. Future effects within the USA after lifting the ban, would be unintended consequences, *Rio Tinto Zinc Corp v Westinghouse Electric Corp* (1978) 1 ER 434 (UK House of Lords); facts summary, Gardiner (n 26) 324–325; Lowe and Staker (n 26) 322–323 no ‘intraterritorial’ conduct.

¹⁰⁷ Lowe and Staker (n 26) 322–323. Intent; “foreign conduct that was meant to produce and did in fact produce some substantial effect” *Hartford Fire Ins Co v California* (1993) 509 US 764 (US Supreme Court) 796.

¹⁰⁸ If stretched, objective territorial jurisdiction could face similar criticisms, Hirst (n 79) 47–48. Reconceptualization, such as territorial extension, suggests conflicts will rest upon the extraterritorial scope of territorial jurisdiction rather than extraterritorial nexuses.

¹⁰⁹ Quoting the UK Secretary of State for Trade, AV Lowe, ‘Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980’ (1981) 75 *The American Journal of International Law* 257, 257.

¹¹⁰ “In practical terms, however, the differences between the effects and the implementation doctrine are small, and even non-existent” Ryngaert, *Jurisdiction in International Law* (n 13) 83; Simma and Th. Müller (n 61) 140.

¹¹¹ Subjective territorial principle variant, Ryngaert, *Jurisdiction in International Law* (n 13) 83.

¹¹² *Ahlström Osakeyhtiö and others v Commission of the European Communities* [1988] CJEU Joined C-89, 104, 114, 116, 117 and 125-129/85, ECR 5233 [16]; *Opinion of Mr Advocate-General Darmon, A Ahlström Osakeyhtiö*

reasonably foreseeable and substantial effect” occurred.¹¹³ This is simultaneously characterised as “intraterritorial” conduct,¹¹⁴ and an effects doctrine variant.¹¹⁵

Further supportive cases have followed *Woodpulp*, with the common suggestion “virtually all States apply some form of the ‘effects’ test”,¹¹⁶ albeit with divergent scope.¹¹⁷ When intent or foreseeability is removed, the effects doctrine takes on a broader and distinct unilateralism in scope.¹¹⁸ This legitimizes broad protective jurisdiction for a state’s citizens, or the potential for abuse; depending upon whether an outlook as regulating territory, or regulated territory, is adopted.¹¹⁹

Finally, the effects doctrine’s acceptability may be witnessed in changing approaches of international and academic criticisms.¹²⁰ They no longer focus upon effects doctrine’s legitimacy, but rather upon the failure to consider the territorial state’s interests where the regulated person or company is situated.¹²¹ Again, no ordering principle has been incorporated.¹²²

and others v Commission of the European Communities [1988] CJEU Joined C-89, 104, 114, 116, 117 and 125-129/85, ECR 5214 [47–58].

¹¹³ *Woodpulp (Darmon Opinion)* (n 112) [53] citing previous jurisprudence.

¹¹⁴ *Lowe and Staker* (n 26) 323.

¹¹⁵ Reliant upon a legal fiction of territorial elements, and “strained” application of objective territoriality; *Abass* (n 87) 247.

¹¹⁶ *Ryngaert, Jurisdiction in International Law* (n 13) 83–84; Jacques Hartmann, ‘A Battle for the Skies: Applying the European Emissions Trading System to International Aviation’ (2013) 82 *Nordic Journal of International Law* 187, 207.

¹¹⁷ “While there is widespread consensus that the effects doctrine is necessary to regulate anti-competitive behaviour, both the meaning and application of the doctrine vary considerably” Hartmann (n 116) 207.

¹¹⁸ “the [*Alcoa*] intent requirement largely fell out of use, referred to only where the impact on the US is indirect and not substantial [...] *Hartford Insurance* [...] applies to foreign conduct that was meant to produce an effect in the US, but the ruling left unclear what place intent has in the analysis” Calster (n 104) 9–11.

¹¹⁹ “[e]very assertion of sovereign power in the form of sanction [...] may be justifiable under the effects doctrine” *Ryngaert, Jurisdiction in International Law* (n 13) 83; “an excessive effects doctrine would indeed bear the risk of creating a sort of jurisdiction ‘butterfly effect’ [...] although this] also cuts in the other direction; the more complex and interlinked the world economy becomes and the more the liberal global economic order permits market-relevant activity to be performed from any place on the planet, the more it might prove necessary to adapt the concept of ‘result’ to the more complicated and interwoven reality of today’s economy” Simma and Th. Müller (n 61) 140–141.

¹²⁰ *Contra*, Nico Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108 *The American Journal of International Law* 1, 12–13.

¹²¹ Discussing criticisms following *Hartford Insurance*, Calster (n 104) 11.

¹²² E.g. “where the primary effect is felt” Michael Akehurst, ‘Jurisdiction in International Law’ (1972) 46 *British Year Book of International Law* 145, 154.

In an (air)port state context, the effects doctrine has recently and controversially been proposed within ATAA to incorporate extraterritorial emissions as contributions to pollution within the territory.¹²³ Combatting IUU fishing as a global policy objective may face similar criticisms for the effects of IUU fishing not being territorially discernible or limited.¹²⁴ An exception would be straddling or highly migratory fish stocks extending to the territorial sea or quasi-territorial jurisdiction within the EEZ. Alternatively, where pollution has no discernible territorial effect, the ‘effect’ of submitting false documentation upon the functioning of the port state’s authorities has been advanced.¹²⁵ This could be extended to PSMs and false documentation.

2.3.1.4. Quasi-territorial functional jurisdiction

Territorial jurisdiction above relies upon an element of territorial conduct, or legal fiction, to establish a sufficient nexus over an entire offence. Beyond hooking conduct within its territorial sovereignty, a state may equally extend prescriptive jurisdiction outwards. Thus, customary law of the sea empowers coastal states to claim quasi-territorial jurisdiction within their ‘sui generis’ maritime zones, the EEZ (or its variations),¹²⁶ and the continental shelf.¹²⁷ These maritime zones include territorial elements which, although insufficient to incorporate

¹²³ *C-366/10, ATAA (Judgment)* (n 37) [129]. Using the courts approach, IUU fishing is a threat to the sustainability of global fisheries and, given its highly mobile nature, could pose a threat (effect) to fish stocks within member states’ territories and EEZs. This can be contrasted with the court’s uncontroversial precedent, whereby a hydrocarbons spillage in the EEZ “drifted along the coast until they were washed up on it, so being discharged on the Member State’s land territory” *Commune de Mesquer v Total France and Total International Ltd* [2008] CJEU C-188/07, ECR 4501 [60–62].

¹²⁴ Emissions; Geert De Baere and Cedric Ryngaert, ‘The ECJ’s Judgment in Air Transport Association of America and the International Legal Context of the EU’s Climate Change Policy’ (2013) 18 *European Foreign Affairs Review* 389, 400–401.

¹²⁵ False documentation ‘effects’: “the agency’s function is compromised and the laws that agency seeks to enforce undermined” *US v. Royal Caribbean Cruises, Ltd.* (n 100) 1364; however, objective territorial jurisdiction is sufficient in such cases and the argument effects doctrine be limited to cases where effect is of ‘legal significance’ Marten, *PSJ and Merchant Shipping* (n 88) 94–95.

¹²⁶ E.g. exclusive fisheries zones, where only limited rights or functions are claimed. The Exclusive Economic Zone Order 2013 SI No. 3161 repealed and replaced various functional zones with a UK EEZ and a limited Renewable Energy and Gas Importation and Storage Zone.

¹²⁷ Concurrently treaty-based; UNCLOS (n 3) part V, VI; Convention on the Continental Shelf, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

the zone within a state's territory,¹²⁸ are nonetheless a nexus for jurisdiction exercised therein.

As an expression of the concept, "the land dominates the sea",¹²⁹ these maritime zones are generated by a sea-coastline.¹³⁰ Only as a coastal state are states availed the rights to declare or inherit these maritime zones, with the jurisdiction therein.¹³¹ These are states retaining sovereignty over lands adjacent to the waters in question,¹³² highlighting the importance of territory as the source of coastal state jurisdiction therein.¹³³ When territorial sovereignty over land is disputed (e.g. Antarctica),¹³⁴ the right to claim maritime zones or exercise jurisdiction therein may also be disputed.¹³⁵ Equally, when the lay of the land and titles to sovereignty result in overlapping maritime claims, delimitation is necessary.¹³⁶

¹²⁸ Territorial sovereignty ends at the outer limit of the territorial sea, Convention on the Territorial Sea and the Contiguous Zone, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964) art. 1(1); UNCLOS (n 3) art. 2(1).

¹²⁹ "[T]he consistency of the Court's [ICJ] view is beyond doubt that the territorial sovereignty of the coastal State must be the starting point for determining the maritime rights to which the State is entitled under international law" Bing Bing Jia, 'The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges' (2014) 57 German Yearbook of International Law 1, 13.

¹³⁰ Erik J Molenaar, 'New Maritime Zones and the Law of the Sea' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 251. The EEZ is an "adjacent" zone, while the CS is either a "natural prolongation of its land territory" or measured from a coastal state's baselines, UNCLOS (n 3) arts. 55; 76(1).

¹³¹ Baselines are determinative; UNCLOS (n 3) arts. 8 (internal waters), 3 (territorial sea), 49 (archipelagic water), 33 (contiguous zone), 57 (EEZ), 76 (CS).

¹³² "State having a sea coast, as distinct from a land-locked State" *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award [2015] PCA 2011-03 (Arbitral Tribunal (UNCLOS, Annex VII)) [203]; "a State from whose coast or baselines the breadth of the territorial sea is measured" George K Walker, *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention* (Brill 2011) 131.

¹³³ "[T]he fact that the territory of Western Sahara does not form part of the territory of the Kingdom of Morocco [...] the waters adjacent to the territory of Western Sahara are not [waters falling within the sovereignty or jurisdiction of Morocco]", *The Queen, on the application of Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs* [2018] CJEU C-266/16, ECLI:EU:C:2018:118 unpublished [57–69].

¹³⁴ Patrizia Vigni, 'Antarctic Maritime Claims: "Frozen Sovereignty" and the Law of the Sea' in Alex G Oude Elferink and Donald R Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff 2001).

¹³⁵ See also, whether a submission was primarily "interpretation and application of the term 'coastal State' [...] Or does the Parties' dispute primarily concern sovereignty, with [...] actions as a 'coastal State' merely representing a manifestation of that dispute?", *Chagos MPA Arbitration* (n 132) [211]; differing conclusion from tribunal, *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, *Dissenting and Concurring Opinion Judge James Kateka and Judge Rüdiger Wolfrum* [2015] PCA 2011-03 (Arbitral Tribunal (UNCLOS, Annex VII)) [17].

¹³⁶ UNCLOS (n 3) arts. 15, 50, 74, 83.

Jurisdiction within these maritime zones is extensive (spatial) but limited to regulation of activities related to a function attributed to the state (functional).¹³⁷ Debates focus upon the scope of these functions as a limitation.¹³⁸ PSJ in relation to its own (coastal state) jurisdiction within these maritime zones would therefore equally be quasi-territorial functional jurisdiction.¹³⁹ The state is enforcing its rights and interests as a coastal state in-port.¹⁴⁰ The focus here is extraterritorial PSJ, i.e. conduct spatially or functionally beyond these rights, meaning quasi-territorial functional jurisdiction is of little further interest.

2.3.2. Extraterritorial nexus jurisdiction

In addition to its territory, a state is defined by its population and government in effective control (2.2.4.1). Jurisdiction may be derived from these conditions of sovereignty and applied extraterritorially.¹⁴¹ Thus, extraterritorial prescription may be based upon the involvement of a state's legal subjects (2.3.2.1) or vital state interests (2.3.2.2.). In respect of PSJ, active nationality and flag state jurisdiction provide distinctive jurisdictions (2.3.2.1.1-2.3.2.1.2). These nexuses are already extraterritorially absolute, so the more qualified PSJ is unnecessary. In contrast, the grounds of passive personality and protective jurisdiction might establish a port state's jurisdictional nexus (2.3.2.1.3-2.3.2.2).

2.3.2.1. Nationality

Conduct or conditions not only occur somewhere but involve someone or something. The nexus between a state and a legal person provides a further jurisdictional ground;

¹³⁷ Irini Papanicolopulu, 'A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea' in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Brill 2014) 392.

¹³⁸ The "substantive limits", Bernard Oxman, 'The Territorial Temptation: A Siren Song at Sea' 100 *The American Journal of International Law* 830, 839. Conflicts are resolved through functionality and the economic (coastal) or non-economic (international community) interests at heart, Myron Nordquist, Satya Nandan and Shabtai Rosenne, *UN Convention on the Law of the Sea Commentary 1982 Online* (Brill 2013) para 59.6(b).

¹³⁹ Erik J Molenaar, 'Port and Coastal States' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 289.

¹⁴⁰ Rosemary Rayfuse, 'The Role of Port States' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2015) 72.

¹⁴¹ Colangelo terms these "intuitive" national jurisdiction, derived from independent sovereignty Anthony J Colangelo, 'Universal Jurisdiction as an International "False Conflict" of Laws' (2009) 30 *Michigan Journal of International Law* 881, 886–888.

“[J]urisdiction to prescribe [...] the activities, interests, status, or relations of its nationals outside as well as within its territory”¹⁴²

Jurisdictional nexuses may attach to the offender (active nationality), a registered vessel (a rule of common convenience akin to nationality), or to a victim of an offence (passive personality). Prescriptive jurisdiction exercised by the state of registry over registered aircraft, spacecraft and perhaps offshore structures is comparable to that of flag state jurisdiction.¹⁴³ However, jurisdictional obligations to combat IUU fishing and promote port state responsibilities are explicitly broader for flag states (2.3.2.1.2, 3.2.2.5). Flag state jurisdiction is therefore the registry state discussed below.

2.3.2.1.1. Active nationality

Historically, one’s allegiance was the dominant jurisdictional basis, with laws ‘following’ a person.¹⁴⁴ Prescriptive jurisdiction continues over nationals wherever they may be,¹⁴⁵ the defining factor being the offender’s nationality. ‘Active nationality’ remains founded upon a legal person’s allegiances towards their state of nationality,¹⁴⁶ and the (now qualified) lack of third state interest in how states treat their own nationals.¹⁴⁷ Many criminal codes exhibit

¹⁴² American Law Institute (n 16) § 402.

¹⁴³ Aircraft, Convention on International Civil Aviation, adopted 7 December 1944, 15 UNTS 295 (entered into force, 4 April 1947) arts. 17-19; UNCLOS (n 3) art. 104; Spacecraft, Vincent P Cogliati-Bantz, *Means of Transportation and Registration of Nationality: Transportation Registered by International Organizations* (Routledge 2015) 28–37; Offshore installation UNCLOS (n 3) state of registry (arts. 109[3][b], 262) and its rights (arts. 87[1][d], 94[7]).

¹⁴⁴ Customary personal law, quoting Blackstone (1765, p. 104), Gordon Woodman, ‘Pitcairn Island Law: A Peculiar Case of the Diffusion of the Common Law’ in Dawn Oliver (ed), *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP 2009) 65, 68.

¹⁴⁵ Well-established; Abass (n 87) 248; Lowe and Staker (n 26) 323; Hirst (n 79) 101; Ryngaert, *Jurisdiction in International Law* (n 13) 104.

¹⁴⁶ E.g. status of Pitcairn, settled by mutineers rejecting the Crown but nonetheless held to be a colony by settlement as per executive decrees, *Christian and Ors v The Queen* [2006] PNPC 1 (UK Privy Council) [9–10]; ‘It may nonetheless have been the case under English law that they were to be treated as colonial settlers’ Dawn Oliver, ‘The Pitcairn Prosecutions, Paper Legal Systems, and the Rule of Law’, *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP 2009) 24–26.

¹⁴⁷ ‘Draft Convention on Jurisdiction with Respect to Crime (Comment: Article 5)’ (1935) 29 *The American Journal of International Law* 519, 519.

active nationality,¹⁴⁸ and a recent revival, such as the UK's *Modern Slavery Act 2015*,¹⁴⁹ provides extraterritorial application for serious offences.¹⁵⁰

However, conditions of nationality are set domestically, resulting in divergent practice.¹⁵¹ Examples include natural persons, born within the territory (*jus soli*), born to a national of the state (*jus sanguinis*), and those conferred nationality (*naturalisation*). For legal persons, nationality may be established where a business is incorporated, or where its management has its seat.¹⁵² Legal persons may have multiple nationalities, resulting in concurrent jurisdiction.¹⁵³ Additionally, acts of “governmental authorities, or persons contracted by or under the authority of their own governmental authorities”,¹⁵⁴ or exceptionally residents,¹⁵⁵ are included within this nexus.

Active nationality within fisheries may underlie the broadening of UNCLOS, art. 117's “[d]uty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas” beyond flag states.¹⁵⁶ In general, states “can criminalize and prosecute their own nationals’ involvement in illegal activities on board foreign vessels in any

¹⁴⁸ Simma and Th. Müller (n 61) 142; Lowe and Staker (n 26) 325.

¹⁴⁹ *Modern Slavery Act 2015* art. 2(6); *Modern Slavery Act 2015: Explanatory Notes 2015* para 28.

¹⁵⁰ Note claims to historically “abundant” UK use whilst others claim “sparingly” exercised; Dino Kritsiotis and AWB Simpson, ‘The Pitcairn Prosecutions: An Assessment of Their Historical Context by Reference to the Provisions of Public International Law’ in Dawn Oliver (ed), *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP 2009) 102; Hirst (n 79) 49. Practice may be stimulated by desires for effectiveness or to avoid extraditing their own nationals, Abass (n 87) 249–250; Lowe and Staker (n 26) 325.

¹⁵¹ Lowe and Staker (n 26) 323–325; “nationality is within the domestic jurisdiction of the State” *Nottebohm Case (second phase)*, *Judgment* [1955] ICJ 18, ICJ Rep 1955 4 20.

¹⁵² Lowe and Staker (n 26) 323–324.

¹⁵³ Dual nations, *ibid* 323; Abass (n 87) 248–249.

¹⁵⁴ Lowe and Staker (n 26) 325.

¹⁵⁵ *ibid*; Crime (International Co-operation) Act 2003 art. 52, introducing Terrorism Act 2000, ss 63B (Terrorist attacks abroad by UK nationals or residents: jurisdiction); War Crimes Act 1991 art. 1(2) subsequently resident.

¹⁵⁶ Also, 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, adopted 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001) 1995 art. 7; UNCLOS (n 3) art 97(1); Gavouneli (n 103) 33. Supplementing the primary flag state responsibility, Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, adopted 24 February 2012, US Senate Treaty Doc. 113-2 (entered into force, 19 July 2015) arts. 17(7)(a), 20(2).

maritime zone”.¹⁵⁷ When combatting IUU fishing, its jurisdictional importance is recognised and may also be enforced in-port.¹⁵⁸

2.3.2.1.2. Flag state jurisdiction

Vessel flags, as a loose communal identification, have a long history in defining who is in control.¹⁵⁹ They soon developed into symbolising state allegiance.¹⁶⁰ The flag did not constitute the vessel-state link, but under customary law identified “the legal regime of the ship on the seas”.¹⁶¹ Thus, the flag state was born, i.e. the state “whose flag the ship flies and is entitled to do so under *UNCLOS*”.¹⁶²

Any state may become a flag state,¹⁶³ provided it sets conditions for registration.¹⁶⁴ For convenience, the jurisdiction of fishing entities over flagged vessels (e.g. Chinese Taipei) is treated as equivalent. Flag states are largely free to set their own registration conditions.¹⁶⁵

¹⁵⁷ ILO Special Action Programme to Combat Forced Labour (DECLARATION/SAP-FL), Sectoral Activities Department (SECTOR), ‘Caught at Sea: Forced Labour and Trafficking in Fisheries’ (ILO 2013) 26; caselaw discussed Geoffrey Marston, ‘Crimes by British Passengers on Board Foreign Ships on the High Seas: The Historical Background to Section 686(1) of the Merchant Shipping Act 1894’ (1999) 58 *The Cambridge Law Journal* 171, 171–175, 193.

¹⁵⁸ FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2001) paras 9.3, 15, 18–19, 21, 73–74; FAO, ‘Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (FAO 2002) FAO Technical Guidelines for Responsible Fisheries 9 pt. 3.2.2; Diane Erceg, ‘Deterring IUU Fishing through State Control over Nationals’ (2006) 30 *Marine Policy* 173; Mary Ann E Palma, Martin Tsamenyi and William R Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill 2010) 104; ‘any person with the nationality of the Republic of China shall not engage in or support IUU fishing’ Act for Distant Water Fisheries 2016 (Presidential Order Hua-Tsung (1) Yi-Tzu No 10500079291) arts. 13–14.

¹⁵⁹ Practice c. 1000 BCE, Nivedita M Hosanee, ‘A Critical Analysis of Flag State Duties as Laid down under Article 94 of the 1982 United Nations Convention on the Law of the Sea’ (United Nations-Nippon Foundation Fellowship Thesis, Milan 2008) 8.

¹⁶⁰ John NK Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer 2009) 14.

¹⁶¹ Hosanee (n 159) 9.

¹⁶² Walker (n 132) 193; similarly, United Nations Convention on Conditions for Registration of Ships, adopted 7 February 1986, UN Doc. TD/RS/CONF/19/Add.1 (not in force) art. 2.

¹⁶³ UNCLOS (n 3) art. 90; Convention on the High Seas, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art. 4; UNCRCR (n 162) art. 4(1); Jeremy Firestone and James J Corbett, ‘Maritime Transportation: A Third Way for Port and Environmental Security’ (2003) 9 *Widener Law Symposium Journal* 403, 403.

¹⁶⁴ UNCLOS (n 3) art. 91; 1958 HSC (n 163) art. 5.

¹⁶⁵ David Attard and Patricia Mallia, ‘The High Seas’ in Malgosia Fitzmaurice and Norman A Martinez Gutierrez (eds), *The IMLI Manual on International Maritime Law: The Law of the Sea*, vol 1 (OUP 2014) 247; furthermore, 1958 HSC (n 163) art. 18; UNCLOS (n 3) art. 104, retention/loss of nationality determined by state of nationality laws.

Beyond the implied need for a registry, there are three general limitations. The vessel must not already be flagged,¹⁶⁶ registration must not be prohibited by a treaty obligation, and finally there must exist a “genuine link”.¹⁶⁷

Genuine link is loosely defined as a sufficient link to enable the flag state to exercise effective jurisdiction over the vessel. This lies somewhere between registration, which provides a link, and a proposal for economic ties which states reject as a necessity for genuine link.¹⁶⁸ *UNCLOS*, art. 94(6) provides foreign states may question the genuine link, requesting a flag state investigation.¹⁶⁹ Having recognised the requirement of genuine link only arises after registration,¹⁷⁰ ITLOS¹⁷¹ and the CJEU¹⁷² have, to date, dismissed further sanctions such as non-recognition.

Flag state jurisdiction is disputed as territorial or nationality-based jurisdiction.¹⁷³ The PCIJ,¹⁷⁴ and at least Italy,¹⁷⁵ treat it as territorial. The correct rationalisation is something akin to

¹⁶⁶ *UNCLOS* (n 3) art. 92, contrasts with active nationality which accepts dual nationality.

¹⁶⁷ Richard Barnes, ‘Flag States’ in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 306; *Muscat Dhows (France/Great Britain)*, Award [1905] PCA 1904-01 (Arbitral Tribunal (Compromis)) 2.

¹⁶⁸ Robin R Churchill, ‘The Meaning of the “genuine Link” Requirement in Relation to the Nationality of Ships’ (International Transport Workers’ Federation 2000) 68–73; Ariella D’Andrea, ‘The “genuine Link” Concept in Responsible Fisheries: Legal Aspects and Recent Developments’ (2006) 61 *FAO Legal Papers Online* 16; ‘[UNCLOS] does not require that a ship’s master be a national of the flag State’ *Colegio de Oficiales de la Marina Mercante Española v Administración del Estado* [2003] CJEU C-405/01, ECR 10391 [46].

¹⁶⁹ Darren S Calley, *Market Denial and International Fisheries Regulation: The Targeted and Effective Use of Trade Measures Against the Flag of Convenience Fishing Industry* (Martinus Nijhoff Publishers 2011) 99; Churchill (n 168) 48–49.

¹⁷⁰ *M/V “Virginia G” (Judgment)* (n 37) [110, 113] doesn’t impose ‘prerequisites or conditions’ for granting nationality, ‘once a ship is registered’ obligation arises.

¹⁷¹ *M/V “Saiga” (No 2) (Saint Vincent and The Grenadines v Guinea)*, Judgment [1999] ITLOS 2, ITLOS Rep 1999 10 [80–86]; matter of domestic law, *M/V “Louisa” (Saint Vincent and the Grenadines v Kingdom of Spain)*, Judgment, Declaration of Judge Paik [2013] ITLOS 18, ITLOS Rep 2013 49 [3].

¹⁷² *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] CJEU C-286/90, ECR 06019 [13–15]; Churchill (n 168) 27–33 discussing European cases.

¹⁷³ Daniel Bodansky, ‘Protecting the Marine Environment from Vessel Source Pollution: UNCLOS III and Beyond’ (1991) 18 *Ecology Law Quarterly* 719, 736.

¹⁷⁴ *SS Lotus* (n 27) 25.

¹⁷⁵ Attard and Mallia (n 165) 247–248 fn. 42, discussing Italian Navigation Code, art. 4; critique application in caselaw, Seline Trevisanut, ‘The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea’ (2014) 27 *Leiden Journal of International Law* 661, 673.

nationality, albeit with distinctive characteristics.¹⁷⁶ Territoriality is nevertheless a useful metaphor, as acts aboard are treated “as if” committed within, or in relation to, a territory.¹⁷⁷

But the principle is best seen as a rule of convenience, applied to chattels by international consent.¹⁷⁸ Floating territory is rejected by states, and a state’s territory is immaterial to defining this jurisdiction.¹⁷⁹ Difficulties in applying active nationality include that flag state jurisdiction is more extensive and persons “involved or interested” in a vessel’s operations may not have the nationality of the flag state.¹⁸⁰

PSJ interest lays in prescription over foreign flagged vessels (1.2). For flagged vessels, no broader prescription rights are available. However, complementary obligations may be imposed. *PSMA* parties should apply measures to flagged vessels “at least as effective in preventing, deterring, and eliminating IUU fishing and fishing related activities in support of such fishing”.¹⁸¹

2.3.2.1.3. Passive personality

State allegiance is accompanied by a “corresponding right or duty of protection of the state with regard to the national”.¹⁸² A crime against a national may also be an affront against that

¹⁷⁶ Flag state jurisdiction “partakes more of the characteristics of personal than of territorial sovereignty” *Cunard SS Co v Mellon* (1923) 262 US 100 (US Supreme Court) 123–124; “a derivative’ from the active nationality principle” Joop Voetelink, *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (Springer 2015) 121.

¹⁷⁷ Hirst (n 79) 52. Similarly, objective and subjective variations apply.

¹⁷⁸ As reasoned, *The Case of the SS Lotus (France v Turkey)*, *Judgment, Dissenting Opinion of Lord Finlay* [1927] PCIJ 9, PCIJ Ser No 10 50 53.

¹⁷⁹ Yoshifumi Tanaka, ‘Jurisdiction of States and the Law of the Sea’ in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 139.

¹⁸⁰ ‘the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State’ *M/V ‘Saiga’ (No. 2) Judgment* (n 171) [106]; *M/V ‘Virginia G’ (Judgment)* (n 37) [127]; “A unit such that its crew, all persons and objects on board, as well as its owner and every person involved or interested in its operations, are part of an entity linked to the Netherlands as the flag State” *The Arctic Sunrise Arbitration (Netherlands v Russia)*, *Award on the Merits* [2014] PCA 2014-02 (Arbitral Tribunal (UNCLOS, Annex VII)) [170–172]. The objective variation of flag state jurisdiction being greater than the corresponding passive personality found within nationality doctrine – i.e. protection of persons aboard who are not nationals, or even crew.

¹⁸¹ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, opened for signature 22 November 2009, I-54133 (entered into force 5 June 2016) art. 20(6).

¹⁸² Simma and Th. Müller (n 61) 142.

state.¹⁸³ Passive personality therefore provides state jurisdiction over foreigners for serious crimes committed against the state's nationals, wherever they occur.

Whilst initially subject to scepticism,¹⁸⁴ passive personality is now at least well-founded for serious crimes specifically targeting a state's nationals, e.g. terrorism.¹⁸⁵ It can be expected to expand into other fields and, as seen with active nationality, persons (or property) protected, e.g. acts against a state's residents.¹⁸⁶

Passive personality-based extraterritorial jurisdiction may be linked to port use, e.g. US criminal law, but this is not a necessity of international law.¹⁸⁷ Such crimes are within the state's prescriptive jurisdiction, regardless of whether a vessel is entering or departing a port.¹⁸⁸

2.3.2.2. *Protective jurisdiction*

Protective jurisdiction is undisputed for certain crimes, regardless of what nationalities are involved, where it was committed, or where the harm was felt;

¹⁸³ Spanish jurisprudence, Abass (n 87) 258–259.

¹⁸⁴ 'Introductory Comment: Draft Convention on Jurisdiction with Respect to Crime' (n 81) 445; ICC did not include in statute Simma and Th. Müller (n 61) 143; 'could' have been basis, but court reserved its opinion *SS Lotus* (n 27) 22–23; rejected *SS Lotus Judgment (Dis. Finlay)* (n 178) 55–58; *The Case of the SS Lotus (France v Turkey)*, Judgment, Dissenting Opinion by M Loder [1927] PCIJ 9, PCIJ Ser No 10 34 35–36.

¹⁸⁵ See discussion 18 United States Code [2017] § 2332 (once an objecting state to passive personality jurisdiction); Hirst (n 79) 51; and historical caselaw, Abass (n 87) 256–257.

¹⁸⁶ As highlighted, Lowe and Staker (n 26) 325; Crime (International Co-operation) Act (n 155) inserting, Terrorism Act 2000, s 63(c), 'Terrorist attacks abroad on UK nationals, residents and diplomatic staff etc: jurisdiction'; Joanne Scott, 'The New EU "Extraterritoriality"' (2014) 51 Common Market Law Review 1343, 1360–1364 "transacting with an EU person or property".

¹⁸⁷ 18 U.S.C. 2017 (n 185) § 7(8) "To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States".

¹⁸⁸ Port reference may be a domestic limitation having broadly defining passive personality, *US v Roberts* (1998) 1 F Supp 2d 601 (US District Court, ED Louisiana) 608; 18 U.S.C. 2017 (n 185) § 7(7) applicable high seas offences with no such limitation.

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“[J]urisdiction to prescribe [...] certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests”¹⁸⁹

This protects vital state interests from extraterritorial threats which might otherwise go unpunished by unconcerned host states.¹⁹⁰ In contrast to territorial jurisdiction, no actual effect upon the territory is required.¹⁹¹ Intentionally targeting a state’s vital interests is sufficient.¹⁹² However, the threshold for an act ‘threatening’ an interest, and how this is assessed, is disputed. Papastavridis, discussing US drug trafficking case law, reasons a “real potential danger for the security or public order of the state concerned” must be present before a nexus between illicit cargo and state can be established.¹⁹³

Such acts planned, or launched, from foreign territories are largely restricted to security threats; an attack upon a state’s sovereignty and political independence.¹⁹⁴ Extraterritorial threats to security, “or the operation of its governmental functions”,¹⁹⁵ include espionage, treason and currency counterfeiting.¹⁹⁶ Other suggestions include terrorism-related

¹⁸⁹ American Law Institute (n 16) § 402; The ‘focus’ being “the nature of the interest that may be injured” Christopher L Blakesley, ‘United States Jurisdiction over Extraterritorial Crime’ (1982) 73 *Journal of Criminal Law and Criminology* 1109, 1137.

¹⁹⁰ Inadequacy of foreign laws and lack of global authority necessitate unilateral jurisdiction, Bialostozky (n 38) 620.

¹⁹¹ E.g. targeting of “military and diplomatic missions located abroad” Ilias Bantekas, ‘Criminal Jurisdiction of States under International Law’, *Max Planck Encyclopedia of Public International Law* (OUP 2011) para 20.

¹⁹² Blakesley (n 189) 1111; “even when no effect occurs within the territory, but only when these actions potentially have adverse effect on or pose a danger to the state’s security, integrity, sovereignty, or governmental function” *ibid* 1136; Karl Meessen, *Extraterritorial Jurisdiction in Theory and Practice: [Contains the Edited of a Symposium Held in Dresden Between 8 and 10 October 1993]* (Martinus Nijhoff Publishers 1996) 109; Bialostozky (n 38) 623.

¹⁹³ Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart 2014) 249–251, 255 attempts to import drugs, by evading customs and narcotics laws, is said to challenge the governmental functions of the US.

¹⁹⁴ ‘Draft Convention on Jurisdiction with Respect to Crime (Comment: Article 7)’ (1935) 29 *The American Journal of International Law* 543, 543; e.g. treason, ‘a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm should be amenable to its laws’ *Joyce v DPP* [1946] AC 347 (UK House of Lords) 372.

¹⁹⁵ *US v Pizarusso* (1967) 388 F 2d 8 (US Court of Appeals, 2nd Circuit) 10; Ryngaert, *Jurisdiction in International Law* (n 13) 116–117; Peter Greenwald, ‘Pollution Control at the Maritime Frontier: The Limits of State Extraterritorial Power’ (1979) 19 *Santa Clara Law Review* 747, 756.

¹⁹⁶ Bialostozky (n 38); Akehurst (n 122) 158; ‘Draft Convention on Jurisdiction with Respect to Crime’ (n 29) art. 8.

conduct,¹⁹⁷ arms control violations,¹⁹⁸ immigration and customs control violations,¹⁹⁹ drug smuggling,²⁰⁰ and lying to consulate staff.²⁰¹

In a maritime context, vital coastal state interests could be broader given any societal or economic dependence on the coastline, or coastal resources. Thus, prior to *UNCLOS*, protection of resources and environmental integrity was argued as a sufficient state interest for jurisdiction over “grave threats” posed by pollution from passing vessels. This was particularly so for vulnerable ice-covered waters,²⁰² although such jurisdiction was subsequently incorporated within *UNCLOS*, art. 234, and broader quasi-territorial EEZ jurisdiction.²⁰³

A restrictive approach to expanding the subject matter or precedents for protective jurisdiction should be taken. Dangers include; politicisation; lack of objective evaluation; post-facto defence/vengeance; weaponization against foreign state sovereignty; self-defined sovereignty and thus scope; likelihood of an unfair trial; undermining international relations where acts are condoned by a foreign state, and possible judgment upon state acts.²⁰⁴ Indeed, application may already be too broad in cases with no meaningful threat to national security.²⁰⁵ A reasonableness-threshold provides little settlement capacity when state interests are centre stage.²⁰⁶

¹⁹⁷ Gavouneli (n 103) 32; Papastavridis (n 193) 149.

¹⁹⁸ Jennifer A Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas’ (2010) 59 Corporate Social Responsibility Initiative Working Paper 121.

¹⁹⁹ Greenwald (n 195) 756.

²⁰⁰ Gavouneli (n 103) 31 discussing US practice and the (repealed) 1986 Maritime Drug Law Enforcement Act. Discussing the US practice and the now repealed 1986 *Maritime Drug Law Enforcement Act*.

²⁰¹ Ryngaert, *Jurisdiction in International Law* (n 13) 116–119; Blakesley (n 189) 1135.

²⁰² Bialostozky (n 38) 633–644 discussing Canadian Arctic Waters Pollution Prevention Bill, S.C. 1969–70, c. 47 and Canadian Reply to U.S. Government, 9 I.L.M. 607, 608 (1970); Linda Paul, ‘Using the Protective Principle to Unilaterally Enforce Transnational Marine Pollution Standards’ in RS Shomura and ML Godfrey (eds), *Proceedings of the Second International Conference on Marine Debris, 2-7 April 1989, Honolulu, Hawaii* (NOAA 1990) 1054–1056. For earlier (Truman Proclamation) and later (1990 Oil Pollution Act) US protective practice, Gavouneli (n 103) 31; Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (n 90) 84–85.

²⁰³ Contra, if not quasi-territorial functional jurisdiction (2.3.1.4), this is a protective/quasi-territorial jurisdiction hybrid, Iain Cameron, ‘International Criminal Jurisdiction: Protective Principle’, *Max Planck Encyclopedia of Public International Law* (OUP 2007) para 9.

²⁰⁴ As summarised Ryngaert, *Jurisdiction in International Law* (n 13) 115; Cameron (n 203) para 21.

²⁰⁵ Bialostozky (n 38) 619; Papastavridis (n 193) 250.

²⁰⁶ This “dresses up comity considerations and presents them as an international rule” Bialostozky (n 38) 621.

Apart from limitation to offences that significantly harm state security, sovereignty, or governmental functions, regulation should be a matter of necessity.²⁰⁷ Applicability in PSJ could occur when a real danger is established.²⁰⁸ One extraterritorial state interest is that its “vessels, nationals or companies may fish, trade or consume [marine living] MLR resources sourced from those waters beyond its own”.²⁰⁹ The conceptual limitation of ‘vital’ would however be significantly diluted if this were sufficient for protective jurisdiction. Otherwise, national consumption could be linked to swaths of extraterritorial regulation. Furthermore, market interaction may be a policy objective, but PSMs broadly target vessel/product interaction with the port state’s territory.

Hypothetically, a distant water fishing nation may be dependent upon an extraterritorial fishery, which if threatened by IUU fishing, may thereby threaten that nation’s food security or economy.²¹⁰ That would be exceptional. Alternatively, presenting false evidence to acquire immigration papers may have effects detrimental to a state’s sovereignty and independence.²¹¹ However, it is doubtful the false evidence example could, or should, extend to all dishonest conduct and false documentation within the context of visiting fishers.

2.3.3. Universal jurisdiction

Universal jurisdiction is based solely upon the nature of the crime, “transcending” national sovereignty with no nexus required and territoriality/extraterritoriality being irrelevant:

“[T]he competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any

²⁰⁷ “Only then would a state be sufficiently linked to extraterritorial conduct to warrant interference in the domestic affairs of another state” *ibid* 622.

²⁰⁸ Arron N Honniball, *Port State Jurisdiction Beyond Oceans Governance: The Closure of Ports to Qatar in the 2017 ‘Gulf Crisis’* (2017) <<https://www.ejiltalk.org/port-state-jurisdiction-beyond-oceans-governance-the-closure-of-ports-to-qatar-in-the-2017-gulf-crisis/>> (although not in this case).

²⁰⁹ Proposing protective jurisdiction basis of extraterritorial PSMs, Gregory L Rose and Martin Tsamenyi, ‘Universalising Jurisdiction over Marine Living Resources Crime’ [2013] WWF Report 68.

²¹⁰ If ports are regionally important, PSMs could be an effective mechanism.

²¹¹ Recent Developments, ‘Protective Principle of Jurisdiction Applied to Uphold Statute Intended to Have Extra-Territorial Effect’ (1962) 62 *Columbia Law Review* 371.

link of active or passive nationality, or other grounds of jurisdiction recognized by international law”²¹²

Other definitions equally avoid the political sensitivity of what is required by defining what is not required for universal jurisdiction.²¹³ Divisions over offences covered persist,²¹⁴ which for a prescriptive basis defined by its offences, is deeply troubling.²¹⁵ This is exacerbated when obligations attach to exercising universal jurisdiction.²¹⁶

When implemented, further disputes arise, e.g. whether its application has been discriminatory,²¹⁷ or about its relationship to immunity.²¹⁸ Outright opponents, such as Guillaume, point to these inherent dangers in order to discourage universal jurisdiction beyond piracy and quasi-universal treaty provisions.²¹⁹ The equally dangerous alternative of universally held values being degraded and destroyed by jurisdictional paralysis comes to mind.

Nevertheless, two broadly descriptive requirements can be distilled from practice for identifying a crime of universal jurisdiction.²²⁰ It must be of such universal concern that states

²¹² Institute of International Law (n 59) art. 1. M Cherif Bassiouni, ‘The History of Universal Jurisdiction and Its Place in International Law’ in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2006) 43–44; Ryngaert, *Jurisdiction in International Law* (n 13) 120–142.

²¹³ See all sources cited, Ryngaert, *Jurisdiction in International Law* (n 13) 120 fn. 132.

²¹⁴ open termed definition, American Law Institute (n 16) § 404 ‘certain offenses recognized by the community [...] such as [...] and perhaps’.

²¹⁵ “[U]niversal jurisdiction derives from a State’s shared entitlement— with all other States in the international legal system—to apply and enforce the international law against universal crimes” Colangelo (n 141) 888–892.

²¹⁶ Allyson Bennett, ‘That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act’ (2012) 37 *The Yale Journal of International Law* 433, 437; Arron N Honniball, ‘The “Private Ends” of International Piracy: The Necessity of Legal Clarity in Relation to Violent Political Activists’ (2015) 13 *ICD Briefs* pt III.

²¹⁷ “[C]reating unnecessary frictions between states, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution” M Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42 *Virginia Journal of International Law* 81, 82.

²¹⁸ *ibid* 83–87; Ryngaert, *Jurisdiction in International Law* (n 13) referred to as controversies on the “modalities of its application”.

²¹⁹ “To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary, for the benefit of the powerful, purportedly acting as agent for an ill-defined ‘international community’” *Arrest Warrant Judgment (Sep. Op. Guillaume)* (n 28) [15]. However, the same critique applies to universal piracy jurisdiction.

²²⁰ Building on, Bassiouni, ‘History of Universal Jurisdiction’ (n 212) 42; Sienho Yee, ‘Universal Jurisdiction: Concept, Logic, and Reality’ (2011) 10 *Chinese Journal of International Law* 503, 505.

dismiss *laissez-faire* co-existence in favour of foreign jurisdictional intrusions unconnected to territorial sovereignty. Therefore, there must first exist fundamental values (near)universally held by the international community. Secondly, there must be an interest in all states having the right to jurisdiction. The interest of all states can be a crime's affront to the fundamental values of the international community (**normative universality**), and/or, the necessity of universalism in promoting accountability for crimes that would otherwise be insufficiently addressed (**policy-oriented pragmatism**).²²¹

A crime's universal condemnation, or violation of *jus cogens* or *erga omnes* norm(s) is insufficient.²²² *Opinio juris* must demonstrate that exceptional universal jurisdiction applies.²²³ Bassiouni suggests a further "assumption that expanded jurisdiction will deter and prevent crime, and ultimately enhance world order, justice, and peace".²²⁴ One can expect states to consider the practical results, but normative universality developments include other rationales, such as international condemnation, which could stimulate practice and *opinio juris*.²²⁵

2.3.3.1. Normative universality

To protect fundamental values recognised by the international community, states have the right to act as the community's 'surrogate'.²²⁶ States are unwilling to vest jurisdiction within a community enforcement mechanism, so it is left to states to prevent and suppress threats to these fundamental values.²²⁷ As a potential threat to all states, they have an interest in

²²¹ Bassiouni, 'History of Universal Jurisdiction' (n 212) 42–43.

²²² Yee (n 220) 507. "The fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction" Lord Slynn of Hadley, *R v. Bartle*; ex parte Pinochet, UK House of Lords, 25 November 1998, quoted, *Arrest Warrant Judgment (Sep. Op. Guillaume)* (n 28) [12].

²²³ Ryngaert, *Jurisdiction in International Law* (n 13) 127–128; whether *opinio juris* is sufficient, despite lack of practice: war crimes, Bassiouni, *International Criminal Law (Vol. 2)* (n 58) 176; contra *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits, Judgment* [1986] ICJ 5, ICJ Rep 1986 14 [184] "the court may not disregard the essential role played by general practice".

²²⁴ Bassiouni, 'History of Universal Jurisdiction' (n 212) 42.

²²⁵ Condemnation may however be symbolic without jurisdictional effect, e.g. modern slavery; Bassiouni, *International Extradition* (n 78) 432–437.

²²⁶ *ibid* 420; A "decentralized enforcer" or "agent" for the international community; Colangelo (n 141) 882; *Arrest Warrant Judgment (Sep. Op. Higgins, Kooijmans, and Buergenthal)* (n 28) [50].

²²⁷ A functional remedy to "the inability of the decentralized international system to enforce even its most fundamental laws" Brown (n 57) 383–384; an exception being UNSC referral to the ICC Bassiouni, *International Extradition* (n 78) 453–454; contra, treaty-based Cedric Ryngaert, 'The International Criminal Court and Universal Jurisdiction: A Fraught Relationship' (2009) 12 *New Criminal Law Review* 498, 500.

preserving universally held values, or for natural lawyers “international morality”.²²⁸ Crimes against humanity or genocide are crimes so heinous that they may be subject to universal jurisdiction.²²⁹

2.3.3.2. *Policy-oriented pragmatism*

Universal jurisdiction can also be premised on the inability of other jurisdictional grounds to adequately protect common values in areas beyond national jurisdiction.²³⁰ A classic example is piracy under international law.²³¹ The common interest of all states in the freedoms of the high seas was vested, for exercise and protection, with flag states who had exclusive enforcement jurisdiction. Piratical attacks however, particularly when viewed collectively, threatened these freedoms and the maritime commerce built thereof.²³² Therefore, although all states benefited from freedoms and maritime commerce, few states historically had the right to exercise jurisdiction over high seas piratical acts.²³³ Furthermore, flag state enforcement would often be ineffective and piratical acts would often go unpunished.²³⁴ Therefore, those factually capable of fighting piracy were vested with legal capacity to act.

²²⁸ The “dominant” justification Ryngaert, *Jurisdiction in International Law* (n 13) 127; early natural law grounding Bassiouni, *International Extradition* (n 78) 421–422; ‘affect the international community as a whole’ *Guatemala Genocide Case* [2005] Constitutional Tribunal of Spain (Second Chamber) STC No. 237/2005 [7]; “offend against the human conscience” *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* [2013] Constitutional Court of South Africa CCT 02/14, ZACC 30 46 [40].

²²⁹ *Arrest Warrant Judgment (Sep. Op. Higgins, Kooijmans, and Buergenthal)* (n 28) [60–61]; Lowe and Staker (n 26) 326–327.

²³⁰ Offences “practically impossible for any state to prosecute under other, narrower jurisdictional principles” Bennett (n 216) 449.

²³¹ 1958 HSC (n 163) art. 19; UNCLOS (n 3) art. 105; *Arrest Warrant Judgment (Dec. Ranjeva)* (n 40) [6]; *Arrest Warrant Judgment (Sep. Op. Guillaume)* (n 28) [5].

²³² Douglas Guilfoyle, ‘Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force’ (2007) 56 *International and Comparative Law Quarterly* 69; Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011); Arron N Honnibal, ‘Private Political Activists and the International Law Definition of Piracy: Acting for “Private Ends”’ (2015) 36 *Adelaide Law Review* 279. Contra, piratical acts lack state sanctioning, in the interest of no state.

²³³ Universal jurisdiction accepted because piracy occurs “outside all State territory”, *Arrest Warrant Judgment (Sep. Op. Guillaume)* (n 28) [5].

²³⁴ Right to summarily execute captured pirates would put to bed that fear; Kontorovich (n 65) 190.

The “commonality of interests in securing themselves from the perils of piracy”²³⁵ witnessed in broad flag state prescription, converged into a doctrine of universal jurisdiction.²³⁶

Transnational environmental crimes have conceptually developed in soft law,²³⁷ with relevance for transnational fisheries crime.²³⁸ Without a settled legal definition of transnational fisheries crime, and the seeming non-desire to subject it to universal jurisdiction, normative universality is inapplicable. Equally, proponents of transnational fisheries crimes have to date focused on maximising jurisdiction already available, namely targeting associated criminal activity.²³⁹ Any comparable suggestion of PSMs grounded within universal jurisdiction would be legally unsound.

2.3.4. Treaty-based jurisdiction

Discretionary jurisdiction, limited by allocation, reflects the importance of state consent. But rights flowing from sovereignty are mirrored by the right to relinquish authority to others.²⁴⁰ This consent is typically expressed through treaty provisions, which expand the jurisdiction of parties through “pooled” sovereignty.²⁴¹ A state may then exercise jurisdiction normally limited to the relinquishing state.

Treaty-based jurisdiction is a mutually agreed departure from the primacy of territoriality or flag state jurisdiction. One first examines the agreed allocation. Departure occurs when political will exists to pursue global, regional, or bilateral interests through independent rules

²³⁵ Bassiouni, *International Extradition* (n 78) 428.

²³⁶ UNCLOS (n 3) art. 101; although extensive practice has not followed rights, Eugene Kontorovich and Steven Art, ‘An Empirical Examination of Universal Jurisdiction for Piracy’ (2010) 104 *American Journal of International Law* 436, 453.

²³⁷ Teresa Fajardo, ‘Transnational Environmental Crime: A Challenging Problem but Not yet a Legal Concept’ (*Völkerrechtsblog*, 15 February 2017) <<https://voelkerrechtsblog.org/transnational-environmental-crime-a-challenging-problem-but-not-yet-a-legal-concept/>> accessed 17 April 2018.

²³⁸ Valentin Schatz, ‘The Battle against Transnational Fisheries Crime: Jurisdictional Challenges’ (*Völkerrechtsblog*, 3 March 2017) <<http://voelkerrechtsblog.org/the-battle-against-transnational-fisheries-crime/>> accessed 17 April 2018.

²³⁹ Eve de Coning and Emma Witbooi, ‘Towards a New ‘fisheries Crime’ Paradigm: South Africa as an Illustrative Example’ (2015) 60 *Marine Policy* 208, 211; UNGA, ‘Resolution 72/72: Sustainable Fisheries [...]’ (2017) A/RES/72/72 para 98.

²⁴⁰ Gallagher and David (n 48) 204.

²⁴¹ Quoting Henkin, Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005) 80–81.

of jurisdiction customized to achieve those interests.²⁴² After all, states with jurisdiction may not be the states with the greatest factual capacity, or willingness, to act.²⁴³ Thus;

“[H]armonization between capacity in fact and capacity in law requires a complex range of cooperative arrangements [...] whereby States may delegate to other States their own capacity to act”²⁴⁴

Treaty provisions may: expand a state’s jurisdiction through shared competence;²⁴⁵ restrict a state’s jurisdiction through consent;²⁴⁶ facilitate jurisdictional cooperation, or international standard setting;²⁴⁷ increase accountability;²⁴⁸ increase legal transparency;²⁴⁹ or reduce jurisdictional black holes, or safe havens.²⁵⁰ State parties may not however go beyond their own shared competence.²⁵¹

²⁴² “States that draw up multilateral treaties are interested in adopting rules of jurisdiction that help these common regulations achieve their goals best” Hayashi (n 61) 60.

²⁴³ Contra, the *Lotus* approach whereby right of prescription is disproportionately in the hands of the strongest states with the means and capabilities to extend law. Protests would likely be insufficient in terms of state practice or *opinio juris* to create customary law limitations.

²⁴⁴ Gallagher and David (n 48) 202–203.

²⁴⁵ E.g. jurisdiction for an offence when perpetrators are subsequently found within its territory, UK Criminal Justice Act 1988 (C 33) s 134 implementing CAT.

²⁴⁶ “Some treaties involve trades in which states accept a disfavored obligation in return for others making a concession on a different front; reservations might fatally undermine such deals, which is why treaties like the 1982 U.N. Convention on the Law of the Sea (UNCLOS) -the classic example of such a “package deal”- prohibit them” Edward T Swaine, ‘Reserving’ (2006) 31 *Yale Journal of International Law* 307, 332; Robin Churchill, ‘The 1982 United Nations Convention on the Law of the Sea’ in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 33–34.

²⁴⁷ E.g. UNCLOS (n 3) art. 218 ‘in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference’. (3.2.2.4). States often retain competence to set standards beyond treaties, e.g. predating the respective multilateral convention’s entry into force Regulation (EC) No 782/2003 of the European Parliament and of the Council of 14 April 2003 on the prohibition of organotin compounds on ships (OJ L115/1 of 9/5/2003).

²⁴⁸ Upholding standards being necessary for effectiveness and credibility. Although for *UNCLOS*, art. 218 more evident in prescription than enforcement practice, Ho-Sam Bang, ‘Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea’ (2009) 40 *Journal of Maritime Law & Commerce* 291, 312.

²⁴⁹ Pollution related entry conditions, “shall give due publicity to such requirements and shall communicate them to the competent international organization” UNCLOS (n 3) art. 211(3).

²⁵⁰ Gallagher and David (n 48) 223; PSMA (n 181) art. 2.

²⁵¹ E.g. distinction between universal jurisdiction and a theoretical treaty purporting to provide such jurisdiction; Yee (n 220) 508; protest if feel states go beyond treaty-based rights *Certain Criminal Proceedings in France (Republic of the Congo v France)*, *Provisional Measure, Order of 17 June 2003* [2003] ICJ 129, ICJ Rep 2003 102 [1]; contra, Scharf (n 74) who relies upon the *Lotus* approach.

JURISDICTION IN INTERNATIONAL LAW

The most expansive forms of treaty-based jurisdiction are labelled quasi-universal jurisdiction. Beyond the maritime example of the *SUA Convention* and protocols,²⁵² examples are found in respect of serious offences (*Torture Convention*),²⁵³ crimes targeting specific persons (*Protection of Diplomats Convention*),²⁵⁴ and terrorism related offences (*Bombings Convention*).²⁵⁵ States agree to exercise jurisdiction over offenders found within their territory. Quasi-universal jurisdiction, while operationally like universal jurisdiction, only applies amongst state parties.²⁵⁶

Within the port state context, *UNCLOS*, art. 218(1), is notable.²⁵⁷ Whilst defining enforcement, it should be recalled enforcement jurisdiction requires validly exercised prescriptive jurisdiction (2.2.2). Article 218 addresses extraterritorial conduct with no nexus to the port state, implying port states also have necessary treaty-based prescriptive jurisdiction.²⁵⁸

Care should be applied in distinguishing treaty-based jurisdiction from treaties which codify, modify (limitations or obligations) or are silent upon customary PSJ.²⁵⁹ In the latter case, states may have only agreed to implement harmonised standards using existing rights. Port

²⁵² Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation, adopted 10 March 1988, 1678 UNTS 221 (entered into force, 1 March 1992) (as amended, 2005 Protocol to the SUA Convention) art. 6(4); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, as amended Protocol adopted 14 October 2005, LEG/CONF.15/22 (entered into force, 28 July 2010) art. 3(4).

²⁵³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, 1465 UNTS 85 (entered into force, 26 June 1987) art. 5(2).

²⁵⁴ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted 14 December 1973, 1035 UNTS 167 (entered into force, 20 February 1977) art. 3(2).

²⁵⁵ International Convention for the Suppression of Terrorist Bombings, adopted 15 December 1997, 2149 UNTS 284 (entered into force, 23 May 2001) art. 6(4); further examples, 'Report of the AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction' (2009) Council of the European Union doc 8671/09 para 9.

²⁵⁶ Ryngaert, *Jurisdiction in International Law* (n 13) 123–124; Julia Geneuss, 'Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction' (2009) 7 *Journal of International Criminal Justice* 945, 952–953.

²⁵⁷ Brian F Fitzgerald, 'Port State Jurisdiction and Marine Pollution Under UNCLOS III' (1995) 11 *MLAANZ Journal* 29, 30,36; Ringbom, *The EU Maritime Safety Policy and International Law* (n 89) 215–216; Erik J Molenaar, 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage' (2007) 38 *Ocean Development & International Law* 225, 236. It is beyond the scope of this manuscript to consider whether a customary right of jurisdiction has subsequently crystallised, although note the USA and Turkey are not party to UNCLOS despite practice. Bernard H Oxman, 'Jurisdiction of States', *Max Planck Encyclopedia of Public International Law* (OUP 2007) 'analogous to universal jurisdiction'.

²⁵⁸ Bang (n 248) 300–301; Ted L McDorman, 'Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention' (1997) 28 *Journal of Maritime Law and Commerce* 305, 305.

²⁵⁹ Contra, suggestion the *Wellington Convention* provisions on withholding port privileges (customary rights) could provide a treaty-based right for port state enforcement over high seas conduct (novel right), Rayfuse (n 89) 76. Comparative argumentation should not be accepted by flag states.

state control (PSC), and as will be seen RFMO/A CMMs (ch 5), often use existing jurisdictional rights. Contrary to the position sometimes expressed, such practice should not therefore be interpreted as treaty-based jurisdiction.²⁶⁰

A distinguishing characteristic is that PSC is not limited to contracting party vessels in other contracting party ports.²⁶¹ Indeed, “no more favourable treatment” clauses extend the harmonised standards to visiting non-contracting party vessels.²⁶² Secondly, other states may implement codified vessel-standards, despite being a non-contracting party.²⁶³ For example, Chinese Taipei’s unilateral port state control regime implements the standards contained within various international conventions to which it is a non-contracting party.²⁶⁴ Thirdly, the existence of jurisdiction independent of the agreement on harmonised standards (3.2.1) is demonstrative. One example is port state saving clauses to go beyond agreed vessel standards, another, the application of comparable port state powers to vessels below an applicable convention size.²⁶⁵ In all three cases, no treaty provision exists between the port state and another state with jurisdiction which could provide the legal basis.²⁶⁶ For

²⁶⁰ The “legal basis for action in port States under such MOUs derived from existing conventions that make provision for port State control” FAO, ‘Report of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters (Rome, Italy, 9-11 October 2000)’ (FAO 2001) FAO Fisheries Report 637 para 38 response other members, para. 40; ‘The authority for exercising PSC is the national law based on relevant conventions. It is therefore necessary for a port State to be Party to those conventions and to have promulgated the necessary legislation before exercising PSC’ Heike Hoppe, ‘Port State Control - An Update on IMO’s Work’ (2000) 1 IMO News 9, 9.

²⁶¹ The limit of treaty-based jurisdiction.

²⁶² Maritime Labour Convention, adopted 23 February 2006, 45 ILM 792 (entered into force, 20 August 2013) art. V(7); Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, adopted 11 November 1988, IMO Doc. HSSC/CONF/11 (entered into force, 3 February 2000) art. 1(3); International Convention for the Prevention of Pollution, as modified Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, adopted 2 November 1943; 17 February 1978, 1340 UNTS 184 (entered into force, 2 October 1983) art. 5(4); International Convention on standards of training, certification and watchkeeping for seafarers, adopted 7 July 1978, 1361 UNTS 2 (entered into force 28 April 1984) art. X(5).

²⁶³ Equally, a state’s maritime authority need not be a participant within any PSC *MoU*, e.g. Chinese Taipei’s maritime authority is not a member authority to the *Tokyo MoU* for Asia-Pacific PSC (3.2.2.2.1).

²⁶⁴ Chunghwa Telecom Co., Ltd, entrusted by Ministry of Transportation and Communication (ROC), ‘Taiwan’s Development of Port State Control’ (*MTNet*) <http://eng.mtnet.gov.tw/psc_eng/index.html> accessed 18 April 2018; Rong-Her Chiu, Chien-Chung Yuan and Kee-Kuo Chen, ‘The Implementation of Port State Control in Taiwan’ (2008) 16 *Journal of Marine Science and Technology* 207, 208.

²⁶⁵ Size discretion, Paris Memorandum of Understanding on Port State Control, adopted 26 January 1982, 21 ILM 1 (entered into force, 1 July 1982); Including 40th Amendment, adopted 26 May 2017 (effective date, 1 July 2017) Annex 1, pt. 2; Hoppe (n 260) 13; for maritime ‘saving clause’ examples beyond later fisheries discussion (4.2.2.) see Ringbom, ‘Employment Conditions and Foreign Ships’ (n 89) 121 fn. 21; NILOS (n 91) 12, 35–37.

²⁶⁶ I.e., an exercise of unilateral port state jurisdiction from the perspective of a flag state (1.2).

consistency, implementation amongst contracting parties is equally based within other permissive grounds.

Equally, treaty-based jurisdiction must be distinguished from treaty-based limitations. For extraterritorial PSJ, *UNCLOS* art. 218, and subsequently *UNFSA* art. 23, have been restrictively interpreted as exhaustive of extraterritorial PSJ.²⁶⁷ Focusing on fisheries, this led to jurisdictional disputes and contributed towards previous non-participation within the *UNFSA*, notably by Chile.²⁶⁸ *UNFSA* art. 23 provides:

“1. A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.

2. A port State may, inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.

3. States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.

4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law”.

A restrictive treaty-based interpretation of extraterritorial PSJ arose in the *Chile/EC Swordfish Dispute*. The EU Commission services reasoned that article 23 “gives” the right to “take

²⁶⁷ Exhaustive for high seas discharges; McDorman (n 258) 321. Labour standards; “While ILO Conventions never prevented Members from adopting higher standards nationally, it was important to bear in mind that there were different schools of thought on the question of how far port State jurisdiction over foreign vessels goes when it is not based on specific treaty provisions” (J Thullen) IMO, ‘Report of the Committee on the Fishing Sector’ (ILO 2007) Provisional Record, International Labour Conference, Ninety-sixth Session, Geneva, 2007 12 para 258.

²⁶⁸ Chilean belief *UNFSA*, art. 23 may not adequately recognise residual PSJ; Erik J Molenaar, ‘Non-Participation in the Fish Stocks Agreement: Status and Reasons’ (2010) 26 *The International Journal of Marine and Coastal Law* 195, 206–208; EC, ‘Report to the Trade Barriers Regulation Committee: TBR Proceedings Concerning Chilean Practices Affecting Transit of Swordfish in Chilean Ports’ (1999) 40.

measures to promote the effectiveness of sub-regional, regional and global conservation and management measures”, adding:

“In particular [...] to prohibit landings and transshipment where it has been established that the catch has been taken in a manner that undermines the effectiveness of sub-regional, regional or global conservation and management measures on the high seas. *A contrario, it follows that a prohibition of landing and transshipment would not be justified in other cases*”²⁶⁹

Chilean law that denied port services on the basis of a unilateral licensing requirement for straddling fish stocks in the adjacent high seas area was therefore “in breach of the 1995 Agreement”.²⁷⁰ This argument was not elaborated upon, nor brought before ITLOS as non-parties (Chile) are not subject to *UNFSA*’s dispute settlement procedure.²⁷¹

Nonetheless, a restrictive interpretation would only be sustainable if one were to ignore customary rules of treaty interpretation, including the ordinary meaning of terms, within their context, and considering the treaty’s object and purpose.²⁷² Customary treaty interpretation demonstrates that article 23 is declaratory in nature, noting but not empowering a right to take PSMs. Measures may be used to promote regional CMMs but not exclusively so.²⁷³ Most notably, a saving clause preserves sovereignty over ports under customary international law.²⁷⁴ The novelty was not a new right, but the promotion of its use in the fisheries context (ch 3).

Subsequent practice (including the EU and other *UNFSA* parties) has largely overtaken this debate, demonstrating the lack of evidence to substantiate a restrictive interpretation of

²⁶⁹ (emphasis added) EC (n 268) 40.

²⁷⁰ *ibid.*

²⁷¹ *UNFSA* (n 156) art. 30(1).

²⁷² VCLT (n 36) art. 31.

²⁷³ Note, ‘has’ the right, or ‘may’ adopt regulation, terminology. An exhaustive treaty-based right would also define its scope of application, not note a “port State may, *inter alia*”. Finally, the *preamble* objectives include “more effective” port state enforcement, not progressive development of PSJ’s scope.

²⁷⁴ “Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law” *UNFSA* (n 156) art. 23(4); discussed Erik J Molenaar, ‘Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement’ in Dawn Russell and David VanderZwaag (eds), *Recasting Transboundary Fisheries Management Arrangements* (Martinus Nijhoff Publishers 2010) 381.

UNFSA (ch 5-6).²⁷⁵ It represents neither treaty-based PSJ, nor a limitation of customary extraterritorial PSJ. Residual PSJ is recognised in RFMO/A practice,²⁷⁶ and most recently in the *PSMA preamble*, and articles 4(1)(b) and 18(3).

Chile has since joined the *PSMA* and *UNFSA*,²⁷⁷ demonstrating confidence that residual PSJ is sufficiently recognised and adding reaffirming declarations of sovereignty to this effect.²⁷⁸ The Bahamas made a similar declaration upon joining the *PSMA*, with no subsequent protests or contrary declarations found.²⁷⁹

2.3.5. Sub-conclusions

If an element of cross-border conduct, cross-border effects, or sovereign rights arises, territorial jurisdiction may extend to extraterritorial elements when the territorial nexus is sufficient. Disagreements can be expected over whether a territorial nexus is sufficient for prescription of extraterritorial conduct when initiated (2.3.1.1), completed (2.3.1.2) or effectual (2.3.1.3) upon a territory. Disagreements can also concern the question if conduct is within the functional and spatial limitations of quasi-territorial jurisdiction (2.3.1.4). Alternatively, numerous other permissive grounds were raised (2.3.2-2.3.4), but ultimately demonstrated as of little application in the case of extraterritorial PSMs.

However, in practice how prescription is conceptualised may differ, depending upon whether focus is placed upon its extraterritorial or territorial elements. Focus upon the former raises suspicions of jurisdictional overreach, whilst the latter may characterise extraterritorial

²⁷⁵ VCLT (n 36) art. 31(3)(b).

²⁷⁶ Molenaar, 'Port and Coastal States' (n 139) 291.

²⁷⁷ *PSMA*, signed 22 Nov 2009, ratified 28 Aug 2012, FAO, *Status (25/09/2018): Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2018) <http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf>; UNFSA, acceded 11 Feb 2016, UN, *Status (15/03/2018): 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 1995* (2018) <[https://treaties.un.org/doc/Publication/MTDSG/Volume II/Chapter XXI/XXI-7.en.pdf](https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-7.en.pdf)>.

²⁷⁸ UN (n 277) 4 Chile, Declaration made upon accession; FAO, *Status: PSMA* (n 277) Chile, declaration made upon ratification of the Agreement; concluding, interpretation impediment removed Molenaar, 'Non-Participation UNFSA' (n 268) 208.

²⁷⁹ FAO, *Status: PSMA* (n 277) The Commonwealth of The Bahamas, declaration made upon accession to the Agreement.

elements as “effects” and not regulation *per se*.²⁸⁰ Defined by Scott as territorial extension, “[t]he application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad”.²⁸¹ Examples covered involve diverse thematic issues and employ various territorial ‘triggers’. One cannot therefore talk of any limitations to fields of application.²⁸² However, if not accommodated within the limits of territorial jurisdiction, the largest hurdle remains the outspoken protest and lack of practice or *opinio juris* demonstrable from other states/regions.²⁸³ It can equally apply in the other direction, whereby focus is placed on the extraterritorial effects of law to argue against what is primarily territorial prescription and enforcement (4.3.1).

This outlook would benefit port states imposing conduct conditions because PSJ, almost by definition, includes at least some territorial nexus. If a law is conceptualised as a territorial rule which only seeks to consider extraterritorial activities, perhaps having extraterritorial effect(s), the territorial nexus is much more significant and thus more readily defined as sufficient.

However, while beneficial for applying subjective or objective territoriality this conceptualisation can extend too far.²⁸⁴ Application to entry conditions is one example, because not even the legal frontier of “transient presence” triggering application is arguable. Transient presence of a vessel in-port will result in obligations to comply with standards upon

²⁸⁰ Mills defines territorial extension as ‘informal’ extraterritoriality, and rightly points to the possible threat this poses to rules on jurisdiction A Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187, 194. Global regulatory power would rest upon market or political power, and not the more traditional ‘sufficient link’ to an activity.

²⁸¹ Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62 *American Journal of Comparative Law* 82, 90.

²⁸² *ibid* 96–105 examples of climate change, environmental, maritime transportation, air transportation, financial services; Scott (n 186) 1355 the EU’s IUU Regulation.

²⁸³ European Union Emissions Trading Scheme Prohibition Act of 2011 (n 66); Baere and Ryngaert (n 124) 402–403; Jane A Leggett, Bart Elias and Daniel T Shedd, ‘Aviation and the European Union’s Emission Trading Scheme’ (2012) CRS Report for Congress R42392. If practice (ch 5-6) was characterised as territorial extension, one may argue for more global acceptance.

²⁸⁴ A danger highlighted, albeit with ‘reasonableness’ as the solution Cedric Ryngaert, ‘An Urgent Suggestion to Pour Old Wine into New Bottles: Comment on “A New Jurisprudential Framework for Jurisdiction”’ (2015) 109 *AJIL Unbound* 81, 83. Ryngaert’s position would be represented in some unilateral practice, whereby ministerial discretion exists. For others, broadly defined ‘IUU fishing’ is employed with obligatory PSMs regardless of foreign state or private actor interests/expectations.

entry. This includes refitting the vessel, or paying fees based upon submissions to the authority which, when examined, have vast extraterritorial effect in respect of very minor territorial presence or conduct. Nonetheless, through the lens of territorial extension the subject matter of prescription is that transient presence.²⁸⁵ Yet for entry conditions of a conduct nature, obligations are assumed and enforced prior to presence through denial of entry. One cannot even talk of transient presence subject matter. Obligations are triggered from the moment the ink dries, with the respective purpose of denying even transient presence.²⁸⁶

2.4. Permissive grounds for enforcement state jurisdiction

Territorial enforcement jurisdiction is universally accepted as exclusive in nature, subject only to explicit consensual exceptions.²⁸⁷ Seaward of the outer limit of the territorial sea no state has territorial sovereignty. Instead, exclusive flag state enforcement jurisdiction over its vessels is the starting point. For non-flag states, an exceptional basis must be found.²⁸⁸ Any unauthorised enforcement will infringe upon the principle of non-intervention and the sovereignty it upholds.²⁸⁹

2.4.1. Territorial jurisdiction

Unlike its prescriptive counterpart (2.3.1), territorial enforcement jurisdiction is strictly limited to a state's legal territory - subject only to quasi-territorial functional enforcement jurisdiction.

²⁸⁵ Scott (n 186) 1355.

²⁸⁶ Contra, Scott includes the necessity of meeting conditions of EU law to gain access as within transient presence, *ibid.*

²⁸⁷ Roger O'Keefe, *International Criminal Law* (OUP 2015) 30.

²⁸⁸ UNCLOS (n 3) art. 92; *SS Lotus* (n 27) 24–27; Simone Borg, *Conservation on the High Seas: Harmonizing International Regimes for the Sustainable Use of Living Resources* (Edward Elgar Publishing 2012) 194–196.

²⁸⁹ *Military and Paramilitary Activities (merits)* (n 223) [202–205]; Stigall (n 18) 9–10, 18; Jamnejad and Wood (n 36) 372.

2.4.1.1. Territorial enforcement jurisdiction

Assuming valid prescription, enforcement within one's own territory will not violate another state's exclusive enforcement jurisdiction.²⁹⁰ PSJ thus presents few difficulties for applying enforcement jurisdiction (contra, 2.5.1.2). Ports are located within territorial enforcement jurisdiction (4.2.1, *Omunkete*).²⁹¹ The exceptional deep-sea ports beyond territorial enforcement are unproblematic. Foreign states must relinquish exclusive flag state jurisdiction before gaining access for their vessels. Thus, US bilateral treaties condition foreign vessel entry to its continental shelf (CS) platforms upon granting enforcement jurisdiction comparable to that of US territory.²⁹²

2.4.1.2. Quasi-territorial functional jurisdiction

Coastal states have quasi-territorial functional jurisdiction to enforce laws and regulations related to the "sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone".²⁹³ For the CS regime under *UNCLOS*, no explicit quasi-territorial enforcement rights cover sedentary species fisheries.²⁹⁴ However, enforcement jurisdiction is usually taken as included within the sovereign rights to explore and exploit such resources, with a supportive enforcement right of hot pursuit for CS violations.²⁹⁵ Disputes

²⁹⁰ "As a general rule [...] unqualified, unless international law explicitly provides for the contrary", Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (n 90) 78; Restatement (third) § 432(1), commentary, quoted Stigall (n 18) 17.

²⁹¹ Application of port inspections; *Omunkete Fishing (Pty) Limited v Minister for Fisheries* [2008] CIV 2008-485-1310 (High Court of New Zealand (Wellington Registry)) [60–65].

²⁹² Deepwater Port Act of 1974, codified 33 U.S.C. 2017 (n 185) §§ 1501-1524, §1518(c) Vessels of United States and foreign states subject to Federal jurisdiction; Gordon Earl Dunfee, 'Territorial Status of Deepwater Ports' (1977) 15 San Diego Law Review 603.

²⁹³ *UNCLOS* (n 3) art. 73(1), followed by limitations and safeguards; functional enforcement jurisdiction; "*Arctic Sunrise*" (*Kingdom of the Netherlands v Russian Federation*), *Order of 22 November 2013, Joint Separate Opinion of Judge Wolfrum and Judge Kelly* [2013] ITLOS 22, ITLOS Rep 2013 256 [12–14].

²⁹⁴ 1958 CSC (n 127) art. 2(4); *UNCLOS* (n 3) art. 77(4); Dolliver Nelson, 'Maritime Jurisdiction', *Max Planck Encyclopedia of Public International Law* (OUP 2010) para 53; contrast, CS dumping, *UNCLOS* (n 3) arts. 210(5), 216(1)(a).

²⁹⁵ Alfred HA Soons, 'Law Enforcement in the Ocean' (2004) 3 WMU Journal of Maritime Affairs 3, 11; Tanaka (n 179) 134–136; Joanna Mossop, *The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities* (OUP 2016) 203–204.

may arise as to whether a species is sedentary,²⁹⁶ which will have jurisdictional consequences if the suprajacent waters are not the coastal state's EEZ e.g. the extended continental shelf.²⁹⁷

Beyond quasi-territorial enforcement rights, a coastal state may possess a quasi-territorial enforcement zone of a functional nature. The contiguous zone enables extraterritorial²⁹⁸ enforcement jurisdiction to prevent or punish "infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea".²⁹⁹ This may offer synergies between port state prescription and coastal state enforcement, such as attempts to fraudulently import fish in violation of customs regulations and related false documentation submitted for port access.

Finally, hot pursuit may be classified as quasi-territorial functional jurisdiction.³⁰⁰ This is because an uninterrupted pursuit must commence when a vessel is within a maritime zone under the sovereignty of the coastal state.³⁰¹ If the pursuit commenced in the contiguous zone, EEZ, or on the CS, it must result from a violation of a law adopted within its quasi-territorial functional jurisdiction.³⁰² Conditions for hot pursuit must be cumulatively met,³⁰³

²⁹⁶ Chie Kojima, 'Fisheries, Sedentary', *Max Planck Encyclopedia of Public International Law* (OUP 2008) paras 1–5; Robin R Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1988) 128–129.

²⁹⁷ Where EEZ jurisdiction applies, both sedentary and water column fisheries are captured. Mossop (n 295) ch 8; Tanaka (n 179) 136–138.

²⁹⁸ Up to 24nm from its baselines, UNCLOS (n 3) arts. 33(2), 48; baselines, *ibid* arts. 5-7, 9-10, 13-14, 47.

²⁹⁹ 1958 TSC (n 128) art. 24(1); UNCLOS (n 3) art. 33(1), art. 303(2) unauthorised removal of archaeological or historical objects from the contiguous zone may be presumed to violate territorial laws, granting extraterritorial enforcement therein; Hugo Caminos, 'Contiguous Zone', *Max Planck Encyclopedia of Public International Law* (OUP 2013); Soons (n 295) 7, 10; Convention for the Protection of the Underwater Cultural Heritage, adopted 3 November 2001, 2562 UNTS 1 (entered into force, 2 January 2009) art. 8.

³⁰⁰ 1958 HSC (n 163) art. 23; UNCLOS (n 3) art. 111; Hugo Caminos, 'Hot Pursuit', *Max Planck Encyclopedia of Public International Law* (OUP 2013). A territorial nexus is also evident in the right of visit for unauthorised high seas broadcasting, suggesting quasi-territorial functional jurisdiction for states "where the transmissions can be received" or "where authorized radio communication is suffering interference"; UNCLOS (n 3) arts. 110(1)(c), 109(3)(d)-(e), 109(4).

³⁰¹ UNCLOS (n 3) art. 111(1); marine internal waters, archipelagic waters and territorial sea, using the terminology of Quentin Hanich and Martin Tsamenyi, 'Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States' (2012) 27 *The International Journal of Marine and Coastal Law* 783.

³⁰² UNCLOS (n 3) art. 111(1) (contiguous zone violations), art. 111(2) (EEZ and CS violations); PHG Vrancken, *South Africa and the Law of the Sea* (Martinus Nijhoff Publishers 2011) 214–216; Erik J Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi' (2004) 19 *The International Journal of Marine and Coastal Law* 19, 28; Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn, CUP 2015) 168–172.

³⁰³ *M/V 'Saiga' (No. 2) Judgment* (n 171) [146].

and enforcement jurisdiction ceases upon the vessel's entry into a foreign territorial sea.³⁰⁴ Again, coastal state enforcement could complement port state prescription.³⁰⁵

Clearly, while subsequent analysis concerns PSJ, quasi-territorial coastal state enforcement may broaden a state's toolbox to enforce its port state prescription.

2.4.2. Extraterritorial enforcement jurisdiction

Extraterritorial enforcement jurisdiction is very limited in customary law. While this territorial absolutism is questioned for regulatory spaces disconnected from territories (e.g. the internet),³⁰⁶ its theoretical underpinning remains true for land and sea. Greater use of treaty-based enforcement regimes and cooperative action are testament to territorial absolutism's continual application in customary law.

The most notable customary extraterritorial enforcement jurisdiction is a flag state's jurisdiction over flagged vessels located outside foreign territorial seas.³⁰⁷ Corresponding to its prescriptive jurisdiction (2.3.2.1.2), enforcement jurisdiction is not territorially defined, nor thematically limited.

Equally, other customary extraterritorial enforcement is applicable seaward of the territorial sea. For non-flag states, true extraterritorial enforcement is mostly linked to universal jurisdiction, namely piracy, and possibly protective jurisdiction for coastal states.³⁰⁸ Vessels suspected of involvement in, or planning of, a piratical act, are subject to any state's extraterritorial enforcement jurisdiction seaward of foreign territorial seas.³⁰⁹

³⁰⁴ UNCLOS (n 3) art. 111(3).

³⁰⁵ E.g. failure to provide advance notification, before attempting to evade being brought in-port for inspection and/or enforcement.

³⁰⁶ Abass (n 87) 239.

³⁰⁷ Codified, 1958 HSC (n 163) arts. 5-6; UNCLOS (n 3) arts. 91-92; Borg (n 288) 194.

³⁰⁸ E.g. maritime casualties threatening a vital coastal state interest. Customary breadth, and whether it involves criminal enforcement beyond responses of necessity, is disputed; Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (n 90) 387-388; Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution* (Brill 2012) 79-80; Alan Khee-Jin Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (CUP 2005) 182; codified and expanded, International Convention relating to intervention on the high seas in cases of oil pollution casualties, concluded 29 November 1969, 970 UNTS 211 (entered into force, 6 May 1975); UNCLOS (n 3) art. 221.

³⁰⁹ UNCLOS (n 3) arts. 101, 105, 110(1)(a); 1958 HSC (n 163) arts. 15, 19, 22(1)(a).

Broader conduct at conflict with states' interests is covered by another customary non-flag state right, namely the right of visit, now codified.³¹⁰ For piracy and unauthorised broadcasting, this expressly includes further enforcement measures.³¹¹ Debate continues upon whether enforcement measures beyond boarding and examination are available in other right of visit cases.³¹²

As with prescription, this framework may be adapted through consent and pooling of jurisdiction. States are free to permit another state to exercise enforcement jurisdiction in their territory or maritime zones, or upon their vessels outside foreign territorial seas.³¹³ This can occur ad hoc or through bilateral or multilateral agreements.³¹⁴ Within fisheries a significant amount of treaty-based extraterritorial enforcement exists. The most significant example is the high seas boarding and inspection procedures established under *UNFSA*, arts. 21-22, and RFMO/A implementation thereof.³¹⁵ For example, *North Pacific Fisheries Commission (NPFC) CMM 2017-09* provides for high seas boarding and inspection by authorised vessels for fishing vessels flagged to contracting parties and (reportedly) engaged in a fishery regulated by NPFC.³¹⁶ Explicit reference is not made to the case of non-contracting

³¹⁰ UNCLOS (n 3) art. 110; 1958 HSC (n 163) art. 22; history Papastavridis (n 193) 50–54; customary law and rationales, Douglas Guilfoyle, 'The High Seas' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 219–220; Natalie Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation' (2007) 35 *Denver Journal of International Law and Policy* 287, 296–302.

³¹¹ UNCLOS (n 3) arts. 105, 109(4).

³¹² E.g. slavery, Guilfoyle, 'The High Seas' (n 310) 220; stateless vessel debate, Papastavridis (n 193) 264–267; foreign vessels flying an inspecting state's flag without authorisation are subject to enforcement measures, Tanaka (n 179) 145.

³¹³ Recognised, UNCLOS (n 3) arts. 92, 110(1); other treaties, Nelson (n 294) paras 52–58.

³¹⁴ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted 19 December 1988, 28 ILM 497 (entered into force, 11 November 1990) art. 17; UN Charter (n 9) ch. VII; "Actual enforcement of UN embargoes at sea has occurred in the cases of Southern Rhodesia, Iraq, former Yugoslavia, Haiti, Serbia and Montenegro and Sierra Leone" Soons (n 295) 13.

³¹⁵ UNFSA (n 156) art. 21; in general, Rayfuse (n 89) pt II; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) ch 6; the continued necessity of consent Papastavridis (n 193) 197–204.

³¹⁶ NPFC, CMM 2017-09 For High Seas Boarding and Inspection Procedures for the North Pacific Fisheries Commission 2017 paras. 5-6.

parties to NPFC who are nonetheless party to *UNFSA*.³¹⁷ However ad-hoc flag state consent may provide a basis for high seas boarding and inspection.³¹⁸

2.4.3. Sub-conclusions

Port state enforcement offers jurisdictional simplicity in combatting IUU fishing, it being grounded within classic territorial enforcement jurisdiction (2.4.1.1). This may be contrasted with treaty-based extraterritorial enforcement, such as boarding at-sea, which is limited to contracting party flagged vessels. Customary extraterritorial enforcement can develop out of a necessity to remove jurisdictional vacuums that would otherwise be exploited by perpetrators. However, despite enforcement vacuums in combatting IUU fishing at sea, no such rights developed.

The general statements above are subject to qualification by international or municipal law e.g. human rights or immunities.³¹⁹ Some authors have suggested a general limitation to a port state's territorial enforcement jurisdiction, but this is dismissed in a later chapter (4.2.8). The greatest limit to residual port state enforcement under the law of jurisdiction then is simply the required precursor of valid prescriptive jurisdiction (2.2.2).³²⁰

2.5. Jurisdiction exercised within the *domaine réservé*

State practice dealt with in chapters 3-6 demonstrates a popular legislative technique, whereby conditions for port access and/or port services are prescribed to address extraterritorial conduct.³²¹ Non-compliance will result in enforcement through denial of port

³¹⁷ “[M]ay, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such State Party is also a member of the organization or a participant in the arrangement” *UNFSA* (n 156) art. 21(1).

³¹⁸ NPFC, CMM 2017-09 (n 316) para. 45.

³¹⁹ Bassiouni, *International Extradition* (n 78) 353; e.g. domestic law prohibiting double jeopardy *ibid* 367.

³²⁰ Evident within the contiguous zone, *M/V ‘Saiga’ (No 2) (Saint Vincent and The Grenadines v Guinea)*, *Judgment, Separate Opinion of Judge Laing* [1999] ITLOS 2, ITLOS Rep 1999 154 [15]; Gallagher and David (n 48) 240.

³²¹ Beyond fisheries, e.g. receiver vessel access dependent upon CDEM standards compliance ‘in the EEZ by receiving as well as delivering vessels’ *NILOS* (n 91) 102; denial of entry on basis of visiting other port states or even simply representing differing political views to that of the port authorities *Honniball, PSJ Beyond Oceans Governance* (n 208); Valentin J Schatz and Arron N Honniball, *The C-Star’s Odyssey and the International Law of the Sea* (2017) <<http://voelkerrechtsblog.org/the-c-stars-odyssey-and-the-international-law-of-the-sea/>>.

entry/use, with further enforcement measures reserved for further infractions. Yet, as a *prima facie* presumption, the content of the law prescribed determines the scope of jurisdiction exercised and demonstrates the permissive ground upon which it is based. Regardless of whether a requirement of extraterritorial conduct is formulated as an entry condition or as an offence, in both cases “it would still amount to a requirement to comply with certain behaviour beyond port”.³²²

The conundrum raised is that widespread and accepted practice includes prescribing conditions of extraterritorial conduct for port entry or use, despite the fact that no permissive ground for prescriptive state jurisdiction provides a sufficient nexus for legality.³²³ Advice to the Australian Government in 2013 concluded “there is little guidance, either in treaties or in the academic literature, about the sorts of conditions of access which would be permitted”.³²⁴ How does one rationalise port states having largely unlimited extraterritorial scope in this respect?

2.5.1. The insufficiency of state jurisdiction to provide the legal basis for conditions of port entry or use of port services

A foreign vessel approaching port was involved in fishing, or related activity, or it is carrying the resulting catch or product. Neither the vessel, the catch, the product or the fishing *per se* are reprehensible. Rather, the conditions under which fishing has occurred,³²⁵ or the fishing method(s) employed, will define whether IUU fishing has occurred.³²⁶ PSMs in respect of IUU fishing must therefore directly, or indirectly, incorporate the fishing conduct. Only then can IUU fishing be distinguished from legal fishing. When this conduct occurred beyond the

³²² NILOS (n 91) 101–102; Kopela (n 88) 96–98.

³²³ “[L]ittle support in favour of the view that port entry conditions cannot be imposed with respect to matter relating to extraterritorial conduct” Ringbom, *The EU Maritime Safety Policy and International Law* (n 89) 370; entry conditions less likely to invoke state protest than port state offences NILOS (n 91) 103.

³²⁴ Australian Government Solicitor, ‘Appendix D - Legal Advice’ in House of Representatives: Standing Committee on Social Policy and Legal Affairs, *Troubled Waters: Inquiry into the arrangements surrounding crimes committed at sea* (Commonwealth of Australia 2013) para 31.

³²⁵ Including e.g. location, species or flag state.

³²⁶ In short, “used fishing methods that do not comply with the official and classic fishery law (in the case of illegal fishing), or do not respect transparency and reporting requirement (unreported fishing), or, are used in insufficient regulatory conditions (unregulated fishing)”, Antonia Leroy, Florence Galletti and Christian Chaboud, ‘The EU Restrictive Trade Measures against IUU Fishing’ (2016) 64 *Marine Policy* 82, 84.

maritime zones of the coastal state in which the port is located, this jurisdiction inherently includes an element of extraterritoriality.³²⁷

Extraterritorial harvesting conduct or support activities can therefore result in non-compliance with prescribed conditions for port entry or use of port services. Further conditions require extraterritorial conduct, such as the advance submission of information upon previous activities.³²⁸ From the moment extraterritorial conduct is (believed to be) undertaken, denial of entry or use of services may apply. Prescribed conduct and an eventual request to enter are distinct acts and do not constitute a continuum. Indeed, the extent of intermediate conduct is immaterial to whether entry is denied.

2.5.1.1. *The insufficiency of permissive grounds for prescriptive state jurisdiction*

Substantive analysis of entry conditions within literature often relies upon an assumption of legality so that subsequent questions can be addressed.³²⁹ Prescriptive jurisdiction is constructed through implication, analogy and logic.³³⁰ Treaties, practice and the lack of a general right of entry imply a broad right to prescribe conditions thereof.³³¹

³²⁷ McDorman (n 258) 311–314 discussing PSJ clearly distinguishes territorial CDEM standards and extraterritorial conduct beyond PSJ. Such conduct would fall into the latter.

³²⁸ Note requirements, in the words of Marten, are geographically imprecise upon application e.g. when defined by time of submission (*x* hours before *y*). Therefore, whilst agreeable that the secondary offence of providing false information *in-port* can be justified by territorial jurisdiction, there is no explanation for the first i.e. denial of entry for failure to provide advance information related to extraterritorial conduct. If the location of information production does not ‘stamp it’, then neither can its location of submission. Kopela (n 88) 98; Bevan Marten, ‘Port State Jurisdiction over Vessel Information: Territoriality, Extra-Territoriality and the Future of Shipping Regulation’ (2016) 31 *The International Journal of Marine and Coastal Law* 470, 486; UNCLOS (n 3) art. 62 prescription is tied to the subject matter of fishing conduct “in” the EEZ.

³²⁹ Noting the ‘right’ or ‘customary powers’, before delving into issues other than jurisdictional basis; Richard A Legatski, ‘Port State Jurisdiction Over Vessel-Source Marine Pollution’ (1977) 2 *Harvard Environmental Law Review* 448, 464; Bang (n 248) 294, also notes treaty assumption; AV Lowe, ‘The Right of Entry into Maritime Ports in International Law’ (1976) 14 *San Diego Law Review* 597, 608 subject to sovereignty, p. 619; *Military and Paramilitary Activities (merits)* (n 223) [213].

³³⁰ E.g. “These uncommon exercises of extra-territorial port State jurisdiction may be justified by the broad *implicit* prescriptive and enforcement powers under Articles 25(2), 211(3) and 255 of the LOS Convention. However, by *analogy* with Article 218 of the LOS Convention, it seems *logical* that, in the absence of an enabling treaty provision, only the less onerous enforcement measures would be available (e.g. denial of access to port) but not the institution of proceedings or the imposition of penalties” NILOS (n 91) 101–102; Implied jurisdiction of UNCLOS Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (n 90) 103–104.

³³¹ The exception proves the rule in cases not excepted.

Implication may demonstrate factual realities, but does not establish why, under international law, a port state has jurisdiction and upon which legal basis. Implication cannot provide a complete legal answer. Furthermore, a practical consideration arises for port states. If a flag state disputes the prescriptive legality of an entry condition, a legal defence premised on implication alone would fail for lack of legal footing.³³²

For example, a lack of right to entry implies port states may enforce their decisions on who may enter through denial of entry. Given the general discretion on entry, conditions may be prescribed to determine who may enter.³³³ This argumentation is supported by the proposition that vessels are not compelled to enter, and so entry is taken as acceptance of the “legitimacy” of conditions imposed.³³⁴

However, it would be counter-intuitive to argue that the lack of an obligation to allow entry provides the legal basis for a right to regulate or deny entry.³³⁵ Indeed, in the *Chile/EC Swordfish Dispute* the EC took different positions on these related but distinct matters. Concerning the law of the sea, the EC accepted there was no obligation incumbent upon Chile to provide port access.³³⁶ Simultaneously the EC challenged the legal basis of Chile for prohibiting landings and transshipment in respect of high seas fishing, arguing it was beyond Chile’s prescriptive jurisdiction.³³⁷ Acceptance or non-acceptance of laws by non-state actors equally has no bearing on whether states must accept foreign prescription.³³⁸

³³² Open to challenge, Yoshinobu Takei, ‘International Legal Responses to the Flag State in Breach of Its Duties: Possibilities for Other States to Take Action against the Flag State’ (2013) 82 *Nordic Journal of International Law* 283, 306–307.

³³³ Ringbom, ‘Global Problem - Regional Solution?’ (n 89) 621; Ringbom, ‘Employment Conditions and Foreign Ships’ (n 89) 133; Molenaar, ‘Port State Jurisdiction (2007)’ (n 257) 232–237 having previously noted the need for a jurisdictional basis looks to treaty implication of a broad right to set entry conditions.

³³⁴ Marten, *PSJ and Merchant Shipping* (n 88) 130; Bevan Marten, ‘Port State Jurisdiction in New Zealand: The Problem with Sellers’ (2013) 2 *Victoria University College Law Review* 559, 567–568; ‘if Keselj (n 91) 150; “put themselves within the territorial sovereignty” of the port state, Churchill and Lowe, quoted by many e.g. Bang (n 248) 295; Ted L McDorman, ‘Regional Port State Control Agreements: Some Issues of International Law’ (2000) 5 *Ocean and Coastal Law Journal* 207, 210; reflection, but does not take a side Kopela (n 88) 94–95.

³³⁵ An “absence of this right does not mean that extraterritorial port state jurisdiction is exempt from the need for a sufficient jurisdictional basis” Molenaar, ‘Port State Jurisdiction (2007)’ (n 257) 229; McDorman (n 258) 312.

³³⁶ EC (n 268) 48.

³³⁷ EC (n 268) Beyond and in breach of UNCLOS pp. 35–38 and the UNFSA, p. 40.

³³⁸ McDorman (n 258) 314. Just as non-state actors may not transfer foreign state jurisdiction to another, they may not remove limitations thereof, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v*

Where discussions move beyond “sovereignty”,³³⁹ the tendency to equate valid territorial enforcement with valid territorial prescription has entered into case law. The CJEU concluded “once within port vessels are subject to the unlimited jurisdiction of the port state”.³⁴⁰ This was then applied by analogy to airports, without exploration of what full sovereignty, “unlimited jurisdiction”, or territorial jurisdiction entails.³⁴¹

When extraterritorial elements of conduct arise, the sufficiency of a territorial link cannot be presumed.³⁴² The territorial conduct of requesting entry may be insignificant compared to the full scope of conduct prescribed as entry conditions. Equally, the lack of enforcement against offending vessels who do not request entry does not restrict the prescription exercised.³⁴³ Port state practice should be reviewed in terms of jurisdictional nexus(es) to the regulated conduct, not the geographical presence of the vessel at the moment of enforcement.³⁴⁴ Thus, in the *ARA Libertad* case, Ghana noted vessels within port are subject to the more accurate

Belgium), *Judgment* [2002] ICJ 121, ICJ Rep 2002 3 [61]; Vienna Convention on Diplomatic Relations, 24 April 1963, 500 UNTS 95 (entered into force 24 April 1964) art. 32(1) waiver of immunity “by the sending state”.

³³⁹ *Military and Paramilitary Activities (merits)* (n 223) [213]. Referring to the bundle of rights which come with statehood tells us states may impose conditions, but not why, when, or how. Authors examining other issues frequent the existence of a “right” to close or condition port entry, but save jurisdictional discussions for more onerous measures; Rayfuse (n 89) 69–70, 76–78.

³⁴⁰ *C-286/90, Poulsen (Judgment)* (n 172) [28] contrasted with other non-absolute maritime zones, paras. 25-27. Yet, “subsequent presence of the guilty person cannot have the effect of extending the jurisdiction of the State”, *SS Lotus Judgment (Dis. Loder)* (n 184) [35].

³⁴¹ “those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union” *C-366/10, ATAA (Judgment)* (n 37) [124–127]. For critique of both CJEU cases’ failure to engage with territoriality, Baere and Ryngaert (n 124) 400, 405–406.

³⁴² See divergence in literature between (a) port state sovereignty and voluntary acceptance by vessels and (b) the need for a sufficient nexus to the extraterritorial conduct and the application of prescriptive jurisdiction under international law Ringbom, *The EU Maritime Safety Policy and International Law* (n 89) 360–361; dangers of territorial/extraterritorial presumptions in jurisdiction discourse Cedric Ryngaert and Henrik Ringbom, ‘Port State Jurisdiction: Challenges and Potential’ (2016) 31 *The International Journal of Marine and Coastal Law* 379, 381–382.

³⁴³ From the moment defined extraterritorial conduct occurred a vessel may be denied entry. In *Chile/EC Swordfish Dispute* the EC noted the “more drastic”, but unimplemented, prohibition of all Chilean port services. The ITLOS submission referred to the Chilean Decree generally, suggesting this could also have been challenged; EC (n 268) 33; *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community)*, *Order of 20 December 2000* [2000] ITLOS 7, ITLOS Rep 2000 148 [2(3)(e)].

³⁴⁴ Presence alone is insufficient, Ringbom, ‘Employment Conditions and Foreign Ships’ (n 89) 127-130,135; contrast, Scott (n 186) 1355. Note the rather broad conclusion of *Opinion of Advocate General Kokott, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] CJEU C-366/10, ECR 13765 [148] “In one fisheries case, the Court of Justice even ruled that fish caught in the high seas could be confiscated as soon as the vessel concerned, flying the flag of a third country, reached a port within the European Union”.

“jurisdictional powers” as opposed to “jurisdiction” – the question of the extent of those powers not being presupposed as the CJEU wording above suggests.³⁴⁵

If willing presence is sufficient for setting conditions of extraterritorial conduct, enforced through measures within the enforcement discretion of a port state, these states would have global prescriptive authority.³⁴⁶ This would extend to all states and all objects of law. Any provision upon extraterritorial conduct needs only end with “and the defendant is subsequently present in the territory of the state” to be jurisdictionally valid.³⁴⁷ Prescription, including standards of extraterritorial conduct, would be deemed territorial by the mere fact that they are crafted as entry conditions. Indeed, if entry and exit conditions are indistinguishable under state jurisdiction,³⁴⁸ equal breadth extends to conditioning future conduct.³⁴⁹ This blurring of territorial and extraterritorial jurisdiction would result in unlimited territorial prescriptive jurisdiction for states with competent legal drafters.

Only through the separation of prescribing entry conditions from other true exercises of jurisdiction governed by state jurisdiction do the rules of state jurisdiction maintain integrity.³⁵⁰ On a secondary level, separation provides greater attainment of state jurisdiction’s functions. Bar the removal of negative conflicts of jurisdiction (2.2.4.5),

³⁴⁵ “ARA Libertad” (*Argentina v Ghana*), *Provisional Measures, Order of 15 December 2012* [2012] ITLOS 20, ITLOS Rep 2012 332 [56].

³⁴⁶ Hence Marten’s call for a new ‘substantial connect’ test, Marten, ‘PSJ, International Conventions, and Extraterritoriality’ (n 89) 137–139 reasonableness factors; John T Oliver, ‘Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction over Foreign-Flag Vessels in U.S. Ports’ (2009) 5 *South Carolina Journal of International Law and Business* 209, 244–245, 325–327. However, as state jurisdiction attempts to delimit jurisdiction through *sufficient nexus(es)* (2.2.3), it is difficult to see how *substantial connection(s)* as a secondary reasonableness test would be any more effective?

³⁴⁷ Formulated simply as; [prescribed extraterritorially conduct] + [territorial consequence] = territorial jurisdiction.

³⁴⁸ Kopela distinguishes jurisdictional capacity, but without reason why the latter argument does not equally apply to entry conditions: “it would be different if the port state denied exit (or detained a vessel) with respect to a requirement for use of the equipment on the high seas. Denial of exit should not be linked to denial of access, but to the jurisdictional basis for exercise of jurisdiction, which is, in this case, territorial due to the static nature of the requirement” Kopela (n 88) 96.

³⁴⁹ Few support exit conditions prescribing extraterritorial conduct, rather focusing upon the territorial nature of prescription Marten, ‘PSJ in New Zealand’ (n 334) 566–558; when seen as prescribing extraterritorial conduct, the opposite conclusion is reached J Scott Davidson, ‘Freedom of Navigation on the High Seas: Sellers v. Maritime Safety Inspector’ (1999) 14 *International Journal of Marine and Coastal Law* 435, 438; Dermott Devine, ‘Port State Jurisdiction: A Judicial Contribution from New Zealand’ (2000) 24 *Marine Policy* 215, 218.

³⁵⁰ Alternatively, some propose limiting conditions of port entry/use in line with prescriptive state jurisdiction Australian Government Solicitor (n 324) para 7. This would be unrepresentative of state practice. Port states have shown no inclination to withdraw PSJ’s extraterritorial tentacles.

territorial PSJ would need not show any deference to the territorial integrity or sovereignty of foreign states where conduct primarily occurred (2.2.4.1). The distinction between port state values and values of the international community would not be reflected in the scope of state jurisdiction, universality being consumed within territorial jurisdiction (2.2.4.2). When undertaking fishing or related activities, no objective test would exist for vessels or states to distinguish which legal systems might govern that conduct, unless all future port visits are known indefinitely (2.2.4.4). This creates vast potential for concurrent and conflicting legal obligations, whilst simultaneously increasing previously avoidable conflicts of jurisdiction (2.2.4.4). Finally, if jurisdictional allocation arises from territorial presence, the effective operation of other rules of international law such as obligations premised on allocation, might become overly broad and undetermined (2.2.4.4).

2.5.1.2. The insufficiency of permissive grounds for enforcement state jurisdiction

Territorial enforcement jurisdiction is enough for port states' rights, but insufficient to explain limitations visible in practice. This is known as the enforcement paradox and will arise whenever the same rules of prescriptive jurisdiction are applied to prescribing conditions of port privilege(s) and prescribing port state offences.

In short, practice suggests that conditions for port entry may be enforced through the denial of entry or use of port, but not through other more intrusive enforcement tools.³⁵¹ This limitation may result in relatively minor offences being only enforceable through denial of entry, as opposed to e.g. more proportionate fines.³⁵² Yet, this is contrary to previous discussions on port state enforcement concerning high seas fisheries, wherein "it was agreed that a degree of proportionality had to be maintained between the suspected offense and the enforcement measures the port State might take".³⁵³ When states collectively deny entry the severity of enforcement measures multiplies.³⁵⁴ Enforcement jurisdiction beyond the

³⁵¹ Molenaar, 'Port State Jurisdiction (2007)' (n 257) 229; Marten, *PSJ and Merchant Shipping* (n 88) 233–235.

³⁵² Marten, 'PSJ, International Conventions, and Extraterritoriality' (n 89) 132–133.

³⁵³ 'Port State Responsibilities' IISD, 'High Seas Fisheries Conference Highlights: Thursday, 22 July 1993' (1993) 7 Earth Negotiations Bulletin.

³⁵⁴ Ryngaert and Ringbom (n 342) 385.

denial of entry or other port privileges is reserved exclusively for offences other than the nonfulfilment of entry conditions.³⁵⁵

Contrasting static vessel conditions with conduct requirements highlights a further element of the state jurisdiction paradox. Port authority MoUs (3.2.2.1) frequently require vessel detention until a static requirement is met.³⁵⁶ Yet, entry conditions of extraterritorial conduct are not subject to detention but only to the more limited denial of port privileges.³⁵⁷ If entry conditions are indistinguishably subject to the rules of state jurisdiction and the nexus of territorial jurisdiction, detention should equally follow for extraterritorial conduct entry requirements when presence ‘triggers’ an offence. The rules of enforcement state jurisdiction provide no answers for these enforcement capacity distinctions.

Nonetheless, some argue that enforcement may, in part, be determinative of prescriptive jurisdiction. For example, the legality of extraterritorial PSJ depends upon the type of enforcement measure used.³⁵⁸ Alternatively, refusal of port entry or use of services is “easier to justify”.³⁵⁹ Thus, when withholding benefits, port states exercise largely unlimited extraterritorial scope, but more onerous enforcement measures require a greater nexus or treaty-based right to prescriptive jurisdiction.³⁶⁰

However, as prescriptive jurisdiction is a precursor to enforcement jurisdiction, enforcement cannot logically determine prescriptive validity. This distinction must be based upon prescriptive jurisdiction, or result from a limitation to enforcement jurisdiction in the case of conditions prescribed for port privileges, or result from a policy preference.³⁶¹

³⁵⁵ Uncertainty has negatively affected enforcement jurisdiction certainty for validly prescribed offences; uncertainty of enforcement Kopela (n 88) 96, 99, 101, 105–106.

³⁵⁶ E.g. Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ L 131, 28/5/2009, p 57–100) art. 19(2).

³⁵⁷ Limited in the sense of jurisdictional rights. For example, circumstances may mean denial of entry or services has a greater or equal economic impact to vessel detention.

³⁵⁸ ‘The argument that the justifiability of extraterritorial port state jurisdiction depends not only on an adequate jurisdictional basis, but also on the type of enforcement action taken, is examined by means of four case studies’ Molenaar, ‘Port State Jurisdiction (2007)’ (n 257) 227, 229.

³⁵⁹ Henrik Ringbom, ‘The European Union and International Maritime Law - Lessons for the Asia-Pacific Region?’ (2016) 30 Australian and New Zealand Maritime Law Journal 67, 73.

³⁶⁰ Ringbom, ‘Employment Conditions and Foreign Ships’ (n 89) 119.

³⁶¹ Molenaar identified the latter two options; Molenaar, ‘Port State Jurisdiction (2007)’ (n 257) 232.

An enforcement limitation for prescribed port entry/use conditions has become the dominant theory within literature. It proposes that *UNCLOS* arts. 25 and 218, when interpreted in the light of fisheries practice, “demonstrates” that international law prohibits enforcement jurisdiction beyond denial of entry for a breach of entry conditions.³⁶² *UNCLOS* article 25 only includes the right to prevent the breach of entry conditions, while the prosecution and imposition of more punitive enforcement measures is reserved for *UNCLOS* article 218.

Yet, the scope of enforcement measures available to a state under customary law cannot be limited through treaty implication. This directly contradicts the fundamental tenet of consent.³⁶³ Under state jurisdiction, a state has freedom of choice in enforcement measures within its territory, so long as this does not conflict with another obligation.³⁶⁴

For example, a conflicting international obligation would be a treaty provision explicitly limiting enforcement for entry conditions.³⁶⁵ *UNCLOS*, arts. 25 and 218 are however insufficient.³⁶⁶ *UNCLOS*, article 25(2) codifies a coastal state enforcement right within the territorial sea over vessels attempting to breach entry conditions. It says little on limits to enforcement measures within a state’s territory. *UNCLOS*, article 218 provides limits to enforcement concerning its treaty-based right to prescription,³⁶⁷ but would require an expansive interpretation to affect residual PSJ. For other states, protection of their interests

³⁶² *ibid* 279, 235–237; Marten, ‘PSJ, International Conventions, and Extraterritoriality’ (n 89) 131–132; Ringbom, ‘Global Problem - Regional Solution?’ (n 89) 626–627; Marten, *PSJ and Merchant Shipping* (n 88) 234.

³⁶³ “Restrictions upon the independence of States cannot therefore be presumed” assumed, or implied *SS Lotus* (n 27) 18.

³⁶⁴ Indeed, in a PSM case; “New Zealand able to regulate matters within its jurisdiction in whatever manner it wishes” *Omunkete Fishing (Pty) Limited v Minister for Fisheries* (n 291) [63]. A “port state may impose penal sanctions and fines in compliance with its other international obligations or national requirements, a right well within its competence to enforce its legislation inside its territory”, Kasoulides, ‘Global and Regional Port State Regimes’ (n 89) 133.

³⁶⁵ Bar an express treaty provision, international law would require a significant amount of state practice and *opinio juris* to demonstrate customary limitations. The lack of *opinio juris* for such a limitation is evident in suggestions practice could equally be explained as a policy preference.

³⁶⁶ Marten, ‘PSJ, International Conventions, and Extraterritoriality’ (n 89) 135. States not party to *UNCLOS* nonetheless demonstrates the same enforcement paradox (USA, 6.2), despite not being subject to any treaty-based limitations therein, VCLT (n 36) art. 34.

³⁶⁷ *UNCLOS* (n 3) art. 218(2) is expressly only applicable to proceeding pursuant to the treaty-based prescriptive jurisdiction of 218(1).

through an implied PSJ limitation is vulnerable to dilution by port states' increasing use of the simplicity of territorial prescription and enforcement.³⁶⁸

The lack of an adequate solution within enforcement jurisdiction suggests a step has been misplaced in previous assumptions of prescriptive jurisdiction. Only re-examination of the legal basis of prescription will lead to an answer to the question why state jurisdiction is insufficiently able to rationalise the prescription and enforcement jurisdiction of port states.³⁶⁹

2.5.2. *Domaine réservé* as an exception to state jurisdiction

International law sets aside exceptional cases of domestic regulation whereby states have *prima facie* freedom to act.³⁷⁰ *Domaine réservé*, or domestic jurisdiction, "appeared as a means of restricting the rights of international organizations or individual States to interfere in the decisions, or the consequences of decisions taken by a State".³⁷¹ These matters are defined by international law with ever-shrinking content because state rights and responsibilities are increasingly regulated by international law.³⁷² Nonetheless, it would at least typically include border control and the granting of nationality. *Domaine réservé* may

³⁶⁸ Voluntary submission by non-state actors, if sufficient for territorial prescription, will become sufficient for enforcement, Marten, 'PSJ, International Conventions, and Extraterritoriality' (n 89) 132–136.

³⁶⁹ Surprisingly, current literature has not approached enforcement differences from the perspective of prescription. Marten comes closest, noting the distinction of territorial extension for offences and territorial sovereignty for entry conditions. But, he concludes in most cases port entry conditions is used in a descriptive sense, with the "lack of any consistent and specific legal meaning" Marten, *PSJ and Merchant Shipping* (n 88) 233–235. Nonetheless, defines as subjection to territorial jurisdiction, Marten, 'PSJ, International Conventions, and Extraterritoriality' (n 89) 130. Ringbom, 'Global Problem - Regional Solution?' (n 89) 625–626 also proposes port state control over access as a sovereign right flowing from sovereignty which, given practice, is underrepresented by application of state jurisdiction. The hope is to build upon these works in answering why.

³⁷⁰ Not an accidental leftover or *lacunae*, but a qualified silence as desired by states Robert Kolb, *The International Court of Justice* (Bloomsbury Publishing 2013) 466–467; defined by international law Manusama (n 9) 53; Galina G Shinkaretskaya, 'Content and Limits of "Domaine Reserve"' in Grigory Tunkin, Rüdiger Wolfrum and J Enno Harders (eds), *International law and municipal law: Proceedings of the German-Soviet Colloquy on Internal. Law at the Inst. fur Internal. Recht an d. Univ. Kiel, 4 to 8 May 1987* (Duncker & Humblot 1988) 128.

³⁷¹ Shinkaretskaya (n 370) 123.

³⁷² *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921, Great Britain v France, Advisory Opinion* [1923] PCIJ 4, PCIJ Ser B No 4 23–24; *Military and Paramilitary Activities (merits)* (n 223) [258–259]; Shaw (n 46) 471–472; Shinkaretskaya (n 370) 129–130.

therefore provide a legal basis to act, but, like the exercise of state jurisdiction rights, implementation nonetheless remains subject to limitations.³⁷³

Immigration control and the right to exclude aliens may have stimulated *domaine réservé's* recognition by the *Covenant of the League of Nations*,³⁷⁴ and the *Charter of the United Nations*.³⁷⁵ Conceptually, “[b]y carving out a territorial jurisdiction for themselves, states withdraw part of the surface of the earth from free access to outsiders”.³⁷⁶ This border stabilizes the state, maintains interstate peace and order, and “express[es] in legal terms the values on which the territorial states or community (e.g. the European Union) builds its own identity”.³⁷⁷ Exercising control is thus an element of managing borders. When this is implemented through legislation, there clearly is an exercise of jurisdiction which falls outside the purview of state jurisdiction and the international legal question it seeks to answer. These matters “remain within the regulatory competence of States”.³⁷⁸

Thus, border control legislation is not apt to application of state jurisdiction because the very freedom from non-interference that *domaine réservé* conceptualisation seeks to secure would be removed. In defining undesirable aliens, the territorial/extraterritorial dichotomy of state jurisdiction is immaterial and conduct with no nexus to the state may be prescribed as a ground for denial. At the very least, as a matter of internal structuring, interdependence sovereignty has recognised the exclusion of a foreign subject from a state’s dominion.³⁷⁹ Anyone visiting the USA will witness the vast scope of extraterritorial conduct which may make you ineligible for admission. Had these grounds of inadmissibility been prescribed

³⁷³ Gallagher and David (n 48) 209 and, fn. 26; Shinkaretskaya (n 370) 132 Bernhardt’s response, “There are no subject matters which are totally excluded from international concern by their nature. Even in fields where in former times there was no international law rule whatsoever, new international law can impose limits on state sovereignty”.

³⁷⁴ When disputes “arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement” *Covenant of the League of Nations*, adopted 28 April 1919, 225 CTS 195 (entered into force, 10 January 1920) art. 15(8).

³⁷⁵ A guiding principle for the UN and its Members, *UN Charter* (n 9) art. 2(7).

³⁷⁶ János Kis, Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 *American Journal of Comparative Law* 295, 298.

³⁷⁷ Trevisanut (n 175) 671–672.

³⁷⁸ Katja S Ziegler, ‘*Domaine Réservé*’, *Max Planck Encyclopedia of Public International Law* (OUP 2013) para 1.

³⁷⁹ “[T]he concept does retain validity in recognising the basic fact that state sovereignty within its own territorial limits is the undeniable foundation of international law as it has evolved, and of the world political and legal system” Shaw (n 46) 472.

within a criminal offence, or been enforced by measures beyond denial of entry, there would likely be a violation of the law of state jurisdiction. The violation would consist in the weak nexus between the USA and the prescribed inadmissibility conduct.³⁸⁰ Instead, inadmissibility criteria result in the denial of a visa or admittance to the territory. Only territorially-defined conduct constitutes the separate and subsequent offence subject to more onerous enforcement measures; “improper entry by alien”.³⁸¹

However, obligations assumed under other fields of international law still place constraints upon the content of such prescription.³⁸² But this does not limit the jurisdictional scope. Limitations on content do not *ex post facto* mean that privileges which were previously denied as a matter of *domaine réservé* prerogative must now be justified upon rules of state jurisdiction. For example, entry conditions for persons must still be compatible with human rights, notably the right to seek asylum, while entry conditions for goods must still be compatible with international trade law.

2.5.2.1. *Application of domaine réservé -based jurisdiction to PSJ*

The law of the sea leaves space for arguing that the prescription of entry conditions and denial of port privileges can be regarded as a matter of *domaine réservé*-based jurisdiction. In cases where *UNCLOS* and other applicable treaties refer to powers of state jurisdiction, they explicitly refer to jurisdiction. Other rights of state are referred to by different terminology, such as sovereign rights. For residual PSJ, not only is state jurisdiction preserved, but also “sovereignty” over ports.³⁸³ This is a broader concept than state jurisdiction and could therefore incorporate the sovereign rights of *domaine réservé*. Indeed, the frequently cited

³⁸⁰ Codified, 8 U.S.C. 2017 (n 185) § 1182 e.g. § 1182(2)(c)(ii) reason to believe historically obtained financial benefit from a related ‘controlled substance trafficker’, or § 1182(3)(d)(i) previous membership of a foreign community party.

³⁸¹ 8 *ibid* § 1325, ‘(1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact’.

³⁸² “[T]he entitlement of a State to control the entry of aliens into its territory must be filtered through the lens of international rules that the State has in one way or another agreed to” Gallagher and David (n 48) 209.

³⁸³ UNFSA (n 156) art. 23(4); FAO, *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing* (FAO 2007) para 10; PSMA (n 181) preamble, art. 4(1)(b).

ICJ case, *Military and Paramilitary Activities*, similarly refers to sovereignty in respect of regulating port access, without prejudice to this being a matter of state jurisdiction.³⁸⁴

Thus, evidencing an exercise of *domaine réservé*-based jurisdiction, the ICJ has stated “[t]he power of a State to issue or refuse visas is a *practical expression* of the *prerogative* which each State has to control entry by non-nationals into its territory”.³⁸⁵ The power of a port state to deny port entry or services is, by analogy, a practical expression of its prerogative to control entry of foreign flagged vessels into its territory. Filtering acceptable foreign vessels to enter the state would be as much a necessity of a state’s independence as filtering foreign nationals.

2.5.2.1.1. Prescription of conditions for port entry or use of port services

The *domaine réservé*-based jurisdiction to grant or deny entry “entails discretion”.³⁸⁶ This discretion is equally excluded from the limits imposed by state jurisdiction. Therefore, port entry and privileges may be conditionally extended on an *ad hoc* or defined basis.

Conditionality may be prescribed within law. Thus, the *domaine réservé* right to control entry extends to prescriptive jurisdiction over conditions thereof. Discretion includes not only prescribing grounds upon which a vessel may be denied entry, but also conditions upon which entry is granted. Here other port privileges may be included such as landing, transshipment, refuelling, resupplying and other port services. PSJ, when limited to denial of entry or services, is an institutionalisation of an ad-hoc power.

However, while matters of *domaine réservé* are given some deference by international law, this is not absolute. This is demonstrated in the *Dispute Regarding Navigational and Related Rights*, where *domaine réservé* discretion could not be exercised because this would be in breach of rights granted to a foreign state by international law.³⁸⁷ In a PSJ context, the law of the sea provides one such reference for questions of subsequently applicable limitations (3-4). Thus, international law may impose constraints on exercising that discretion. Similarly, the

³⁸⁴ *Military and Paramilitary Activities (merits)* (n 223) [213].

³⁸⁵ (emphasis added) *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment [2009] ICJ 133, ICJ Rep 2009 213 [113].

³⁸⁶ *ibid* 115.

³⁸⁷ *ibid* 115–118.

question of a right of entry would be an exceptional right granted to a foreign state through multilateral or bilateral treaty arrangements.³⁸⁸ Imposing measures that denied entry to vessels who should benefit from their state's right of entry would be a breach of this right, not a breach of state jurisdiction.

Nonetheless, reclassification of port entry/use conditions as *domaine réservé*-based jurisdiction flowing from the discretion over who may enter, removes the blur between territorial and extraterritorial state jurisdiction (2.5.1.1). *Domaine réservé* preserves a state's interests in determining who may enter and in preventing unwanted vessels entering; and no more than that. Prescribing offences, including offences related to the breach of entry conditions, does not fall within this sovereign right and therefore must be based upon principles of prescriptive state jurisdiction.

Rather than removing the special status of entry conditions over time,³⁸⁹ this approach reaffirms its distinction from other PSJ. As mutually exclusive rights of prescriptive jurisdiction, expansive extraterritorial practice within the *domaine réservé* cannot be comparatively applied to argue expansive territorial state jurisdiction. That would undermine territoriality, sovereign equality, and respect for the plurality of legal systems.³⁹⁰

For foreign flag and coastal states, their jurisdictional autonomy is preserved because port states are not unjustifiably extending or abusing territorial jurisdiction. Port states may not prescribe offences, concurrent to a foreign state's jurisdiction, without a nexus. Equally port states need not accept conduct they disapprove of when granting entry privileges.³⁹¹ Foreign states recognise that port states have *prima facie* unfettered discretion over who is denied

³⁸⁸ States are free to consent to the withdrawal, limitation or transfer of *domaine réservé*-based rights (3). Gero Brugmann, *Access to Maritime Ports* (Books on Demand 2003).

³⁸⁹ Predicting an expansive approach, Marten, 'PSJ, International Conventions, and Extraterritoriality' (n 89) 132–136.

³⁹⁰ Or what may be termed territoriality *light*, where withholding benefits as an enforcement power makes the prescriptive jurisdiction "easier" to find, Ryngaert and Ringbom (n 342) 385.

³⁹¹ See the comparable rise of 'regulatory pluralism' resulting from increased market access regulation upon process and production methods, Gareth Davies, 'International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism' (2012) 13 German Law Journal 1203, 1207–1208, 1210–1213. A broader conceptualisation of 'economically involved' would have to be adopted to account for regulating any service access or port presence i.e. from market access to any state access. Thereupon, blurring 'factual power' with 'formal jurisdiction' would dilute the benefits seen when limited to explaining product standards regulation.

entry, including for extraterritorial conduct. This *domaine réservé* is preserved, because they share similar interests in controlling the entry of foreign vessels or persons into their state. One might define this not as a state power to compel or govern extraterritorial conduct, but rather as a state power to not become complicit within it and voice dissent against it.

2.5.2.1.2. Enforcement through the denial of port privileges

To remain within the *domaine réservé*-based exception, a state must remain within the purview of controlling access to its territory. For enforcement, this extends to denial of entry or conditional entry (e.g. entry is allowed but not the use of port services). Enforcement measures beyond withholding port privileges would fall outside this *domaine réservé*-based rationale and therefore would necessitate enforcement state jurisdiction.

On the basis of this analysis, the enforcement paradox is legally grounded. Should a state decide to exercise enforcement against a vessel that does not fulfil entry conditions,³⁹² it has no choice but to impose denial of entry or limited entry as the enforcement mechanism. If the state has no valid ground on which to prescribe a port state offence, it may not utilize different enforcement tools which require valid enforcement state jurisdiction. Denial of entry may be a disproportionate response. However, given the lack of state jurisdiction to prescribe and enforce further measures, denial may be the only mechanism available to express disapproval and avoid complicity.

UNCLOS, arts. 25 and 218 do not constitute an implied limitation upon enforcement state jurisdiction. They rather reflect the different enforcement powers available depending on whether prescription and enforcement are grounded within state jurisdiction or the exceptional *domaine réservé*. The distinction in enforcement practice between entry conditions of a static nature and entry conditions of a conduct nature is reflective of the respective applicability and inapplicability of territorial prescriptive state jurisdiction. Nonfulfilment of static entry requirements would be continuous in-port and thus easily subjected to complementary territorial state jurisdiction. This includes the full capacity of

³⁹² The discretion upon whether enforcement is exercised in cases of non-compliance may nonetheless be subject to obligation(s) to exercise jurisdiction in defined cases (ch 3).

enforcement state jurisdiction that territoriality entails (e.g. detention). Finally, the question of exit conditions is, from this perspective, a different legal question. Who may navigate freely out of a territory is a question that affects different interests than the question who may navigate freely into a territory. It does not raise issues of sovereign independence, prerogatives over community membership, or the freedom to not be complicit within conduct a state disapproves of. Exit conditions thus fall outside *domaine réservé*-based jurisdiction.

2.5.3. Sub-conclusions

The suitability of the law of state jurisdiction to provide meaningful input into delimiting the scope of PSJ concerning prescription and enforcement of entry conditions has begun to be questioned.³⁹³ Yet, without knowing the source of a legal right, one cannot conclude its legal scope. Attempts to provide an answer have raised serious questions of prescriptive and enforcement jurisdiction which cannot be adequately answered through application of state jurisdiction alone (2.5.1). For the sound functioning of the law of state jurisdiction, an answer must be found.

Building upon Molenaar's separation of PSJ into denial of port privileges and the imposition of more onerous measures, section 2.5 provides the legal basis for the inapplicability of state jurisdiction to the denial of port privileges.³⁹⁴ The age-old concept of *domaine réservé* enables a port state to prescribe entry conditions without reference to the territorial/extraterritorial dichotomy of state jurisdiction (2.5.2). To remain within the *domaine réservé* exception of controlling entry into the territory, *domaine réservé*-base jurisdiction may only be enforced through denial of entry or conditioned entry (i.e. denial of landing, transshipment or other port

³⁹³ Ringbom, 'Global Problem - Regional Solution?' (n 89) 625–626; Marten, 'PSJ, International Conventions, and Extraterritoriality' (n 89) 130; Robert C Beckman, 'PSSAs and Transit Passage—Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS' (2007) 38 *Ocean Development & International Law* 325 pp. (343–344 no prescriptive jurisdiction), 345 no enforcement jurisdiction, but 348 right to prescribe entry conditions, enforced through denial; "Entry requirements and prescriptive jurisdiction do not necessarily coincide and, therefore, jurisdictional principles have to be taken into account when exercising jurisdiction in the port on the basis of entry requirements" Kopela (n 88) 92.

³⁹⁴ Molenaar, 'PSJ to Combat IUU Fishing' (n 274) 379–380 defined this distinction and proposed the answer is found within enforcement jurisdiction, "The relevance of the type of enforcement measures opted for is directly related to the absence of a right of access to ports under customary international law". Given Molenaar rightly points out enforcement is predicated on valid prescription, the analysis is likely predicated on extraterritorial conduct conditions of entry nonetheless being an exercise of territorial prescriptive jurisdiction.

services). Whilst the *basis* remains a freedom of statehood, *implementation* remains subject to limitations or obligations assumed under international law. This includes all questions outside of the international legal basis, such as obligations to exercise jurisdiction (ch 3), or obligations to limit its implementation in customary law or treaty-based cases (ch 4).

2.6. Conclusions

This chapter provides the framework for assessing the jurisdictional basis of port state practice within international law. Prescriptive and enforcement jurisdiction is by and large governed by the international law of state jurisdiction. In both cases one must find a permissive ground to exercise jurisdiction, applying a territorial/extraterritorial dichotomy. The sole exception is where a matter of *domaine réservé* is accompanied by regulatory competence. In such cases, laws prescribed will be *domaine réservé*-based exercises of jurisdiction which, by that very nature, are not susceptible to the application of prescriptive state jurisdiction under international law. Of course, to remain within this exception any subsequent enforcement must be intimately linked to the *domaine réservé* decision and its legal consequences. In this sense, enforcement jurisdiction may actually be narrower than that found within international law's territorial enforcement jurisdiction.

Applying this chapter to the definition of extraterritorial PSJ (1.2), one must separate PSJ into two strands, namely jurisdiction over, (a) access to port privileges, and (b) port state offences. In the case of extraterritorial PSJ exercised over denial of port privileges (a), the state need not have a legal basis in state jurisdiction or evidence to punish such conduct. It may withhold its port privileges and prescribe conditions of access under its *domaine réservé*-based jurisdiction. When prescribing port state offences or imposing more onerous measures (b), the *domaine réservé*-based exception is not applicable. Therefore, such PSJ must be prescribed under a permissive ground of prescriptive state jurisdiction. When such jurisdiction is enforced in-port, the port state will be exercising territorial enforcement state jurisdiction, and this is not limited as a matter of state jurisdiction.

Nonetheless, in both cases jurisdiction will be subject to limitations within other fields of international law. For port states this includes the law of the sea, amongst others. While there is debate about the question whether principles, such as reasonableness, are a matter of

comity or legal limitation,³⁹⁵ these principles have largely been incorporated within the law of the sea. General limitations are therefore dealt with subsequently (ch 4). One may thus schematise PSJ flowing from sovereignty as:

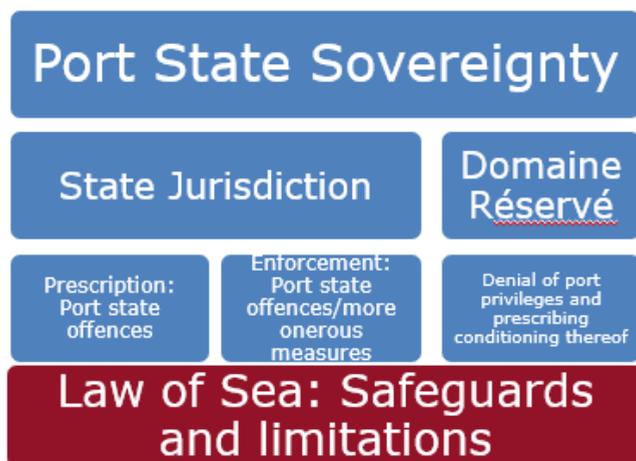


Figure 1

³⁹⁵ Extensive coverage; Ryngaert, *Jurisdiction in International Law* (n 13) chs 5 and 6.5 (pp. 215-230). Note, "Restatement (Fourth) does not continue the position of Restatement (Third) Section 403, which stated that customary international law requires an assessment of the reasonableness of exercising prescriptive jurisdiction in each case [only included as a] [...] domestic principle of statutory interpretation" William S Dodge, 'The Customary International Law of Jurisdiction in the Restatement (Fourth) of Foreign Relations Law' (*Opinio Juris*, 8 March 2018) <<http://opiniojuris.org/2018/03/08/the-customary-international-law-of-jurisdiction-in-the-restatement-fourth-of-foreign-relations-law/>> accessed 27 March 2018.

Chapter 3 Port State Jurisdiction under Global Instruments

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3.1. Introduction

Traditional positivistic jurisdiction, whereby state rights are viewed in isolation, can only take analysis so far. Prescriptive (2.3) and enforcement (2.4) PSJ was resystematised, with conditioning and enforcing port state privileges distinguished from port state offences and with state jurisdiction as a *domaine réservé*-based jurisdiction (2.5). However, when exercising jurisdiction, particularly in a transboundary context, interaction with other fields of international law occurs. The law of the sea's influence upon jurisdiction includes, first, the nature of PSJ, and more specifically, PSMs to combat IUU fishing. Rights may entail responsibilities, with jurisdiction being no exception.¹

¹ E.g. international crimes, whereby treaty based quasi-universal jurisdiction is not solely a right but a mandatory duty; A Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187.

PORT STATE JURISDICTION UNDER GLOBAL INSTRUMENTS

This chapter demonstrates a transformative shift in PSJ when addressing extraterritorial IUU fishing. A progressive move towards obligatory standards of prescription and enforcement is evident, culminating in the *FAO Port State Measures Agreement* (PSMA).² This chapter is not a chronology of PSJ within global oceans governance instruments or soft law. It deals with the stepping stones of practice from discretionary national interests (3.2.1) to obligatory PSMs in the global interest (3.2.2). This argumentation is predicated on several precursors, from port states playing a facilitative role through assistance to, or pressure upon, other jurisdictions (3.2.2.1), to recognising the power of coordinated port state enforcement (3.2.2.2). From coordination, one moves to a general port state duty in fisheries, with increasingly specific treaty-based obligations for contracting parties (3.2.2.3). Discretion to prescribe or enforce port state offences beyond this ‘floor’ of governing port state privileges is preserved (3.2.2.4). The discussion comes full circle, with the facilitative role of others in assisting or pressuring port states (3.2.2.5). In conclusion, future developments may chart further jurisdictional evolution (3.3).

3.2. The developing nature of PSJ: From discretionary to obligatory PSMs

To date, of sustainable fisheries and the elimination of IUU fishing globally have not been achieved. Increased pressure upon flag state and coastal state responsibilities for fisheries under their respective jurisdictions is necessary. Increased regulation, or strengthening the existing rules, will remain ineffective until adequate implementation and compliance is addressed.³

² Comparable to “Jurisdictional duties owed to other states”, *ibid* 209–213. Obligatory enforcement jurisdiction over suspects found within a state’s territory for extraterritorial conduct, implies equally binding obligations to exercise prescriptive jurisdiction over such acts.

³ “Non-compliance with fisheries regulations is widespread and a major factor in unsustainability [...] Enacting ever more legislation and regulations is not going to solve the problem” Philippe Cacaud, ‘The Case of Developing Countries’ in Judith Swan and Dominique Gréboval (eds), *Report of the International Workshop on the Implementation of International Fisheries Instruments and Factors of Unsustainability and Overexploitation in Fisheries (Mauritius, 3-7 February 2003)* (FAO Fisheries Report No 700, FAO 2003). Even self-styled ‘global leader’, the EU, suffers from inadequate implementation, particularly in sanctions and infringement follow-ups; EU, ‘Implementation and Evaluation of Regulation (EC) 1224/2009 Establishing a Union Control System for Ensuring Compliance with the Rules of the Common Fisheries Policy as Required under Article 118 and REFIT Evaluation of the Impact of the Fisheries Regulation’ (Report from the Commission to the European Parliament and the Council 2017) COM(2017) 192 final 7.

CHAPTER 3

In addressing inadequate implementation, one could focus on state failures. Flag states failing their responsibilities could be defined as not fulfilling the ‘genuine link’ requirement.⁴ States could be held accountable through subjection to unfriendly retorsion when undermining fisheries governance, or even countermeasures when non-compliant.⁵ Alternatively, greater focus upon supplementary jurisdictional capacities would expand the net of actors ensuring compliance.⁶ At the global level, the latter approach has taken precedence for port states.

3.2.1. National interests, national prerogative

PSJ has long been utilised, with early historical accounts focused on national interests such as raising revenue or keeping out ‘undesirables’ – be it vessels, or persons aboard.⁷ Undesirables fluctuate per state and period. For example, an extensive list of persons prohibited from landing in US ports at the turn of the 20th Century included “feeble-minded”, those with “previous attacks of insanity”, diseased, “defectives”, polygamists, or natives of specific Asiatic zones.⁸ By contrast, the previous extraterritorial conduct of foreign vessels was of little

⁴ Largely dropped as a fruitless avenue, but occasionally resurfacing, e.g. “The principle of ‘genuine link’ [...] should be a key instrument in international efforts to support sustainable development goals” EU, ‘Strategic Goals and Recommendations for the EU’s Maritime Transport Policy until 2018’ (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2009) COM(2009) 8 final 3.

⁵ Unfriendly PSMs (5.3.3.4; 6.2.4; 6.3.1.5, 6.3.2.1, 6.4.1). PSMs founded upon a valid right of *domaine réservé* or state jurisdiction, without violating LoS obligations, require no recourse to counter-measures unless violations occur within other fields. For distinction; United Nations Legislative Series, *Materials on the Responsibility of States for Internationally Wrongful Acts* (ST/LEG/SER B/25, United Nations 2012) 304–305.

⁶ UNCLOS is traditionally understood as a framework balancing flag and coastal state jurisdiction, with provisions representing further interest groups, e.g. nationality for fisheries, United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art. 117.

⁷ An excellent historical summary, including the health certification mechanism of 14th century Mediterranean states to control diseases; Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer 2014) 37–42. Early examples include the imposition of customs duties in ancient Egypt (early as 1300-1225BC), C Ernest Fayle, *A Short History of the World’s Shipping Industry* (First published in 1993, Routledge 2006) 36.

⁸ An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States (1917) HR 10384, Pub L No 301 39 Stat 874 secs. 3 (undesirables), 7 (landing prohibition), 8-9 (vessel offences for bringing into US), 10 (designated ports and times), 12-13 (documentation requirements), 14 (documentation offence).

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interest during this period.⁹ The powers that existed were rarely exercised for political or practical reality.¹⁰

The late 19th Century witnessed a breakthrough in using PSJ to regulate international trade and all visiting vessels, whichever the flag, with the UK's *Merchant Shipping Act*. This included the, at the time, questionable offence of port arrival "in winter with a cargo of timber carried on deck".¹¹ Inappropriate loading in a foreign port could lead to vessel instability of concern to subsequent states.¹² Proliferation of other limited practice began settling the theoretical PSJ competence over foreign vessels.¹³ For example, the British position by 1930 was "the State is entitled to exercise jurisdiction over a foreign merchant ship lying in its port and over persons and goods on board" (2.3.1, 2.4.1).¹⁴

Thus, for most of its history, PSJ is discretionary, which is characteristic of jurisdiction generally. Whence it came to law of the sea codification conferences, jurisdictional discretion was incorporated as territorial sovereignty over internal waters and its extension into further maritime zones.¹⁵ Subject to a narrow exception (4.2.3), no right of entry exists (4.2.2) and states may:

⁹ David Anderson, 'Port State Powers in the Modern Law of the Sea', *Modern Law of the Sea: Selected Essays* (Martinus Nijhoff Publishers 2008) 268. "Maritime authorities were concerned almost exclusively with the affairs of their own ships" John Hare, 'Port State Control: Strong Medicine to Cure a Sick Industry' (1997) 26 *The Georgia Journal of International and Comparative Law* 571, 573.

¹⁰ David Anderson, 'The Roles of Flag States, Port States, Coastal States and International Organisations in the Enforcement of International Rules and Standards Governing the Safety of Navigation and the Prevention of Pollution from Ships under the UN Convention on the Law' (1998) 2 *Singapore Journal of International & Comparative Law* 557, 564.

¹¹ Discussed, Marten (n 7) 41 referencing *Merchant Shipping Act 1876*, 39 & 40 Vic, c 80, s 24. Reproduced Authority (AU), 'Supplement to the Victoria Government Gazette of Friday, February 9, 1877' (1877) 1877 No 17. Suspicions to early practice; Douglas Bell, 'Port State Control v Flag State Control: UK Government Position' (1993) 17 *Marine Policy* 367, 368.

¹² UK Board of Trade, 'Archtor (S.S)' (1912) Wreck Report 160.

¹³ Philippe Boisson, 'The History of Safety at Sea', *Safety At Sea. Policies, Regulations and International Law* (Reproduced, Edition Bureau Veritas 1999) pt Foreign ships in port; Gero Brugmann, *Access to Maritime Ports* (Books on Demand 2003) ch V. E.g., the prohibition era; *Cunard SS Co v Mellon* (1923) 262 US 100 (US Supreme Court). However European responses were unsettled, with claims extension violated international law, Jason M Schupp, 'The Clay Bill: Testing the Limits of Port State Sovereignty' (1994) 18 *Maryland Journal of International Law* 199, 224.

¹⁴ Statement at the 1930 Hague Codification Conference, quoted Anderson (n 9) 267–268 citing League of Nations Doc. C74M39(1929), v.99. Internal affairs/economy debate likely inhibited earlier practice (4.2.4).

¹⁵ Convention on the Territorial Sea and the Contiguous Zone, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964) art. 1(1); UNCLOS (n 6) art. 2(1); Brugmann (n 13) 14. An earlier treaty

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“In the case of ships proceeding to internal waters [or a call at a port facility outside internal waters], the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to [internal] waters [or such a call] is subject”¹⁶

National interests clearly extend to any violation within its jurisdiction. Port, coastal and flag state competencies are theoretical divisions for analysis. Port states will often concurrently be flag or coastal states, with sufficient prescription but insufficient enforcement jurisdiction.¹⁷ UNCLOS therefore recognises port state enforcement for territorial or quasi-territorial coastal state prescription:

“When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State”¹⁸

Case law reiterates deference to national discretion, notably, “by virtue of its sovereignty that the coastal State may regulate access to its ports”.¹⁹

emphasised discretion to adopt measures in the national interest; Convention on Facilitation of International Maritime Traffic, adopted 9 April 1965, 591 UNTS 265 (entered into force 5 March 1967) art. V(2).

¹⁶ UNCLOS (n 6) art. 25(2), repeats verbatim, with the addition of the bracketed; 1958 TSC (n 15) art. 16(2). Specifically, pollution related conditions require notification, but without limiting full port state sovereignty, UNCLOS (n 6) arts. 211(3), 218. The “duty to notify about access regulations is a counterbalance born out of the understanding that access itself is a matter of a port state’s discretion” Brugmann (n 13) 16. Similarly, for research vessels states shall “endeavour to adopt reasonable rules”, UNCLOS (n 6) art. 255.

¹⁷ Coastal state prescription regarding non-living resources may be enforced in-port as a policy preference, given applicable (but discretionary) EEZ enforcement jurisdiction, UNCLOS (n 6) arts. 56, 73; *The Arctic Sunrise Arbitration (Netherlands v Russia)*, Award on the Merits [2014] PCA 2014-02 (Arbitral Tribunal (UNCLOS, Annex VII)) [279–285].

¹⁸ UNCLOS (n 6) art. 220(1). For wide enforcement options and applicability of national rules, broadly related to prevention, reduction or control of vessel-source pollution, Henrik Ringbom, *The EU Maritime Safety Policy and International Law* (Brill 2008) 215–217; ‘discharge standards and navigation measures’ Erik J Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998) 186–187.

¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment [1986] ICJ 5, ICJ Rep 1986 14 [213]. A *sui generis* case for access and passage, suggesting in default no such rights within internal waters and ports, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Judgment 11 September 1992 [1992] ICJ 75, ICJ Rep 1992 351 [412].

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Turning to fisheries governance, national prerogative followed similar developments. However, in leadup to confirmation within *UNFSA*, some Fish Stocks Conference participants,²⁰ criticised PSJ over fisheries as;

“going beyond the framework represented by the LOS Convention and as departing from well-established international practice”²¹

Nonetheless, limited or non-existent exercises of jurisdiction are as much a part of PSJ’s prerogative as exercising jurisdiction over merchant vessels.²² Access for foreign fishers was unaccompanied by *opinio juris* upon differentiation as a legal right. Indeed, a Fish Stocks Conference provision on the right to deny access to fishing vessels was rejected as superfluous.²³ Fisheries protectionist policies had already resulted in exclusion of fishing vessels from access/equal treatment relations.²⁴

Subsequent practice provides different port state roles (3.2.2) whilst preserving discretion to go further. The *PSMA* preserves discretionary PSJ beyond the duties contained therein, explicitly “including their right to deny entry thereto as well as to adopt more stringent port State measures than those provided for in this Agreement”.²⁵ Parties must also deny port services to vessels believed to have engaged in IUU fishing or supportive conduct following inspection, but additional measures are neither prevented nor mandated.²⁶

²⁰ ‘United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks’ <http://www.un.org/depts/los/fish_stocks_conference/fish_stocks_conference.htm> accessed 15 November 2017.

²¹ Anderson (n 9) 279. Chee discusses many of the objections, including right of access (4.2.2), infringement of flag state jurisdiction (4.3.3), beyond the conference mandate, and inconsistency with fisheries cooperation obligations; Choung Il Chee, ‘Jurisdiction of Port State Over Private Foreign Vessel in International Law’ (1994) 39 *The Korean Journal of International Law* 55.

²² Bilateral port access provisions usually excluded fishing vessels, bar exceptional cases, Brugmann (n 13) 55–56.

²³ Anderson (n 9) 279. 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, adopted 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001) 1995 art. 23(4) makes no vessel distinction.

²⁴ Brugmann (n 13) 101.

²⁵ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, opened for signature 22 November 2009, I-54133 (entered into force 5 June 2016) art. 4(1)(b). “may adopt more stringent measures” *ibid* preamble.

²⁶ *PSMA* (n 25) art. 18(3).

Port state offences also remain within national discretion.²⁷ Global instruments noted intact sovereignty beyond the agreements, with additional measures a discretion within *IPOA-IUU*,²⁸ and *FAO Model Scheme PSM*.²⁹ The preservation of PSJ beyond any minimum standards imposed was likely a negotiation strategy to secure consensus and eventual contracting parties.³⁰ This demonstrates the importance states placed upon maintaining national prerogatives beyond duty-based provisions.

3.2.2. International interests, international roles

When interests extend beyond a state's territory and discretion, cooperation may result in defined roles for each jurisdictional capacity. These are not mutually exclusive and thus an international instrument will frequently use PSJ in different manners to achieve the same objective or different objectives. Port states may have a supplementary role, assisting or pressuring jurisdictions with primary responsibility for ensuring compliance and adequate sanctions (3.2.2.1). Alternatively, regional instruments and global networks may recognise and coordinate the exercise of PSJ to ensure compliance with generally accepted standards or regional measures (3.2.2.2.). To avoid 'leakage' of non-compliant vessels from one region to another, global instruments may also impose minimum standards in the exercise of customary PSJ (3.2.2.3). The applicability, detail and source (hard or soft law) of that port state duty varies, but principally concerns *domaine réservé*-based jurisdiction to deny port privileges. In contrast to fisheries, only PSJ concerning certain vessel discharges has been expanded by international instruments through extraterritorial treaty-based state jurisdiction (3.2.2.4). Global fisheries instruments have nonetheless recognised that with primary responsibilities for port states comes the possibility that other jurisdictions have a supplementary role, assisting or pressuring port states (3.2.2.5). The relationship between

²⁷ UNFSA (n 23) art. 23(4). Tang Jianye, 'The Agreement on Port State Measures: A Commentary' [2009] *China Oceans Law Review* 312, 319–320.

²⁸ FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2001) paras 53, 59. Trade measures, that "could" be imposed in a port state capacity include catch documentation, import/export prohibitions or controls, and offences to conduct business or trade in fish or fish products derived from IUU fishing, *ibid* 69, 73.

²⁹ FAO, *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing* (FAO 2007) paras 10–11.

³⁰ Necessity for securing consensus; Jianye (n 27) 315.

jurisdictions thus works both ways, creating a net of states able to address vessel non-compliance.

3.2.2.1. Facilitative Jurisdiction

3.2.2.1.1. Assisting foreign states

Port states may recognise where their assistance is neither required nor desired. An ‘internal affairs’ deference policy (4.2.4) prevents “wasting scarce state resources to address problems which are another state’s concern”.³¹ Nonetheless, a crucial element of PSJ in oceans governance, particularly within earlier instruments, is assisting other states with their rights and responsibilities.

Extensive flag state jurisdiction over its vessels’ fishing, and its primary obligation to address non-compliance translated into a ‘facilitative’ port state role.³² While not affecting port state rights, its international role was principally one of deference and flag state assistance. The *Compliance Agreement* provided the first explicit global fisheries agreement role for PSJ,³³ being comparatively conservative to PSJ’s merchant shipping role. The port state obligation was only to initiate the process by informing flag states of reasonable suspicions, and then only amongst state parties:

“Parties shall cooperate [...] to assist the flag State in identifying those fishing vessels flying its flag reported to have engaged in activities undermining international conservation and management measures [...]

³¹ Cedric Ryngaert, *Unilateral Jurisdiction and Global Values* (Eleven International Publishing 2015) 24.

³² Flag state, *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion* [2015] ITLOS 21, ITLOS Rep 2015 4 [129, 134–138]. On due diligence, *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, Separate Opinion of Judge Paik* [2015] ITLOS 21, ITLOS Rep 2015 102 [20–29].

³³ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003) 1993; Nivedita M Hosanee, ‘A Critical Analysis of Flag State Duties as Laid down under Article 94 of the 1982 United Nations Convention on the Law of the Sea’ (United Nations-Nippon Foundation Fellowship Thesis, Milan 2008) 61; FAO, ‘Report of the Technical Consultation to Draft a Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Rome, 23–27 June 2008, 26–30 January 2009, 4–8 May 2009 and 24–28 August 2009)’ (FAO 2009) FAO Fisheries and Aquaculture Report 914 50 ‘Opening Statement’.

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2. When a fishing vessel is voluntarily in the port of a Party other than its flag State, that Party, where it has reasonable grounds for believing that the fishing vessel has been used for an activity that undermines the effectiveness of international conservation and management measures, shall promptly notify the flag State accordingly. Parties may make arrangements regarding the undertaking by port States of such investigatory measures as may be considered necessary [...]

(b) Each Party, where it has reasonable grounds to believe that a fishing vessel not entitled to fly its flag has engaged in any activity that undermines the effectiveness of international conservation and management measures, shall draw this to the attention of the flag State concerned³⁴

The voluntary *Code of Conduct for Responsible Fisheries*,³⁵ of which the *Compliance Agreement* is an integral part,³⁶ furthered international standards and norms, while promoting PSMs. The emphasis of explicit port state duties nonetheless remained upon assisting flag states:

“8.3.1 Port States should take [...] such measures as are necessary to achieve and to assist other States in achieving the objectives of this Code [...]

8.3.2 Port States should provide such assistance to flag States as is appropriate [...] when a fishing vessel is voluntarily in a port or at an offshore terminal of the port State and the flag State of the vessel requests the port State for assistance in respect of non-compliance with subregional, regional or global conservation and management measures or with internationally agreed minimum standards for the prevention of pollution and for safety, health and conditions of work on board fishing vessels³⁷

³⁴ Compliance Agreement (n 33) arts. V, VI(8)(b). Martin Tsamenyi and Erik J Molenaar, ‘Satellite-Based Vessel Monitoring Systems International Legal Aspects & Developments in State Practice’ [2000] FAO Legal Papers Online 28.

³⁵ FAO, *Code of Conduct for Responsible Fisheries* (FAO 1995).

³⁶ Compliance Agreement (n 33) preamble; FAO, *Code of Conduct for Responsible Fisheries* (n 35) art. 1.1, Annex 2 Resolution, para. 4. FAO, ‘Resolution 15/93: Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas’ (1993) C 93/REP Report of the Conference of FAO Twenty-seventh Session (Rome, 6–24 November 1993) para 3.

³⁷ FAO, *Code of Conduct for Responsible Fisheries* (n 35) art. 8.3 (contrast, art. 8.2 flag state duties). Continuing the trend of a ‘passive’ port states role, Emma Witbooi, ‘Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context’ (2014) 29 *The International Journal of Marine and Coastal*

The addition of assisting flag states, when requested, has found greater representation within international instruments addressing IUU fishing post-*UNFSA*. Not to be interpreted as a jurisdictional limitation, further discretionary measures are promoted when flag state requests or consent are forthcoming.³⁸

Early port state assistance measures were to be nonintrusive, largely consisting of inspecting vessels and documentation. This follows precedents of assistance set within other thematic fields during the 1950-70s, such as multiple pollution-related conventions,³⁹ *SOLAS*,⁴⁰ *Merchant Shipping (Minimum Standards) Convention*,⁴¹ and the *STCW Convention*.⁴² The role most expected of a port state beyond inspection and flag state notification was a preventative role for continued non-compliance. Port states should prevent the vessel from leaving until the standards were met.⁴³ In terms of enforcement jurisdiction, prevention may be contrasted with punishment (2.2.2).⁴⁴ Thus, detention and denial of port entry and services (3.2.2.2-3.2.2.3) are implemented to prevent non-compliance. It is hoped that substandard or non-compliant vessels will thereby be removed from the area, or not allowed to proceed until non-compliance is rectified.

Law 290, 298–299; Sean A Hagan, 'Too Big to Tackle: The Persistent Problem of Pirate Fishing and the New Focus on Port State Measures' (2014) 37 *Suffolk Transnational Law Review* 109, 120.

³⁸ FAO, *IPOA-IUU* (n 28) para 59; FAO, *Model Scheme PSM* (n 29) art. 4(5); PSMA (n 25) art. 18(3).

³⁹ International Convention for the Prevention of Pollution of the Sea by Oil, adopted 12 May 1954, 327 UNTS 3 (entered into force, 26 July 1956) arts. IX-X, oil record book inspection, violations being reported to flag state. Subsequently, International Convention for the Prevention of Pollution, as modified Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, adopted 2 November 1943; 17 February 1978, 1340 UNTS 184 (entered into force, 2 October 1983) art. 5(2), port inspection, reporting to flag state unless a substantial deficiency between vessel and certificate, whereby prevent exit until necessary repairs undertaken. [note art. 5(3) expanded port state role below].

⁴⁰ International Convention for the Safety of Life At Sea, adopted 1 November 1974, 1184 UNTS 3 (entered into force 25 May 1980) Ch. 1, reg. 19, port inspection of certificates, ensuring (if clear evidence) that vessels with substantial deficiency 'shall not sail until it can proceed to sea without danger to the passengers or the crew'.

⁴¹ Convention (No. 147) concerning Minimum Standards in Merchant Ships, adopted 29 October 1976, 1259 UNTS 335 (entered into force 28 November 1981) art. 4. Port inspection and report to flag state, preventing further violation through taking 'measures to rectify any conditions on board that are clearly hazardous to safety and health'. Replaced, for the majority of parties by Maritime Labour Convention, adopted 23 February 2006, 45 ILM 792 (entered into force, 20 August 2013).

⁴² International Convention on standards of training, certification and watchkeeping for seafarers, adopted 7 July 1978, 1361 UNTS 2 (entered into force 28 April 1984) art. X. Examples discussed, Anderson (n 9) 269–273, 296. Ports state inspectors as unobtrusive as possible, reflected, UNCLOS (n 6) art. 226(1).

⁴³ Note, whilst not promoting entry denial and other direct action, states remain free to exercise discretion to promote compliance e.g. Canadian legislation and *SOLAS* compliance, Bruggmann (n 13) 96–99.

⁴⁴ *STCW Convention* (n 42) reg. 1/5(2)-(3).

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Preventative PSJ continues within fisheries governance with treaties being drawn up aimed at establishing global fishing vessel standards. According to the *Torremolinos Convention* and *Torremolinos Protocol* (neither in force), port states verify the certification by other parties, with a duty to prevent a dangerous vessel leaving,⁴⁵ or a vessel for which there is no valid certificate or “there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of that certificate”.⁴⁶ The comparable *STCW-F Convention* provides port state inspection of certification and the corresponding duty to prevent the vessel sailing until defined deficiencies (ch.1, reg. 4) that pose “a danger to persons, property or the environment” are rectified.⁴⁷ Punishment for non-compliance is not entrusted to port states, but rather the flag state or the personnel’s state of nationality.⁴⁸

The more recent *Work in Fishing Convention*⁴⁹ takes a slightly lighter approach, given its focus on the internal workings of a vessel and what would traditionally be left to flag states’ ‘internal affairs’. Flag states are obliged to ensure vessel compliance.⁵⁰ Conversely, PSJ “may” (i.e. discretionary) result in reporting to the flag state and ILO, or in corrective action if conditions are “clearly hazardous to safety or health”.⁵¹

⁴⁵ “[O]r that the vessel and its equipment are not in compliance with the provisions of the relevant regulations [...] shall take steps to ensure that the vessel shall not sail until it can proceed to sea or leave the port for the purpose of proceeding to the appropriate repair yard without danger to the vessel or persons on board” *Torremolinos Protocol Relating to the 1977 Torremolinos International Convention for the Safety of Fishing Vessels*, adopted 2 April 1993, 2001 Tractatenblad 168 (not in force) art. 4(2)-(3).

⁴⁶ *Torremolinos International Convention for the Safety of Fishing Vessels*, adopted 2 April 1977, 1980 Tractatenblad 139 (not in force) art 4(2); 1993 *Torremolinos Protocol* (n 45) art. 4; the latest IMO initiative to have the *Torremolinos Convention* and *Protocol* enter into force does not modify the PSJ; *Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol relating to the 1977 Torremolinos International Convention for the Safety of Fishing Vessels*, adopted 11 October 2012, 2014 Tractatenblad 49 (not in force) art. 2. Also, (3.2.2.2.1).

⁴⁷ *International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel*, adopted 7 July 1995, IMO Doc. STCW/CONF/10 (entered into force 29 September 2012) arts. 8(1) (port state certification inspection); 8(2) (prevent sailing of vessels posing ‘danger to person, property or environment’ [defined Regulation I/4(3)] until standards met); Regulation I/4 (control procedures).

⁴⁸ *STCW Convention* (n 42) art. 7(2)-(3).

⁴⁹ *Convention (No. 188) concerning work in the fishing sector*, adopted 14 June 2007, I-54755 (entered into force 16 November 2017).

⁵⁰ *ibid* art. 40. See discretionary nature of port state control, ILO legal advisor, Fourth item on the agenda: Work in the fishing sector (single discussion), (J Thullen) IMO, ‘Report of the Committee on the Fishing Sector’ (ILO 2007) Provisional Record, International Labour Conference, Ninety-sixth Session, Geneva, 2007 12 para 258.

⁵¹ *Work in Fishing Convention* (n 49) arts. 43 and 44 (no more favourable treatment NCP vessels). Noting the shipping pedigree of corrective measures, this “provides a powerful incentive for fishing vessel owners to

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Finally, promoting port states' assistance to flag states, or the obligatory prevention of deficient vessels sailing, clearly requires implementation via exercises of prescriptive and enforcement jurisdiction. Assistance provisions usually point to "procedures established in their national legislation".⁵² At the same time discretionary options, e.g. under the *Work in Fishing Convention*, require at least prescription of a port state inspection regime that could be utilised should a complaint or evidence be submitted.⁵³

3.2.2.1.2. Pressuring foreign states

As Witbooi highlighted, the port state's fisheries assistance role was not mirrored by flag state duties to cooperate.⁵⁴ Flag states could benefit from port state assistance in combatting IUU fishing but could equally dismiss information without regard. Assistance is thus only useful for flag states willing and able to exercise adequate jurisdiction to fulfil their global or regional responsibilities.

It will be subsequently demonstrated that port states may nationally or regionally take unfriendly (retorsion)⁵⁵ measures and withhold port privileges to all vessels flying the flag of a state perceived as non-cooperating.⁵⁶ This expansive practice, covering all vessels of one

provide fishers on such vessels with decent working conditions", ILO, 'Guidelines for Port State Control Officers Carrying out Inspections under the Work in Fishing Convention, 2007 (No. 188)' (International Labour Office 2011) VI and p. 19, section 3.1. Further, 'Resolution concerning port State control', annexed IMO, 'Report of the Committee on the Fishing Sector 2007' (n 50) 12/94.

⁵² FAO, *Code of Conduct for Responsible Fisheries* (n 35) para 8.3.1.

⁵³ Although indicative and non-binding, "The competent authority should develop an inspection policy for authorized officers to take the measures referred to in paragraph 2 of Article 43 of the Convention" ILO, 'Recommendation (No. 199) Concerning the Work in the Fishing Sector' (2007) adopted 96th ILC session (14 Jun 2007), R119 para 53.

⁵⁴ Witbooi (n 37) 298. Some regions require flag states to ensure a ship's master cooperates with inspections; GFCM, Recommendation GFCM/40/2016/1 on a regional scheme on port State measures to combat illegal, unreported and unregulated fishing activities in the GFCM area of application 2016 paras 39–41 and in general cooperate with other contracting states, para. 36. Discussing previous version and the consequences of refusal, Nicola Ferri, 'Current Legal Developments: General Fisheries Commission for the Mediterranean' (2009) 24 *The International Journal of Marine and Coastal Law* 163, 169. (3.2.2.5). PSMA (n 25) art. 20.

⁵⁵ In jurisdiction law terms (2), not raising state responsibility issues and thus counter-measures relevance, Douglas Guilfoyle, 'Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force' (2007) 56 *International and Comparative Law Quarterly* 69, 82; David J Bederman, 'Counterintuiting Countermeasures' (2002) 96 *American Journal of International Law* 817, 827.

⁵⁶ Formally measures target vessels and not the flag state, Judith Swan, 'Port State Measures to Combat IUU Fishing: International and Regional Developments' (2006) 7 *Sustainable Development Law & Policy* 38, 41. Conceptually, undermining regional CMMs is broader than flag state non-compliance with legal obligations, thus demonstrating a desire to influence flag state policy beyond legal obligations. Exercising jurisdiction over vessels, in contrast to countermeasures against the state, avoids this potential limitation.

state, has not been addressed within global fisheries instruments and therefore not become part of the ‘responsible’ port state concept.⁵⁷ Nonetheless, within the context of RFMO/As, the use of PSMs targeting NCP vessels who undermine its CMMs is promoted.⁵⁸

It is unlikely such PSMs will move beyond ‘consideration’ within global fisheries instruments for the foreseeable future. An exception could be *PSMA*, art. 23(2), under which parties “shall” take measures against NCPs undermining effective *PSMA* implementation. This could include non-cooperative flag states, or port states operating ports of convenience (3.2.2.5).⁵⁹ Measures of retorsion are not explicit but could include PSMs withdrawing port privileges to all vessels flying that flag, given the *domaine réservé*-based jurisdiction to do so (2.5).

The scope of application for retorsion in fisheries governance is not settled. Port states with sufficient market, geographic or other dominance could therefore exercise control over foreign fleets for a host of reasons. For example, vessels might be targeted to persuade a state to re-enter into regional fishing quota distribution cooperation.⁶⁰ International law in general discourages but does not prohibit retorsion. Retorsion should be the measure of last resort, with fisheries practice demonstrating that implementation may be highly subjective in determining which states are subject to port state pressure.⁶¹ Equally, different national interests influence the direction and strength of that practice.

⁵⁷ Martin Tsamenyi and others, ‘The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective’ (2010) 25 *The International Journal of Marine and Coastal Law* 5, 29. For similar propositions in merchant shipping, J. Roach in 1999 explored the option of port state action against a flag, but without a legal basis to point to (given the article’s law of the sea focus); J Ashley Roach, ‘Alternatives for Achieving Flag State Implementation and Quality Shipping’ in Myron H Nordquist and John Norton Moore (eds), *Current Maritime Issues and the International Maritime Organization* (Martinus Nijhoff Publishers 1999) 169–170.

⁵⁸ *FAO, IPOA-IUU* (n 28) para 63. It “calls upon States, acting through RFMOs, to consider schemes to restrict landings and transshipments of fish harvested by non-members”, *FAO, ‘Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’* (FAO 2002) *FAO Technical Guidelines for Responsible Fisheries* 9 43. *UNFSA* (n 23) arts. 17(4) and 33(2) (both measures, as opposed to specifically PSMs). *Swan* (n 56) 40–41.

⁵⁹ E.g. *PSMA* (n 25) arts. 20(1), 20(4), 20(6), are instrumental for the effectiveness of the *PSMA*, building on the primary responsibility of flag states.

⁶⁰ EC, ‘Commission Adopts Trade Measures against Faroe Islands to Protect the Atlanto-Scandian Herring Stock’ (2013) Press release IP/13/785; EC, ‘Herring Dispute: EU Lifts Measures against the Faroe Islands’ (2014) Press Release IP/14/931. (6.3.2.1).

⁶¹ (6.3.1.5, 6.3.2.1) “[I]t is not clear what basis and standard the EU will implement to determine whether a state has taken effective measures in respect of its operators, or whether sanctions applied to IUU fishers are of sufficient severity” Tsamenyi and others (n 57) 29.

3.2.2.1.3. Sub-conclusion: Indirect fisheries governance

Port states may assist or put pressure on flag states in exercising jurisdiction. PSMs targeting foreign vessels are necessary if only because flag states fail to effectively exercise their jurisdiction and to adequately respond to global concerns in relation to IUU fishing.⁶² A facilitative PSJ role continues, but is marked by a transition post-UNFSA in which it is one “indicative”⁶³ example within the repertoire of a port state’s role.⁶⁴ This shift, from secondary to concurrent actor within international instruments, “emphasise[d] the potency of port State action against IUU fishing that occurs in areas beyond national jurisdiction”.⁶⁵ This chapter now turns to PSMs directly applicable to vessels and how within international law responsibilities have progressively attached to their implementation.

3.2.2.2. *Coordinated denial of port privileges to foreign vessels*

High mobility in merchant and fishing fleets means that practical and economic competition amongst port authorities will inhibit the scope for long-term unilateral PSMs. At the opposite end of the scale, competition can incentivise the development of ports of convenience. Moreover, global or regional interests may be unattainable through unilateralism. For port states to be able to collectively address these factors, discretionary PSJ may therefore be altered by arrangements for the coordination and harmonisation of *domaine réservé*-based denial of port privileges. Pooling sovereignty within a multilateral arrangement, attached to a political commitment to exercise PSJ, was first prominent in merchant shipping practice. This provided exemplary practice for subsequent fisheries agreements.

⁶² A ‘remedy’, Witbooi (n 37) 295.

⁶³ “[E]xamples of the powers that such full sovereignty entails” UNGA, ‘Note Verbale Dated 22 May 2006 from the Permanent Missions of Argentina, Chile, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Mexico and Peru to the United Nations Addressed to the Secretariat’ (UNFSA Review Conference, 22-26 May 2006) A/CONF210/2006/12 para 4; discussed with further examples, Erik J Molenaar, ‘Non-Participation in the Fish Stocks Agreement: Status and Reasons’ (2010) 26 *The International Journal of Marine and Coastal Law* 195, 206–208.

⁶⁴ “[I]n addition to any other actions it may take consistent with international law”, FAO, *IPOA-IUU* (n 28) para 59; UNFSA (n 23) art. 23; FAO, *Model Scheme PSM* (n 29) art. 4(5); PSMA (n 25) art. 18(3).

⁶⁵ Blaise Kuemlangan and Michael Press, ‘Preventing, Deterring and Eliminating IUU Fishing’ (2010) 40 *Environmental Policy & Law* 262, 262–263.

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3.2.2.2.1. Port State *MoUs* to uphold international maritime conventions

Discussions on the changing role of port states during *UNCLOS* negotiations in the 1970s were put into multilateral practice in the 1980s following a series of maritime incidents that culminated in the 1978 *Cadiz* disaster.⁶⁶ Increasing awareness of environmental damage, heightened public pressure, and the recognition that flag and coastal states alone were insufficient to ensure shipping standards, stimulated action by the affected Northern European states.⁶⁷ If sub-standard vessels simply ‘leaked’ to neighbouring ports, where comparable PSJ was not exercised, vessels would still present maritime casualty or spill risks as they traversed coastal maritime zones. Coordination and harmonisation were a necessity.

Thus, the port states’ maritime administrations agreed to cooperate, introducing regional inspection schemes and denial of port entry and services to vessels which did not comply with minimum international standards. This commitment would be upheld by introducing a minimum inspection scheme and annual percentage target. Substandard vessels could be detained until the fault was rectified, or refused access to any port belonging to one of the participants (banning).

The tentative first steps of the 1978 *Hague Memorandum* to enforce standards derived “from various international instruments”⁶⁸ were ramped up and superseded by the 1982 *Paris MoU*.⁶⁹ The objectives; “to eliminate the operation of sub-standard ships through a

⁶⁶ Anderson (n 9) 274–276; Richard WJ Schiferli, ‘Regional Concepts of Port State Control: A Regional Effort with Global Effects’ (1994) 11 *Ocean Yearbook Online* 202, 202–203.

⁶⁷ Alternatively, as adopted by Canada and influential in the eventual agreement of *UNCLOS*, art. 234, one may claim expanded coastal state jurisdiction. See discussion of Arctic Waters Pollution Prevention Act 1970, John C Klotz, ‘Are Ocean Polluters Subject to Universal Jurisdiction - Canada Breaks the Ice’ (1972) 6 *International Lawyer* 706; Erik Franckx, ‘The “New” Arctic Passages and the “Old” Law of the Sea’ in Henrik Ringbom (ed), *Jurisdiction over ships: post-UNCLOS developments in the law of the sea* (Brill 2015) 194–197. A similar strategy was adopted by Canada for extraterritorial fisheries enforcement during *UNFSA* negotiations, Francisco Orrego Vicuña, ‘Coastal States’ Competences over High Seas Fisheries and the Changing Role of International Law’ (1995) 55 *ZaöRV* 520, 528–529.

⁶⁸ Furthermore, to ensure “that on board the ship no conditions exist, which are clearly hazardous to safety or health” Memorandum of Understanding between certain Maritime Authorities on the Maintenance of Standards on Merchant Ships, adopted 2 March 1978, 1978 *Tractatenblad* 72 (not in force) art. 1(ii).

⁶⁹ Paris Memorandum of Understanding on Port State Control, adopted 26 January 1982, 21 *ILM* 1 (entered into force, 1 July 1982); Including 40th Amendment, adopted 26 May 2017 (effective date, 1 July 2017).

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harmonized system of port State control”,⁷⁰ and “to avoid distorting competition between ports”.⁷¹ Initially an arrangement between 14 European maritime administrations, it has expanded to 27 participating maritime organisations,⁷² with an ever increasing scope of applicable international standards.⁷³ The *Paris MoU*’s exemplary successes, together with proactive work by the IMO,⁷⁴ inspired further regional *MoUs* and the cooperative unilateral regime of the USA.⁷⁵ As Marten concluded;

“Organised on a regional basis, the memoranda of understanding upon which port state control is based now cover almost every part of the globe (albeit with varying levels of efficiency in practice)”⁷⁶

⁷⁰ Paris MoU, ‘Organisation’ <<https://www.parismou.org/about-us/organisation>>. PSJ is “required to prevent” substandard ships operating, while flag states have primary responsibility for the effective application of international standards, Paris MoU (n 69) preamble.

⁷¹ Paris MoU (n 69) preamble. Council Directive 95/21/EC, repealed and replaced by, Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ L 131, 28/5/2009, p 57–100) preamble; Erik J Molenaar, ‘The EC Directive on Port State Control in Context’ (1996) 11 *The International Journal of Marine and Coastal Law* 241, 258; Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Brill 2007) 49. Humanitarian considerations and the economic costs of substandard shipping disasters may also stimulate MoUs, Marten (n 7) 45.

⁷² 26 May 2017.

⁷³ Paris MoU (n 69) sect. 2.1.

⁷⁴ “IMO also actively promoted regional port State measures [...] mostly modelled after the 1982 Paris Memorandum of Understanding on Port State Control’, UNGA, ‘Law of the Sea: Report of the Secretary-General’ (UNGA 49th Sess 1994) A/49/631 para 111.

⁷⁵ ‘Tokyo MoU’ <<http://www.tokyo-mou.org/>>; ‘Latin American Agreement of Viña Del Mar’ <<http://alvm.prefectura naval.gov.ar/cs/ciala/home?Lang=1374097586996>>; ‘Caribbean MoU’ <<http://www.caribbeanmou.org/>>; ‘Mediterranean MoU’ <<http://www.medmou.org/>>; ‘Indian Ocean MoU’ <<http://www.iomou.org/>>; ‘Black Sea MoU’ <<http://www.bsmou.org/>>; ‘Abuja MoU’ <<http://www.abujamou.org/index.php>>; ‘Riyadh MoU’ <<https://www.riyadh mou.org/>>; US Coast Guard, ‘Port State Control’ (*Foreign & Offshore Compliance Division (CG-CVC-2)*) <<http://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/Commercial-Vessel-Compliance/Foreign-Offshore-Compliance-Division/PSC/>>.

⁷⁶ Marten (n 7) 46.

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These MoUs undoubtedly inspired states developing a similar scheme for fisheries.⁷⁷ Some general conclusions on how PSJ is envisaged are therefore considered, together with the question why a similar but more regionally focused approach for fisheries developed.⁷⁸

Firstly, *MoUs* are developed and administered on a regional level, with regional secretariats. But these *MoUs* are part of a global strategy. Port states act within a global network.⁷⁹ States are compelled by the risk of maritime casualties and spills to co-operate within the affected region,⁸⁰ but IMO promotion has global objectives⁸¹;

“being convinced that regional co-operation in the application of port State control measures in all parts of the world would enhance international standards and could further contribute to preventing the operation of substandard ships, thus making a significant contribution to maritime safety and pollution prevention”⁸²

⁷⁷ Terje Lobach, ‘Port State Control of Foreign Fishing Vessels’ [2003] FAO Fisheries Circular No. 987. For more detail (merchant); George C Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port State Regime* (Martinus Nijhoff Publishers 1993); Marten (n 7); Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (n 18); Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer 2006) 93–109. Equally inspirational for other fields, e.g. *MLC* “builds upon well established arrangements under the various regional memorandums of understanding on port State control”, UNGA, ‘Oceans and the Law of the Sea: Report of the Secretary-General’ (UNGA 61st Sess 2006) A/61/63 para 79.

⁷⁸ “[International fisheries] instruments have tended to focus on the role of the port States individually or through RFMOs” Judith Swan, ‘Port State Measures: Examining the Value, Implementation and Challenges of Port State Measures for the Southern African Region’ (2008) www.StopIllegalFishing.com 73.

⁷⁹ Global objectives, to promote port state MoUs in other regions and foster inter-regional inspection networks, Paris MoU, ‘Strategic Plan 2012-2017 REV’ <[https://www.parismou.org/system/files/Strategic%20Plan%202012-2017%20REV%20\(final\).pdf](https://www.parismou.org/system/files/Strategic%20Plan%202012-2017%20REV%20(final).pdf)> Strategic Directions, 6, 9-10.

⁸⁰ Pollution disasters are usually only felt regionally. The economic disadvantages, expenses and resource expenditures resulting from ensuring compliance by visiting vessels in a highly competitive field, means a sufficient number of port states are unlikely, for the global common good, to go beyond minimal necessity, Brugmann (n 13) ch IV; Schiferli (n 66) 210–215.

⁸¹ As summarized, “IMO’s policy is aimed at putting in place a global PSC system. Consisting of regional systems [...] once operational and effective, deprive substandard ships of any area of operation” Fernando Plaza, ‘The Future for Flag State Implementation and Port State Control’ in Myron H Nordquist and John Norton Moore (eds), *Current Maritime Issues and the International Maritime Organization* (Martinus Nijhoff Publishers 1999) 205. Inter-regional information exchange and harmonised standards are promoted; *ibid* 206–208; Terje Lobach, ‘Measures to Be Adopted by the Port State in Combating IUU Fishing’ [2000] FAO Fisheries Report No. 666 AUS:IUU/2000/15, para 29; The Antarctic and Southern Ocean Coalition, ‘Port State Control: An Update on International Law Approaches to Regulate Vessels Engaged in Antarctic Non-Governmental Activities’ (XXVI ATCM 2003) IP-044-ASOC 2–4.

⁸² IMO, ‘Regional Co-Operation in the Control of Ships and Discharges’ (1991) IMO Resolution A682(17) 17. Cooperation amongst MoUs; *Joint Ministerial Declaration* (Third Joint Ministerial Conference of the Paris and

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What is more, standards applied in the MoUs are not novel or unilateral. Standards are generally accepted shipping standards included within global treaty frameworks, which, by and large, are already accepted as applicable to over 90% of the merchant fleet through flag state ratification and implementation.⁸³ The “no more favourable treatment” treaty provisions are reflected in the *MoUs*. Thereby, standards are applicable to all visiting vessels, regardless of flag, and therefore regardless of whether the vessel is or should actually be bound to these generally accepted standards as a matter of flag state implementation.⁸⁴

Saving clauses usually preserves unilateral PSJ.⁸⁵ Nonetheless, such arrangements are essentially about harmonisation, “ensuring full application of the existing standards laid down in international conventions open to all states and intended to be observed by all states worldwide”.⁸⁶ It is upon this rationale that authors and *MoU preambles* emphasise the supplementary role of port states to flag state control and primary responsibility.⁸⁷ International standards guide port state control arrangements, with unilateralism limited to how those standards are applied.⁸⁸ For example, in addition to ensuring ‘full application’, port state control arrangements may pursue early implementation of generally accepted standards.

As for as fisheries are concerned, *MoUs* usually only apply to merchant vessels. They therefore may cover some fishing-related vessels, but not all.⁸⁹ The lack of a comparable global ‘static’ conditions arrangement, dedicated to the fisheries domain, is explainable by the lack of generally accepted standards which could be applied.⁹⁰ For example, the *Maritime Labour*

Tokyo Memoranda of Understanding, Vancouver, 3-4 May 2017) paras 3.7, 3.18-3.19, 5.8, 5.18, 6.1.11, 6.1.15, 6.1.22-25, 7.1.

⁸³ Marten (n 7) 47–48. For the latest numbers; IMO, ‘Status of Treaties’ Printed: 21/09/2018 <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf>> accessed 10 December 2018; ILO, ‘NORMLEX’ <[http://www.ilo.org/dyn/normlex/en/f?p=1000:1:::NO:::~:::](http://www.ilo.org/dyn/normlex/en/f?p=1000:1:::NO:::)> accessed 21 November 2017.

⁸⁴ Paris MoU (n 69) sects. 1.2; 2.3-2.4.

⁸⁵ Paris MoU (n 69) sect. 1.7.

⁸⁶ Anderson (n 9) 274.

⁸⁷ Lobach (n 81) para 31; *Joint Ministerial Declaration* (n 82) para 3.4.

⁸⁸ Hare (n 9) 574 the ‘framework’ of port state control, providing direction and effectiveness.

⁸⁹ Paris MoU (n 69) sects. 1.2-1.3, 4.1. Note vessels covered by PSMs is very broad when one considers e.g. definition of “vessel” and “fishing related activities”, PSMA (n 25) arts. 1(d),1(j).

⁹⁰ Majority of fishing vessels not covered by IMO conventions, but support vessel may be, FAO, ‘Report of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters (Rome, Italy, 9-11 October 2000)’ (FAO 2001) FAO Fisheries Report 637 paras 36, 39, 42; Lobach (n 77) 1.

Convention and *SOLAS* largely (but not completely) exclude fishing-related vessels from applicability.⁹¹ In other scenarios either fishing vessels fall outside the conventions' vessel size limitations, or major fishing-related flag states are not party.

There have been IMO initiatives to create global fishing vessel standards, notably the 1977 *Torremolinos Convention*, the superseding 1993 *Torremolinos Protocol* and the 2012 *Cape Town Agreement*.⁹² These have not entered into force. The 1995 *STCW-F Convention*⁹³ entered into force in 2012.⁹⁴ Yet, the 25 contracting parties only represent 5.91% of world tonnage (September 2018) – which hardly makes it a case of 'generally accepted' standards.⁹⁵ Equally, the 2007 *Work in Fishing Convention* entered into force November 2017, providing standards for conditions for work on board fishing vessels.⁹⁶ As of September 2018, it only had 25 contracting parties. Until more such instruments enter into force, and standards are generally accepted, it appears unlikely port state control *MoUs* will broaden to include fishing vessels.⁹⁷

3.2.2.2.2. Strengthened regional coordination on PSMs

Early regional cooperation in fisheries could not use generally accepted standards contained within global treaties to impose PSJ obligations. Instead, regional PSMs confirmed the rights of *domaine réservé*-based jurisdiction and territorial state jurisdiction. These would be used to pursue observance of regional standards. An early example, perhaps the first,⁹⁸ originated in the South Pacific Forum Fisheries Agency (FFA). A regional agreement to ban the use of

⁹¹ MLC (n 41) art. 2(4); SOLAS (n 40) ch.1, reg. 3(a)(iv). Fishing vessels are subject to SOLAS (Chapter V) safety provisions, *Joint Ministerial Declaration* (n 82) para 4.1.

⁹² *Torremolinos Convention* (n 46); 1993 *Torremolinos Protocol* (n 45); 2012 *Cape Town Agreement* (n 46).

⁹³ *STCW-F* (n 47).

⁹⁴ IMO, 'STCW-F Convention Background' <<http://www.imo.org/en/OurWork/HumanElement/Pages/STCW-F-Convention.aspx>>.

⁹⁵ IMO, 'Status of Treaties' (n 83).

⁹⁶ *Work in Fishing Convention* (n 49).

⁹⁷ "From IMO's perspective, [...] port State control under the regional MOU commenced with a review of the required certificates of compliance [...] the vast majority of fishing vessels would not be required to carry any certification relating to the instruments addressing vessel safety and environmental protection, it was considered neither appropriate nor feasible to broaden the scope of the existing MOU on port State control [...] without the requisite legal instruments being in force", FAO, 'FAO/IMO Working Group IUU Fishing 2000' (n 90) paras 38–39.

⁹⁸ The Antarctic and Southern Ocean Coalition, 'The Use of Port State Measures to Improve Fisheries Compliance at the International Level: Issues and Instruments - the CCAMLR Case' [2006] CCAMLR-XXV/BG/29 4; Rosemary Gail Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff Publishers 2004) 76.

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driftnets over 2.5 kilometres in the South Pacific region (including the high seas) recognised the discretionary port states' right to;

- “(a) Prohibit the landing of driftnet catches within its territory;
 - (b) Prohibit the processing of driftnet catches in facilities under its jurisdiction;
 - (c) Prohibit the importation of any fish or fish product, whether processed or not, which was caught using a driftnet;
 - (d) Restrict port access and port servicing facilities for driftnet fishing vessels; and
 - (e) Prohibit the possession of driftnets on board any fishing vessel within areas under its fisheries jurisdiction
- (3) Nothing in this Convention shall prevent a Party from taking measures against driftnet fishing activities which are stricter than those required by the Convention”⁹⁹

Whether the flag state is a contracting party is immaterial. Like those regional *MoU* efforts that were subsequently adopted as an IMO global strategy, the regional and national efforts against driftnet fishing were commended and welcomed by the *UNGA* in its continued efforts for a global moratorium on large-scale pelagic driftnet fishing.¹⁰⁰

Other regional fisheries agreements recognised port states' regulatory options. *The Micronesia Arrangement for Regional Fisheries Access* provided for advance notification, designated transshipment ports, discretionary inspection and discretionary detention amongst state parties.¹⁰¹ RFMO/A practice frequently started with discretionary measures, which were subsequently revised to impose specific port state obligations on parties (ch 5). Other regional arrangements continue to coordinate PSMs through political non-binding commitments. The Southern African Development Community (SADC), a regional economic community, resolved to “emphasize the importance of, and commitment to, developing nationally and regionally tailored port State measures based on relevant international

⁹⁹ Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, adopted 24 November 1989, 1899 UNTS 3 (entered into force, 17 May 1991) art. 3(2).

¹⁰⁰ UNGA, 'Resolution 46/215: Large-Scale Pelagic Drift-Net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas' (1991) UN Doc A/Res/46/215.

¹⁰¹ Federated States of Micronesia Arrangement for Regional Access, adopted 30 November 1994, IUCN TRE-154133 (entered into force, 23 September 1995) arts. 9, 13, 16; reproduced, Anthony Bergin and Transform Aqorau, 'The Federated States of Micronesia Arrangement for Regional Fisheries Access' (1997) 12 *The International Journal of Marine and Coastal Law* 37, 57–80.

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instruments”.¹⁰² Cooperation on investigatory PSMs was an explicit option of the preceding fisheries protocol.¹⁰³

Beyond the significant quantity of binding RFMO/A PSJ practice (ch 5), other regional communities impose mandatory coordination, including the EU *IUU Regulation*, which predated the *PSMA* (6.3.1). Insufficient prescription and/or enforcement PSC may result in infringement proceedings being brought against an EU member state, as demonstrated in the context of the EU Directive on port state control.¹⁰⁴ The European Commission issued reasoned opinions to Cyprus and Romania requesting the communication of national measures to fully implement the 2013 amendments to the PSC Directive.¹⁰⁵ France was brought before the CJEU and was found to have failed its port state inspection obligations.¹⁰⁶ Binding regional PSJ commitments under EU law therefore have real teeth.

The necessity and commitment to regional PSMs is not limited to environmental instruments. This is reflected in the *Trans-Pacific Partnership*, and now the replacement *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*:

“In support of efforts to combat IUU fishing practices and to help deter trade in products from species harvested from those practices, each Party shall:
[...]; (c) implement port State measures”¹⁰⁷

¹⁰² SADC, ‘Statement of Commitment by SADC Ministers Responsible for Marine Fisheries on Illegal, Unreported and Unregulated Fishing’ (2008) para 4.

¹⁰³ SADC Protocol on Fisheries, adopted 14 August 2001, IUCN TRE-001362 (entered into force 8 August 2003) art. 8(4)(c).

¹⁰⁴ Directive 2009/16/EC (n 71).

¹⁰⁵ EC, ‘September Infringements Package: Key Decisions’ (2015) Press Release, MEMO/15/5657 5.

¹⁰⁶ *Commission v France* [2004] CJEU C-439/02, ECLI:EU:C:2004:380 unpublished.

¹⁰⁷ *Trans-Pacific Partnership Agreement*, 26 January 2016 (not in force) art. 20.16(14); *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 21 February 2018 (not in force) art. 20.16(14). Note cooperation may also address port state enforcement to address pollution of the marine environment from ships, TPP art. 20.6(3)(h); CPTPP art. 20.6(3)(h).

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Not only are global and regional PSM instruments recognised, with the awareness that cooperation needs to be improved,¹⁰⁸ but parties that failed to fulfil their obligations above to “implement” PSMs could be confronted with a dispute resolution process.¹⁰⁹

Finally, regionalised cooperation and PSM harmonisation are objectives of the global instruments adopted. The IPOA-IUU notes that states “should” [not shall], develop national, regional and international PSMs - cooperating within and amongst RFMO/As.¹¹⁰ RFMO/As should at least consider establishing PSMs.¹¹¹ The *FAO Model Scheme PSM* placed great emphasis on regionalisation. It noted the regional variations upon what IUU fishing is, what instruments apply, and was equally addressed to both states and RFMO/As.¹¹² Subsequent initiatives promoted its contents as international minimum standards for implementing regional PSMs.¹¹³ Finally, *PSMA* incorporates a more global perspective on PSMs, but nonetheless continues to emphasise the role of regional measures and regional adaptation in implementation, with many cooperative responsibilities falling upon RFMO/As.¹¹⁴

3.2.2.2.3. Sub-conclusion: Regional coordination based on international instruments

International instruments recognise the power of collectively withholding port state privileges to foreign vessels when this will assist in achieving compliance with international standards to which the port state is party. Coordination is achieved through multilateral arrangements (*MoUs*) for the merchant shipping domain or binding regional agreements for

¹⁰⁸ TPP (n 107) art. 20.16(13); CPTPP (n 107) art. 20.16(13).

¹⁰⁹ TPP (n 107) arts. 20.20-20.23; ch. 28; Noting the mixed willingness of states to litigate, Margaret Young, ‘Catch of the Day: The TPP Might Be Good News for Sustainable Fisheries’ (*The Conversation*, 19 November 2015) <<http://theconversation.com/catch-of-the-day-the-tpp-might-be-good-news-for-sustainable-fisheries-50837>> accessed 22 November 2017; CPTPP (n 107) arts. 20.20-20.23; ch. 28.

¹¹⁰ FAO, *IPOA-IUU* (n 28) paras 62–64.

¹¹¹ FAO, ‘Implementation IPOA-IUU’ (n 58) pt 8.3.5.

¹¹² The result of consultations addressing “principles and guidelines for the establishment of regional memoranda on port States measures, FAO, *Model Scheme PSM* (n 29) iii fn. 5-6.

¹¹³ Swan (n 56) 41–42. Note, international minimum standards concern the establishment, cooperation and coordination of PSMs implemented, in contrast to PSC in merchant shipping which also addresses the generally accepted standards such control seeks to uphold.

¹¹⁴ FAO, ‘Matters Concerning the Implementation of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ [2017] First Meeting of the Parties to the FAO Agreement on Port State Measures, Oslo 29-31 May 2017, *PSMA/2017/4*, 22–23, further international organisations p. 24.

the fisheries domain. As demonstrated by *CPTPP*, non-fisheries instruments may equally promote PSMs.

In general, PSJ coordination in fisheries makes greater use of regionalisation than shipping, given the comparable lack of global standards in force. This also results in a broader context for harmonisation and coordination, given the fact that the purview of regional CMMS includes both static and conduct standards. In addressing compliance with generally accepted vessel standards, PSC will generally apply to merchant vessels.¹¹⁵ However, to combat IUU fishing and fishing related activities in support of such fishing, the category of vessel is not determinative.¹¹⁶ A vessel's previous or intended extraterritorial conduct will also define 'vessels' subject to PSMs.¹¹⁷

3.2.2.3. Minimum standards in the denial of port privileges to foreign vessels

International law was seen to preserve the prerogative for national port state interests (3.2.1), facilitates adequate flag and costal state implementation (3.2.2.1) and coordinate or recognising regional port state variations (3.2.2.2). All of these roles leave space for proactive port states to unilaterally contribute towards regulating marine capture fisheries. However, like other jurisdictional capacities, there probably are universal communalities in the disadvantages caused by IUU fishing, and in the PSMs suitable to be included in global instruments.¹¹⁸ Thus, the welcoming of regional PSMs (based on the *FAO Model Scheme PSM*) was accompanied by calls for development of an instrument on global minimum standards.¹¹⁹ This third subsection addresses global instruments and the imposition of a 'floor' to PSMs – the minimum expected of 'responsible' port states.

¹¹⁵ Paris MoU (n 69) sect. 1.2.

¹¹⁶ Conduct and activities; PSMA (n 25) arts. 1(c)-(e), 3(3).

¹¹⁷ Vessels linked to conduct and activities; *ibid* arts. 1(j), 3(1). The definition of fishing vessel has expanded overtime, Jianye (n 27) 316–319.

¹¹⁸ E.g. applying RFMO/A IUU vessel lists to withhold port services as a global and not regional ban, UNGA, 'Report of the Resumed Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks' (2010) A/CONF210/2010/7 para 97.

¹¹⁹ UNGA, 'Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks' (2006) A/CONF210/2006/15 para 108.

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3.2.2.3.1. A general due diligence port state duty in fisheries

The *UNFSA* was the first non-regional fisheries treaty to recognise that port states have a duty to exercise jurisdiction in order to promote fisheries conservation and management. Hereto, they should implement measures independent of any further assistance given to flag or coastal states. An increase in port state enforcement was deemed necessary by the drafters.¹²⁰ Therefore a right and a duty to exercise prescriptive and enforcement PSJ – be it pursuing national or international interest(s) - was included:

“1. A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures [...]”¹²¹

A non-exhaustive list of discretionary enforcement options followed, without prejudice to further PSJ (2.3.4):

“2. A port State may, inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.

3. States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.

4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.”¹²²

Some resisted this inevitable transfer of PSJ successes from a shipping context to fisheries. Described as a “misapplication” of PSJ,¹²³ the enforcement of extraterritorial fisheries CMMs

¹²⁰ UNFSA (n 23) preamble.

¹²¹ *ibid* art. 23(1).

¹²² *ibid* art. 23(2)-(4). On infringements found during inspection, Uruguay emphasised flag state notification and requests for them to assume their responsibility; Uruguay, ‘Declarations Made upon Signature and Confirmed upon Ratification’ (1999) UNTS Declarations and Reservations (UNFSA) para 4.

¹²³ Ronald Barston, ‘United Nations Conference on Straddling and Highly Migratory Fish Stocks’ (1995) 19 *Marine Policy* 159, 166.

resulted in proposals to the effect that this regime only applied amongst state parties.¹²⁴ This is particularly so for the denial of landings and transshipments, which the EU, China, Japan, Korea and Poland suggested were not, at the time, supplementary to the customary denial of entry.¹²⁵

Applicability only amongst state parties is persuasive for novel *UNFSA*-based rights, e.g. non-flag state high seas enforcement.¹²⁶ However, it is not apparent why the denial of port privileges is not simply an exercise of *domaine réservé*-based jurisdiction to a lesser degree than denying port entry (2.5).¹²⁷ *UNFSA* PSJ is not a separate regime with distinct enforcement rights. Preceding and widely accepted treaties, including *MARPOL 73/78*,¹²⁸ already reconfirmed that such customary PSJ includes fishing vessels.¹²⁹ Ship is broadly defined,¹³⁰ with port state provisions on assisting flag states,¹³¹ and more importantly denial of entry or other measures equally available.¹³² Therefore, application of PSJ to fishing vessels and the confirmation of different enforcement measures did not present novel jurisdictional rights. It did raise political and policy concerns regarding the question whether port state enforcement should be included within the fisheries domain.¹³³

Concerning rights, *UNFSA* rather clarifies PSJ's breadth by explicitly linking *domaine réservé*-based jurisdiction over port privileges to the promotion of subregional, regional and global

¹²⁴ André Tahindro, 'Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks' (1997) 28 *Ocean Development & International Law* 1, 41; Moritaka Hayashi, 'The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention' (1995) 29 *Ocean & Coastal Management* 51, 63.

¹²⁵ Rayfuse (n 98) 78.

¹²⁶ *UNFSA* (n 23) arts. 21–22.

¹²⁷ Francisco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (CUP 1999) 263–264.

¹²⁸ *MARPOL 73/78* (n 39).

¹²⁹ *Joint Ministerial Declaration* (n 82) para 4.1. Note comparable obligatory PSJ interpretations in the merchant shipping context; "the IMO passes its own assembly resolutions which in turn bind the member states of the IMO. Therefore, it is these resolutions coupled with the international conventions, which impose obligations on port states to exercise the controls envisaged by the resolutions" Hare (n 9) 575, 582.

¹³⁰ A "vessel of any type whatsoever operating in the marine environment [...]" *MARPOL 73/78* (n 39) art. 2(4).

¹³¹ *ibid* arts. 5(1)-(2), 6. Representative of historical flag state negotiating power; Kasoulides (n 77) 114.

¹³² *MARPOL 73/78* (n 39) art. 5(3). This expanded on previous assistance roles without denial of entry provisions, e.g. *SOLAS*, Brugmann (n 13) 17–21.

¹³³ Objecting states being distant-water fishing states. Equally, earlier drafts only concerned landing but the importance of transshipment resulted in a broadening of policy upon PSJ's role, Orrego Vicuña (n 127) 263–264.

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CMMs.¹³⁴ The geographical scope of multilateral agreements in which CMMs are adopted, and the explicit high seas reference (art. 23(3)), demonstrate that this includes PSMs based upon extraterritorial conduct. The flag state's RFMO/A or *UNFSA* status are of no consequence in this context. Thus, PSMs promoting compliance with the international legal framework of marine capture fisheries is explicitly recognised and encouraged.

Undoubtedly, *UNFSA*'s greatest PSJ shift has been the acceptance of a globally applicable duty to take measures.¹³⁵ In contrast to rights, this is only binding on parties. Which situations require PSMs to "promote the effectiveness" of CMMs was not defined. Cases where an applicable CMM directly includes PSMs clearly would (ch 5), but the exemplary PSMs, arts. 23(2)-(4), are not obligatory. This is evidence from the discretionary "may" of inspections, prohibiting landings or transshipment, and other measures.¹³⁶

When this duty is triggered is undefined, but in line with other general jurisdictional responsibilities in fisheries, it is arguably a due diligence obligation. This is an obligation of best possible efforts, not result. Reconstructing flag and coastal state due diligence obligations, a port state should:

"adopt the necessary administrative and enforcement measures to ensure that [foreign] fishing vessels [...] [visiting its ports] are not involved in activities which infringe the applicable conservation and management measures of marine biological resources, and in case of infringement to cooperate and consult with other states in

¹³⁴ Rayfuse (n 98) 76–78. As demonstrated (2.3.4, 5.3.1.1), *UNFSA* is declaratory not innovative in jurisdictional rights. International CMMs are primarily regional, but exceptional global suggestions include International Whaling Commission standards, or the high seas driftnet fishing moratorium, Moritaka Hayashi, 'The Straddling and Highly Migratory Fish Stocks Agreement' in Ellen Hey (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999) 72–73.

¹³⁵ Added at the suggestion of Chile, Anderson (n 9) 281. Discretion beyond this duty is preserved and reaffirmed; *UNFSA* (n 23) art. 23(4). J Helms, 'Report [To Accompany Treaty Doc. 104-24]' (1996) 4 <<https://www.congress.gov/104/crpt/erpt20/CRPT-104erpt20.pdf>> noted port state duty; *contra*, art. 23 reflects customary discretion to adopt PSMs, W Christopher, 'Letter of Submittal (US Secretary of State)' (1996) Treaty Doc 104-24 XIII <<https://www.congress.gov/104/cdoc/tdoc24/CDOC-104tdoc24.pdf>>.

¹³⁶ In discharging their duty, *UNFSA* "creates no global legally binding obligation on port states to take specific measures to combat IUU fishing", Witbooi (n 37) 296. Reflecting on distinction of obligatory (23(1)) and discretionary (23(2)-(4)); Anderson (n 9) 281.

order to investigate and, if necessary, impose sanctions which are sufficient to deter violations and deprive offenders of the benefits from their illegal activities”¹³⁷

This general duty’s inclusion within treaty law has provided a hook upon which further practice has built.¹³⁸ Equally, subsequent soft and binding practice, elaborating specific PSMs, has been used at *UNFSA Review Conferences* to highlight the art. 23 duty and recommendations to adopt, or implement, further PSMs.¹³⁹

3.2.2.3.2. Specific port state measures elaborated in soft law

Soft law foundations may be of greater influence and assistance in the development of legal responsibilities than in the creation of novel rights. Soft law may: declare norms as a precursor to adopting a legally binding instrument; reaffirm or elaborate previously applicable norms; stimulate negotiations; stimulate state practice, possibly leading to customary law; persuade inactive states to consent to developments without protest; consolidate political opinion; fill gaps within existing treaty law; form subsequent practice of significance for treaty interpretation; provide *opinio juris* of significance for emerging custom; provide guidance for implementation; and, finally, substitute legally binding obligations where constraints upon resources, political will or time inhibit treaty relations.¹⁴⁰ Port state duties are a great

¹³⁷ Commission Decision 2015/C 324/07 (OJ C 324, 2/10/2015, p 6–14) para 7. Eva Romée van der Marel, ‘ITLOS Issues Its Advisory Opinion on IUU Fishing’ *The JCLOS Blog* (21 April 2015) <<http://site.uit.no/jclos/2015/04/21/itlos-issues-its-advisory-opinion-on-iuu-fishing/>>.

¹³⁸ In addition to discussions below, see e.g. emphasis on the responsibility of port states to control IUU fishing; FAO, ‘The 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing’, *Adopted by the FAO Ministerial Meeting on Fisheries, Rome, Italy, 12 March 2005* (FAO Fisheries Report No 778, Appendix E 2005).

¹³⁹ The *2006 Review Conference* underscored the general port state duty, by identifying and emphasising the problem of ports of convenience, i.e. ports failing in their minimum jurisdictional responsibilities, Swan (n 78) 74; UNGA, ‘UNFSA Review Conference 2006 Report’ (n 119) paras 82, 99, 107–110, 135, ‘Outcome of the Review Conference’, Annex, paras. 40, 43(d), 49(d), 55(a)(iv). Interestingly, non-parties mention port state duties as one factor inhibiting *UNFSA* adoption (para. 125), lack of clarity in port state rights being another; Molenaar, ‘Non-Participation UNFSA’ (n 63) 206–208. The *2010 Resumed Review Conference* emphasised the adoption and implementation of the *PSMA*, with assistance to developing countries to develop PSMs; UNGA, ‘Resumed UNFSA Review Conference 2010 Report’ (n 118) paras 24, 40, 94, 97–100, 117, 150, 152, ‘Outcome of the resumed Review Conference’, Annex, paras. III(b), IV(b).

¹⁴⁰ This list is adapted and drawn from; Dinah Shelton, ‘Soft Law’ in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 4–9. Most points are evident below, but the final point also strikes a chord, given the *PSMA* was the first legally binding global fisheries conservation and management instrument in over a decade. In this environment, soft law can be more responsive, experimental, adaptive and timely to tackle fisheries challenges.

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example, with the *UNFSA* swiftly followed by the influential, but non-binding, *IPOA-IUU* and *FAO Model Scheme PSM*.

The *IPOA-IUU* was the earliest global initiative to combat IUU fishing, emphasising cooperation through RFMO/As and what port states “should” do.¹⁴¹ Non-binding and less forceful than “shall”, these “should” commitments are nonetheless a noticeable step further than previous “may” language. It ‘prods’ states towards adopting specific PSMs,¹⁴² raising awareness of existing use.¹⁴³ Furthermore, PSJ duties (i.e. *UNFSA*, art. 23) are reaffirmed when addressing developing state support:

“so that they can more fully meet their commitments under the IPOA and obligations under international law, including their duties as flag States and port States”¹⁴⁴

Compared to the assistance nature of PSMs within the *Code of Conduct for Responsible Fisheries* (3.2.2.1.1), under which the *IPOA-IUU* developed, it thus expands the PSMs expected of responsible port states.¹⁴⁵ States “should” use all available jurisdiction, including PSMs.¹⁴⁶ From its toolbox,¹⁴⁷ port states “should” use measures to prevent, deter and eliminate IUU fishing.¹⁴⁸ They “should” require advance notice for entry, with sufficient information to ascertain IUU fishing involvement.¹⁴⁹ They “should” deny landing or transshipment where clear evidence of IUU fishing activity exists,¹⁵⁰ publicize open ports with sufficient inspection

¹⁴¹ Hagan (n 37) 121; Shih-Ming Kao, ‘International Actions Against IUU Fishing and the Adoption of National Plans of Action’ (2015) 46 *Ocean Development & International Law* 2, 4; FAO Fisheries and Aquaculture Department, ‘About IPOA-IUU’ (FAO) <<http://www.fao.org/fishery/ipoa-iuu/about/en>> accessed 22 November 2017.

¹⁴² To use the language of Kuemlengan and Press (n 65) 263. FAO, *IPOA-IUU* (n 28) paras 4 (voluntary), 13 (without effect on the international legal rights or obligations of states).

¹⁴³ FAO, ‘Implementation IPOA-IUU’ (n 58) pt 6.1; Gilles Hosch, *Assessing the IPOA-IUU* (2015) 58 <http://www.stopillegalifishing.com/doc/publication/eng/assessing_the_IPOA-IUU.pdf> accessed 10 September 2015.

¹⁴⁴ FAO, *IPOA-IUU* (n 28) para 85. Note, port state national strategies should consider capacity-building needs *ibid* 61.

¹⁴⁵ FAO, *Code of Conduct for Responsible Fisheries* (n 35) art. 2(d); FAO, *IPOA-IUU* (n 28) paras 1–2, 4.

¹⁴⁶ FAO, *IPOA-IUU* (n 28) para 9.3.

¹⁴⁷ FAO, ‘Implementation IPOA-IUU’ (n 58) pt 3.2.1.

¹⁴⁸ FAO, *IPOA-IUU* (n 28) para 52.

¹⁴⁹ *ibid* 55.

¹⁵⁰ *ibid* 56.

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capacity,¹⁵¹ implement detailed inspection regimes,¹⁵² and prevent importation of fish caught by RFMO/A IUU listed vessels.¹⁵³ Also, they “should” cooperate with flag states, coastal states, and RFMO/As in the implementation of their responsibilities.¹⁵⁴

By encouraging the exercise of enforcement jurisdiction against suspected IUU fishing vessels (or those importing the resulting fish/products), provisions necessarily encourage prescription. At a minimum, a legislative framework should be in place whereby the full ‘toolbox’, including the above PSMs, can be considered and used when necessary.¹⁵⁵

Concerning breadth, *IPOA-IUU* conceptually extends the PSJ ‘duty’ beyond the confines of *UNFSA*. This soft law duty applies to all IUU fishing and all FAO members.¹⁵⁶ *UNFSA* by contrast only covers straddling and highly migratory fish stocks, and only *UNFSA* parties.¹⁵⁷

These expansions have been important milestones, stimulating further fleshing out of responsibilities within the *FAO Model Scheme PSM*. Initiated to promote implementation of the *IPOA-IUU*,¹⁵⁸ the *FAO Model Scheme PSM* developed a detailed departure point for harmonised practice by regional blocs, whether within the context of an RFMO/A or outside, or unilaterally.¹⁵⁹ Thus, like the IMO’s global PSC network (3.2.2.1), the FAO attempted to promote a global network of regional PSMs. This regional focus resulted from highly influential early stages of negotiation, regionality being the focus at the *Joint FAO/IMO Ad*

¹⁵¹ *ibid* 57. Implying the closure of ports to foreign vessels where no such capacity exists.

¹⁵² *ibid* 57–59.

¹⁵³ *ibid* 66.

¹⁵⁴ *ibid* 56, 58–60, 62–64.

¹⁵⁵ The problem not being a lack of rights, but a lack of prescriptive practice, FAO, ‘FAO/IMO Working Group IUU Fishing 2000’ (n 90) para 40; FAO, ‘Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Rome, 4-6 November 2002)’ (FAO 2002) FAO Fisheries Report 692 para 25.

¹⁵⁶ FAO, *IPOA-IUU* (n 28) paras 3, 8, 9.1-9.2. FAO Legal Office, ‘Membership of FAO’ <<http://www.fao.org/legal/home/fao-members/en/>> accessed 23 November 2017.

¹⁵⁷ *UNFSA* (n 23) arts. 3, 37-41.

¹⁵⁸ Kao (n 141) 4; FAO, ‘Expert Consultation PSMs 2002’ (n 155) 1 including further IMO collaboration; FAO, *IPOA-IUU* (n 28) para 90; FAO, ‘FAO/IMO Working Group IUU Fishing 2000’ (n 90).

¹⁵⁹ “This model scheme would be considered as constituting principles and guidelines to be used by States as a reference for the negotiation and adoption of regional MOUs or of resolution or recommendations within RFMOs, as well as alternatively for the adoption of measures by Port States at the national level” FAO, ‘Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Rome, 31 August – 2 September 2004)’ (FAO 2004) FAO Fisheries Report 759 para 16. Discussed, Witbooi (n 37) 299–300; in practice, Erik J Molenaar, ‘Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage’ (2007) 38 *Ocean Development & International Law* 225, 244–245.

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Hoc Working Group,¹⁶⁰ the *FAO Expert Consultation to Review PSMs*,¹⁶¹ and the *FAO Technical Consultation to Review PSMs*.¹⁶²

As highlighted in the *preamble*, the *FAO Model Scheme PSM* falls within the category of soft law instruments promoting PSMs. Yet, it further detailed what port states “should” do, reconfirming and expanding the *IPOA-IUU*’s PSMs. This expansion includes extensive provisions on conditioning port use by exercising *domaine réservé* prescriptive jurisdiction (2.5) and detailed territorial inspection regimes that “should” be implemented (2.3.1).¹⁶³ These provisions facilitate effective PSMs by stimulating political will, increasing implementation pressure, and serving as a complementary reference point to argue the legality of any regional or unilateral practice.

For states not party to binding PSM obligations, these references (and the *PSMA*) outline the jurisdiction expected of responsible port states, politically if not legally. They may provide the yardstick by which the general port state duty of the *UNFSA* is assessed. If *UNFSA* art. 23 is a due diligence obligation, a state implementing these model standards would be discharging that obligation. Indeed, *UNFSA* review conferences referenced the *FAO Model Scheme PSM* and *PSMA* contents.¹⁶⁴

¹⁶⁰ FAO, ‘FAO/IMO Working Group IUU Fishing 2000’ (n 90) paras 43–44; as per the terms of reference FAO, ‘FAO/IMO Working Group IUU Fishing 2000’ (n 90) Annex D, para. 1.2.2.3, recommendations upon regional/subregional harmonisation of port state inspection.

¹⁶¹ FAO, ‘Expert Consultation PSMs 2002’ (n 155) paras 9–11, 29(1). It identified elements for a regional MoU on PSMs to facilitate the implementation of the *IPOA-IUU*.

¹⁶² FAO, ‘Technical Consultation PSMs 2004’ (n 159) paras 4, 15–19 (consideration draft MoU regional PSMs – renamed ‘model scheme’). “It is not practical to contemplate adopting a Memorandum of Understanding (MOU) on port State measures at a global level; the elements proposed by the Expert Consultation were for regional MOUs” *ibid* 8.

¹⁶³ FAO, *Model Scheme PSM* (n 29) paras 2-3.10, Appendixes A-D.

¹⁶⁴ *Supra*, 139.

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The vital importance of exercising minimum PSJ has been repeated in other international fora at the global,¹⁶⁵ regional,¹⁶⁶ and bilateral level.¹⁶⁷ The UNGA welcomed minimum port state standards, with the expectation that port states implement all necessary measures to fulfil their duty.¹⁶⁸ Subsequently, UNGA resolutions welcomed the *PSMA* and regional PSMs, attempting to foster early adoption and entry into force.¹⁶⁹

¹⁶⁵ The UN Open-Ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) has made similar recommendations or comments. See, *Reports on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea; First meeting*, A/55/274, 2000, paras. 12 (welcome consideration of PSMs), 17 (enhanced port state control); *Fourth meeting*, A/58/95, 2003, paras. 12 (g)(h)(j) (recommendations to UNGA on fishing vessels PSC), 79 (endorse and encourage strengthening PSC); *Sixth meeting*, A/60/99, 2005, paras. 9 (UNGA should encourage *FAO Model Scheme PSM* application), 67 (some delegations suggest mandatory application), 72 (promotion RFMO/A PSMs); *Ninth meeting*, A/63/174, 2008, para. 67 (port state duty); *Eleventh meeting*, A/65/164, 2010, para. 44 (importance of PSMs); *Twelfth meeting*, A/66/186, 2011, para. 27 ('responsible fishing nations' would become party to *PSMA*, or undertake comparative action); *Fifteenth meeting*, A/69/90, 2014, para. 20 (encourage *PSMA* ratification/implementation). The Committee on fisheries (COFI), a subsidiary of the FAO Council, has been supportive throughout; recognising the importance of port states and regional PSMs (25th Sess., 28th Sess.), the urgent need for comprehensive PSMs and approved development of a binding instrument (25th Sess., 26th Sess., 27th Sess.), its 'vital' importance during the drafting (28th Sess.), and the importance of the *PSMA* entry into force (29th Sess., 31st Sess., 32nd Sess.), along with its complementary nature (29th Sess., 30th Sess., 32nd Sess.). See, FAO, *Reports on the Sessions of the Committee on Fisheries; Twenty-fifth*, FAO Fisheries Report No. 702, 2003, para. 24; *Twenty-sixth*, FAO Fisheries Report No. 780, 2005, para. 25; *Twenty-seventh*, FAO Fisheries Report No. 830, 2007, para. 68; *Twenty-eighth*, FAO Fisheries and Aquaculture Report No. 902, 2009, paras. 14-15, 63-73, 100; *Twenty-ninth*, FAO Fisheries and Aquaculture Report No. 973, 2011, paras. 31-33; *Thirtieth*, FAO Fisheries and Aquaculture Report No. 1012, 2013, para. 19; *Thirty-first*, FAO Fisheries and Aquaculture Report No. 1101, 2015, paras. 13, 38; *Thirty-second*, FAO Fisheries and Aquaculture Report No. 1167, 2017, paras. 66, 69.

¹⁶⁶ SADC (n 102) paras 3, 15(d)-(e) commit to implement some PSMs consistent with IPOA-IUU and FAO Model Scheme PSM, including specific examples and participate in *PSMA* process.

¹⁶⁷ Encouraging PSMs at global and regional levels, EU-Japan, 'Joint Statement on Efforts to Combat Illegal, Unregulated and Unreported (IUU) Fishing' (2012) The Mission of Japan to the European Union <<http://www.eu.emb-japan.go.jp/Fishing%20Agreement%202012.html>> accessed 23 November 2017; Joint Statement Between the European Commission and the United States Government on Efforts to Combat Illegal, Unreported and Unregulated (IUU) Fishing, Washington 7 September 2011.

¹⁶⁸ Kuemlangan and Press (n 65) 264. UNGA, 'Resolution 60/31: Sustainable Fisheries [...]' (2005) A/RES/60/31 paras. 33 (IUU fishing obligations and IPOA-IUU implementation), 36 (take necessary PSMs), 42 (encourage application FAO Model Scheme PSM); UNGA, 'Resolution 61/105: Sustainable Fisheries [...]' (2006) A/RES/61/105 paras. 33 (IUU fishing obligations and IPOA-IUU implementation), 39 (take necessary PSMs), 42-44 (note UNFSA art. 23, encourage application FAO Model Scheme PSM and initiate process for legally binding agreement). Along similar lines, UNGA, 'Resolution 62/177: Sustainable Fisheries [...]' (2007) A/RES/62/177 paras 49-55; UNGA, 'Resolution 63/112: Sustainable Fisheries [...]' (2008) A/RES/63/112 paras. 52-55 (welcoming the work of the *PSMA* technical consultation).

¹⁶⁹ UNGA, 'Resolution 64/72: Sustainable Fisheries [...]' (2009) A/RES/64/72 3 and paras. 54-57; UNGA, 'Resolution 65/38: Sustainable Fisheries [...]' (2010) A/RES/65/38 4 and paras. 49-52; UNGA, 'Resolution 66/68: Sustainable Fisheries [...]' (2011) A/RES/66/68 4 and paras. 53-56; UNGA, 'Resolution 67/79: Sustainable Fisheries [...]' (2012) A/RES/67/79 4 and paras. 49, 59-63; UNGA, 'Resolution 68/71: Sustainable Fisheries [...]' (2013) A/RES/68/71 4 and paras. 50, 60-64; UNGA, 'Resolution 69/109: Sustainable Fisheries [...]' (2014) A/RES/69/109 4 and paras. 57, 67-73. Annex, UNGA, 'Resolution 66/288: The Future We Want' (2012) A/RES/66/288 paras 170-171.

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Soft law and persistent promotion helped to politically settle the content of what could be included within a port state's 'duty'. Ready acceptance of applying port state duties beyond the *UNFSA* added provenance to the possibility that they would extend beyond treaty law. For now, that would be a political as opposed to a legal obligation. Nonetheless, this secondary evidence could support a customary due diligence obligation if followed by state practice and *opinio juris*. In any event, it did support the transition of some PSMs from exemplary to a binding treaty-based obligation to impose PSMs.¹⁷⁰

3.2.2.3.3. Obligatory port state measures at the global level

A marked shift soon occurred. An *IPOA-IUU* draft included a provision that proposed a binding international agreement on PSMs, but this was rejected.¹⁷¹ Yet, by the *FAO Model Scheme PSM* technical consultation, a regional PSM-based approach "did not exclude the need to prepare in the future an international instrument on the rights and obligations of port States".¹⁷² Soon thereafter, and upon adoption of the *FAO Model Scheme PSM*, work began on a further layer of PSJ within global instruments – i.e. explicit PSMs to address IUU fishing, obligatory as a matter of treaty law.¹⁷³

It should be recalled that the nature of PSJ will depend upon the specific PSM under discussion. As is evident above, discretionary (3.2.1) or facilitative (3.2.2.1) PSJ continues within the *PSMA*. Nonetheless, *PSMA* parties now have several legally binding prescriptive and enforcement obligations to address the insufficiency of regionalism and the failings by port states to fulfil their own duty. In respect of the latter, global fora recognised this failure as a reason to commence negotiations.¹⁷⁴ Even the USA and EU, the self-identified global

¹⁷⁰ Soft law "created the proper environment for the development of the binding *PSMA*", Hagan (n 37) 128.

¹⁷¹ "States should elaborate a binding international agreement on port State controls to deter IUU fishing and related activities" *Preliminary draft*, para. 53, FAO, 'Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing (Sydney, Australia, 15-19 May 2000)' (FAO 2001) FAO Fisheries Report 666 Appendix D. Deleted, FAO, 'Report of the Technical Consultation on Illegal, Unreported and Unregulated Fishing (Rome, Italy, 2 -6 October 2000)' (FAO 2000) FAO Fisheries Report 634 Appendix D. Resurfaced by some member as one purpose for a future binding instrument, FAO, 'FAO/IMO Working Group IUU Fishing 2000' (n 90) para 20.

¹⁷² FAO, 'Technical Consultation PSMs 2004' (n 159) para 10.

¹⁷³ *Supra*, 165, 168; *PSMA* (n 25) preamble.

¹⁷⁴ "The Committee acknowledged that there was a need to strengthen port State measures as a means of combating IUU fishing in a more substantive manner given that the lack of agreed, binding measures provided

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leaders, had not consistently fulfilled their legal (*UNFSA*) or political (soft law) port state duties.¹⁷⁵

In respect of regionalism shortfalls, the *FAO Model Scheme PSM* followed the *IPOA-IUU*'s regional call.¹⁷⁶ Regional regimes are essential, given the diversity of state needs and state capacities. What is more, the limited geographical scope of distribution for fish stocks suggests that regional and subregional regimes are often the most appropriate. But these must be combined with global minimum standards to avoid the danger of 'ports of convenience' simply leaking outside the regional agreement.¹⁷⁷ The NEAFC had witnessed this previously. The denial of entry to IUU fishing-listed vessels had the desired effect amongst member states' ports, but "the proportion of such vessels visiting ports of non-NEAFC-member states doubled".¹⁷⁸ Global enforcement standards, supportive of regional prescriptive variations (e.g. listing criteria), are necessary if PSMs are to effectively address activities within the RFMO/A's jurisdiction.¹⁷⁹

The 2009 *PSMA* is the first global legally binding instrument focusing on combatting IUU fishing. It sets minimum standards to be applied regardless of which foreign flag is flown and regardless of where the IUU fishing related conduct occurred.¹⁸⁰ The objective is to affect

a loophole" FAO, 'Report of the Twenty-Sixth Session of the Committee on Fisheries (Rome, 7–11 March 2005)' (FAO 2005) FAO Fisheries Report 780 para 25. Some members requested a regional approach remain.

¹⁷⁵ Las Palmas (Spain) has improved standards, but was known as a port of convenience for IUU fishing, *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, Dissenting Opinion of Judge Ndiaye* [2014] ITLOS 19, ITLOS Rep 2014 230 [14]. EJF, 'Pirate Fishing Exposed: The Fight Against Illegal Fishing in West Africa and the EU' (2012) <<https://ejfoundation.org/resources/downloads/Pirate-Fishing-Exposed.pdf>>; IUU-listed (support) vessels previously entered US ports, NMFS, 'Illegal Fishing: Not in Our Ports' (2016) <http://www.nmfs.noaa.gov/stories/iuu/docs/now_port_state_handout_v1_11_16.pdf>.

¹⁷⁶ FAO, *IPOA-IUU* (n 28) paras 62–63, 80.7.

¹⁷⁷ Interplay of global-regional PSMs highlighted, Ferri (n 54) 170–171. "A workable system has to be mandatory, comprehensive and transparent. In order to establish mandatory obligations for port States and thereby giving the concept «duty» a relevant content, it seems to be beneficial building on the regional fisheries management organizations" Lobach (n 81) para 35.

¹⁷⁸ Stefan Flothmann and others, 'Closing Loopholes: Getting Illegal Fishing under Control' (2010) 328 *Science* 1235, 1236. Further examples abound, demonstrating the necessity of complementary global minimum standards, Erik J Molenaar, 'Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement' in Dawn Russell and David VanderZwaag (eds), *Recasting Transboundary Fisheries Management Arrangements* (Martinus Nijhoff Publishers 2010) 374.

¹⁷⁹ *PSMA* (n 25) art. 6(3) cooperate at the subregional, regional and global levels, e.g. art. 12(2) (agree minimum inspection levels).

¹⁸⁰ *ibid* art. 3(1)-(3).

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ports and “fishing in marine areas” globally,¹⁸¹ with the emphasis very much on extraterritorial fishing or related activities.¹⁸² Canada, while critical of the *PSMA*’s lack of clarity in defining IUU fishing, which could undermine the obligations therein, noted it “afforded those Parties that wished to take a robust approach to deter IUU fishing the opportunity to do so, particularly when it came to vessels engaged in fishing in high seas areas not regulated by a RFMO”.¹⁸³ The *PSMA* thus focuses on imposing jurisdictional obligations and addressing extraterritorial conduct. This is the opposite of how jurisdiction is traditionally conceived, i.e. primarily about permissive rights and primarily territorial concerns (ch 2).

Consensus on specific types of PSMs to be included in the future *PSMA* was quickly reached, given the preceding soft law, strong support amongst FAO members and the necessity of global action to combat IUU fishing.¹⁸⁴ Adopted at the FAO Conference (36th Sess.), the *PSMA* was submitted to members with the urge they “bring it into force at the earliest possible time”.¹⁸⁵ A diverse group of 11 geographically distributed states immediately signed.¹⁸⁶ The *PSMA* quickly entered into force (2016), with 55 parties to-date.¹⁸⁷

¹⁸¹ *ibid* arts. 3(3), 3(5) and the non-geographically limited objective, art. 2.

¹⁸² Defined, *ibid* art. 1(c)-(d). Pacific Islands and Canadian interpretations during the technical consultation emphasised its application to foreign vessels fishing beyond their coastal state maritime zones given they already had equivalent or stronger measures to combat IUU fishing therein; FAO, ‘Technical Consultation Legally-Binding PSMs 2008-2009’ (n 33) paras 54–55. Note however, PSMs should still be applied if necessary because this is beyond the discretionary exception of *PSMA* (n 25) art. 3(2).

¹⁸³ Canadian position, FAO, ‘Technical Consultation Legally-Binding PSMs 2008-2009’ (n 33) para 22.

¹⁸⁴ Necessity was widely noted, e.g. by Russia; *ibid* 23. 91 states at the FAO agreed to the drafting of a legally binding instrument, Jianye (n 27) 313.

¹⁸⁵ Resolution No 12/2009, adopted 22 November 2009, available in FAO, ‘Report of the Conference of FAO: Thirty-Sixth Session (Rome, 18-23 November 2009)’ (2009) C 2009/REP 56–57. Submitted under, Constitution of the Food and Agriculture Organization, adopted 16 October 1945, CTS 1945/32 (entered into force, 16 October 1945) art. XIV(1).

¹⁸⁶ FAO, ‘Groundbreaking Treaty on Illegal Fishing Approved’ (*FAO News Article*, 25 November 2009) <<http://www.fao.org/news/story/en/item/37627/icode/>> accessed 24 November 2017.

¹⁸⁷ FAO, *Status (25/09/2018): Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2018) <http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf>.

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Jurisdictionally,¹⁸⁸ *PSMA* focuses upon developing the port state's 'duty', not its rights.¹⁸⁹ After all, many provisions build upon unilateral practice predating its negotiation (ch 5-6).¹⁹⁰ Thus, one could provisionally apply the agreement by accepting the obligations therein, prior to *PSMA*'s entry into force.¹⁹¹

No reservations to port state obligations under *PSMA* are permitted.¹⁹² When defined scenarios arise, or other reasonable grounds exist to believe a vessel was engaged in IUU fishing or related activities, certain measures "shall" be applied. Unlike measures in its *UNCLOS* counterpart for unseaworthy vessels, the obligations of *PSMA* are not tempered by any "as far as practicable" caveat.¹⁹³ Mandatory PSMs include designation of ports (denying entry to others),¹⁹⁴ minimum advance notification requirements (otherwise denial of entry),¹⁹⁵ and mandatory denial of entry or use of port in certain scenarios.¹⁹⁶ Obligatory PSMs under the *PSMA* are therefore those related to *domaine réservé*-based PSJ. The only example of obligatory state jurisdiction is the exercise of territorial jurisdiction in the form of documentary requirements,¹⁹⁷ mandatory inspections, and the minimum standards expected of those inspections.¹⁹⁸ Some leeway is provided for annual inspection levels, which are left

¹⁸⁸ Many provisions extend beyond exercising jurisdiction e.g. promoting cooperation and information exchange, assistance to developing countries, dispute settlement, due publicity and the role of flag, coastal, vessel masters' and other states, the FAO, RFMO/As and other international organisations.

¹⁸⁹ James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 222.

¹⁹⁰ This is not to say there is no novelty in the breadth of PSMs, e.g. port uses denied is broader than the usual landing and transshipment provisions; "landing, transshipping, packaging, and processing of fish and for other port services including, *inter alia*, refuelling and resupplying, maintenance and drydocking" *PSMA* (n 25) art. 9(6).

¹⁹¹ *ibid* art. 32(1); Vienna Convention on the Law of Treaties, signed 23 May 1969, 1155 UNTS 331 (entered into force 21 January 1980) art. 25; UNGA, 'Second Report on the Provisional Application of Treaties by Juan Manuel Gómez-Robledo, Special Rapporteur' (ILC 66th Sess 2014) A/CN.4/675.

¹⁹² *PSMA* (n 25) art. 30. *Contra*, "Statement of the delegations of Colombia, the Bolivarian Republic of Venezuela, Ecuador and Mexico", FAO, 'Technical Consultation Legally-Binding PSMs 2008-2009' (n 33) Appendix E.

¹⁹³ *UNCLOS* (n 6) art. 219, "shall, as far as practicable, take administrative measures to prevent the vessel from sailing". Some argue an obligation to maintain capacity, which would still be distinct from obligatory exercises of jurisdiction; Ambrose Rajadurai, 'Regulation of Shipping: The Vital Role of Port State Control' (2004) 18 *Australian and New Zealand Maritime Law Journal* 83, 87–88.

¹⁹⁴ *PSMA* (n 25) art. 7(1).

¹⁹⁵ *ibid* arts. 8, 9(1), Annex A.

¹⁹⁶ Entry; *ibid* art. 9(4). Use of port; *ibid* art. 9(5), 11(1), 18(1)(b). Note limitations to obligatory jurisdiction under *ibid* art. 4(2)-(3). "Denial of the use of port is possible (and potentially obligatory) at three separate points in time: prior to entry into port, upon entry, and after inspection" Witbooi (n 37) 300–302.

¹⁹⁷ *PSMA* (n 25) art. 9(2) shall prescribe requirement to present entry authorisation upon arrival.

¹⁹⁸ *ibid* Part 4, risk based (12[3]), minimum inspection standards (13, 14, Annexes B, C), minimum inspector standards (13[2][a], 17).

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to a number that is “sufficient to achieve the [PSMA] objectives”.¹⁹⁹ Yet, in other defined cases an inspection must occur.²⁰⁰

Interestingly, provisions are framed as enforcement obligations that require action when suspected vessels or operators arrive, or request entry.²⁰¹ However, to discharge these obligations, and to be seen to do so, port states must prescribe a suitable legislative foundation. Thus, next to the discretionary adoption of the ‘responsible port state’ concept in 2006, the conclusions of the High Seas Task Force are equally applicable to these now obligatory port state responsibilities; “the port state needs to be able to act decisively. To do this, effective domestic legislation must be in place”.²⁰²

Finally, however, not all ‘responsible port state’ aspects have been incorporated within binding international instruments. This unfortunately is the case for the very question of being a port state in the fisheries domain. The *IPOA-IUU* made the important link between duty and capacity,²⁰³ with the FAO implementation guidelines suggesting:

“a State should only grant foreign fishing vessels access to its ports where the State has the capacity to conduct vessel inspections”²⁰⁴

This conceptualisation of PSJ would follow similar soft law on flag state jurisdiction, whereby states without capacity to meet their flag state responsibilities should consider not becoming

¹⁹⁹ *ibid* art. 12(1). See also art. 7(2) “greatest extent possible” ensure designated ports have sufficient inspection capacity.

²⁰⁰ *ibid* arts. 9(5) (vessels suspected of IUU fishing or fishing related activities who should otherwise have been denied entry).

²⁰¹ Department of Foreign Affairs and Trade, ‘Australia Takes Action against Illegal Fishing’ (2015) Joint Press Release <https://foreignminister.gov.au/releases/Pages/2015/jb_mr_150728.aspx?ministerid=4> accessed 9 November 2017.

²⁰² High Seas Task Force, ‘Closing the Net: Stopping Illegal Fishing on the High Seas’ (Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University 2006) 78.

²⁰³ “States should publicize ports to which foreign flagged vessels may be permitted admission and should ensure that these ports have the capacity to conduct inspections” FAO, *IPOA-IUU* (n 28) para 57.

²⁰⁴ FAO, ‘Implementation IPOA-IUU’ (n 58) 40, 76.

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flag states.²⁰⁵ The *FAO Model Scheme PSM* followed suit,²⁰⁶ but the legally binding *PSMA* version now contains the caveat of “to the greatest extent possible”.²⁰⁷

PSMA therefore leaves space for designated ports without sufficient inspection capacity, legally excused by balancing adequate inspection capacity against other state interests. A competitive advantage would be obtained by designating more ports than one has the capacity to monitor. In this scenario, these ports of convenience would be exploited by IUU fishing vessels without *PSMA* non-compliance arising for the port state. Thus, just as with flag states unwilling or unable to meet international standards, it remains upon states to unilaterally address (or accept) such ports through capacity development, regional PSMs,²⁰⁸ international pressure, or shifting inspections to another jurisdiction.²⁰⁹

3.2.2.3.4. Sub-conclusion: Extraterritorial conduct triggers obligatory PSI

Port states party to *UNFSA* have a duty to act to promote the effectiveness of subregional, regional and global conservation and management measures. In respect of combatting IUU fishing this duty has expanded to marine capture fisheries generally, firstly as a soft law commitment but increasingly as a hard law obligation. Subsequent soft and hard treaty law have elaborated upon which PSMs might be first promoted, and then required. The policy rationales underlying global instruments, together with the application of regional or national PSMs could support the crystallization of a customary obligation of due diligence (3.2.2.3.2, 3.3). If this were to occur, port states must at the very least prescribe, and be willing to

²⁰⁵ UNGA, ‘Resolution 70/75: Sustainable Fisheries [...]’ (2015) A/RES/70/75 para 70; UNGA, ‘Resolution 71/123: Sustainable Fisheries [...]’ (2016) A/RES/71/123 para 77 “urges States operating open registry to effectively control all fishing vessels flying their flag, as required by international law, or otherwise stop open registry for fishing vessels”. UNGA, ‘Resolution 70/235: Oceans and the Law of the Sea’ (2015) A/RES/70/235 para 163; UNGA, ‘Resolution 71/257: Oceans and the Law of the Sea’ (2016) A/RES/71/257 para 173 “Urges flag States without an effective maritime administration and appropriate legal frameworks to establish or enhance the necessary infrastructure, legislative and enforcement capabilities to ensure effective compliance with and implementation and enforcement of their responsibilities under international law, in particular the Convention, and, until such action is taken, to consider declining the granting of the right to fly their flag to new vessels, suspending their registry or not opening a registry”. FAO, *IPOA-IUU* (n 28) para 35.

²⁰⁶ FAO, *Model Scheme PSM* (n 29) para 2.3.

²⁰⁷ *PSMA* (n 25) art. 7(2).

²⁰⁸ E.g. CCSBT, Resolution for a CCSBT Scheme for Minimum Standards for Inspection in Port 2015 para 9(b) “ensure that it has sufficient capacity to conduct inspections in every designated port pursuant to this Resolution”.

²⁰⁹ E.g. market states could increase inspection levels for fish or products coming from ports known to have insufficient capacity.

enforce, a framework for denying port privileges to vessels suspected of IUU fishing or related activities. More onerous measures will remain a matter of discretion and capacity.

3.2.2.4. Granting treaty-based extraterritorial jurisdiction

Beyond positive affirmations of PSJ, it is important to note what PSJ is not included within relevant treaty practice. Global instruments continue to rely upon the denial of port privileges to address extraterritorial fishing-related conduct. By contrast, PSJ concerning certain vessel discharges includes extraterritorial treaty-based state jurisdiction.

The direct response to states' interest in regulating extraterritorial conduct, and the willingness of other states to accept that concurrent prescription, is to provide an express right of extraterritorial jurisdiction.²¹⁰ In respect of the violation of international rules and standards for vessel discharges,²¹¹ *UNCLOS*, article 218 provides;

“When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from the vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference”²¹²

This treaty-based ground for extraterritorial jurisdiction is discretionary (“may”).²¹³ Further provisions apply reasonableness limitations on how article 218 is utilized. Thus, port states

²¹⁰ Article 218, not only “expresses the jurisdiction that a port State could claim” but also “that vessel’s/flag state’s willingness to temporarily surrender its control” Kuan-Hsiung Wang, ‘In Combating and Deterring IUU Fishing: Do RFMOs Work?’ in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Brill 2014) 440.

²¹¹ Generally taken to be those in breach of customary law and MARPOL standards. Discussed; Ho-Sam Bang, ‘Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea’ (2009) 40 *Journal of Maritime Law & Commerce* 291, 299; Erik J Molenaar, ‘Port State Jurisdiction’, *Max Planck Encyclopedia of Public International Law* (OUP 2014) para 24; [t]he existence of “applicable international rules and standards” is an essential element with a view to ensuring legitimacy of port state jurisdiction’ Yoshifumi Tanaka, ‘Protection of Community Interests in International Law: The Case of the Law of the Sea’ (2011) 15 *Max Planck Yearbook of United Nations Law Online* 329, 351. Investigation is equally restricted, *UNCLOS* (n 6) art. 226.

²¹² *UNCLOS* (n 6) art. 218(1).

²¹³ Moira L McConnell and Edgar Gold, ‘The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment?’ (1991) 23 *Case Western Reserve Journal of International Law* 83, 96;

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are to be reasonable, but not necessarily responsible. Nonetheless, even without a duty to do so, some proactive states have exercised this right through prescription.²¹⁴

For enforcement, continued emphasis is placed on cooperation with the flag state,²¹⁵ deferring proceedings to the flag or coastal state, or in some cases another state threatened/damaged by the discharge.²¹⁶ A facilitative nature thus remains, with the caveat that PSJ may be exercised as a last resort where no other state is willing/able to act, or where the flag State “has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels”.²¹⁷ When not suspended or prohibited by *UNCLOS*,²¹⁸ enforcement is limited to monetary penalties.²¹⁹ Equally, such enforcement demonstrates the need for an extraterritorial prescriptive basis of state jurisdiction (2.3.4, 2.5).

Imposing more onerous measures in respect of extraterritorial fisheries remains discretionary and unelaborated upon compared to article 218-based enforcement. Principally, global fisheries agreements focus upon preventative action, keeping IUU fishing-related vessels, or the resulting fish/product, away from port and services therein.²²⁰ If there is clear evidence of IUU fishing or related activities, it is still the flag state that is called upon to take further investigative or enforcement measures.²²¹ This is despite long international recognition that PSMs need further strengthening, not just coordination.²²² It is thus left to proactive port

Tanaka (n 211) 354–355; Alla Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution* (Brill 2012) 84–85; Tatjana Keselj, ‘Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding’ (1999) 30 *Ocean Development & International Law* 127, 140–141.

²¹⁴ Some examples; Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (n 18) 109–110.

²¹⁵ *UNCLOS* (n 6) arts. 218(3), 231.

²¹⁶ *ibid* art. 218(2).

²¹⁷ *ibid* art. 228(1). This exception for flag states which have “repeatedly disregarded” their obligations also applies to art. 218(4), given the cross-reference to section 7 where it is contained.

²¹⁸ *ibid* arts. 218(4), 228(1).

²¹⁹ *ibid* art. 230. Note the specific scope of this limitation, which would not cover territorialised offences e.g. a prohibition on inaccurate logbook records.

²²⁰ Witbooi (n 37) 291; EC, ‘The EU and FAO Closing the Door to Illegal Fish’ (2006) 71 *European Maritime Affairs and Fisheries*; Committee On Foreign Relations United States Senate, ‘Fisheries Treaties And Port State Measures Agreements’ (2014) S. Hrg. 113-482 Statement of Russell F. Smith III.

²²¹ PSMA (n 25) art. 20(4). Note, flags of convenience allowing registration with anonymous ownership and corporate charades will hamper any efforts, Eve de Coning and Emma Witbooi, ‘Towards a New ‘fisheries Crime’ Paradigm: South Africa as an Illustrative Example’ (2015) 60 *Marine Policy* 208, 213.

²²² FAO, ‘Implementation IPOA-IUU’ (n 58) 38.

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states to exercise their residual PSJ explicitly preserved by global instruments in the fisheries domain (3.2.1).

This is not however for lack of attempts. A port state enforcement proposal during *Compliance Agreement* negotiations was rejected for lack of consensus.²²³ The *UNFSA*'s PSJ 'right' was instrumental in including denial of port privileges and territorial investigative powers for extraterritorial conduct, but avoided the "port state enforcement" terminology of earlier drafts.²²⁴ Furthermore, a draft provision on port state detention "for such reasonable period as is necessary for the flag State to take control of the vessel or otherwise take responsibility for enforcement purposes",²²⁵ did not proceed.²²⁶

Alternatively, a *Lacey Act*²²⁷ style provision was included in the *IPOA-IUU* preliminary draft, explicitly expanding upon enforcement as follows: "violations should be subject to sanctions of sufficient severity to deter such trade and deprive offenders of the benefits accruing from such trade".²²⁸ Insufficient support existed.²²⁹

Yet, in subsequently drafting the *FAO Model Scheme PSM* an expert consultation agreed that detention of vessel or crew was not an option. The preferred more onerous measures were "(ii) forfeiture of fish and fishery products, or (iii) refusal to permit a vessel to leave its port pending consultation with the flag State of the vessel."²³⁰ Even so, a draft "measures such as forfeiture of fish and fishery products, as may be provided for under its national legislation"²³¹ was eventually reformulated to only refer to denial of port use.²³²

A *PSMA* draft also explicitly recognised RFMO/As' ability to further develop PSMs, with port state discretion to take additional measures against stateless vessels and the kind of measure

²²³ Hayashi (n 134) 72.

²²⁴ Rayfuse (n 98) 77–78; further enforcement falling within the 'inter alia' Orrego Vicuña (n 127) 259–266.

²²⁵ UNGA, 'Revised Negotiating Text: Prepared by the Chairman of the Conference' (United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks 1993) A/CONF164/13/Rev1 art. 38.

²²⁶ Lobach (n 77) 16.

²²⁷ 6.2.2.

²²⁸ *Preliminary draft*, para. 63, FAO, 'Expert Consultation IUU Fishing 2000' (n 171) Appendix D.

²²⁹ Molenaar, 'Port State Jurisdiction (2007)' (n 159) 243.

²³⁰ FAO, 'Expert Consultation PSMs 2002' (n 155) para 18.

²³¹ *ibid* 14.

²³² FAO, *Model Scheme PSM* (n 29) para 2.6. Molenaar, 'Port State Jurisdiction (2007)' (n 159) 234.

that “gives effect to a decision of a regional fisheries management organization or is taken pursuant to other international agreements”.²³³ The final text does not limit such developments,²³⁴ nor does it diminish the continued importance of RFMO/As in developing such practice. However, this is recognised only within a general article in the final *PSMA* on its relationship to international law. It is not reaffirmed within provisions on port state ‘action’ and enforcement.²³⁵ The article addressing the problem of stateless vessels was removed from the final *PSMA*.

To conclude, *UNCLOS* has granted a treaty-based prescription right for extraterritorial vessel discharges, subject to limited enforcement jurisdiction. This has not yet occurred for extraterritorial fisheries conduct. Innovative or exemplary provisions have so far garnered insufficient support for inclusion within global instruments. Whilst not limiting residual PSJ, persistent rejection of inclusion demonstrates that at the global level, the nature of PSMs remains focused on denying port privileges, i.e. *domaine réservé*-based jurisdiction.

3.2.2.5. Reinforcing ‘responsible’ port states through other jurisdictions

As the legal nature of a port state’s duty gains momentum, some states may continue to leave responsibilities unfulfilled, operating ‘ports of convenience’. This will undermine global and regional efforts to deny port privileges to IUU fishing vessels, demanding the international community’s attention.

Ports of convenience arise from port states’ unwillingness or inability to fulfil their responsibilities.²³⁶ For ‘unable’ states, PSM awareness is raised through the repeated, and increasingly developed, PSMs found within fisheries instruments. Capacity development is also a key *PSMA* feature, with Part 6 dedicated to the requirements of developing states and

²³³ *Draft agreement on port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing*, art. 17(2)(c)-(d), 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 2007) FAO Fisheries Report 846 Appendix E.

²³⁴ *PSMA* (n 25) art. 18(3) Port State actions following inspection.

²³⁵ *ibid* art. 4(1)(b). Molenaar, ‘PSJ to Combat IUU Fishing’ (n 178) 382.

²³⁶ Like flags, ‘ports of non-compliance’ would have been a better terminology choice.

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a proposed Assistance Fund on the agenda to assist parties.²³⁷ The international community's interest in responsible port states extends beyond parties to the *PSMA*,²³⁸ as is evident in the FAO global capacity development programme.²³⁹ So far, this has included seven regional workshops, promoting PSMs, highlighting responsibilities and noting the scope for regionalisation.²⁴⁰ Further country-specific FAO training has included the necessity of exercising prescriptive jurisdiction, with strengthened legislation for Papua New Guinea, St. Kitts and Nevis and the Philippines.²⁴¹

Nonetheless, more may be needed. Malaysia explicitly pointed to a lack of implementation capacity as a reason for not signing the *PSMA*, while other states opposed PSMs being defined as "more cost effective".²⁴² For 'unable' states, only time will tell if the international community is sufficiently prepared to offset the necessary technological, administrative, training and financial costs of implementing minimum PSMs within enough jurisdictions.²⁴³

For 'unwilling' port states, several initiatives strengthen 'responsible' port state conceptualisation. Bilateral, regional, and unilateral initiatives certainly exist,²⁴⁴ but for the

²³⁷ *Draft Terms of Reference: Funding Mechanisms under Part 6 of the FAO Agreement on Port State Measures to prevent, deter and eliminate illegal, unreported and unregulated fishing*, paras. 4-5, FAO, 'Report of the First Meeting of the Ad Hoc Working Group Established by the Parties to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Oslo, Norway, 1–2 June 2017)' (FAO 2017) FAO Fisheries and Aquaculture Report 1212 Appendix 3. For capacity development including within preceding instruments, David J Douman and Judith Swan, 'A Guide to the Background and Implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (FAO 2012) FAO Fisheries and Aquaculture Circular 1074 78–86.

²³⁸ *PSMA* (n 25) art. 23(1); Presidential Task Force on Combating IUU Fishing and Seafood Fraud, 'Action Plan for Implementing the Task Force Recommendations' (2015) 10 'Global implementation of robust port State controls on port access will disrupt IUU fishing vessel operations by decreasing the ports where IUU fishing products can be landed and increasing the costs associated with IUU fishing'.

²³⁹ FAO, 'First Meeting *PSMA* Part 6 Working Group 2017' (n 237) paras 16–17.

²⁴⁰ Reports available, FAO Fisheries and Aquaculture Department, 'Port State Measures Agreement' (FAO) <<http://www.fao.org/fishery/psm/agreement/en>> accessed 24 November 2017.

²⁴¹ FAO, 'FAO Inputs in Relation to Resolution A/Res/69/245 Concerning "Oceans and the Law of the Sea" for the Report of The Secretary-General to the Seventieth Session of the United Nations General Assembly' (2015) 4 <http://www.un.org/Depts/los/general_assembly/contributions_2015_2/FAO_Contribution.pdf> accessed 24 November 2017.

²⁴² "Algeria, Mauritius, Morocco, and India, opposed by the US and the EU, said port state-measures should not be defined as 'more cost-effective' highlighting the cost implications of their implementation. Delegates agreed that these measures are 'potent and cost-effective'" IISD, 'Summary of the 29th Session of the FAO Committee on Fisheries: 31 January - 4 February 2011' (2011) 29 Earth Negotiations Bulletin 1, 8. Many stressed capacity development.

²⁴³ "[I]t is still questionable if this could be achieved under the framework of the PSM" Wang (n 210) 446.

²⁴⁴ For a regional success example, see the discussion of Namibia and Mauritius who under sufficient diplomatic pressure agreed to implement the CCAMLR CDS in an appropriate manner, Darren S Calley, *Market Denial and*

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purposes of this manuscript the focus is on *PSMA*. The permeance of the port state's 'duty' within the international consciousness has affected the flag state's role, whereby it "shall encourage" its vessels to only use "ports of States that are acting in accordance with, or in a manner consistent with this Agreement".²⁴⁵ This is above and beyond simply ensuring that their vessels cooperate with port states.²⁴⁶ It involves the identification of ports of convenience.²⁴⁷ Ports of convenience, being defined by reference to states, not parties, and by consistency with the *PSMA*, not parties' obligations under the *PSMA*, could include ports of non-contracting parties. To maximise the revenue losses for ports of convenience, parties are encouraged to globally and regionally develop identification procedures for such ports.²⁴⁸

Furthermore, all parties acting in any capacity shall 'encourage' non-parties to join and/or prescribe and enforce consistent measures.²⁴⁹ The promotion of port states fulfilling their 'duty' through *PSMA* consistent measures is one aspect. Encouraging flag states to adopt measures for their fleets to only visit compliant port states could be another. Entities which cannot become party should also be encouraged to adopt PSMs.²⁵⁰

Encouragement alone may be insufficient. Therefore, parties "shall" take measures to "deter the activities of non-Parties which undermine the effective implementation of the Agreement".²⁵¹ Success relies upon port states at the global, regional and subregional level

International Fisheries Regulation: The Targeted and Effective Use of Trade Measures Against the Flag of Convenience Fishing Industry (Martinus Nijhoff Publishers 2011) 154–155. Alternatively, see EU candidate countries, whereby domestic legislation to implement PSMs and whether party to treaties including the port state 'duty' e.g. *UNFSA* is reviewed (the EU is already party to the *PSMA* and therefore does not require further ratifications); EC, 'Screening Report Montenegro: Chapter 13 Fisheries' (2013) European Neighbourhood Policy And Enlargement Negotiations 5, 8 <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/montenegro/screening_reports/screening_report_montenegro_ch13.pdf> accessed 24 November 2017.

²⁴⁵ *PSMA* (n 25) art. 20(3).

²⁴⁶ *ibid* art. 20(1).

²⁴⁷ Doulman and Swan (n 237) 62.

²⁴⁸ *PSMA* (n 25) art. 20(3), via RFMO/As and FAO.

²⁴⁹ *ibid* art. 23(1). Recognising a variety of reasons may prevent the states becoming party, but who may nonetheless act consistently, Doulman and Swan (n 237) 65.

²⁵⁰ *PSMA* (n 25) art. 3(5). E.g. Chinese Taipei and PSJ (7). Note, beyond this research's scope the EU may also take flag, coastal, nationality and market state measures against non-cooperating third countries; Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (as amended and consolidated 09/03/2011) (OJ L 286/1, 29/10/2008) arts. 36, 38.

²⁵¹ *PSMA* (n 25) art. 23(2).

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meeting the minimum standards.²⁵² A non-party providing port privileges to IUU fishing vessels as a result of PSMs inferior to the *PSMA* minimum standards would undermine the effectiveness of implementation. The number of states imposing deterrent measures upon such non-parties will increase as the parties to the *PSMA* increases. The non-parties' choice between enduring retorsion or becoming a responsible port state by implementing (non-binding) minimum standards, will therefore increasingly favour the latter.

To conclude, reconceptualization of PSJ within fisheries as also including a duty has permeated other jurisdictions and international organisations. They are encouraged to take measures, or they shall take measures, to assist, encourage, or compel port states to exercise at least the minimum level of jurisdiction expressed within global instruments.

3.3. Conclusion

In the past years exercising port state prescriptive or enforcement jurisdiction has been profoundly reshaped by global agreements and soft law arrangements. The discretionary rights-based nature of state jurisdiction and *domaine réservé*-based jurisdiction (ch 2) have, in practice, been replaced with a plethora of different roles depending on the subject matter of the regulation in question and the specific PSMs employed.

Jurisdictional discretion remains applicable to PSJ and to those PSMs untouched by international obligations (3.2.1). This certainly includes state jurisdiction to impose port state offences and more onerous measures (2.3). While port states are equipped with discretionary extraterritorial jurisdiction to promote compliance with international rules and standards on vessel source pollution, this is notably absent in combatting IUU fishing (3.2.2.4).²⁵³ Furthermore, even exemplary draft provisions based on existing jurisdictional rights have so far failed to reach the final texts. Customary discretion to go further remains but is not explicitly promoted.

²⁵² *ibid* art. 2. Harmonisation being vital; "whatever strides are taken in port state controls are vulnerable to being undone by ports of convenience" Witbooi (n 37) 292.

²⁵³ Regrettable, in the eyes of some experts, Molenaar, 'PSJ to Combat IUU Fishing' (n 178) 386.

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In other cases, international law has defined the port state's role.²⁵⁴ This ranges from being an indirect regulator, facilitating foreign exercises of jurisdiction (3.2.2.1), to coordinating their own entitlement to exercise jurisdiction (3.2.2.2). Alternatively, in respect of combatting IUU fishing, international law has moved towards an obligation to exercise jurisdiction, with increasingly concrete minimum standards to discharge that duty (3.2.2.3).²⁵⁵ Given the obligations therein, the prospect arises that port states are found failing in their legal duty, in and of themselves, and not just as supplementary assistants to flag and coastal states. At the same time treaty law obligations, with the increased 'duty' application to suspected IUU fishing beyond the limits of the relevant treaties and state parties, could provide practice and *opinio juris* for a customary due diligence port state obligation.

Specific PSMs will remain treaty-based minimum standards but could exemplify how to discharge the general duty. The previous jurisdictional distinction is once again apparent; obligations largely relate to the denial of port privileges, in stark contrast to the imposition of port state offences or more onerous measures. To date, port states primarily need to prescribe and implement - within their domestic legal order - a procedure whereby entry and use of port may be denied to foreign vessels suspected of IUU fishing or related activities (3.2.2.3.3). Thus, *domaine réservé*-based jurisdiction has great freedom - in its legal basis under international law - to address extraterritorial conduct, but has been subjected to obligations in implementation. Ironically, previous freedoms of international law must now be exercised.

International law does not have blind faith that port states have the will and/or capacity to fulfil their obligations. Complementary roles for international organisations and other states

²⁵⁴ Noting the transition of applying PSJ to IUU fishing within international instruments, "the concept has seen an important development in that it may be used to serve the interests of the international community in the conservation and management of the living resources of the seas" Dolliver Nelson, 'Maritime Jurisdiction', *Max Planck Encyclopedia of Public International Law* (OUP 2010) para 65.

²⁵⁵ The risks and consequences of IUU fishing are fundamentally different from non-compliance with international rules and standards applicable to merchant shipping. This might explain why the responsibility for IUU fishing applies to suspected conduct globally, as opposed to the latter where the port is to ensure compliance by vessels in its port. "It seemed to some participants that it was not enough to consider only the responsibility of the port State to control fishing vessels in its port according to national legislation in conformity with international law, but also to consider the duty for the port State to cooperate in deterring IUU fishing in the EEZs of other coastal States and on the high seas" FAO, 'FAO/IMO Working Group IUU Fishing 2000' (n 90) para 21.

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promote 'responsible' port states (3.2.2.5). This may be through capacity development or, in a reversal of roles, the exercise of jurisdiction by other states to promote the fulfilment of international responsibilities by port states. Identification of ports of convenience is only the first step, with deterrent measures as foreseen by *PSMA* being on the horizon.

To put this evolution in context, imposing international obligations on states often seeks to tackle state inaction.²⁵⁶ The factual failure of (sufficient) port states to take adequate measures against foreign vessels suspected of IUU fishing/support, for whatever reason, has been partially addressed with jurisdictional obligations to stimulate state practice. The global traction of the 'port state duty' concept means most developments charted have occurred in the last twenty years. Indeed, the very concept of 'responsible' port states is an attempt to appeal to an apparent objective and universally shared understanding of what a state should do.²⁵⁷ Those with a different approach are conversely defined as irresponsible.

A remaining difficulty already witnessed in the discharge of coastal and flag state duties in respect of IUU fishing is the question when the test of 'effectively' exercising jurisdiction has been successfully met. Due diligence provides a framework within which this can be assessed but carries inherent flexibility and vagueness and herewith the risk of subjective interpretation or application (6.2.4, 6.3.1.5).²⁵⁸ Harmonised PSMs would assist in applying

²⁵⁶ Slaughter and Burke-White's general observation seems applicable; "The all-too-often inadequate domestic response to transnational threats has three separate but related causes: a lack of domestic governance capacity, a lack of domestic will to act, and new problems that exceed the ordinary ability of states to address. International law has key leverage points to help improve the response of domestic governments in each of these three ways" Anne-Marie Slaughter and William Burke-White, 'The Future of International Law Is Domestic (or, The European Way of Law)' (2006) 47 *Harvard International Law Journal* 327, 333. However, see "The Dangers of Using International Law To Shape and Influence Domestic Politics", most notably in deteriorating the ability to balance interests, *ibid* 346–349.

²⁵⁷ 'Responsible' conceptualisation; High Seas Task Force (n 202) 78; Molenaar, 'Port State Jurisdiction (2007)' (n 159) 246.

²⁵⁸ Robin R Churchill, 'The Meaning of the "genuine Link" Requirement in Relation to the Nationality of Ships' (International Transport Workers' Federation 2000) 38–39; Valentin Schatz, 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ' (2016) 47 *Ocean Development & International Law* 327, 337 'Considerable discretion is granted to states in exercising due diligence as a standard feature of due diligence is the absence of specific rules'; *SRFC Advisory Opinion* (n 32) 131–132, 150 all necessary and appropriate measures. "In many cases, the precise scope and application of the obligation on a flag State to exercise due diligence in respect of fishing by vessels flying its flag in the exclusive economic zone of another State may be difficult to determine" *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)*, Award [2016] PCA 2013-19 (Arbitral Tribunal (UNCLOS, Annex VII)) [754]. Some guidance, *ibid* 744, 944, 956, 959, 971, 974, 964; FAO, 'Voluntary Guidelines for Flag State Performance' (FAO 2015).

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that test by highlighting whether states have met their obligations. Simultaneously, they would leave marginal scope for subjectivity in the development of international law in line with subsequent needs and practice. Greater predictability for states and fishers alike would result from harmonised enforcement measures. Nevertheless, states have opted for a patchwork of differing national port state penalties.²⁵⁹ Enforcement to address PSM non-compliance beyond *domaine réservé*-based measures (2.5.2.1.2) is untouched.

However, at the regional level, research suggests port states frequently fail to comply with their obligations.²⁶⁰ It is doubtful compliance at the global level will be any better. Nonetheless, it is not always the case that what the law is, and its application, are necessarily identical.²⁶¹ Imperfect enforcement or flexibility in implementation does not remove the legal obligation imposed, or its binding character. Scholars often note non-enforcement as a general weakness of international law, recognizing the limitations of the law in which all operate.

Proactive port states imposing offences and more onerous measures implicitly benefit from the development of duties, despite these being limited to denying port privileges. So far, proactive port states have played an active role in the funding and negotiation of these obligations,²⁶² increasing the effectiveness of their own *domaine réservé* measures now shared by other parties.²⁶³ The levelling of the playing field will also reduce the competitive

²⁵⁹ For a comparable situation in respect of a flag state's obligation to "adopt and impose effective sanctions which are adequate in severity to secure compliance, discourage violations, and deprive offenders of the benefits accruing from their illegal activities", Rosemary Rayfuse, 'To Our Children's Children's Children: From Promoting to Achieving Compliance in High Seas Fisheries' (2005) 20 *The International Journal of Marine and Coastal Law* 509, 523.

²⁶⁰ Although a limited project, "Nearly three-quarters of the port visits by IUU-listed vessels to RFMO CPs were in violation or potential violation of the port States' obligations to one or more RFMOs" The Pew Charitable Trusts, 'Port State Performance: Putting Illegal, Unreported and Unregulated Fishing on the Radar' (2010) 12–13 <<http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Report/iuu-port-state-performance-iuu-on-the-radar.pdf>>.

²⁶¹ Discussing extraterritorial jurisdiction and the inapplicability of Fuller's idea that "a failure of congruence between the rules as announced and their actual administration" offends legal morality, Dan Svantesson, 'A Jurisprudential Justification for Extraterritoriality in (Private) International Law' (2015) 13 *Santa Clara Journal of International Law* 517, 532–535.

²⁶² E.g., consultation hosting and funding provided by the Governments of Australia, Canada, New Zealand, Norway, USA and the Nordic Council of Ministers, FAO, 'Expert Consultation Legally-Binding PSMs 2007' (n 233) iii; FAO, 'Technical Consultation Legally-Binding PSMs 2008-2009' (n 33) iii.

²⁶³ Furthermore, complementary notification provisions within *PSMA* will trigger enforcement. "The idea is to disseminate the information as widely and quickly as possible to enable harmonised actions amongst other port states against the IUU vessel in real time" Witbooi (n 37) 301.

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disadvantage of unilaterally denying port privileges, and possibly going further.²⁶⁴ Acceptance of extraterritorial *domaine réservé*-based PSMs by the international community will promote acceptability of jurisdictional claims beyond the denial of port privileges.²⁶⁵

Finally, practice mirrors developments within other fields concerning the international law of jurisdiction.²⁶⁶ Jurisdiction as a duty is not unique. But there are distinguishing factors: its oceans context, the transformation of customary *domaine réservé*-based jurisdiction as opposed to treaty-based state jurisdiction, and the potential for treaty-based obligations to advance towards a customary due diligence obligation.

²⁶⁴ I.e. port state offences subject to confiscation where such vessels shall be denied entry by all port states would be less distinct and discouraging for foreign vessels than if other ports were freely open for business.

²⁶⁵ “[T]he international community’s desire to punish certain types of criminal activities seems to promote acceptance of extraterritorial claims of jurisdiction” Svantesson (n 261) 523.

²⁶⁶ Mills (n 1) 209–213.

Chapter 4 Principles and Restrictions in the Law of the Sea

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4.1. Introduction

Jurisdictional rights (ch 2) and responsibilities (ch 3) do not exist in a legal vacuum. When exercised within other legal frameworks, limitations upon otherwise valid jurisdiction apply. Unless otherwise indicated, limitations apply to the implementation of jurisdiction regardless of its legal basis, i.e. both *domaine réservé*-based and state jurisdiction-based PSJ. Restricting frameworks can be thematic, e.g. laws upon immunity, or geographic, e.g. the law of the sea

(LoS). It is the latter which is examined as a source of PSJ limitations. As Allott said of *UNCLOS*, the framework agreement of LoS:

“It is comprehensive in dealing with the whole nonland areas of the world. It is also legally comprehensive. It has a rule for everything. The rule may be a permissive rule. It may be an obligation. It may confer an explicit freedom or leave a residual liberty by not specifying a right or a duty”¹

The last few decades have demonstrated *UNCLOS* does not quite have a rule for everything, the PSJ obligations developed within subsequent instruments being just one example. Nonetheless, long-term conservation and sustainable use of fish stocks falls within its ambit, with *UNFSA* giving further effect to cooperative duties applicable to straddling and highly migratory fish stocks.² Fisheries governance is a subordinate integrated package of the LoS.³ Integration continues within negotiations for a new instrument on marine biological diversity for areas beyond national jurisdiction (BBNJ).⁴ One of the early negotiation questions to emerge has been that of the inclusion of fisheries, and if included, its weight within any new BBNJ instrument.⁵

How does expanding PSMs to combat extraterritorial IUU fishing interact with and integrate within the rights and obligations of *UNCLOS*, and the balance of interests contained therein?⁶

¹ Philip Allott, ‘Power Sharing in the Law of the Sea’ (1983) 77 *American Journal of International Law* 1, 8; United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) preamble, a ‘legal order’; DOALOS, ‘UNCLOS at 30’ 2–3.

² 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, adopted 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001) 1995.

³ Allott (n 1) 12.

⁴ UN/DOALOS, ‘Page: Preparatory Committee Established by General Assembly Resolution 69/292’ <<http://www.un.org/depts/los/biodiversity/prepcom.htm>> accessed 14 March 2017.

⁵ Atsuko Kanehara, ‘What Does a New International Legally Binding Instrument on Marine Biological Diversity of Areas beyond National Jurisdiction “Under the UNCLOS” Mean?’ (2016) 59 *Sophia Law Journal* 53, 69; silent on the position of fisheries; UNGA, ‘Report of the Preparatory Committee Established by General Assembly Resolution 69/292’ (2017) A/AC287/2017/PC4/2; compared Preparatory Committee established by General Assembly resolution 69/292, ‘Chair’s Streamlined Non-Paper on Elements of a Draft Text of an International Legally-Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction’ Fourth Session of the Prepcom (10 – 21 July 2017) p. 9 material scope (opt. 8 exclude fisheries) and p. 14.

⁶ Comparable to question posed by a BBNJ agreement; UNGA, ‘Outcome of the Ad Hoc Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction and Co-Chairs’ Summary of Discussions’ [2015] A/69/780 para 16.

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Does *UNCLOS* impose limits to PSJ? There are a few explicit *UNCLOS* limitations to PSJ. This chapter also includes discussion of general *UNCLOS* principles and restrictions which may limit PSJ.⁷ This chapter's analysis of limitations will apply to PSJ broadly. Nonetheless, the discussion is primarily about PSMs and their legal position will be distinguished from general PSJ when necessary.

The first step is identifying the maritime zone(s) in which PSMs apply. *UNCLOS* provisions govern a designated subject and/or maritime zone.⁸ Subjects may be topical (e.g. resource exploitation), or they may be actorial (e.g. vessels exercising the right of innocent passage). Several customary enforcement limitations would be of general application to PSJ, i.e. limitations upon enforcement PSJ regardless of the subject matter of prescription. In contrast, there are no general limitations on prescriptive PSJ. Only PSJ with an extraterritorial element applicable to high seas conduct has raised dispute. Enforcement PSJ is therefore addressed first given its broader potential for application.

The practice of port state enforcement jurisdiction primarily falls within the state's territory, extending to port facilities located within the internal waters or territorial sea (4.2.1). Limitations to enforcement PSJ previously proposed, but largely dismissed by this chapter, concern a right of port entry (4.2.2), voluntary entry requirements and a force majeure exception (4.2.3), internal affairs (4.2.4), sovereign immunity (4.2.5), due publicity requirements and prompt notification of the flag state (4.2.6), prompt release of foreign vessels (4.2.7) and finally a limit to imposing more onerous enforcement measures (4.2.8).

Interest in port state prescription concerns extraterritorial prescriptive elements applicable to the high seas or foreign maritime zones (4.3). Jurisdictional packages adopted under the

⁷ Supplementary and subordinate role of domestic law to *UNCLOS*; "The Convention is to be considered as a framework agreement; it provides for further rules to be enacted by States, in particular coastal States, international organizations or international conferences. Those rules, to the extent they are in accordance with the Convention, supplement the latter" *M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea)*, Judgment, Separate Opinion of Vice-President Wolfrum [1999] ITLOS 2, ITLOS Rep 1999 92 [57].

⁸ Primarily evident in coastal state jurisdiction limits, e.g. Erik J Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998) pt II analysing the jurisdiction over pollution, per maritime zone and exceptions therein; Bevan Marten, 'Port State Jurisdiction over Vessel Information: Territoriality, Extra-Territoriality and the Future of Shipping Regulation' (2016) 31 *The International Journal of Marine and Coastal Law* 470. The zonal differences for information request rights may 'melt away', but this is because compatible alternatives of observation and information sharing exist for collection; *ibid* 480–482.

auspices of *UNCLOS*'s zonal management framework govern state rights therein.⁹ These rules are not displaced by the territorial nature of enforcement. Limitations raised therefore concern the freedoms of the high seas (4.3.1), invalidity of claims to high seas sovereignty (4.3.2), exclusive flag state jurisdiction (4.3.3), and where collisions or other incidents of navigation occur (4.3.4).

Finally, PSJ may be subject to thematic and crosscutting provisions of general application. This includes the limitation upon enforcement that endangers navigation, safety or the marine environment (4.4.1), non-discrimination of foreign vessels (4.4.2), and the prohibition upon abuse of rights (4.4.3). Alternatively, compulsory third-party dispute settlement (4.5) provides an opportunity for societal limitation of PSJ by challenging port state practice. Jurisdiction beyond the rights afforded by international law, or within the grey area of current developments, may be curbed by application of compulsory dispute settlement processes. In this manner, overzealous port state jurisdictions may be tempered. However, given the need to trigger the dispute settlement process it is not a freestanding and substantive limitation. Compulsory dispute settlement is therefore distinguished as a safeguard.

The conclusion will chart where PSJ is currently limited, thus identifying where state practice remains influential for the clarification or evolution of international law or identifying non-compliance (4.6).

4.2. LoS safeguards and limitations to port state enforcement

The section concerns principles of wider legal significance than jurisdiction. Nonetheless, for the purposes of PSJ they concern enforcement capacity and limitations thereof.

4.2.1. Maritime zone(s) of port state enforcement

The 'port' of PSJ is defined for jurisdictional purposes and does not reflect any individual maritime zone.¹⁰ Nonetheless, ports and foreign vessels therein are usually within a state's

⁹ Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer 2014) 14; Yoshifumi Tanaka, *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea* (Ashgate 2008) 1–6.

¹⁰ Marten, *PSJ and Merchant Shipping* (n 9) 22–25.

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territory or internal waters.¹¹ Internal waters are landward “of the baseline of the territorial sea”.¹² In the case of archipelagic waters,¹³ closing lines may delimit internal waters.¹⁴ Within internal waters, coastal states have full sovereignty just like they do within their land territory.¹⁵ Many ports will be within closed bays or rivers landward of straight baselines.¹⁶ For extending infrastructure, “outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast”.¹⁷ The *PSMA* equally refers to a state’s territory including its ports.¹⁸

Ports in the territorial sea, or perhaps archipelagic waters, are also legally recognised.¹⁹ The territorial sea is extended for roadsteads which would otherwise be wholly or partially located outside it.²⁰ Full sovereignty extends to the territorial sea²¹ and archipelagic waters,²² subject to *UNCLOS* and other pertinent international law.²³

Finally, *UNCLOS* includes offshore loading/unloading points for exploration or exploitation of the EEZ or continental shelf.²⁴ These, together with exceptional deepwater ports within the EEZ/high seas,²⁵ are irrelevant to regulating extraterritorial fisheries and are therefore not considered further.

¹¹ Gordon Earl Dunfee, ‘Territorial Status of Deepwater Ports’ (1977) 15 *San Diego Law Review* 603, 612–613.

¹² *UNCLOS* (n 1) art. 8(1).

¹³ *ibid* part IV, particularly arts. 47-48.

¹⁴ *ibid* art. 50.

¹⁵ *ibid* art. 2(1).

¹⁶ Stuart Kaye, ‘The Proliferation Security Initiative in the Maritime Domain’ (2006) 81 *International Law Studies* 141, 144; *UNCLOS* (n 1) arts. 9-10.

¹⁷ *UNCLOS* (n 1) arts. 11, 216(1)(c) loading occurs “within its territory [ports] or at its off-shore terminals”.

¹⁸ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, opened for signature 22 November 2009, I-54133 (entered into force 5 June 2016) preamble, art. 4(1)(b). Earlier academic support; NILOS, ‘Study on the Labour Market and Employment Conditions in Intra-Community Regular Maritime Transport Services Carried out by Ships under Member States’ or Third Countries’ Flags Aspects of International Law’ (2008) TREN/G01/380-2006 25.

¹⁹ *UNCLOS* (n 1) arts. 18(1)(a)-(b); 25(2). furthermore, ‘off-shore terminals’ are treated alike, but are not part of the coast (*ibid* art. 11, ‘ports’) *ibid* arts. 211(3), 216(1)(c), 218(1), 218(3), 219, 220(1).

²⁰ *UNCLOS* (n 1) art. 12.

²¹ *ibid* art. 2(1).

²² *ibid* art. 49, subject to Part IV.

²³ *ibid* art. 2(3).

²⁴ *ibid* arts. 56, 60, 80; Henrik Ringbom, ‘National Employment Conditions and Foreign Ships - International Law Considerations’, *Scandinavian Institute of Maritime Law Yearbook* (Marlus 2015) pt 4.

²⁵ Governed by bilateral treaties requiring acquiescence and sharing of jurisdiction by the flag state, providing PSJ analogous to territorial ports; Marten, *PSJ and Merchant Shipping* (n 9) 22; Gero Bruggmann, *Access to*

Interestingly, jurisdiction is similar for all cases, regardless of the maritime zone in which a port is located. The *UNCLOS* exceptions to full sovereignty and coastal state enforcement within these maritime zones are inapplicable once a vessel requests port entry or enters port.²⁶ Within internal waters, no navigational rights limit PSJ.²⁷ For archipelagic waters or territorial sea ports, innocent passage ends upon the vessel's calling at such port facilities.²⁸

Inbound vessels exercising innocent passage remain subject to measures necessary to enforce entry conditions.²⁹ Before they can be treated as "akin to vessels engaged in non-innocent passage",³⁰ it should be demonstrable that the vessel is proceeding to port or internal waters and that measures are necessary and preventative.³¹ For outbound vessels "passing through the territorial sea after leaving internal waters", coastal state enforcement jurisdiction remains at the state's discretion.³² For example, innocent passage would not limit the breach of PSMs being enforced within the territorial sea as a matter of hot pursuit.³³

Maritime Ports (Books on Demand 2003) 57–58. Territorial argument, Dunfee (n 11). Entry is limited to flags for which a bilateral agreement exists; comparable to other domaine réservé-based practice (5.3.3).

²⁶ E.g., *UNCLOS* (n 1) art. 27(5), enforcement limitation for extraterritorial offences extinguishes upon entry to internal waters.

²⁷ *ibid* art. 18(1), innocent passage ends at the baselines, with no corresponding navigational rights within internal waters, bar *UNCLOS*, art. 8(2). However, upon calling at port this limited exception would extinguish by analogy to port calls outside internal waters; *ibid* art. 18(1)(a); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment* [1986] ICJ 5, ICJ Rep 1986 14 [214] 'in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters'. *Contra*, "ARA Libertad" (*Argentina v Ghana*), *Provisional Measures, Order of 15 December 2012, Separate Opinion of Judge Lucky* [2012] ITLOS 20, ITLOS Rep 2012 382 [29] port detention preventing 'continued' innocent passage violates art. 18. Rights of navigation apply within defined maritime zones and there is no evidence to support the extension of innocent passage to provide a right of port exit on the basis of previous innocent passage.

²⁸ *UNCLOS* (n 1) art. 18(1). Stopping at other facilities, e.g. beach landings, would similarly not constitute innocent passage or the limited exception of *ibid* art. 8(2). This would constitute stopping or anchoring not 'incidental to ordinary navigation' *ibid* art. 18(2). Innocent passage within archipelagic waters is narrower and subject to similar analysis, *ibid* art. 52. The right of archipelagic sea lanes passage is inapplicable as it is limited to vessels traversing *from* and *to* the EEZ/high seas; *ibid* art. 53(3).

²⁹ *UNCLOS* (n 1) arts. 25(2), 52(1). Unrestricted scope for conditions reconfirmed, *ibid* art. 211(3), without prejudice to applying 25(2).

³⁰ Inclusion within article on enforcement against non-innocent passage, Richard Barnes, 'Article 25' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) para 9.

³¹ See necessity element (4.4.3).

³² *UNCLOS* (n 1) arts. 27(2); 28(3).

³³ Richard Barnes, 'Article 27' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) para 18 justified by analogy to hot pursuit. *UNCLOS* (n 1) arts. 111(1), 111(8), anticipate hot pursuit commenced within internal waters. See 'vertical passage', Nicholas M Poulantzas, *The Right of Hot Pursuit in International Law* (Martinus Nijhoff Publishers 2002) 151–154.

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Therefore, ports may be found within the state's territory or diverse maritime zones, but enforcement jurisdiction does not differ. Nonetheless, other limits may apply regardless of zonal classification. A systematic analysis of potential LoS safeguards and limitations follows.

4.2.2. A right of port entry

A right of entry to foreign ports would significantly limit enforcement jurisdiction. Does such a right exist within the international law of the sea? If so, it should be without prejudice to the still unsettled issue of the extent of any right to port access within international trade law (1.2.2). Port entry conditions would be unenforceable through denial of entry if a right of port access conflicts with the right to enforcement PSJ. Historically a right of port entry was the subject of a lively debate, but academia and state practice have largely concluded no such general right exists.³⁴ Yet, it occasionally resurfaces including for PSMs. In 2016 an amendment proposed to an RFMO/A conservation measure sought to exempt certain vessels from an entry requirement of submitting documentation. This was based upon the "right of a vessel to peaceful entry into port [a]s enshrined in international maritime law".³⁵ Other states disagreed, and the proposal failed to gain support.³⁶ Challenges to national implementation on this basis have been equally unsuccessful in case-law.³⁷

In short, even the presumption of being granted port access for peaceful and compliant merchant vessels does not extend to fishing vessels.³⁸ In 1958, an arbitration tribunal in the *ARAMCO* case reasoned that "[a]ccording to a great principle of public international law, the

³⁴ Both sides discussed; AV Lowe, 'The Right of Entry into Maritime Ports in International Law' (1976) 14 San Diego Law Review 597; Louise de La Fayette, 'Access to Ports in International Law' (1996) 11 International Journal of Marine and Coastal Law 1; Brugmann (n 25) ch Conclusion; Vasilios Tasikas, 'The Regime of Maritime Port Access: A Relook at Contemporary International and United States Law' (2007) 5 Loyola Maritime Law Journal 1; Benjamin Parameswaran, *The Liberalization of Maritime Transport Services: With Special Reference to the WTO/GATS Framework* (Springer 2004) 127–140.

³⁵ Delegation of Ukraine, 'Proposal by Ukraine to Amend CCAMLR Conservation Measure 10-05 on the Dissostichus Catch Documentation Scheme' (CCAMLR-XXXV/29 2016) CCAMLR-XXXV/29. Reference was also made to innocent passage, but as noted, this is inapplicable.

³⁶ E.g. Chile "could not agree to proposals that seek to undermine Port States' rights to establish certain requirements for port access", CCAMLR, 'Report of the Thirty-Fifth Meeting of The Commission (Hobart, Australia, 17 to 28 October 2016)' (2016) paras 3.18-3.20. Other states also expressed reservation; *ibid* 154–157.

³⁷ *Omunkete Fishing (Pty) Limited v Minister for Fisheries* [2008] CIV 2008-485-1310 (High Court of New Zealand (Wellington Registry)) [60].

³⁸ Lowe (n 34) 621–622; John T Oliver, 'Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction over Foreign-Flag Vessels in U.S. Ports' (2009) 5 South Carolina Journal of International Law and Business 209, 214–215.

ports of every State must be open to foreign merchant vessels and can only be closed when the vital interest of the State so require".³⁹ This reasoning has been overtaken by contrary practice,⁴⁰ and in any event did not stand for a general right.⁴¹ A vast collection of bilateral access agreements would be superfluous if a general right existed.⁴² Subsequent multilateral conventions reaffirming no general access right include *UNCLOS*⁴³ and *PSMA*,⁴⁴ while the *1923 Ports Convention* neither represents customary law, nor provides a right of entry.⁴⁵ In any event, fishing vessels were excluded from the reciprocity provided,⁴⁶ and are often excluded or further qualified in bilateral access agreements which could limit enforcement.

4.2.3. Force majeure, distress and voluntary entry

One (4.2.2) exception is the customary right of access to port or another sheltered area in the case of vessels in distress or in a situation of *force majeure* in which access is necessary for the preservation of human life.⁴⁷ Within the parameters below, denial of entry will be

³⁹ *Saudi Arabia v Arabian American Oil Company (Aramco)*, Award of 23 August 1958 (1963) 27 ILR 117 (Arbitration Tribunal) 212.

⁴⁰ Subsequent case law upon no such right, arguments of the Swedish Environmental Protection Agency; *Environmental Board of the Municipality of Helsingborg v HH-Ferries AB and Sundbusserne A/S* [2006] Svea Court of Appeal M 8471-03, ILDC 634 [67]. Concluding no right of entry; Havsmiljökommissionens, 'Havet - Tid För En Ny Strategi' 268 'Hamnstatsjurisdiktion'.

⁴¹ 'Vital interests' are undefined and subject to national interpretation. Some argue *ARAMCO* only stood for non-discrimination, Kai Trümpler, 'Article 8' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) paras 17–19.

⁴² Practice: Erik J Molenaar, 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage' (2007) 38 *Ocean Development & International Law* 225, 227–228; Erik J Molenaar, 'Port and Coastal States' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015); Brugmann (n 25); Ted L McDorman, 'Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention' (1997) 28 *Journal of Maritime Law and Commerce* 305, 310–311; Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer 2006) 48–70; Marten, *PSJ and Merchant Shipping* (n 9) 31–35.

⁴³ *UNCLOS* (n 1) arts. 25(2), 211(3) and art. 255, which includes discretion over entry of marine scientific research vessels; "as appropriate, to facilitate, subject to the provisions of their laws and regulations, access to their harbours".

⁴⁴ *PSMA* (n 18) arts. 4(1)(b), 7-9.

⁴⁵ "Subject to the principle of *reciprocity* and to the reservation set out in the first paragraph of Article 8, every Contracting State undertakes to grant the vessels of every other Contracting State *equality of treatment*" (emphasis added) Convention and Statute of the International Regime of Maritime Ports, adopted 9 December 1923, 58 *LNTS* 285 (entered into force 26 July 1926) Statute, art. 2.

⁴⁶ *ibid* Statute, art. 14.

⁴⁷ US Department of State, 'Collection of Sources on Entry into Port under Force Majeure', *Archive* (2009) <<https://2001-2009.state.gov/s/l/2007/112701.htm>> accessed 30 May 2017; Terje Lobach, 'Advances in Port State Control Measures' in OECD (ed), *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD Publishing 2004) 296; Alexander Proelss, 'Rescue at Sea Revisited: What Obligations Exist towards Refugees?', *Scandinavian Institute of Maritime Law Yearbook* (2008) 22–25. Uncodified customary principles of refuge; *NILOS* (n 18) 25'A widely acknowledged exception'; Aldo Chircop, 'Assistance at Sea and Places of Refuge for

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limited.⁴⁸ Requests for access to a place a refuge may arise in other contexts, such as a situation presenting an environmental hazard.⁴⁹ There is however no obligation under international law for a coastal state to grant permission to enter a place of refuge, and in any event this need not be a port.⁵⁰

The state testing the necessity of the preservation of human life, balances the interests raised by the vessel's circumstances and those of the state.⁵¹ Further entry conditions may therefore be applied,⁵² but illegal activity alone cannot be grounds for denial.⁵³ Decisions about the necessity or lack thereof should be based on objective facts, balanced against the port state's interests.⁵⁴

Essentially, port states should exercise due diligence in reviewing, on a case by case basis, whether an entry right applies.⁵⁵ The port state determines whether *force majeure* or distress is demonstrated,⁵⁶ which domestic interests are threatened, the weight of competing interests, and any decision upon entry and upon what conditions. Significant implementation discretion exists.

Therefore, enforcement of PSJ through entry denial is limited in *force majeure* or distress cases. Given the focus of *PSMA* (3.2.2.3.3), the limitation is unaffected by obligations

Ships: Reconciling Competing Norms' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 148. Explicit *force majeure* or distress exception for stopping during passage, UNCLOS (n 1) arts. 18(2), 39(1)(c), 45, 52(1), 54.

⁴⁸ A place of refuge for distress will not normally require port entry but rather a sheltered area along the coastline, "a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment", IMO, 'Guidelines On Places of Refuge for Ships in Need of Assistance' (2004) Resolution A943(23) para 1.19.

⁴⁹ IMO (n 48) para. 1.18.

⁵⁰ *ibid* paras. 1.19, 3.12, fn. 3.

⁵¹ Jon M Van Dyke, 'Safe Harbour', *Max Planck Encyclopedia of Public International Law* (OUP 2010) paras 4–6; IMO (n 48) preamble; Henrik Ringbom, 'You Are Welcome, But ... Places of Refuge and Environmental Liability and Compensation, with Particular Reference to the EU' [2004] CMI Yearbook 208, 208; NILOS (n 18) 25.

⁵² Ringbom (n 51) 210; 'whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress' International Convention on Salvage, done 28 April 1989, 1953 UNTS 165 (entered into force, 14 July 1996) art. 11.

⁵³ Eric Van Hooydonk, 'The Obligation to Offer a Place of Refuge to a Ship in Distress' [2003] CMI Yearbook 403, 408.

⁵⁴ *ibid* 407.

⁵⁵ Chircop (n 47) 161–162.

⁵⁶ Proelss (n 47) 25.

imposed.⁵⁷ Earlier practice on rights and responsibilities recognised that qualified vessels should be granted entry.⁵⁸ Further treaties recognise this custom, exempting vessels from their standards.⁵⁹ Nonetheless, port states may condition entry.⁶⁰ In respect of accessing port services, only those essential to health and safety are obligatory.⁶¹

Beyond denial of privileges, PSJ incorporating extraterritorial elements may be limited. Firstly, certain laws are inapplicable when *force majeure* or distress entry occurs.⁶² Unsettled in scope, this at least includes those “in connection with actions to relieve the distress”.⁶³ Rules closely tied to voluntary entry are therefore inapplicable. For example, the breach of customs laws as a result of *force majeure* or distress port entry.⁶⁴

For fisheries, rules prescribing advance notification or documentation could be inapplicable against vessels entering for reasons of *force majeure* or distress. If so, subsequent territorial offences built upon these entry requirements should also be limited. If the advance

⁵⁷ PSMA (n 18) art. 10; FAO, *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing* (FAO 2007) para 9; UNGA, ‘Resolution 71/123: Sustainable Fisheries [...]’ (2016) A/RES/71/123 para 76.

⁵⁸ FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2001) para 54.

⁵⁹ Fisheries; Convention (No. 188) concerning work in the fishing sector, adopted 14 June 2007, I-54755 (entered into force 16 November 2017) arts. 4(2)(d);43(3) application when vessel ‘calls in the normal course of business or for operations reasons’; Torremolinos Protocol Relating to the 1977 Torremolinos International Convention for the Safety of Fishing Vessels, adopted 2 April 1993, 2001 Tractatenblad 168 (not in force) art. 5. Maritime; International Convention for the Safety of Life At Sea, adopted 1 November 1974, 1184 UNTS 3 (entered into force 25 May 1980) art. IV; and other examples, listed Chircop (n 47) 149–150.

⁶⁰ PSMA (n 18) art. 10 ‘exclusively for the purpose of rendering assistance’; SOLAS (n 59) art. V(b).

⁶¹ PSMA (n 18) arts. 10; 11(2)(a); 18(2).

⁶² If “had to put into port because of an emergency or weather, there may be a limitation in customary international law on the authority of the port state regarding that vessel” Ted L McDorman, ‘Regional Port State Control Agreements: Some Issues of International Law’ (2000) 5 *Ocean and Coastal Law Journal* 207, 210; Robin R Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1988) 68. Limitations decreasing, perhaps now relegated to comity; Van Dyke (n 51) paras 12–14.

⁶³ US Department of State (n 47); contra, no services required Tang Jianye, ‘The Agreement on Port State Measures: A Commentary’ [2009] *China Oceans Law Review* 312, 324.

⁶⁴ Yang (n 42) 66; David J Douman and Judith Swan, ‘A Guide to the Background and Implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (FAO 2012) FAO Fisheries and Aquaculture Circular 1074 45; Oliver (n 38) 292 embargo breach. “[T]he literature is almost unanimous in considering that the vessel in question *cannot be subject to the laws of the port State on the ground alone that it entered the port, unless, obviously, the alleged activities took place in territory under the jurisdiction* of the State in question” (emphasis added to distinguish entry laws and other jurisdictional rules) *Opinion of Advocate General Tesouro, Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] CIEU C-286/90, ECR 6034 6046.

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notification requirement is inapplicable against said vessels, a significant element of the subsequent offence, i.e. entry without advance notification, has not occurred.

However, port states are not limited in imposing comparable conditions upon *force majeure* or distress entry that achieve similar results. For example, they may subject port entry to providing a detailed account of catch aboard when suspicions arise (6.3.1.4). This is justifiable as providing evidence for balancing the interests in granting access.

Treaty-based extraterritorial jurisdiction is certainly limited in *force majeure*/distress cases.⁶⁵ Instituting proceedings or further enforcement actions under *UNCLOS*, art. 218 is conditional upon “[w]hen a vessel is voluntarily within a port or at an off-shore terminal”.⁶⁶ Subsequent sentences clarify that the prescription and the vessel’s violation are unaffected by this limitation. Any subsequent voluntary port visit by the vessel may be subject to enforcement.

“Voluntarily within port” can feature within fisheries law. The *Code of Conduct for Responsible Fisheries* only promotes PSMs where “a fishing vessel is voluntarily in a port”.⁶⁷ *UNFSA* only includes inspection “when such vessels are voluntarily in its ports”.⁶⁸ Nonetheless, in both cases the limitation applies to duties, not rights. “Voluntarily” is not essential for said residual jurisdiction and is insufficiently explicit to limit it. Rather, because *force majeure* or distress may require deference to limiting investigation/enforcement, port state duties are inapplicable. *PSMA* is explicit upon this, distinguishing no effect upon *force majeure*/distress entry cases (non-port right) from not preventing port states permitting entry (in contrast to duties; *PSMA*, part II).⁶⁹

⁶⁵ In contrast to provisions reflecting customary PSJ, *UNCLOS* (n 1) arts. 219, 220. Disagreements upon whether 220 limits jurisdiction by reference to voluntarily within port; Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (n 8) 187. Ahmed Adham Abdulla, ‘Flag, Coastal and Port State Jurisdiction over the Prevention of Vessel Source Pollution in International Law: Analysis of Implementation by the Maldives’ (University of Wollongong 2011) 171 article 220 restricts PSJ to voluntary entry. As the pollution incident occurred in the territorial sea or EEZ, unconnected to the compelled port entry, enforcement should not be limited.

⁶⁶ *UNCLOS* (n 1) art. 218(1);(3). Ho-Sam Bang, ‘Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea’ (2009) 40 *Journal of Maritime Law & Commerce* 291, 300. Doris König, ‘Article 218’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) para 7.

⁶⁷ *FAO, Code of Conduct for Responsible Fisheries* (FAO 1995) para 8.3.2.

⁶⁸ *UNFSA* (n 2) art. 23(2).

⁶⁹ *PSMA* (n 18) art. 10.

In other extraterritorial fisheries cases, it is less clear whether restraint should be exercised as comity or as within the *force majeure*/distress limitation.⁷⁰ The author of this manuscript argues that the limitation should be narrowly interpreted as when a breach of general entry regulations forms a material part of the offence, or when treaty-based jurisdiction explicitly requires ‘voluntary’ entry. Involuntary entry excludes the vessel from the treaty-based right, or excuses violation of entry related offences because the offence stems from irresistible forces.⁷¹ Offences closely linked to rendering port state approved assistance would similarly be limited. An example of this is the landing and sale of catch in breach of customs law where necessary to cover the costs of essential health and safety services.

Otherwise, enforcement jurisdiction is not limited, even if *force majeure*/distress compelled the territorial presence. Perhaps a comparative stretch, but general international law dismisses the process of how a defendant arrived in a foreign territory as largely immaterial to the question whether enforcement jurisdiction is exercisable.⁷² Here, the vessel’s compelled arrival is immaterial to prosecuting an offence unassociated with compelled entry.

Ambiguity may arise for objective territorial offences, when the act of the overlying offence is not compelled by the *force majeure*/distress situation, but the fact that it was committed within the port state’s territory is. Thus, *force majeure* would not compel the possession of IUU catch, but would compel possession occurring within port/internal waters, i.e. the ‘import’ (ch 6). Comity discourages enforcement, but it arguably remains legal given other territorial laws stand, and preservation of property rights is not required.

4.2.4. Internal affairs

Another historical, but persistent,⁷³ debate concerns jurisdiction over the ‘internal affairs/economy’ of foreign vessels in port. French domestic doctrine advanced this as a

⁷⁰ *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] CJEU C-286/90, ECR 06019 [35–39] EU law silent on legal consequences of non-compliance resulting from a situation of distress.

⁷¹ Except specific *force majeure* or distress scenario conditions to protect the coastal/port state interests, e.g. adequate insurance to cover potential pollution, or prior dumping of cargo.

⁷² See, extraterritorial abduction and subsequent prosecution; “international law does not appear to prohibit such prosecution” Roger O’Keefe, *International Criminal Law* (OUP 2015) 40. Other fields beyond the scope of this discussion would apply e.g. human rights. Malcolm Shaw, *International Law* (7th edn, CUP 2014) 493–495.

⁷³ *Re the Maritime Union of Australia & Ors; Ex parte CSL Pacific Shipping Inc* [2003] HCA 43 (High Court of Australia) [49–54] concluding matter of comity.

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customary law limitation, while Anglo-American doctrine posited it as comity.⁷⁴ As Marten highlights, the concept of ‘internal affairs’ was never elaborated beyond “a loosely-defined group of subjects such as employment conditions, inter-crew disputes, and minor offences committed on board a visiting vessel”.⁷⁵

Flag state duties, notably *UNCLOS*, article 94, apply regardless of the vessel’s in-port location.⁷⁶ But foreign duties do not imply PSJ limitation. Furthermore, a limitation based upon an ever-expanding non-exhaustive list of flag state duties, including non-explicit fisheries duties,⁷⁷ would be unworkable. To suggest otherwise would result in PSJ being narrowed as foreign duties and internal affairs expanded.

Few support internal affairs as a legal limitation. Its supporters are unpersuasive, given the lack of state practice or refined definition necessary for legal certainty.⁷⁸ What is more, an exception for matters affecting port state interests is suggested. ‘Interests’ and ‘affected’ are determined by the port state. The practical result of an ‘internal affairs’ legal limitation would therefore be similar to applying it as a consideration of comity.⁷⁹

Rather than an undefined limitation, with undefined exceptions, practice within these loosely-defined areas employs PSJ, e.g. *Maritime Labour Convention*.⁸⁰ Fisheries treaties and soft law include PSJ addressing vessel safety and working conditions.⁸¹ Deferral to flag states

⁷⁴ Both positions well covered; Marten, *PSJ and Merchant Shipping* (n 9) 28–31; Ringbom (n 24) 123–127; Jason M Schupp, ‘The Clay Bill: Testing the Limits of Port State Sovereignty’ (1994) 18 *Maryland Journal of International Law* 199; Trümpler (n 41) para 21.

⁷⁵ Bevan Marten, ‘Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation’ in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 115–117.

⁷⁶ Myron Nordquist, Satya Nandan and Shabtai Rosenne, *UN Convention on the Law of the Sea Commentary 1982 Online* (Brill 2013) para 94.8(L); Ringbom (n 24) 115; NILOS (n 18) 31.

⁷⁷ *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion* [2015] ITLOS 21, ITLOS Rep 2015 4 [117–119].

⁷⁸ Alan Boyle, ‘EU Unilateralism and the Law of the Sea’ (2006) 21 *The International Journal of Marine and Coastal Law* 15, 23–24 provides some supportive practice, but still doesn’t conclusively support a legal limitation (rather ‘not usual’ to do so). *C-286/90, Poulsen (Tesaura Opinion)* (n 64) 6044 accepted the internal affairs limitation, arguing jurisdiction over fish brought into port was limited to that with an intention to land.

⁷⁹ Schupp (n 74) 210.

⁸⁰ *Maritime Labour Convention*, adopted 23 February 2006, 45 ILM 792 (entered into force, 20 August 2013). For previous ILO practice and PSC; NILOS (n 18) 84–88; employment and safety standards, Ringbom (n 24) 115–118; Marten, *PSJ and Merchant Shipping* (n 9) 192–195, ch. 4.

⁸¹ FAO, *Code of Conduct for Responsible Fisheries* (n 67) paras 6.17; 8.1.5; 8.4.1 (health and safety standards or working and living conditions); 8.3 (port state duties including use of own legislation and non-discrimination).

through reporting is provided, but measures against “clearly hazardous” internal conditions are recognised, and equally applicable to vessels of non-parties.⁸² For third states, the implementation by port states of standards which would be *pacta tertiis* demonstrates the lack of a customary internal affairs limitation.⁸³

Therefore, port states may commonly not regulate internal affairs,⁸⁴ but this is unaccompanied by the requisite *opinio juris*.⁸⁵ Only under domestic law may ‘internal affairs’ limit PSJ.⁸⁶ In terms of comity, promoting friendly relations, a lack of domestic interest, and the possibility of reciprocal measures by foreign port states discourage regulation.

4.2.5. Sovereign immunity

Sovereign immune vessels are exempt from all non-flag enforcement unless the flag state expressly waives immunity. *UNCLOS* provides complete immunity for warships and vessels “owned or operated by a State and used only on government non-commercial service” upon the high seas or EEZ.⁸⁷ Further *UNCLOS* provisions and international standards for protection of the marine environment do not apply to sovereign immune vessels.⁸⁸

Treaties below.

⁸² Work in Fishing Convention (n 59) arts. 43 (PSC), 44 (NMFT); 1993 Torremolinos Protocol (n 59) arts. 4(1)-(3) (PSC), 4(7) (NMFT); International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, adopted 7 July 1995, IMO Doc. STCW/CONF/10 (entered into force 29 September 2012) arts. 8(1)-(3) (PSC), 8(4) (NMFT).

⁸³ Vienna Convention on the Law of Treaties, signed 23 May 1969, 1155 UNTS 331 (entered into force 21 January 1980) art. 34.

⁸⁴ Molenaar, ‘Port and Coastal States’ (n 42) 285; Ringbom (n 24) 111; Australian Government Solicitor, ‘Appendix D - Legal Advice’ in House of Representatives: Standing Committee on Social Policy and Legal Affairs, *Troubled Waters: Inquiry into the arrangements surrounding crimes committed at sea* (Commonwealth of Australia 2013) paras 19–20, 23–24.

⁸⁵ NILOS (n 18) 103–104; Trümpler (n 41) paras 22–25; Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn, CUP 2015) 79–80.

⁸⁶ *Spector v Norwegian Cruise Line Ltd* (2005) 545 US 119 (US Supreme Court) 130–132 statutory construction if lacking congressional intent; *Re the Maritime Union of Australia* (n 73) [51] quoting Reporters’ Notes to §512, whereby entry conditions may relate to internal affairs.

⁸⁷ *UNCLOS* (n 1) arts. 58(2); 95-96; 110(1), 102 (mutiny piracy). Debates upon immunity including prescriptive jurisdiction would limit extraterritorial PSJ. However, this is based upon expansive interpretations of exclusive flag state jurisdiction, rejected below (4.3.3). Discussion; Ted L McDorman, ‘Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions’ in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 95.

⁸⁸ *UNCLOS* (n 1) art. 236. However, note flag state duty. This logically flows from the fact sovereign immune vessels are exempt from application of the prescribed standards – a frequent treaty feature; McDorman, ‘Sovereign Immune Vessels’ (n 87) 98–101.

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The precise customary or also *UNCLOS*-based source of immunity within port, internal waters and the territorial sea is disputed (*“ARA Libertad” Case*).⁸⁹ Article 32 is not geographically defined and therefore could apply in-port.⁹⁰ Whatever the source, port state enforcement is limited. At best, formal requests and ultimately expulsion from port will apply.⁹¹ However, for denial of port privileges, no presumption of entry applies,⁹² and specific authorisation via diplomatic correspondence is usually required.⁹³

ARA Libertad proceedings were discontinued,⁹⁴ but if immunity within port were a matter of *UNCLOS*, compulsory dispute settlement provisions could apply. However, through the application of the rules for treaty interpretation, the *Joint Separate Opinion of Judges Wolfrum and Cot* is rather convincing in demonstrating that the matter is one of customary international law.⁹⁵

4.2.6. Due publicity and prompt notification

In addition to substantive limitations, procedural requirements may apply.⁹⁶ *UNCLOS* frequently requires due publicity,⁹⁷ including for port states:

“States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall

⁸⁹ Discussed, McDorman, ‘Sovereign Immune Vessels’ (n 87).

⁹⁰ *“ARA Libertad” (Argentina v Ghana), Provisional Measures, Order of 15 December 2012* [2012] ITLOS 20, ITLOS Rep 2012 332 [44-46 (Argentina), 47, 52 and 55 (Ghana), 63-65 (ITLOS)]; *“ARA Libertad” Provisional Measures (Sep. Op. Lucky)* (n 27) [38] supportive reasoning; *“ARA Libertad” (Argentina v Ghana), Provisional Measures, Order of 15 December 2012, Joint Separate Opinion of Judges Wolfrum and Cot* [2012] ITLOS 20, ITLOS Rep 2012 363 [44–45] only applies to the territorial sea.

⁹¹ Analogous CS enforcement, *UNCLOS* (n 1) art. 30. Force may be used; McDorman, ‘Sovereign Immune Vessels’ (n 87) 97–98. A state may recover damages; Oliver (n 38) 220–221.

⁹² Oliver (n 38) n 42.

⁹³ *“ARA Libertad” Provisional Measures* (n 90) [38].

⁹⁴ *The ARA Libertad Arbitration (Argentina v Ghana), Termination Order* [2013] PCA 2013-11 (Arbitral Tribunal (*UNCLOS*, Annex VII)).

⁹⁵ *UNCLOS* wording “does not establish the immunity”, but rather takes it “for granted”, *“ARA Libertad” Provisional Measures (Sep. Op. Wolfrum and Cot)* (n 90) [38–43], *ibid* 46–50 customary immunity within internal waters.

⁹⁶ Not considering domestic requirements implementing international obligations e.g. human rights.

⁹⁷ Publicity featuring in at-least 20 provisions; e.g. *UNCLOS* (n 1) arts. 21(3), 41(3) publication of specific coastal state laws.

give due publicity to such requirements and shall communicate them to the competent international organization”⁹⁸

This does not limit jurisdiction *per se*, as a failure to fulfil procedural requirements does not invalidate legality.⁹⁹ This contrasts with other publicity provisions, including article 25(3) where suspension of innocent passage only takes effect after due publicity.¹⁰⁰ Indeed, the Swedish court in *Helsingborg v HH-Ferries* confirmed PSJ to enforce standards, despite lacking formal adherence to *UNCLOS*, art. 211(3).¹⁰¹ Nonetheless, to avoid protest or disputes arising out of non-compliance, port states should take closely linked procedural requirements into account.

Any teleological interpretation of article 211(3) covering entry conditions generally (i.e. fisheries) would go against its express conditions.¹⁰² However, concerning straddling or highly migratory fish stocks, PSMs within an RFMO/A framework are covered by the *UNFSA* publicity requirement.¹⁰³ That requirement applies to all CMMs which, upon the broad interpretation of the *Fisheries Jurisdiction (Spain/Canada)*,¹⁰⁴ includes PSMs.

⁹⁸ *ibid* art. 211(3).

⁹⁹ A distinction shared; Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (n 8) 104.

¹⁰⁰ Similarly; *UNCLOS*, arts. 41(2); 52(2); 53(7); and 211(5)(c).

¹⁰¹ *Helsingborg v HH-Ferries* (n 40) [21] the Environmental Board noted no reporting of the standards was undertaken, but nonetheless the case upheld the decision and port state requirements. *ibid* 98 non-discrimination is a jurisdictional limitation, while reporting requirements a question of whether Sweden breached its international obligations.

¹⁰² The Environmental Board suggested “in light of the purpose of the provision (i.e. to make it easier for foreign ships to gain advance knowledge of national requirements) and the fact that the issue of air pollution from ships has not been brought up in 1982, when *UNCLOS* was adopted, corresponding requirements for publication and reporting should also apply to national protective requirements intended to improve air quality” *Helsingborg v HH-Ferries* (n 40) [16].

¹⁰³ *UNFSA* (n 2) art. 10(m); *FAO, Code of Conduct for Responsible Fisheries* (n 67) para 7.1.10 reiterates this and goes further by encouraging states “ensure that laws, regulations and other legal rules governing their implementation are effectively disseminated”.

¹⁰⁴ “it is sufficient that its purpose is to conserve and manage living resources and that, to this end, it satisfies various technical requirements. [...] The question of who may take conservation and management measures, and the areas to which they may relate, is neither in international law generally nor in these agreements treated as an element of the definition” *Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment* [1998] ICJ 96, ICJ Rep 1998 432 [70]. Criticised by Oda, but his subsequent interpretation was broader; *Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment, Separate Opinion of Judge Oda* [1998] ICJ 96, ICJ Rep 1998 474 [11–16].

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No UNFSA due publicity requirement covers unilateral PSMS.¹⁰⁵ PSMA only requires states to publicize designated ports.¹⁰⁶ One could infer that publicity of recourse mechanisms available (article 19) requires publicity of the laws prescribed. An assessment of “unlawful action by the Party” would be a fundamental element of the right to compensation, explicitly covering unilateral measures following inspection (article 18). Unfortunately, a recourse or compensation mechanism is not mandatory.¹⁰⁷ Finally, PSMA implies sharing regional or unilateral CMMs which could again include PSMS.¹⁰⁸ However, it lacks the concrete and mandatory language of UNCLOS, art. 211(3).

A related trend is to include prompt notification of the flag state (thereby assisting, 3.2.2.1.1). Other states or international organisations may also be mandatory notifyees. Prompt notification of the flag state under UNCLOS, art. 231 extends to pollution-related (pt. XII(6)) port state provisions.¹⁰⁹ Any conditioning or refusal of release during an investigation of foreign vessels pursuant to articles 216, 218 or 220 must also be accompanied by notification.¹¹⁰ Further multilateral practice requires prompt notification, notably MARPOL and the Paris MOU.¹¹¹ IMO procedures for port state control similarly promote prompt notification.¹¹²

¹⁰⁵ UNFSA (n 2) art. 23.

¹⁰⁶ PSMA (n 18) art. 7(1), preferably via a website, Annex D, para. (b).

¹⁰⁷ *ibid* art. 19(1). Clearly, if no mechanism is established, no publicity will be required. This contrasts with PSI under UNCLOS, pt. XII(6); “States shall provide for recourse in their courts for actions in respect of such damage or loss” attributable to the port state because of unlawful or excessive enforcement measures, UNCLOS (n 1) art. 232. A proposal along these lines was not taken forward, Erik J Molenaar, ‘Commentary on the FAO Preliminary Working Draft of July 2007 for a FAO Agreement on Port State Measures’ (Royal Ministry of Fisheries and Coastal Affairs of Norway 2007) 11.

¹⁰⁸ PSMA (n 18) arts. 6(1) (exchange information on regional CMM’s); 6(2) (support CMMs adopted by other States, which presupposes knowledge of said measures).

¹⁰⁹ Note, slightly differing requirement for violations committed ‘in’ the territorial sea.

¹¹⁰ UNCLOS (n 1) art. 226(1)(c).

¹¹¹ International Convention for the Prevention of Pollution, as modified Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, adopted 2 November 1943; 17 February 1978, 1340 UNTS 184 (entered into force, 2 October 1983) art. 5(3); Paris Memorandum of Understanding on Port State Control, adopted 26 January 1982, 21 ILM 1 (entered into force, 1 July 1982); Including 40th Amendment, adopted 26 May 2017 (effective date, 1 July 2017) paras 3.7-3.9, Annex 2 para. 2.3.

¹¹² IMO, ‘Procedures for Port State Control, 2011’ (2011) Resolution A1052(27) throughout, e.g. pts. 2.3, 3.3, ch. 4.

Again, for PSMs *UNCLOS* is understandably silent. By contrast, each coastal state enforcement of EEZ fisheries law requires prompt notification of the flag state.¹¹³ Only more generally, when a vessel is pursued for breaching port state rules and arrested within the territorial sea, may the master request notification of her/his flag state.¹¹⁴ Prompt notification under *UNFSA* similarly covers non-flag enforcement upon the high seas, but not PSMs.¹¹⁵

This disparity is addressed in subsequent soft and hard law, being a procedural requirement of the *Compliance Agreement*,¹¹⁶ *Work in Fishing Convention*,¹¹⁷ *Torremolinos Protocol*,¹¹⁸ and most extensively the *PSMA* for all PSMs pursuant to the agreement.¹¹⁹ What is apparent from the growing and repetitive treaty-based prompt notification requirement is the lack of a general international law duty. Nonetheless, prompt notification under the *PSMA* only concerns domaine réservé-based PSMs. Enforcement of port state offences (2.6) does not require prompt notification.

4.2.7. Prompt release of foreign vessels

A further *UNCLOS* procedural safeguard is prompt release. Article 218-based extraterritorial PSJ is tempered by the requirement that investigations do not unduly delay the vessel.¹²⁰ If investigations indicate a violation occurred, the vessel shall be released “promptly subject to reasonable procedures such as bonding or other appropriate financial security”.¹²¹ Within fisheries, a comparable limitation covers coastal state enforcement of EEZ laws and

¹¹³ *UNCLOS* (n 1) art. 73(4). See, prompt release and restriction of article 73 to the EEZ regime (5.2.7). *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment [2014] ITLOS 19, ITLOS Rep 2014 4 [328] the arrest, detention and subsequent actions each violated *UNCLOS*.

¹¹⁴ *UNCLOS* (n 1) art. 27(3).

¹¹⁵ *UNFSA* (n 2), arts. 21(5), 22(1)(b) prompt notification upon boarding and any subsequent alleged violations.

¹¹⁶ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003) 1993 arts. V(2); VI(8)(b) notify flag of suspected vessels.

¹¹⁷ *Work in Fishing Convention* (n 59) arts. 43(2)-(3), report to flag state and notify any measures taken.

¹¹⁸ 1993 *Torremolinos Protocol* (n 59) arts. 4(4)-(5), notification of any port state ‘intervention’ or lack thereof.

¹¹⁹ *PSMA* (n 18) arts. 9(3); 11(3) (which also covers 9[6]); 11(5); 18(1)(a); 19(2).

¹²⁰ *UNCLOS* (n 1) art. 226(1)(a).

¹²¹ *ibid* arts. 226(1)(b); 220(7)-(8).

CHAPTER 4

regulation.¹²² Further teeth are provided by the flag state right to compulsory dispute settlement proceedings if it believes the detaining state is non-compliant.¹²³

However, PSJ in respect of fishing upon the high seas or in foreign maritime zones falls outside the scope of this prompt release procedure. Thematically, it falls outside PSJ covered by article 226 (pollution), whilst article 73 is inapplicable because it only covers enforcement of laws in respect of living resources within the EEZ.¹²⁴ Article 292 dispute resolution is a self-contained regime to be narrowly interpreted.¹²⁵ Article 292 only applies when a provision upon prompt release applies. It may expand via further treaties, but there has been no appetite for that to date. Thus, ITLOS has heard many prompt release cases, including detention of vessels suspected of conducting IUU fishing in respect of living resources within the EEZ. However, this will not be witnessed in the port state's fight against extraterritorial IUU fishing beyond its EEZ.

Subsequent practice to *UNCLOS* continues to exclude extraterritorial PSMs from prompt release and applies a comparably lighter approach. *UNCLOS*'s "shall not" in relation to unduly delay for discharge investigations, has become the *PSMA*'s "all possible efforts to avoid unduly delaying the vessel".¹²⁶ As "shall" is transformed into an obligation of best effort, broader reasons for delay are acceptable. What is more, early multilateral fisheries practice proposed vessels "shall be entitled" to compensation for undue delay.¹²⁷ Yet, within *PSMA*,

¹²² *ibid* art. 73(2).

¹²³ *ibid* art. 292.

¹²⁴ James Harrison, 'Article 73' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) para 13; Ed Brown, 'The M/V "Saiga" Case on Prompt Release of Detained Vessels: The First Judgment of the International Tribunal for the Law of the Sea' (1998) 22 *Marine Policy* 307, 312.

¹²⁵ *Contra* the non-restrictive Saint Vincent and the Grenadines argumentation; *M/V 'SAIGA' (Saint Vincent and the Grenadines v Guinea)*, *Prompt release, Judgment* [1997] ITLOS 1, ITLOS Rep 1997 16 [53]. See, *M/V 'SAIGA' (Saint Vincent and the Grenadines v Guinea)*, *Prompt release, Judgment, Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto* [1997] ITLOS 1, ITLOS Rep 1997 46 [16]; *M/V 'SAIGA' (Saint Vincent and the Grenadines v Guinea)*, *Prompt release, Judgment, Dissenting Opinion of Judge Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye* [1997] ITLOS 1, ITLOS Rep 1997 53 [23–25]; *M/V 'SAIGA' (Saint Vincent and the Grenadines v Guinea)*, *Prompt release, Judgment, Dissenting Opinion of Judge Anderson* [1997] ITLOS 1, ITLOS Rep 1997 63 [11].

¹²⁶ *PSMA* (n 18) art. 13(f). 1993 Torremolinos Protocol (n 59) art. 4(6); STCW-F (n 82) art. 8(3)(1).

¹²⁷ 1993 Torremolinos Protocol (n 59) art. 4(6); STCW-F (n 82) art. 8(3)(1).

compensation is a discretionary possibility within a discretionary recourse mechanism.¹²⁸ Here then, the flag state hand has weakened.

4.2.8. More onerous enforcement measures

Finally, prompt release's inapplicability further demonstrates the lack of limitations to enforcement jurisdiction when valid prescriptive state jurisdiction is established (note however the *domaine réservé*-based distinction and enforcement limits thereof (2.5.2.1.2)). The limited interpretation of prompt release for violations of coastal state laws and regulations in respect of living resources within the EEZ resides within a delicate zonal balance of coastal and flag state interests.¹²⁹ Other enforcement limitations should be interpreted by analogy.

Thus, firstly vessel confiscation for violating EEZ rules and regulations may be inappropriate given the potential frustration of prompt release processes.¹³⁰ The increase in punitive fisheries-related measures may demonstrate the narrowing of this limitation.¹³¹ But whatever the case in an EEZ governance context, the lack of comparable flag state rights in a port state context leaves confiscation unrestrained.¹³² Without a law of the sea limitation applicable, general territorial enforcement jurisdiction knows no limits.¹³³ As Kokott argued by analogy in ATAA, this goes for all territorial enforcement options responding to extraterritorial

¹²⁸ PSMA (n 18) art. 19(1).

¹²⁹ "It cannot be reiterated often enough that this procedure is a special one intended to balance the rights and interests", *M/V 'Saiga' Judgment (Dis. Op. Wolfrum and Yamamoto)* (n 125) [9]; "*Tomimaru*" (*Japan v Russian Federation*), *Prompt Release, Judgment* [2007] ITLOS 15, ITLOS Rep 2005-2007 74 [74]; purpose and function Harrison (n 124) 557.

¹³⁰ '[C]onfiscation of a fishing vessel must not be used in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention [...] a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention' "*Tomimaru Judgment*" (n 129) [74–76].

¹³¹ See Indonesia's vessel sinking/burning policy for foreign fishing vessels; Law No. 45/2009 Amending Law No. 31/2004 Concerning Fishery 2009 (Business News Nos 7910-7914, Jan-Feb 2010) art. 29 (amending, art. 69[4]).

¹³² Other considerations of due process or access to domestic judicial remedies mentioned in *Tomimaru* could still apply. *C-286/90, Poulsen (Judgment)* (n 70) [30–34] recognised confiscation of catch harvested upon the high seas and subsequently transported in a state's port as part of a 'panoply' of measures that could be ordered when community legislation was infringed.

¹³³ One can substantially disagree with the suggestion that territorial prescriptive jurisdiction is "unlimited", but one cannot question the unlimited enforcement state jurisdiction within one's territory (2). *Opinion of Advocate General Kokott, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] CJEU C-366/10, ECR 13765 [149] 'the power to confiscate a ship's cargo is also ultimately based on the territoriality principle'.

conduct, so long as the conduct has validly been incorporated within the state's prescriptive jurisdiction.¹³⁴

Secondly, corporal punishment or imprisonment by coastal states for fisheries offences committed in the EEZ is prohibited.¹³⁵ But extraterritorial PSJ discussed here only encompasses high seas/foreign waters conduct and territorial conduct. Port state offences would therefore not fall within the geographical application of this limitation, or the balancing of interests thereof.

Alternatively, "monetary penalties only" solely applies to enforcing extraterritorial PSJ over pollution.¹³⁶ PSMs therefore thematically fall outside this limitation, and one might wonder whether this has developed as an unforeseen gap in *UNCLOS*. On the other hand, the significant profits from IUU fishing that undermine the effectiveness of using fines reveal the freedom to impose other enforcement measures as a blessing in disguise for fisheries law.

Therefore, port state fisheries offences are subject to enforcement measures the port state deems valid.¹³⁷ The practice limited to less onerous measures identified by Molenaar is presumably due to policy preferences and not to legal limitation.¹³⁸ Subsequent chapters upon practice will review whether more onerous enforcement measures are being imposed, and in respect of which prescriptive basis.

4.2.9. Sub-conclusions

Section 4.2 evaluates the applicability of enforcement limitations to PSJ previously raised in literature and case law, particularly in the context of combatting IUU fishing. The question in

¹³⁴ *ibid* 155.

¹³⁵ *UNCLOS* (n 1) art. 73(3).

¹³⁶ *ibid* art. 230, "committed by foreign vessels beyond the territorial sea", applicable to art. 218-based PSJ; König (n 66) para 10; origins in an earlier draft upon port state enforcement for violations committed by foreign vessels beyond the internal waters Vasco Becker-Weinberg, 'Article 230' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) para 3.

¹³⁷ Other agreements may limit discretion; Harrison (n 124) para 16; "If a foreign flag vessel is found in a coastal State's internal waters without its permission, the full range of reasonable enforcement procedures is available against a foreign commercial vessel," J Ashley Roach and Robert W Smith, *Excessive Maritime Claims* (3rd edn, Martinus Nijhoff Publishers 2012) 683.

¹³⁸ Whilst concluding unlimited residual port state enforcement is not supported by practice, the possibility this is due to comity is left open; Molenaar, 'Port State Jurisdiction (2007)' (n 42) 233–235.

which maritime zone a port is found is largely immaterial for questions of the jurisdiction available. Several general conclusions can be gathered.

Firstly, enforcement through denial of port entry or services is not limited by a general right of entry for foreign vessels. Secondly, for PSMs against IUU fishing this includes the lack of any voluntary entry requirement. The *PSMA* is the most recent practice and specifically addresses PSMs. It is authoritative, given the lack of any limitation for vessels to be 'voluntarily' within port before port state enforcement may be exercised. Excluding any access right under international trade law (1.2.2), the only exception in the fisheries context is the customary right of port entry if a situation of *force majeure* or distress compelling entry.¹³⁹ This exception prevents the port state from denying entry or exercising jurisdiction in order to use entry-related conduct to territorialise offences. This limitation upon entry-related conditions or offences is however substantially narrowed by the port state's ability to balance national interests against those of the vessel on a case-by-case basis. In doing so, the port state may impose ad hoc entry conditions which apply in the case of *force majeure* entry.

Bar sovereign immune vessels, in-port enforcement is not limited for issues deemed 'internal', nor is the general scope of enforcement tools limited for state jurisdiction-based PSJ. Exceptions are treaty-based PSJ, namely *UNCLOS* art. 218, limited to monetary penalties. The greatest limit to enforcing port state offences thus remains the requirement for a valid prescriptive basis of state jurisdiction.

Finally, other in-port limitations such as procedural requirements are less clear-cut. Prompt release and due publicity are two examples that apply to article 218-based PSJ. These also apply to quasi-territorial fisheries laws concerning the EEZ and its resources. Yet, these procedural requirements are inapplicable to PSJ regulating living resources in the high seas or foreign maritime zones.¹⁴⁰ The same conclusion applies in respect of promptly notifying the flag state. This requirement is being addressed by subsequent instruments, but only in respect of the denial of port privileges.

¹³⁹ Narrower than the voluntary entry requirement applicable in other contexts, e.g. *UNCLOS* (n 1) art. 218.

¹⁴⁰ Bar, PSMs within an RFMO/A framework for straddling or highly migratory fish stocks.

4.3. LoS safeguards and limitations to extraterritorial port state prescription

When PSJ includes extraterritorial elements, conduct within multiple maritime zones may be material to port entry conditions or port state offences. The harvesting, which defines whether the product, vessel, or conduct under review is IUU fishing-related, may have occurred within the high seas or a foreign maritime zone. A territorial (2.3.1) or domaine réservé-based (2.5.2.1.1) PSM may nonetheless have extraterritorial elements applicable to high seas or foreign EEZ conduct. Given that laws must be compatible throughout their field of application, such PSJ must be compatible with international law applicable to high seas jurisdiction. This is not just a theoretical conflict leading to LoS disputes. There have been cases concerning extraterritorial elements being prescribed for port privileges (*Chile/EC Swordfish Dispute*) or within PSJ-comparable offences (*M/V Norstar*). Section 4.3 analyses the LoS high seas principles being raised as PSJ limitations within current jurisprudence.

4.3.1. Freedoms of the High Seas

Freedoms of the high seas have been a defining and evolving feature of LoS for hundreds of years.¹⁴¹ The general rule holds that, unless an exception applies, non-flag state enforcement upon the high seas is “undoubtedly” contrary to international law.¹⁴² This general rule is closely tied to the invalidity of claims to sovereignty over the high seas (4.3.2) and the exclusive flag state jurisdiction (4.3.3).¹⁴³ Case law argumentation has posited a broader protection from non-flag state jurisdiction which, if adopted, would limit extraterritorial PSJ. As distinct legal principles, the freedoms of the high seas certainly have a differing scope from

¹⁴¹ Michael A Becker, ‘The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea’ (2005) 46 *Harvard International Law Journal* 131, 169–172; AL Morgan, ‘The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action’ (1996) 27 *Ocean Development and International Law* 5, 18–19.

¹⁴² *The Case of the SS Lotus (France v Turkey)*, Judgment [1927] PCIJ 9, PCIJ Ser No 10 [25].

¹⁴³ “[D]ebate played out amidst the rise of mercantilism, industrialization, and colonialism—each of which ultimately benefited from the emergent legal regime that juxtaposed a model of inclusive jurisdiction over the high seas (i.e., any state’s ships could sail across the ocean or fish in its waters) with a model of exclusive jurisdiction over the vessels that entered that domain” Becker (n 141) 169; right of all states to be flag states “emanates” from the freedoms, Jeremy Firestone and James J Corbett, ‘Maritime Transportation: A Third Way for Port and Environmental Security’ (2003) 9 *Widener Law Symposium Journal* 403, 403; Arron N Honniball, ‘The Exclusive Jurisdiction of Flag States: A Limitation on Pro-Active Port States?’ (2016) 31 *The International Journal of Marine and Coastal Law* 499, 526–528.

exclusive flag state jurisdiction. But would port state prescription or in-port enforcement ever violate the freedoms of the high seas when it regulates conduct within such freedoms?

UNCLOS and customary law provide a non-exhaustive list of high seas freedoms.¹⁴⁴ For the purposes of this manuscript these are limited to the rights of navigation¹⁴⁵ and fishing on the high seas.¹⁴⁶ PSJ prescribing high seas conduct could potentially conflict with these rights.¹⁴⁷ Equally, subject to its *sui generis* regime,¹⁴⁸ prescription over EEZ conduct could raise freedom of navigation issues.¹⁴⁹

If UNCLOS, art. 87 is applicable as a PSJ limitation, any undue vessel hindrance would cause direct injury to the flag state,¹⁵⁰ raising the option of compulsory third-party dispute settlement (4.5).¹⁵¹ As this concerns an injury to the state, exhaustion of local remedies may not be required.¹⁵²

¹⁴⁴ UNCLOS (n 1) art. 87; Convention on the High Seas, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art. 2. Customary; *ibid* preamble; *North Sea Continental Shelf, Judgment* [1969] ICJ 51 & 52, ICJ Reports 1969 3 [65]; J Ashley Roach, 'Today's Customary International Law of the Sea' (2014) 45 *Ocean Development & International Law* 239, 248–249.

¹⁴⁵ UNCLOS (n 1) art. 90.

¹⁴⁶ *ibid* art. 115.

¹⁴⁷ A theoretical freedom of overflight example would be port state conditions upon using aircraft during harvesting.

¹⁴⁸ UNCLOS (n 1) art. 58, reiterated, art. 86.

¹⁴⁹ Customary, *Military and Paramilitary Activities (merits)* (n 27) [214]. Freedom to fish is inapplicable, but the non-exhaustive nature of freedoms is preserved, "other internationally lawful uses", UNCLOS (n 1), art. 58(1)-(2). Maritime zones declared to a lesser substantive extent than the EEZ regime could leave fisheries subject to the high seas regime (4.3.1.2, as if high seas). See, *in maiore stat minus*, Erik J Molenaar, 'New Maritime Zones and the Law of the Sea' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015).

¹⁵⁰ Right of navigation examples; *M/V 'Norstar' (Panama v Italy), Preliminary Objections, Judgment* [2016] ITLOS 25 [270]; *M/V 'Virginia G' (Judgment)* (n 113) [157]; *M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea), Judgment* [1999] ITLOS 2, ITLOS Rep 1999 10 [97].

¹⁵¹ UNCLOS (n 1) pt. XV(2) and art. 297(1)(a).

¹⁵² *M/V 'Virginia G' (Judgment)* (n 113) [157–160]; however, this interpretation renders article 295 meaningless, *M/V 'Virginia G' (Panama/Guinea-Bissau), Judgment, Joint Separate Opinion of Judges Cot and Kelly* [2014] ITLOS 19, ITLOS Rep 2014 164 [14]; *M/V 'Norstar' (Panama v Italy), Preliminary Objections, Judgment, Declaration of Judge Cot* [2016] ITLOS 25 [5].

4.3.1.1. Freedom of navigation

Freedom expands beyond jurisdictional competence as an exclusionary right (5.3.3), to include rights of action. Rights to do something.¹⁵³ The unhindered “right to sail ships flying its flag on the high seas”,¹⁵⁴ raises the question whether non-flag state prescription or port state enforcement concerning high seas activity is sufficient to constitute a violation of article 87.¹⁵⁵ In the ongoing *M/V Norstar* case, Italy’s arrest order for a Panamanian flagged vessel, “due to its activities on the high seas”, resulted in a claim that such an order “breached UNCLOS article 87 and constituted a serious violation of the freedom of navigation”.¹⁵⁶

Rejecting Italy’s preliminary objection upon jurisdiction *ratione materiae*, the tribunal reasoned:

“The Decree of Seizure by the Public Prosecutor at the Court of Savona against the M/V “Norstar” with regard to activities conducted by that vessel on the high seas and the request for its execution by the Prosecutor at the Court of Savona may be viewed as an infringement of the rights of Panama under article 87 as the flag State of the vessel. Consequently, the Tribunal concludes that article 87 is relevant to the present case”¹⁵⁷

¹⁵³ Applying the first two of Henriksen’s perspectives: Tore Henriksen, ‘Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations’ (2009) 40 *Ocean Development & International Law* 80, 83–84.

¹⁵⁴ UNCLOS (n 1) arts. 90, 87(1)(a).

¹⁵⁵ *M/V ‘Norstar’ P.O. Judgment* (n 150) [119–122].

¹⁵⁶ *ibid* 120. In short, *M/V Norstar* was involved in high seas bunkering, providing fuel to yachts who then re-entered the Italian territorial sea without the corresponding customs declarations. Charges were brought against individuals for smuggling mineral oils and tax fraud, with a claim for seizure and detention of the *M/V Norstar* as ‘*corpus delicti*’. Spain fulfilled this, detaining *M/V Norstar* within its internal waters; comparable to port state enforcement. *M/V ‘Norstar’ (Panama v Italy), Written Preliminary Objections Under Article 294, Paragraph 3, of the United Nations Convention on the Law of the Sea* [2016] ITLOS 25 [8]; *M/V ‘Norstar’ P.O. Judgment* (n 150) [41–43]; *M/V ‘Norstar’ (Panama v Italy), Preliminary Objections, Judgment, Separate Opinion of Judge Lucky* [2016] ITLOS 25 [14–19].

¹⁵⁷ *M/V ‘Norstar’ P.O. Judgment* (n 150) [122].

M/V Norstar's high seas bunkering arguably falls within the freedoms.¹⁵⁸ The question remains whether a decree for seizure,¹⁵⁹ or indeed its (port state) enforcement by Spain (who detained the vessel), when it "regards" high seas conduct, violates article 87.

No reasoning was given for this broad article 87 interpretation,¹⁶⁰ but two options exist. Firstly, interpretation of the decree as concerning high seas conduct suggests an extraterritorial element to prescription.¹⁶¹ Non-flag state prescription over high seas navigation could violate that freedom. This appears to be Judge Ndiaye's position, suggesting Italy was enforcing the application (prescription) of its customs legislation to the high seas; a potential violation of Panamanian navigation.¹⁶²

Alternatively, Italy's seizure decree and request are enforcement acts, completed by Spain once the vessel entered internal waters. A seizure order would not directly impact high seas navigation, but its foreseeable enforcement would occur upon entering a cooperative state's territorial enforcement jurisdiction.¹⁶³

¹⁵⁸ *M/V "Virginia G" (Judgment)* (n 113) [215, 223]. Within the EEZ the position differs, as the recipient (bunkering fishing vessels *ibid* 217, 222.) or the environmental threat (UNCLOS (n 1) art. 56(1)(i).) may bring activities within the coastal state rights, *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, Joint Declaration of Judges Kelly and Attard* [2014] ITLOS 19, ITLOS Rep 2014 142. Contrast: *M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea), Judgment, Separate Opinion of Judge Zhao* [1999] ITLOS 2, ITLOS Rep 1999 113 [3] bunkering in the EEZ is a commercial activity; *M/V 'Saiga' Judgment (Dis. Op. Anderson)* (n 125) [14] 'internationally lawful use of the sea related to navigation'.

¹⁵⁹ The tribunal searched for a link between the seizure decree, or request for execution, and Panama's rights, *M/V 'Norstar' P.O. Judgment* (n 150) [111].

¹⁶⁰ *M/V 'Norstar' (Panama v Italy), Preliminary Objections, Judgment, Joint Separate Opinion of Judges Wolfrum and Attard* [2016] ITLOS 25 [5, 35].

¹⁶¹ Contra, Italy; Italian tax law violations took place upon territorial sea entry; *ibid* 40.

¹⁶² Albeit discussing exhaustion of local remedies. Italian prescription must be the source of harm if Spanish enforcement is immaterial, "the location where the vessel was seized is less decisive than the motivation of Italy, which accused Panama of infringing its tax laws by bunkering mega yachts on the high seas. It is on that basis [...] Italy has thus violated its rights and, in particular, its freedom to navigate on the high seas" *M/V 'Norstar' (Panama v Italy), Preliminary Objections, Judgment, Separate Opinion of Judge Ndiaye* [2016] ITLOS 25 39.

¹⁶³ ITLOS's wording could limit any preparatory coastal state act if involving a link to high seas navigation; *M/V 'Norstar' P.O. Judgment (Sep. Op. Wolfrum and Attard)* (n 160) [37].

4.3.1.1.1. Exercising prescriptive jurisdiction over navigation

Limited literature suggests non-flag state prescription beyond *UNCLOS* would violate articles 58/87.¹⁶⁴ In the *Sellers* case, territorial PSJ was set aside due to intended “effect” upon high seas navigation beyond multilateral standards.¹⁶⁵ However, no explicit article 87 cross-reference or reasoning occurred,¹⁶⁶ and it has not found support in other jurisdictions.¹⁶⁷ The limitation to multilateral standards would equally not be supported by port state practice previously discussed, and the explicit preservation of residual unilateralism even when harmonisation is pursued (3.2.2.1).

The method of analysis used in the *M/V Virginia G* case could provide further limited support. Concerning EEZ jurisdiction and the question whether arresting or confiscating a foreign vessel violates *UNCLOS*, ITLOS first addressed whether bunkering fell within the freedom of navigation or within coastal state prescriptive jurisdiction.¹⁶⁸ ITLOS concluded “article 58 does not prevent coastal States from regulating, under article 56, bunkering of foreign vessels fishing in their exclusive economic zones”.¹⁶⁹ The unanimous opinion of the tribunal was that the exercise of coastal state prescriptive jurisdiction over vessel bunkering in this case did not violate the freedom.¹⁷⁰ However, this leaves open the question whether the freedom of navigation could ever be violated by the exercise of valid prescriptive jurisdiction, including prescriptive basis not codified or established by *UNCLOS*.

¹⁶⁴ J Scott Davidson, ‘Freedom of Navigation on the High Seas: Sellers v. Maritime Safety Inspector’ (1999) 14 International Journal of Marine and Coastal Law 435, 438–439; Dermott Devine, ‘Port State Jurisdiction: A Judicial Contribution from New Zealand’ (2000) 24 Marine Policy 215, 218–219.

¹⁶⁵ “[E]ffect, if not the purpose, of the provision is to place requirements on the exercise of the freedom to navigate on the high seas” port states have “no general power to unilaterally impose its own requirements [...] if the requirements are to have effect on the high seas” *Sellers v Maritime Safety Inspector* (1999) 120 ILR 585 (New Zealand, Court of Appeal) [48, 57].

¹⁶⁶ The court proceeded to examine other *UNCLOS* provisions, since heavily criticised; Molenaar, ‘Port State Jurisdiction (2007)’ (n 42) 232; Bevan Marten, ‘Port State Jurisdiction in New Zealand: The Problem with Sellers’ (2013) 2 Victoria University College Law Review 559; NILOS (n 18) 39.

¹⁶⁷ Plaintiffs in *ATAA* attempted to rely upon *Sellers*; summarily dismissed by the Advocate General and unreferenced by the CJEU; Andrew Serdy, ‘Changing Perspectives on the High Seas Freedom of Navigation?’ in Malcom Clarke (ed), *Maritime Law Evolving* (Hart 2013) 33–35.

¹⁶⁸ *M/V “Virginia G” (Judgment)* (n 113) [208–223].

¹⁶⁹ *ibid* 222.

¹⁷⁰ *ibid* 452(6).

Nonetheless, the further question of coastal state enforcement jurisdiction *within* the EEZ should be seen as vital in raising the possibility that the right of navigation was violated.¹⁷¹ Argumentation upon the question whether coastal state prescription was customs or fisheries law in the case of *M/V Saiga (No. 1)* was equally to determine if coastal state enforcement jurisdiction existed (art. 73).¹⁷² ITLOS was not asked to determine the legality of the arrest,¹⁷³ but noted that “classification under article 73 permits the assumption that Guinea [coastal state] was convinced that in arresting the *M/V Saiga* it was acting within its rights under the Convention”.¹⁷⁴ On the merits, *M/V Saiga (No. 2)*, the lack of enforcement jurisdiction implied a violation of the right of navigation.¹⁷⁵ Judge Laing, in a comprehensive separate opinion, reasoned this must be a logical presupposition of the arrest being illegal.¹⁷⁶

This interpretation follows the well-established example of unauthorised enforcement at sea.¹⁷⁷ Freedom of navigation prohibits direct navigational interference at the point of exercise, i.e. whilst navigating. Intent to affect navigation, or the factual reality of affecting prior or subsequent navigation is insufficient to violate *UNCLOS*, art. 87.

¹⁷¹ In this case, where the tribunal concludes a right to ‘regulate’, this includes prescriptive and enforcement jurisdiction *ibid* 264; *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, Declaration of Judge Gao [2014] ITLOS 19, ITLOS Rep 2014 134 [11]. French submissions in *SS Lotus* noted the enforcement nature of freedom of navigation exceptions (ultimately losing argument on basis adjudicative action was also exclusive); *SS Lotus* (n 142) 25–26.

¹⁷² *M/V ‘Saiga’ Judgment* (n 125) [56–59]. *M/V ‘Saiga’ Judgment (Dis. Op. Park et al)* (n 125) [9] (article 73[1] “permits the coastal State to arrest a vessel in the circumstances stated therein”).

¹⁷³ *M/V ‘Saiga’ Judgment* (n 125) [62]. The focus was prompt release.

¹⁷⁴ *ibid* 73. Critique; *M/V ‘SAIGA’ (Saint Vincent and the Grenadines v Guinea)*, Prompt release, Judgment, Dissenting Opinion of President Mensah [1997] ITLOS 1, ITLOS Rep 1997 39 [19–23]; *M/V ‘Saiga’ Judgment (Dis. Op. Park et al)* (n 125) [17–20].

¹⁷⁵ *M/V ‘Saiga’ (No. 2) Judgment* (n 150) [149–150, 183(7)-(8)]; *M/V ‘Saiga’ (No. 2) Judgment (Sep. Op. Wolfrum)* (n 7) [51]; *M/V ‘Saiga’ (No 2) (Saint Vincent and The Grenadines v Guinea)*, Judgment, Dissenting Opinion of Judge Warioba [1999] ITLOS 2, ITLOS Rep 1999 195 [61].

¹⁷⁶ *M/V ‘Saiga’ (No 2) (Saint Vincent and The Grenadines v Guinea)*, Judgment, Separate Opinion of Judge Laing [1999] ITLOS 2, ITLOS Rep 1999 154 [17].

¹⁷⁷ *The Arctic Sunrise Arbitration (Netherlands v Russia)*, Award on the Merits [2014] PCA 2014-02 (Arbitral Tribunal (UNCLOS, Annex VII)) [401(C), 332–333] no applicable enforcement jurisdiction for the coastal state under the EEZ or continental shelf regime - violation art. 58(1) freedom of navigation. Italy’s “*Enrica Lexie*” claim was restricted to enforcement; “*Enrica Lexie*” (*Italy v India*), Provisional Measures, Notification Instituting Arbitral Proceedings [2015] ITLOS 24 [29(C)] ‘Such interference with the freedom of navigation is not justified under the narrow exceptions set out in UNCLOS because the circumstances did not give Indian authorities any right of visit nor any right of hot pursuit’.

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For prescriptive jurisdiction, only the lack of a jurisdictional basis would conflict with navigational freedom.¹⁷⁸ State practice would support the proposal that excessive prescriptive claims are a violation in and of themselves.¹⁷⁹ Thus, prescriptive PSJ including high seas conduct is not limited by the freedom of navigation where a valid basis of state jurisdiction or *domaine réservé* is found. Otherwise, there would be no end to claims against port state enforcement.¹⁸⁰ A high seas “effects” test was implicitly rejected in the *ATAA* case.¹⁸¹

4.3.1.1.2. Enforcement jurisdiction hindrance upon navigation

Alternatively, because “alleged offences occurred in international waters”,¹⁸² Judge Lucky in the case of the *M/V Norstar* suggested wrongful arrest and detention in-port were sufficient to raise freedom concerns.¹⁸³ The vessel was unable to “continue its business on the high seas”.¹⁸⁴ Lucky’s separate opinion in the case of the *ARA Libertad* was similar, “by preventing

¹⁷⁸ *M/V ‘Saiga’ Judgment (Dis. Op. Wolfrum and Yamamoto)* (n 125) [22–23]. Violation resulted from the lack of a valid basis for extraterritorial prescriptive jurisdiction; *M/V ‘Saiga’ (No 2) (Saint Vincent and The Grenadines v Guinea), Judgment, Separate Opinion of Judge Anderson* [1999] ITLOS 2, ITLOS Reports 1999 131 137.

¹⁷⁹ E.g. objections to Australia’s Torres Strait pilotage scheme as lacking jurisdictional basis and therefore violating navigational rights – only eventually accepted when revised as a port entry condition, Roach and Smith (n 137) 336–342. Schatz argues whenever coastal states lack a right to jurisdiction, freedom of navigation is infringed; Valentin J Schatz, ‘Combating Illegal Fishing in the Exclusive Economic Zone Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State’ (2016) 7 *Goettingen Journal of International Law* 383, 389.

¹⁸⁰ Potential limitation of coastal state’s exercising their rights through vessel arrests, *M/V ‘Norstar’ P.O. Judgment (Sep. Op. Wolfrum and Attard)* (n 160) [42]; “To take this argument to the extreme [...] freedom of navigation would render all vessels immune from civil proceedings and in consequence from the implementation of the national law of the port State in question” “*ARA Libertad’ Provisional Measures (Sep. Op. Wolfrum and Cot)* (n 90) [37].

¹⁸¹ The court applied a strictly formal test of where the regulation applied, rejecting an art. 87 based claim when this was found not to be the high seas; “Nor can such application of European Union law affect the principle of freedom to fly over the high seas since an aircraft flying over the high seas is not subject, in so far as it does so, to the allowance trading scheme” *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2012] CJEU C-366/10, ECR 13833 [126]. Also dismissed by the Advocate General - without a concrete rule applying to high seas conduct, freedom of overflight was irrelevant; *C-366/10, ATAA (Kokott Opinion)* (n 133) 147–149.

¹⁸² *M/V ‘Norstar’ P.O. Judgment (Sep. Op. Lucky)* (n 156) [30]; and the position of Panama, *M/V ‘Norstar’ P.O. Judgment* (n 150) [121]. *M/V Louisa* (below) was distinguished because detention concerned offences committed within internal waters.

¹⁸³ *M/V ‘Norstar’ P.O. Judgment (Sep. Op. Lucky)* (n 156) [44, 56].

¹⁸⁴ *ibid* 56.

the vessel from leaving its berth to proceed as innocently as it came, Ghana appears to be depriving the *ARA Libertad* of its rights under articles 18, 87(1) and 90 of the Convention”.¹⁸⁵

This distinction would severely hamper non-flag state investigations or detentions whenever a high seas conduct nexus was established. This would be at odds with *UNCLOS*'s confirmation of PSJ to detain vessels during inspections, as part of legal proceedings, or to promote compliance with international rules and standards.¹⁸⁶ Temporary vessel detention pending repair is a frequent PSC feature (3.2.2.2.1), which, as *UNCLOS* recognises, will not always end in conviction.¹⁸⁷ Indeed, several global instruments provide for temporary port state detention of foreign vessels, preventing a dangerous vessel leaving despite the lack of any right to punish non-compliance (3.2.2.1.1). Yet, under this “continued enjoyment” interpretation, freedom of navigation infringements would be a common feature of modern maritime governance.¹⁸⁸

“The decisive point is that article 87 protects against enforcement action undertaken by a State different from the flag State which hinder the freedom of movement of the vessel concerned. In this case such an enforcement action on the high seas did not take place”¹⁸⁹

Only enforcement action on the high seas or in the EEZ could violate the freedom of navigation. Port state enforcement “concerning activities conducted on the high seas” cannot in and of itself be used by states to claim a violation of article 87.¹⁹⁰ This follows the zonal

¹⁸⁵ “*ARA Libertad*” *Provisional Measures (Sep. Op. Lucky)* (n 27) [29].

¹⁸⁶ E.g. *UNCLOS* (n 1) arts. 218-220.

¹⁸⁷ *ibid* art. 220(6), “where the evidence so warrants, institute proceedings, including detention of the vessel [...]”.

¹⁸⁸ The temporal nature of detention would be irrelevant. During high seas enforcement, the mere unjustified stopping of a vessel would be a violation and so comparable strict liability would apply.

¹⁸⁹ *M/V ‘Norstar’ P.O. Judgment (Sep. Op. Wolfrum and Attard)* (n 160) [38]. Protection from enforcement is article 87’s object and purpose; *ibid* 34. Protection from private ‘enforcement’ threatening navigation may rationalize exceptions, Arron N Honniball, ‘Private Political Activists and the International Law Definition of Piracy: Acting for “Private Ends”’ (2015) 36 *Adelaide Law Review* 279, 320–322.

¹⁹⁰ Which is how Treves characterised Panama’s argument; *M/V ‘Norstar’ (Panama v Italy)*, *Preliminary Objections, Judgment, Dissenting Opinion of Judge Ad Hoc Treves* [2016] ITLOS 25 [12] rejecting Tribunal’s jurisdiction [13-16].

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approach of *UNCLOS*, whereby navigational rights extinguish at the limits of their respective maritime zones. Rights apply to maritime zones, not to vessels:

“[A]rticle 87 of the Convention deals with the freedom of the high seas, in particular the freedom of navigation, which applies to the high seas and, under article 58 of the Convention, to the exclusive economic zone. It is not disputed that the M/V “Louisa” was detained when it was docked in a Spanish port. Article 87 cannot be interpreted in such a way as to grant the M/V “Louisa” a right to leave the port and gain access to the high seas”¹⁹¹

Within other maritime zones other navigation rights apply.¹⁹² On land, freedom of transit may allow access to the sea from where high seas freedoms are exercised.¹⁹³ Before and after access, transit states retain full territorial sovereignty, with no limitation to their jurisdiction for the protection of subsequent high seas “business” by the flag state.¹⁹⁴ As reiterated in *Ara Libertad*, article 87 is inapplicable to internal waters, regardless of detention “preventing” continued freedom of navigation.¹⁹⁵

Furthermore, the treaty context of the freedom of navigation firstly provides the closely linked exclusive flag state principle concerning enforcement jurisdiction (4.3.3). This context lends credence to a similar spatial and thematic interpretation.¹⁹⁶ Secondly, the restrictions upon navigation that require compensation under *UNCLOS* are all examples of unjustified high

¹⁹¹ *M/V “Louisa” (Saint Vincent and the Grenadines v Kingdom of Spain)*, Judgment [2013] ITLOS 18, ITLOS Rep 2013 4 [109].

¹⁹² For an overview; Albert J Hoffmann, ‘Freedom of Navigation’, *Max Planck Encyclopedia of Public International Law* (OUP 2011).

¹⁹³ *UNCLOS* (n 1) Part X, art. 125.

¹⁹⁴ *ibid* art. 125(2)-(3).

¹⁹⁵ “*ARA Libertad*” *Provisional Measures* (n 90) [26; 43 (Argentinian claims); 54 (Ghana response); 61 (ITLOS dismissal of article 87 “freedom of navigation on the high seas do not relate to the immunity of warships in internal waters”)].

¹⁹⁶ Yoshifumi Tanaka, ‘Navigational Rights and Freedoms’ in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 556; Hoffmann (n 192) paras 21–25 dealing with violations of exclusive flag state jurisdiction and freedom of navigation as one where unauthorised enforcement occurs.

seas enforcement.¹⁹⁷ Thirdly, subsequent treaties provide additional at-sea enforcement, whilst territorial enforcement in respect of high seas conduct is assumed.¹⁹⁸

Therefore, vessel detention within internal waters,¹⁹⁹ or comparable PSJ, is not a violation of article 87, regardless of its preventing “continued” freedom enjoyment.²⁰⁰ Vessel navigation may be deterred by extraterritorial PSJ, but until port visitation, the right is freely exercisable upon the high seas. Equally, prescription remains ineffective against navigation when no visit occurs. For sound, foreseeable application of the rights of state, whereby the functions of state are delimited (2.2.4), the test of hindrance should apply to instances of enforcement at sea which prevent, or restrict, the exercise of navigation.

4.3.1.2. Freedom of fishing

PSMs with an extraterritorial element are additionally challenged under the right to fish on the high seas. This freedom is conditional, being subjected to three classes of obligations within *UNCLOS*.²⁰¹ International fisheries law places further, largely treaty-based, conditions upon exercising this right.²⁰² The present analysis proceeds on the assumption a flag state is validly exercising its right to fish, asking whether PSJ could nonetheless conflict with this right.

¹⁹⁷ *M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, Dissenting Opinion of Judge ad hoc Sérvulo Correia* [2014] ITLOS 19, Case No 19 ITLOS Rep 2014 359 [5] referencing *UNCLOS*, arts. 106, 110(3) and 111(8); furthermore, UNFSA (n 2) art. 21(18).

¹⁹⁸ Contrast, Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation, adopted 10 March 1988, 1678 UNTS 221 (entered into force, 1 March 1992) (as amended, 2005 Protocol to the SUA Convention) art. 13(2) which presuppose the right to detain vessels ‘present’ in their territory, with art. 8bis(5) on enforcement beyond the territorial sea, which requires flag state cooperation. Furthermore, UNFSA (n 2) arts. 21-23, whereby at-sea enforcement limited to flag state parties, whilst port state enforcement in respect of at-sea activity not so limited.

¹⁹⁹ Italy pointed to Spanish enforcement, deeming Spain the responsible port state for claims submitted. *UNCLOS* (n 1) art. 218(2) recognise the possibility of non-flag states with prescriptive jurisdiction over activities in the EEZ under the effects doctrine transferring their jurisdiction to port states.

²⁰⁰ *M/V ‘Norstar’ P.O. Judgment (Sep. Op. Wolfrum and Attard)* (n 160) [29–31] Spanish detention was an indispensable ingredient of the limitation upon navigation. Not all limitations however are violations.

²⁰¹ *UNCLOS* (n 1) arts. 87(1)(e), 116 “(a) their treaty obligations; (b) the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67; and (c) the provisions of this section [UNCLOS, Part VII, Section 2. Conservation and Management of the Living Resources of the High Seas]”. Freedom of navigation is subject to general ‘due regard’ obligations, *ibid* art. 87(2). For this distinction of general/specifically limited freedoms; Stefán Ásmundsson, ‘Freedom of Fishing on the High Seas, and the Relevance of Regional Fisheries Management Organisations (RFMOs)’ (2015) 37 *NPAFC Newsletter* 2, 4.

²⁰² Customary example; Nele Matz-Lück and Johannes Fuchs, ‘Marine Living Resources’ in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 503’ Following implementation on the

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The European Community (EC) was of the opinion that PSJ could indeed conflict with the freedom of fishing in the *Chile/EC Swordfish Dispute*.²⁰³ The EC challenged Chilean PSMs that enforced Chilean rules prescribed for foreign high seas fishing.²⁰⁴ Arguing the right to high seas fishing, it also challenged substantive provisions within the *Galapagos Agreement*,²⁰⁵ a regional agreement that would use PSMs to enforce high seas rules.²⁰⁶ The parallel WTO and ITLOS disputes were discontinued upon reaching settlement,²⁰⁷ but the EC interpretation essentially concerned PSMs with extraterritorial effect and/or intent.

4.3.1.2.1. PSMs with extraterritorial effect and/or intent

The *mar presencial* zone claimed by Chile extended beyond the 200nm EEZ limit, meaning prescription would go beyond coastal state jurisdiction.²⁰⁸ Chilean law required fishing vessels to be licenced to fish within the *mar presencial*, despite the lack of sufficient nexus to justify extraterritorial prescriptive jurisdiction. This high seas prescription without legal basis would infringe the right to fish; as seen with navigation.²⁰⁹ This may be the EC's *mar presencial*

national level, Resolution 46/225 [high seas driftnet fishing] is often quoted as a rare example of a provision of an UNGA resolution evolving into binding customary law'.

²⁰³ At least since the early 1990s both disagreed over conservation and exploitation of swordfish fisheries in the South-Eastern Pacific, culminating in parallel dispute settlement proceedings before WTO and ITLOS; MA Orellana, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71 *Nordic Journal of International Law* 55, 55. *Chile — Measures affecting the Transit and Importing of Swordfish* WTO DSB DS193; *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Community), Order of 20 December 2000* [2000] ITLOS 7, ITLOS Rep 2000 148.

²⁰⁴ "[W]hether the Chilean Decree 598 which purports to apply Chile's unilateral conservation measures relating to swordfish on the high seas is in breach of, *inter alia*, articles 87, 89 and 116 to 119 of the Convention" *Swordfish (Chile/EC) Order 2000* (n 203) [2(3)(e)].

²⁰⁵ Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific, adopted 14 August 2000, 45 LOSB 70 (not in force).

²⁰⁶ "[W]hether the "Galapagos Agreement" [...] substantive provisions are in consonance with, *inter alia*, articles 64 and 116 to 119 of the Convention" *Swordfish (Chile/EC) Order 2000* (n 203) [2(3)(f)].

²⁰⁷ *Chile — Measures affecting the Transit and Importing of Swordfish, Arrangement between the European Communities and Chile* [2001] WTO DSB DS193, 01-1770; *Chile — Measures affecting the Transit and Importing of Swordfish, Joint Communication from the European Union and Chile* [2010] WTO DSB DS193, 10-3069; *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union), Order of 16 December 2009* [2009] ITLOS 7, ITLOS Rep 2008-2010 13.

²⁰⁸ Molenaar, 'New Maritime Zones and the Law of the Sea' (n 149) 267–268.

²⁰⁹ Orellana (n 203) 61 interprets the EU position as suggesting violation of the high seas freedoms is triggered by Chilean prescription of conservation measures to the high seas where it should retain authority as flag state.

position because Chile's conditional interpretation of article 116 through high seas prescription was contrasted with the right to fish.²¹⁰

However, as Serdy notes,²¹¹ the EC counter-claim was not based upon the extraterritorial prescription itself, but *Chilean Decree 598* and the PSJ exercised to indirectly enforce the *mar presencial* measures.²¹² No coastal state enforcement beyond the EEZ is contained therein.²¹³ Under the EC's interpretation, the Chilean prohibition on unloading or transhipping "is a sanction for the violation of the Chilean legislation governing access to fisheries i.e. a sanction for fishing without a valid licence under Chilean law".²¹⁴

Thus, port state enforcement proposedly violates the high seas fishing right.²¹⁵ This is because the prohibition's "objective" extraterritorial effect and intent is to hinder swordfish fishing on the high seas and "hence to determine the behaviour of fisheries States on the high seas".²¹⁶ How the EC had hoped to square its overlapping conclusions, that a port state is free to restrict port entry or use but cannot impose said measures with extraterritorial effect, is unclear.²¹⁷

The *Galapagos Agreement* was also challenged. Negotiation, and eventual agreement, faced strong opposition from some fishing states because it was only negotiated by coastal states.²¹⁸ Indeed, the subsequent provisional settlement provided that the *Galapagos*

²¹⁰ EC, 'Report to the Trade Barriers Regulation Committee: TBR Proceedings Concerning Chilean Practices Affecting Transit of Swordfish in Chilean Ports' (1999) 35–38, 41–42.

²¹¹ Andrew Serdy, 'See You in Port: Australia and New Zealand as Third Parties in the Dispute between Chile and the European Community over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas' (2002) 3 Melbourne Journal of International Law 79, 116–117.

²¹² Aplica artículo 165 de la ley general de pesca y acuicultura a la especie pez espada (DS No 598, Diario Oficial No 36523, 25 Nov 1999) art. 2 modified 165 to include "The landing of catches of the swordfish species, or of products derived from them, from the high seas, when obtained in contravention of the measures in force in accordance with this decree, is prohibited" [translation]. No enforcement practice beyond PSMs was witnessed; Molenaar, 'New Maritime Zones and the Law of the Sea' (n 149) 271. "The most important provision of the Fishery Law for the dispute in question is Article 165", EC (n 210) 32.

²¹³ Orellana (n 203) 61; Serdy (n 211) 83–84.

²¹⁴ EC (n 210) 29. A Chilean Minister is given authority to prohibit or limit landings and port services; *ibid* 32–33.

²¹⁵ EC (n 210) 40.

²¹⁶ Peter-Tobias Stoll and Silja Vöneky, 'The Swordfish Case: Law of the Sea v. Trade' (2002) 62 ZaöRV 21, 23 fn. 16. The port ban acts as a disincentive, Serdy (n 211) 84.

²¹⁷ EC (n 210) 43.

²¹⁸ Galapagos Agreement (n 205) preamble: fishing nations may only later accede. Negotiated by Chile, Peru and Ecuador, Alan Boyle, 'Further Development of The Law of the Sea Convention: Mechanisms for Change' (2005) 54 International and Comparative Law Quarterly 563, 578 fn. 71.

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Agreement never entered into force.²¹⁹ By excluding non-coastal states with a fisheries interest from the process,²²⁰ those coastal states would fail their duty of cooperation in conservation and management, which flows from the freedom of high seas fishing.²²¹

However, the high seas fishing right is limited to questions of resource access.²²² Determining whether this right is violated required something more than denial of participation in an agreement that would be non-binding for the flag state and its vessels. Controlling access to the high seas fisheries must be demonstrable. Given the *Galapagos Agreement's* contents, the EC was again objecting to PSMs which have, as their purpose or effect, the termination of EC fishery rights in the area.²²³ Had high seas conservation measures been adopted under the *Galapagos Agreement*, the only relevant enforcement against non-CNCP vessels required by state parties is the use of PSMs.²²⁴ Other enforcement arrangements apply to party nationals, are limited to “conformity with the relevant provisions of international law” (at sea boarding/inspection of foreign vessels), or are subject to further consultation (measures against IUU fishing or support).²²⁵

The *Fisheries Jurisdiction (UK/Iceland)* case, in which Iceland applied its legislation beyond the recognised maritime zones could provide limited support for the idea that territorial enforcement with an extraterritorial effect on the freedom to fish can be a violation:

“The *provisions* of the Icelandic Regulations of 14 July 1972 *and the manner of their implementation* disregard the *fishing rights of the Applicant*. Iceland's unilateral action thus constitutes an infringement of the principle enshrined in Article 2 of the 1958 Geneva Convention on the High Seas which requires that all States, including coastal

²¹⁹ Boyle (n 218) 578 fn. 71.

²²⁰ Possibly limited to “real interest” by UNFSA (n 2) art. 8(3). Discussed, Erik J Molenaar, ‘The Concept of “Real Interest” and Other Aspects of Co-Operation through Regional Fisheries Management Mechanisms’ (2000) 15 *The International Journal of Marine and Coastal Law* 475, 495.

²²¹ UNCLOS (n 1) arts 118-119, to which the EC also referenced in its counter-claim.

²²² A conditional right of access, subject to obligations under UNCLOS, arts. 116-120 and any further legal instruments assumed; Henriksen (n 153).

²²³ To use the words of *Fisheries Jurisdiction (United Kingdom v Iceland)*, *Merits, Judgment* [1974] ICJ 55, ICJ Rep 1974 3 [67].

²²⁴ *Galapagos Agreement* (n 205) art. 9.

²²⁵ *ibid* art. 8.

States, in exercising their freedom of fishing, pay reasonable regard to the interests of other States”²²⁶

The court applied a purpose test, as the EC later suggested in the *Chile/EC Swordfish Dispute*. “The language of the relevant government regulations indicates that *their object is to establish an exclusive fishery zone*, in which all fishing by vessels registered in other States, including the United Kingdom, would be prohibited”.²²⁷ This is reconfirmed by the means of implementation, i.e. enforcement measures with reference to the interim measures.²²⁸ Interestingly, the interim measures included a request not to use port state enforcement:

“Iceland should not take or threaten to take in their territory (including their ports [...]) measures [...] which have as their purpose or effect the impairment of the freedom of such [UK] vessels to fish outside the said 12-mile limit”²²⁹

This case is however distinguishable from the EC position in the *Chile/EC Swordfish Dispute*. Icelandic law provided an exclusive fisheries zone, not simply port state enforcement of an extraterritorial law. The foreign state’s freedom to fish was “disregarded” or “impaired”, but not explicitly violated. Instead, Iceland infringed upon the due regard for other states’ rights expected when exercising its rights.²³⁰ Iceland exercised its freedom of fishing without due regard to the UK’s rights because it was purporting to exercise that right exclusively.²³¹

4.3.1.2.2. PSMs extraterritorial “intent” or “effect” are insufficient to violate the freedom of fishing

Firstly, the freedom should be narrowly interpreted in line with freedom of navigation (4.3.1.1). Only extraterritorial prescription without legal basis, or enforcement against a

²²⁶ (emphasis added) *Fisheries Jurisdiction (UK/Iceland) Judgment* (n 223) [67].

²²⁷ *ibid* 62.

²²⁸ *ibid* 61–62.

²²⁹ *Fisheries Jurisdiction (United Kingdom v Iceland), Interim Protection, Order of 17 August 1972* [1972] ICJ 55, ICJ Rep 1972 12 [1(b)].

²³⁰ *Fisheries Jurisdiction (UK/Iceland) Judgment* (n 223) [68].

²³¹ Unlawfully exercising its freedom, 1958 HSC (n 144) art. 2; now, UNCLOS (n 1) art. 87(2), rather than an unlawful violation of the flag state’s freedom of fishing itself.

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vessel when fishing upon the high seas, would be an infringement.²³² Otherwise an unmerited distinction arises. PSMs would not be analysed for their intent or effect in navigation infringements, but this test would apply to the freedom of fishing. A vessel condition would therefore result in different article 87 analysis depending on whether a merchant or fishing vessel is the subject matter. This distinction is not found within *UNCLOS* and would raise further questions upon the relevance of intent or effect for other high seas freedoms.

Secondly, an intent or effects test is unworkable in practice. An extraterritorial effects-based test for PSJ would not address cases where laws are ineffective, i.e. when vessels are not seeking port entry. Contrary to sovereign equality, only attractive port states would violate the freedom of fishing. Equally, the 'effect' of a PSM may only become known upon implementation or change over time due to external economic or social factors. Even if subsequent port use was assumed as necessary for a foreign fleet, the test is inconclusive. In arguing the Chilean law's factual effects:

“[I]f one takes the premise for granted that fishing swordfish on the high seas bordering Chile's EEZ is economically senseless and unreasonable for the EC fisheries States as long as Chile prohibits the unloading of swordfish in its ports; in this case the effect of Chile's prohibition is the same as if Chile would prevent the fishing of swordfish at this part of the high seas by its warships”²³³

Similar EC argumentation suggested Chilean laws amount “in fact” to exclusion, whilst noting Peruvian ports were less equipped and at a greater distance.²³⁴ Yet, these geographical and developmental status factors demonstrate the fallacy of an extraterritorial effects-based test. A right to fish does not imply a right to economic success. Nor can it be a restriction upon port state's sovereignty merely because they are advantaged because their ports are geographically more attractive for operators. Indeed, a key objective of regional practice is to

²³² UNFSA (n 2) art. 7(1) explicit in freedom applies to fishing on the high seas; Compliance Agreement (n 116) preamble, also limited to 'engagement' in fishing on the high seas. It is during this engagement that non-consensual hindrance could violate the exercise of this freedom.

²³³ Stoll and Vöneky (n 216) 23 fn. 16.

²³⁴ EC (n 210) 29, 38.

close all available ports to non-compliant vessels, thereby making their operation impossible or prohibitively costly.

The subsequent practice to *UNCLOS* demonstrates the freedom of fishing concerns questions of access to, and harvesting of, high seas fisheries. Unauthorised at-sea enforcement would infringe this right, and therefore *UNFSA*-based enforcement is only applicable between consenting states.²³⁵ In contrast, the *UNFSA* includes PSMs for promoting high seas standards regardless of whether the flag state is party to *UNFSA*.²³⁶ After the *Chile/EC Swordfish Dispute* the EU has promoted PSMs that use their extraterritorial effect to discourage extraterritorial IUU fishing (6.3). This change in position demonstrates a lack of continued support for the freedom of fishing as a PSM limitation, with no other state taking up the previous EC position.

To conclude, port state enforcement cannot infringe high seas freedoms, regardless of intent or effect. Indeed, many subsequent global agreements have assigned such a role to port states, an explicit objective of port state enforcement being to “promote the effectiveness of subregional, regional and global conservation and management measures” (3.2.2.2.2, 3.2.2.3). Only PSJ with no valid prescriptive basis will violate the freedom of fishing. Given the previous conclusions upon conditioning port privileges and prescribing port state offences (2.6), this would only ever occur in respect of prescribing port state offences. For example, one state’s claim before the ICJ clearly objected to both high seas *prescription* and subsequent high seas enforcement by a coastal state.²³⁷ However, the flag state need not wait for enforcement before raising an objection.²³⁸

4.3.2. Invalidity of claims of sovereignty over the high seas

UNCLOS, article 89 provides “no State may validly purport to subject any part of the high seas [or the EEZ] to its sovereignty”.²³⁹ Whilst underpinning the freedoms above, this remains a

²³⁵ *UNFSA* (n 2) arts. 21-22.

²³⁶ *ibid* art. 23(1).

²³⁷ *Fisheries Jurisdiction (Spain/Canada) Judgment* (n 104) [10(A), 23]; *Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment, Separate Opinion of Judge Koroma* [1998] ICJ 96, ICJ Rep 1998 486 [1]. The ICJ dismissed the case for lack of jurisdiction. Shabtai Rosenne, *The World Court: What It Is and How It Works* (Terry D Gill ed, 6th edn, Brill 2003) 214–217.

²³⁸ “Vigorous” protest to the legislation long predated the case; *Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment, Dissenting Opinion of Judge Bedjaoui* [1998] ICJ 96, ICJ Rep 1998 516 [20].

²³⁹ *UNCLOS* (n 1) arts. 89, 58(2); 1958 HSC (n 144) art. 2.

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distinct principle that was separated from the freedoms article during the *UNCLOS* drafting process.²⁴⁰ *UNCLOS*, article 89 has recently been included within the list of *UNCLOS* provisions that Italy is invoking in the *Enrica Lexie* case.²⁴¹ Italy's claims are disputed, but if Italy's arguments on the scope of article 89 are accepted, this could limit non-flag state jurisdiction, including PSJ. Italy essentially argues that extraterritorial coastal state prescriptive and/or enforcement jurisdiction beyond rights contained within *UNCLOS* constitutes a claim to high seas sovereignty.²⁴² Its subsequent argumentation focuses upon the extension of prescription as violating article 89.²⁴³ On this reading, PSJ incorporating extraterritorial elements could also be challenged by any *UNCLOS* party as article 89 is an *erga omnes* obligation subject to compulsory third-party dispute settlement.

Alas, Bouguetaia's characterisation of Italy's claims as "hopeless" is a fitting description for this interpretation of article 89.²⁴⁴ Jurisdictional claims are claims to exercise authority over an individual or vessel upon the high seas. This is insufficient to constitute a claim to sovereignty over the high seas itself. As the *Stanford Encyclopedia of Philosophy* defines sovereignty, "it is not a matter of mere authority, but of supreme authority" within a territory.²⁴⁵ Territoriality is essential, i.e. "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such a portion in the territory

²⁴⁰ "As for articles 87 and 89 of the Convention, they bear on freedom of the high seas, particularly freedom of navigation" *"Enrica Lexie" (Italy v India), Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Ndiaye* [2015] ITLOS 24, ITLOS Rep 2015 246 [23]; "article 89 serves as more than an underpinning for the freedom of the high seas set out in article 87. It emphasizes that, beyond the outer limit of the territorial sea, the principle of 'no sovereignty' is an inherent part of the law of the sea as a whole" Nordquist, Nandan and Rosenne (n 76) para 89(9)(c), drafting process; paras. 89.5-89.7.

²⁴¹ "Italy maintains that the dispute with India concerns the interpretation and application of the Convention, including, 'in particular Parts II, V and VII, and notably Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the Convention'", *"Enrica Lexie" (Italy v India), Provisional Measures, Order of 24 August 2015* [2015] ITLOS 24, ITLOS Rep 2015 182 [38].

²⁴² *Enrica Lexie (Italy, Notification)* (n 177) [29(h)].

²⁴³ "The exercise of general criminal jurisdiction in the EEZ, including the contiguous zone, is contrary to Articles 89 and 33(1) of UNCLOS, and renders internationally unlawful the basis on which India has exercised jurisdiction over the Italian Marines" *The Enrica Lexie Incident (Italy v India), Request for the Prescription of Provisional Measures under UNCLOS Article 290(1)* [2015] PCA 2015-28 (Arbitral Tribunal (UNCLOS, Annex VII)) [63(e)]; "Italy argues that Article 89 of the Convention excludes India's exercise of criminal jurisdiction in India's EEZ" *The Enrica Lexie Incident (Italy v India), Order on Request for the Prescription of Provisional Measures* [2016] PCA 2015-28 (Arbitral Tribunal (UNCLOS, Annex VII)) [91].

²⁴⁴ *"Enrica Lexie" (Italy v India), Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Vice-President Bouguetaia* [2015] ITLOS 24, ITLOS Rep 2015 232 [12].

²⁴⁵ "It is within a geographic territory that modern sovereigns are supremely authoritative" Daniel Philpott, 'Sovereignty' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2016, 2016) <<https://plato.stanford.edu/archives/sum2016/entries/sovereignty/>>.

of any particular state”.²⁴⁶ Other uses of ‘sovereignty’ within *UNCLOS* also refer to areas of supreme authority.²⁴⁷ Article 89 clarifies that claims to external sovereignty over any area of the EEZ or high seas will not be recognised and without legal effect. Nothing short of claims to territorially defined ownership or statehood will conflict with article 89.²⁴⁸

4.3.3. Exclusive flag state jurisdiction

“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas”²⁴⁹

If vessels on the high seas, or within the EEZ,²⁵⁰ are subject to the exclusive jurisdiction of flag states, does this limit the extraterritorial scope of PSJ? No exceptional or express jurisdictional right exists for port states prescribing fisheries conduct. Similarly, territorial enforcement in respect of high seas conduct is not provided. States could provide for this through subsequent treaties, or on an ad hoc basis, but neither would be applicable against the vessels of non-parties.²⁵¹ Therefore, if exclusivity under article 92 includes prescriptive jurisdiction, a flag state may object via compulsory third-party dispute settlement (4.5) to extraterritorial PSJ where consent has not been provided.

In a previous publication by the author of this manuscript, it was charted how the exclusive jurisdiction of flag states has frequently been raised in inter-state disputes over non-flag state

²⁴⁶ *Island of Palmas (or Miangas) (The Netherlands/The United States of America), Award of the Tribunal* [1928] PCA Case No 1925-01 (Arbitral Tribunal (Special Agreement)) 8. “Article 89 uses the term ‘sovereignty’ in its normal sense in international law. ‘Sovereignty’ is a term used in particular with respect to territory” Nordquist, Nandan and Rosenne (n 76) para 89.9(a); Douglas Guilfoyle, ‘Article 89’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) paras 7–9.

²⁴⁷ Nordquist, Nandan and Rosenne (n 76) para 89.9(a) citing articles 2, 19, 34, 49, 125, 137 and 245; with arts 137 and 241 comparable to 89 in rejecting claims to an area.

²⁴⁸ E.g. claim to historic title over areas within the EEZ or high seas, as occurred: “Norwegian sovereignty over these waters would constitute an exception, historic titles justifying situations which would otherwise be in conflict with international law” *Fisheries Case, Judgment of December 18th, 1951* [1951] ICJ 5, ICJ Rep 1951 116 131; *The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China), Award* [2016] PCA 2013-19 (Arbitral Tribunal (UNCLOS, Annex VII)) [277] “the Tribunal concludes that, as between the Philippines and China, the Convention defines the scope of maritime entitlements in the South China Sea, which may not extend beyond the limits imposed therein”.

²⁴⁹ UNCLOS (n 1) art. 92.

²⁵⁰ *ibid* art. 58(2).

²⁵¹ Treaties may not create third party obligations, VCLT (n 83) arts. 34–38.

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jurisdiction.²⁵² This was equally visible in literature, where article 92 was interpreted as (a) a limitation upon non-flag prescriptive jurisdiction, (b) a limitation upon PSJ beyond article 218, and finally (c) as being itself ‘weakened’ by expanding port state practice.²⁵³ One may add further examples.²⁵⁴

Those arguments are not rehashed here, as this manuscript is dedicated to other PSJ concerns. However, in short, an application of the rules of treaty interpretation, the legislative history of article 92, the opinions of limited case law, and a growing body of literature suggest article 92 is only concerned with enforcement jurisdiction.²⁵⁵ Again, further examples can be added.²⁵⁶

More specifically, article 92 only encompasses enforcement jurisdiction exercised against a vessel within the high seas or EEZ area. Much like the freedoms it seeks to protect, it applies to the maritime zone – to be enjoyed by vessels within that zone. PSJ will, *at most*, include extraterritorial prescription subject to territorial enforcement. It is therefore incapable of violating exclusive flag state jurisdiction. *Vice versa*, exclusive flag state jurisdiction cannot limit PSJ – and will never be limited by PSJ.

²⁵² Honniball (n 143) 511–518.

²⁵³ For disclosure, the author also unnecessarily included prescription in a previous exclusive flag state jurisdiction discussion; Honniball (n 189) 320. The arguments made concerned exceptions to flag state enforcement and so remain unaffected, but it would be nice to go back and rewrite that sentence.

²⁵⁴ “That nationality in turn is the main factor in determining what state may exercise executive, legislative and judicial jurisdiction over a vessel. According to Art. 92(1) of UNCLOS [...] apart from in exceptional cases expressly provided [...] shall be subject to its exclusive jurisdiction on the high seas” Thomas Ormond, ‘Enforcing EU Environmental Law Outside Europe? The Case of Ship Dismantling’ (2009) 1 Environmental Law Network International Review 13, 14–15. “The obligation [art. 117] accepts that vessels fishing on the high seas are solely subjected to the regulations of their flag state” Henriksen (n 153) 89,84. ‘The Convention includes no such express exceptions in the field of employment matters, which suggests that port and coastal states are prevented from regulating such matters, at least as far as ships on the high seas are concerned’ Ringbom (n 24) 115, 128, 135; ‘Position Paper on the Proposed “Code of Conduct for NGOs Involved in Migrants” Rescue at Sea’ (Associazione per gli Studi Giuridici sull’Immigrazione 2017) 2–3; Richard A Legatski, ‘Port State Jurisdiction Over Vessel-Source Marine Pollution’ (1977) 2 Harvard Environmental Law Review 448, 453.

²⁵⁵ Honniball (n 143) 519–528.

²⁵⁶ Anna Petrig, ‘Looking at the Montreux Document from a Maritime Perspective’ (2016) 2 Maritime Safety and Security Law Journal 6, 17; O’Keefe (n 72) 42–43 (although p. 14, para. 144 previously argued for exclusive enforcement and prescriptive jurisdiction); Atsuko Kanehara, ‘Challenging the Fundamental Principle of the Freedom of the High Seas and the Flag State Principle Expressed by Recent Non-Flag State Measures on the High Seas’ (2008) 51 Japanese Yearbook of International Law 21, 51 and the discussion on p. 33 with supportive reference of French author, Gidel.

4.3.4. Collisions or any other incident of navigation

The final limitation posed by the high seas regime to extraterritorial PSJ is article 97.²⁵⁷ In respect of collisions or any other “incident of navigation”, port states are prohibited from instituting penal or disciplinary proceedings against the master or crew of visiting foreign vessels (unless they are port state nationals).²⁵⁸

Without the flag state’s express consent, port states are prohibited from arresting or detaining the vessel.²⁵⁹ Any *prima facie* prescriptive jurisdiction is therefore unenforceable. Recent practice focuses upon high seas arrest or detention.²⁶⁰ However, *UNCLOS*, article 97 incorporates practice reversing the decision of *S.S. Lotus* in so far as it concerns collisions or any other incidents of navigation. The *S.S. Lotus* dispute arose out of a port detention, suggesting port state enforcement is also limited by article 97.²⁶¹

There is some ambiguity as to the exact scope of “incidents of navigation”.²⁶² Nonetheless, working from the cases of physical contact between two vessels,²⁶³ or maritime casualties involving a vessel and infrastructure (e.g. pipelines),²⁶⁴ it is apparent that IUU fishing falls outside this limitation.

4.3.5. Sub-conclusions

PSJ is not limited by *UNCLOS*, art. 89 (4.3.2), nor art. 92 (4.3.3). Article 97 limits PSJ but is inapplicable in the context of PSMs (4.3.4). Greatest interest has been placed in the freedoms

²⁵⁷ Also within the EEZ; *UNCLOS* (n 1) art. 58(2). International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision and Other Incidents of Navigation, adopted 10 May 1952, 439 UNTS 233 (entered into force, 20 November 1955) art. 2; 1958 HSC (n 144) art. 11.

²⁵⁸ *UNCLOS* (n 1) art. 97(1). This may be waived, Ivan Shearer, ‘Collisions at Sea’, *Max Planck Encyclopedia of Public International Law* (OUP 2007) para B(5).

²⁵⁹ *UNCLOS* (n 1) art. 97(3).

²⁶⁰ Nordquist, Nandan and Rosenne (n 76) para 97.8(d) but this limitation is not apparent in *UNCLOS* itself which simply refers to arrest or detention of ‘the ship’. Italy’s art. 97(3) claim is also linked to arrest and detention “while the *Enrica Lexie* was in international waters” *Enrica Lexie (Italy, Notification)* (n 177) [29(b)].

²⁶¹ *SS Lotus* (n 142) 5 although the legal dispute before the PCIJ was solely on jurisdiction exercised over the officer on watch.

²⁶² “*Enrica Lexie*” *Provisional Measures* (n 241) [41, 46]; “the contention that ‘incident’ can also mean allegation of murder is incorrect” “*Enrica Lexie*” (*Italy v India*), *Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Lucky* [2015] ITLOS 24, ITLOS Rep 2015 268 [38].

²⁶³ “*Enrica Lexie*” *Provisional Measures (Dis. Op. Ndiaye)* (n 240) [25].

²⁶⁴ Nordquist, Nandan and Rosenne (n 76) paras 97.8(a)-(b).

of the high seas. Extraterritorial conditions prescribed for port privileges and *only* enforced through denial of port privileges would never violate the freedoms of the high seas given the unlimited jurisdictional basis (2.5.2.1.1). Extraterritorial port state offences with a valid prescriptive state jurisdiction basis, like its treaty-based counterpart, should be classified as an indirect interference with the freedoms of the high seas.²⁶⁵ Only extraterritorial prescriptive jurisdiction without a sufficient jurisdictional basis would violate either the freedom of navigation, or the freedom of fishing, or both. These would themselves be breaches of international law, and so the freedoms are best seen not as limitations, but further breaches of international law.²⁶⁶

In practice, the necessity of visiting port can compel compliance with unilateral non-flag state standards. The extraterritorial effects of such standards might thus gut the principles of their freedom character. Rather than a flag state setting the standards, vessels will comply with the most stringent port state conditions that might become binding due to future visitation. Flag state freedoms become a mere paper right for transboundary actors. However, an extraterritorial effects test would be highly unworkable and undefined in scope.

4.4. General LoS safeguards and limitations to maritime jurisdiction

Beyond those limitations applicable to defined maritime zones (zonal management), LoS limitations may generally apply (systematic management). These may be triggered by any exercises of jurisdiction, and form part of the package deal. Limitations for PSJ include enforcement endangering navigation, safety or the maritime environment (4.4.1), non-discrimination of foreign vessels (4.4.2) and abuse of right (4.4.3).

Other possibilities arise in selective cases, such as *UNCLOS*, pt. X. This provides landlocked states with two rights, namely access to and from the seas and freedom of transit.²⁶⁷ Port states are obliged to provide equal treatment (compared to other foreign states), but this

²⁶⁵ Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 70–71.

²⁶⁶ Note the similarity to the conclusions above upon procedural requirements such as *UNCLOS*, art. 211(3) (4.2.6).

²⁶⁷ *UNCLOS* (n 1) art. 125; 1958 HSC (n 144) art. 3.

does not itself equate a right of port entry or use of port.²⁶⁸ The right of access is for the purpose of exercising high seas rights (4.3.1), whilst transit is for the purpose of exercising that right of access.²⁶⁹ Given the fact that access rights for landlocked states necessarily cover foreign seaports,²⁷⁰ it may effect PSJ as it tries to “establish equilibrium” between free access and state sovereignty.²⁷¹ However, this right is non-self-executing and conditional on further agreements requiring thorough analysis beyond this research’s scope.²⁷²

4.4.1. Enforcement action endangering navigation, safety or the marine environment

UNCLOS, pt. XII, can be of general application, including the exercise of adequate jurisdiction to combat IUU fishing.²⁷³ Likewise, safeguards therein may broadly apply:

“In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk”²⁷⁴

Unlike *UNCLOS*, pt. XII(7) safeguards (4.2.6-4.2.8), article 225 is not restricted to pt. XII.²⁷⁵ This is confirmed in case law, including enforcement by coastal states of their quasi-territorial functional jurisdiction.²⁷⁶

As a due regard obligation, port/coastal states must adopt necessary measures to avoid endangerment (minimum), whilst refraining from actions which may have that result

²⁶⁸ Kishor Uprety and Amber Rose Maggio, ‘Article 131’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) paras 10–11.

²⁶⁹ Nordquist, Nandan and Rosenne (n 76) para X1.

²⁷⁰ *ibid.*

²⁷¹ Uprety and Maggio (n 268) para 1.

²⁷² Kishor Uprety and Amber Rose Maggio, ‘Article 125’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017); obligation to enter negotiation, not of result *ibid* 40.

²⁷³ *UNCLOS* (n 1) art. 192; *SRFC Advisory Opinion* (n 77) [120–124, 136 (flag), 180, 216 (coastal)].

²⁷⁴ *UNCLOS* (n 1) art. 225.

²⁷⁵ Vasco Becker-Weinberg, ‘Article 225’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) para 5.

²⁷⁶ *M/V “Virginia G” (Judgment)* (n 113) [373].

(maximum).²⁷⁷ A port state example of the latter is bringing a vessel to an unsafe port or anchorage.²⁷⁸

Applicability of *UNCLOS* article 225 to residual PSJ may be questioned given it refers to powers “under” *UNCLOS*.²⁷⁹ Nonetheless, PSJ with an extraterritorial element, in part, concerns maritime zones beyond internal waters. One cannot justify a PSJ distinction whereby powers reconfirmed by *UNCLOS* are so limited, but customary law-based jurisdiction is left unlimited. It would also be strange for entry conditions if preventative enforcement acts within the territorial sea are covered,²⁸⁰ but punitive enforcement acts within internal waters are not.²⁸¹

4.4.2. Non-discrimination of foreign vessels

Non-discrimination of foreign vessels is a well-established general principle, peppered throughout *UNCLOS*.²⁸² Supplementary multilateral practice has followed suit, with port state MoU’s requiring their application “without discrimination as to flag”²⁸³ as an “established norm in shipping law”.²⁸⁴

UNCLOS provisions only bind port states within the context of Part XII,²⁸⁵ but fisheries practice has incorporated non-discrimination to limit port states. This includes *UNFSA*,²⁸⁶ *Code of*

²⁷⁷ Becker-Weinberg (n 275) para 1, due regard 8.

²⁷⁸ E.g. permitting port departure on the condition of proceeding to a repair yard found unsafe.

²⁷⁹ Broad application, Becker-Weinberg (n 275) para 7; however, origins in coastal state pollution control Nordquist, Nandan and Rosenne (n 76) paras 225.1-225.4.

²⁸⁰ *UNCLOS* (n 1) arts. 2(3), 25(2).

²⁸¹ Furthermore, refusal of *force majeure* entry could impair passage or unreasonably threaten the marine environment; Becker-Weinberg (n 275) para 10. Surely ejection of a vessel would be governed by the same due regard obligation.

²⁸² *UNCLOS* (n 1) arts. 24(1)(b); 25(3); 26(2); 42(2); 52(2); 119(3); 140(2); 141; 151(1)(c); 227; 234.

²⁸³ E.g. Paris MoU (n 111) art. 1.2.

²⁸⁴ Michael Tsimplis, ‘Shipping and the Marine Environment in the 21st Century’ in Malcom Clarke (ed), *Maritime Law Evolving* (Hart Publishing Limited 2013) 115; Yang (n 42) 52–53 discussing possible customary status; Molenaar, ‘Port and Coastal States’ (n 42) 285 a general LoS principle.

²⁸⁵ *UNCLOS* (n 1) art. 227, “in exercising their rights and performing their duties under this Part”.

²⁸⁶ *UNFSA* (n 2) art. 23(1). General application beyond *UNFSA*; Terje Lobach, ‘Port State Control of Foreign Fishing Vessels’ [2003] FAO Fisheries Circular No. 987 12.

Conduct for Responsible Fisheries,²⁸⁷ *IPOA-IUU*²⁸⁸ and *PSMA*.²⁸⁹ As a general principle, its scope depends on the facts of the case.²⁹⁰ Some guidance can nonetheless be provided.

Literature often simply repeats that port states may not discriminate in form or fact against foreign vessels, but there is scope for justifiable discrimination. For analysis, discrimination is separated here into two strands; (1) discriminatory standards applied amongst vessels of differing flags, (2) discriminatory standards applied amongst flag states. Unjustified port state discrimination against flag states will be prohibited in both cases, best highlighted through examples.

In the first scenario, port states cannot discriminate in PSMs applied solely on the grounds of the flag flown. This includes discrimination between foreign flag states, or between foreign vessels and its own flag.²⁹¹ This is demonstrated by the “no more favourable treatment” concept, whereby compliance with vessel standards is applied regardless of flag state or whether the flag state has accepted those standards.²⁹² Thus, treaty conditions are applied against all visiting foreign vessels regardless of whether the vessel is flying the flag of a non-contracting state. Whilst ‘no more favourable treatment’ is an obligation, it reflects the non-discrimination principle. To do otherwise would discriminate in the standards imposed depending upon the flag state. The same applies to unilateral port state standards.²⁹³

²⁸⁷ in the application of port state duties, encouraged to act in a non-discriminatory and transparent manner *FAO, Code of Conduct for Responsible Fisheries* (n 67) art. 8.3.1; trade related measures *ibid* art. 11.2.4.

²⁸⁸ *FAO, IPOA-IUU* (n 58) para 9.6 non-discrimination; PSMs; paras. 52-54, 63; market measures, 65-74.

²⁸⁹ *FAO, Model Scheme PSM* (n 57) paras 9, 11–12; *PSMA* (n 18) arts. 3(4); 13(2)(h), 20(3).

²⁹⁰ Discrimination may apply in a positive (favouritism) or negative (harassment) sense, *Doulman and Swan* (n 64) 39.

²⁹¹ *Lobach* (n 286) 12 ‘According to Article 23 of the 1995 UN Fish Stocks Agreement, port States shall not discriminate in form or in fact against the vessels of any State. This suggests that port States as a basic principle should treat their vessels and foreign vessels on equal terms’. *PSMA* (n 18) art. 20(6), “shall ensure that measures applied to vessels entitled to fly its flag are at least as effective in preventing, deterring, and eliminating IUU fishing and fishing related activities in support of such fishing as measures applied to vessels referred to in paragraph 1 of Article 3”; *STCW-F* (n 82) art. 8(3)(2), “the discretion allowed in the case of the personnel of foreign fishing vessels shall not be less than that afforded to the personnel of vessels flying the flag of the port State”.

²⁹² E.g. *MARPOL 73/78* (n 111) art. 5(4); *Paris MoU* (n 111) sect. 2.4; *Tsimplis* (n 284) 115 fn. 96.

²⁹³ *Helsingborg v HH-Ferries* (n 40) [98] “In [...] applying stricter requirements [...] the said requirements may not be discriminatory [...] requirements that are the same regardless of which flag the ships fly”.

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Nonetheless, port states may justifiably use the flag as a factor (amongst others) to identify vessels posing a greater non-compliance risk.²⁹⁴ Vessels are treated differently, but not discriminated in the standards applied.²⁹⁵ Discriminatory processes do not equate discriminatory standards, e.g. the legality of the catch must be demonstrated. This risk assessment is justified by the need to use the port state resources and manpower efficiently. In this example, a demonstrable and justified reason exists to treat non-CNCP vessels differently because their fishing activities within the RFMO/A area are presumably IUU fishing.²⁹⁶ This is supported by regional practice.²⁹⁷

That discrimination should be rebuttable for individual vessels which can “establish the catch was taken in a manner consistent with those conservation and management measures”.²⁹⁸ Therefore, strictly speaking PSM enforcement only occurs against vessels failing to demonstrate the legality of their catch, not their flag state alone.²⁹⁹

Yet, the line between justified discrimination in identifying non-compliance, and unjustified discrimination dressed up as a rebuttable presumption may be difficult to define.³⁰⁰ PSMA recognises that the implementation may be discriminatory in terms of procedure.³⁰¹ There is

²⁹⁴ “Most MOUs now allow (indeed require) discrimination upon the basis of flag, age, type of vessel, loan owner, operator, or even known classification society” John Hare, ‘Port State Control: Strong Medicine to Cure a Sick Industry’ (1997) 26 *The Georgia Journal of International and Comparative Law* 571, 579.

²⁹⁵ Yang (n 42) 52 ‘this principle cannot be successfully invoked to claim the equal right of access to ports, because even the requirement of non-discrimination does not prevent unequal treatment with particular good reasons [...] Yet a State may not go so far as to arbitrarily discriminate against a flag without any justifiable ground’.

²⁹⁶ Lobach (n 286) 13 supports such a presumption as non-discriminatory. A presumption for the application of, and the actual application of a PSM, is legally different.

²⁹⁷ “SEAFO (South East Atlantic Fisheries Organization) has incorporated these elements in Article 15 of the Convention, except the last sentence of paragraph 1 of Article 23 of the 1995 UN Fish Stocks Agreement where it refers to that ‘when taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.’ This was deliberately left out as parties felt that such discrimination could take place against Flag of Convenience (FOC) vessels” *ibid* 4 fn. 21.

²⁹⁸ FAO, *IPOA-IUU* (n 58) para 63.

²⁹⁹ A measure based on the flag alone may breach the general non-discrimination principle, fishery instruments and international trade law; Olav Schram Stokke and Davor Vidas, ‘Regulating IUU Fishing or Combating IUU Operations?’ in OECD (ed), *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD Publishing 2004) 34 ‘such measures in effect would discriminate against vessels that have operated in consistence with RMFO regulations but fly a “wrong” flag’.

³⁰⁰ As Hare identified, we have departed from the no discrimination of early PSC; Hare (n 294) 583. The question now remains how far discrimination will remain justified.

³⁰¹ PSMA (n 18) art. 13(2)(h), “ensure that inspections are conducted in a fair, transparent and non-discriminatory manner and would not constitute harassment of any vessel”. The required standards of conduct for inspectors; Douman and Swan (n 64) 53.

further concern when PSMs apply to a limited class of flag states, i.e. non-members to an RFMO/A.³⁰² To avoid unjustified discrimination comparable measures should apply to members' flagged vessels.

In the second scenario, port state fisheries practice has developed beyond measures targeting individual vessels. PSMs are applied at the state-level when a state's activities (e.g. failure to fulfil its obligations) threaten a fishery's conservation and management (ch 5-6). In such cases, no rebuttable presumption for individual vessels applies because the measures target the state and all vessels operating under its control for a defined fishery.³⁰³ Port states appear to have wide discretion in the interests protected, provided the state presents non-discriminatory standards used to assess other states.³⁰⁴ PSMA includes state-level measures, demanding implementation via non-discriminatory processes:

“[Flag State] Parties are encouraged to develop, including through regional fisheries management organizations and FAO, fair, transparent and *non-discriminatory procedures* for identifying any State that may *not be acting in accordance with, or in a manner consistent with, this Agreement*”³⁰⁵

³⁰² “Argentina seems to have serious concerns about practices within RFMOs on participation, allocation of fishing opportunities, and combating IUU fishing by means of IUU vessel lists, for the reasons that all these practices are in its view discriminatory to non-members, including new entrants” Erik J Molenaar, ‘Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement’ in Dawn Russell and David VanderZwaag (eds), *Recasting Transboundary Fisheries Management Arrangements* (Martinus Nijhoff Publishers 2010) 385. “[M]any of the regimes are optional or apply exclusively to vessels flying the flag of non-members of the RFMO. Such discrimination may be unjustifiable and thereby inconsistent with international trade law” Erik J Molenaar, ‘Port State Jurisdiction’, *Max Planck Encyclopedia of Public International Law* (OUP 2014) para 37.

³⁰³ E.g. Commission Implementing Regulation (EU) No 793/2013 of 20 August 2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock (OJ L 223/1, 21/8/2013) arts. 1-2, 5(2).

³⁰⁴ Non-discriminatory standards amongst states is required otherwise one could discriminate against foreign flagged vessels but simply claim it was taking measures against the state and not individual vessels.

³⁰⁵ PSMA (n 18) art. 20(3); “When licensing a vessel [...] to require, as a condition of that licence that the vessel should land catches only in States that are fully implementing the CDS” CCAMLR, Resolution 15/XXII Use of ports not implementing the Catch Documentation Scheme for *Dissostichus* spp. 2003; implemented in EU law, Council Regulation (EC) No 1368/2006 of 27 June 2006 amending Regulation (EC) No 1035/2001 establishing a catch documentation scheme for *Dissostichus* spp. (OJ L253/1, 16/9/2006) art. 4(1).

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“[All] Parties shall take fair, *non-discriminatory* and transparent measures consistent with this Agreement and other applicable international law to deter the activities of non-Parties *which undermine the effective implementation of this Agreement*”³⁰⁶

Although measures will be taken against vessels flying that flag, this discrimination is justified on the basis that the state undermined effective *PSMA* implementation - not the non-party status alone. If all states are held to identical standards, this will not be discrimination of foreign vessels by flag, but by those who represent states that “undermine the effective implementation of this Agreement”. This is a substantive test and therefore becoming party is not required.³⁰⁷

In conclusion, there are two exceptions by which, if there are justifiable reasons to do so, a flag state may be identified, and its vessels subsequently discriminated against.³⁰⁸ This can occur in terms of *how* measures are applied against individual vessels, provided the result is not differing vessel standards based upon flag. Secondly, it may be justified to discriminate *if* further measures are applied against all vessels of a flag state due to perceived failures of that state. In this case, different high-risk circumstances, based on the conduct of the flag state, demand different responses. This is the most controversial exception and therefore the identification process has been made subject to a non-discrimination requirement.

4.4.3. Abuse of right and good faith fulfilment of obligations

The obligation to act in good faith and the prohibition upon the abuse of rights are general principles of international law, which when applied to exercising jurisdiction can be grouped under “reasonableness” (2.6).³⁰⁹ *Prima facie* PSJ is then conditioned on any obligations assumed being fulfilled in good faith, and the rights, jurisdiction or freedoms being exercised “in a manner that would not constitute an abuse of right”. The obligation to act in good faith

³⁰⁶ PSMA (n 18) art. 23(2).

³⁰⁷ *ibid* art. 23(1).

³⁰⁸ Yang (n 42) 86 ‘what is actually prohibited by international law is discrimination without any justifiable ground against foreign ships’.

³⁰⁹ Ringbom (n 24) 121; WTO linkages to reasonableness, Killian O’Brien, ‘Article 300’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) para 12.

and the prohibition upon the abuse of rights are found within *UNCLOS*, *UNFSA* and *PSMA*.³¹⁰ They are also found in regional practice, notably the *WCPFC Convention*.³¹¹

Reasonableness reflects the balance of coastal and flag state interests, and so should apply to PSJ with extraterritorial elements to avoid jurisdictional sidestepping.³¹² Again the scope of limitation depends upon the circumstances of the case,³¹³ but factors to be considered in assessing if a port state is abusing its jurisdictional rights may be provided. These are gathered from *UNCLOS* broadly, having first established applicability to port states.

ITLOS has clarified that the *UNCLOS* lack of good faith or abuse of right doctrines must be invoked in respect of a specific *UNCLOS* provision to establish dispute settlement jurisdiction under pt. XV.³¹⁴ It cannot be invoked alone, or in general.³¹⁵ PSJ found within pt. XII and the coastal state's right to prevent breaches of entry conditions,³¹⁶ can therefore be challenged. Nonetheless, *UNFSA*, art. 34, on good faith and abuse of rights would also cover PSMs within art. 24 (4.5). In addition, the extensive obligations and rights within *PSMA* are subject to good faith and abuse of right respectively.³¹⁷ *PSMA* is not subject to compulsory dispute settlement, but its applicability provides further ammunition for states protesting excessive PSMs. Excessive residual PSJ outside the limited scope of *UNCLOS* and *UNFSA* above could be challenged through diplomatic protest.

Substantively, abuse of right occurs in three scenarios:

³¹⁰ *UNCLOS* (n 1) art. 300; *UNFSA* (n 2) art. 34; *PSMA* (n 18) art. 4(5).

³¹¹ Convention on the Conservation and Management of High Migratory Fish Stocks in the Western and Central Pacific Ocean, adopted 5 September 2000, 2275 UNTS 43 (entered into force 19 June 2004) art. 33 (good faith/abuse of rights), applicable art. 27 (PSMs).

³¹² O'Brien (n 309) para 1 provision to balance competing interests and control excessive exercises of discretionary power.

³¹³ Ringbom (n 24) 121.

³¹⁴ ITLOS, *Digest of Jurisprudence: 1996-2016* (COMPACT MEDIA GmbH 2016) 205; *M/V 'Louisa' Judgment* (n 191) [137]; *M/V 'Virginia G' (Judgment)* (n 113) [396-401].

³¹⁵ Some note a claim under article 300 against Chilean PSMs in the *Chile/EC Swordfish Dispute*; Sophia Kopela, 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons' (2016) 47 *Ocean Development & International Law* 89, 101. However, the EU only referred to "Chile's actions concerning the conservation of swordfish"; *Swordfish (Chile/EC) Order 2000* (n 203) [2(3)(g)] following subsequent case law, the claim would have failed.

³¹⁶ *UNCLOS* (n 1) art. 25(2).

³¹⁷ *PSMA* (n 18) art. 4(5).

CHAPTER 4

1. A “State exercises its rights in such a way that another State is hindered in the exercise of its own rights and, as a consequence, suffers injury”³¹⁸
2. A “right is exercised intentionally for an end which is different from that for which the right has been created, with the result that injury is caused”³¹⁹
3. An “arbitrary exercise of its rights by a State, causing injury to other States but without clearly violating their rights”³²⁰

In all cases, a balancing of the port state’s and another state’s interests in an arbitrary manner must result in an injury to the latter.³²¹ Given the previously witnessed deference granted to port states in determining their interests and the protection necessary, it will only be those cases which are “patently unreasonable or discriminatory” that result in an abuse of right.³²²

When exercising jurisdiction, abuse may result from prescription or enforcement.³²³ An abusive example noted by Akehurst concerned prescriptive jurisdiction, it being a proposed US law whereby seamen were to be provided a right to demand half their wages upon port arrival – disregarding any previous advance payments abroad.³²⁴ The US interests of increasing labour availability and reducing manning costs was pursued “illegitimately at the expense of other states”.³²⁵ The inconvenience and raising labour costs for foreign vessels, with complete disregard to the flag state’s law, led to state protests.

These references to unreasonableness and the necessity to avoid injury to the interests of other states arguably signals that one could look to similar practice within *UNCLOS* for guiding

³¹⁸ Alexandre Kiss, ‘Abuse of Rights’, *Max Planck Encyclopedia of Public International Law* (OUP 2006) para 4; fisheries example O’Brien (n 309) para 13.

³¹⁹ Kiss (n 318) para 5. Marten convincingly argues that a state requesting information under its coastal state jurisdiction would abuse those rights if it then used it within another context; Marten, ‘PSJ over Vessel Information’ (n 8) 491.

³²⁰ Kiss (n 318) para 6.

³²¹ In line with Oppenheim’s description, Australian Government Solicitor (n 84) para 35; “It seems that the fact of injury resulting from an abuse of rights is a fundamental element in the implementation of that principle” Kiss (n 318) para 31; agreed understanding article 300 “to be interpreted relative to the rights of other States” O’Brien (n 309) para 4.

³²² Discussing port entry conditions or closure; Churchill and Lowe (n 62) 53; PHG Vrancken, *South Africa and the Law of the Sea* (Martinus Nijhoff Publishers 2011) 119–120.

³²³ Australian Government Solicitor (n 84) para 37.

³²⁴ Michael Akehurst, ‘Jurisdiction in International Law’ (1972) 46 *British Year Book of International Law* 145, 189–190.

³²⁵ Australian Government Solicitor (n 84) para 37.

factors. Coastal and flag state EEZ rights are also to be exercised with “due regard” to the rights of other states.³²⁶ This includes exercising enforcement.³²⁷ Here, coastal state enforcement should proceed with “all possible consideration”,³²⁸ which implies the need of some sort of proportionality or reasonableness analysis.³²⁹ Proportionality must be demonstrated through the “necessity” of enforcement measures undertaken.³³⁰ The practice of other states may be useful to interpret necessity.³³¹ Loosely, this is interpreted as necessary to sanction violations, or deter repeat violations.³³² For enforcement measures to be applied reasonably, “due regard has to be paid to *the particular circumstances of the case* and the *gravity of the violation*”.³³³

In short, PSJ is tempered by an abuse of right limitation. The preceding factors are only applicable to exercising coastal state EEZ jurisdiction. However, given their comparable character, they may help flesh out what a port state abuse of right entails. Has the port state disregarded the interests of another state? Have the rights and interests of a third state been injured? Are measures disproportionate? Do measures go beyond what is necessary to sanction or deter violations? Are measures incomparable to those of other port states? Are they unreasonable in their context, given the circumstances of the case and gravity of the violation? As these questions are progressively answered in the affirmative, the likelihood a PSM is abusive increases.

4.4.4. Sub-conclusions

Section 4.4 provides insight in how general limitations of abuse of right and non-discrimination of foreign vessels would apply to PSMs. One may add to these the generally

³²⁶ UNCLOS (n 1) arts. 56(2); 58(3); 87(2).

³²⁷ *M/V “Virginia G” (Judgment)* (n 113) [347].

³²⁸ *ibid.*

³²⁹ Ringbom (n 24) 121 fn. 27 notes other provisions of UNCLOS do include proportionality tests; UNCLOS (n 1) arts. 221(1) (proportionate measures for maritime casualties); 232 (liability for unreasonable enforcement measures within part XII).

³³⁰ UNCLOS (n 1) art. 73(1); “The coastal State may, [...] take such measures [...] as may be necessary to ensure compliance with the [EEZ] laws and regulations adopted by it in conformity with this Convention”.

³³¹ Article 73(1) “has to be interpreted in the light of the practice of coastal States on the sanctioning of violations of fishing laws and regulations” *M/V “Virginia G” (Judgment)* (n 113) [253].

³³² *ibid* 266, 269.

³³³ (emphasis added) *ibid* 270. Despite only requiring ‘reasonable’ bonds (UNCLOS, art. 73(2)), “In the view of the Tribunal the principle of reasonableness applies generally to enforcement measures under article 73” *ibid.*

applicable *UNCLOS*, art. 225, which may constrain the enforcement measures employed.³³⁴ The examples provided for each might be comparatively applied in other cases. It will be seen in the following chapters that the distinction of justified discrimination at the vessel and state level is based within practice (ch 5-6). The application of abuse of right is more complex and, given its high threshold, is difficult to conclusively demonstrate. Nonetheless, factors identified above may assist in testing concrete PSMs.

4.5. Enforcing limitations to foreign PSJ: compulsory third-party dispute settlement

In the case of *Fisheries Jurisdiction (Spain/Canada)*, Canada had extended its coastal state prescription and enforcement upon the high seas. It had done so within the NAFO regulatory area, above and beyond jurisdiction under customary law or the *NAFO Agreement*.³³⁵ Canada was not party to *UNCLOS*, so the option for dispute settlement entailing a binding decision was the ICJ's optional acceptance clause procedure.³³⁶ It is noteworthy that Canada amended its acceptance two days before adopting the disputed jurisdictional amendments, its revised reservation successfully keeping its unilateralism outside ICJ jurisdiction.³³⁷ The correlation between excessive jurisdiction and avoidance of compulsory dispute settlement suggests that in other cases compulsory dispute settlement may act as a safeguard and limit to questionable jurisdiction. This can be through an omnipresent 'chilling effect', or through non-port states triggering dispute settlement when their rights are affected. The extent compulsory third-party dispute settlement discourages excessive PSJ depends upon the extent to which PSJ is covered by compulsory third-party dispute settlement treaty provisions.

Disputes are a "disagreement on a point of law or fact, a conflict of legal views or of interests".³³⁸ However, *UNCLOS*, pt. XV concerns disputes upon *interpretation or application*

³³⁴ Critique of extension to fisheries for legal certainty, Schatz (n 179) 394.

³³⁵ This unilateralism was nonetheless an attempt to influence the multilateral negotiations of the Fish Stocks Agreement; Rosenne (n 237) 215.

³³⁶ *Fisheries Jurisdiction (Spain/Canada) Judgment* (n 104) [39]; Statute of the International Court of Justice, adopted 26 June 1945, 3 Bevens 1179 (entered into force, 24 October 1945) art. 36(2).

³³⁷ Rosenne (n 237) 215; reprinted *Fisheries Jurisdiction (Spain/Canada) Judgment* (n 104) [14(2)(d)].

³³⁸ *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan), Provisional Measures, Order of 27 August 1999* [1999] ITLOS 3–4, ITLOS Rep 1999 280 [44].

of the Convention.³³⁹ Compulsory third party dispute settlement entailing binding decisions under Part XV therefore largely excludes PSMs combatting extraterritorial IUU fishing.

Jurisdiction *ratione materiae* requires “invoking particular provisions of the Convention that allegedly have been violated”.³⁴⁰ Denial or conditioning of port privileges is not a right granted, nor significantly limited by, *UNCLOS* (ch 3). It invokes zero provisions in which to apply settlement.³⁴¹ Other limitations are customary and uncodified by *UNCLOS*, and therefore not subject to pt. XV (e.g. violation of a right to *force majeure* entry).

PSJ provisions could not be invoked here, as they are only applicable to prevention, reduction and control of vessel pollution. Exercises of extraterritorial coastal state fisheries jurisdiction may be subject to compulsory conciliation, but *only* in respect of living resources within the EEZ.³⁴² In case of a port state acting with regard to fishing conduct on the high seas or within foreign waters, even compulsory conciliation does not apply under *UNCLOS*.³⁴³

The best prospect appears if one accepts the freedoms (5.3.2) as protecting vessels from prescription applicable within the EEZ’s or high seas when no legal basis exists.³⁴⁴ Unfortunately, the flag state’s burden of proof in demonstrating that no valid jurisdictional nexus exists is very high, as case law has treated rather minimal territorial links as sufficient for territorial jurisdiction.

Nonetheless, as seen in *Chile/EC Swordfish Dispute*, if both states are party to *UNFSA*, a broader scope for compulsory dispute settlement is available. Article 23 recognised the right and the duty of port states to take measures “to promote the effectiveness of subregional, regional and global conservation and management measures”.³⁴⁵ PSJ incorporating

³³⁹ Evident throughout *UNCLOS* (n 1) arts. 279-299.

³⁴⁰ *M/V ‘Norstar’ P.O. Judgment* (n 150) [109,84]; *M/V ‘Louisa’ Judgment* (n 191) [151].

³⁴¹ Similar conclusion for manning standards; *NILOS* (n 18) 111.

³⁴² *UNCLOS* (n 1) art. 297(3)(b); Annex V, Section 2.

³⁴³ Other compulsory conciliation covers maritime delimitation or historic bays/titles; *ibid* art. 298(1)(a). First practice; *Conciliation between Timor-Leste and Australia, Decision on Australia’s Objections to Competence* [2016] PCA Case N° 2016-10 (Conciliation Commission (*UNCLOS*, Annex V)).

³⁴⁴ Freedoms of the sea disputes are explicitly excluded from the compulsory dispute limitation above; *UNCLOS* (n 1) art. 297(1)(a).

³⁴⁵ *UNFSA* (n 2) art. 23(1).

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extraterritorial elements could raise disagreements upon the scope of port state rights and/or duty:

“1. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply mutatis mutandis to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention”³⁴⁶

Non-discrimination of foreign vessels is also included within *UNFSA*, opening another avenue to restrain PSJ overreach within its narrow confines.

Finally, in combatting IUU fishing, further substance and specificity upon the port state’s ‘duty’ has developed (ch 3). These at least represent the jurisdictional duties of parties. Disagreements upon interpretation or application of the *Compliance Agreement* or *PSMA* are however only subject to third party dispute settlement through mutual consent.³⁴⁷ Within the confines of the *UNFSA*’s scope (straddling and highly migratory fish stocks),³⁴⁸ and ‘interpreting’ article 23, these could nonetheless inform the content of a port state’s right or duty.

Clearly, limits exist upon what could be incorporated within a broadly defined port state duty. Flexible *PSMA* requirements, i.e. process-orientated as opposed to result-orientated standards, would likely not be clarified through compulsory dispute settlement. An example of a flexible *PSMA* requirement is the duty to ensure that annual levels of inspection are “sufficient” to achieve the *PSMA* objectives.³⁴⁹ This requires a certain process to set annual levels, but one could envisage disputes over what is sufficient.³⁵⁰ As with overstretching port

³⁴⁶ *ibid* art. 30(1), RFMO/A PSMs may also be caught by art. 30(2) (if relating to straddling fish stocks or highly migratory fish stocks).

³⁴⁷ *PSMA* (n 18) art. 22(3); *Compliance Agreement* (n 116) art. IX(3).

³⁴⁸ *UNFSA* (n 2) art. 3.

³⁴⁹ *PSMA* (n 18) art. 12(1). This requires an assessment of its capacity to inspect and the setting of annual inspection levels at the national level – in contrast to international or regional inspection requirements of a set percentage; Doulman and Swan (n 64) 50.

³⁵⁰ *PSMA* (n 18) art. 12(2) only require parties to “seek to agree” harmonised inspection levels and therefore a port known to have lower inspection levels within the region could be more attractive to IUU vessels.

state rights, dispute settlement's ability to safeguard against the nonfulfilment of port state duties is limited.

4.6. Conclusions

Many authors have concluded that international law governing the basis and limits of PSJ is found within other fields outside of the law of the sea, namely state jurisdiction and international trade law. In abstract then, it is often concluded that the law of the sea says very little on the limits of PSJ. Within an article publication, space restricts analysis to a few legal provisions directly relevant to the case study undertaken. However, for this manuscript, this hypothesis had to be tested thoroughly. This has been done by bringing conflicts raised by authors and cases together, further examining previously undiscussed provisions, and finally expanding analysis in each case to the study of PSMs.

Through this expository review, this author does not dispute that conclusion. Nonetheless, one does witness a greater number of 'barks' by the law of the sea at PSJ, albeit with little bite to follow, and even less so in the case of PSMs (table 1). Indeed, many of the previously proposed PSJ limitations, submitted by states to dispute settlement, raised in literature, or diluted in subsequent state practice, were found of little application (4.2.2, 4.2.4, 4.2.8, 4.3.1, 4.3.2, 4.3.3). Where limits do 'bite', it will be within limited and defined cases, as opposed to the more academically captivating sweeping limits of general application (4.4.2, 4.4.3). Thus, where defined vessels (4.2.5), incidents (4.3.4), offences (4.2.7) or environmental parameters (4.2.3) arise the jurisdiction of a port state shall be limited. Equally the exercise of PSJ may have to be restrained, or follow a defined protocol, if closely linked port state obligations are not to be violated (4.2.6, 4.4.1).

A major difficulty for non-port states is how one procedurally challenges erroneous PSJ (4.5). UNCLOS, art. 218-based PSJ, or extraterritorial PSJ with no prescriptive basis within customary law could be subjected to compulsory third-party dispute settlement procedures under UNCLOS. However, concerning PSMs, UNCLOS procedures are largely inapplicable for lack of jurisdiction *ratione materiae*. Only for UNFSA parties may the *mutatis mutandis* application of that procedure to disputes on the interpretation of UNFSA provide a limited avenue for

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challenges. In other cases, dispute settlement outside of the law of the sea will need to be sought (WTO DSB 1.2.2, CPTPP or CJEU 3.2.2.2.2).

Table 1: LoS safeguards and limitations to PSJ with an extraterritorial element

Law of the Sea Framework	PSJ limitation or safeguard	PSMs limitation or safeguard
Territorial or at-sea port	X	X
A general right of port entry	X	X
Force majeure or distress	✓ (limited)	✓ (limited)
Voluntary entry	✓ (limited, 218)	X
Internal affairs	X	X
Sovereign immunity	✓	✓
Due publicity	✓ (limited, pollution-related)	✓ (very limited, fisheries agreements)
Prompt notification	✓ (limited, pollution-related)	✓ (limited, fisheries agreements)
Prompt release	✓ (limited, 218)	X
Enforcement measures	✓ (limited, 218)	X
Freedom of navigation	Extraterritorial prescription without a valid basis in international law (violation)	Extraterritorial prescription without a valid basis in international law (violation)
Freedom of fishing	Extraterritorial prescription without a valid basis in international law (violation)	Extraterritorial prescription without a valid basis in international law (violation)
Article 89	X	X

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Exclusive flag state jurisdiction	X	X
Incidents of navigation	✓	✓ (unlikely subject matter)
Enforcement action endangering safety/environment	✓	✓
Non-discrimination	✓	✓
Abuse of right	✓	✓
Compulsory dispute settlement	✓ (limited, pollution-related)	✓ (limited, fisheries agreements)

Chapter 5 Regional Port State Measures

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5.1. Introduction

Following the conceptual analysis (ch 2-4), this chapter shifts to the regional practice of PSJ, reviewing the contribution and role of port states therein. Does regional practice of PSJ implement port state obligations (ch 3), within the limits of state jurisdiction (ch 2) and LoS (ch 4)? Does it support the previously suggested jurisdictional distinction (2.5), or does it go further than the limits prescribed? Finally, does this practice provide a basis for interpreting the limits of residual PSJ preserved by global instruments (3.2.1), and evidence the prescription of port state offences being enforced through more onerous measures (2.2-2.3)?

Regional fisheries bodies or arrangements (RFBs) promote regional cooperation in the pursuit of long-term conservation and management of shared fisheries.¹ Management RFBs, as opposed to scientific or advisory RFBs, shall adopt conservation and management measures (CMMs) for highly migratory or straddling fish stocks.² Many RFBs have recently included PSMs in their CMMs. Time and feasibility constraints prohibit including RFBs which provide scientific or management advice in this manuscript. Advisory instruments which promote defined PSMs will remain soft law until voluntarily adopted and implemented by states.³

Thus, the practice used is that of regional fisheries management organizations or arrangements (RFMO/As), distinguished by their imposition of legally binding CMMs upon members or participants. PSMs are found within constitutive instruments or CMMs adopted as binding under said instruments.⁴ In addition, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) adopts binding CMMs for marine capture

¹ FAO Fisheries and Aquaculture Department, 'Regional Fishery Bodies (RFB)' (FAO) <<http://www.fao.org/fishery/rfb/en>> accessed 21 July 2016.

² United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) arts. 61-67, 116-120; 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, adopted 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001) 1995 art. 10(a).

³ Nonetheless persuasive evidence of what PSMs are within PSJ.

⁴ E.g., International Convention for the Conservation of Atlantic Tunas, 14 May 1966, 673 UNTS 63 (entered into force 21 March 1966; 5th Revision 2007) arts. VIII, IX; Agreement for the Establishment of the General Fisheries Council for the Mediterranean, 24 September 1949, 126 UNTS 237 (entered into force 20 February 1952) (last amended 20 May 2014) arts. 13-14.

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fisheries.⁵ It is not an RFMO/A as it has broader competencies and differing object and purpose. As a conservation organisation for the Antarctic marine ecosystem, embedded within the larger Antarctic Treaty System, it allows 'rational' resource use.⁶ Interesting PSMs to combat IUU fishing by vessels flying the flag of non-contracting parties (NCPs) have been adopted.⁷

Furthermore, PSMs applicable to vessels flying the flag of NCPs, or non-cooperating non-contracting parties (Non-CNCPs) are those of interest to PSJ's legal basis and limits. Under treaty law,⁸ PSM provisions are binding upon RFMO/A contracting parties (CPs) and, where applicable, cooperating non-contracting parties (CNCPs) have agreed to PSMs implementation.⁹ Jurisdiction and the law of the sea limitations may be departed from through flag state consent. Therefore, practice amongst CPs and CNCPs (in short, CPCs) is of less interest because it does not provide useful state practice and *opinio juris* to modify or interpret customary international law within this manuscript.

Instead of describing the PSMs of each RFMO/A, practice is synthesised by PSM type, its extraterritorial scope, and PSJ relevance. Firstly, RFMO/As with extraterritorial regulatory competence are identified, before excluding those without PSMs addressing IUU fishing (5.2). Regional PSMs may be demarcated by the object(s) of jurisdiction, namely the port state itself (5.3.1), convention area and/or species (5.3.2), defined vessels (5.3.3), the catch or resulting fish products regardless of transporting vessel (5.3.4), and finally port state offences subject to more onerous enforcement measures (5.3.5). Where the object of jurisdiction is comparable to the object of jurisdiction within other regional PSMs, the prescriptive

⁵ Convention on the Conservation of Antarctic Marine Living Resources, 20 May 1980, 1329 UNTS 48 (entered into force 7 April 1982).

⁶ 'CCAMLR Performance Review Panel Report' (CCAMLR 2008) 7–8.

⁷ Members fish subject to conservation measures, whilst acceding states are bound by the *CAMLR Convention* but not permitted to fish. Cooperating non-contracting parties may voluntarily implement PSMs.

⁸ Statute of the International Court of Justice, adopted 26 June 1945, 3 Bevans 1179 (entered into force, 24 October 1945) art. 38(1); Vienna Convention on the Law of Treaties, signed 23 May 1969, 1155 UNTS 331 (entered into force 21 January 1980) art. 26.

⁹ Labels vary, e.g. cooperating non-members (WCPFC), but is immaterial here. For the purposes discussed here, cooperating non-contracting parties are distinguished from non-contracting parties by their consent to abide by and implement the conservation and management measures established by an RFMO/A; Convention on the Conservation and Management of High Migratory Fish Stocks in the Western and Central Pacific Ocean, adopted 5 September 2000, 2275 UNTS 43 (entered into force 19 June 2004) art. 32(4); GFCM Agreement (n 4) art. 1(e).

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jurisdiction exercised will often be comparable. This enables crosscutting sub-conclusions on jurisdictional basis and limits. Nonetheless, recalling the methodology limitations (1.3.2) and as a small counter-balance to difficulties presented by annual CMMs revision, future developments are outlined for regional PSMs (5.3.6). The chapter concludes with a description of regional jurisdictional trends (5.4).

5.2. RFMO/As with high seas competence and PSMs

The analysis focuses upon practice adopted by CCAMLR or RFMO/As with high seas competence and binding PSMs with extraterritorial 'effect', i.e. incorporation of extraterritorial conduct. The RFMO/As in question are the *Commission for the Conservation of Southern Bluefin Tuna (CCSBT)*,¹⁰ *General Fisheries Commission for the Mediterranean (GFCM)*,¹¹ *Inter-American Tropical Tuna Commission (IATTC)*,¹² *International Commission for the Conservation of Atlantic Tunas (ICCAT)*,¹³ *Indian Ocean Tuna Commission (IOTC)*,¹⁴ *Northwest Atlantic Fisheries Organization (NAFO)*,¹⁵ *North-East Atlantic Fisheries Commission (NEAFC)*,¹⁶ *North Pacific Fisheries Commission (NPFC)*,¹⁷ *South East Atlantic Fisheries Organisation (SEAFO)*,¹⁸ *South Indian Ocean Fisheries Agreement (SIOFA)*,¹⁹ *South Pacific Regional Fisheries Management Organisation (SPRFMO)*,²⁰ and the *Western and Central*

¹⁰ Convention For The Conservation Of Southern Bluefin Tuna, adopted 10 May 1993, 1819 UNTS 360 (entered into force, 20 May 1994).

¹¹ GFCM Agreement (n 4). As of 27 April 2015, Egypt, Israel, and Syria are CPC to *GFCM Agreement*, as amended 1997 FAO, 'GFCM Agreement: Status' (2015). Differences relate to the introduction of mandatory contributions, so for simplicity *GFCM Agreement*, as amended 20 May 2014, is referenced.

¹² Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica, adopted 27 June 2003, OJ L 224, 16/8/2006, p. 24 (entered into force 27 August 2010).

¹³ ICCAT Convention (n 4).

¹⁴ Agreement for the Establishment of the Indian Ocean Tuna Commission, adopted 25 November 1993, 1927 UTS 329 (entered into force 27 March 1996).

¹⁵ Convention on Cooperation in the Northwest Atlantic Fisheries, adopted 24 October 1978, 1135 UNTS 369 (entered into force 1 January 1979) (significant amendment, entered into force 18 May 2017).

¹⁶ Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries, adopted 18 November 1980, 1285 UNTS 129 (entered into force 17 March 1982) (last amended 11 August 2006).

¹⁷ Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, adopted 24 February 2012, US Senate Treaty Doc. 113-2 (entered into force, 19 July 2015).

¹⁸ Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, adopted 20 April 2001, 2221 UNTS 189 (entered into force 13 April 2003).

¹⁹ Southern Indian Ocean Fisheries Agreement, adopted 7 July 2006, 2835 UNTS I-49647 (entered into force 21 June 2012).

²⁰ Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, adopted 14 November 2009, OJ L 67, 6/3/2012, p. 3 (entered into force 24 August 2012).

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Pacific Fisheries Commission (WCPFC).²¹ The *Agreement on the International Dolphin Conservation Program* (IDCP)²² that focuses on mammals and as such does not count as an RFMO/A, includes PSMs that are also supportive of its RFMO/A sister organisation, IATTC.

RFMO/As without an area of high seas within their area of competence could prescribe PSMs incorporating extraterritorial conduct, e.g. CMMs implementing another RFMO/A's rules and regulations. However, a preliminary review demonstrated no binding practice of any interest to the present research.²³

Of those remaining, various RFMO/As have been excluded for different reasons. The *Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea* (CCBSP) is excluded due to a continued moratorium on pollock fishing in the convention area.²⁴ The *North Atlantic Salmon Conservation Organization* (NASCO) similarly prohibits CPs fishing for convention stocks in the high seas.²⁵ An optional protocol and resolutions do address high seas fishing by NCPs, but without PSMs.²⁶ Under the *North Pacific Anadromous Fish Commission* (NPAFC) directed high seas fishing for anadromous fish is prohibited,²⁷ but PSMs are minimal.²⁸

²¹ WCPFC Convention (n 9).

²² Agreement on the International Dolphin Conservation Program, 15 May 1998, 37 ILM 1246 (entered into force, 15 Feb 1999) (last amended July 2014).

²³ At most, discussing *PSMA* implementation; RECOFI, 'Status of IPOA-IUU and Port State Measures in the RECOFI Area and Preparation for the Arabian Sea International Workshop' (Eighth Meeting of the Working Group on Fisheries Management Cairo (Arab Republic of Egypt 8-10 December 2014)) RECOFI:WGFM8/2014/6.

²⁴ Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea, adopted 16 June 1994, 34 ILM 67 (entered into force 8 December 1995) art. VII, Annex pt. 1 result in Allowable Harvest Level of zero.

²⁵ Convention for the Conservation of Salmon in the North Atlantic Ocean, adopted 2 March 1982, 1338 UNTS 33 (entered into force 1 October 1983) art. 2(1).

²⁶ NASCO, 'Fishing for Salmon in International Waters' Resolution of the Council of NASCO at its Seventh Annual Meeting (Helsinki 12-15 June 1990) CNL(90)49; Protocol Open for Signature by States Not Parties to the Convention for the Conservation of Salmon in the North Atlantic Ocean, adopted June 1992, CNL(92)53; NASCO, 'Fishing for Salmon on the High Seas' Resolution of the Council of NASCO at its Ninth Annual Meeting (Washington DC, 9-12 June 1992) CNL(92)54.

²⁷ Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, adopted 11 February 1992, TIAS 11465 (entered into force 16 February 1996) arts. III-V.

²⁸ Information exchange on national PSMs and encouragement to join *PSMA*; NPAFC, 'Terms of Reference Committee on Enforcement (ENFO)' Amended July 24 2015 arts. 3, 5; PSM guidelines were reportedly considered in 2012, Youngho Park, 'Port State Measures Oppose Illegal High-Sea Salmon Fishing' 32 NPAFC Newsletter 7, 8.

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The *International Pacific Halibut Commission* (IPHC) may still apply to the outer continental shelf,²⁹ where pacific halibut can be found during spawning.³⁰ However, the fishery is concentrated within CPs' EEZs (Canada and the USA).³¹ Measures primarily use coastal, flag and nationality based jurisdiction,³² but implementing legislation as early as 1937 did incorporate PSMs, prohibiting landing and effective use of port by NCP vessels.³³ Another body established by bilateral agreement, *Joint Norwegian-Russian Fisheries Commission*,³⁴ may not qualify as an RFMO/A.³⁵ Spatially undefined in its constitutive instrument, practice extends to the high seas. Denial of port privileges to NCP vessels is used to discourage high seas fishing of managed stocks,³⁶ together with information exchange and reliance upon NEAFC PSMs.³⁷ These bilateral bodies are not considered here.

Finally, the *Asia-Pacific Fishery Commission* (APFIC) is excluded. Established as an *FAO Constitution* article XIV body, with the intention of having management competency,³⁸ this competency has not been granted.³⁹ PSM practice is thus of a guidance and capacity building nature.⁴⁰ It is worth noting, a lack of binding regional PSMs for the excluded RFMO/As could

²⁹ Protocol amending the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, adopted 29 March 1979, TIAS 9855 (entered into force, 15 October 1980) art. 1(3). Previously, the convention area included the high seas, Convention For The Preservation Of The Halibut Fishery Of The Northern Pacific Ocean And Bering Sea, 2 March 1953, 222 UNTS 78 (entered into force 28 October 1953) art. 1(3).

³⁰ 'Pacific Halibut: Stock Status and Biology' (*IPHC*) <<https://iphc.int/management/science-and-research/pacific-halibut-stock-status-and-biology>> accessed 14 October 2018.

³¹ Cleo Small, *Regional Fisheries Management Organisations: Their Duties and Performance in Reducing Bycatch of Albatrosses and Other Species* (BirdLife International 2005) 58–59.

³² IPHC Convention (n 29) art. II(1).

³³ F Howard Bell, 'Agreements, Conventions and Treaties Between Canada and the United States of America with Respect to the Pacific Halibut Fishery' (1969) Report of the International Pacific Halibut Commission 50 13–14, Appendix N (USA example); IPHC, Pacific Halibut Fishery Regulations 2017 art. 15 unloading clearance required.

³⁴ Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on Co-operation in the Fishing Industry of 11 April 1975, 983 UNTS 7.

³⁵ Erik J Molenaar, 'International Regulation of Central Arctic Ocean Fisheries' in Myron Nordquist, John Norton Moore and Ronán Long (eds), *Challenges of the Changing Arctic* (Brill 2016) 442–443.

³⁶ Erik J Molenaar, 'Arctic Fisheries Management' in Erik J Molenaar, Alex Oude Elferink and Donald Rothwell (eds), *Law of the Sea and the Polar Regions: Interactions Between Global and Regional Regimes* (Brill 2013) 255–256.

³⁷ See 37th Session, 'The Fisheries Commission: History' (*Joint Fish: Joint Russian-Norwegian Fisheries Commission*) <<http://www.jointfish.com/eng/THE-FISHERIES-COMMISSION/HISTORY>> accessed 15 July 2018.

³⁸ Asia-Pacific Fishery Commission (APFIC) Agreement, adopted 26 February 1948, 120 UNTS 59 (entered into force 9 November 1948), as last amended 1996 and approved 1997.

³⁹ FAO, 'Report of the Twenty-Seventh Session of the Asia-Pacific Fishery Commission, 19-21 September 2001' (2001) RAP/Publication 2001/18 paras 29–34.

⁴⁰ 'APFIC Port Inspection of Fishing Vessels Training Course' (*FAO, Asia-Pacific Fishery Commission*) <<http://www.fao.org/apfic/training/port-inspection-training/en/>> accessed 13 March 2018.

result from various reasons and does not necessarily reflect any objection or resistance to increasing PSJ and port state responsibility. Thankfully, that question does not need answering here.

5.3. PSMs in RFMO/A practice

Now that the RFMO/As in this review have been established, practice can be synthesised. To avoid distinctions irrelevant to this research, differences in labelling and membership is simplified to non-CNCPs and CPCs, even if formally an RFMO/A does not have cooperating non-contracting parties.

5.3.1. A port state duty to cooperate in fisheries conservation and management

RFMO/As provide mechanisms and forums for cooperation in the conservation and management of fisheries. The historic focus upon flag and coastal states has given way to a greater diversity in jurisdictional actors, comparable to global practice (ch 3). This is equally true of rights and obligations. The link of port state obligations to an RFMO/A creates a mandatory role for CPC port states to prevent conduct that undermines its CMMs. Equally, measures may be adopted to promote the exercise of port state responsibility.

5.3.1.1. Recognition of port state duties

The ideal scenario is when obligations are included within the RFMO/A's constitutive instrument. Port states thereby agree to uphold the RFMO/A's objectives, taking measures necessary to promote the effectiveness of conservation and management as opposed to only when expressly called for in specific CMMs. This should also encourage consideration of including PSMs within future CMMs.

Seven RFMO/As include port state duties within their constitutive instruments. SEAFO, SIOFA, SPRFMO and WCPFC adopt the *UNFSA* language, taking "full account of the right and duty of a port state to take measures, in accordance with international law, to promote the

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effectiveness of subregional, regional and global conservation and management measures”.⁴¹ Otherwise, GFCM and NPFC refer to port state duties broadly,⁴² and NAFO includes a geographically limited duty “to promote the effectiveness of conservation and management measures adopted by the [NAFO] Commission”.⁴³

Note, except GFCM and NPFC, all instruments include ‘taking into account’ port state duties. For NAFO this is explicitly found “under international law” as opposed to the convention alone. GFCM refers to measures to ensure port state duties are “fulfilled in accordance with relevant instruments to which it is party”, suggesting that those instruments impose additional requirements but are not the sole source. This may be interpreted not only as further treaty-based regionalisation of the *UNFSA* duty, but also as state practice and *opinio juris* that this generally accepted duty is of broader application, i.e. customary law. This is most persuasive for CPs not party to *UNFSA*, namely, Albania (GFCM), Algeria (GFCM), Angola (SEAFO), Chinese Taipei (NPFC, SPRFMO, WCPFC), Cuba (NAFO, SPRFMO), Lebanon (GFCM), Libya (GFCM), Montenegro (GFCM), Peru (SPRFMO), Syria (GFCM), Tunisia (GFCM), Turkey (GFCM) and Vanuatu (NPFC, SPRFMO).⁴⁴

The constitutive instruments contain different levels of specificity in the port state’s duty. Denial of port privileges, regardless of territorial/extraterritorial conduct is most prevalent. WCPFC “may” regulate catch through prohibitions of landing or transshipment, if “taken in a manner which undermines the effectiveness” of WCPFC CMMs.⁴⁵ SEAFO’s CPCs “shall” prohibit landing or transshipment by non-CNCP vessels in such cases,⁴⁶ while SIOFA reverses the burden of proof and prohibits further supply services unless satisfied the catch was taken in a manner consistent with CMMs.⁴⁷ SPRFMO similarly includes denial of port privileges, to be given effect once included within a CMM.⁴⁸ NPFC CPCs shall give effect to PSMs once

⁴¹ SEAFO Convention (n 18) art. 15(1); SIOFA Agreement (n 19) art. 12(1); SPRFMO Convention (n 20) art. 26(1); WCPFC Convention (n 9) art. 27(1).

⁴² GFCM Agreement (n 4) art. 14(3); NPFC Convention (n 17) art. 14(1).

⁴³ NAFO Convention (n 15) arts. 1(n), XII(1).

⁴⁴ Vanuatu has since ratified *UNFSA* (15 Mar 2018). Furthermore, CNCPs not party to *UNFSA*; Colombia, El Salvador, Mexico and Vietnam.

⁴⁵ WCPFC Convention (n 9) art. 27(3).

⁴⁶ SEAFO Convention (n 18) art. 15(3).

⁴⁷ SIOFA Agreement (n 19) art. 12(2)(b).

⁴⁸ SPRFMO Convention (n 20) art. 26(2)(a).

adopted, with the *NPFC Convention* only requiring at least flag state notification of non-compliant vessels found in-port.⁴⁹ As is usually the case the *NPFC Convention* preserves residual PSJ.⁵⁰ Measures shall be taken against non-CNCP vessels, which does not explicitly refer to PSMs, but does cite the *UNFSA* which does include PSMs against non-CNCP vessels.⁵¹

Denial of port privileges is an obligation of responsive conduct. Purposive duties entailing active conduct and infrastructure development are less prevalent and of limited scope. SEAFO CPCs shall, in part, discharge their duties by establishing a port inspection programme.⁵² But its objective is primarily that of assisting flag states discharge their duties (3.2.2.1), implicitly limiting the duty to CPC vessels.⁵³ In a wider reading of the reference to discharging duties under the *UNFSA* (3.2.2.3.1) it could refer to inspecting non-CNCP vessels. WCPFC inspections are not a constituent instrument duty, and only refer to CPC vessels.⁵⁴ The greatest evidence of port state inspection duties is within NAFO, SIOFA and SPRFMO. When adopted in CMMs, CPCs shall carry out minimum inspection requirements, at least for the fish stocks covered, regardless of flag.⁵⁵

Looking beyond constitutive instruments, practice refers to the general port state duty as a rationale to act.⁵⁶ The GFCM strategy includes CPCs in their capacity as port states, amongst others capacities, as primarily responsible to address IUU fishing.⁵⁷ *SEAFO, System (2015)*, reaffirms port state duties, albeit with subsequent measures only applying to CPC vessels.⁵⁸ Finally, SPRFMO notes the port state duty to prohibit landing/transshipment of catch “taken

⁴⁹ NPFC Convention (n 17) arts. 14(2)(a), 14(3).

⁵⁰ *ibid* art. 14(4).

⁵¹ *ibid* art. 20(4); UNFSA (n 2) arts. 17(4), 23 (PSMs).

⁵² SEAFO Convention (n 18) arts. 16(1), 16(3)(b).

⁵³ *ibid* art. 16(1). Furthermore, 5.3.2.1; fn. 105.

⁵⁴ WCPFC Convention (n 9) art. 27(2).

⁵⁵ NAFO Convention (n 15) arts. VI(9)(b), XII(2); SIOFA Agreement (n 19) art. 12(2)(a); SPRFMO Convention (n 20) art. 26(2)(a).

⁵⁶ IOTC, Resolution 05/03 Relating to the Establishment of an IOTC Programme of Inspection in Port 2005 preamble, recalling duty and CPC consensus upon port inspection as a ‘central element’.

⁵⁷ GFCM, Resolution GFCM/40/2016/2 for a mid-term strategy (2017–2020) towards the sustainability of Mediterranean and Black Sea fisheries 2016 target 3.

⁵⁸ SEAFO, System of Observation, Inspection, Compliance and Enforcement (2015), adopted 3 December 2015 (entered into force 15 February 2016) art. 19, effective PSC system for “all vessels”. Subsequent PSM provisions refer to foreign vessels (defined as CPC vessels, art. 2(d)).

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in a manner which undermines the effectiveness of regional” CMMs on the high seas.⁵⁹ While the reference to *UNFSA* art. 18 may provide the source of the flag state’s duties, it does not provide the source for this port state duty.

Some RFMO/As without a port state duty within their constitutive instrument have called upon this duty when adopting measures, providing further evidence for such a generally accepted duty. “Mindful” of port state obligations to promote effective regional measures, CCAMLR and ICCAT adopted PSMs.⁶⁰ For ICCAT, port state obligations contrast with “complementary” market state’s rights. CCAMLR’s non-CNCP cooperation policy promotes implementation of port state inspection and catch documentation schemes (CDS) similar to that of CPCs. This policy would arguably include informing non-CNCPs of the need to fulfil port state duties and the practical reality that as port states they could undermine CCAMLR CMMs.⁶¹ CMMs will refer to a port state’s duty without defining the legal source of this duty beyond ‘international law’. This broad language leaves space for inclusion as customary law.⁶²

5.3.1.2. Promoting ‘responsible’ non-CNCP port states

CPCs recognise their port state duties. They may also promote port state duties for non-CNCPs that, although not legally bound, are encouraged to co-operate through carrot and stick CMMs.

Light touch options include requesting participation in research and data collection. CMMs should be based upon the best scientific information available. Thus, ports where SIOFA high seas stocks are landed or transhipped may collect valuable data.⁶³ WCPFC identified Thailand

⁵⁹ SPRFMO, CMM 3.05 Conservation and Management Measure for the Regulation of Transshipment and Other Transfer Activities 2015 preamble.

⁶⁰ CCAMLR, Conservation Measure 10-05 (2015) Catch Documentation Scheme for *Dissostichus* spp. 2015 preamble; CCAMLR, Conservation Measure 10-04 (2015) Automated satellite-linked Vessel Monitoring Systems (VMS) 2015 preamble; CCAMLR, Resolution 32/XXIX Prevention, deterrence and elimination of IUU fishing in the Convention Area 2010 preamble and para. 1, recalling port inspection and landing/transshipment obligations. ICCAT, Recommendation 07-10 On an ICCAT Bluefin Tuna Catch Documentation Program 2007 preamble, replaced (with simplified preamble) via; ICCAT, Recommendation 11-20 Amending Recommendation 09-11 on an ICCAT Bluefin Tuna Catch Documentation Program 2011.

⁶¹ CCAMLR, Res. 32/XXIX (n 60) paras. 4, 5 (NCPs).

⁶² Noting rights and obligations of exporting/importing CPCs, but nonetheless including PSMs within the ‘market measures’ ICCAT, Recommendation 14-04 Amending the Recommendation 13-07 by ICCAT to Establish A Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean 2014 para 94.

⁶³ SIOFA, Resolution on Data Collection concerning the high seas in the Southern Indian Ocean 2004 art. 2.

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as a non-CNCP port state where a “substantial portion of purse seine catches in the Convention area is landed”,⁶⁴ before noting CPC’s responsibility to monitor landings and promoting non-CNCP data collection cooperation.⁶⁵ Experimentation with technology may also assist in discharging responsibilities. For example, IOTC has adopted an electronic PSM system and encourages other port states to utilise the e-PSM system as well.⁶⁶

The responsibility to promote the effectiveness of regional CMMs is not limited to the state’s own region or RFMO/As membership. RFMO/As therefore seek cooperation from non-CNCP port states in ensuring compliance with their CMMs.⁶⁷ A general duty to seek non-CNCP port state cooperation is found within the *SPRFMO Convention*,⁶⁸ but CCAMLR has a more detailed cooperation scheme. To avoid the negative consequences of the *Dissostichus spp.* catch documentation scheme (CDS) (5.3.4) non-CNCPs may apply to be a “non-Contracting Party cooperating with CCAMLR by participating in the CDS”. To qualify, and to continue participating, the state should implement the entire CDS (including PSMs) and demonstrate measures taken.⁶⁹ Additional non-binding resolutions request that CPCs “encourage the cooperation of non-Contracting Parties to take similar steps to implement CCAMLR’s Catch Documentation Scheme for *Dissostichus spp.* at their ports”.⁷⁰

Furthermore, in combatting IUU fishing, CCAMLR recognises that flag state cooperation alone is insufficient. CPCs are urged to seek cooperation from non-CNCP port states when IUU fishing vessels request port use, “urging them to take the steps in accordance with Conservation Measure 10-07”.⁷¹ That CMM addresses numerous PSMs, including inspection,

⁶⁴ WCPFC, CMM 2009-10 To Monitor Landings of Purse Seine Vessels at Ports so as to Ensure Reliable Catch Data by Species 2009 preamble.

⁶⁵ *ibid* 1.

⁶⁶ IOTC, Resolution 16/11 On port state measures to prevent, deter and eliminate illegal, unreported and unregulated fishing 2016 para 3.3. Currently optional, the compliance committee shall consider whether application should become mandatory. E-PSM is “designed to facilitate compliance” with PSM resolutions.

⁶⁷ CCSBT, Compliance Plan 2014 11.1, identify important port states and nominate for seeking cooperation.

⁶⁸ SPRFMO Convention (n 20) art. 32(4).

⁶⁹ CCAMLR, CM 10-05 (n 60) ANNEX 10-05/C, C7-C8. However, see little implementation by Seychelles during its decade of listing, CCAMLR, ‘Report of the Thirty-Fifth Meeting of The Commission (Hobart, Australia, 17 to 28 October 2016)’ (2016) para 108.

⁷⁰ CCAMLR, Res. 32/XXIX (n 60) para. 5.

⁷¹ CCAMLR, Resolution 25/XXV Combating illegal, unreported and unregulated fishing in the Convention Area by the flag vessels of non-Contracting Parties 2006 para 2.

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denial of entry and services, or the confiscation of catch.⁷² *Resolution 32* goes further, urging non-CNCs to implement *CMM 10-07* and port inspection procedures comparable to *CMM 10-03*.⁷³

Whilst the promotion of responsible port states falls upon CPCs, CCAMLR institutions also have a role to play. Firstly, the chairman of the Commission may “request non-Contracting Parties to deny landing or transshipment in their ports for fish harvested in CCAMLR waters not taken in compliance with CCAMLR conservation measures and requirements under the convention”.⁷⁴ Secondly, key non-CNCP port states are added to a priority list for capacity building. When this cooperation program is implemented, the “ultimate desired outcome is more countries working with CCAMLR to combat illegal, unreported and unregulated (IUU) fishing on the water and in their ports”.⁷⁵ Achieving ‘responsible’ port states for the sustainability of a fishery, that is all port states fulfilling their legal duties, clearly requires RFMO/As engaging with both unwilling and unable non-CNCs.

However, cooperation, diplomatic pressure and capacity building will not persuade or enable all ports of non-compliance to fulfil their duty. Just as port states may withhold privileges to flag states of non-compliance, flag states may exercise jurisdiction to influence ports of non-compliance (3.2.2.5). For example, the economic and social benefits provided by foreign vessels visiting a port state may be withheld by a flag state. Thus, CPC fishing vessels within the ICCAT regime shall only land Bluefin tuna within the designated ports of CPCs.⁷⁶ Similarly, landing or transshipment in a port not designated by a NAFO CPC, or without fulfilling the notification and authorisation requirements, constitutes a serious offence requiring follow-up flag state action.⁷⁷

Vice versa, flag states may designate foreign ports for its vessels. The CCSBT program for transshipment by tuna longline fishing vessels with freezing capacity (LSTLVs) requires flag

⁷² CCAMLR, Res. 32/XXIX (n 60) para. 4.

⁷³ *ibid* para. 5, including CDS.

⁷⁴ CCAMLR, Policy to Enhance Cooperation between CCAMLR and Non-Contracting Parties (as amended, 2008) 1999 para. II(j). Note, under para. III CPs still assist the chairman and undertake appropriate complementary efforts.

⁷⁵ *ibid* attachment B.

⁷⁶ ICCAT, Rec. 14-04 (n 62) para. 63.

⁷⁷ NAFO, Conservation and Enforcement Measures (2016) 2015 (NAFO FC Doc 16/1) arts. 38(1)(p)-(r); 39.

states to designate foreign ports for transhipment, prohibiting transhipment of their vessels at any other port.⁷⁸ This is to ensure effective port state inspection and oversight.⁷⁹ GFCM imposes broader limitations, that require flag states to ensure that port services generally are only utilised by their vessels in CPC ports acting consistently with GFCM port state standards.⁸⁰ Finally, CCAMLR flag states are urged to evaluate a port state's implementation of *CMM 10-05*, conditioning applicable fishing licences upon landing "in port states implementing fully the catch documentation scheme".⁸¹ Indeed previous diplomatic pressure upon Namibia and Mauritius who were undermining the effectiveness of CDS as non-CNCP port states,⁸² resulted in agreements that each state would implement CCAMLR's CDS.⁸³

Finally, CCSBT notes that action will be taken against IUU southern bluefin tuna (SBT) fishing, including trade and market measures.⁸⁴ While not explicitly targeting port states, CCSBT seeks cooperation from "port States that are facilitating any fishing for SBT that is inconsistent with CCSBT" within the preceding sentence of the *Compliance Plan*.⁸⁵ Effective action "against IUU SBT fishing" could therefore include action against 'facilitating' port states.

5.3.1.3. Sub-conclusions

Regional port state duties are treaty-based but given their generally accepted status could begin progression towards customary law recognition. The duty is used as an impetus or rationale to adopt CMMs, often without pointing to its legal source. This may be early evidence of a minimum due diligence obligation regardless of global treaty membership (ch

⁷⁸ CCSBT, Resolution on Establishing a Program for Transhipment by Large-Scale Fishing Vessels 2014 para. 21.

⁷⁹ CCSBT, Resolution on action plans to ensure compliance with Conservation and Management Measures 2009 para. 2.

⁸⁰ GFCM, Recommendation GFCM/40/2016/1 on a regional scheme on port State measures to combat illegal, unreported and unregulated fishing activities in the GFCM area of application 2016 para. 45.

⁸¹ CCAMLR, Resolution 15/XXII Use of ports not implementing the Catch Documentation Scheme for *Dissostichus* spp. 2003.

⁸² CCAMLR, Resolution 14/XIX Catch Documentation Scheme: implementation by Acceding States and non-Contracting Parties 2000 preamble; para. 3.

⁸³ Darren S Calley, *Market Denial and International Fisheries Regulation: The Targeted and Effective Use of Trade Measures Against the Flag of Convenience Fishing Industry* (Martinus Nijhoff Publishers 2011) 155.

⁸⁴ CCSBT, Compliance Plan (n 67) para. 8.4.

⁸⁵ *ibid* para. 8.4.

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3), but other explanations may be found. For example, silence upon the source may be preferred in order to avoid any distinction between CPCs party and CPCs not party to *UNFSA*.

Regardless, in both cases acceptance of a port state duty to combat IUU fishing has expanded beyond those party to globally applicable treaties (5.3.1.1). The port state duty is also of interest to states acting in different capacities, such as flag states withholding benefits from non-CNCP port states or those not fully implementing regional PSMs. Outreach to non-CNCPs thus also includes the implementation of PSMs, and the possibility of capacity development in this regard. Equally, cooperation in regional fisheries management now clearly extends beyond flag and coastal state jurisdiction to include PSJ. *UNCLOS*, art. 118 upon cooperation in the conservation and management of living resources should be read to include port states in and of themselves, regardless of flag or coastal state status (5.3.1.2). In the wider context, one may wonder if port states wishing to give effect to this duty should also have a right to participation within an RFMO/A. I.e., RFMO/As should include port states where a significant 'interest' of a fishery is landed as within their interpretation of states with a 'real interest' in a fishery.⁸⁶

5.3.2.PSMs applicable to fishing in the convention area and/or regulated species

One conservation and management approach is to prescribe rules applicable to all foreign fishing vessels visiting port. This practice will demonstrate the breadth of PSJ exercised. It will also show how PSMs now included at the global level were previously utilised with extraterritorial effect. Concerning enforcement, general PSMs are comparable with more targeted CMMs (5.3.3-5.3.4), notably denial of landing.

Secondly, at the global level, 'vessel' is broadly defined for the purpose of PSMs application (ch 3).⁸⁷ A more limited definition may be adopted at the regional level for the exercise of PSJ and the imposition of port state duties upon CPCs. In drafting regional PSMs, limited port state resources or limited political will may make it impractical, impossible or undesirable to

⁸⁶ UNFSA (n 2) art. 8(3) "States having a real interest" only referring to flag and coastal states but calls for non-discrimination.

⁸⁷ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, opened for signature 22 November 2009, I-54133 (entered into force 5 June 2016) arts. 1(j), 3 does not provide explicitly vessel size or stocks-based exceptions.

apply PSMs to all vessels. The implementation of PSMs will impose a financial burden on the state. When a balance between the need for PSMs and the capacity of CPCs cannot be found, proposed CMMs have failed to gain CPCs' approval.⁸⁸ Limitations to the vessels covered by a CMM may be geographic, or may concern the species caught, the vessel length or vessel type, or combinations thereof.⁸⁹ It remains desirable that vessels not covered by the regional PSMs are nonetheless subject to equivalent national measures.⁹⁰ These limitations will affect the practical extent of port state practice, but do not alter the underlying jurisdiction exercised.

5.3.2.1. Implementation of PSMA minimum standards as RFMO/A minimum standards

PSMA requires development and implementation of PSMs at the national or regional level, such as minimum annual inspection levels.⁹¹ RFMO/A prescription promotes implementation of PSMs by all CPCs, regardless of *PSMA* status. The CPCs potential for more stringent or broader measures is preserved. Beyond jurisdictional issues, the cooperation and information exchange provisions of *PSMA* are promoted within RFMO/As.⁹²

Prior to *PSMA*'s entry into force, IOTC, *Resolution 10/11* provided the broadest regional state practice, containing many of the now *PSMA* minimum standards.⁹³ It was subsequently replaced by *Resolution 16/11*, and its provisions are a near verbatim *PSMA* implementation.⁹⁴ Provisions upon the non-discrimination of flag states demonstrate support for the two variations previously discussed, namely prohibiting discriminatory standards between vessels

⁸⁸ IATTC and WCPFC proposals and failures Judith Swan, *Implementation of Port State Measures: Legislative Template: A Legislative Template. Framework for Procedures. The Role of RFMOs* (FAO 2016) 86.

⁸⁹ E.g. ICCAT, Recommendation 13-04 Management Measures for Mediterranean Swordfish in the Framework of ICCAT 2013 paras. 1-2 (Mediterranean swordfish); ICCAT, Recommendation 12-07 For an ICCAT Scheme for Minimum Standards for Inspection in Port 2012 para. 4 (over 12 meters); ICCAT, Recommendation 13-13 Concerning the Establishment of an ICCAT Record of Vessels 20 Meters in Length Overall or Greater Authorized to Operate in the Convention Area 2013 13 para. 1 (large scale fishing vessels); IATTC, Resolution C-11-05 On the Establishment of a List of Longline Fishing Vessels over 24 Meters (LSTLFVs) Authorized to Operate in the Eastern Pacific Ocean 2011 para. 1 (over 24 meters).

⁹⁰ IATTC (Submitted by The EU), Proposal IATTC-92 G-1 For an IATTC Scheme for Minimum Standards for Inspection in Port 2017 para. 9.

⁹¹ *PSMA* (n 87) art. 12.

⁹² FAO, 'Matters Concerning the Implementation of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' [2017] First Meeting of the Parties to the FAO Agreement on Port State Measures, Oslo 29-31 May 2017, *PSMA/2017/4*, 22-23 RFMO responsibilities.

⁹³ IOTC, *Resolution 10/11* On port state measures to prevent, deter and eliminate illegal, unreported and unregulated fishing 2010.

⁹⁴ IOTC, *Res. 16/11* (n 66).

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on the basis of flag, or discriminatory standards as between states (4.4.2).⁹⁵ Compared to the minimum standards of *PSMA*, the major weakness is that *Resolution 16/11* only binds ports within the IOTC area of competence.⁹⁶ Only the general port state duty, contained in *UNFSA*, *PSMA*, and perhaps customary law, can dissuade ports of convenience outside the IOTC area of competence but open to IOTC regulated stocks.

Other RFMO/As have progressively implemented *PSMA* to varying degrees. The GFCM Secretariat was mandated with production of a draft CMM to align its regional PSM scheme with *PSMA*.⁹⁷ This recommendation was unanimously adopted, but does not include situations where sufficient proof of (extra)territorial conduct requires mandatory denial of entry – in contrast to *PSMA* and GFCM’s own IUU vessel listing practice.⁹⁸ Unlike the non-exhaustive services denied under *PSMA* in such situations, within port only denial of landing, transshipment, or processing is required.⁹⁹ Only when an inspection provides reasonable belief in engagement in or support of IUU fishing must the full breadth of services be denied.¹⁰⁰ Under *PSMA* these services should be denied in additional scenarios, including prior to inspection.¹⁰¹ Finally, similar to IOTC, the scheme is geographically limited. The recommendation only applies to vessels “within the GFCM area of application”.¹⁰² Several contracting parties have ports past the strait of Gibraltar. They would fall outside the GFCM area of application and therefore outside the applicability of this recommendation to foreign vessels in-port or seeking access.

⁹⁵ *ibid* paras. 3.2, 11(h) (vessels), 17.3 (states).

⁹⁶ *ibid* para. 20.

⁹⁷ FAO, ‘Report of the Fortieth Session of the General Fisheries Commission for the Mediterranean (GFCM), St. Julian’s, Malta, 30 May – 3 June 2016’ (2017) GFCM Report 40 para 67.

⁹⁸ Contrast, GFCM, Rec. GFCM/40/2016/1 (n 80) paras. 17-19; *PSMA* (n 87) art. 9(4). Furthermore, GFCM, Recommendation GFCM/33/2009/8 on the establishment of a list of vessels presumed to have carried out IUU fishing in the GFCM area repealing recommendation GFCM/30/2006/4 2009 para. 14(b) (GFCM listed vessels prohibited entry); GFCM, Rec. GFCM/40/2016/1 (n 80) para. 20 (only denial of services - which is further limited than GFCM, Rec. GFCM/33/2009/8, para. 14[a]).

⁹⁹ GFCM, Rec. GFCM/40/2016/1 (n 80) paras. 19-20. Para. 22, discretionary denial of other port services (e.g. refuelling and resupplying), is mandatory under *PSMA* (n 87) art. 11.

¹⁰⁰ GFCM, Rec. GFCM/40/2016/1 (n 80) para. 36(b).

¹⁰¹ *PSMA* (n 87) arts. 9(6), 11(1), 18(1)(b).

¹⁰² GFCM, Rec. GFCM/40/2016/1 (n 80) para. 3.

Given that IATTC has repeatedly failed to adopt a CMM on minimum PSMs,¹⁰³ the other examples are NEAFC and SEAFO. NEAFC simply provides that *PSMA* be applied as a minimum standard, including against non-CNCP vessels, 30 days after all CPs have become *PSMA* parties.¹⁰⁴ In contrast the *SEAFO System's* minimum standards for PSMs only apply to the entry of foreign CPC vessels,¹⁰⁵ and only in respect of “coastal States, which have areas of national jurisdiction adjacent to the Convention Area”.¹⁰⁶ For non-CNCP vessels, it therefore does not build upon the broadly defined duty and limited denial of services within the *SEAFO Convention* (5.3.1.1). This manuscript now turns to specific PSMs developed in regional practice.

5.3.2.2. Limiting use to designated ports with inspection capacity

If designating ports open to foreign fishing vessels is mandatory, then vessels engaged in fishing or related conduct within the RFMO/A area of application are not permitted to land, tranship or use other services in non-designated ports.¹⁰⁷ This measure may be accompanied by an express prohibition for undesignated ports.¹⁰⁸ At the global level, designation of ports shall apply to port entry, regardless of the use of port services.¹⁰⁹

Limiting the number of ports available and imposing an obligation for designated ports to have full or sufficient inspection capacity reduces undetected port use by vessels suspected IUU vessels. Furthermore, this assists port states in meeting their responsibilities. For example, ICCAT members must designate ports where entry may be requested by vessels carrying ICCAT-managed species and/or resulting fish products (subject to certain

¹⁰³ Latest; IATTC, Proposal IATTC-92 G-1 (n 90); most support but reservations prevent progress, IATTC, ‘92nd Meeting (Mexico City, Mexico 24-28 July 2017): Minutes of Meeting’ (2017) 13.

¹⁰⁴ NEAFC, Scheme of Control and Enforcement (2016) 2015 arts. 20Bis, 38Bis, without prejudice to, arts. 21-27, 39-46.

¹⁰⁵ SEAFO, System (2015) (n 58) art. 2 (foreign vessel is “a vessel flying the flag of another Contracting Party”); Ch. VI PSC consistently refers to foreign vessels.

¹⁰⁶ *ibid* art. 26.

¹⁰⁷ Designation varies e.g. NAFO, CEMs (2016) (n 77) art. 10(5)(b) (landing); GFCM, Recommendation GFCM/40/2016/4 establishing a multiannual management plan for the fisheries exploiting European hake and deep-water rose shrimp in the Strait of Sicily (GSA 12 to 16) 2016 para. 3(c) (ports where various services are provided).

¹⁰⁸ GFCM, Rec. GFCM/40/2016/4 (n 107) para. 20.

¹⁰⁹ *PSMA* (n 87) arts. 7(1), 20(3).

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requirements).¹¹⁰ There must be “sufficient capacity to conduct inspections in every designated port”.¹¹¹ CCSBT’s scheme is similar.¹¹² For ICCAT Atlantic bluefin tuna, designated ports must have full inspection coverage during transshipment periods and places,¹¹³ while certain GFCM fisheries are subject to full inspection coverage for all landing and transshipment places and periods.¹¹⁴ Within NAFO, the duty to designate ports is only applicable to the access of foreign CPC vessels, but non-CNCP vessels must be inspected upon entry.¹¹⁵

Still, several RFMO/As only impose a soft “best effort” obligation for inspection coverage.¹¹⁶ GFCM (generally), SPRFMO, SEAFO and NAFO all limit foreign vessels to designated ports, but sufficient inspection capacity in every port is only required “to the greatest extent possible”.¹¹⁷ Vice versa, CCAMLR imposes a high inspection requirement, but discretion over limiting ports through designation.¹¹⁸

5.3.2.3. Prior notification requirements

To improve port state knowledge of activities at sea, prior notification requirements are frequent.¹¹⁹ Formally, the requirement ‘bites’ when a vessel attempts to enter port having, or having not, provided notification. Nonetheless, the prescribed conduct of collecting information and submitting the notification may occur extraterritorially. It can be notification must have occurred 48 hours before approaching the territory. Where the notification conduct occurs is then determined by the vessel’s speed and not a geographical nexus. territoriality cannot be the basis of jurisdiction. Extraterritoriality may differ, as port states

¹¹⁰ ICCAT, Rec. 12-07 (n 89) paras. 2-4, 9(a).

¹¹¹ *ibid* para. 9(b).

¹¹² CCSBT, Resolution for a CCSBT Scheme for Minimum Standards for Inspection in Port 2015 para. 9.

¹¹³ ICCAT, Rec. 14-04 (n 62) paras. 59 (transshipment); 63-64 (landing full control, subject to a risk-based inspection percentage).

¹¹⁴ GFCM, Rec. GFCM/40/2016/4 (n 107) paras. 18-19.

¹¹⁵ NAFO, CEMs (2016) (n 77) arts, 10(5), 43, 51.

¹¹⁶ The same is seen at the global level, PSMA (n 87) art. 7(2).

¹¹⁷ GFCM, Rec. GFCM/40/2016/1 (n 80) para. 13; SPRFMO, CMM 2.07 Conservation and Management Measure on Minimum Standards of Inspection in Port 2014 paras. 7-8; SEAFO, System (2015) (n 58) art. 20 (CPC vessels).

¹¹⁸ CCAMLR, Conservation Measure 10-03 (2015) Port inspections of fishing vessels carrying Antarctic marine living resources 2015 para. 4. Furthermore, WCPFC Convention (n 9) art. 29(1); WCPFC, CMM 2009-06 On the Regulation of Transshipment 2009 para. 5 (may designate transshipment ports).

¹¹⁹ PSMA (n 87) arts. 8-9.

can unilaterally request further information,¹²⁰ or modify the notification period.¹²¹ Additional written declaration may be required, notably CCAMLR requires a declaration that the vessel has neither engaged in, nor supported, IUU fishing within the Convention Area and has complied with all CCAMLR requirements.¹²²

Information obtained through prior notification, written declarations, or CDS (5.3.4) could be used for monitoring and reporting by the port state. However, the port state may also use this information and its jurisdiction to advance its and/or the RFMO/A's fisheries agenda. These conditions help RFMO/As in gathering information to develop RFMO/A IUU vessel lists.¹²³ Furthermore, vessels which have not fulfilled the notification requirements, or have provided incomplete or false information, should be refused port privileges (5.3.2.4). The extent of denial depends upon whether notification covers port calls generally,¹²⁴ or is limited to landing and transshipment calls.¹²⁵

5.3.2.4. Denial of entry

Information obtained from prior notifications, at-sea observations, and in-port inspections, together with information requested from other states and RFMO/As, will often form the basis of regional or unilateral PSMs.¹²⁶ Now that the number of ports available has been limited and advance (extra)territorial notification requirements have been imposed, the next point of control is entry. Prescribed conduct may therefore trigger *domaine réservé*-based

¹²⁰ SEAFO, System (2015) (n 58) art. 22(1) (CPC vessels); GFCM, Rec. GFCM/40/2016/1 (n 80) para. 17; CCSBT, Res. Port Inspection (n 112) para. 11; ICCAT, Rec. 12-07 (n 89) para. 13; SPRFMO, CMM 2.07 (n 117) para. 11(g).

¹²¹ SEAFO, System (2015) (n 58) art. 21 (CPC vessels); CCSBT, Res. Port Inspection (n 112) para. 12; ICCAT, Rec. 12-07 (n 89) para. 12; SPRFMO, CMM 2.07 (n 117) para. 12; NAFO, CEMs (2016) (n 77) art. 43(2) (non-CNCP vessels, via arts. 51, 45[1]); NEAFC, Scheme (2016) (n 104) art 22(1) (non-CNCP vessels, via art. 39[1]).

¹²² CCAMLR, CM 10-03 (n 118) para. 4.

¹²³ Where evidence arises, secretariat shall be notified for inclusion on the draft IUU list; CCSBT, Res. Port Inspection (n 112) para. 25.

¹²⁴ NEAFC, Scheme (2016) (n 104) arts. 39(1) (non-CNCP vessels), 21-22, Annex XV (3 working days); GFCM, Rec. GFCM/40/2016/1 (n 80) para. 16 (72 hours); SEAFO, System (2015) (n 58) art. 21; Annex VI (CPC vessels, 48 hours); CCAMLR, CM 10-03 (n 118) para. 4, Annex 10-03/A (48 hours).

¹²⁵ ICCAT, Rec. 12-07 (n 89) para. 11 (72 hours); SPRFMO, CMM 2.07 (n 117) para. 11 (48 hours); CCSBT, Res. Port Inspection (n 112) para. 11, Annex A (72 hours); NAFO Convention (n 15) arts. 51(1) (Non-CNCP), 42, 43(2), 45, Annex II (3 working days). Transshipments, ICCAT, Rec. 14-04 (n 62) paras. 60, 64; CCSBT, Res. Transshipment LSTLV (n 78) paras. 26-27. Landings, NAFO, CEMs (2016) (n 77) arts. 9(7) (shrimp fishing in division 3L), 10(5)(d) (authorised vessels for Greenland Halibut).

¹²⁶ See further, e.g. information from non-state actors, 'Global Fishing Watch' (*Global Fishing Watch*) <<http://globalfishingwatch.org/>>.

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enforcement tools, but notably no other tools within a state's enforcement jurisdiction. For example, incomplete notification may result in denial of entry, but is not prescribed as an offence whereby upon the next visit (where notification is complete) the vessel is punished for its previous extraterritorial conduct.¹²⁷

Denial of entry is now a staple of regional fisheries governance. Within CCAMLR, NEAFC, and NAFO (subject to humanitarian exceptions or other effective PSMs), port entry shall explicitly be denied to vessels that fail to provide complete prior notification,¹²⁸ together with any mandatory declarations.¹²⁹ This is in addition to cases where the vessel is listed (5.3.3.2), or where sufficient proof of IUU fishing activities exists.¹³⁰

In regional practice where discretion over entry remains, it may implicitly be taken that entry should be denied when vessels provide inadequate notification or documentation. SEAFO and GFCM do not mandate denial (thereby not fully implementing *PSMA*), but discretion is only triggered after notification. Port states "shall, *before* granting access to their designated ports, require the masters of vessels to notify the competent authorities [...]",¹³¹ and "[a]fter receiving the relevant information [...] each CPC shall decide whether to authorise or deny the entry".¹³²

5.3.2.5. Port state inspection

Even when explicitly employed for determining extraterritorial activities, inspections fall within territorial jurisdiction.¹³³ Inspection occurs within the port state's territory and relates

¹²⁷ Contrasting with cases where additional conduct provides a state jurisdiction nexus e.g. entry having provided incomplete notification, or submission of false declarations in-port.

¹²⁸ NEAFC, Scheme (2016) (n 104) art. 39(2); NAFO, CEMs (2016) (n 77) art. 51(2)(b) (cross-referencing art. 45[1]). *Contra*, SPRFMO, CMM 2.07 (n 117) para. 16(b) (ground for inspection); CCSBT, Res. Port Inspection (n 112) para. 16(a) (a factor in considering vessels for inspection).

¹²⁹ CCAMLR, CM 10-03 (n 118) para. 6.

¹³⁰ SEAFO, System (2015) (n 58) art. 22(4) (longwinded and perhaps unintentional applicability to non-CNCP vessels via art. 28[20]).

¹³¹ GFCM, Rec. GFCM/40/2016/1 (n 80) para. 16; SEAFO, System (2015) (n 58) art. 21 (CPC vessels). CCSBT, Res. Port Inspection (n 112) para. 11, general condition of port state's wishing to grant access as opposed to individual entry requests - i.e. discretionary. See fn. 128.

¹³² GFCM, Rec. GFCM/40/2016/1 (n 80) para. 17; SEAFO, System (2015) (n 58) art. 22(1) (CPC vessels, after receiving information); CCSBT, Res. Port Inspection (n 112) para. 13 (after receiving information, but not requiring denial of entry).

¹³³ E.g. NAFO, CEMs (2016) (n 77) art. 51(2)(d)(i), including "examination of logbooks, fishing gear, catch on board, and any other matter related to the vessel's activities in the Regulation area". Furthermore, fn. 160,

to the vessel or other property and information aboard the vessel within its territory (or property and information accessible by a person located therein).¹³⁴ This is reflected in the vast non-exhaustive list of inspection items in the *PSMA* and its RFMO/A counterparts.¹³⁵ It may be disappointing to see examples like IOTC only repeat the customary right of inspection, but the majority of CMMs do impose an inspection duty.¹³⁶ Other control mechanisms below imply further inspections.¹³⁷

The more stringent inspection requirements apply to non-CNCP vessels that voluntarily enter port. NAFO and NEAFC include within a port state's obligation the inspection of all non-CNCP vessels permitted to enter.¹³⁸ ICCAT is limited to an obligation to inspect non-CNCP vessels that voluntarily enter having been sighted as "may be fishing contrary to ICCAT conservation measures".¹³⁹ CCAMLR applies similar obligations for sighted non-CNCP vessels (and non-CNCP vessels engaged in transshipment activities with that vessel),¹⁴⁰ or those vessels that should have been denied access,¹⁴¹ or those carrying toothfish (*dissostichus spp.*).¹⁴² This

Bevan Marten, 'Port State Jurisdiction over Vessel Information: Territoriality, Extra-Territoriality and the Future of Shipping Regulation' (2016) 31 *The International Journal of Marine and Coastal Law* 470, 493.

¹³⁴ Marten (n 133) 484.

¹³⁵ "[V]essel identification documentation onboard and information relating to the owner of the vessel [...] vessel's flag and markings [...] authorizations for fishing and fishing related activities [...] all other relevant documentation and records held onboard, including [...] electronic format and vessel monitoring system (VMS) data [...] Relevant documentation may include logbooks, catch, transshipment and trade documents, crew lists, stowage plans and drawings, descriptions of fish holds, and documents required pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and Flora [...] fishing gear onboard [...] as well as related devices [...] fish [...] containers [...] fish holds [...] PSMA (n 87) Annex B, Port State inspection procedures. Adopted, NEAFC, Scheme (2016) (n 104) Annex XVIII, but strangely only applicable CPC vessels (arts. 25[1], 25[4]), non-CNCP vessels (only refers arts. 25[2], 25[6]). Similarly, SEAFO, System (2015) (n 58) Annex VIII.

¹³⁶ IOTC, Res. 05/03 (n 56) para 3, although para. 8, (reports upon foreign vessel landings) at least requires monitoring.

¹³⁷ CCAMLR, CM 10-03 (n 118) para. 1, "if it intends to land or tranship *Dissostichus spp.*, the catch to be unloaded or transhipped is accompanied by a *Dissostichus* catch document (DCD) required by Conservation Measure 10-05 and that the catch agrees with the information recorded on the document".

¹³⁸ NAFO, CEMs (2016) (n 77) art. 51(2)(d); NEAFC, Scheme (2016) (n 104) art. 40(1) (cross-referencing arts. 25[2], 25[6]).

¹³⁹ ICCAT, Recommendation 98-11 Concerning the ban on landings and transshipments of vessels from non-Contracting Parties identified as having committed a serious infringement 1998 paras. 1-2; cross-referencing ICCAT, Recommendation 97-11 On transshipments and vessel sightings 1997 para. 4.

¹⁴⁰ CCAMLR, Conservation Measure 10-07 (2016) Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures 2016 para. 5.

¹⁴¹ CCAMLR, CM 10-03 (n 118) para. 6.

¹⁴² *ibid* para. 1 (by-catch exception, fn. 4).

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includes vessels allowed entry exclusively for inspection and those benefitting from *force majeure*/distress entry exceptions.

Different facts, or other RFMO/As, require inspection, but not full coverage. Instead, vessels are selected through risk assessment, e.g. when clear grounds exist for suspecting engagement in IUU fishing or supportive fishing-related activities,¹⁴³ or when vessels have previously been denied entry or use.¹⁴⁴ Inspection can also be requested by other states and RFMO/As.¹⁴⁵ Within CCAMLR all vessels carrying toothfish (*dissostichus spp.*) are inspected, compared to 50% of vessels carrying other species harvested in the convention area.¹⁴⁶ Vessels entering GFCM ports without authorisation must be inspected,¹⁴⁷ but the general minimum target is “at least 15 percent of the total number of port entries of vessels in the previous year”.¹⁴⁸ Incomplete advance notification shall result in inspection under SPRFMO,¹⁴⁹ with further inspections for vessels denied port privileges “in accordance with this or other RFMO’s provisions”,¹⁵⁰ or when simply requested by other states of RFMO/As.¹⁵¹

When determining which vessels to inspect, port states may discriminate on the basis of a vessel’s flag, namely non-CNCP vessels.¹⁵² However, this is arguably a justified case of flag state discrimination as it identifies foreign vessels posing the greater risk of non-compliance (4.4.2). This risk assessment will prioritise non-CNCP vessels for inspection, but the vessels are inspected for compliance with the same CMM standards as CPC vessels.

Alternatively, inspections may be without quotas or procedures.¹⁵³ SIOFA has no CMM for port inspections, while SEAFO’s inspections could extend to non-CNCP vessels as it is not

¹⁴³ GFCM, Rec. GFCM/40/2016/1 (n 80) para. 28(c); CCAMLR, CM 10-03 (n 118) para. 3(iii).

¹⁴⁴ GFCM, Rec. GFCM/40/2016/1 (n 80) para. 28(a) (only those denied in accordance with GFCM/40/2016/1); CCAMLR, CM 10-03 (n 118) para. 3(i) (denied in accordance with any CCAMLR CM).

¹⁴⁵ GFCM, Rec. GFCM/40/2016/1 (n 80) para. 28(b); CCAMLR, CM 10-03 (n 118) para. 3(ii) (only CPC requests).

¹⁴⁶ CCAMLR, CM 10-03 (n 118) para. 2 (to determine if harvested in compliance with CMs).

¹⁴⁷ GFCM, Rec. GFCM/40/2016/1 (n 80) para. 26.

¹⁴⁸ *ibid* para. 27.

¹⁴⁹ SPRFMO, CMM 2.07 (n 117) para. 16(b).

¹⁵⁰ *ibid* para. 16(c).

¹⁵¹ *ibid* para. 16(a).

¹⁵² IOTC, Res. 05/03 (n 56) para. 7.

¹⁵³ SIOFA Agreement (n 19) art. 12(2)(a); SEAFO Convention (n 18) art. 15(2).

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explicitly limited to CPC vessels.¹⁵⁴ Nonetheless, inspection levels beyond the general “effective” PSC system are not mandated.¹⁵⁵

PSMA requires port states to inspect an annual level of foreign vessels “in its port” that will meet the *PSMA*’s objectives.¹⁵⁶ RFMO/A practice setting an annual inspection level is more widespread when the inspection obligations are limited to vessels entering port for transshipment or landing services. Foreign vessels seeking such port operations are subject to minimum inspection levels of 5% under ICCAT, SPRFMO and CCSBT.¹⁵⁷ Further ICCAT measures target landings of Bluefin tuna from the eastern Atlantic and Mediterranean, whereby risk assessment should result in “a percentage” inspected.¹⁵⁸ This is in addition to the broader data collection requirements for CPCs “that import tuna and tuna-like fish and/or in whose ports those products are landed”.¹⁵⁹

Besides requirements concerning the number of inspections, minimum standards regarding the depth of inspection are also set as regional responsibilities. RFMO/As may prescribe what must be inspected, i.e. “shall include the vessel’s documents, logbooks, fishing gear, catch on board and any other matter relating to the vessel’s activities in the Convention Area”.¹⁶⁰ They

¹⁵⁴ Contrast, SEAFO, System (2015) (n 58) art. 24 (‘vessel’ inspection), with arts. 20-23 (‘foreign vessels’, art. 2[1][d] CPC vessels); *ibid.* art. 1, “Unless otherwise stated [...] the System, shall apply to all fishing vessels and fishing research vessels operating or intending to operate in the Convention Area”.

¹⁵⁵ SEAFO, System (2015) (n 58) art. 19.

¹⁵⁶ *PSMA* (n 87) art. 12(1).

¹⁵⁷ ICCAT, Rec. 12-07 (n 89) para. 15; SPRFMO, CMM 2.07 (n 117) para. 15; implementing, SPRFMO Convention (n 20) arts. 27(1)(b), 26(2); CCSBT, Res. Port Inspection (n 112) para. 15. Similarly, factor in determining inspections; ICCAT, Rec. 12-07 (n 89) para. 16; CCSBT, Res. Port Inspection (n 112) para. 16; although as restricted to landing or transshipment this will largely be CPC vessels given only they are authorised, CCSBT, Resolution on a CCSBT Record of Vessels Authorised to Fish for Southern Bluefin Tuna 2015 para. 2.

¹⁵⁸ ICCAT, Rec. 14-04 (n 62) para. 64. For CPC vessels; NAFO, CEMs (2016) (n 77) art. 10(5)(e) (Greenland halibut landings, but only authorised CPC vessels are allowed entry), art. 43(10), 15% minimum inspection level for landing or transshipments; NEAFC, Scheme (2016) (n 104) art. 25(1), landing/transshipment inspection quotas.

¹⁵⁹ ICCAT, Recommendation 06-13 Concerning Trade Measures 2006 para. 1, potentially leading to non-discriminatory trade related measures (para. 6[c]).

¹⁶⁰ ICCAT, Rec. 98-11 (n 139) para. 2. Similarly, NAFO, CEMs (2016) (n 77) art. 51(2)(d)(i); SEAFO Convention (n 18) art. 15(2); SEAFO, System (2015) (n 58) art. 24(3), Annex VIII; GFCM, Rec. GFCM/40/2016/1 (n 80) para. 30(c), Annex 2. CCAMLR, CM 10-03 (n 118) para. 5, ‘guided’ by template (Annex 10-03/B); and CCAMLR, System of Inspection (adopted CCAMLR-VII, as amended to CCAMLR-XXVI) 2017 (formally only apply CPC vessels). NEAFC, Scheme (2016) (n 104) art. 40(1) (inspection and report, which requires catch logbook examination, art. 27[1] and Annex XVI). CCSBT, Res. Port Inspection (n 112) para. 17-18; ICCAT, Rec. 12-07 (n 89) paras. 17-18, inspectors ‘may’ examine the vessel, equipment, documents and cargo, or question “master, crew members, or any other person on the vessel being inspected” but must cross-check the advance notification with tuna aboard for landing or transshipment.

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may also determine how inspections are conducted. Standardised principles, namely fair, transparent, expeditious and non-discriminatory inspections, which do not constitute harassment and do not interfere with the master's ability to communicate with the flag state authorities are well represented.¹⁶¹ CCAMLR implements this as a binding commitment, whereby inspections "shall be conducted within 48 hours".¹⁶²

5.3.2.6. Denial of the use(s) of port

To date, regional practice distinguishes the denial of landing and transshipment from general denial of port privileges. General denial of port privileges may nonetheless result from previously discussed measures, such as denial of entry whereby all port uses thereafter are a violation.¹⁶³ When an exceptional authorisation to enter is granted it is exclusively for that purpose. Explicitly or implicitly, services beyond those necessary from a humanitarian perspective are prohibited.¹⁶⁴ The same is true of designating ports, which conversely prohibits entry to all non-designated ports, or the use of defined privileges within non-designated ports (e.g. landing ports).¹⁶⁵

Denying use of port may apply as a temporary precautionary measure to complement other PSMs. Under NEAFC and ICCAT, landing or transshipment is prohibited until inspections are undertaken.¹⁶⁶ Alternatively, denial of landing and transshipment may result from inspection. Vessels carrying toothfish (*dissostichus spp.*) must be inspected within CCAMLR. If evidence suggests a vessel has been engaged in fishing in contravention of CCAMLR CMMs (regardless

¹⁶¹ PSMA (n 87) arts. 13(2)(f),(h)-(i); NEAFC, Scheme (2016) (n 104) arts. 25(2); 26(6), 40(1) (non-CNCP vessels); GFCM, Rec. GFCM/40/2016/1 (n 80) para. 30(f)-(i). RFMO/A variations include inspections with minimum interference or inconvenience, and as far as practical the avoidance of catch quality degradation; SEAFO, System (2015) (n 58) art. 24(5); CCSBT, Res. Port Inspection (n 112) para. 18; ICCAT, Rec. 12-07 (n 89) para. 18; CCAMLR, CM 10-07 (n 140) para. 5 (cross-referencing, 10-03, para. 5), expeditious inspection without undue burden on vessel or crew. *Contra*, no reference; ICCAT, Rec. 98-11 (n 139); NAFO, CEMs (2016) (n 77), although general provision on fair and transparent application, art. 48(3)(b).

¹⁶² CCAMLR, CM 10-03 (n 118) para. 5.

¹⁶³ PSMA (n 87) art. 9(6) prohibit services when a vessel normally would have been denied entry.

¹⁶⁴ SEAFO, System (2015) (n 58) art. 22(6) (explicit); CCAMLR, CM 10-03 (n 118) para. 6 (implicit); GFCM, Rec. GFCM/40/2016/1 (n 80) para. 42; CCSBT, Resolution on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities For Southern Bluefin Tuna (SBT) 2014 para. 18(d).

¹⁶⁵ GFCM, Rec. GFCM/40/2016/4 (n 107) para. 20.

¹⁶⁶ NEAFC, Scheme (2016) (n 104) art. 40(1); ICCAT, Rec. 98-11 (n 139) para. 2.

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of any territorial/extraterritorial nexus, 2.5), then landing or transshipment is prohibited.¹⁶⁷ Resolution 32/XXIX reemphasises this duty,¹⁶⁸ and seeks non-CNCPs to implement similar inspection measures that arguably include landing denials as an integral part.¹⁶⁹

ICCAT takes a different approach. If inspection of a non-CNCP vessel reveals species onboard subject to ICCAT CMMs, then landing and transshipment of all fish is prohibited in all CPC ports. The vessel will have to establish “that the fish were caught outside the Convention Area or in compliance with” ICCAT CMMs to gain access to landing and transshipment privileges.¹⁷⁰

Further practice demonstrates an intent to address IUU fishing throughout the convention areas, regardless of the territorial or extraterritorial nature of fishing conduct examined. NAFO CPCs shall “prohibit landings of Greenland halibut from non-Contracting Party vessels that have engaged in fishing activities in the Regulatory Area”.¹⁷¹ IOTC prohibits non-CNCP vessel landing or transshipment, if the catch was taken in a manner that undermines the effectiveness of applicable IOTC CMMs.¹⁷² Finally, GFCM prohibits landing, transshipment and processing of fish by non-CNCP vessels that engaged in fishing within the GFCM area.¹⁷³ In a departure from *PSMA*, other port services, such as refuelling and resupplying, are only denied when “appropriate”,¹⁷⁴ or when inspections reveal reasonable evidence of IUU fishing related conduct.¹⁷⁵

In contrast, NEAFC does not distinguish in the denial of port services. All port services, including refuelling and resupplying, are denied whenever a non-CNCP vessel enters port and a condition of article 41 applies, which looks to potentially extraterritorial conduct.¹⁷⁶ Any

¹⁶⁷ CCAMLR, CM 10-03 (n 118) para. 7 (or “other monitoring, control, surveillance or enforcement action of equivalent or greater severity”).

¹⁶⁸ CCAMLR, Res. 32/XXIX (n 60) para. 5 (CDS and harvested consistently with CCAMLR, 10-05).

¹⁶⁹ *ibid* para. 4.

¹⁷⁰ ICCAT, Rec. 98-11 (n 139) para. 3.

¹⁷¹ NAFO, CEMs (2016) (n 77) art. 10(7).

¹⁷² IOTC, Res. 05/03 (n 56) para. 4.

¹⁷³ GFCM, Rec. GFCM/40/2016/1 (n 80) para. 19(a).

¹⁷⁴ *ibid* para. 22.

¹⁷⁵ *ibid* para. 36(b), ‘belief’ allowing further discretion.

¹⁷⁶ NEAFC, Scheme (2016) (n 104) art. 41(1). Prohibitions apply when (1) inspections reveal NEAFC governed species aboard (unless the master demonstrates compliance or the fish were taken outside NEAFC’s area), (2) if involved in transshipment, the donor vessel(s) flag state(s) fail to provide art. 23 confirmation, (3) an uncooperative master (4) clear evidence the fish result from illegal fishing within another CPC’s waters, or (5)

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future SEAFO CMM on non-CNCP vessels should follow a similar framework as the *SEAFO Convention* dictates that the “manner” in which the catch is taken should be the basis for prohibition.¹⁷⁷

Alternatively, the legal standing of the vessel or catch at the date of port entry may trigger denial. Within CCAMLR, failure to adequately identify the origin of the catch triggers denial of landing and transshipment.¹⁷⁸ Similarly, vessels not on an authorised vessel list (5.3.3.2) or on an IUU vessel list (5.3.3.1) will frequently not be authorised to, and prohibited from, landing at port.¹⁷⁹ GFCM extends denial from listed IUU vessels, to those reasonably suspected as not having valid and applicable authorisation.¹⁸⁰

Finally, species-specific CMMs apply to CPCs as flag states but are not explicitly limited to CPC vessels. IATTC CPCs shall “prohibit retaining onboard, transshipping, *landing*, storing, selling, or offering for sale any part or whole carcass” of a variety of sharks and rays caught in the IATTC area.¹⁸¹ To promote the effectiveness of CMMs, port states should equally prohibit landings.¹⁸² One could extend this argumentation to CMMs on shark fin fishing, where similar prohibitions apply under IOTC, IATTC and NAFO for a fin “harvested in contravention” (e.g. discarding part of the shark carcass at sea).¹⁸³

sufficient proof of engagement in IUU fishing, or support activities, within NEAFC area. SEAFO, System (2015) (n 58) arts. 22(6), 23(1) (CPC vessels).

¹⁷⁷ SEAFO Convention (n 18) art. 15(3).

¹⁷⁸ CCAMLR, CM 10-07 (n 140) para. 22(iv)(a). Note, (5.3.5).

¹⁷⁹ IATTC, Res. C-11-05 (n 89) paras. 1 (unauthorised), 6(a) (prohibited); ICCAT, Rec. 13-13 (n 89) paras. 1, (unauthorized), 7(a) (prohibited), 7(b)(ii) (Statistical Document Programs documentary requirement); applies mutatis mutandis to authorised vessel lists established under ICCAT, Rec. 13-04 (n 89) paras. 1-2; and ICCAT, Rec. 14-04 (n 62) paras. 51-53.

¹⁸⁰ GFCM, Rec. GFCM/40/2016/1 (n 80) paras. 20-21.

¹⁸¹ Contrasting, IATTC, Resolution C-11-10 On the Conservation of Oceanic Whitetip Sharks Caught in Association with Fisheries in the Antigua Convention Area 2011 paras. 1 (CPCs prohibit landing), 2 (explicitly refers to flag states). Similarly, IATTC, Resolution C-16-06 Conservation Measures for Shark Species, with Special Emphasis on the Silky Shark (*Carcharhinus Falciformis*), for the Years 2017, 2018, and 2019 2016 para. 1; IATTC, Resolution C-15-04 On the Conservation of Mobulid Rays Caught in Association with Fisheries in the IATTC Convention Area 2015 paras. 1-2.

¹⁸² An easier argument when flag state and landing obligations are distinguished, ICCAT, Recommendation 13-02 Conservation of North Atlantic Swordfish 2013 para. 10, prohibit ‘taking by its vessels’ and ‘landing and sale in its jurisdiction’.

¹⁸³ IOTC, Resolution 05/05 Concerning the conservation of sharks caught in association with fisheries managed by IOTC 2005 para. 6; IATTC, Resolution C-05-03 On the Conservation of Sharks Caught in Association with Fisheries in the Eastern Pacific Ocean 2005 para. 6; NAFO, CEMs (2016) (n 77) art. 12(4).

5.3.2.7. *Denial of exit*

Within the GFCM area, minimum standards for Vessels Monitoring Systems (VMS) apply for CPC flagged vessels.¹⁸⁴ These “[f]ishing vessels shall not be allowed by the Flag State/the Port State to commence a further fishing trip in the GFCM Area without having defective devices(s) repaired or replaced, unless authorized to leave by the competent Flag State/the Port State authority”.¹⁸⁵ A number of other RFMO/As similarly require that upon entry into port, CPC vessels with defective VMS shall not be authorized to commence a fishing trip until the VMS is repaired or replaced.¹⁸⁶ Unlike entry conditions, exit conditions are limited to vessel conditions and not conduct. Exit conditions do not fall within the *domaine réservé* exception, given the protective rationales are inapplicable (2.5.2). Hence, a state jurisdiction nexus must be found, which in this context is the territorial nature of the vessel’s VMS in-port (if ever expanded to non-CNCP vessels) (2.3.1.1).

5.3.2.8. *Sub-conclusions*

PSMs applied to an area of competence of an RFMO/A reflect the regional ability to apply different standards fitting local needs and capacity (5.3.2.2,¹⁸⁷ 5.3.2.3, 5.3.2.5¹⁸⁸). They also mirror the necessity of a global duty to close accessible ports in non-bound port states that would otherwise undermine regional CMMs (3.2.2.3.4). Global minimum standards for PSMs have yet to be fully implemented, but practice demonstrates that rights now contained within the *PSMA* are within the limits of PSJ. As practice is lagging behind *PSMA* standards, not every *PSMA* provision can be within the general due diligence port state duty (3.2.2.3.1, 5.3.1).

By comparison, denial of the use of port services is more limited in practice than denial of landing or transshipment. It can however be expected to gain greater traction following

¹⁸⁴ GFCM, Recommendation GFCM/33/2009/7 concerning minimum standards for the establishment of a Vessel Monitoring System (VMS) in the GFCM area 2009 paras. 2-3.

¹⁸⁵ *ibid* para. 8.

¹⁸⁶ Holly Koehler, ‘A Survey of RFMO Vessel Monitoring Systems and Set of Best Practices’ (IOTC-2016-CoC13-Inf03 2016) ISSF Technical Report 2016–02 17; IATTC, Resolution C-14-02 (Amended) on the Establishment of a Vessel Monitoring System (VMS) 2014 para 4 although, in contrast, authorisation is not explicitly of the port state.

¹⁸⁷ *PSMA* (n 87) art. 7(2).

¹⁸⁸ *ibid* art. 12.

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PSMA's entry into force.¹⁸⁹ At the same time, some regional practice may be inconsistent with the port state's duty under international law if equivalent measures are not applied in CPC ports falling outside the RFMO/A's CMM on PSMs. The feature of a port which should define whether regional PSMs apply is whether foreign vessels utilise a port in connection with fishing or fishing related activities under the jurisdiction of the RFMO/A.

The indefinite closure of non-designated ports (5.3.2.2), together with the conditioning and potential denial of access to designated ports (5.3.2.3.-5.3.2.2.6) confirms the lack of any entry right (4.2.2), bar the exceptional case of *force majeure*/distress (4.2.3, 4.3.2.6). Application of this exception provides access, but not immunity from inspections and, in contrast to the global level,¹⁹⁰ can in rare cases result in CPCs not being discharged from their inspection duties (5.3.2.5).¹⁹¹

Inspections are often limited to voluntary entry, but applicability to *force majeure* entry demonstrates that within fisheries this is a matter of comity (4.2.3.). The use of flag in the risk-assessment process is not discriminatory in practice because the same standards (CMMs) remain applicable (4.4.2). Nor is it an abuse of right given the lack of injury (4.4.3). Other PSMs and any resulting denial will inhibit non-CNCP fishing within the convention area, but not violate the enjoyment of high seas freedoms (4.3.1).

Finally, port entry or service conditions are prescribed wholly on the basis of extraterritorial conduct.¹⁹² A lack of guiding principles from the law of state jurisdiction (2.3) implies that the *domaine réservé*-based jurisdiction exception should be adopted to explain the discretion in prescribing these conditions (2.5). In keeping with that theory, the PSMs applicable besides the conditions placed on port privileges is limited to the law of state jurisdiction. Thus, inspection is prescribed for vessels in-port, and enforced in-port. The fact that inspection may be triggered by conduct in another RFMO/A region entirely, or the previous denial by foreign ports beyond the RFMO/A's CPCs (SPRFMO), is immaterial to the territorial nature of

¹⁸⁹ *ibid* art. 11.

¹⁹⁰ *ibid* art. 10.

¹⁹¹ CCAMLR, CM 10-03 (n 118) para. 6.

¹⁹² Following, vessel definition as including "used for" or "intended to be used for" fishing (related) activities, wherever it occurs, PSMA (n 87) art. 1(J).

prescription. The same can be said of the inspection's objective to reveal previous extraterritorial conduct. This difference in prescriptive basis will influence enforcement. Failure to supply documentation for prior notification will result in denial of entry or mandatory inspection (5.3.2.3). Failure to co-operate with in-port inspections by withholding documentation may be subject to more onerous measures (ch 6).

5.3.3. PSMs applicable to targeted vessels

PSMs may also be prescribed over classifications of vessels.

5.3.3.1. RFMO/A IUU vessel lists

PSMs for specific vessels, some mandatory, are taken when those vessels occur on an RFMO/As IUU vessel list. Listing begins with identifying vessels presumed to be undermining the effectiveness of CMMs. In general, this occurs when evidence of defined conduct in the convention area is presented. 'Fishing activities' that undermine an RFMO/A or its CMMs encompass any conduct the CPCs deem unwanted.¹⁹³ More specific examples include: harvesting without authorisation by a CPC or by a vessel not positively listed (5.3.3.2);¹⁹⁴ using prohibited gear;¹⁹⁵ and participating in transshipment or joint fishing operations with a listed vessel, including support or re-supply operations.¹⁹⁶ Indeed, for transshipment, identification

¹⁹³ CCAMLR, CM 10-07 (n 140) para. 9(vi); ICCAT, Recommendation 11-18 Further Amending Recommendation 09-10 Establishing a List of Vessels Presumed to Have Carried out Illegal, Unreported and Unregulated Fishing Activities in the ICCAT Convention Area 2011 para. 1(j); GFCM, Rec. GFCM/33/2009/8 (n 98) paras. 1(vi), 2; IATTC, Resolution C-15-01 Amendment to Resolution C-05-07 on Establishing a List of Vessels Presumed to Have Carried out Illegal, Unreported and Unregulated Fishing Activities in the Eastern Pacific Ocean 2015 para. 3(i); IOTC, Resolution 11/03 Establishing a list of vessels presumed to have carried out illegal, unreported and unregulated fishing in the IOTC area of competence 2011 para. 1(j); CCSBT, Res. IUU Vessel List (n 164) para. 3(f); SPRFMO, CMM 4.04 Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing activities in the SPRFMO Convention Area 20161(i); IDCP, Resolution A-04-07 To Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the Agreement Area 2004 para. 1(c)-(d). WCPFC, CMM 2010-06 To Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the WCPO 2010 para. 3(i); NEAFC, Scheme (2016) (n 104) art. 37(2) (non-CNCP vessels sighted or otherwise identified as engaged in fishing activity within the NEAFC area).

¹⁹⁴ WCPFC, CMM 2010-06 (n 193) para. 3(a); CCSBT, Res. IUU Vessel List (n 164) para. 3(a); IOTC, Res. 11/03 (n 193) para. 1(a); ICCAT, Rec. 11-18 (n 193) para. 1(a); SPRFMO, CMM 4.04 (n 193) para. 1(a); SEAFO, System (2015) (n 58) art. 28(4)(a); IATTC, Res. C-15-01 (n 193) para. 3(a); IDCP, Res. A-04-07 (n 193) para. 1(a).

¹⁹⁵ WCPFC, CMM 2010-06 (n 193) para. 3(f); CCSBT, Res. IUU Vessel List (n 164) para. 3(c); ICCAT, Rec. 11-18 (n 193) para. 1(f); SPRFMO, CMM 4.04 (n 193) para. 1(f).

¹⁹⁶ WCPFC, CMM 2010-06 (n 193) para. 3(g); NEAFC, Scheme (2016) (n 104) art. 37(3) (non-CNCP vessel identified as engaged in transshipment activities with another identified or sighted non-CNCP vessel); CCSBT, Res. IUU

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can result from conduct undertaken outside the RFMO/As regulatory area. Involvement of non-CNCP vessels in NAFO “transshipment with another NCP vessel sighted or identified as engaged in fishing activities inside or outside the Regulatory Area” will lead to a presumption of IUU fishing.¹⁹⁷

These examples show that extraterritorial conduct can result in the listing of foreign vessels and the PSMs that follow. IUU presumptions may extend to other extraterritorial conduct, e.g. non-CNCP vessels that refuse boarding of officials within the NEAFC convention area following suspected fishing activities.¹⁹⁸ Alternatively, identification may arise out of facts with minimal connection to the RFMO/A area, such as ownership or control of a vessel by an operator with a pre-existing vessel listing.¹⁹⁹

Port states are not mere recipients of IUU vessel lists but may contribute to vessel identification. Non-cooperation by the vessel’s master during port inspections will result in a presumption of IUU activities,²⁰⁰ and denial of the use of port services.²⁰¹ Thus, port states provide information for presumptions and provisional listing on the basis of their inspections,²⁰² vessels having been refused access or services,²⁰³ vessels visiting port without valid catch documentation,²⁰⁴ and any other information.²⁰⁵ Finally, listing can result from the flag state’s conduct, such as failing to provide information requested by port states.²⁰⁶

A final note - before moving on to the PSMs applied - is that RFMO/As work together in their listing processes. Therefore, a vessel’s conduct may lead to its being added to IUU vessel lists

Vessel List (n 164) para. 3(d); ICCAT, Rec. 11-18 (n 193) para. 1(g); SPRFMO, CMM 4.04 (n 193) para. 1(g); CCAMLR, CM 10-07 (n 140) para. 9; IDCP, Res. A-04-07 (n 193) para. 1(e).

¹⁹⁷ NAFO, CEMs (2016) (n 77) art. 49(1)(b), contrasting with ‘fishing activities’ which should occur within the area, art. 49(1)(a).

¹⁹⁸ NEAFC, Scheme (2016) (n 104) art. 38(3), including master’s cooperation obligations.

¹⁹⁹ WCPFC, CMM 2010-06 (n 193) para. 3(j); IATTC, Res. C-15-01 (n 193) para. 3(j); IDCP, Res. A-04-07 (n 193) para. 1(g).

²⁰⁰ NEAFC, Scheme (2016) (n 104) art. 40(2).

²⁰¹ *ibid.* art. 41(c), broad and non-exhaustive definition.

²⁰² *ibid.* art. 44(1) (cross-referencing port inspections).

²⁰³ CCAMLR, CM 10-07 (n 140) para. 9.

²⁰⁴ *ibid.* para. 9.

²⁰⁵ IOTC, Res. 11/03 (n 193) para. 2(d); SPRFMO, CMM 4.04 (n 193) para. 2; CCSBT, Res. IUU Vessel List (n 164) para. 5; IATTC, Res. C-15-01 (n 193) para. 2; SEAFO, System (2015) (n 58) art. 28(3).

²⁰⁶ NEAFC, Scheme (2016) (n 104) art. 44(1), cross-referencing failure of a flag state to provide information when Non-CNCP vessels attempt to use a CPC port (arts. 41[1][b], 23).

of multiple RFMO/As.²⁰⁷ In general, the RFMO/A decides when to add a vessel to its IUU vessel list on a ‘case by case basis’,²⁰⁸ usually making use of a cross-listing process unless a CPC objects.²⁰⁹

NEAFC goes further for non-CNCP vessels, adding vessels that are confirmed by CCAMLR, NAFO and SEAFO as engaged in IUU fishing to the IUU ‘B-list’, which already entails PSMs.²¹⁰ SEAFO leaves discretion with the port state. Inclusion on a ‘relevant’ list is evidence which may trigger port state responsibilities and for vessels the denial of entry.²¹¹

Significant PSMs and responsibilities are triggered when a vessel is listed. First and foremost, many RFMO/As provide that listed vessels shall be prohibited entry, except in the case of *force majeure/emergency*, or for the purposes of appropriate enforcement action. This can be seen within ICCAT,²¹² SEAFO,²¹³ SPRFMO,²¹⁴ CCAMLR,²¹⁵ CCSBT,²¹⁶ GFCM,²¹⁷ IATTC,²¹⁸ NEAFC (B-list)²¹⁹ and NAFO.²²⁰ The only RFMO/A that elaborates upon what appropriate enforcement action could be is CCAMLR. If the catch’s origin cannot be adequately verified, the catch will be detained, or landing and transshipment of the catch refused.²²¹ If it is found to be taken in contravention of CCAMLR CMMs, *where possible*, the catch is confiscated.²²² Establishing a jurisdictional link will, in part, define “where possible”. The previously discussed

²⁰⁷ E.g. transmission of list to other RFMO/As; WCPFC, CMM 2010-06 (n 193) para. 23; SEAFO, System (2015) (n 58) art. 28(18); NEAFC, Scheme (2016) (n 104) art. 44(5); CCSBT, Res. IUU Vessel List (n 164) para. 19.

²⁰⁸ CCSBT, Res. IUU Vessel List (n 164) para. 20; ICCAT, Rec. 11-18 (n 193) para. 11.

²⁰⁹ ICCAT, Rec. 11-18 (n 193) para. 11; ICCAT, Resolution 14-11 Establishing guidelines for the cross-listing of vessels contained on IUU vessel lists of other tuna RFMOs on the ICCAT IUU vessel list in accordance with Recommendation 11-18 2014; CCSBT, Res. IUU Vessel List (n 164) para. 20; IATTC, Res. C-15-01 (n 193) para. 18; SEAFO, System (2015) (n 58) art. 28(19); NAFO, CEMs (2016) (n 77) arts. 49(1)(c) (IUU presumption if NEAFC listed), 52(3)(j) (listing process); GFCM, Rec. GFCM/33/2009/8 (n 98) para. 16.

²¹⁰ NEAFC, Scheme (2016) (n 104) art. 44(6), which shall be prohibited port entry (45[2][a]) and imports of fish coming from such vessels (45[2][e]).

²¹¹ SEAFO, System (2015) (n 58) art. 22(4).

²¹² ICCAT, Rec. 11-18 (n 193) para. 9.

²¹³ SEAFO, System (2015) (n 58) art. 22(4).

²¹⁴ SPRFMO, CMM 4.04 (n 193) para. 13; SPRFMO, CMM 2.07 (n 117) para. 17.

²¹⁵ CCAMLR, CM 10-07 (n 140) para. 22(iii).

²¹⁶ CCSBT, Res. IUU Vessel List (n 164) para. 18(d).

²¹⁷ GFCM, Rec. GFCM/33/2009/8 (n 98) para. 14(b).

²¹⁸ IATTC, Res. C-15-01 (n 193) para. 16(c).

²¹⁹ NEAFC, Scheme (2016) (n 104) art. 45(2)(a), ‘B’ list vessels.

²²⁰ NAFO, CEMs (2016) (n 77) art. 54(c).

²²¹ CCAMLR, CM 10-07 (n 140) paras. 22(iii), 22(iv)(a).

²²² *ibid* para. 22(iv)(b).

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written declaration would thereby be a false declaration submitted in-port, which could provide a territorial nexus.

Other RFMO/As leave open “enforcement action” but the implementation of PSMs as “counter” measures suggests a responsive rather than a deterrent or preventative role via punitive measures. Flag states are turned to for ‘further’ measures.²²³ Nonetheless, for IUU listed vessels otherwise found in port, inspection procedures apply. In the case of ICCAT, such vessels are prioritised for inspection,²²⁴ while CCAMLR,²²⁵ NEAFC (A-list vessels)²²⁶ and WCPFC (no entry denial requirement),²²⁷ subject these vessels to mandatory inspection.

Turning to the denial of use of port by IUU listed vessels, this occurs more often in RFMO/As’ practice than entry denial and inspection requirements.²²⁸ Refusal of authorisation by port states may cover landing or transshipment within CPC ports,²²⁹ or also refuelling and re-supply,²³⁰ or even engaging in any other “commercial transactions”.²³¹ Beyond general non-authorisation for *all* landings and transshipments, the import, landing, transshipment and other “commercial transactions” regarding species covered by the RFMO/A shall be prohibited in line with the *IPOA-IUU*, paras. 56 and 66.²³² Indeed this prohibition may follow the catch

²²³ Countermeasures, ICCAT, Rec. 11-18 (n 193) preamble; CCSBT, Res. IUU Vessel List (n 164) preamble; IOTC, Res. 11/03 (n 193) preamble; measures, WCPFC, CMM 2010-06 (n 193) preamble; IATTC, Res. C-15-01 (n 193) preamble. Not countermeasures in the normal international law sense (3.2).

²²⁴ ICCAT, Rec. 11-18 (n 193) para. 9.

²²⁵ CCAMLR, CM 10-07 (n 140) para. 22(iii), regardless of rationale for entry.

²²⁶ NEAFC, Scheme (2016) (n 104) art. 45(1) IUU ‘A’ list vessels inspection, in contrast to ‘B’ list (above) which first and foremost are denied entry.

²²⁷ WCPFC, CMM 2010-06 (n 193) para. 22(b); WCPFC, CMM 2010-02 For the Eastern High-Seas Pocket Special Management Area 2010 para. 7, infringement dealt with in accordance with 2010-06.

²²⁸ GFCM, Rec. GFCM/40/2016/1 (n 80) para. 20 denial of services; despite, GFCM, Rec. GFCM/33/2009/8 (n 98) para. 14(b) IUU listed vessels denied entry.

²²⁹ IDCP, Res. A-04-07 (n 193) para. 9(b); SPRFMO, CMM 4.04 (n 193) para. 13; IATTC, Res. C-15-01 (n 193) para. 16(b).

²³⁰ NEAFC, Scheme (2016) (n 104) arts. 45(1)(b)-45(1)(d), 45(2) (both lists); WCPFC, CMM 2010-06 (n 193) para. 22(b); WCPFC, CMM 2010-02 (n 227) para. 7. Note differing approach of prohibiting the supply of provisions, fuel or other services *to such vessel*, NAFO, CEMs (2016) (n 77) art. 54(b).

²³¹ ICCAT, Rec. 11-18 (n 193) para. 9; IOTC, Res. 11/03 (n 193) para. 16(b); CCAMLR, CM 10-07 (n 140) para. 22(iv)(b)(ii); CCSBT, Res. IUU Vessel List (n 164) para. 18(c); GFCM, Rec. GFCM/33/2009/8 (n 98) para. 14(a); SEAFO, System (2015) (n 58) art. 28(17)(b).

²³² IOTC, Res. 11/03 (n 193) para. 16(e); ICCAT, Rec. 11-18 (n 193) para. 9; SEAFO, System (2015) (n 58) art. 28(17)(e); SPRFMO, CMM 4.04 (n 193) para. 13; IDCP, Res. A-04-07 (n 193)9(e); CCAMLR, CM 10-07 (n 140) para. 22(iv)(a)-(b); CCSBT, Res. IUU Vessel List (n 164) para. 18(g); WCPFC, CMM 2010-06 (n 193) para. 22(e); GFCM, Rec. GFCM/33/2009/8 (n 98) para. 14(d); IATTC, Res. C-15-01 (n 193) para. 16(f); NEAFC, Scheme (2016) (n 104) art. 45(2)(e).

beyond the vessel, with NAFO “prohibiting landing and importation of fish from onboard or traceable to such vessel”.²³³

5.3.3.2. RFMO/A positive vessel lists

IUU listing procedures are not watertight. Vessels may fall through the cracks, go undetected or adapt their identity (e.g. reflagging/renaming) to avoid eventual PSMs. An alternative tool is to build an RFMO/A list of vessels authorised to undertake fishing activity within the convention area. Vessels not listed are not authorised to carry out fisheries activities, or, importantly for port states, not allowed to land the RFMO/A’s species.²³⁴ Related conduct can also be implicitly controlled by port states. For example, allowing transhipment for listed vessels at sea is subject to documentary requirements for importation,²³⁵ or if transhipment occurs in-port, is limited to listed vessels.²³⁶

Vessels not listed are “deemed not to be authorised to fish for, retain on board, tranship, transport, transfer, process or land” certain Bluefin tuna (ICCAT, CCSBT),²³⁷ tropical tuna (ICCAT),²³⁸ tuna or tuna-like species (ICCAT, IATTC, IOTC),²³⁹ swordfish (ICCAT),²⁴⁰ redfish

²³³ NAFO, CEMs (2016) (n 77) art. 54(h).

²³⁴ Although sometimes without reference to PSMs, *ibid* art. 25(2); NEAFC, Recommendation 15:2016 On the conservation and management of North-East Atlantic Mackerel in NEAFC Regulatory Area in 2016 2016 para. 3; SPRFMO, CMM 4.05 For the establishment of the Commission Record of Vessels authorised to fish in the Convention Area 2016; built upon with discretionary PSMs, SPRFMO, CMM 4.01 For *Trachurus murphyi* 2016 para. 21.

²³⁵ ICCAT, Recommendation 12-06 On a Programme for Transhipment 2012 paras. 21(c), 23 (transhipment declaration and possibly statistical documentation for landings or import), 8-9 (non-listed vessels not authorised to tranship at-sea); CCSBT, Res. Transhipment LSTLV (n 78) paras. 4 (not-listed, not authorised), 7-8 (listed vessels transhipping in-port required to have operational VMS).

²³⁶ SPRFMO, CMM 3.05 (n 59) para. 1 (in-port transhipment only between listed vessels), preamble (port state duty to prohibit landings/transhipment that undermine CMMs - i.e. including this one).

²³⁷ ICCAT, Rec. 14-04 (n 62) paras. 51, 53 (conditions of 13-13 apply); CCSBT, Res. Authorised Vessels (n 157) para. 2.

²³⁸ ICCAT, Recommendation 14-01 On a Multi-Annual Conservation and Management Program for Tropical Tunas 2014 para. 4.

²³⁹ ICCAT, Rec. 13-13 (n 89) para. 1; IATTC, Res. C-11-05 (n 89) paras. 1 (not-listed, not authorised), 2 (only list CPC flagged vessels). IOTC goes further, covering support vessels and “support [of] any fishing activity” in the IOTC area, IOTC, Resolution 15/04 Concerning the IOTC record of vessels authorised to operate in the IOTC area of competence 2015 para. 1.

²⁴⁰ ICCAT, Rec. 13-04 (n 89) paras. 1-2, 5.

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(NEAFC),²⁴¹ Chilean jack mackerel (SPRFMO),²⁴² highly migratory stocks (WCPFC),²⁴³ and convention stocks more generally (SEAFO, GFCM).²⁴⁴ The majority of RFMO/As will not list non-CNCP vessels, which are therefore, in the eyes of CPCs, not authorised to conduct fisheries. Given that the requirements for authorisation may only be binding upon CPC vessels, CPCs are further requested by the RFMO/A to prohibit the aforementioned conduct, including landings, by vessels not listed.²⁴⁵

Finally, like IUU vessel lists, RFMO/As promote coordination and implementation amongst port states. Some require that information upon fisheries activities by unauthorised vessels be shared with the regional commission or other CPCs, hoping they also take action (including PSMs).²⁴⁶ Similar schemes are promoted globally to coordinate RFMO/As so as to avoid IUU fishing leaking to less regulated waters.²⁴⁷ Looking to the future, SPRFMO is committed to review and take into account progress made on the *FAO Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels*.²⁴⁸ This is a global information system to

²⁴¹ NEAFC, Recommendation 1:2016 On Conservation and Management Measures for Deep and Shallow Pelagic Redfish in the Irminger Sea and adjacent waters in the NEAFC Convention Area for 2016 2015 para. 6(a).

²⁴² SPRFMO, CMM 4.01 (n 234) paras. 2 (only listed vessels), 21 (port access and verification framework necessary).

²⁴³ WCPFC, CMM 2013-10 WCPFC Record of Fishing Vessels and Authorization to Fish 2013 para. 17 (not authorised, including flag state prohibition - but see, para. 18 PSM).

²⁴⁴ SEAFO, System (2015) (n 58) art. 4(6); GFCM, Recommendation GFCM/33/2009/6 concerning the establishment of a GFCM record of vessels over 15 metres authorized to operate in the GFCM area amending the recommendation GFCM/29/2005/2 2009 para. 1.

²⁴⁵ IOTC, Res. 15/04 (n 239) para. 9; CCSBT, Res. Authorised Vessels (n 157) para. 9; ICCAT, Rec. 13-13 (n 89) para. 7; IATTC, Res. C-11-05 (n 89) para. 6; ICCAT, Rec. 14-01 (n 238) para. 9; ICCAT, Rec. 13-04 (n 89) para. 8; WCPFC, CMM 2013-10 (n 243) para. 18; ICCAT, Rec. 13-02 (n 182) paras. 9-10; GFCM, Rec. GFCM/33/2009/6 (n 244) para. 7; SEAFO, System (2015) (n 58) art. 4(6) (prohibit 'the' vessels not registered, in contrast earlier provisions directed at flag state, 'their' or 'its vessels', art. 4[4]).

²⁴⁶ ICCAT, Rec. 13-13 (n 89) paras. 8-10 communication within ICCAT and outside to address suspected activity of unlisted vessels; WCPFC, CMM 2013-10 (n 243) para. 22 inform all CPCs for appropriate action.

²⁴⁷ Cooperation and similar records; ICCAT, Rec. 13-13 (n 89) para. 10; CCSBT, Res. Authorised Vessels (n 157) para. 12; IATTC, Res. C-11-05 (n 89) para. 9; WCPFC, CMM 2013-10 (n 243) para. 23; flag state consistency between GFCM and ICCAT record of vessels; GFCM, Rec. GFCM/33/2009/6 (n 244) para. 5(g). The five tuna RFMO/As recognised the benefits of a Consolidated List of Authorized Vessels, e.g. WCPFC, CMM 2013-04 For WCPFC Implementation of a Unique Vessel Identifier (UVI) 2013 2.

²⁴⁸ SPRFMO, CMM 4.05 (n 234) para. 13. 'Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels' (FAO) <<http://www.fao.org/global-record/information-system/en/>>.

which port states may contribute data, but that they may also make use of in determining who will be denied port privileges.²⁴⁹

5.3.3.3. *Non-CNCP flagged vessels presumed to be undermining RFMO/A CMMs*

Some non-CNCP vessels are subject to PSMs when extraterritorial gives rise to the presumption of IUU fishing. The focus is upon explicit PSMs, but PSMs can also be implicitly included in general provisions for deterring the activities of non-CNCP vessels that undermine the effectiveness of the RFMO/As CMMs.²⁵⁰

Firstly, a non-CNCP vessel that is sighted within the convention area and appears to be fishing contrary to CMMs therein, will be presumed to be undermining CMMs. The threshold for sighting is rather soft, being defined as “may” be fishing contrary to ICCAT measures,²⁵¹ or “grounds for believing” it is fishing contrary to IOTC CMMs.²⁵² A non-CNCP vessel sighted during any “fishing activities” in the CCAMLR convention area, or previously denied port access, landing or transshipment, is presumed to be undermining CCAMLR’s CMMs.²⁵³ For non-CNCP vessels involved in transshipment, this consideration of extraterritorial conduct extends beyond the convention area, to “any transshipment activities involving a sighted Non-Contracting Party vessel, *inside or outside the Convention Area*, [whereby] the presumption of undermining the effectiveness of CCAMLR conservation measures applies to any other non-Contracting Party vessel which has engaged in such activities with that vessel”.²⁵⁴

This is not an exercise of PSJ, but the presumption of undermining CMMs has knock-on PSJ effects beyond submission for listing (5.3.3.1). In IOTC it was said landing and transshipment

²⁴⁹ FAO, ‘The Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels (Global Record)’ (2016) Committee On Fisheries (Thirty-Second Session, Rome, 11-15 July 2016) COFI/2016/Inf.12 para 1.

²⁵⁰ E.g. AIDCP (n 22) art. xxII (deter non-CNCP vessels); no PSMs within the AIDP, however the preceding Declaration of Panama (Governments of Belize, Columbia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, United States of America, Vanuatu and Venezuela), signed 4 October 1995, 1995 PITSE 7 Appendix V(B) included for non-CNCPs “Restriction of access to ports and port servicing facilitates for tuna-fishing vessels of the non-party” – albeit with a requirement for further elaboration; SIOFA Agreement (n 19) art. 17 (deter non-CNCP vessels), but without explicit reference to art. 12 port state duty.

²⁵¹ ICCAT, Rec. 98-11 (n 139) para. 1 (cross-referencing 97-11).

²⁵² IOTC, Resolution 01/03 Establishing a scheme to promote compliance by Non-Contracting Party vessels with Resolutions established by IOTC 2001 paras. 1-2.

²⁵³ CCAMLR, CM 10-07 (n 140) para. 4.

²⁵⁴ (Emphasis added) *ibid* para. 4.

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would be denied if it was demonstrated that the catch was caught in the area and undermining CMMs.²⁵⁵ However, when the presumption applies, landings and transshipment of all fish are prohibited until an inspection occurs.²⁵⁶ Within IOTC and CCAMLR, when the presumption applies, the vessels shall be inspected (not just prioritised).²⁵⁷ If inspections reveal species subject to CMMs the burden of proof switches – with PSMs applied “unless the vessel establishes that the fish were caught outside the IOTC Area or in compliance with the relevant IOTC CMMs and requirements under the Agreement”.²⁵⁸ Vessels sighted as “engaged in, or supporting, IUU fishing within the GFCM area”, must establish the catch was taken consistently with GFCM CMMs, or be denied use.²⁵⁹ Finally, IOTC extends the application of PSMs, with landing and transshipment of all fish prohibited in all CPC ports.²⁶⁰

To conclude, extraterritorial conduct that occurred or is believed to have occurred, may trigger a presumption of IUU fishing. This results in previously discretionary PSMs becoming mandatory. For jurisdiction, the defining feature of whether enforcement occurs is a presumption of conduct, based on previous potentially extraterritorial conduct. One will note a lack of offences (2.5).

5.3.3.4. Vessels flying flags of non-compliance

A second category, identified less frequently but subject to broader PSMs, are vessels registered to a ‘flag of convenience’ (FOC), or ‘flag of non-compliance’ (FONC). IOTC prohibits landing and transshipment in-port to FOC vessels “engaged in fishing activities diminishing the effectiveness of measures adopted by IOTC”.²⁶¹ A combination of extraterritorial conduct and legal relationship with a foreign state results in port state enforcement. In contrast to the rules for certain non-CNCP vessels (5.3.3.3), no inspection is necessary, nor demonstration of species subject to IOTC CMMs remaining onboard. Indeed, any fishing activities by ‘flag of

²⁵⁵ IOTC, Res. 05/03 (n 56) para. 4.

²⁵⁶ IOTC, Res. 01/03 (n 252) para. 3.

²⁵⁷ *ibid* para. 3 (including minimum standards); CCAMLR, CM 10-07 (n 140) para. 5.

²⁵⁸ IOTC, Res. 01/03 (n 252) para. 4; CCAMLR, CM 10-07 (n 140) para. 5.

²⁵⁹ GFCM, Rec. GFCM/40/2016/1 (n 80) para. 19(b).

²⁶⁰ IOTC, Res. 01/03 (n 252) para. 4; CCAMLR, CM 10-07 (n 140) para. 5.

²⁶¹ IOTC, Resolution 99/02 Calling for actions against fishing activities by large scale flag of convenience longline vessels 1999 para. 2.

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convenience' vessels engaged in large scale tuna longline fishing within the IOTC area are defined as "diminishing" the effectiveness of IOTC CMMs.²⁶²

To increase the extraterritorial effect of IOTC's resolution against flags of convenience, and thus to help attain its objective, IOTC firstly encourages non-CNCPs to implement similar PSMs.²⁶³ Secondly, the Secretariat will "prepare possible measures including trade restrictive measures to prevent or eliminate FOC fishing activities".²⁶⁴ This suggests measures may be taken against the flag state, thus affecting all vessels and captured resources within its fleet. PSMs are likely candidates.

CCAMLR has urged, not obliged, CPCs to take PSMs against all vessels flying a flag of non-compliance – whether that vessel has been involved in fishing activities or not. Failure by the flag state to fulfil its responsibilities for vessels carrying out activities in the Convention Area will facilitate the undermining of CCAMLR CMMs. Therefore, CPC's are urged to target all vessels flying that flag so as to compel the flag state to meet its responsibility.²⁶⁵ CPCs are also urged to "[p]rohibit the landings and transshipments of fish and fish products from FONC vessels".²⁶⁶

Other RFMO/As implement trade related measures against FONCs. This can be done through implementation of PSMs, but this is not explicitly required. CCSBT identifies non-CNCPs whose vessels catch Southern Bluefin Tuna and thereby undermine CMMs.²⁶⁷ If the state fails to rectify identified undermining conduct, this may lead to trade-restrictive measures.²⁶⁸ NEAFC warns that non-CNCPs who fail to rectify fishing activities, as identified within the IUU vessel lists, may be subject to trade-restrictive measures or further measures.²⁶⁹ Finally, the NAFO Fisheries Commission will propose follow-up "action" against flag states that fail to cooperate in deterring or eliminating the activities of identified IUU vessels flying their flag.²⁷⁰ Given

²⁶² *ibid* preamble.

²⁶³ *ibid* para. 4.

²⁶⁴ *ibid* para. 7.

²⁶⁵ CCAMLR, Resolution 19/XXI Flags of non-compliance* 2002 preamble.

²⁶⁶ *ibid* para. 4.

²⁶⁷ CCSBT, Action Plan 2000 para. 2.

²⁶⁸ *ibid* para. 6.

²⁶⁹ NEAFC, Scheme (2016) (n 104) art. 46.

²⁷⁰ NAFO, CEMs (2016) (n 77) art. 55.

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precedents of other RFMO/As, and the fact NAFO already adopts PSMs against the offending vessels,²⁷¹ it appears likely that trade-restrictive measures and PSMs are considered suitable 'action' against the FONC.²⁷²

Finally, older practice refers to flags of convenience, not flags of non-compliance. If measures were limited to flags of convenience (those flag states with easy and accessible ship registration for foreign owners and operators), that would arguably be a violation of the second variant of the principle of non-discrimination against flag states (4.4.2). The convenience of registration does not necessarily result in the nonfulfilment of fisheries law obligations.²⁷³ Unjustified discrimination based on registration rules and procedure would occur between non-compliant flag states. Thankfully, it appears this was inappropriate use of terminology and would refer to IUU fishing or non-CNCP vessels operating in the area.²⁷⁴ States failing to address such conduct will be flags of non-compliance.

5.3.3.5. Stateless vessels

A presumption of IUU fishing is also triggered by vessels not holding the nationality of any flag state. These vessels will not be captured by CPCs domestic implementation of CMMs, nor by measures against non-CNCP vessels. In areas beyond national jurisdiction they may therefore present a legal vacuum.²⁷⁵ The primary state with jurisdiction and responsibility, a flag state, is missing.²⁷⁶ As a consequence, the vessels are engaged in unregulated fishing, undermining the RFMO/A's objectives and any CMMs adopted in pursuit of such objectives. Thus, several

²⁷¹ *ibid* art. 54.

²⁷² WCPFC Convention (n 9) art. 25(12).

²⁷³ EJF, 'All at Sea – The Abuse of Human Rights Aboard Illegal Fishing Vessels' (Environmental Justice Foundation: London 2010) 20.

²⁷⁴ Philippe Cacaud, 'Development of Harmonized Terms and Definitions for IOTC Conservation and Management Measures' (IOTC 2016) 8, 39.

²⁷⁵ SPRFMO, CMM 4.15 On vessels without Nationality in the SPRFMO Convention Area 2016.

²⁷⁶ "[B]y definition, unregulated" IOTC (Australia Submission), Proposed Resolution on Vessels Without Nationality: Explanatory Memorandum 2016 (IOTC–2016–S20–PropN[E]) 1.

RFMO/As define any fishing activity by vessels without nationality upon the high seas as presumed IUU fishing,²⁷⁷ or simply as IUU fishing.²⁷⁸

IUU fishing on the high seas is not an offence of universal jurisdiction (2.3.3) and so PSJ is exercised to deter this common threat. In contrast with PSMs for non-CNCP flagged vessels or FONC flagged vessels (5.3.3.3-5.3.3.4), PSMs are usually only encouraged where stateless vessels are concerned. SPRFMO and CCAMLR specifically encourage denial of port services, landing and the transshipment of fish and fish products from stateless vessels.²⁷⁹ Equally, stateless vessels are incorporated in IUU listing mechanisms of RFMO/As, including WCPFC, IDCP and GFCM.²⁸⁰ Wide undefined provisions, such as WCPFC's "all necessary measures",²⁸¹ may include PSMs.²⁸²

Indeed, when WCPFC introduced the initial proposal on a CMM for vessels without nationality the USA suggested a number of PSMs concerning stateless vessels. This included seizure and forfeiture of the vessel amongst other civil or criminal sanctions.²⁸³ IOTC *Resolution 16/05* encourages similar PSMs to the previous paragraph, but also further "enforcement action" and domestic prescription to allow such enforcement.²⁸⁴

5.3.3.6. Sub-conclusions

In these cases, conduct does not necessarily trigger PSMs directly (5.3.2), but at least results in a label being assigned to the vessel. 'Labelled' vessels are subject to PSMs. Labelling can

²⁷⁷ WCPFC, CMM 2009-09 For Vessels Without Nationality 2009 paras. 1 (presumed to undermine CMMs), 2 (fishing activities on high seas undermine CMMs and constitutes a serious violation, WCPFC Convention, art. 25); IDCP, Res. A-04-07 (n 193) para. 1(f); IOTC, Res. 11/03 (n 193) para. 1(i). Limited to IATTC species, IATTC, Res. C-15-01 (n 193) para. 3(5).

²⁷⁸ SPRFMO, CMM 4.15 (n 275) para. 1; CCAMLR, Resolution 35/XXXIV Vessels without nationality 2015 35; IOTC, Resolution 16/05 On vessels without nationality 2016 preamble (presumption for tuna/tuna like species), para. 2 (are engaged, any fishing in high seas area).

²⁷⁹ SPRFMO, CMM 4.15 (n 275) para. 3 (CPCs); CCAMLR, Res. 35/XXXIV (n 278) para. 3 (encouraging CPCs and non-CNCPs).

²⁸⁰ WCPFC, CMM 2010-06 (n 193) para. 3(h); IDCP, Res. A-04-07 (n 193) para. 1(f); GFCM, Rec. GFCM/33/2009/8 (n 98) para. 2.

²⁸¹ WCPFC, CMM 2009-09 (n 277) para. 4.

²⁸² *ibid* para. 2; WCPFC Convention (n 9) art. 25(11), may act in accordance with international law and procedures adopted (which include PSMs).

²⁸³ WCPFC, US - Proposal for CMM on Vessels without Nationality 2009 (WCPFC-TCCS-2009/DP-04 (Rev1)) 1.

²⁸⁴ IOTC, Res. 16/05 (n 278) paras. 3-4; IOTC, Vessels Without Nationality (Australia: EM) (n 276) p. 1 (encouraged).

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follow from vessel listing or a lack thereof (5.3.3.1-5.3.3.2), or from the status of its flag state (5.3.3.3-5.3.3.5).

As previously noted, concern was raised about the discriminatory nature of RFMO/A measures only applicable to non-CNCP states (4.4.2). This is evident in the case of IUU vessel lists (5.3.3.1). Such listing may result in a discriminatory process if conduct by non-CNCP vessels leads to mandatory PSMs, but identical conduct by CPC vessels does not. This is best avoided through comparable measures, such as keeping another IUU vessel list for CPC vessels, as is done by CCAMLR.²⁸⁵

If denial of port privileges is the only PSM that may be imposed, the use of positive vessel lists is a suitable alternative to achieve similar results without discrimination (5.3.3.2). Port services for vessels fishing within a convention area may be extended only to authorised vessels. While currently focused upon landing, this could be expanded to all port services as well as to entry based upon information within the prior notification.

Other PSMs explicitly target non-CNCP vessels and thus discriminate upon flag. However, *unjustified* discriminatory standards are not imposed. Flying a non-CNCP flag may result in a presumption of undermining CMMs if the vessel is engaged in the area, but this is rebuttable or only results in investigative measures such as inspection (5.3.3.3). Equally, flying a flag of non-compliance may result in the application of PSMs, but this is based on the flag state's conduct and failure to meet non-discriminatory standards as between states (5.3.3.4). The identification of the flag state and the application of PSMs to its vessels will target the flag state's non-compliance (e.g. Japan's historical ICCAT practice)²⁸⁶ - a justified reason to discriminate amongst vessels.

²⁸⁵ CCAMLR, Conservation Measure 10-06 (2008) Scheme to promote compliance by Contracting Party vessels with CCAMLR conservation measures 2008.

²⁸⁶ "The Government of Japan prohibits port calls by tuna longline fishing vessels registered in Panama, Belize and Honduras. This is because these three countries were designated by ICCAT as countries diminishing the effectiveness of resource management measures regarding Atlantic bluefin tuna" Masayuki Komatsu, 'The Importance of Taking Cooperative Action Against Specific Fishing Vessels That Are Diminishing Effectiveness of Tuna Conservation and Management Measures', *Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing Sydney, Australia, 15-19 May 2000* (FAO Fisheries Report No 666, FAO 2001) para 16(b).

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In contrast, PSMs targeting stateless vessels are, at first appearance, discriminatory and perhaps even an abuse of right. The only distinguishing factor between vessels is where the vessel is registered, or rather the lack of registration in compliance with the law of the sea.²⁸⁷ However, obligations are owed to another state. Stateless vessels have no flag state which could object to discrimination and an abuse of right claim therefore lacks any harm to the interests of another state (4.4.3).

In terms of jurisdiction, the clear distinction between denial of port privileges (prescribed by RFMO/As) and more onerous measures (residual jurisdiction under RFMO/As) is maintained. Extraterritorial conduct, the ownership of a vessel, or the presumption of conduct may result in listing (5.3.3.1) which port states apply with the intent to influence that conduct. The legal position of a vessel is not altered until a port state implements measures based on the list. Therefore, contrary to Italy's arguments in *M/V Norstar* (a comparable request to exercise jurisdiction), the listing itself is not an enforcement measure applicable to the high seas that could conflict with the freedoms thereof (4.3.1.1). Finally, port states remain constrained by LoS limitations when implementing PSMs applicable to targeted vessels. Illegal activity is not a legal basis to deny entry in *force majeure*/distress scenarios (4.2.3), and thus this exception is equally recognised within IUU vessel lists.

5.3.4. PSMs applicable to fish and fish products

Catch documentation schemes (CDS) help to distinguish fish caught in compliance with applicable CMMs, and their related fish products, from fish and products classified as IUU by the RFMO/A. Movement of products is controlled by "tracking the product from the point of capture throughout the whole operation to its final market", which clearly implies a central role for flag, port and market states.²⁸⁸ Port states are a gateway that all fish or produce must

²⁸⁷ No nationality, or multiple flags, UNCLOS (n 2) art. 92(2).

²⁸⁸ ICCAT, Rec. 07-10 (n 60) preamble; now, ICCAT, Rec. 11-20 (n 60) with a significantly reduced preamble, silent upon port state obligations.

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pass to reach a market. At the time of writing, five RFMO/As adopted CDS for various tuna species and toothfish, the PSJ of which is discussed here.²⁸⁹

RFMO/As may review extraterritorial conduct on the basis of the documentation in the CDS required about landings, imports, exports or re-exports of a species.²⁹⁰ Whilst valid documentation is a territorial requirement, the approval or prohibition of port services relates to extraterritorial fishing and depends on whether it was authorised and in compliance with applicable CMMs. Proof of authorisation and valid documentation are provided by the CPC flag,²⁹¹ and therefore significant PSMs are triggered for vessels attempting to land or import tuna/toothfish in CPC ports, caught by non-CNCP flagged vessels.

ICCAT prohibits landing Bluefin tuna without complete and validated documentation.²⁹² As of May 2016,²⁹³ mandatory electronic CDS applies.²⁹⁴ CCAMLR similarly requires all landings of *Dissostichus spp.* unaccompanied by electronic documentation to be prohibited.²⁹⁵ Non-CNCP port states are also encouraged to prohibit landings.²⁹⁶

²⁸⁹ Note, the necessity of work at the global level, recognised, CCSBT, Resolution on the Implementation of a CCSBT Catch Documentation Scheme 2014 preamble; FAO, 'Voluntary Guidelines for Catch Documentation Schemes' (FAO 2017).

²⁹⁰ ICCAT, Rec. 11-20 (n 60) para. 2(c) ('import any introduction of Bluefin tuna in its harvested or processed form [including farmed] into the territory of a CPC, which is not the CPC where the fishing vessel is flagged), 3 (shall be accompanied by a validated BCD); CCSBT, CDS Implementation (n 289) para. 1.6, 5.6.

²⁹¹ ICCAT, Rec. 11-20 (n 60) para. 9. Non-CNCP participation is focused on port states, not flagged vessels; CCAMLR, CM 10-05 (n 60) preamble; CCAMLR, Policy NCP Cooperation (n 74) para. 11(j) request reports on landing and transshipments in port; however, CCSBT, CDS Implementation (n 289) para. 1.5 cooperation of non-CNCPs 'involved in catching, landing, transferring and or farming SBT'.

²⁹² ICCAT, Rec. 11-20 (n 60) para. 3; ICCAT, Rec. 14-04 (n 62) para. 94.

²⁹³ ICCAT, Recommendation 15-10 To Clarify and Amend Aspects of ICCAT's Bluefin Tuna Catch Documentation Program to Facilitate the Application of the EbCD System 2015 para. 2 (subject to exceptions).

²⁹⁴ *ibid* para. 4.

²⁹⁵ CCAMLR, CM 10-05 (n 60) paras. 3-4, Annex 10-05/A paras. A1 and A5 (minimum contents).

²⁹⁶ CCAMLR, Res. 32/XXIX (n 60) para. 5. Indeed, Singapore (non-CNCP) pointed to its PSMs as evidence in its request for status as a non-CNCP cooperating with CCAMLR by participating in the CDS. 'Report of the Standing Committee on Implementation and Compliance (SCIC)', in CCAMLR, *Report of the Thirty-First Meeting of the Commission (Hobart, Australia, 23 October-1 November 2012)* (2012) Annex 6, paras. 8.3-8.6 (not reinstated); had 'limited access', CCAMLR, 'Non-Contracting Parties' (CCAMLR: *Commission for the Conservation of Antarctic Marine Living Resources*) <<https://www.ccamlr.org/en/compliance/non-contracting-parties>>.

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The broader “import” is defined as “introduction of [CDS species] in its harvested or processed form (including farmed) into the territory of a CPC”.²⁹⁷ With respect to import, CCSBT²⁹⁸ and IOTC²⁹⁹ can be added to the list of RFMO/As preventing import without valid and complete documentation.³⁰⁰ Port states will implement this should such harvested or processed fish be brought into the territory via the sea.

Nevertheless, documentation schemes may contain inaccurate or fraudulent documentation, so port states need to have verification rights. Port states, as landing or importing state, have the responsibility to identify each consignment of CDS-covered fish that enters their territory and to identify its origin.³⁰¹ Until such verification, landing or import is temporarily prohibited.³⁰² This may extend to consideration of previous extraterritorial conduct, in that the port state shall take ‘steps’ to identify whether a catch that occurred in the convention area was in compliance with CMMs.³⁰³ Clearly incomplete or unvalidated documentation results in the denial of landing or importation.³⁰⁴

Port states may also examine the catch documentation, related documents, the vessel, and the cargo to verify the information contained in the catch documentation.³⁰⁵ Verification may extend further, as within ICCAT where cooperation with previously involved states can be sought to resolve ambiguities,³⁰⁶ or within CCAMLR where a state “may require additional verification, from the relevant CDS Contact Officer, of information contained in DCDs, DEDs or DREDs by using, *inter alia*, VMS, in respect of *Dissostichus* spp. taken outside the

²⁹⁷ ICCAT, Rec. 11-20 (n 60) para. 2(c); IOTC, Resolution 01/06 Concerning the IOTC bigeye tuna statistical document programme 2001 para. 1.

²⁹⁸ CCSBT, CDS Implementation (n 289) paras. 1.1-1.2, 1.6, 5.6 (require CDS documentation and SBT caught by authorised vessels only).

²⁹⁹ IOTC, Res. 01/06 (n 297) paras. 1, 13 (initial stage frozen bigeye). No explicit denial, but mandatory condition of import implies no documentation should result in denial.

³⁰⁰ ICCAT, Rec. 11-20 (n 60) para. 3; ICCAT, Rec. 14-04 (n 62) para. 94; CCAMLR, CM 10-05 (n 60) paras. 6-7, Annex 10-05/A, A2. See import and export definitions which cover port visit without landing (paras. 1[v]-[vi]).

³⁰¹ ICCAT, Rec. 11-20 (n 60) para. 22.

³⁰² *ibid* para. 25.

³⁰³ CCAMLR, CM 10-05 (n 60) para. 2.

³⁰⁴ CCSBT, CDS Implementation (n 289) para. 5.6.

³⁰⁵ *ibid* para. 5.8, 7.1; ICCAT, Rec. 11-20 (n 60) para. 22.

³⁰⁶ ICCAT, Rec. 11-20 (n 60) para. 23; CCAMLR, CM 10-05 (n 60) para. 10.

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Convention Area, when landed at, imported into, or exported or re-exported from its territory”.³⁰⁷ This may include non-CNCPs, as in the case of Thailand.³⁰⁸

Should verification demonstrate invalid catch documentation, or, for CCAMLR, that the catch was “not harvested in a manner consistent with CCAMLR conservation measures”, import shall be prohibited.³⁰⁹ It appears no more stringent measures than denial of landing or import have been adopted. This is disappointing given the submission of incomplete or inaccurate documentation is a territorial act, subject to a port state’s territorial prescriptive and enforcement state jurisdiction (2.3.1.2, 6.3.1.3). CCAMLR’s CDS mentions “sale or disposal of seized or confiscated *Dissostichus* spp.”, which could include the catch seized or confiscated by port states.³¹⁰ But the requirement of a “Specially Validated *Dissostichus* Catch Document (SVDCD)” implies the flag state is the only competent authority to issue a standard “*Dissostichus* catch document (DCD)”.³¹¹

5.3.5. More onerous port state enforcement measures

Disappointingly, global minimum standards within the *PSMA* do not appear to have been built upon in terms of mandatory PSMs of an enforcement nature. Certain *PSMA* tools, such as denial of port entry or services, are put to greater and wider use. But more punitive measures, that can be used to not only discourage IUU fishing (e.g. by cutting profits through co-ordinated entry denial) but to impose accountability and prevent future infringements (e.g. through confiscation), are discretionary.

The only explicit additional PSMs agreed to are: requesting additional verification of information contained in documentation inspected;³¹² the adoption of multilaterally agreed trade-related measures amongst parties (usually dependant on port and market state

³⁰⁷ CCAMLR, CM 10-05 (n 60) paras. 12, 13 (“any other inspection or investigation conducted in accordance with relevant domestic law”).

³⁰⁸ ‘Report of the Standing Committee on Implementation and Compliance (SCIC)’ (n 296) para. 8.7, appointed CDC contact officer.

³⁰⁹ ICCAT, Rec. 11-20 (n 60) para. 26; CCAMLR, CM 10-05 (n 60) para. 13.

³¹⁰ CCAMLR, CM 10-05 (n 60) para. 14 (discretionary).

³¹¹ *ibid* Annex 10/05A, A4.

³¹² *ibid* para. 12, including demonstration of species being taken outside of the convention area.

measures, and distinguishable from RFMO/A adopted trade measures);³¹³ and the potential for confiscation of suspected IUU catch from non-CNCP vessels “where possible” (5.3.3.1).³¹⁴ All three examples are CCAMLR’s.³¹⁵

However, other RFMO/As have adopted confiscation provisions for CPC vessels.³¹⁶ Thus, whilst implementation of the *PSMA* in respect of non-CNCP vessels was found in *NEAFC Scheme (2016)*, it also applies to CPC vessels with additional provisions. Failure to receive confirmation by the CPC flag state may lead to confiscation of fish provisionally landed.³¹⁷ *NAFO CEMs (2016)* also includes a port state control chapter only applicable to foreign CPC vessels, including discretionary confiscation of catch if a confirmation from the CPC flag state is not forthcoming within 14 days of the landing.³¹⁸ In very selective cases, punitive PSMs shall apply within ICCAT for CPC vessels, such as “confiscation and the appropriate follow-up action” upon landing of particular Bluefin tuna by-catch.³¹⁹ The exceptional conditions required will result in rare instances of implementation. However, this still provides practice evidencing the use of more onerous port state enforcement measures and even a (very limited) port state obligation thereof.

All RFMO/As nonetheless leave scope for more onerous port state enforcement action. The majority of practice correlates with the position within global instruments (ch 3). RFMO/A practice emphasises that nothing within its CMMs affects the exercise of sovereignty over ports, and that more stringent measures may be adopted by port states if taken in conformity with domestic and international law.³²⁰ To enable more stringent measures, port states can use a common exception to the obligation to deny entry, namely granting entry for inspection

³¹³ CCAMLR, CM 10-07 (n 140) para. 30.

³¹⁴ *ibid* para. 22(iv)(b)(i).

³¹⁵ See also, CCAMLR, CM 10-03 (n 118) para. 7 ‘shall cooperate with the Flag State in taking such appropriate action as is required to investigate the alleged infringement and, if necessary, apply appropriate sanctions’.

³¹⁶ For CCAMLR, see CCAMLR, CM 10-06 (n 285).

³¹⁷ *NEAFC, Scheme (2016)* (n 104) art. 23(3).

³¹⁸ *NAFO, CEMs (2016)* (n 77) art. 43(7).

³¹⁹ ICCAT, Rec. 14-04 (n 62) para. 29.

³²⁰ CCSBT, Res. Transshipment LSTLV (n 78) para. 34; CCSBT, Res. Port Inspection (n 112) para. 18; *NAFO, CEMs (2016)* (n 77) art. 48(2)(a); *NAFO Convention* (n 15) art. XII(3); ICCAT, 12-06 (n 235) Annex 3, para. 1; ICCAT, Rec. 12-07 (n 89) para. 1; IOTC, Res. 05/03 (n 56) para. 6; *WCPFC Convention* (n 9) art. 27(4); *SEAFO Convention* (n 18) art. 15(5); *SPRFMO Convention* (n 20) art. 26; *SPRFMO, CMM 2.07* (n 117) preamble; *SIOFA Agreement* (n 19) art. 12(4); *GFCM, Rec. GFCM/40/2016/1* (n 80) para. 38.

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or for “appropriate enforcement action” against the vessel.³²¹ States may of course also go beyond the CMMs, denying entry to a greater number of vessels under the rubric of their *domaine réservé*-based jurisdiction.³²²

Perhaps in recognition of jurisdictional uncertainty in the scope of PSJ, CMMs only note that if the infringement falls within the legal jurisdiction of the port state, then it may act in accordance with domestic law.³²³ This approach is comparable to quasi-universal treaty-based jurisdiction (2.3.4), albeit with a lighter touch, that promotes enforcement as opposed to binding obligations to create a jurisdictional ‘net’. Thus, port states may act when the infringement is within their jurisdiction, but they are required to inform the flag and/or coastal state when the infringement is outside their jurisdiction, or if they decide not to exercise jurisdiction.³²⁴ It is hoped the flag state will then live up to its responsibility and exercise jurisdiction. This is hoped even more when reporting to the flag state is the only explicit addition to denial of privileges (3.2.2.1.1).³²⁵

Finally, the promotion of minimum port state standards demonstrates room for national expansion. ICCAT in its funding for developing states goes beyond domestic prescription of CMM standards, including participation within meetings and training on “enforcement and legal proceedings for infractions”.³²⁶ Similar assistance schemes, in recognition of the necessity of regional port state implementation, exist for other RFMO/As.³²⁷ Apparently,

³²¹ NAFO, CEMs (2016) (n 77) art. 48(2)(b).

³²² ICCAT, Rec. 12-07 (n 89) para. 1; CCSBT, Res. Port Inspection (n 112) para. 18; SPRFMO, CMM 2.07 (n 117) para. 29; SPRFMO, CMM 4.01 (n 234) para. 21(b); NAFO, CEMs (2016) (n 77) arts. 42, alternatively, art. 43(4) “the requirements contained in paragraphs 1, 2, and 3 do not apply to a Contracting Party that does not permit any landings or transshipments in its ports by vessels flying the flag of another Contracting Party” (a right that can be equally exercised against non-CNCP vessels, given the lack of treaty obligations requiring an opt-out).

³²³ “If the infringement falls within the legal jurisdiction of the port Member, it may take action in accordance with its domestic laws [...]” CCSBT, Res. Port Inspection (n 112) para. 23; similarly, SPRFMO, CMM 2.07 (n 117) para. 24; ICCAT, Rec. 12-07 (n 89) para. 23; GFCM, Rec. GFCM/40/2016/1 (n 80) para. 38; IATTC, Proposal IATTC-92 G-1 (n 90) para. 29.

³²⁴ Shall be referred, and prompt reporting if inspection reveals IUU activities; CCSBT, Res. Port Inspection (n 112) paras. 24-25; ICCAT, Rec. 12-07 (n 89) paras. 24-25; SPRFMO, CMM 2.07 (n 117) para. 25-26; IATTC, Proposal IATTC-92 G-1 (n 90) paras. 30-31.

³²⁵ IOTC, Res. 05/03 (n 56) para. 5.

³²⁶ ICCAT, Rec. 12-07 (n 89) para. 26(b); ICCAT, Recommendation 14-08 To Support Effective Implementation of Recommendation 12-07 by ICCAT for an ICCAT Scheme for Minimum Standards for Inspection in Port 2014 para. 2 ‘shall be used to provide technical assistance to port inspectors and other relevant enforcement personnel from developing CPCs’; IATTC, Proposal IATTC-92 G-1 (n 90) para. 32(b).

³²⁷ IOTC, Res. 16/11 (n 66) pt. 6, notably para. 18.1(a) ‘enhance their ability [...] to develop a legal basis and capacity for the implementation of effective port State measures’; weaker provision, CCSBT, Res. Port Inspection

RFMO/As recognise that global minimum standards alone are insufficient. Different regional port state standards are being developed or are awaiting RFMO/A implementation.³²⁸ SPRFMO and IOTC further note the necessity of PSM coordination at the regional and interregional level.³²⁹ As regions have different needs and capacities, with their focus on PSMs being regional CMM standards, regionalisation is expected. Port state enforcement standards could follow suit, funded by RFMO/As or otherwise.

5.3.6. Forthcoming RFMO/As and PSMs

Looking to the future, regional PSMs will continue their march in coverage through ever increasing adoption by existing RFMO/As and the creation of new RFMO/As. It is a process subject to negotiation and agreement by interested parties, and those negotiations underway may be protracted or unsuccessful. Nonetheless, in the example of WECAFC, at its 16th Session (2016) the “Commission agreed to launch a process to establish a Regional Fisheries Management Organization”.³³⁰ Notably, “regional collaboration in addressing IUU fishing” focused upon *PSMA*’s successful implementation and parties previously agreed to take measures to strengthen their *PSMA* implementation.³³¹ It is therefore unlikely any future RFMO/A will not include PSMs or responsibilities. Furthermore, regions where a transition from advisory to managerial is not forthcoming nonetheless demonstrate political will to tackle IUU fishing, in part, through co-ordinated PSMs.³³²

(n 112) para. 26 ‘Members are encouraged to assess the special requirements of developing Members concerning the implementation of this Resolution’. Alternatively, WCPFC, CMM 2013-07 On Special Requirements of SIDS and Territories 2013 para. 15(b), ‘promote, consistent with national laws and regulations, the processing, landing, or transshipment of catches within designated ports of SIDS and territories in the Convention Area’.

³²⁸ NAFO Convention (n 15) art. VI(9) the commission shall develop “minimum standards for inspection of fishing vessels by Contracting Parties in ports where fishery resources or products derived from fishery resources originating in the Regulatory Area are landed”.

³²⁹ Aware of the need for increasing coordination at the regional and interregional levels to combat IUU through PSMs; SPRFMO, CMM 2.07 (n 117) preamble; IOTC, Res. 16/11 (n 66) preamble.

³³⁰ FAO Western Central Atlantic Fishery Commission, ‘Report of the Sixteenth Session of the Commission, Gosier, Guadeloupe, 20–24 June 2016’ (FAO 2016) FAO Fisheries and Aquaculture Report 1162 para 55.

³³¹ WECAFC, Resolution WECAFC/15/2014/9 On the Implementation of the Port State Measures Agreement and the FAO Voluntary Guidelines on Flag State Performance in The Region 2014; WECAFC, Resolution WECAFC/14/2012/1 On strengthening the implementation of international fisheries instruments 2012 para. 2.

³³² Recognising port state duties and the need for strengthening PSMs; Castries (St. Lucia) Declaration on Illegal, Unreported and Unregulated Fishing, adopted by the 2nd Special Meeting of the CRFM Ministerial Council held in Castries, St. Lucia (28 July 2010) preamble and paras. 4(i), 6(ii), 6(iv).

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PSMs are becoming a staple of regional fisheries governance. Even during this chapter's drafting, the WCPFC changed its position from not adopting detailed PSMs (at the time of writing),³³³ to having a minimum PSM CMM (at the time of editing).³³⁴ The question remains whether practice will continue as implementation of similar measures, or whether further progress beyond the minimum standards will be pushed.

5.4. Conclusion

While some RFMO/As have yet to adopt appropriate PSMs (5.2), practice since the 1930s has established the exercise of port states' *domaine réservé*-based jurisdiction to withhold privileges to vessels undermining the RFMO/A or CMMs (5.3). Diverse PSMs and scenarios for application have been witnessed. Their extraterritorial breadth is most evident when entry or a non-exhaustive list of services are denied in a range of defined scenarios, where it can be assumed, but need not be proven, that IUU fishing or supportive conduct occurred (5.3.2). Alternatively, the flag state involved (5.3.3), or the history of the fish/products aboard the vessel (5.3.4) may trigger PSMs. CPCs do not have jurisdiction over non-CNCP vessel conduct within the high seas convention area. Yet, they may prescribe such conduct as a basis to deny port privileges. In contrast, port state offences are largely left untouched in regional practice, deferring to CPCs when 'possible' for non-CNCP vessels (5.3.5). The preservation of authority and room to do so should nonetheless not be underestimated. This preservation further confirms the state jurisdiction beyond the denial of port privileges. Such residual PSJ may be employed in the future, or at the national level (ch 6).

In respect of jurisdictional obligations, PSMs in RFMO/A practice have built upon the recognition of a general port state duty to promote the effectiveness of subregional, regional and global CMMs. Equally, there is a "need for non-Contracting Parties [...] to apply the conservation and management measures adopted".³³⁵ Thus, when CMMs incorporate port state obligations to impose minimum standards applicable to a fishery, those minimum standards should extend to non-CNCP port states who are visited by vessels involved in fishing

³³³ Swan (n 88) 83–84.

³³⁴ WCPFC, CMM 2017-02 On minimum standards for Port State Measures 2017.

³³⁵ SIOFA Agreement (n 19) preamble.

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activities within the convention area and/or concerning the RFMO/A species. To do otherwise, would undermine regional CMMs.

Finally, it should be recalled that the methodology employed for this manuscript demanded a date on which regional practice must have been assessed for the state of the art concerning PSJ (1.3.2). A deadline set for 2016 was beneficial for conducting most of the research. This has enabled discussion and feedback without continual rewriting as CMMs were updated with minimal substantive PSJ changes, be it rights or duties. A date set around the entry into force of the *PSMA* enabled practice to provide further evidence of the lack of any treaty-based jurisdiction for PSMs (ch 3). Also, it proved the necessity of finding a defensible jurisdictional basis in the *lex generalis* (ch 2). And, while global instruments have added port state obligations, the few limitations that originate from the law of the sea exist independent of their reiteration in the *PSMA* (ch 4).

Nonetheless, to counter any suggestion that this author has mistakenly presumed that this PSJ practice has been generally accepted and that it will only broaden in the future, a final review has been undertaken upon finalisation (October 2018). Firstly, PSJ practice at the regional level has not retracted and thus the port state rights and implementation to combat extraterritorial IUU fishing presented above remains true. For the large part, 2017-2018 CMMs contain no material differences in PSJ exercised. Equally, the commitment to generally accepted port state duties remain. The GFCM reiterated the port state responsibilities of its CPCs, adopting a *regional plan of action to combat IUU fishing* (5.3.1.1),³³⁶ while CCSBT continues to identify and seek cooperation from important non-CNCP port states (5.3.1.2).³³⁷ ICCAT, in recognition of the port state inspection obligations it has established, is further developing its capacity building scheme.³³⁸

³³⁶ GFCM, Recommendation GFCM/41/2017/7 on a regional plan of action to combat illegal, unreported and unregulated fishing in the GFCM area of application 2017 part V.

³³⁷ CCSBT, Compliance Plan 2017 strategy 11.1.

³³⁸ ICCAT, Recommendation 16-18 To Clarify and Supplement the Process for Seeking Capacity Building Assistance Pursuant to ICCAT Recommendation 14-08 2016 16–18.

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Some minimal PSM changes have occurred.³³⁹ Designated ports within NAFO now include designating ports for all port services,³⁴⁰ while SEAFO implementation is no longer limited to states with maritime zones adjacent to the convention area.³⁴¹ Furthermore, NPFC and SIOFA have since adopted CMMs with comparable PSMs to those discussed above, and with applicability in comparable cases.³⁴² One expansion however is the SIOFA port state inspection regime, which not only makes use of other RFMO/A IUU vessel lists but incorporates national IUU vessel lists to deny entry (5.3.2.4).³⁴³ The designated GFCM landing points have also been expanded to support the establishment of a fisheries restricted area (5.3.2.2).³⁴⁴ Sadly, RFMO/As have still not made further progress in imposing more onerous port state measures. The recognition by IOTC “that IUU fishing activities may be linked with serious and organised crime” may however suggest possible measures in the future (5.3.5).³⁴⁵

³³⁹ E.g. removal of any suggestion the IUU vessel list only covers fishing vessels (5.3.3.1), CCSBT, Resolution on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities for Southern Bluefin Tuna (SBT) 2017 para. 3.

³⁴⁰ NAFO, Conservation and Enforcement Measures (2018) 2017 art. 43(1); a force majeure entry exception has also been added *ibid* art. 42.

³⁴¹ SEAFO, System of Observation, Inspection, Compliance and Enforcement (2017) 2017 former art. 26 deleted; meanwhile, adding such a limitation SIOFA, CMM 2017/08 Establishing a Port Inspection Scheme (Port Inspection) 2017 paras. 30-31.

³⁴² NPFC, CMM 2017-02 To Establish a List of IUU Vessels 2017 paras 1, 24(c), 24(f); SIOFA, CMM 2018/06 on the Listing of IUU Vessels (IUU Vessel List) 2018 paras 1, 5, 19(c)-(d), 19(g), 20, 25 (5.3.3.1). SIOFA, CMM 2018/10 For the Monitoring of Fisheries in the Agreement Area (Monitoring) 2018 paras 20–24 (5.3.2.2-5.3.2.3) ; SIOFA, CMM 2017/07 On Authorisation and Notification to Fish (Vessel Authorisation) 2017 paras 1, 7 (5.3.3.2); see also, WCPFC, CMM 2017-05 WCPFC Record of Fishing Vessels and Authorisation to Fish 2017 paras 18, 22. NPFC, CMM 2016-04 On Vessels Without Nationality 2016 para 3; SIOFA, CMM 2016/04 On Vessels without Nationality (Vessels without Nationality) 2016 para 3 (5.3.3.5); SIOFA, CMM 2017/08 (n 341).

³⁴³ SIOFA, CMM 2017/08 (n 341) para. 8.

³⁴⁴ GFCM, Recommendation GFCM/41/2017/3 on the establishment of a fisheries restricted area in the Jabuka/Pomo Pit in the Adriatic Sea 2017 para. 15; IATTC, Resolution C-18-02 Amendment to Resolution C-16-08 On a Long-Term Management Framework for the Conservation and Management of Pacific Bluefin Tuna in the Eastern Pacific Ocean 2018 para 8, continued development of CDS (5.3.4).

³⁴⁵ IOTC, Resolution 18/03 On Establishing a List of Vessels Presumed to Have Carried out Illegal, Unreported and Unregulated Fishing in the IOTC Area of Competence 2018 preamble.

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6.1. Introduction

The third practice instalment uncovers national PSMs with extraterritorial scope, analysing their jurisdiction basis. Jurisdictionally defined, unilateral national PSMs are those incorporating extraterritorial conduct requirements (prescriptively broader than those seen at the global level), and/or those inclusive of punitive measures (broader enforcement than that seen at the global level) (1.2). Not being agreed upon within global instruments, they demonstrate the extent of PSJ beyond withholding privileges.

Often viewed with scepticism, unilateralism here is descriptive of standards imposed, not substantive jurisdictional input. For example, the treaty-based PSJ provided by *UNCLOS*, art. 218 is expressly limited to “the violation of applicable international rules and standards” and monetary penalties.¹ The question whether a port state has jurisdiction may therefore be determined upon whether the standards imposed are generally accepted international rules and standards, or if the enforcement exercised is within the agreed measures. PSJ in the fisheries domain has not been expanded by treaty-based rights (3.2.2.4). Therefore, the question whether it upholds a unilateral or multilateral standard may affect the political acceptability of an exercise of jurisdiction, but not its legal basis. Rather, the context of unilateralism is useful here for the interpretation and (re)charting of international law, i.e. beyond multilateral treaty-based limits or consensus to establish the content of residual PSJ.

Self-appointed global leaders will probably be at the forefront of maximising jurisdiction, so the starting point is US (6.2) and EU (6.3) practice. While both unilaterally identify states not fulfilling jurisdictional responsibilities, only the EU identifies non-cooperating port states. Their PSJ legislative responses will provide cutting-edge practice, potentially equal to, or exceeding, EU leadership (6.4). Finally, for balance, practice outside the EU identification framework is analysed (6.5). The conclusion summarises the findings (6.6).

¹ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art. 218(1), 230.

6.2. USA: Sustainable fisheries global leader

The USA uses a combination of multilateralism and unilateralism to address its concerns.² A self-appointed global leader in sustainable fisheries, the fight against IUU fishing as a threat to shared resources is a key responsibility.³

6.2.1. Unilateral PSMs

US policy promotes PSMs at the global,⁴ regional⁵ and national level.⁶ US practice predating the *PSMA* is now largely incorporated within it. Through its ratification in 2016, *PSMA* became a mechanism to export US ‘best practice’ worldwide. Subsequent reform expanded the domestic legislation’s scope to meet *PSMA* standards, e.g. RFMO/A IUU listed transport and support vessels were previously allowed port entry.⁷ The *Port State Measures Agreement Act of 2015* filled those gaps.⁸ Domestic provisions do address IUU fishing scenarios not explicit within the measures under the *PSMA*, including denial of services to stateless vessels.⁹

More extensive PSMs than *PSMA* remain. For example, further authorisation is necessary to conduct fish processing (broadly defined) within internal waters,¹⁰ and the importation of frozen toothfish requires additional preapproval certification to RFMO/A catch

² Working with partners “to address the global problem of IUU fishing”, but, given unilateral prescription, does not coordinate with differing unilateral processes (6.2.4 and 6.3.1.5), NOAA, ‘High Seas Driftnet Fishing Moratorium Protection Act: Identification and Certification Procedures To Address Illegal, Unreported, and Unregulated Fishing Activities and Bycatch of Protected Living Marine Resources’ (2011) 76 Federal Register 2011, 2016.

³ Unilateral and multilateral leadership; Presidential Task Force on Combating IUU Fishing and Seafood Fraud, ‘Action Plan for Implementing the Task Force Recommendations’ (2015) 7,10,18; NOAA, ‘Improving International Fisheries Management: January 2017 Report to Congress’ (2017) 3,9-11,56,65,67.

⁴ Encouraging *PSMA* ratification and implementation; Presidential Task Force on Combating IUU Fishing and Seafood Fraud (n 3) 10–11; Joint Statement Between the European Commission and the United States Government on Efforts to Combat Illegal, Unreported and Unregulated (IUU) Fishing, Washington 7 September 2011.

⁵ Presidential Task Force on Combating IUU Fishing and Seafood Fraud (n 3) 6, 11; free trade agreements, such as TPP and TTIP offer another avenue *ibid* 16–17; but a change in administration led to TPP withdrawal, Office of the United States Trade Representative, ‘Letter to TPP Depository’ (30 January 2017).

⁶ 16 United States Code [2017] § 1826i(a)(1)(e), 2(C) promote PSI.

⁷ NMFS, ‘Illegal Fishing: Not in Our Ports’ (2016) 2 <http://www.nmfs.noaa.gov/stories/iuu/docs/now_port_state_handout_v1_11_16.pdf>.

⁸ Pub. L. 114–81, title III, §301-310, Nov. 5, 2015, 129 Stat. 664, codified, 16 U.S.C. 2017 (n 6) §7401-7409.

⁹ 16 *ibid* § 7404(c)(3).

¹⁰ 16 *ibid* § 1856(c)(1)(b), defined (c)(4)(A) “fish processing” includes, in addition to processing, the performance of any other activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, or transportation’.

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documentation.¹¹ Furthermore, as a general rule subject to exceptions, denial of landing applies to all foreign vessels carrying fish/products derived from high seas catch, not just suspected IUU vessels.¹² As an exception, landings may occur in US unincorporated territories, but that fish - unloaded and not sold or transferred for “immediate consumption in those [US Virgin] islands” - is subject to seizure and forfeiture.¹³ This demonstrates territorial PSJ’s breadth when crafting law around acts over property now located within the state (6.5.3).

6.2.2. Port state offences

In US PSMs, offences are framed as objective territorial offences, despite an initial trigger of extraterritorial conduct. Thus, to gain port entry a foreign vessel must provide advance operating information (extraterritorial conduct).¹⁴ Offences and prohibited acts are then limited to territorial conduct, namely, violating a provision (or implementing regulation), refusing port inspection, or submission of false information.¹⁵

‘Violations’ only occur when entry has previously been denied, when false information for entry has been used, or when port use has taken place without authorisation; all being defined around the territorial element. Persons are subject to civil administrative penalties,¹⁶ or criminal enforcement when having knowingly committed a prohibited act.¹⁷ What is more, “[a]ny foreign vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used and any fish (or the fair market value thereof) imported or possessed in connection with” a prohibited act, may be forfeit.¹⁸ It is presumed all fish aboard are of IUU origin.¹⁹

This shift in non-flag states’ governance, from attempts to regulate practices beyond their jurisdiction toward regulating territorial fishing-related conduct, and the physical results of

¹¹ Alexa Cole, Meggan Engelke-Ros and Jonathan Galatzan, ‘More Than “Just” Paperwork Violations: Combatting IUU Fishing Through Enforcement of Seafood Traceability Schemes’ (2015) 63 United States Attorneys’ Bulletin 27, 32.

¹² Pub. L. 109–304, § 8(c), Oct. 6, 2006, 120 Stat. 1639, codified, 46 U.S.C. 2017 (n 6) § 55114. Exceptions apply e.g. American Samoa, Bureau of Customs, Marine Circular No. 124 1953.

¹³ 46 U.S.C. 2017 (n 6) § 55114(c)(1)-(2), a territorial offence (unloaded).

¹⁴ 16 *ibid* § 7404(a)(1).

¹⁵ 16 *ibid* § 7406, (WCPFC implementation) § 6906.

¹⁶ 16 *ibid* § 7407(b)(1)(a).

¹⁷ 16 *ibid* § 7407(d).

¹⁸ 16 *ibid* § 7407(c)(1).

¹⁹ 16 *ibid* § 7407(c)(3).

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IUU fishing, is evident in associated laws. For economic, environmental and food security reasons, the USA maintains a role as 'leader' in sustainably managed shark fisheries, incorporating and promoting global efforts in US domestic law.²⁰ Distaste for shark finning practices resulted in the 2000 *Shark Finning Prohibition Act*, and the 2011 *Shark Conservation Act*, that prohibits the landing of fins or carcasses without the corresponding natural attachment.²¹ A complementary rebuttable presumption for violations applies if unattached shark fins are aboard non-fishing vessels or weight disparities arise between fins and carcasses landed.²² Landing is broadly defined to include arrival at port for the purposes of offloading.²³ Arrival at port with said purpose is sufficient territorial conduct to be an offence when such fins (property) are within US territory (4.2.1).²⁴

Fins may be harvested beyond the USA's EEZ,²⁵ but harvesting practice is revaluated as a condition of the catch, triggering the territorial landing prohibition. "Landing" must occur within US territory as an essential element of the offence (2.3.1.2).²⁶ Prescription "affects foreign vessels' activities only while they are under US jurisdiction and does not purport to control their activities on the high seas or in other nations' waters".²⁷ Identical non-compliant fins present aboard a foreign vessel in port, but without landing intent, is not an offence.²⁸

²⁰ NOAA, 'Magnuson-Stevens Fishery Conservation and Management Act Provisions: Implementation of the Shark Conservation Act of 2010' (2016) 81 Federal Register 42285, 42287.

²¹ P.L. 106-557, 21 December 2000; P.L. 111-348, 4 January 2011, codified 16 U.S.C. 2017 (n 6) § 1857(1)(P)(iv), and (ii) possession.

²² 16 *ibid* § 1857(1)(R). Crucial assistance to port state enforcement; General Counsel of the US Department of Commerce, 'Views of the Department of Commerce on S. 850, the "Shark Conservation Act of 2009"' (29 August 2009) <<https://www.legislative.noaa.gov/viewsletters/S850-082609.pdf>>.

²³ 50 United States Code of Federal Regulations [2017] § 600.1202(a).

²⁴ 50 *ibid* § 600.1203.

²⁵ NOAA, 'Implementation Shark Conservation' (n 20) 42285.

²⁶ 50 CFR (n 23) § 600.1203(a)(5)(6), the previous edition explicit in application 'No person aboard a U.S. or foreign fishing vessel (including any cargo vessel that received shark fins from a fishing vessel at sea) shall land shark fins harvested in waters seaward of the inner boundary of the U.S. EEZ without corresponding shark carcasses'; NOAA, 'Fisheries Off West Coast States and in the Western Pacific; Atlantic Highly Migratory Species; Fisheries of the Northeastern United States; Implementation of the Shark Finning Prohibition Act' (2002) 68 Federal Register 6194.

²⁷ NOAA, 'Implementation Shark Finning Prohibition' (n 26) 6198.

²⁸ Free to land in foreign ports; *Us v Approximately 64,695 Pounds of Shark Fins* (2007) 520 F 3d 976 (US Court of Appeals, 9th Circuit) 983.

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That is not to say mere possession is theoretically insufficient. Prohibiting foreign vessels possessing unaccompanied shark fins within port was considered but not prescribed for economic reasons.²⁹

Landing offences may be combined with the *Lacey Act*,³⁰ a general conservation law, as occurred for a Japanese vessel's crew landing in Guam (unincorporated US territory).³¹ The broadly defined overarching *Lacey Act* offence of 'importation' includes foreign vessels entering US jurisdiction with 'illegal' catch aboard.³² Port arrival whilst carrying 'illegal' catch is sufficient for an import violation,³³ whereas 'transport' or 'possession' offences also present alternatives.³⁴ Importantly, catch is illegal when it results from violations of US law, a treaty to which the USA is party,³⁵ or extraterritorial conduct, perceived by the USA³⁶ as violating "foreign laws":

"unlawful for any person [...] to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce – (a) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law"³⁷

²⁹ Estimated "port activity [foreign longline vessels] generates between \$40 and \$60 million per year in sales by Hawaiian businesses", NOAA, 'Implementation Shark Finning Prohibition' (n 26) 6195–6196.

³⁰ *Lacey Act* 62 Stat. 687, as amended, codified, 18 U.S.C. 2017 (n 6) § 42-43; *Lacey Act Amendments of 1981*, Pub. L. 97–79, Nov. 16, 1981, as amended, Pub. L. 108–191, Dec. 19, 2003; Pub. L. 110–234, May 22, 2008; Pub. L. 110–246, June 18, 2008, codified 16 *ibid* § 3371-3378. Interest lays in the later Title 16.

³¹ NOAA-NMFS, '2004 Report to Congress Pursuant to the Shark Finning Prohibition Act of 2000 (Public Law 106-557)' (2004) 11 custodial sentence, followed by deportation.

³² 16 U.S.C. 2017 (n 6) § 3371(b); in contrast to the shark example, 'import' was broadly defined "to permit the seizure and forfeiture of illegal catch being transshipped through USA ports" Paul Ortiz, 'An Overview of the U.S. *Lacey Act* Amendments of 1981 and a Proposal for a Model Port State Fisheries Enforcement Act', *Ministerially-Led Task Force on Illegal, Unreported and Unregulated Fishing on the High Seas* (2005) 5.

³³ Even contiguous zone entry is sufficient, Ortiz (n 32) 17.

³⁴ 'transport', 16 U.S.C. 2017 (n 6) § 3371(k); examples, Robert S Anderson and Mary D Carraway, 'Current Issues Arising in *Lacey Act* Prosecutions' (2015) 63 *United States Attorneys' Bulletin* 3, 5.

³⁵ 16 U.S.C. 2017 (n 6) § 3372(a)(1), § 3372 (false labelling); labelling port state proposal, Ortiz (n 32) 29–30.

³⁶ NOAA policy dictates prosecution only with foreign government support Ortiz (n 32) 12. This reflects domestic reasonableness, but is not a legal limitation and it remains a US decision as to whether acts are interpreted as breaching foreign laws.

³⁷ 16 U.S.C. 2017 (n 6) § 3372(2)(a).

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This provision has been replicated by other states,³⁸ following signification promotion.³⁹ For jurisdiction, two distinct steps must occur.⁴⁰ First, the taking, possession, or transport of fish in violation of foreign law (*'underlying element'*), and secondly, subsequent US import (or bringing into) of that fish (*'overlying offence'*). For the purposes of this manuscript the offence is committed by the master of a foreign vessel at port.⁴¹ The foreign law must be 'resource related', whereby protection of wildlife is one purpose, that is easily met in fisheries conservation and management cases.⁴² The USA broadly defines law and determines applicability.⁴³

As it focuses on the subsequent trafficking element, a distinct act in time and manner,⁴⁴ territorial jurisdiction is exercised over the defendant's territorial conduct in dealing with "tainted" property. "[A] person must do something to wildlife that has already been 'taken or possessed' in violation of law".⁴⁵ Extraterritorial conduct is not regulated *per se* but considered as a legal condition of the fish when brought into US ports so as to trigger an offence.⁴⁶ Indeed, the extraterritorial conduct need not have been committed by the defendant.⁴⁷

³⁸ Other states, Ortiz (n 32) 27; further states had 'instruction' on the Lacey Act, Anastasia Telesetsky, 'Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime.' (2014) 41 Ecology Law Quarterly 939, 985.

³⁹High Seas Task Force, 'Closing the Net: Stopping Illegal Fishing on the High Seas' (Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University 2006) 79–80; previous IPOA-IUU draft provision (3.2.2.4), closest final is market state measures, FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2001) paras 66, 73.

⁴⁰ Note, significant exception, 16 U.S.C. 2017 (n 6) § 3377; Cole, Engelke-Ros and Galatzan (n 11) 33 CMMs implemented under Magnuson-Stevens Act cannot form underlying violation.

⁴¹ Terminology and four elements making up the two-steps; Anderson and Carraway (n 34) 3–4; Ortiz (n 32) 4–7. May also be an offence for the owner.

⁴² 'to protect wildlife' *US v McNab* (2003) 331 F 3d 1228 (US Court of Appeals, 11th Circuit) 1239; Ortiz (n 32) 15–16.

⁴³ "[R]egulations and other such legally binding provisions that foreign governments may promulgate [...] initial foreign law determination, however, is a question of law for the court" *US v. McNab* (n 42) 1239–1241.

⁴⁴ Anderson and Carraway (n 34) 4–5.

⁴⁵ *ibid.*

⁴⁶ Describing the fish as metaphorically 'glowing', the underlying illegality being the reason why the fish 'glow': Christopher Hale, 'Domestic Fisheries Enforcement' (2015) 63 United States Attorneys' Bulletin 23, 24–25.

⁴⁷ Defined as "provisions [that] end at the borders of the USA", Darren S Calley, *Market Denial and International Fisheries Regulation: The Targeted and Effective Use of Trade Measures Against the Flag of Convenience Fishing Industry* (Martinus Nijhoff Publishers 2011) 7.

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By 2005, ten *Lacey Act* prosecutions were reportedly brought and settled for foreign vessels offloading tuna caught in breach of foreign fisheries laws.⁴⁸ Since then, the highly-publicised *Arnold Bengis* case, involving importation of lobsters illegally harvested under South African law, led to *Lacey Act* conspiracy and violation charges, resulting in imprisonments, \$13.3 million forfeitures, and a restitution order of nearly \$29.5 million.⁴⁹ No foreign state objections on jurisdictional grounds are known.

6.2.3. Unilateral catch certification scheme(s)

PSJ discussed here nonetheless requires information upon extraterritorial conduct to trigger subsequent territorial offences. Advance notification (6.2.1) and documentary requirements conditioning port access or use, may assist in establishing the underlying element.⁵⁰ This is not the place for detailed coverage, but a host of legislation now addresses, via penalties and forfeiture,⁵¹ “importation of fish that have been harvested illegally in an area outside national jurisdiction, regardless of nationality of the vessel or individual who harvested the fish”.⁵² The implementing regulation for CCAMLR’s CDS (5.3.4) prohibits imports without complete and accurate documentation, with outright prohibition, including possession, of resources harvested in violation of conservation measures to which the USA is party.⁵³ It is generally prohibited:

“to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish taken, possessed, transported, or sold in violation of any foreign law or regulation or any treaty or in contravention of any binding conservation

⁴⁸ Published 2005, referring to the pacific region, “resulting in the collection of US\$90,000 in civil penalties and US\$139,000 in forfeited catch”, Ortiz (n 32) 10.

⁴⁹ Jan Glazewski, ‘United States v. Bengis: A Victory for Wildlife Law and Lessons for International Fisheries Crime’ (2014) 29 *The International Journal of Marine and Coastal Law* 173, 173–174; *US v Bengis* (2014) 783 F 3d 407 (US Court of Appeals, 2nd Circuit) 409–410.

⁵⁰ Previous loophole, Ortiz (n 32) 22–25.

⁵¹ Magnuson-Stevens Fishery Conservation and Management Act, P. L. 94-265, as amended Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, P.L. 109-479, codified, 16 U.S.C. 2017 (n 6) § 1858(a);(d) (in rem liability for fishing vessels involved); § 1860(a) potential forfeiture of vessel, gear and fish; § 1860(e)(1) rebuttable presumption for forfeiture of fish abroad, or § 1860(e)(3) driftnet equipment.

⁵² Listing several legislative examples, Cole, Engelke-Ros and Galatzan (n 11) 33–34.

⁵³ 50 CFR (n 23) § 300.114(b), (d) and for CCAMLR IUU listed vessels, (o).

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measure adopted by an international agreement or organization to which the United States is a party”⁵⁴

PSMs and related market measures nonetheless require sufficient information to identify suspected vessels or catch.⁵⁵ The *Seafood Import Monitoring Program* (SIMP) will, for the initial priority species, enter into force January 2018.⁵⁶ Whilst SIMP does not impose restrictions upon fishing activity itself,⁵⁷ importers are subject to further reporting and recordkeeping requirements (2.3.2.1.1),⁵⁸ necessitating data from foreign vessels and exporters.

The USA does not share the flag state focus of EU CDS (6.3.1.2). Importers are ‘responsible’ for determining the source of their products, which the USA verifies. To enjoy the benefits of US market access,⁵⁹ US importers will have to implement traceability transparency throughout their supply chain, regardless of the extraterritorial effects this may have on foreign actors therein.⁶⁰ To promote port state responsibility, foreign ports of concern may also be identified for further pre-release verification schemes.⁶¹

⁵⁴ 16 U.S.C. 2017 (n 6) § 1857(1)(q).

⁵⁵ Relationship discussed, Anastasia Telesetsky, ‘Scuttling IUU Fishing and Rewarding Sustainable Fishing: Enhancing the Effectiveness of the Port State Measures Agreement with Trade-Related Measures’ (2015) 38 *Seattle University Law Review* 1237, 1263–1264.

⁵⁶ 50 CFR (n 23) § 300.324 Seafood Traceability Program; facilitating enforcement of 16 U.S.C. 2017 (n 6) § 1857(1)(q); NOAA, ‘Magnuson-Stevens Fishery Conservation and Management Act: Seafood Import Monitoring Program’ (2016) 81 *Federal Register* 88975, 88975 eventually expanding all seafood 88976.

⁵⁷ NOAA, ‘SIMP’ (n 56) 88994 reporting and recordkeeping, not restricting fishing activity.

⁵⁸ “[M]ust be a US citizen”, Elizabeth Havice, ‘US Seafood Import Monitoring Program: Briefing and Analysis for the Pacific Islands Forum Fisheries Agency’ (2017) 2 <<https://www.ffa.int/system/files/Havice%202017%20-%20Brief%20on%20US%20Seafood%20Import%20Monitoring%20Program-%20FINAL.pdf>> accessed 26 April 2018.

⁵⁹ “Those importers that do not comply with these new traceability requirements would have their imports barred from entry into the U.S. market” *Complaint and Petition for Review: Alfa International Seafood v Ross* [2017] US Dist Court of Columbia Case 1:17-cv-00031 [41]; “It sends an important message to the international seafood community that if you are open and transparent about the seafood you catch and sell across the supply chain, then the USA markets are open for your business” ‘U.S. Raises Bar on Seafood Imports to Further Curb Illegal Fishing, Fraud’ (NOAA, 8 December 2016) <<http://www.noaa.gov/media-release/us-raises-bar-on-seafood-imports-to-further-curb-illegal-fishing-fraud>> accessed 10 March 2017.

⁶⁰ “The Rule, were it to go into effect, would remake the way in which seafood is caught, processed and imported around the World” *Complaint (Alfa. V Ross)* (n 59) [3]; complaint dismissed, *Alfa Intern Seafood v Ross* (2017) 264 F Supp 3d 23 (US Dist Court of Columbia).

⁶¹ NOAA, ‘SIMP’ (n 56) 88992.

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6.2.4. Unilateral identification and certification of states

The USA reviews jurisdiction exercised by foreign states. If this results in extraterritorial conduct detrimental to conservation and management measures to which the USA is party, or is not comparable to US standards,⁶² the foreign state may be ‘identified’ for IUU fishing or driftnet fishing. To compel reform, a state may be negatively certified, resulting in denial of market access for its fish or fish products, and denial of port access for vessels flying its flag.⁶³ The *High Seas Driftnet Fisheries Enforcement Act*⁶⁴ and *High Seas Driftnet Fishing Moratorium Protection Act* (as amended)⁶⁵ contain relevant provisions.

The highly destructive nature of large-scale pelagic driftnet fishing is recognised by the international community.⁶⁶ The US secretary of commerce may thus identify states “whose nationals or vessels conduct large-scale driftnet fishing beyond the exclusive economic zone of any nation”.⁶⁷ The applicable fish/products from that state are subject to import prohibitions, greater documentation requirements, and denial of port privileges (including entry) – with economic sanctions imposed when measures prove unsuccessful or the state retaliates.⁶⁸ The USA is prescribing norms for and aiming to influence extraterritorial conduct through the conditions placed on port entry and use. The wide discretion to do so is evident in the terminology of conditioning port “privileges” and withholding “clearance required”. Comparable standards are applied amongst flag states to ensure non-discrimination (4.4.2).

⁶² Can be very specific, e.g. *Identification and certification of nations engaged in bycatch of protected living marine resources*; mandatory use of circle hooks within pelagic longline fishing to avoid high seas bycatch; 50 CFR (n 23) § 300.203(e)(1)(i); NOAA, ‘Identification and Certification Procedures IUU’ (n 2) 2016.

⁶³ Comparable import ban without explicit PSMs for “commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards”, The Marine Mammal Protection Act, Pub. L. 92-522, October 21, 1972, as amended through 2015, codified, 16 U.S.C. 2017 (n 6) § 1371(a)(2).

⁶⁴ Pub. L. 102–582, Nov. 2, 1992, 106 Stat. 4901; Pub. L. 109–479, Jan. 12, 2007, 120 Stat. 3632; Pub. L. 114–81, Nov. 5, 2015, 129 Stat. 656, codified 16 *ibid* § 1826(a)-(c).

⁶⁵ Pub. L. 104–43, 3 November 1995, as added Pub. L. 109–479, Jan. 12, 2007, 120 Stat. 3630; amended Pub. L. 111–348, Jan. 4, 2011, 124 Stat. 3669; Pub. L. 114–81, Nov. 5, 2015, 129 Stat. 654, 655; Pub. L. 114–327, Dec. 16, 2016, 130 Stat. 1995, codified, 16 *ibid* § 1826(d)-(k).

⁶⁶ 16 *ibid* § 1826(b)(5)-(6).

⁶⁷ 16 *ibid* § 1826a.

⁶⁸ 16 *ibid* §§ 1826a-1826b. The “additional economic sanctions” (§ 1826a(B)(4)) could include “prohibit the bringing or the importation into the United States of any products from the nation for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the WTO” NOAA, ‘High Seas Driftnet Fishing Moratorium Protection Act: Identification and Certification Procedures to Address Shark Conservation’ (2013) 78 Federal Register 3338, 3340.

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Denial of port privileges and entry,⁶⁹ import prohibitions,⁷⁰ or economic sanctions⁷¹ also apply to vessels, fish, or fishery products, of states identified and negatively certified, amongst others:

“whose vessels engaged in illegal, unreported, or unregulated fishing”⁷²

The USA determines which states have fishing vessels engaged in IUU fishing. This is based on current and previous vessel conduct. Then, like in the EU (6.3.1.5), they are notified and advised to address this conduct and take appropriate corrective action, as defined by the USA. The subsequent congressional report should then issue a certification, positive for states that address the IUU activities, negative for those which cannot provide sufficient evidence of action taken.⁷³

Unilateralism is prevalent, with US evidence, US tests for identification and highly flexible US tests of certification.⁷⁴ Even the IUU fishing definition differs from international consensus, e.g. including a paragraph on “seamounts, hydrothermal vents, cold water corals and other vulnerable marine ecosystems located beyond any national jurisdiction”.⁷⁵ At least one state pointed out this is not supported by internationally agreed standards; to which the response was that this is what is required under national law.⁷⁶ Finally, membership of the flag state of

⁶⁹ 16 U.S.C. 2017 (n 6) § 1826a(a)(2)(a).

⁷⁰ 16 *ibid* § 1826a(b)(3)(A)(i).

⁷¹ 16 *ibid* § 1826a(b)(4)(A).

⁷² 50 CFR (n 23) § 300.202, implementing; 16 U.S.C. 2017 (n 6) § 1826j IUU Fishing; further identification and certification, 50 CFR (n 23) § 300.200-300.209; 16 U.S.C. 2017 (n 6) § 1826k, equivalent conservation measures ABNJ bycatch.

⁷³ If certification decision not taken before the next report, a discretionary shipment-by-shipment port entry procedure applies, 50 CFR (n 23) §300.207.

⁷⁴ A review of the process discussion highlights this, including; communicating the requirements of US law, using information ‘available’, ‘consideration’ of action taken, whether ‘effective’ measures are ‘effectively’ enforced, their ‘comparability’ to US practice, and ultimately, given the breadth of identification, “NMFS will determine the data, information, and standards on a case-by-case basis” for positive certification, NOAA, ‘Identification and Certification Procedures IUU’ (n 2) 2012–2013, 2021.

⁷⁵ 50 CFR (n 23) § 300.201. The rationale provided is the *PSMA* definition addresses vessels, whilst US practice is to promote sustainable fisheries by identifying and certifying flag states; NOAA, ‘Identification and Certification Procedures Shark Conservation’ (n 68) 3341.

⁷⁶ NOAA, ‘Identification and Certification Procedures IUU’ (n 2) 2017; equally narrower at points, e.g. stateless vessels NOAA, ‘Identification and Certification Procedures Shark Conservation’ (n 68) 3338.

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the RFMO/A is immaterial. Compliance is assessed against RFMO/A CMMs applicable to the area in which their vessels operate, only US commitment to those rules is necessary.⁷⁷

Unlike the variety of jurisdictional capacities assessed by the EU (6.3.1.5), US certification only concerns flag states and their vessel(s).⁷⁸ Without identifying ports of convenience, it will not contribute to port state obligations in a comparable manner. Nonetheless, as a port state the process is more transparent, with the identification and certification procedure having been published – albeit at NOAA’s discretion and after the first identification practice in 2009.⁷⁹ In contrast, the EU has no general identification process or factors, and this could raise discrimination concerns (6.3.1.5).

However, identification has expanded, addressing “prohibited actions of fishing vessels but also non-compliance in the form of action or inaction at the national level that leads to IUU fishing”.⁸⁰ Within NOAA’s *IUU Certification Final Rule* commentary, the identification and certification processes extend beyond flag state responsibilities to include measures addressing IUU fishing generally, e.g. PSMs.⁸¹

In practice, all IUU fishing identified nations had received positive certification by the next congressional report. However, in 2017 Mexico received a negative certification,⁸² and Mexican vessels fishing in the Gulf of Mexico were subject to denial of port access and services.⁸³ In the alternative, denial of port entry and additional documentary requirement

⁷⁷ Considered ‘whether or not the nation is party to or maintains cooperating status with the organization’ NOAA, ‘Identification and Certification Procedures IUU’ (n 2) 2012; NOAA, ‘Identification and Certification Procedures Shark Conservation’ (n 68) 3338.

⁷⁸ 50 CFR (n 23) §300.202.

⁷⁹ Published in the interest of transparency and providing context to decisions NOAA, ‘Identification and Certification Procedures IUU’ (n 2) 2012.

⁸⁰ NOAA, ‘Identification and Certification Procedures Shark Conservation’ (n 68) 3338.

⁸¹ NOAA, ‘Identification and Certification Procedures IUU’ (n 2) 2012 (identification); 2013 (certification).

⁸² “for having vessels fishing illegally in USA waters and for overfishing of a stock shared by the United States, in areas without applicable international measures or management organizations, which has adverse impacts on such stocks” NOAA, ‘2017 Report to Congress’ (n 3) 29.

⁸³ NOAA, ‘Notification to Mexican Fishing Vessels Subject to Port Denial under the High Seas Driftnet Fishing Moratorium Protection Act’ (2017).

‘deterrents’ were employed against Italian large-scale driftnet vessels and Italians exports “to effect the immediate termination of Italian large-scale high seas driftnet fishing”.⁸⁴

6.2.5. Sub-conclusions

The self-appointed global leadership of the USA in sustainable fisheries is more broadly framed than that of the EU. Within this mission, combatting IUU fishing includes promoting PSMs at the global, regional and national level (6.2.1). Indeed, global practice (ch 3) has been stimulated and modelled after predating regional (ch 5) and unilateral practice. The USA continues to export PSJ rights and responsibilities, with numerous states including similar long-arm offences in domestic law via the exercise of objective territorial jurisdiction (6.4.10, 6.5.7). The USA and EU practice remains beyond the *PSMA* minimum standards, requiring further documentation or imposing outright prohibitions for high seas catch (6.2.1).

In contrast to port entry or service conditions, offences for foreign vessels or masters are crafted around associated territorial conduct or property in-port providing a sufficient nexus for the entire offence (7.2.2). A presumption of violation occurs when a territorial act takes place, and while not ultimately pursued, “possession” was considered as an act. Within the *Lacey Act* this is the case, extraterritorial conduct being a necessary trigger for the overlying territorial offence of possession.

On a negative note, this continues to blur the territorial-extraterritorial jurisdiction boundary. There appears to be no limitation upon what could be incorporated as a property ‘feature’. The broadly defined import of fish is a sufficient constituent element to grant territorial jurisdiction. Yet the distinguishing factor between importing vessels is how the fish were harvested - a status wholly defined by the who, where, when and how of fish harvesting, and the compliance with foreign law therewith. Once this is established, diverse enforcement measures are visible (4.2).

⁸⁴ Trade sanctions avoided, and documentary requirements were dropped mid-2015, but the report is silent upon if and when denial of port entry was lifted, NOAA-NMFS, ‘2015 Report of the Secretary of Commerce to the Congress of the United States Concerning U.S. Actions Taken on Foreign Large-Scale High Seas Driftnet Fishing’ (2015) 12.

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The USA and EU both go further than global standards in imposing unilateral catch certification (6.2.3) and the identification of other states not fulfilling their international responsibilities (6.2.4). The resulting PSMs of identification are comparable. But US certification of foreign states is broader than the EU identification because the USA applies a different definition of IUU fishing and additional standards, such as negative certification to states allowing high seas driftnet fishing. Equally, US practice is narrower than the EU because it primarily targets flag state responsibilities. When implemented, PSMs have as their very purpose the termination of a foreign state's high seas fishing practice. For both denial of entry and documentary requirements a valid prescriptive basis exists, *domaine réservé*, and territorial state jurisdiction respectively. Thus, no violation of the freedom of fishing occurs. This is despite the measures both having similar extraterritorial objectives to the measures challenged in the *Chile/EC Swordfish Dispute* (4.3.1.2).

Indeed, the policy of *exercising* territorial control (right: *domaine réservé* or territorial-based jurisdiction) to *implement* extraterritorial change (policy: global) was captured in a US response to a foreign state objection concerning a prohibition on imports of certain marine mammals. This prohibition is comparable to the IUU fishing identification and certification process discussed above:

“[The USA] is not attempting to regulate marine mammals within a nation's coastal waters. [...] *The harvesting nation must develop and implement such a [comparable] regulatory program only if it wishes to export fish and fish products to the United States*”.⁸⁵

6.3. European Union: Combatting IUU fishing global leader

The EU's power to “shape international ocean governance” is, in part, based upon its exemplary practice in combatting IUU fishing.⁸⁶ The fight continues as a key action, targeted

⁸⁵ NOAA, 'Fish and Fish Product Import Provisions of the Marine Mammal Protection Act' (2016) 81 Federal Register 54389, 54397.

⁸⁶ EC, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on International Ocean Governance: An Agenda for the Future of Our Oceans' (2016) JOIN(2016) 49 final 4. Previous expanding references to ocean governance leadership; 'Healthy and Safe Seas - EU Backs United Nations Resolutions on Sustainable Fisheries and the Law of the Sea' (*European Commission - Fisheries*, 12 September 2014) <<https://ec.europa.eu/fisheries/healthy-and>

through both multilateral measures and stronger unilateral action.⁸⁷ The *Common Fisheries Policy* (CFP)⁸⁸ objectives, including the fight against IUU fishing, are promoted internationally, through multilateral cooperation or leadership,⁸⁹ and through a control and enforcement system based on a global approach.⁹⁰ Foreign flagged IUU fishing beyond Union waters and PSJ exercised thereon are found in the *IUU Regulation*.⁹¹ This regulation aims to address IUU fishing and associated activities wherever they occur and whoever they involve.

6.3.1. Regulation (EC) No 1005/2008: PSMs to combat IUU fishing

The international community's focus on tackling IUU fishing was taken up by the EU as a matter of "implementation".⁹² EU regulation is designed to broaden the application of and compliance with existing fishery standards, from limited applicability to universality. The identification of non-compliance or non-cooperation is based upon rules applicable to the location where the fishing occurred.⁹³ While this means the standards applied will not be novel EU rules, it equally means the standards applied may be different from those applicable under the law of the sea's distribution of jurisdiction. An example of the latter would be the non-compliance of a vessel with CMMs applicable to an RFMO/A area of competence, despite being flagged to a non-CNCP which does not implement those CMMs.

safe-seas-eu-backs-united-nations-resolutions-sustainable-fisheries-and-law-sea_en> accessed 23 February 2017; EC, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Developing the International Dimension of the Integrated Maritime Policy of the European Union' (2009) COM(2009)536 final 3.

⁸⁷ EC, 'International Ocean Governance' (n 86) 11–12.

⁸⁸ Regulation (EU) No 1380/2013 on the Common Fisheries Policy (as amended and consolidated 01/06/2015) (OJ L 354/22, 28/12/2013).

⁸⁹ *ibid* preamble [50], arts. 28(2)(e) external policy, 30 (RFMO/A compliance), 31(9) (condition of partnership agreements).

⁹⁰ *ibid* preamble [59], art. 36 (control and enforcement).

⁹¹ Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (as amended and consolidated 09/03/2011) (OJ L 286/1, 29/10/2008); Commission Regulation (EC) No 1010/2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 (as amended and consolidated 17/09/2013) (OJ L280/5, 27/10/2009).

⁹² EC, 'Commission Communication of 28 May 2002: Community Action Plan to Eradicate Illegal, Unreported and Unregulated Fishing' (2002) COM(2002) 180 final Action 7 and Action 14, pursuit of defining port state right and responsibilities at the international level.

⁹³ *IUU Regulation* (n 91) art. 3. While offences are framed as in-port, it is the IUU fishing behaviour which is to be discouraged, *ibid* preamble [6,10].

6.3.1.1. Unilateral PSMs

At the entry into force of the *IUU Regulation*, its PSMs were not found within a globally applicable treaty. Those PSMs remain more developed in formality and implementation than could be agreed within a treaty,⁹⁴ e.g. detailed inspection requirements,⁹⁵ designated ports,⁹⁶ prior notice,⁹⁷ entry and use authorisation⁹⁸, transshipment in port,⁹⁹ and documentary requirements.¹⁰⁰ Expansive PSJ is discussed below, including linkages to catch certification, further enforcement measures, a unilateral IUU vessel list, and unilateral non-cooperating third country identification.

PSMs are also employed to greater breadth, including wholly extraterritorial considerations. Port privileges are denied in all cases, unless the regulation's requirements are fulfilled. The law of jurisdiction is not a limiting factor, bar *force majeure* or distress as defined in *UNCLOS* (4.2.3).¹⁰¹

Most notably a vessel must not be presumed to have engaged in IUU fishing. Article 3(1) provides a test of extraterritorial conduct against CMM's applicable to the area and not necessarily the vessel. The *domaine réservé* basis is further evident in cooperation with third states. The *IUU Regulation* refers to "formalities linked to the access to ports", not prescribed law or resulting enforcement.¹⁰² Extraterritorial conduct is determinative of the prescribed requirements enforced through denial. The territorial link of requesting port entry/use has minimal impact as to whether port privileges are denied. No other extraterritorial nexus applies, hence the necessity of novel thinking to justify prescriptive practice (2.5). This contrasts with practice beyond gaining access to a foreign state (below). This difference must

⁹⁴ Since amended, providing further support e.g. inspection benchmark for vessels previously denied privileges in accordance with *PSMA*; *IUU Implementation Regulation* (n 91) art. 4(u).

⁹⁵ *IUU Regulation* (n 91) arts. 4(1), 9-11; *IUU Implementation Regulation* (n 91) arts. 4-5.

⁹⁶ *IUU Regulation* (n 91) art. 5.

⁹⁷ *ibid* art. 6; *IUU Implementation Regulation* (n 91) arts. 1-2.

⁹⁸ *IUU Regulation* (n 91) art. 4(2).

⁹⁹ *ibid* art. 4(3).

¹⁰⁰ *ibid* arts. 6-8; *IUU Implementation Regulation* (n 91) art. 3.

¹⁰¹ *IUU Regulation* (n 91) art. 4(2).

¹⁰² *ibid* art. 20(4)(b).

lay in how standards are prescribed, and not the enforcement *per se*, which in both cases is in-port.

6.3.1.2. Unilateral catch certification scheme

EU catch certification scheme (a CDS) is a market state mechanism, utilizing port state notification, verification and measures for its functioning.¹⁰³ Additionally, whilst the EU importer submits completed documentation to the importing state,¹⁰⁴ denial of certification effects the legal rights of foreign actors (2.2.1), as “the products cannot be recuperated by the exporter”.¹⁰⁵

Importation of fishery products “obtained” from IUU fishing is prohibited, with the burden upon importers to demonstrate legality through documentation.¹⁰⁶ Port state notice must be accompanied by a validated CDS if the vessel has fishery products.¹⁰⁷ Without documentation, entry is not authorised.¹⁰⁸ Therefore port entry is contingent upon a host of extraterritorial activity by numerous actors in conformity with CDS, albeit at the behest of the importer and not *per se* prescribed. This expands beyond the vessel and its contents, to include harvesting by any vessel that produced and defined said contents.

The importer requests the vessel master to record his/her activities and vessel information, which must be validated by the flag state.¹⁰⁹ This is limited to flag states that previously notified the European Commission (EC) pursuant to article 20. Any products derived from catch by vessels flying a non-notified flag are, by definition, prohibited and vessel access will be refused.¹¹⁰

¹⁰³ Exportation not discussed.

¹⁰⁴ IUU Regulation (n 91) art. 16(1).

¹⁰⁵ EC, *Handbook on the Practical Application of Council Regulation (EC) No. 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (The IUU Regulation)* (Mare A4/PS D(2009) A/12880 2009) 78. Removal of individual property rights is clearly an exercise of jurisdiction.

¹⁰⁶ IUU Regulation (n 91) arts. 12(1)-(2).

¹⁰⁷ *ibid* art. 6(2).

¹⁰⁸ *ibid* art. 7(1).

¹⁰⁹ Indirect importation requires further documentary evidence and actor’s verification.

¹¹⁰ The link of port access and landing is exploited to ensure control by third countries over the legality of catches is “proper” IUU Regulation (n 91) preamble [10].

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An alternative for RFMO/A's CDS is possible if such a scheme is recognised and meets EU CDS standards.¹¹¹ The acceptance of multilateral schemes in the EU is therefore subject to meeting the EU's unilateral standards¹¹² and only when the importer submits additional details on transportation, as per the *IUU Regulation*. Thus, notification or recognition is an additional requirement determinative of whether PSMs apply. The resulting sole distinguishing factor is the flag state and whether it has provided notification to the EC under article 20 to be accepted as a competent state for the purposes of flag state verification. This raises questions of compatibility with the non-discrimination principle (4.4.2). However, international soft law appears to accept both practices as justified discrimination.¹¹³

The essence is therefore information and complete documentation being provided within the EU - deferring to flag states the responsibility to certify the extraterritorial conduct and its accurate record.¹¹⁴ Documentation requirements allow for the artificial separation of conduct. Prohibited extraterritorial conduct will result in not being able to obtain valid documentation. Vessels carrying fishery products without valid documentation will be met by denial of port entry. Prohibited territorial conduct, i.e. import of a catch into the community when not accompanied by a valid catch certificate, will be met by refusal of importation and possible confiscation.¹¹⁵ Extraterritorial conduct is reinvented as documentary deficiencies.¹¹⁶ Additionally, member states retain the right to verify its validity against evidence or reports of extraterritorial conduct.¹¹⁷ Following confirmation by the flag state of invalidity or non-compliance - or an inadequate reply/no reply - products may be refused and confiscated (2.4.1).¹¹⁸

¹¹¹ *ibid* art. 13(1).

¹¹² *IUU Implementation Regulation* (n 91) preamble [6], art. 7, Annex V.

¹¹³ FAO, 'Voluntary Guidelines for Catch Documentation Schemes' (FAO 2017)4.2, non-discriminatory, 4.3 'could' recognise other CDS if 'equivalent outcomes', 5.3 flag state notification requirement.

¹¹⁴ *IUU Regulation* (n 91) arts. 12(3)-(4), "It shall be used to certify that such catches have been made in accordance with applicable laws, regulations and international conservation and management measures".

¹¹⁵ *ibid* art. 18(3); for (limited) implementation statistics, 2010-2013 Carlos Palin and others, 'Compliance of Imports of Fishery and Aquaculture Products with EU Legislation' (European Parliament's Committee on Fisheries 2013) IP/B/PECH/IC/2012-087 113.

¹¹⁶ *IUU Regulation* (n 91) art. 18(1), (a) not able to submit certificate because flag state is not a notified state; (c) not validated by flag state; (d) all required information is not contained e.g. master record keeping.

¹¹⁷ *ibid* art. 17, in particular 17(4)(b)-(c); 17(5) (random).

¹¹⁸ *ibid* arts. 18(2), 18(3).

6.3.1.3. Port state offences

The content of global agreements left the prescription of port state offences and subsequent enforcement to PSJ unilateralism, e.g. allowing entry for “appropriate actions” (3.2.1).¹¹⁹ With the *IUU Regulation*, the EU has taken steps that have been further developed by national laws. Fundamentally, a hard distinction between serious infringements of a territorial nature, subject to chapter IX,¹²⁰ and serious infringements of an extraterritorial nature, “detected” in-port, but requiring a transfer of jurisdiction for chapter IX, has been adopted.¹²¹ Thus sanctions prescribed by port states require an express transfer of jurisdiction from flag states for high seas violations to port states, or from coastal states for violations within their maritime waters to port states.¹²²

However, this is immediately tempered by the regulation’s jurisdictional approach, predominately asking where the offence *stricto sensu* occurred as opposed to the conduct prescription seeks to influence. Serious infringements include activities “constituting IUU fishing” and “the falsification of documents referred to in this regulation *or the use of such false or invalid documents*”.¹²³ Through territorial extension (2.3.5), many serious infringements are brought within territorial jurisdiction. Incomplete recording and reporting,¹²⁴ falsified or concealed markings, identity or registration,¹²⁵ and being a stateless vessel¹²⁶ will continue into port as failures to meet vessel requirements, constituting serious territorial offences.¹²⁷

¹¹⁹ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, opened for signature 22 November 2009, I-54133 (entered into force 5 June 2016) art. 9(5).

¹²⁰ *IUU Regulation* (n 91) art. 41(2).

¹²¹ *ibid* art. 41(3), cross referring the limited port state enforcement of art. 11(4).

¹²² *ibid* art. 11(4). A flag state should also be able to transfer jurisdiction for violations within third state maritime waters, given the continued jurisdiction is exercised.

¹²³ (emphasis added) *ibid* art. 42(1)(a) and (c).

¹²⁴ *ibid* art. 3(1)(b), obligatory as per prior notice requirements (art. 6) – offence being committed upon entry without adequate prior notice.

¹²⁵ *ibid* art. 3(1)(f).

¹²⁶ *ibid* art. 3(1)(l).

¹²⁷ Evidence related offences, or the obstruction of inspectors may occur in-port, but not necessarily so given the high seas/coastal state inspection possibilities; *ibid* art. 3(1)(g)-(h). Jurisdiction exists over prohibited gear possessed in-port, but presumption of IUU fishing is attached to use of said gear, *ibid* art. 3(1)(e).

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Other IUU fishing examples are non-serious infringements, covered by noncompliance with prior notice requirements and/or CDS.¹²⁸ If truthful, documentation will reflect IUU fishing activity and entry will be denied. Any entry into port is thereafter a territorial offence. If documentation is incomplete, entry may be exceptionally authorised pending completion. If documentation is still incomplete after 14 days, the fishery products may be confiscated.¹²⁹ If it is completed and still gives evidence of IUU fishing, this may give rise to confiscation.¹³⁰ In any event, extraterritorial conduct discovered upon inspection would result in denial of landing or transshipment – unauthorised use being a territorial offence.¹³¹

This could work as an incentive for actors to submit false documentation and data in order to gain port access/use. Documentation in such a case records extraterritorial conduct and may be falsified extraterritorially. But if such documentation is subsequently ‘used’ in-port for approval, inspection or services, this constitutes a serious offence of a territorial nature.¹³²

Beyond further investigation, immediate measures for serious offences include seizure of gear, catch, and products, and temporary vessel immobilisation.¹³³ “[E]ffective, proportionate and dissuasive administrative sanctions” may apply, increasingly so for repeat offenders, and these sanctions should account for the “prejudice to the fishing resources and the marine environment concerned”.¹³⁴ Criminal law remains an additional or alternative tool,¹³⁵ as does sequestration of the vessel, or confiscation of prohibited fishing gear, catch or products.¹³⁶ Clearly, no implied limitation to port state territorial enforcement jurisdiction is evident when valid prescriptive state jurisdiction applies (5.2.8).

¹²⁸ IUU Regulation (n 91) art. 6(1) e.g. (c) fishing authorisation (art. 3[1][a]); art. 6(2) accompanied by catch documentation (Chapter III). For landing and transshipment, these may be discoverable upon further declarations (art. 8); IUU Implementation Regulation (n 91) art. 3.

¹²⁹ IUU Regulation (n 91) art. 7(3).

¹³⁰ *ibid*, art. 18(3) applying art 18(1)(c) in which clear demonstration of IUU fishing should not be validated by the flag state. If validated, it may be subject to port state verification and refusal or import/confiscation *ibid* arts. 17, 18(2); with a verification risk-factor being suspected IUU fishing activities of deficiencies in flag state control, art. 31(k) and (n).

¹³¹ IUU Regulation (n 91) art. 11(2), import of IUU products being prohibited, 12(2).

¹³² *ibid* art. 42(1)(c).

¹³³ *ibid* art. 43(1)(e)-(f).

¹³⁴ *ibid* arts. 44 (natural persons); 47 (legal persons); 46, sanctions should “effectively deprive those responsible of the economic benefits derived from their serious infringements”.

¹³⁵ *ibid* art. 44(3).

¹³⁶ *ibid* arts. 45(1), 45(3).

Additional measures provided remain at member states implementation discretion. The *Sea Fishing (Illegal, Unreported and Unregulated Fishing) Order 2009* covers vessels within the territorial jurisdiction of England and Wales.¹³⁷ Mandatory refusal of landing and transshipment applies if records are not submitted in the required form and 4 hours prior.¹³⁸ Additional offences include “for the person in charge of a third country fishing vessel to enter port without authorisation under article 7” of the *IUU Regulation*;¹³⁹ the import of fishery products without valid catch documentation;¹⁴⁰ and the use of falsified documentation.¹⁴¹ Offenders may be fined,¹⁴² and upon conviction, the boat, gear and catch may be detained.¹⁴³ Bar refusal of port services, these are all examples of objective territorial prescription.

6.3.1.4. Unilateral IUU vessel list

The Community IUU vessel list includes a co-operative and unilateral element.¹⁴⁴ RFMO/A IUU vessel lists are transposed into the Community IUU vessel list.¹⁴⁵ Internally, a consolidated list discourages proliferation of unilateral IUU vessel lists by EU Member States.¹⁴⁶ Externally, it shall include additional vessels unilaterally identified.¹⁴⁷ Vessels allegedly engaged in IUU fishing are investigated,¹⁴⁸ and likewise subject to mandatory inspections upon entry.¹⁴⁹ Where sufficient evidence exists, they are presumed to be engaged in IUU fishing.¹⁵⁰

¹³⁷ The Sea Fishing (Illegal, Unreported and Unregulated Fishing) Order 2009 (SI 2009 No 3391) art. 2(1)(a) territory and (c) fisheries limits.

¹³⁸ *ibid* art. 7(2).

¹³⁹ *ibid* arts. 9(1) and 9(11) Person in charge; owner, master, charterer or agents.

¹⁴⁰ *ibid* art. 9(3).

¹⁴¹ *ibid* art. 9(8).

¹⁴² *ibid* art. 10(1).

¹⁴³ *ibid* art. 11; alternatively, The Sea Fishing (Penalty Notices) (England) Order 2011 (SI 2011 No 758) Schedule, art. 11 (covers art. 9 offences discussed).

¹⁴⁴ IUU Regulation (n 91) ch. V; amendments proposed to align EC role as an implementing power; Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (COM(2012) 332 final 2012/0162 (COD)) art. 1(7)-1(10); Consolidated version of the Treaty on the Functioning of the European Union, signed 25 March 1957, OJ C 326/47, 26/10/2012 (effective 1 January 1958) art. 291.

¹⁴⁵ IUU Regulation (n 91) art. 30.

¹⁴⁶ *ibid* preamble [29].

¹⁴⁷ *ibid* art. 27(1).

¹⁴⁸ *ibid* art. 25.

¹⁴⁹ *ibid* art. 9(2)(c).

¹⁵⁰ *ibid* art. 26.

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If engagement in IUU fishing is established and “flag States have not complied with the official requests” to investigate, take appropriate enforcement action, and share its results, foreign vessels are listed.¹⁵¹ Delisting occurs “when the criteria for its listing are no longer met”.¹⁵² The EU has yet to implement unilateral identification,¹⁵³ the Community IUU vessel list to date only including RFMO/A listed vessels.¹⁵⁴ With no geographical scope or necessary link to RFMO/As, its objective is addressing engagement in IUU fishing wherever it occurs.¹⁵⁵

PSMs applied go beyond regional practice (5.3.3.1), targeting vessels and products resulting from extraterritorial conduct. Listed vessels are denied entry, bar cases of *force majeure* or distress.¹⁵⁶ If exceptional access is granted a mandatory entry condition is that “the catches on board and, where appropriate, fishing gear prohibited pursuant to conservation and management measures adopted by regional fisheries management organisations, are confiscated”.¹⁵⁷ This is the most expansive combination of domaine réservé-based entry conditions and objective territorial prescription to date.

Normally, entry conditions are somewhat objective in application. E.g. vessels engaged in driftnet fishing are prohibited entry. A breach is committed through entry, resulting in a case of a territorially prescribed offence. This is accompanied by enforcement measures. Here however, the conditioning of port entry and the latter offence are conflated into an entry condition where property loss must be accepted by a vessel to gain port entry. This blurs the distinction between domaine réservé-based jurisdiction and state jurisdiction. Were this approach to jurisdiction to apply broadly, beyond the limited case of listed vessels, an abuse of rights could be argued (4.4.3).

¹⁵¹ *ibid* preamble [25], arts. 26(2), 27(1), procedures to “safeguard the rights of the fishing vessels placed on the Community IUU vessel list and of their flag States” apply, *ibid* preamble [28], e.g. arts. 27(2), 27(4).

¹⁵² IUU Regulation (n 91) preamble [28], procedure art. 28.

¹⁵³ Commission Implementing Regulation (EU) 2017/2178 of 22 November 2017 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing (OJ L 307/14, 23/11/2017).

¹⁵⁴ Nonetheless, subject to mandatory inspection prior to addition to Community list, IUU Regulation (n 91) art. 9(2)(d).

¹⁵⁵ Regulatory scope extends to activities “carried out in the high seas and in maritime waters under the jurisdiction or sovereignty of coastal countries”, *ibid* preamble [7].

¹⁵⁶ *ibid* art. 37(5).

¹⁵⁷ *ibid* art. 37(5), discretion over gear confiscation but not catch.

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Normally, ingredients such as entry denial, the vessel master's knowledge (hopefully) of law,¹⁵⁸ the lack of motive to enter without access to services,¹⁵⁹ and the likely vessel's response rejecting such an offer, suggest limited practical loss of property as an entry condition. However, in the case of IUU listed vessels using the *force majeure* or *distress* exception (article 4(2)), "Member States shall also confiscate catches and where appropriate, fishing gear prohibited pursuant to those measures, on board IUU fishing vessels which have been authorised to enter into its ports for reason of *force majeure* or *distress*".¹⁶⁰ These exceptions are of a humanitarian nature, necessary for the safety of vessel and persons, but not cargo (4.2.3). Such entry may be conditioned by a provision to protect state interests. But this provision could threaten human life if vessels in a situation of *force majeure* or *distress* do not seek necessary assistance because the vessel master fears the confiscation of property.

Port states need not grant immunity to vessels entering port under the *force majeure* or *distress* exception that have engaged in illegal activity, which could encompass IUU fishing. However, it is possible that the vessel has not been found guilty of any IUU fishing offence but is listed because information available "established" its engagement in IUU fishing. This is based upon extraterritorial conduct beyond EU fisheries waters, so the lack of EU jurisdiction foretells the unlikelihood of an applicable offence. This is a punitive entry condition; the type of provision normally suspended when breach results from *force majeure* or *distress* entry. Again, an abuse of rights could be argued if the port state is taking advantage of the situation to confiscate property from listed vessels (4.4.3).

Finally, extraterritorial conduct by listed vessels will taint any products obtained, which, if brought to the EU, trigger PSMs:

"the importation of fishery products caught by IUU fishing vessels shall be prohibited, and according catch certificates accompanying such products shall not be accepted or validated"¹⁶¹

¹⁵⁸ *ibid* arts. 26(2)(d), 27(6), the flag state is requested to inform vessel owners of possible listing consequences.

¹⁵⁹ *ibid* arts. 37(6)-(7), 4(2) 'services strictly necessary to remedy those situations'.

¹⁶⁰ *ibid* art. 37(5).

¹⁶¹ *ibid* art. 37(9).

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This reaffirms the import prohibition of article 12(1), clarifying that products caught by listed vessels are prohibited regardless of certification. Importation of catch originating from listed vessels is refused,¹⁶² whereby refused products may be confiscated.¹⁶³ Regardless of the transporting vessel, it is accompanied by invalid certification and an offence is completed in-port (2.3.1.2; 6.3.1.2).

*6.3.1.5. Unilateral non-cooperating third country list and emergency measures*¹⁶⁴

The EU may consider that certain foreign states are not fulfilling their jurisdictional obligations.¹⁶⁵ PSMs address all vessels of these states, in the hope that pressure will move them to reform their policy and legal framework. Through structural reform and “mind-set change”, the EU hopes to contribute to “better oceans governance globally”.¹⁶⁶ Exercising jurisdiction and market denial is “one of last resort and will only be taken after numerous consultations with the country”.¹⁶⁷

The EC may unilaterally identify “non-cooperating third countries in fighting IUU fishing”.¹⁶⁸ This builds upon previous EU trade restrictive measures that implemented RFMO/A practice.¹⁶⁹ Measures are based upon information available to the EC,¹⁷⁰ involving unilateral determination whether a state failed “to discharge the duties incumbent upon it under international law as flag, port, coastal or market state, to take action to prevent deter and eliminate IUU fishing”.¹⁷¹ Discretion extends to determining who has failed, what (EU

¹⁶² *ibid* art. 18(1)(f), assuming the catch certificate incorrectly identifies another vessel of harvesting origin, or is incomplete, the products may still be refused *ibid* arts. 18(1)(a)-(b).

¹⁶³ IUU Regulation (n 91) art. 18(3).

¹⁶⁴ Sections 6.2.2; 6.3.1.5 and 6.4 have been combined with other research in (*forthcoming*) Arron N Honniball, ‘What’s in a Duty? EU Identification of Non-Cooperating Port States and Their Prescriptive Responses’ (2019) *The International Journal of Marine and Coastal Law*. Repeated paragraphs may occur.

¹⁶⁵ Equally considered on an ad-hoc basis during inspection or validation risk-assessment, IUU Implementation Regulation (n 91) arts. 4(s), 31(n).

¹⁶⁶ EC, ‘The EU and FAO Closing the Door to Illegal Fish’ (2006) 71 *European Maritime Affairs and Fisheries* 7; e.g. duty to remove flags of convenience in the EU’s and international community’s interest EC, ‘Community Action Plan IUU Fishing’ (n 92) 3.

¹⁶⁷ EC, *IUU Regulation Handbook* (n 105) 65.

¹⁶⁸ IUU Regulation (n 91) ch. VI, art. 31(1).

¹⁶⁹ Gilles Hosch, ‘Trade Measures to Combat IUU Fishing: Comparative Analysis of Unilateral and Multilateral Approaches’ (International Centre for Trade and Sustainable Development (ICTSD) 2016) 15; Telesetsky (n 55) 1260.

¹⁷⁰ IUU Regulation (n 91) art. 31(2).

¹⁷¹ *ibid* art. 31(3).

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interpreted) legal duties are unfulfilled, and, given the (EU interpreted) jurisdiction available to that state, why.

Furthermore, decisions may look beyond prescription,¹⁷² to include enforcement.¹⁷³ This implies port state enforcement duties within the EU's interpretation of international law, allowing additional room for unilateral analysis by the EC. Chapter VI of the *IUU Regulation* has the potential to contribute to defining both the limits of PSJ and the breadth or depth of responsibilities.

In short, the listing procedure involves five stages. Firstly, unpublicised discussions are held and assistance to third states is undertaken. Since the EU has reportedly succeeded in concluding partnerships with over 50 countries,¹⁷⁴ this appears enough for most cases. If one includes legal alignment without EC engagement, whether through shared values or to avoid measures, this expands to 91 countries.¹⁷⁵

Secondly, if this fails, the EC will issue a notification on the possibility of identification; a *yellow card*.¹⁷⁶ If the state introduces reform, or refutes identification, demarches will be terminated; a *green card*. Alternatively, as a third step the commission may identify a state as a non-cooperating third country.¹⁷⁷ This has an immediate effect whereby imports of fish products caught by its flagged vessels shall be refused and possibly confiscated.¹⁷⁸ Indeed, Spain and the UK have exercised sovereign prerogative to reject or suspend Ghanaian tuna at their ports,¹⁷⁹ despite Ghana's only having been issued a yellow card.

¹⁷² *ibid* art. 31(4) 'examination of the measures taken', including prescription over vessels using ports (art. 31[4][a]) and products resulting from IUU fishing having access to its market (art. 31[4][b]).

¹⁷³ *ibid* art. 31(5)(b), whether effective and sufficient enforcement measures are prescribed and enforced.

¹⁷⁴ EC, 'EU Markets Driving Good Governance in Fisheries' (2015) April 2015 *European Maritime Affairs and Fisheries*; EC, 'The EU Leveraging Global Change for the Good Governance of Fisheries' (2015) 67 *European Maritime Affairs and Fisheries* 6, 7 <https://ec.europa.eu/dgs/maritimeaffairs_fisheries/magazine/sites/maremagaz/files/past-issues/mag67_en.pdf> accessed 27 April 2018.

¹⁷⁵ "Faced with the prospect of no trade, as many as 91 countries have complied with international and EU standards since 2010" EC, 'Leveraging Global Change' (n 174) 7.

¹⁷⁶ IUU Regulation (n 91) art. 32(1).

¹⁷⁷ *ibid* art. 31(1).

¹⁷⁸ *ibid* arts. 18(1)(g), 18(3); e.g. Commission Implementing Decision 2014/715/EU (OJ L 297, 15/10/2014, p 13–22) para 69.

¹⁷⁹ UK suspension and control orders, together with Spain's rejection of shipments reported, Richard Ford, 'Tuna Imports Held Following Warnings of "Illegal Fishing"' <<http://www.thegrocer.co.uk/buying-and-supplying/categories/fresh/tuna-imports-held-following-warnings-of-illegal-fishing/238499.article>> accessed 1

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As a fourth step, the Council of the European Union will decide whether the country is added to the list of non-cooperating third countries, i.e. a *red card*.¹⁸⁰ This entails additional measures, which for PSJ includes reiterating the importation ban, and the invalidity of catch certificates issued.¹⁸¹ The *IUU Regulation* focuses upon consequential denial of importation, but, as noted, the practical effect of no catch documentation is also port entry denial for vessels carrying the undocumented catch.¹⁸²

As a fifth and last stage, only when there has been demonstrable rectification with “concrete measures capable of achieving a lasting improvement”, will the country be delisted; a *green card*.¹⁸³ This decision is again taken by the Council, following an EC proposal, but listing/delisting may be simplified by decision-making powers being transferred to the EC as implementing powers.¹⁸⁴

An alternative, but comparable option is the employment of emergency measures if “there is evidence that the measures adopted by a third country undermine the conservation and management measures adopted by a regional fisheries management organisation”.¹⁸⁵ These have yet to be employed, but are of immediate effect¹⁸⁶ and may include amongst other measures the denial of port access to fishing vessels flying that flag.¹⁸⁷ Its use may increase under the *IUU Regulation of the European Parliament and of the Council (proposal)*, given these are renamed ‘temporary’ measures and member state appeal is removed.¹⁸⁸ Explicit extraterritorial effects include the temporary measures’ aim “to alleviate the effects of such third country measures”.¹⁸⁹ Temporary measures are limited to domaine réservé-based prescription of entry conditions, namely not flying the flag of an emergency measure

March 2017. Ghana, ‘National Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing’ (2014) para 22.

¹⁸⁰ *IUU Regulation* (n 91) art. 33(1).

¹⁸¹ *ibid* art. 38(1).

¹⁸² *ibid* arts. 6(2), 7(1).

¹⁸³ *ibid* art. 34(1).

¹⁸⁴ *IUU Regulation* (2012 proposal) (n 144) art. 1(11)-1(13); TFEU (n 144) art. 291.

¹⁸⁵ A right and obligation, *IUU Regulation* (n 91) art. 36(1).

¹⁸⁶ *ibid* art. 36(3).

¹⁸⁷ *ibid* art. 36(2)(a).

¹⁸⁸ *IUU Regulation* (2012 proposal) (n 144) art. 1(14); current mechanism, see *IUU Regulation* (n 91) arts. 36(4)-(5).

¹⁸⁹ *IUU Regulation* (2012 proposal) (n 144) art. 1(14).

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identified state. This jurisdiction is therefore exercised in respect of extraterritorial foreign state practice, unconnected to the vessel denied entry for reasons other than the choice of registry.

In practice, the extent and breath of using chapter VI has progressively increased.¹⁹⁰ Firstly, the EU has been reviewing an expanding scope over time, including coastal, port and market state duties in respect of foreign state practice within foreign territories. Additionally, an increasing depth is seen, from 'noting' to 'notification' of failure to discharge, and from prescription review to prescriptive and enforcement reviews. Post-2015, reviews extended to states that have not even applied to be a catch certification state for the purpose of importation into the EU,¹⁹¹ including Comoros,¹⁹² Sierra Leone¹⁹³ and Trinidad and Tobago.¹⁹⁴ In other cases, the interaction between different foreign states and the jurisdiction exercised was reviewed. This occurred in respect of Curacao, whereby as flag state it failed to cooperate

¹⁹⁰ As of March 2017; Commission Decision 2012/C 354/01 (OJ C 354, 17/11/2012, p 1–47) (Belize, Cambodia, Fiji, Guinea, Panama, Sri Lanka, Togo and Vanuatu); Commission Implementing Decision 2013/C 346/02 (OJ C 346, 27/11/2013, p 2–25) (Belize, Cambodia and Guinea); Council Implementing Decision 2014/170/EU (OJ L 91, 27/3/2014, p 43–47) (Belize, Cambodia and Guinea); Council Implementing Decision 2014/914/EU (OJ L 360, 17/12/2014, p 53–55) (Belize); Commission Notice 2014/C 364/02 (OJ C 364, 15/10/2014, p 2–2) (Fiji, Panama, Togo, Vanuatu); Council Implementing Decision 2016/1818 (OJ L 278, 14/10/2016, p 46–47) (Guinea); Commission Implementing Decision 2014/715/EU (n 178) (Sri Lanka); Council Implementing Decision 2015/200 (OJ L 33, 10/2/2015, p 15–18) (Sri Lanka); Council Implementing Decision 2016/992 (OJ L 162, 21/6/2016, p 15–17) (Sri Lanka); Commission Decision 2013/C 346/03 (OJ C 346, 27/11/2013, p 26–49) (South Korea, Ghana and Curaçao); Commission Notice 2015/C 142/04 (OJ C 142, 29/4/2015, p 5–5) (South Korea); Commission Notice 2015/C 324/08 (OJ C 324, 2/10/2015, p 15–15) (Ghana); Commission Notice 2017/C 60/04 (OJ C 60, 24/2/2017, p 5–5) (Curaçao); Commission Decision 2014/C 185/02 (OJ C 185, 17/6/2014, p 2–16) (Papua New Guinea [PNG]); Commission Notice 2015/C 324/09 (OJ C 324, 2/10/2015, p 16–16) (PNG); Commission Decision 2014/C 185/03 (OJ C 185, 17/6/2014, p 17–31) (Philippines); Commission Notice 2015/C 142/05 (OJ C 142, 29/4/2015, p 6–6) (Philippines); Commission Decision 2014/C 447/09 (OJ C 447, 13/12/2014, p 6–15) (Solomon Islands); Commission Notice 2017/C 60/05 (OJ C 60, 24/2/2017, p 6–6) (Solomon Islands); Commission Decision 2014/C 447/10 (OJ C 447, 13/12/2014, p 16–22) (Saint Kitts and Nevis); Commission Decision 2014/C 453/04 (OJ C 453, 17/12/2014, p 5–10) (Saint Vincent and the Grenadines); Commission Decision 2014/C 447/11 (OJ C 447, 13/12/2014, p 23–29) (Tuvalu); Commission Decision 2015/C 142/06 (OJ C 142, 29/4/2015, p 7–17) (Thailand); Commission Decision 2015/C 324/07 (OJ C 324, 2/10/2015, p 6–14) (Comoros); Commission Decision 2015/C 324/10 (OJ C 324, 2/10/2015, p 17–28) (Chinese Taipei); Commission Decision 2016/C 144/05 (OJ C 144, 23/4/2016, p 4–8) (Kiribati); Commission Decision 2016/C 144/06 (OJ C 144, 23/4/2016, p 9–13) (Sierra Leone); Commission Decision 2016/C 144/07 (OJ C 144, 23/4/2016, p 14–18) (Trinidad and Tobago). Subsequent practice, Honniball (n 164).

¹⁹¹ IUU Regulation (n 91) art. 20.

¹⁹² Commission Decision 2015/C 324/07 (n 190) para. 10.

¹⁹³ Commission Decision 2016/C 144/06 (n 190) para. 9.

¹⁹⁴ Commission Decision 2016/C 144/07 (n 190) para. 9.

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with port states to which catch was being landed or transhipped (Ivory Coast, Senegal, Ghana and Angola).¹⁹⁵

Secondly, countries are evaluated against their own and generally applicable international norms of conservation and management.¹⁹⁶ This evaluation is not based upon 'new' international standards, but attempts to ensure existing standards "are respected equally by all".¹⁹⁷ Thus, the EC reviews states against regional CMM's of RFMO/As in which they *should* participate,¹⁹⁸ or against treaties to which they *should* be party,¹⁹⁹ together with EU standards they have accepted to retain market and port access.²⁰⁰ Standards used include debatable standards²⁰¹ or soft law instruments.²⁰² Therefore, when PSMs are applied against all vessels carrying fish/products harvested under a certain flag, the standards imposed may be unilateral – regardless of being found in multilateral instruments. Taking standards from international instruments enables the port state to demonstrate that comparable standards apply to all states, and thereby avoid discrimination that would violate LoS (4.4.2). This is

¹⁹⁵ Commission Decision 2013/C 346/03 (n 190) paras. 181-182.

¹⁹⁶ EC, 'Leveraging Global Change' (n 174) 6.

¹⁹⁷ EC, 'EU and FAO Closing the Door' (n 166) 4.

¹⁹⁸ Thereby not fulfilling *UNCLOS* and *UNFSA*, Commission Decision 2016/C 144/07 (n 190) paras. 30-31 (CCAMLR); Commission Decision 2015/C 324/07 (n 190) para. 60; Commission Decision 2016/C 144/06 (n 190) para. 29; Commission Decision 2015/C 142/06 (n 190) para. 85 (WCPFC); Commission Decision 2014/C 447/10 (n 190) paras. 43-44 (ICCAT & CCAMLR).

¹⁹⁹ Not ratified or implemented primarily *UNFSA*, *Compliance Agreement*, *Code of Conduct* or *PSMA*, Commission Decision 2015/C 324/07 (n 190) paras. 61-63; Commission Decision 2016/C 144/06 (n 190) paras. 31-32; Commission Decision 2013/C 346/03 (n 190) para. 151; Commission Decision 2015/C 142/06 (n 190) paras. 82, 85; Commission Decision 2014/C 185/03 (n 190) para. 104; Commission Decision 2014/C 447/10 (n 190) para. 42 (should comply UNFSA).

²⁰⁰ E.g. CDS implementation. Not also questions bilateral fisheries agreements or whether there should be one, Commission Decision 2015/C 324/07 (n 190) para. 43; Commission Decision 2014/C 447/09 (n 190) para. 44.

²⁰¹ Following ITLOS and SCS Arbitral Tribunal precedents, and the differences therein, "It is also noted that the obligation of flag States to comply with their due diligence responsibilities concerning, inter alia, IUU fishing activities of their vessels forms part of international customary law" Commission Decision 2015/C 324/10 (n 190) para. 36; differences, Eva Romée van der Marel, 'The Due Diligence Obligations of the Flag State with Respect to Its Fishing Vessels and the Environment' (*The JCLOS Blog*, 18 October 2016) <<http://site.uit.no/jclos/2016/10/18/the-due-diligence-obligations-of-the-flag-state-with-respect-to-its-fishing-vessels-and-the-environment/>>.

²⁰² E.g. IPOA-IUU and FAO Voluntary Guidelines for Flag State Performance, Commission Decision 2015/C 324/10 (n 190) para. 52; going beyond customary law for flag states and no clear standards for port states, Eva Romée van der Marel, 'An Opaque Blacklist: The Lack of Transparency in Identifying Non-Cooperating Countries under the EU IUU Regulation' in Lawrence Martin, Constantinos Salonidis and Christina Hioureas (eds), *Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas under National Jurisdiction and Beyond* (Juris 2017) 250–252.

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particularly important for procedures such as the identification of non-cooperating third countries, to which the EC is empowered but without a defined set of standards for it to apply.

For port state responsibilities, at their most general, regionally important port states are identified when failing their general duty under *UNFSA*, art. 23.²⁰³ Further specificity is taken from *PSMA*, with Sierra Leone noted as having no designated ports,²⁰⁴ and Comoros no port notification procedure,²⁰⁵ even though neither of them is a ratifying party. Indeed, Comoros, as a developing port, was advised it *should* ratify.²⁰⁶ Additionally, port state duties can follow binding regional standards,²⁰⁷ or non-binding soft law,²⁰⁸ or EU standards such as an obligatory traceability scheme,²⁰⁹ or the level of port state communications with relevant coastal states.²¹⁰ In the case of the EU CDS, port state duties may concern the port state's cooperation with flag states or having previously provided the processing state's signature on documentation, despite the state knowing of certification inaccuracies.²¹¹

For state jurisdiction, prescription based upon how foreign vessels are regulated in foreign ports would create serious difficulties. However, this practice is limited to port states regulating the entry of products or vessels into their ports by invalidating catch documentation.

Discrimination and abuse of right concerns may arise in the application of the identification process. On the one hand, implementation is by and large linked back to the EU, with the necessity to protect the EU, its markets and its citizens from the entry of IUU fish or fishery

²⁰³ Commission Decision 2016/C 144/07 (n 190) paras. 17, 20; Panama, Commission Decision 2012/C 354/01 (n 190) para. 272, Sri Lanka, *ibid* para. 332.

²⁰⁴ Commission Decision 2016/C 144/06 (n 190) para. 32.

²⁰⁵ Commission Decision 2015/C 324/07 (n 190) para. 29.

²⁰⁶ *ibid* para. 62.

²⁰⁷ E.g. ICCAT PSMs, Commission Decision 2013/C 346/03 (n 190) para. 136; Commission Decision 2012/C 354/01 (n 190) para. 188.

²⁰⁸ Further regional example, Ghana compliance with (advisory) Fishery Committee of the West Central Gulf of Guinea (FCWC) PSMs Commission Decision 2013/C 346/03 (n 190) para. 122.

²⁰⁹ Commission Decision 2015/C 324/10 (n 190) paras. 48-50; Commission Decision 2016/C 144/05 (n 190) paras. 14-16.

²¹⁰ Commission Decision 2013/C 346/03 (n 190) para. 33.

²¹¹ Commission Decision 2014/C 185/02 (n 190) paras. 52-53; 'Port state authorities in transshipment ports have in the past refused to countersign EU CDS paperwork, explaining that there is no obligation to do so, especially when the same port state has not designated a competent [flag state] authority under the EU scheme' Hosch (n 169) 30 fn. 43.

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products.²¹² Thus, Thailand is a vital processing port state for products to Europe;²¹³ Chinese Taipei a certifying and processing state for products destined for EU markets;²¹⁴ and Papua New Guinea failing in information sharing for EU destined imports.²¹⁵ Unilateral member states' practice is also linked back to "contamination of the EU supply chain" concerns.²¹⁶ A balancing of interests has occurred, and the resulting measures may be necessary in light of comparable practice by other states.

On the other hand, unilateralism is inherent in these broad-stroke port/market measures because of the perceived ulterior motives and colonial tendencies. The latter are characteristics of a system predicated on one state using its dominance to exert influence over how another state prescribes and enforces its laws in respect of its resources or citizens.²¹⁷ For example, Sri Lanka's listing "brought about drastic consequences affecting the livelihood of nearly 2.6 million people and [...] trade loss due to the ban in 2015 [...] estimated to be of 51 Million Euros".²¹⁸ Equally, the Solomon Islands' Prime Minister recognised the "EU's right to decide which fish it allows to be imported into its market", but also access was "vital" to the Solomon economy.²¹⁹ According to the director-general of the Pacific Islands Forum Fisheries Agency "virtually all their fisheries exports were going to Europe", any ban being "catastrophic".²²⁰ With no ability to develop alternative markets within the notice period, and the potential reputational damage,²²¹ little choice existed but adoption of EU

²¹² The necessity of ensuring sustainability and legality of imports given it accounts for 65% of fish consumed, EU Ambassador for the Pacific, quoted Losalini Bolatagici, 'Fight against IUU Fishing Improves - Fiji Times Online' (*The Fiji Times ONLINE*, 10 May 2016) <<http://www.fijitimes.com/story.aspx?id=373394>>.

²¹³ Commission Decision 2015/C 142/06 (n 190) para. 63.

²¹⁴ Commission Decision 2015/C 324/10 (n 190) para. 48.

²¹⁵ Commission Decision 2014/C 185/02 (n 190) paras. 53-56.

²¹⁶ DEFRA, 'Important Information Regarding the Import of West African Fish Products into EU and UK Markets' (27 February 2013) 1.

²¹⁷ 'many entrenched positions (e.g. attacker vs attacked, colonial vs independent) were taken when the EC regulation first came into force, but these only served to slow down the process' Francisco Blaha, 'Impacts of the European Commission Yellow Cards in the Pacific' (2015) 148 SPC Fisheries Newsletter 34, 40.

²¹⁸ Mangalika Adikari, 'Statement on the Recent Developments in Sri Lanka's National Fisheries Governance Policy by Mrs. Mangalika Adikari, Secretary of the Ministry of Fisheries & Aquatic Resources Development of the Government of Sri Lanka, at the Press Conference in Brussels on 27/04/2016 (on File with Author)' (2016) 1.

²¹⁹ Solomon Islands Prime Minister Announces Supports for New Fisheries Act' (*Tri Marine Group*, 3 February 2015) <http://www.trimarinegroup.com/news/press/Trimarine_Announcement_020315.html> accessed 15 April 2018.

²²⁰ 'Solomons, PNG and Tuvalu Tuna Industries Warned to Comply with Regulations' (*ABC News*, 3 February 2015) <<http://www.abc.net.au/news/2015-02-03/tuna-industries-in-solomon-islands2c-png-and-tuvalu-warned-to-/6066732>> accessed 15 April 2018.

²²¹ *ibid.*

compliant legislation. This could be an abuse of right under any of the three scenarios (4.4.3), if convincingly argued as meeting the high threshold of “patently unreasonable or discriminatory” balance of interests.

A perceived unfair targeting (e.g. Pacific focus),²²² and no publicized attempt under the *IUU Regulation* to tackle perceived big offenders add impetus to the question of whether there is discrimination in process (4.4.2). An example of a perceived big offender would be China,²²³ not tackled perhaps for fear of a challenge under the WTO dispute settlement process or because of EU reliance on Chinese imports.²²⁴

6.3.2. Global sustainable fisheries beyond the IUU Regulation: Regulation 1026/2012 and Regulation 952/2013

Other sustainability threats may be partially addressed through PSJ. This includes fisheries CMMs being ineffective because of regional restriction or improper implementation by third states (*Regulation 1026/2012*) and the increasing recognition of a need for an integrated approach (*Regulation 952/2013*).

6.3.2.1. *Regulation 1026/2012: PSMs to combat countries allowing non-sustainable fishing*

As shared, straddling and highly migratory fish stocks do not respect maritime boundaries, cooperation in sustainable management is necessary. But as a best effort obligation, the EU has turned to unilateral measures when cooperation is perceived as not forthcoming. Where a common interest arises and a foreign state “allows, without due regard to existing fishing patterns or the rights, duties and interests of other countries and the Union, fisheries activities that jeopardise the sustainability of that stock, and fails to cooperate [...] in its

²²² PNG Fisheries Minister reported ‘PNG Fishing Manager Addresses EU Yellow Card Concerns’ (*Undercurrent News*) <<https://www.undercurrentnews.com/2015/09/25/png-fishing-manager-addresses-eu-yellow-card-concerns/>> accessed 2 May 2018.

²²³ However, previous practice for hygienic or RFMO/A listing rationales; Juan He, ‘Enhancing Chinese Law and Practice to Combat Illegal, Unreported and Unregulated Fishing and Trade’ (2016) 19 *Asia Pacific Journal of Environmental Law* 4, 19.

²²⁴ Francisco Blaha, ‘China in IUU Fishing’ (*Francisco Blaha*, 14 April 2016) <<http://www.franciscoblaha.info/blog/2016/4/14/china-in-iuu-fishing>>; EU market; pollock 100% imported, 50% from China Telesetsky (n 55) 1257.

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management, specific measures should be adopted in order to encourage that country to contribute to the conservation of that stock”.²²⁵

PSMs apply to vessels and fishery products of any third country determined as allowing unsustainable fisheries and having failed to discharge its obligations to cooperate.²²⁶ This includes extraterritorial stocks in which the EU has a common interest by virtue of its fishing fleets as opposed to coastal interests.²²⁷ Measures are intended to use “objective criteria” and be compatible with international law.²²⁸

Whilst “unsustainable fishing” is based on multilaterally agreed concepts such as maximum sustainable yield,²²⁹ scientific disagreements create space for unilateralism. This is amplified when considering the necessary follow-up of what then is “allowing non-sustainable fishing”,²³⁰ including what management measures are “necessary”, or which activities “could” result in unsustainability.²³¹ Measures will continue to apply until the third state has adopted “appropriate” corrective measures, as determined by the EC.²³²

Encouragement of third state reform is pursued by removing the “incentives for countries allowing non-sustainable fishing to fish”,²³³ as opposed to restricting fisheries access (thereby complying with high seas freedoms (4.3.1)). Measures adopted are subject to the usual limits of non-discrimination and proportionality (4.4.2-4.4.3),²³⁴ or when concerning port services, subject to *force majeure* and distress exceptions. As this exception is limited to “services

²²⁵ Regulation (EU) No 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing (OJ L 316/34, 14/11/2012) preamble [2].

²²⁶ *ibid* art. 1, as identified by the EC art. 4(1)(a).

²²⁷ “‘stock of common interest’ means a fish stock the geographic distribution which makes it available to both the Union and third countries [...]” *ibid* art. 2(a), availability could be due to high seas status.

²²⁸ *ibid* preamble [6].

²²⁹ *ibid* art. 2(f)-(g).

²³⁰ *ibid* preamble [4].

²³¹ *ibid* art. 3(b).

²³² *ibid* preamble [10], art. 7.

²³³ *ibid* preamble [6].

²³⁴ *ibid* arts. 5 (general principles, such as proportionality, compatibility with other norms of international law and non-discriminatory) 6 (procedural requirements, such as notification and opportunity to respond).

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strictly necessary to remedy those situations”, it supports the restrictive interpretation of *force majeure*/distress port entry provided in this manuscript (4.2.3).²³⁵

PSJ can disincentivize the allowance of non-sustainable fishing by targeting profitability. This includes restricting importation of fish (or fish products) which result from catches of a common stock caught ‘under the control’ of the identified state (i.e. extraterritorial activity within a third state’s flag or coastal state jurisdiction).²³⁶ It also includes:

“imposing restrictions on the use of Union ports by vessels flying the flag of that country that fish the stock of common interest and/or associated species and by vessels transporting fish and fishery products stemming from the stock of common interest and/or associated species that have been caught either by vessels flying the flag of that country or by vessels authorised by it while flying another flag”²³⁷

Conditions for denial of port services therefore cover extraterritorial conduct and the flag of a vessel requesting use. Conditions for denial can also cover the extraterritorial conduct of a previous fishing vessel which then defines the status of fish or fishing products aboard a vessel seeking port entry. Enforcement measures attach to said restrictions.²³⁸

In implementation of *Regulation 1026/2012*, measures were applied against the Faeroe Islands as a coastal and flag state for Atlanto-Scandian herring.²³⁹ Disagreement over quota allocations led to the Faeroe Islands announcing a unilateral catch limit for its fleet.²⁴⁰ The EU took this as abandonment of the joint management plan, failing its duty of cooperation and various obligations under *UNCLOS* and *UNFSA*.²⁴¹ The effect of various quotas would be overfishing, threatening the sustainability of the stock.²⁴² The Faeroe Islands was therefore

²³⁵ *ibid* art. 4(1)(e).

²³⁶ *ibid* art. 4(1)(c)-(d).

²³⁷ *ibid* art. 4(1)(e).

²³⁸ *ibid* art. 5(5).

²³⁹ Commission Implementing Regulation (EU) No 793/2013 of 20 August 2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock (OJ L 223/1, 21/8/2013) arts. 1-3.

²⁴⁰ *ibid* preamble [2-9], Faeroe Islands response [16].

²⁴¹ *ibid* preamble [10].

²⁴² *ibid* preamble [11-12, 17].

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identified as a state allowing non-sustainable fishing.²⁴³ In the interest of conservation²⁴⁴ the EU “should prevent the Faeroe Islands to take advantage of the Union markets, ports and facilities to maintain its unsustainable fishing for herring”.²⁴⁵

Sustainability could therefore be contributed to by restricting imports of herring and mackerel fish/products, caught under Faeroe Islands’ control.²⁴⁶ This restriction applied as a prohibition on the introduction of said fish/products into EU territory, “including for transshipment purposes at ports”.²⁴⁷ Products are identified through CDS.²⁴⁸ Equally, vessels to be denied port services include “vessels flying the flag of the Faeroe Islands that fish for Atlanto-Scandian herring or mackerel and by vessels transporting the fish or the fishery products stemming from Atlanto-Scandian herring or mackerel that have been caught either by vessels flying the flag of that country or by vessels authorised by it while flying another flag”.²⁴⁹

This is because the use of EU ports was found by the EU to be routine and necessary for the extraterritorial herring harvesting, an act itself that the EU could not directly address.²⁵⁰ It is important to note that the resulting LoS dispute (*GATT* dispute 1.2) did not concern the PSJ to impose such measures, or any limitations to the prescription of conditions for port use (ch 4). The dispute that followed concerned the EU’s implementation process, namely the lack of

²⁴³ *ibid* preamble [14, 18], art. 4.

²⁴⁴ *ibid* art. 2 (objective).

²⁴⁵ *ibid* preamble [20], effectiveness [26].

²⁴⁶ defined, *ibid* art. 3(d). Mackerel was an associated species, preamble [23]; Regulation 1026/2012 (n 225) art. 2(b).

²⁴⁷ Implementing Regulation 793/2013 (n 239) art. 5(1).

²⁴⁸ *ibid* art. 6(1).

²⁴⁹ *ibid* art. 5(2).

²⁵⁰ *ibid* preamble [25]; Norway consider joining EU, Charles Julien and Jordan Shepherd, ‘Faroe Islands Initiate WTO Dispute Settlement Procedures against European Union’ (*International Law Office*, 7 March 2014) <<https://www.internationallawoffice.com/Newsletters/International-Trade/European-Union/King-Spalding-LLP/Faroe-Islands-initiate-WTO-dispute-settlement-procedures-against-European-Union>>.

exhaustion of *UNCLOS* dispute settlement tools,²⁵¹ and various duties to cooperate within fisheries.²⁵²

The dispute ended in 2014 following the adoption of a reduced catch limit by the Faroe Islands. Whilst the catch limit would still create a total allowable catch greater than that proposed by the other coastal states, the effect on stock conservation was deemed ‘non-significant’.²⁵³

6.3.2.2. Regulation 952/2013: PSMs and customs integration

In May 2016 the *Union Customs Code* entered into force.²⁵⁴ Ports provide a suitable gateway for goods “brought into or taken out of the customs territory of the Union”.²⁵⁵ When contributing to fair and open trade, customs authorities should protect the EU from unfair and “illegal” trade.²⁵⁶ PSMs are one means by which to protect the EU customs territory from non-union fish and fish products stemming from non-compliant harvesting.

Chapter 2 of the *Unions Customs Code* governs the arrival of goods, which by sea requires customs office notification.²⁵⁷ Upon territorial entry, goods are subject to customs

²⁵¹ Implementing Regulation 793/2013 (n 239) preamble [16]; lack of exhaustion of *UNCLOS* dispute settlement tools, Andras Kristiansen, ‘The Faroe Islands Call on the EU to Drop Threats and Return to Consultations’ (*Ministry of Fisheries*, 17 June 2013) <<http://www.fisk.fo/fo/kunning/tidindi/the-faroe-islands-call-on-the-eu-to-drop-threats-and-return-to-consultations/>>; supported by Denmark, ‘Denmark Supports Faroe Islands in Appeal against EU Fishing Sanctions’ (*The Copenhagen Post Online*, 19 August 2013) <<http://cphpost.dk/news/eu/denmark-supports-faroe-islands-in-appeal-against-eu-fishing-sanctions.html>>.

²⁵² Iceland objections beyond WTO non-compliance include *IoS* cooperative duties, Ministry for Foreign Affairs, ‘Statement by the Government of Iceland on EU Threats against the Faroe Islands and Iceland’ (*Government Offices of Iceland*, 16 August 2013) <<https://www.government.is/news/article/?newsid=80318764-fb94-11e7-9423-005056bc4d74>>; Ministry of Industries and Innovation, ‘Cooperation and Diplomacy, Not Illegal Sanctions, Are Needed to Manage the Mackerel Stock’ (*Government Offices of Iceland*, 9 August 2013) <<https://www.government.is/news/article/?newsid=e14fa3b8-fb88-11e7-9423-005056bc4d74>>.

²⁵³ Commission Implementing Regulation (EU) No 896/2014 of 18 August 2014 repealing Implementing Regulation (EU) No 793/2013 establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock 2014 (OJ L 244/10, 19/8/2014) preamble [3-4], art. 1.

²⁵⁴ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the *Union Customs Code* (OJ L 269/1, 10/10/2013).

²⁵⁵ *ibid* arts. 1(1), 4 (customs territory includes internal waters).

²⁵⁶ *ibid* arts. 3(b), 5(3) “customs controls” means specific acts performed by the customs authorities in order to ensure compliance with the customs legislation and other legislation governing the entry, exit, transit, movement, storage and end-use of goods moved between the customs territory of the Union and countries or territories outside that territory, and the presence and movement within the customs territory of the Union of non-Union goods and goods placed under the end-use procedure’.

²⁵⁷ *ibid* arts. 133, and 139-140 (presentation and examination of goods at port for unloading and transshipment purposes).

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supervision and control.²⁵⁸ The point of interest here is the controls by which a port state may regulate fisheries beyond its fisheries law.²⁵⁹ Article 134 provides:

“where applicable, they [goods] shall be subject to such *prohibitions and restrictions* as are justified on grounds of, inter alia, [grounds similar to *GATT*, Article XX: General Exceptions] as well as to the *implementation of fishery conservation and management measures*”²⁶⁰

Vessels entering EU ports carrying fisheries goods for transshipment or landing will need to present their goods,²⁶¹ and “where the customs authorities have reasonable grounds for so doing, they may require goods which have been presented to customs to be destroyed”.²⁶² Reasonable grounds include grounds on which a customs authority shall confiscate goods (for sale, destruction or disposal).²⁶³ The cases where confiscation can be required are when an obligation is unfulfilled, or when goods cannot be released. One reason for refusal of release is “where the good are subject to prohibitions or restrictions”.²⁶⁴ As noted above this includes prohibitions or restrictions justified on the grounds of implementing fisheries conservation and management measures. This may be territorial or protective given the need to protect the internal market from ‘illegal’ goods.

Thus, multiple hurdles can be placed in front of port use, including beyond the *IUU Regulation* into other fields of law and their respective authorities. The *Union Customs Code* demonstrates that other fields of law, taking account of international fisheries law, can be a source of future expansion in port states combatting IUU fishing.

6.3.3. Sub-conclusions

Drawing from RFMO/A CMMs, fisheries standards applied in EU law are not unilateral *per se*, although for non-CNCP flag states they are. Non-compliance and non-cooperation are

²⁵⁸ *ibid* art. 134(1).

²⁵⁹ Vice versa, fisheries law defined ‘import’ for its purposes, e.g. *IUU Regulation* (n 91) art. 2(11).

²⁶⁰ *Customs Code* (n 254) arts. 134(1) (emphasis added), 267(2)(e) (customs supervision of exit with similar prohibitions and restrictions).

²⁶¹ *ibid* art. 139(2).

²⁶² *ibid* art. 197.

²⁶³ *ibid* art. 198.

²⁶⁴ *ibid* art. 198(b)(iv).

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determined by the rules applicable to the geographical location where conduct occurs, as agreed between RFMO/A members. This is to stimulate universal adherence to agreed CMMs, despite the distribution of vessels between bound flag state jurisdictions and unbound non-CNCP flags.

EU regulation maintains more detailed PSMs than global instruments and increased use of territorial jurisdiction, notably in inspections (6.3.1.1). Denial of port privileges applies unless diverse requirements are fulfilled. The greater extraterritorial breadth visible here demonstrates the lack of a meaningful framework for legal basis if reliance is placed on the law of state jurisdiction, and certainly not territorial jurisdiction alone. To include the conditions prescribed for port privileges within the territorial jurisdiction basis would seriously undermine the law of state jurisdiction's merit in distributing prescriptive jurisdiction in other cases. The terminology of "formalities linked to the access to ports" point to the *domaine réservé*-based character of regulating port privileges.

In terms of limitations, the greatest contribution is reconfirmation of the restrictive interpretation proposed for *force majeure*/distress entry (4.2.3). The EU cross-references the *UNCLOS* definition of innocent passage found in article 18(2) to require that port entry must be necessity and that port services will only include those necessary for assistance.

Prior notification requirements have been expanded with unilateral CDS (6.3.1.2), comparable to RFMO/As such as CCAMLR. Discriminatory application of PSMs to all vessels/products of a flag state, on the sole ground they have not notified the EU under its CDS, appears accepted in recent developments on voluntary global guidelines. Flag state notification to the EU is not a justified ground for determining whether a flag state can validate the legality of catch by its vessels. Thus this is best interpreted as discrimination against vessels based on a lack of valid certification.

Documentation requirements allow for the artificial separation of conduct at port, whereby extraterritorial policy objectives (harvesting conduct) can be targeted through documentary offences crafted in-port. Complete documentation giving evidence of IUU fishing will result in confiscation of the catch, while incomplete documentation not rectified within two weeks will also result in confiscation. Similar objective territorial offences completed in-port include

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entering port after having been denied entry, or the use of port without authorisation. The net of entry limitations and subsequent offences may push IUU vessels towards submission of false documentation and information to gain access, whereby they would be committing a serious offence.

Review of EU practice also reveals wide extensions of territorial jurisdiction-based vessel condition offences, including statelessness of vessels. The legal relationship between a vessel and a flag state (or lack thereof) may be distinguishable from other more classic 'static' vessel conditions. It is nonetheless fixed at the moment of port entry. It is therefore arguably comparable to static vessel conditions and may be prescribed as a territorial requirement in-port, subject to enforcement. In keeping with consent-based prescription and enforcement, extraterritorial conduct with no nexus to the EU requires a transfer of jurisdiction from another competent state to the EU (6.3.1.3, 2.3.4, 2.4.1).

Vessels on the EU's unilateral IUU vessel list are subject to stringent PSMs (6.3.1.4). Listing is best viewed as a formalisation procedure, transforming previous ad hoc discretion over port privileges into a defined protocol for identified vessels. It is the results of listing, not listing itself, which determine the jurisdiction exercised.²⁶⁵ The same could be said of emergency measures, non-cooperation processes, or allowing unsustainable fishing (6.3.1.5, 6.3.2.1). When *domaine réservé* and state jurisdiction rights are conflated, as in the case of listed vessels entering under *force majeure*, abuse of rights could be argued. This would reopen the legal uncertainty and unrestrained jurisdiction that distinction sought to avoid (2.5). It should therefore be discouraged.

In addition to the comparisons above (6.2.5), the EU process of listing non-cooperating states has many similarities with its US counterpart. Both are of last resort, reliant upon the state's own information, its own choice of states, its own choice of delisting, and its own choice of benchmarks. The notable difference is the broader practical application as compared to the singular US PSMs in the case against Mexico. Consultations and its last resort nature may shield the process from claims of non-discrimination or abuse of right. While emergency

²⁶⁵ See seizure request discussion, 4.3.1.1.

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measures are not of last-resort, they are more limited to denial of port privileges, comparable to previously accepted RFMO/A practice (5.3.3.4).

Finally, (6.3.2) demonstrates the cross-fertilisation between fisheries entry standards and customs law. Given a host of different legislative fields from immigration to fisheries law converge in prescription at the border, a systematic understanding of PSMs may require looking beyond strictly environmental or fisheries legislation. The imposition of PSMs against countries allowing non-sustainable fishing (6.3.2.1) is a reversal of the EU's previous position in the freedom debate discussed earlier. It also demonstrates that the extraterritorial effect of PSJ is insufficient to violate said freedoms (4.3.1.2).

6.4. EU identified port states and their legislative responses

The countries discussed in this section are those that have been subject to the EU's non-cooperating third country listing process because of a failure to implement port state duties. Such identification is not indefinite. Green cards are awarded when obligations are fulfilled with long-term improvements. Those notified for port state failures should therefore demonstrate legislative reform. The carrot of collaboration and assistance, in combination with the stick of market and port withdrawal, may foster a legislative environment in which PSMs equal to, or beyond, EU practice, are pursued. Emphasis throughout is placed on prescription after EU notification.

Comoros, Sierra Leone, and Trinidad and Tobago are not discussed here due to the lack of reform by March 2017.²⁶⁶ As a port state, Panama was identified for inadequate ICCAT reporting.²⁶⁷ Discussion as a non-cooperating is thus based on inadequate cooperation within an RFMO/A and not necessarily on a lack of PSMs or a lack of the exercise of jurisdiction.

²⁶⁶ Commission Decision 2015/C 324/07 (n 190) para. 68, no reform; 'First Meeting of the Fifth Session of the Fourth Parliament of the Second Republic of Sierra Leone, Proceedings of the Sitting of the House Held Thursday, 1st June, 2017' (2017) Official Hansard Report 1(28) Sierra Leone has begun the PSMA ratification process, as yet not party; FAO, *Status (25/09/2018): Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2018) <http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf>; Jewel Fraser, 'Trinidad and Tobago's IUU Fishing Yellow Card from EU Sign of Deeper Problem' (*Seafood Source*) <<https://www.seafoodsource.com/features/trinidad-and-tobago-iuu-fishing-yellow-card-from-eu-sign-of-deeper-problem>> A draft Fisheries Management Bill (2015), was reportedly in the works for Trinidad and Tobago.

²⁶⁷ Commission Decision 2012/C 354/01 (n 190) paras. 258, 272.

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Panama is thus not discussed, although during the EU process a Panamanian executive decree established prior notification requirements for foreign vessels, to be enforced through the denial of port entry.²⁶⁸ After the EU terminated steps that were being taken against Panama, progress continued with the *PSMA* being approved into national law, and implementation beginning through executive resolutions.²⁶⁹

Guinea is not deeply analysed due to language restraints. Nonetheless, delisting followed the 2015 *Maritime Code of Fishing*.²⁷⁰ This implements *PSMA*, including denial of access (*bar force majeure/distress*) and a unilateral IUU fishing vessel list.²⁷¹ Supportive traceability provisions include prohibition of catch resulting from extraterritorial IUU fishing, with onus upon actors to demonstrate legality through documentation.²⁷² Territorial offences follow non-compliance with PSMs. Since this is a serious offence, fines,²⁷³ and possibly confiscation or retention provisions apply.²⁷⁴

6.4.1. Chinese Taipei (Taiwan)

In Chinese Taipei (Taiwan) PSMs concern global fisheries policy and are found within the *Act for Distant Water Fisheries* (hereinafter *DWFA*).²⁷⁵ Broad policy objectives²⁷⁶ are matched by progressive PSMs supportive of other states and international organisations combatting IUU fishing.

²⁶⁸ Executive Decree No. 161 Which establishes the mechanisms for inspections, surveillance and control of capture and support fishing operations to the international service Panama flag vessels 2013 art. 10.

²⁶⁹ Ley 43 Por la cual se aprueba el Acuerdo sobre Medidas del Estado Rector del Puerto Destinadas a Prevenir, Desalentar y Eliminar la Pesca Ilegal, No Declarada y No Reglamentada, hecho en Roma, el 22 de noviembre de 2009 2016 (28055-B Gaceta Oficial Digital, miércoles 14 de septiembre de 2016 82); designated ports, Resolución ADM/ARAP No. 034 Por la cual se establecen los puertos de entrada autorizados a buques de pesca y de apoyo a la pesca de pabellón extranjero en la República de Panamá y se dictan otras disposiciones 2017 (28433 Gaceta Oficial Digital, miércoles 27 de diciembre de 2017 25).

²⁷⁰ Portant Code de la pêche maritime 2015 (Loi n°2015/26/AN).

²⁷¹ *ibid* arts. 131-140, and cross-references e.g. arts. 141-143 (unilateral IUU fishing vessel list); denied access (art. 132).

²⁷² *ibid* arts. 155-158, lack of certification may result in being listed.

²⁷³ *ibid* arts. 244(g), 245, use of falsified documentation 241(2)(d), 242.

²⁷⁴ *ibid* arts. 248, 246 (update via regulation).

²⁷⁵ Distant water fisheries being conducted on the high seas or foreign maritime zones Act for Distant Water Fisheries 2016 (Presidential Order Hua-Tsung (1) Yi-Tzu No 10500079291) art. 4(3).

²⁷⁶ *ibid* art. 1.

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Article 22, as per *PSMA*, requires foreign flagged fishing vessels to have permission to enter port.²⁷⁷ There is a more extensive list of vessels that are not provided authorisation than is found in the *PSMA*. Beyond suspected involvement in IUU fishing or statelessness, vessels are denied entry if they are listed by “other countries, international fisheries organizations, or other regional economic integrated organizations”, or when “the flag State of the fishing vessel is identified as IUU fishing non-cooperating country or is subject to a letter of identification for more than 2 years by other countries, international fisheries organizations, or other regional economic integrated organizations”.²⁷⁸

Article 22 essentially extends to Taiwanese ports the denial of entry applied on the basis of either unilateral IUU vessel lists or the EU non-cooperating identification. Taiwanese discretion is exercised to extend the geographical scope of foreign unilateral or regional measures, complimenting efforts to combat IUU fishing. In the case of flag states notified by the EU, but not identified as a non-cooperating state, this goes further than the EU’s PSMs.²⁷⁹ Extraterritorial conduct and the fisheries policy of a foreign flag state are filtered into the *domaine réservé*-based jurisdiction over entry.

Subsequent finable offences are territorial, entry without authorisation being the most important.²⁸⁰ If the fine is unpaid, the vessel may be prohibited from leaving.²⁸¹ Violations of other entry rules still require implementing regulation, but would be territorial offences, subject to lower fines and the prohibition on the vessel leaving port.²⁸² Regulatory power (article 22(3)) includes other internationally agreed entry conditions, e.g. advance notification

²⁷⁷ *ibid* art. 22. Like the EU, cross reference to other laws applicable at the border are visible, e.g. customs.

²⁷⁸ *ibid* art. 22(1).

²⁷⁹ This could be unfortunate when a state’s development status was the reason for providing support or time extensions. Notification could extend beyond two years on this basis.

²⁸⁰ DWFA (n 275) art. 37(1)(1), rising for repeat offenders.

²⁸¹ *ibid* art. 37(4).

²⁸² *ibid* art. 37(3).

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or documentation requirements. Indeed, the regulation implementing the *Fishing Port Act*²⁸³ that predated the *DWFA* already required advance notice for port management issues.²⁸⁴

Within port, inspections apply and, as per *PSMA*, services are denied when IUU fishing conduct is revealed.²⁸⁵ Inspection is wholly territorial, so evading, obstructing or refusing inspections, and providing false information, are finable territorial offences.²⁸⁶ One novelty is that vessels are prohibited from leaving whilst the flag state and other relevant states or RFMO/As are informed about suspected offences and an outcome is being awaited.²⁸⁷ If agreement is unforthcoming (60 days), the vessels is given a timeframe for leaving. With no under delay or prompt release limitation applicable (4.2.7), offences within internal waters such as these can be subject to vessel detention.

Furthermore, if inspection reveals that a vessel is stateless, “such vessel and its catches and fisheries products shall be confiscated and the catches and fisheries products shall be destroyed”.²⁸⁸ If the legal relationship of a vessel with its registry state (or lack thereof) is interpreted as a static vessel requirement at inspection, this vessel condition would continue within territorial PSJ.²⁸⁹ In any event, the vessel will have committed multiple territorial violations upon entry, including entry without authorisation or providing false information.²⁹⁰ Therefore territorial enforcement’s validity flows from this territorial prescription.

Finally, for visiting foreign vessels linked to Taiwanese nationals the picture becomes more complex. The *Act to Govern Investment in the Operation of Foreign Flag Fishing Vessels* is primarily prescribed upon active nationality (2.3.2.1.1). However, a previous 2008 version utilised PSJ to extend prescription beyond nationals;

²⁸³ Fishing Port Act, as amended and promulgated 27 January 2006 (Presidential Order Hua-Tsung (1) Yi-Tzu No 09500011661) arts. 15 (denial bar force majeure), art. 16 (permission prior to entry for unregistered vessels and inspections).

²⁸⁴ Regulations on the Implementation of Fishing Ports Act, as amended 15 March 2007 (Council of Agriculture Order Nung-Yu-Tsi No 0961340232) art. 9(3).

²⁸⁵ *DWFA* (n 275) art. 23.

²⁸⁶ *ibid* art. 37(1)(2).

²⁸⁷ *ibid* arts. 23(2), 23(4)-(5).

²⁸⁸ *ibid* art. 37(5).

²⁸⁹ A ‘stateless’ condition being prohibited in-port, comparable to the previous double hull debate.

²⁹⁰ Stateless vessel must have been denied entry, *DWFA* (n 275) art. 22(1)(5).

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“When a foreign flag fishing vessel that is alleged to have involved in fish laundering activities, voluntarily enters into a port in Taiwan, it shall be prohibited from leaving the port without permission from the competent authority”²⁹¹

“‘fish laundering’ means activities that constitute any of the following: (1) selling or transacting in, under the name of a national vessel, fish or fish products of species regulated by international fisheries organizations that are captured or harvested by foreign flag vessels; (2) selling or transacting in, under the name of a foreign flag vessel that is invested or operated by a Taiwan national, fish or fish products of species regulated by international fisheries organizations that are captured or harvested by any other vessels”²⁹²

The prescriptive basis for the rule subject to vessel detention is unclear.²⁹³ Whether prohibiting nationals’ investment or operation of fish laundering vessels can have enforcement consequences for the entire vessel and crew when in port is doubtful. This rule pushed the boundaries, but the 2016 *Act to Govern Investment in the Operation of Foreign Flag Fishing Vessels* only included offences and punishments for nationals involved.²⁹⁴

6.4.2. Ghana

Shortly following notification by the EU, Ghana produced a new NPOA-IUU which included “Action 11: Incorporate FAO Port State Measures Agreement and ICCAT Recommendation 97-10 into domestic legislation and enforcement action”.²⁹⁵ This suggests implementation of international obligations, not a leadership role.²⁹⁶ However, Ghanaian policy and law remain focused upon combatting IUU fishing within its own maritime zones or by its own vessels.

²⁹¹ Ordinance to Govern Investment in the Operation of Foreign Flag Fishing Vessels 2008 (Presidential Order Hua-Tsung (1) Yi-Tzu No 09700271591) art. 17.

²⁹² *ibid* art. 3(6).

²⁹³ There is no prohibition within the act of these vessels entering port. There are also no follow-up release or enforcement provisions.

²⁹⁴ Act to Govern Investment in the Operation of Foreign Flag Fishing Vessels 2016 (Presidential Order Hua-Tsung (1) Yi-Tzu No 10500079291) art. 9.

²⁹⁵ Ghana (n 179) 14.

²⁹⁶ “The Management Plan takes into account Ghana’s obligations and commitments under the following key International Instruments [...] UN Fish Stock Agreement on Flag State Responsibilities and Port State Measures” Ghana, ‘Fisheries Management Plan of Ghana: A National Policy for the Management of the Marine Fisheries

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The *Fisheries (Amendment) Act 2014*²⁹⁷ added a finable offence for any person “engaged” in IUU fishing.²⁹⁸ A wide range of evidentiary presumptions apply for IUU fishing, not limited to Ghanaian maritime zones or vessels. For instance, contrary to CMMs applicable to the fishing area, the vessel lacked coastal state authorisation, or provided falsified documents, or fished as a non-CNCP or stateless vessel.²⁹⁹ Cases will likely be identified through port state notification or inspection, but as the offence is framed for persons not vessels, it appears reliant upon territorial or nationality based jurisdiction.³⁰⁰ This is law governing nationals, enforced in port, not PSJ *per se*.

Regulations may be adopted for foreign flagged vessels:

“The Minister may, on the recommendations of the Commission, by legislative instrument, make Regulations for the purpose of promoting international cooperation to promote the effectiveness of international conservation and management measures adopted by a regional fisheries management organisation to which the Republic is a member and to combat Illegal, Unreported and Unregulated fishing”³⁰¹

These may prescribe PSMs, including denial of entry to IUU listed vessels, designated ports, conditions of access/use, inspection procedures, and more generally the implementation of regionally or globally agreed PSMs. Port state offences may follow, whereby “contravention of a provision of the Regulations by a [...] foreign fishing vessel”, is subject to fines and forfeiture of “catch, fishing vessel, fishing gear or apparatus or any other item involved in the contravention”.³⁰² *Fisheries (Amendment) Regulations 2015* contain extensive PSMs,³⁰³ but

Sector 2015-2019’ 5 <<https://mofad.gov.gh/fisheries-management-plan-of-ghana-2015-2019/>>; reliable CDS and PSMs as part of international law obligations, *ibid* 38. Prescription gave effect to international rights and obligations, Ministry of Fisheries and Aquaculture Development, ‘Medium Term Expenditure Framework (MTEF) For 2016-2018: Programme-Based Budget Estimates’ (2016) 4.

²⁹⁷ Fisheries (Amendment) Act 2014 (No 880) to give effect to international CMM obligations and empower ministerial regulation to combat IUU fishing.

²⁹⁸ Fisheries Act 2002 (as amended 2014) (No 625) art. 88A(2).

²⁹⁹ *ibid* arts. 88A(1)(a),(g),(l),(m).

³⁰⁰ *ibid* art. 115.

³⁰¹ *ibid* art. 139(3).

³⁰² *ibid* art. 139(5)(a) and (d).

³⁰³ Fisheries (Amendment) Regulations 2015 (LI 2217) arts. 49-49D.

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are limited to foreign flagged vessels intending to fish in Ghanaian waters having applied for a foreign fishing licence.³⁰⁴

6.4.3. Kiribati

The latest 2015 amendments predate EC notification but define the current state of the art. This is the *Fisheries Act 2010*, and the *Fisheries (Amendment) Act 2015*³⁰⁵ (hereinafter, *Fisheries Act 2010 (as amended 2015)*).³⁰⁶

Amendments provide for extraterritorial application of the act and, importantly for port states, to all persons (including non-citizens) and vessels (including foreign flagged vessels) “in” and in relation to Kiribati waters.³⁰⁷ This covers all fishing and fishing-related activities.³⁰⁸ The objectives however remain limited to Kiribati’s fisheries and marine environment.³⁰⁹

The regional prohibition on driftnet fishing is implemented through PSMs targeting extraterritorial conduct or static vessel conditions. Vessels “engaged” in driftnet fishing activities (or support³¹⁰), “equipped to engage”, or possessing a driftnet are prohibited entry.³¹¹ A related objective territorial offence (2.3.1.2) means entry of said vessels is punishable by fines upon conviction for the master, owner or charterer.³¹² They are assumed to know the entry conditions, but nonetheless enter in breach.

Licensing conditions for loading/unloading or transshipping fish or supplies within Kiribati waters and ports provide further extraterritorial effect, despite the wholly territorial prescription.³¹³ Firstly, unlicensed foreign fishing vessels are limited in entering Kiribati

³⁰⁴ *ibid* art. 44(b). However, see coastal state prohibition of foreign fishing vessel entering Ghanaian fishery waters, unless an exception applies, *Fisheries Act* (n 298) art. 61(2).

³⁰⁵ An Act to Amend the *Fisheries Act 2010* (Act No 1 of 2015).

³⁰⁶ An Act for the Conservation, Management and Development of Kiribati Fisheries and Control of Foreign Fishing and for Connected Purposes, as amended 2015 (Act No 6 of 2010).

³⁰⁷ *ibid* arts. 2(2)(c)(i) (application), 3(‘Kiribati waters’ includes internal waters). Ports therein; (4.2.1).

³⁰⁸ *ibid* arts. 2(2)-(3).

³⁰⁹ *ibid* art. 2(1).

³¹⁰ *ibid* art. 3.

³¹¹ *ibid* art. 20(1).

³¹² *ibid* art. 20(2). For static equipment standards, see comparable coastal state prescription prohibiting driftnets on-board in Kiribati waters, punishable through greater fines and forfeiture; *ibid* arts. 19(1)(c), 19(5), 29.

³¹³ *Fisheries Act 2010 (as amended 2015)* (n 306) art. 12(2).

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waters, and may not engage in any such activity.³¹⁴ Those which do, commit an offence within Kiribati's coastal state jurisdiction, resulting in fines, imprisonment, or forfeitures.³¹⁵ Imprisonment will be limited for EEZ violations (4.2.8), but not port state (internal waters) violations.

Secondly, licences may be subject to conditions the Director of Fisheries deems necessary,³¹⁶ including a mandatory condition related to extraterritorial conduct;

“compliance by the operator with the requirements, relating to the activities and practices of fishing vessels, of each scheduled treaty, whether operating inside or outside Kiribati waters”³¹⁷

Thus, through licensing limitations, foreign vessels wishing to conduct fisheries and fisheries-related activities within Kiribati's jurisdiction must comply with relevant RFMO/A measures when operating outside Kiribati's jurisdiction.³¹⁸ Licence breaches are enforced via fines.³¹⁹ Theoretically, extraterritorial conditions could equally be incorporated within licences for unloading or resupplying. This is because fishing provides no greater jurisdiction nexus for licence conditions than other territorial conduct.

The territorial/extraterritorial prescription line can therefore be blurred through licensing.³²⁰ Explicitly, the Director of Fisheries may “impose prohibited conditions of the licence for a foreign fishing vessel [to fish inside Kiribati waters], such as fishing on specific high seas areas, or the use of specific fishing gear outside Kiribati waters”.³²¹ Kiribati cannot regulate foreign high seas fishing (2.2.3; 4.3.1), but, if a vessel operator wishes to act within Kiribati, this prohibition can be side-stepped through licensing conditions with extraterritorial effect. This would be a state jurisdiction-based variation of the *domaine réservé*-based provision objected to in the *Chile/EC Swordfish Dispute* (4.3.1.2). Given that extraterritorial effect is

³¹⁴ *ibid* art. 8(2).

³¹⁵ *ibid* arts. 8(6), 29(1) (includes art. 8 violations), 29(2) (equally, fish and gear).

³¹⁶ *ibid* arts. 12(3)(b), 9(a).

³¹⁷ *ibid* art. 12(3)(c).

³¹⁸ *ibid* Schedule.

³¹⁹ *ibid* art. 12(5).

³²⁰ “any special conditions determined for it by the Director of Fishers” *ibid* art. 9(a)(iv).

³²¹ *ibid* explanatory memorandum, art. 12(2A).

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insufficient for violating the freedoms, and that a formalistic interpretation would frame licence breaches as territorial offences, the measure is equally *UNCLOS* compliant.

On a final note,³²² a *Lacey Act* style provision was added.³²³ It being a finable offence, it is (like all offences) one of strict liability,³²⁴ with seizures possible.³²⁵ Operators of foreign fishing vessels may be prevented from leaving until the fines are paid, together with costs incurred (4.2.7).³²⁶ Administrative penalties, as an alternative to criminal proceedings,³²⁷ demonstrate the unfettered discretion in choice of enforcement tools for port state offences (4.2.8).

6.4.4. Papua New Guinea

When reforming its law, PNG was committed “to combating IUU fishing, both in its fisheries waters and through supporting its Pacific neighbours, through regional cooperation”.³²⁸ Legislative amendments to meet PNG’s international responsibilities included “[c]reating a framework for the inspection and sanction of foreign flagged fishing vessels through provisions for Port State Measures”.³²⁹ Equally, although not yet legislated, port privileges may be denied to eradicate “activities of non-cooperating States that engage in IUU fishing”.³³⁰ The jurisdictional scope of its reforms will define the breadth of PNG’s zero tolerance of IUU fishing.³³¹

³²² However, further detail may be provided through ministerial regulation *ibid* art. 45.

³²³ “(1) No person shall, within Kiribati or in Kiribati waters, on their own account or any other capacity – (a) cause or permit a person acting on his or her behalf; or (b) use or permit a vessel to engage in fishing or related activity, to take or to import, export, land, transport, sell, receive, acquire, buy any fish or fish product taken, possessed, transported or sold in contravention of any law or regulation of another State” *ibid* art. 28A.

³²⁴ *ibid* art. 28B.

³²⁵ *ibid* arts. 23(2)(d), 29.

³²⁶ *ibid* arts. 42-44.

³²⁷ *ibid* arts. 40-41.

³²⁸ National Fisheries Authority, ‘PNG and the Fight Against IUU Fishing’ (2015) 2 <<http://www.fisheries.gov.pg/PolicyandRegulation/Legislation/tabid/86/Default.aspx>>.

³²⁹ *ibid* 5.

³³⁰ ‘The PNG Catch Documentation Scheme National Plan of Action’, in Irina Kireeva, *Technical Report: Technical Assistance on Trade Facilitation and Standards for Papua New Guinea* (ACPFish2 2013) 20 <<http://www.fisheries.gov.pg/Portals/0/PNG%20Catch%20Documentation%20Scheme%20National%20Action%20Plan.pdf>> commitment 4.1.6.

³³¹ *ibid* 28 commitments 4.3 PSMs.

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The *Fisheries Management (Amendment) Act 2015* expanded PSMs.³³² Vessels “identified as being engaged in or supporting fishing in contravention of any international conservation and management measure” may be denied entry or allowed limited conditional entry.³³³ The same applies to stateless vessels, or those believed upon reasonable grounds to be either.³³⁴

Interestingly, rather than revoking entry authorisation, authorities may “require a vessel to be detained in a port under such conditions as are approved”.³³⁵ Although this provision is not elaborated, it enables vessel detention for suspected extraterritorial conduct. This goes further than the denial of privileges, therefore requiring a state jurisdiction basis before it can be exercised.

Further regulations enhance the implementation of PSMs. Article 63(A)(6) provides for regulations’ extraterritorial applicability, but article 63(B) follows the standard practice of denying port privileges. Examples (referring to regional, subregional or global CMMs and foreign laws) include designated ports, inspections, notice and extensive documentation, use restrictions, RFMO/A IUU vessel lists, and additional entry requirements.³³⁶

Offences, subject to further enforcement measures, occur upon port entry/use in breach of article 63 or any regulations thereunder.³³⁷ Penalties now cover port state offences,³³⁸ building upon previous false submission or logbook offences,³³⁹ and a *Lacey Act* style provision for fish taken through driftnets.³⁴⁰ Thus, territorialised offences include fines for

³³² Fisheries Management Act 1998 (No 48 of 1998, as amended, Fisheries Management (Amendment) Act 2015, No 1 of 2015).

³³³ *ibid* art. 63A(1)-(2).

³³⁴ *ibid* art. 63A(3)-(4).

³³⁵ *ibid* art. 63A(4).

³³⁶ *ibid* art. 63B(1); ‘The PNG Catch Documentation Scheme National Plan of Action’ (n 330) 28 commitments 4.3, advance notification and designated ports with inspection already implemented.

³³⁷ Fisheries Management Act (n 332) arts. 63A(7), 63B(2).

³³⁸ *ibid* art. 58(1)(dd).

³³⁹ *ibid* art. 58(1)(s)-(v).

³⁴⁰ *ibid* art. 58(1)(z).

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crew, natural persons and corporations involved.³⁴¹ Limited imprisonment,³⁴² additional fines,³⁴³ penalty notice alternatives,³⁴⁴ and forfeiture of gear, vessel or fish,³⁴⁵ may apply.

6.4.5. The Philippines

The *Philippine Fisheries Code of 1998* as amended by *Republic Act No. 10654*,³⁴⁶ and the 2015 *Philippine Fisheries Code Implementing Rules* will be discussed.³⁴⁷ The relevant department is empowered to adopt port use conditions.³⁴⁸ The usual suspects arise, including prior notification, designated ports, entry and use restrictions, documentary requirements, inspections and “other related measures”.³⁴⁹ Internationally agreed measures, co-ordinated with other port states, are emphasised, not unilateralism.³⁵⁰ One exception is the use of a unilateral IUU Vessel List and ‘blacklisting’.³⁵¹ Future orders will amend *FAO No. 199*, which includes many similar requirements, but only for transshipment and landing.³⁵²

Nonetheless within the act a few expansions are provided. Without 24-hour notice entry is prohibited,³⁵³ and “when a foreign fishing vessel is granted entry, failure to provide a catch

³⁴¹ *ibid* art. 58(5) (includes, 58[1][dd] PSM violations).

³⁴² *ibid* arts. 58(2), where an agreement exists with the state of nationality, or 58(7), where the penalty is not paid.

³⁴³ *ibid* arts. 58(8) (non-payment), 58(9)-(10) (repeat offenders).

³⁴⁴ *ibid* art. 58A.

³⁴⁵ *ibid* art. 62-63.

³⁴⁶ The Philippine Fisheries Code of 1998 as amended by Republic Act No. 10654, entitled ‘An Act to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ 2015.

³⁴⁷ Rules and Regulations implementing Republic Act No. 8550, as amended by Republic Act No. 10654 (Department of Agriculture Administrative Order No 10, Series of 2015).

³⁴⁸ Defined Philippine Fisheries Code (n 346) art. 4(73).

³⁴⁹ *ibid* art. 42. Furthermore, art. 135(6) (denial of port privileges for serious offences).

³⁵⁰ Philippine Fisheries Code Implementing Rules (n 347) Rule 42.1. Rule 42.3, periodic review addresses “evolving fisheries activities and international and regional practices”.

³⁵¹ Philippine Fisheries Code (n 346) arts. 135(5), 135(7).

³⁵² Guidelines on Fish Transshipment 2000 (Fisheries Administrative Order (FAO) No 199). For Historical PSMs under DA-FAO 1999, Philippines, ‘National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (2013) 38–40; Mary Ann Palma, ‘Analysis of the Adequacy of the Philippine Legal, Policy, and Institutional Framework to Combat Illegal, Unreported and Unregulated Fishing’ (University of Wollongong 2006) 212–223.

³⁵³ Philippine Fisheries Code (n 346) art. 117. Somewhat undermined by the next paragraph stating vessels *may* be denied entry/use for failures to comply, but it does raise possible impoundment.

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report shall be deemed unlawful”.³⁵⁴ Breach of further PSMs to be implemented will also be unlawful. How this territorial offence is enforced remains to be seen.³⁵⁵

6.4.6. Solomon Islands

The *Fisheries Management Act 2015* was adopted soon after EU notification.³⁵⁶ The applicability provision clarifies that articles may apply beyond Solomon fisheries waters when permitted by international law, and where interpreted in a manner consistent with the Solomon Islands’ conservation and management obligations.³⁵⁷ PSMs discussed here can only be interpreted as supporting the fight against IUU fishing globally.

Entry and use are limited to designated ports,³⁵⁸ requiring notice.³⁵⁹ For vessels without a fisheries licence for the Solomon Islands (i.e. no connection to Solomon Islands fisheries), a further written authorisation is required for port entry/use.³⁶⁰ Comparable to Kiribati licensing (6.4.3), authorisation includes ad hoc conditions.³⁶¹

Territorial prescription includes port inspections,³⁶² whilst preserving autonomy for “appropriate” follow-up actions. The only real addition here is that of fines and/or imprisonment for the operator, master or charter of foreign vessels who, in breach of said provisions, enter/use port.³⁶³

Inspired by others, the legislator has included a *Lacey Act* style provision. Use of a vessel for (amongst others) landing or transporting illegal fish or fish products is prohibited within the

³⁵⁴ *ibid* art. 117.

³⁵⁵ Philippine Fisheries Code Implementing Rules (n 347) Rule 117.1.

³⁵⁶ An Act to make provisions for the conservation, management, development and sustainable use of fisheries and marine resources of Solomon Islands, to monitor and control fishing vessels within and beyond the fisheries waters, to repeal the Fisheries Act 1998 and to make consequential amendments to the Provincial Government Act 1997 and the Town and Country Planning Act (Cap. 154) (No 2 of 2015).

³⁵⁷ *ibid* arts. 3(1)(a), 3(1)(e)(ii), 3(5).

³⁵⁸ *ibid* art. 87(1)(a).

³⁵⁹ *ibid* art. 87(1)(b).

³⁶⁰ *ibid* art. 87(2). Vessels on IUU lists will not be granted such authorisation, 88(1)(b) (subject to 88[2]-[3] exception).

³⁶¹ *ibid* arts. 88(1)(a), 89(1).

³⁶² *ibid* art. 90, to be exercised at least in the case of 88(2).

³⁶³ *ibid* arts. 87(3) and 89(3) which provide for imprisonment for up to one year and/or a fine of 3,000,000 penalty points or 8,000,000 penalty points, respectively (Schedule 1).

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Solomon Islands and its EEZ.³⁶⁴ That is, “fish or fish product taken, possessed, transported or sold in violation of any law or regulation of another State or of applicable international conservation and management measures”.³⁶⁵ Thus, the ‘illegality’ of property is defined by the conditions of its harvesting (extraterritorial, underlying conduct) and Solomon Islands’ interpretation of foreign law. However, prohibited conduct is restricted to subsequent territorial interaction with the property (territorial, overlying offence). Fines and/or imprisonment may apply (4.2.8).³⁶⁶

General enforcement provisions are supportive, including fines for providing false information, or breaching any duty owed to authorised persons.³⁶⁷ Strict liability applies,³⁶⁸ with seizure powers for authorised officers,³⁶⁹ and discretionary forfeiture or additional fines by courts where necessary.³⁷⁰

6.4.7. South Korea

Prescription includes amendments to *Distant Waters Fisheries Development Act* (hereinafter, ‘*DWFD Act*’);³⁷¹ the *Distant Water Fisheries Development Act Enforcement Rules* (hereinafter, ‘*DWFDA Enforcement Rules*’);³⁷² and *The Ministerial Directive on Port State Inspections*.³⁷³ The transformation from industry-promoting legislation and “quantitative growth” to

³⁶⁴ *ibid* art. 128(1).

³⁶⁵ *ibid* art. 128(3), with an exception for foreign laws applicable to the high seas unrecognised by the Solomon Islands.

³⁶⁶ *ibid* art. 128(4), Schedule 1 2,000,000 penalty units.

³⁶⁷ *ibid* arts. 85(2)(g), 85(2)(q), 85(3)(a).

³⁶⁸ *ibid* art. 125.

³⁶⁹ *ibid* art. 72(2).

³⁷⁰ *ibid* arts. 95 (forfeiture), 101 (deprivation of monetary benefits), 107(1)(b) banning orders for repeat offenders.

³⁷¹ *Distant Waters Fisheries Development Act* (Act No 8626, 3 August 2007, as amended, Act No 13001, 6 January 2015).

³⁷² 원양산업발전법 시행규칙 [unofficial: *Distant Water Fisheries Development Act Enforcement Rules*] 2014 (Ministry of Oceans and Fisheries Regulation No 67); relevant provisions in English, ‘Korea – Expansion of Port State Inspections to Eliminate IUU Fishing’ (The Japan Ship Owners’ Mutual Protection & Indemnity Association 2014) Japan P&I News No. 663-14/02/27 <https://www.piclub.or.jp/joyx3ct10-373/?action=common_download_main&upload_id=3820>.

³⁷³ *The Ministerial Directive on Port State Inspections 2014* (Ministerial Directive No 2014-14 of the Ministry of Oceans and Fisheries); annexed, ‘Korea – Expansion of Port State Inspections to Eliminate IUU Fishing’ (n 372).

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sustainable development and increased MCS can be partially credited to pressure from EU and US listing procedures.³⁷⁴

DWFD Act, article 14, applies to all vessels carrying fish or fisheries products caught outside Korea's fisheries waters and arriving at port. Notice and documentation,³⁷⁵ denial of entry for suspected IUU vessels, inspection procedures, and denial of services are provided. Additionally, those suspected of IUU fishing following inspection may be detained.³⁷⁶ The detention of vessels confirms the lack of an undue delay limitation and the ITLOS rulings on freedom of navigation (4.2.7, 4.3.1.1.2).

Territorial in-port offences build upon entry requirements. Failure to report entry is subject to imprisonment with labour and/or a fine.³⁷⁷ Falling within article 33, confiscation (or equivalent fines) of catch, products, vessel, gear "owned or carried by a criminal" may also apply.³⁷⁸ Imprisonment with labour for fisheries offences is possible in this port state context. The offence is initiated beyond the maritime zones of South Korea and completed within internal waters; thereby outside the UNCLOS limitation (4.2.8).

6.4.8. Sri Lanka

Of interest is the *Fisheries and Aquatic Resources Act (as amended)* (hereinafter, *FAR Act*).³⁷⁹ General territorial restrictions on possession or landing of prohibited fish may be

³⁷⁴ Jie-Hyun Park, 'Korea's Fisheries Sector Assessment' (WWF-Korea 2016) 13 <http://awsassets.wwfkr.panda.org/downloads/kfr_2016_eng_compressed.pdf> accessed 2 May 2018; EJF, 'Bold Action Taken by Korea to Combat Illegal, Unreported and Unregulated (IUU) Fishing Shows EU IUU Regulation Is Working' (*Environmental Justice Foundation*, 29 January 2015) <<https://ejfoundation.org/index.php>>.

³⁷⁵ DWFD Act (n 371) art. 14(1); expanded upon, DWFDA Enforcement Rules (n 372) art. 23(1) including any documentation required by an RFMO/A or demonstrating the legality of the catch for species listed by the Minister; The Ministerial Directive on Port State Inspections (n 373) details notification and inspection, with art. 3(2) listing species subject to further documentation.

³⁷⁶ DWFD Act (n 371) art. 14(4); elaborated, DWFDA Enforcement Rules (n 372) art. 23(4).

³⁷⁷ DWFD Act (n 371) arts. 33(2)(1), 33(4)-(5).

³⁷⁸ *ibid* art. 35; no practice is noted in the 2014, which for foreign vessels only notes the detection of three cases referred to the flag state, Ministry of Oceans and Fisheries, 'National Plan of Action of the Republic of Korea to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2014) 25 <http://www.fao.org/fishery/docs/DOCUMENT/IPOAS/national/KoreaRep/NPOA_IUU_Korea_Republic.pdf>.

³⁷⁹ Fisheries and Aquatic Resources Act (as amended 2016) (Act No 2 of 1996 as amended and consolidated until Act No 2 of 2016); available within Department of Fisheries and Aquatic Resources, 'The Compendium of High Seas Fishing Legislations in Sri Lanka' (2016) <<http://fisheriesdept.gov.lk/v3/wp-content/uploads/2016/08/compendium-of-Fisheries-act-2016.pdf>>.

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prescribed,³⁸⁰ including those obtained through prohibited means.³⁸¹ Further PSMs are implemented through articles 61(1)(l) and 61(1)(t)-based regulation; these being upon taking/landing of fish and other aquatic resources, or the implementation of CMMS including those adopted under *PSMA*. The minister exercises these powers³⁸² and applies the regulation's provisions analysed here as well as the *FAR Act* for enforcement.

As expected from the reference to the *PSMA*, provisions follow those agreed internationally, namely designated ports (at the national and regional level),³⁸³ advance notification,³⁸⁴ denial of entry to suspected IUU fishing or support vessels,³⁸⁵ and a 100 % inspection rate for foreign vessels permitted entry.³⁸⁶ However, in-port inspection consequences are limited, being transmitted to the appropriate flag state and RFMO/A without other explicit action.

Novel territorial vessel conditions may require extraterritorial conduct. Territorial submission of a "maintained" log book on catch data and any transhipment declarations clearly requires conduct beyond Sri Lanka, namely keeping records.³⁸⁷ A further vessel condition implies only vessels flagged to states employing a VMS may use port:

"The Communication system of the boat shall be linked to the radio frequencies of the Monitoring Control Surveillance unit of Department of Fisheries and Aquatic Resources of Sri Lanka and each boat shall carry a transponder which is linked to the central monitoring system of the flag state"³⁸⁸

³⁸⁰ *FAR Act* (n 379) art. 29, 49(2B) fines; e.g. Prohibition of Catching Thresher Shark Regulations 2012 (The Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary, No 1768/36, LDB 1/2012, 27/07/2012); reprinted, Department of Fisheries and Aquatic Resources, 'Collection of High Seas Fishing Legislations in Sri Lanka' (2015) <<http://fisheriesdept.gov.lk/v3/wp-content/uploads/2016/02/collection-of-high-seas-regulations-1.pdf>>.

³⁸¹ *FAR Act* (n 379) art. 27(2) possession or landing of fish obtained through poisonous explosive or stupefying substance, art. 49(3A) enforcement.

³⁸² Implementation of Port State Measures to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing Regulations 2015 (The Gazette of the Democratic Socialist Republic of Sri Lanka Extraordinary, LDB 1/2012/ II, 26/03/2015).

³⁸³ *ibid* art. 2(2).

³⁸⁴ *ibid* art. 4.

³⁸⁵ *ibid* art. 7.

³⁸⁶ *ibid* art. 8-10.

³⁸⁷ *ibid* art. 12.

³⁸⁸ *ibid* art. 11 and Schedule III, Fish Landing Condition 4.

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Discretionary licensing conditions, including use of port in conformity with IOTC and *PSMA* contribute to global IUU fishing objectives.³⁸⁹ The NPOA-IUU elaborates on its implementation, with licensing based upon whether flag states are IOTC members, or the vessel has a history of IUU fishing.³⁹⁰ Domestic concerns are found within other conditions, namely an application fee accompanying documentation,³⁹¹ and the mandatory sale of 10 % of any landings to “Ceylon Fisheries Corporation”.³⁹² A solely extraterritorial condition for landing catch is the “[d]eparted port of the boat should be a recognised port of the flag country or a coastal state”.³⁹³

Without a jurisdictional nexus, states cannot prescribe which foreign port a vessel departs from. Yet, discretion over port use allows prescription as a condition to deny landing rights. What is more, subsequent use is a territorial act, law simply asking whether the vessel is acting in compliance with the licence. Extraterritorial conduct defines whether conditions are being breached but remains underlying conduct for an overlying offence.

Therefore, when conditions are unfulfilled the licence becomes invalid.³⁹⁴ Any port use is then not under “authority of a licence”,³⁹⁵ and is thus a finable offence in violation of landing provisions.³⁹⁶ When the regulation implements CMMs,³⁹⁷ the offence is subject to fine or imprisonment.³⁹⁸ Alternatively, a penalty notice procedure applies.³⁹⁹ Violations of a regulation implementing CMMs committed beyond Sri Lankan waters are subject to minimum prison terms or penalty fines.⁴⁰⁰ However, PSMs are unlikely to be contravened extraterritorially as the final in-port conduct completes the offence.

³⁸⁹ *ibid* art. 5(2), and related border laws e.g. customs and immigration, art. 6.

³⁹⁰ Department of Fisheries and Aquatic Resources, ‘Sri Lanka National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (2015) 21 para. 54; Sri Lanka may in practice go beyond its law to simply prohibit all landings by foreign vessels; moratorium as reported Adikari (n 218) 3.

³⁹¹ PSM Regulations (n 382) art. 3.

³⁹² *ibid* art. 13, Schedule III, Fish Landing Condition 10.

³⁹³ *ibid* Schedule III, Fish Landing Conditions 8.

³⁹⁴ *ibid* art. 5(2).

³⁹⁵ *ibid* art. 2(1).

³⁹⁶ FAR Act (n 379) art. 49(5), the PSM Regulations being adopted under art. 61(1)(l) and 61(1)(t).

³⁹⁷ *ibid* art. 61(1)(t)(iv) - CMMs under *PSMA*.

³⁹⁸ *ibid* art. 49(6).

³⁹⁹ *ibid* art. 52B monetary penalties include regulations under art. 61(1)(t) (i.e. PSM Regulations).

⁴⁰⁰ *ibid* art. 49(7).

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Finally, provisions cover offences generally. Authorised officers who believe an offence may have been committed may seize any connected vessel or gear, and any fish landed or possessed in contravention of the act or regulations.⁴⁰¹ Upon conviction of an offence, the vessel, equipment, and fish “shall, by virtue of such conviction, be forfeited to the state”.⁴⁰²

6.4.9. Thailand

The revised aims of the new primary legislation include to “reorganize fisheries in Thailand and in waters at large with a view to preventing IUU fishing in order to preserve aquatic animal resources as a sustainable source of food for humanity”.⁴⁰³ Subsequent objectives are not territorially limited, potentially serving humanity at large. This includes good governance in management and conservation, fulfilment of Thailand’s international responsibilities, and providing the means to prevent, deter and eliminate IUU fishing.⁴⁰⁴ To achieve this, a Committee for continuing fisheries policy and management has a broad remit.⁴⁰⁵

Further support for that reading comes from the leading general provision, which broadly defines wrongdoing so long as prescribed through sanctions;

“any wrongdoing pursuant to this Royal Ordinance or the laws of a coastal state or in accordance with criteria or measures based on relevant international laws, or the rules or measures of relevant international organisations related to fisheries conservation and management, whether being committed in Thai waters or outside Thai waters, and using a Thai fishing vessel, a non-Thai fishing vessel, or a stateless vessel, shall be

⁴⁰¹ *ibid* arts. 46(4)(e)-(f), 46(5). Released upon payment of a bond, art. 53(1) [refers to 48(5), but presumably a typo of 46(5) given 48(5) is non-existent].

⁴⁰² *ibid* art. 51(1).

⁴⁰³ Royal Ordinance on Fisheries B.E. 2558 (2015) art. 4. MFA, ‘Thailand’s Progress in Combating IUU Fishing’ (Ministry of Foreign Affairs (Thailand) (European Union Division) 2016) Press Release <<http://www.mfa.go.th/main/en/media-center/14/63733-Thailand%E2%80%99s-Progress-in-Combating-IUU-Fishing.html>>.

⁴⁰⁴ R.O. Fisheries (2015) (n 403) arts. 4(1)-(4).

⁴⁰⁵ The power to adopt control measures, including “to prevent and deter the support of IUU fishing, including personnel, fuel, fishing gear or any other form of support”, *ibid* arts. 19(5), 21(2). Denial of port privileges is one Thai obligation, given *PSMA* accession, 6 May 2016, FAO, *Status: PSMA* (n 266).

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regarded as a wrongdoing within the Kingdom, and shall be subject to a sanction prescribed in this royal Ordinance”⁴⁰⁶

If international cooperation and transfers of competence are forthcoming, purely extraterritorial cases otherwise lacking in jurisdictional nexus may be pursued:

“If any such offence occurs *outside Thai waters and does not involve a Thai fishing vessel or a Thai national*, proceedings pursuant to the provision under paragraph one shall be implemented after such authorities have been notified thereof by a foreign state in which any such wrongdoing has occurred or by a relevant international organisations related to any such wrongdoing”⁴⁰⁷

A Port offence is committed when a foreign vessel classified as having “undertaken IUU fishing” is brought into Thailand’s territorial jurisdiction.⁴⁰⁸ Objective territoriality suffices, given the fact that bringing the vessel into Thailand is a constituent element of the offence (2.3.1.2). This is enforced through fines.⁴⁰⁹

In classifying said vessels, the use of a unilateral IUU fishing vessel list may incorporate lists from foreign states or international organisations.⁴¹⁰ Much like sharing and automatic listing between RFMO/As (5.3.3.1), Thailand is an example of a state catalysing concurrent port prohibitions through the mutual recognition of suspected IUU fishing vessels.⁴¹¹

In any event, all foreign fishing vessels require various authorisations for in-port activities in Thailand (bar the usual *force majeure*/safety exceptions). Those *wishing to import* must have authorisation to berth; which will be refused if the vessel is suspected of IUU fishing related conduct, or incorrect notification was submitted.⁴¹² Further authorisation is required to then import, prohibiting any landing until the master or owner proves its legality according to the

⁴⁰⁶ R.O. Fisheries (2015) (n 403) art. 8, para. 1.

⁴⁰⁷ *ibid* art. 8, para. 2.

⁴⁰⁸ *ibid* art. 94.

⁴⁰⁹ *ibid* art. 159.

⁴¹⁰ *ibid* art. 94, para. 2.

⁴¹¹ A second ‘list of fishing vessels used in IUU fishing’ can be published by the Minister which can include foreign vessels, *ibid* arts. 116-117. Although no territorial offence is committed upon entry, this list is linked to the *Lacey Act* style provision (below), and port owners should deny landing.

⁴¹² *ibid* art. 95.

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laws applicable at the time of catch.⁴¹³ This provision refers to the vessel, but cross-reference by article 92 of the Royal Ordinance prohibits imports by persons without permission. To gain permission, it is evident here that “catch certificate or any other document” should accompany the catch to prove legality.⁴¹⁴

Documentation would likely be falsified to conceal extraterritorial IUU fishing and to gain permission. Thus, a territorial offence is “producing a false catch certificate or any other false document” (or simply not seeking permission).⁴¹⁵ The importing party, but also master and/or owner are subject to fines.⁴¹⁶

Nevertheless, landing limitations are not entry limitations. The respective Director-General has considerable powers in three scenarios, whereby the master or owner must demonstrate the legality of catch aboard or risk property losses. Those who fail to prove that an import did not result from IUU fishing are asked to leave.⁴¹⁷ Sanctions follow in three cases:

“[1] In the case where the fishing vessel does not leave the Kingdom within the period of time prescribed or [2] when there exists clear evidence that the fishing vessel has undertaken IUU fishing or [3] in a case in which the fishing vessel is a stateless vessel, the Director-General shall have the power to order that the fishing vessel and all the properties on board any such vessel be confiscated and put up for sale by auction or destroyed”⁴¹⁸

Proceeds of sale may vest in the state if the owner or master cannot demonstrate legality within one year.⁴¹⁹ Yet, as regards the aquatic species/products aboard the EU trend is followed, whereby such products should not enter the market. These resources are to be destroyed or distributed amongst the “impoverished or underprivileged members of the

⁴¹³ *ibid* art. 96, para. 2.

⁴¹⁴ *ibid* art. 92.

⁴¹⁵ *ibid* art. 158.

⁴¹⁶ *ibid* art. 159.

⁴¹⁷ *ibid* art. 96, para. 3.

⁴¹⁸ *ibid* art. 96, para. 5 exception for limited and necessary port services when vessel provides insufficient evidence but there is no clear evidence of prior IUU fishing.

⁴¹⁹ *ibid* art. 96, para. 3.

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public” at the DGs discretion,⁴²⁰ so no appeal or legality demonstration procedure applies (which only cover auctioning) (4.2.7).

But what of the jurisdictional basis for this wide-reaching provision? Vessel presence in-port upon detection is insufficient, and no explicit basis for jurisdiction is provided. However, reading the ordinance provisions collectively, the conduct at the basis of the DG’s powers may be territorial and may not be the fact that the vessel “has undertaken IUU fishing”. Scenario [1] is most straightforward, with the vessel having been instructed to leave Thailand by a set date and failing to do so. This is exclusively territorial, regardless of expulsion reasoning.⁴²¹ Scenario [3] is straightforward if statelessness is accepted as a vessel condition fixed at the time of entry (6.4.1).

Finally, scenario [2]. The prohibition “to bring a non-Thai fishing vessel that has undertaken IUU fishing into the Kingdom” should be recalled.⁴²² Clear evidence of extraterritorial IUU fishing is equally evidence of violating article 94 (2.3.1.2). However, that provision has its own enforcement provisions, and is directed at persons as opposed to vessels here.⁴²³

Therefore, if ‘clear evidence’ only exists once the vessel is in port, it must have provided false or incomplete evidence for authorisation to enter and/or land. For entry, mere “cause for suspicion” of IUU fishing involvement – a lower evidentiary threshold – demands denial of berthing, as described above. For landings, authorisation is conditioned on evidence that the vessel has not undertaken IUU fishing. In most cases the vessel would have breached port entry and/or use conditions, the offence being completed upon port entry/use.

Force majeure or distress admission complicates this interpretation.⁴²⁴ When previous IUU fishing is detected in port, a vessel may not have breached entry conditions (article 95), nor import conditions (article 96). If article 94 is not an alternative basis, the question remains if

⁴²⁰ *ibid* art. 96, para. 4.

⁴²¹ As for entry, no customary right to remain in-port exists.

⁴²² R.O. Fisheries (2015) (n 403) art. 94.

⁴²³ *ibid* art. 96.

⁴²⁴ *ibid* art. 95, para. 3.

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vessels that have been allowed entry because of *force majeure* or distress are subject to the DG's confiscation powers, and upon what basis.

As seen above with other port states, a vessel entering port in breach of conditions set, or in breach of other territorial requirements, may trigger general provisions of the Royal Ordinance. Beyond falsified catch documentation, other serious offences are false reporting, logbooks or documentation, or the destruction of evidence.⁴²⁵ Orders for seizure of aquatic animals/products, seizure of gear, or "detention of any such fishing vessels or demanding that a security be deposited where such infringing fishing vessel is a non-Thai fishing vessel" are possible.⁴²⁶ Further territorial offences include possession of prohibited gear (with intent to use),⁴²⁷ possession of rare aquatic species without a licence,⁴²⁸ and a *Lacey Act* style provision prohibiting possession of aquatic animals with knowledge it was caught through prohibited means.⁴²⁹ This includes knowledge it was acquired by a listed IUU vessel,⁴³⁰ or "by a serious infringement under section 114". Section 114 includes operational use of stateless vessels, falsified records, and "participating in, providing support to or securing essential basics to a fishing vessel undertaking IUU fishing".⁴³¹ It may only apply to Thai nationals extraterritorially, but if the catch is knowingly transferred to a foreign vessel subsequently found in-port, its possession would be a finable offence.⁴³²

Finally, general enforcement powers include temporary vessel detention or confiscation of gear and aquatic animals/products "held or obtained from an IUU fishing operation" where credible evidence of (involvement in) an offence occurs.⁴³³ Upon sanctioning, gear, catch, products and vessel "obtained through the commission of an offence" may be forfeit, subject to a security deposit exception for foreign vessels.⁴³⁴

⁴²⁵ *ibid* art. 114(4).

⁴²⁶ *ibid* arts. 113(1), 113(5).

⁴²⁷ *ibid* art. 67, enforcement arts. 146-147.

⁴²⁸ *ibid* art. 65, possession, import, or 'bring in transit' of rare aquatic species, enforcement art. 114.

⁴²⁹ *ibid* art. 61, enforcement art. 142 (fines).

⁴³⁰ *ibid* arts. 94, 116 listing.

⁴³¹ *ibid* art. 114.

⁴³² *ibid* art. 142.

⁴³³ *ibid* art. 105(2).

⁴³⁴ *ibid* art. 169.

6.4.10. Sub-conclusions

In implementing PSMs, states may limit themselves to agreed global standards (6.4.5) or expand implementation of agreed PSMs e.g. Sri Lankan inspection levels (6.4.8). Alternatively, a frequent unilateral PSM is withholding port privileges to vessels on an IUU vessel list. This may be inspired upon regional lists (6.4.4), foreign unilateral lists (6.4.1), and independent listings (6.4.5, 6.4.9). Interestingly, PSMs indirectly targeting foreign states and their failure to fulfil international obligations is spreading (6.4.1) and potentially forthcoming (6.4.4). PSMs may also address whether the flag state is a participant in the relevant RFMO/A, or the vessel left a port designated by the port state (6.4.8).

Evidence of the *domaine réservé*-basis for entry conditions is found in: denial of permission for vessels flying the flag of a state notified by the EU for non-cooperation in IUU fishing (6.4.1), previous suspected driftnet fishing (6.4.3), 'suspicion' of IUU fishing (6.4.7, 6.4.9), demonstrable legality with laws applicable to harvesting (6.4.9) and equally broad port use conditions (6.4.4), e.g. suspicion of IUU activities (6.4.8). Limitation exceptions are narrowly interpreted, with *force majeure* limited to safety of crewmen and vessel, not its cargo or equipment (6.4.9, 4.2.2).

When suspected extraterritorial offences occur but the port state lacks jurisdiction in customary law, that demands a transfer of jurisdiction for the port state to act (6.4.9). Port entry or use of port services in breach of conditions imposed is a subsequent act subject to territorial jurisdiction (6.4.4). Treating the entry of a stateless vessel as an offence is best justified as wholly territorial prescription comparable to the prescription of static vessel conditions (6.4.1, 6.4.9). Bringing an IUU fishing vessel in port is an objective territorial offence when port entry is explicitly prohibited (6.4.9), whilst omissions (e.g. failure to leave) are equally within territorial prescription (6.4.9).

Activities in port, the very reason vessels visit, may be subject to licences (6.4.3, 6.4.8) with the simple offence being port use without a licence. Exercising objective territorial jurisdiction, extraterritorial conduct licensing conditions are imposed with subsequent port use completing the offence (6.4.8). Equally, subjective territorial jurisdiction may mean that

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extraterritorial conduct is of itself a breach of licences previously acquired (6.4.3). Extraterritorial effects are insufficient to violate the freedom of fishing in either case.

States build upon logbooks or other documentary requirements (6.4.8) with false submission (6.4.4) or in-port lack of catch documentation (6.4.5) offences. Documentation may condition port use, with false documents triggering an objective territorial offence when landing occurs without proof of legality (6.4.9). The broadest condition for a vessel to undertake territorial conduct in the port state appears as a VMS requirement linked to the flag state (6.4.8).

Finally, for prescription, *Lacey Act* style provisions are adopted (6.4.3, 6.4.6) with some modification e.g. fish taken through driftnets (6.4.4), knowingly caught by stateless vessels (6.4.9), or knowingly caught by a vessel upon the IUU vessel list (6.4.9).

Enforcement-wise, port privilege conditions are limited to denial of port entry and/or use, whilst port state offences evidence a clear discretion in the choice of enforcement tools – regardless of extraterritorial elements (6.4.4, 6.4.7, 6.4.8, 6.4.9). Confiscation and detention practice dispels any prompt release limitation (6.4.9). There are suspect cases, e.g. if PNG were to detain a vessel for ‘belief’ of IUU fishing or support (6.4.4), as belief may be false, and a vessel might thus not have entered in non-compliance with entry conditions. Thailand’s previous extension of nationality-based prescription to apply enforcement over the vessel would also have been challengeable for prescriptive basis (6.4.9).

6.5. Further high profile and FAOLEX examples

This final section adds examples from desk-based research. Other port states should exercise jurisdiction if they share a global interest in combatting IUU fishing. FAOLEX keyword searches and backtracking from port-related media reports were used to identify practice of progressive PSMS. This was undertaken to avoid potential EU bias in the research if only reliant upon the *IUU Regulation* and third-countries identifications thereof. If the port state’s rights and duties are generally accepted, then they should be evident outside the context of the EU’s *IUU Regulation*.

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6.5.1. Fiji

The *Offshore Fisheries Management Decree 2012*⁴³⁵ extends discretionary port entry denial to vessels engaged in or supporting IUU fishing, globally.⁴³⁶ This extends beyond violating RFMO/A CMMs to which Fiji is a participant of the RFMO/A.⁴³⁷ Territorial offences can subsequently apply, namely port entry despite authorisation denial or prohibition, or entry in breach of conditions set. Thus, whilst far flung extraterritorial conduct influences the granting of port privileges and relevant conditions, offences and resulting fines are triggered by a territorial breach of conditions i.e. failure to comply.⁴³⁸

Analysis applies equally to driftnet fishing regulation.⁴³⁹ Previous extraterritorial conduct (i.e. “been used for or assisted in driftnet fishing activities”) is considered a ground for denial of port entry.⁴⁴⁰ But finable offences are only committed when a vessel “enters” port or possesses a driftnet within Fijian waters.⁴⁴¹ Extraterritorial driftnet fishing activities or support thereof and subsequent entry are both essential elements. High seas driftnet fishing without subsequent Fijian port entry is not an offence.

Port use requires further authorisation, conditioned upon fisheries management agreement compliance or any condition at the respective Director’s discretion.⁴⁴² Subsequent finable offences cover port use without or in breach of authorisation.⁴⁴³ Authorisation conditions

⁴³⁵ Offshore Fisheries Management Decree 2012 (No 78 of 2012, Government of Fiji Gazette, Vol 13 No 145 of 11 December 2012); subsequent amendments are not of relevance to PSMs, Offshore Fisheries Management (Amendment) Decree 2014 (No 4 of 2014, Government of Fiji Gazette, Vol 15 No 14 of 11 February 2014).

⁴³⁶ OFM Decree (n 435) part 7.

⁴³⁷ *ibid* art. 76(2) on denial of entry to IUU listed vessels only refers to RFMO/As to which Fiji is CPC, but this is expressly in addition to 76(1) of suspected IUU fishing/support which contains no such limitation. *ibid* art. 76(4), prohibiting vessels sighted as engaged in or supporting fishing in contravention of CMMs also refers to RFMO/As generally.

⁴³⁸ OFM Decree (n 435) art. 76(8).

⁴³⁹ *ibid* arts. 25, 2 (definition).

⁴⁴⁰ *ibid* art. 25(3).

⁴⁴¹ Both master and operator, *ibid* art. 24(4).

⁴⁴² *ibid* art. 78(1)-(2). However, not an obligation to ensure compliance, but rather that authorisation is provided for vessels meeting the 78(1) requirements.

⁴⁴³ *ibid* art. 78(5).

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may be extraterritorial (*domaine réservé*), but port use in breach of such conditions is an act limited to Fijian territorial jurisdiction.⁴⁴⁴

Furthermore, a *Lacey Act* style provision “applies to all persons, vessels, fishing, related and other activities to which this Decree has application” (which would include port visits).⁴⁴⁵ This prohibits:

“within Fiji or in Fiji Fisheries waters [...] use or permit a vessel to engage in fishing or related activity, to take or to import, export, land transport, sell, receive, acquire, buy any fish or fish product taken, possessed, transported or sold in violation of any law or regulation or another State or of international conservation and management measures”⁴⁴⁶

Underlying extraterritorial conduct is determinative of the status of fish or fish products, with an overlying offence applicable to various territorial types of conduct dealing with said fish. Upon conviction, a fine and/or imprisonment applies.⁴⁴⁷

General enforcement provisions for any offence presumably include port offences. These general provisions include: liability for state losses or costs;⁴⁴⁸ acts or omissions of the vessel being equally that of the operator or master;⁴⁴⁹ strict liability;⁴⁵⁰ fixed penalty notices;⁴⁵¹

⁴⁴⁴ “Any act or omission in contravention of any of the provisions of this Decree, in such places and to such persons to whom this Decree applies shall be dealt with and judicial proceedings taken as if such act or omission had taken place in Fiji with the jurisdiction of the High Court” *ibid* art. 79(1).

⁴⁴⁵ *ibid* arts. 108(1), 108(3) (exception).

⁴⁴⁶ *ibid* art. 108(2).

⁴⁴⁷ *ibid* art. 108(4).

⁴⁴⁸ *ibid* art. 81.

⁴⁴⁹ *ibid* art. 87(4). This could be important for port state offences committed by the master or operator, such as entry of driftnet fishing/support vessels.

⁴⁵⁰ *ibid* art. 89.

⁴⁵¹ *ibid* pt. 9.

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arrest and seizure (including vessel, gear or fish)⁴⁵² and ultimately sale or forfeiture of seized goods upon conviction.⁴⁵³

Furthermore, ministerial regulations may include multilaterally agreed PSMs.⁴⁵⁴ The *Offshore Fisheries Management Regulations 2014*⁴⁵⁵ incorporated regional and global practice,⁴⁵⁶ with further novel PSMs.⁴⁵⁷ The key examples are further enforcement measures and a “Record of Fishing Vessels Using Ports in Fiji”. Enforcement additions include further offences raising financial liability,⁴⁵⁸ and the imposition of a host of fixed penalties for port use related offences.⁴⁵⁹

The “Record of Fishing Vessels Using Ports in Fiji” maximises sovereign discretion over port entry to impose greater control over frequent users.⁴⁶⁰ A “fishing vessel intending to use a port in Fiji at least three times a year shall apply for inclusion on the Record of Fishing Vessels Using Ports in Fiji”.⁴⁶¹ “A foreign fishing vessel included on the Record of Fishing Vessels Using Ports in Fiji is deemed to be a locally based foreign fishing vessel”,⁴⁶² accepting ‘locally based foreign fishing vessels’ obligations, but also registration conditions.⁴⁶³ Registration conditions become “use of port terms and conditions”, with extensive unilateral and RFMO/A PSMs incorporated (e.g. authorised vessel list, 5.3.3.2).⁴⁶⁴

⁴⁵² *ibid* arts. 49(1)(c), 52(1). This may combine with a presumption fish aboard were caught in the commission of that offence, *ibid* art. 87(1). The Permanent Secretary may authorise further inspection, compliance or enforcement measures adopted by RFMO/As to which Fiji is member (54(1)). Foreign flagged vessels detained (52) may be released upon a bond or other financial security; *Offshore Fisheries Management Regulations 2014* (Legal Notice No 18, Government of Fiji Gazette Supplement, No 12 of 6 June 2014) art. 51.

⁴⁵³ OFM Decree (n 435) arts. 58(1) (sold), 59 (forfeiture), 102 (disposal).

⁴⁵⁴ *ibid* art. 104(4). This is not expressly limited to those organisations or arrangements to which Fiji is party.

⁴⁵⁵ OFM Regulations (n 452).

⁴⁵⁶ *ibid*. See general requirements of PSMA, such as designated port, advance requests, inspections etc. arts. 42-43 and 49 (landing requirements).

⁴⁵⁷ Note previously triggered coastal state notification requirements to navigation within Fiji fisheries waters, *ibid* arts. 39(6), 39(8) (offence).

⁴⁵⁸ *ibid* art. 43(3)-(4), failure to fully cooperate with port inspections.

⁴⁵⁹ *ibid* art. 52, Sch. 11.

⁴⁶⁰ *ibid* art. 45.

⁴⁶¹ *ibid* arts. 46(1) and 46(5) (failure to do so being a fixed penalty offence).

⁴⁶² *ibid* art. 46(4).

⁴⁶³ *ibid* art. 47.

⁴⁶⁴ *ibid* art. 47. Furthermore, any other conditions reported in the *Gazette*.

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Vessel monitoring system requirements, extending well beyond the “installation” requirements of the famous *Sellers* case, are the broadest.⁴⁶⁵ Registration requires the installation, maintenance, operation, and consent to monitoring of an approved Mobile Transceiver Unit at all times, both within Fiji fishing waters and *beyond*, including any reporting requirements.⁴⁶⁶ Non-compliance is a fixed penalty offence, and may result in suspension or delisting - triggering denial of port at all Fijian ports.⁴⁶⁷

6.5.2. Iceland

Iceland has a long PSJ tradition, including against IUU fishing.⁴⁶⁸ Legislation dates to 1998, with a recent amendment, *Act No. 38/2015*,⁴⁶⁹ to implement *PSMA* obligations.⁴⁷⁰ A 2016 consolidated edition (unofficial translation) is used,⁴⁷¹ reconfirmed where possible, by the 2008 edition (official translation).⁴⁷²

Entry refusal is necessary to prevent use of Icelandic ports by those exploiting resources not covered by a fisheries management agreement or in breach of such an agreement.⁴⁷³ During IUU fishing discussions within COFI in 2016 Iceland states that unilateral measures should be avoided at all costs.⁴⁷⁴ Icelandic practice reflects this, promoting compliance with regional

⁴⁶⁵ I.e. beyond a vessel condition to include vessel conduct beyond the port (4.3.1.1.1).

⁴⁶⁶ OFM Regulations (n 452) art. 47(2)(d)-(e), (g).

⁴⁶⁷ *ibid* arts. 48(1), 48(4) (denial of use), 47(3) (offence), Schedule 11 (fixed penalty). If satisfied “the vessel has been used in a manner than undermines the conservation and management measures of a regional fisheries management organisation or arrangement”, a vessel may be suspended or removed from the list, *ibid* art. 48(2)(d).

⁴⁶⁸ “This country has a long experience in the application of port State measures in order to impede illegal fishing” (unofficial translation of Government comments attached to 2015 amendments, Iceland, [Government Submission of Bill With Comments] *Frum-varp Til Laga Um Breyt-ing á Lög-um Nr. 22/1998, Um Veiðar Og Vinnslu Er-lendra Skipa í Fisk-veiðiland-helgi Íslands, Með Síðari Breyt-ing-um (Hafn-ríkisaðgerðir)* (Lagt fyrir Alþingi á 144 löggjafarþingi 2014–2015 2015) Þingskjal 626 — 418 Mál 3 <<http://www.althingi.is/altxt/pdf/144/s/0626.pdf>>.

⁴⁶⁹ *Lög um breyting á lögum nr. 22/1998, um veiðar og vinnslu erlendra skipa í fiskveiðilandhelgi Íslands, með síðari breytingum (hafnríkisaðgerðir)* [Unofficial: Act amending Act no. 22/1998, on Fishing and Processing by Foreign Vessels in Iceland’s Exclusive Fishing Zone, as amended (port State measures)] (Act No 38 July 7, 2015).

⁴⁷⁰ Iceland (n 468) 5.

⁴⁷¹ *Lög um veiðar og vinnslu erlendra skipa í fiskveiðilandhelgi Íslands* [Unofficial: Act on Fishing and Processing by Foreign Vessels in Iceland’s Exclusive Fishing Zone] (Act No 22/1998 as amended and consolidated until Act No 38/2015).

⁴⁷² Act on Fishing and Processing by Foreign Vessels in Iceland’s Exclusive Fishing Zone (Act No 22, 8 April 1998 as amended by Act No 22/2007).

⁴⁷³ Iceland (n 468) 3.

⁴⁷⁴ *FAO Committee on Fisheries 2016, Agenda Item 7* (Author’s notes).

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management agreements and now interpreting of this Icelandic law in line with *PSMA*.⁴⁷⁵ Nonetheless, Iceland does implement regional measures against non-CNCP vessels, including the progressive NEAFC and NAFO confiscation provisions not included at the global level (5.3.5).

Legislation includes a PSM framework, with detailed provisions left to implementing regulation.⁴⁷⁶ Port and coastal jurisdiction are combined and foreign fishing and processing vessels must notify the state of their intention to enter/exit the EEZ.⁴⁷⁷ All foreign vessels are required to give advance notice to use a port, including “the amount and type of their catch on board, what sort of fishing they have pursued and in what region, and what services they intend to obtain in the port concerned”.⁴⁷⁸ Lack of notice violates the prohibition on dwelling.⁴⁷⁹

For any visiting vessels carrying fish;

“If catch has been obtained illegally such violation shall make it liable to confiscation in addition to the punishments provided for above. Should an investigation of the catch aboard a foreign fishing vessel reveal that it does not conform to the catch entered in the catch log books or with notifications to the authorities, any quantity in excess of that entered or notified may be confiscated [...] In lieu [...] payment may be demanded corresponding to the value of the catch”⁴⁸⁰

Notifications might refer to port entry notification, or log books including those covered by port state inspection. False documentation or notification will thus result in confiscation.

Finally, when requesting use of designated ports,⁴⁸¹ entry and services are denied when the vessel: has a catch from common interest stocks not covered by an international agreement;

⁴⁷⁵ Foreign Vessels EEZ Act (n 471) art. 16.

⁴⁷⁶ *ibid* art. 9; Gylfi Geirsson and Arnór Snæbjörnsson, ‘Port State Measures in Iceland’ (Ministry of Industries and Innovation 2016) 5 <<http://www.fao.org/3/a-bo562e.pdf>>.

⁴⁷⁷ Foreign Vessels EEZ Act (n 471) art. 2, preserves innocent passage.

⁴⁷⁸ *ibid* art. 4.

⁴⁷⁹ *ibid* arts. 2, 10-12 (enforcement).

⁴⁸⁰ *ibid* art. 14.

⁴⁸¹ *ibid* art. 9(5).

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is caught in breach of an agreement to which Iceland is party; or in any other case the respective Minister considers “necessary for the protection of living marine resources”.⁴⁸² A vessel carrying such stocks that enters port is requested to leave after inspection.⁴⁸³ Those providing false data to avoid denial are caught by article 14 (above), while those found in port with a suspect catch may have it confiscated. The catch cannot be landed, being placed under governmental seal pending confirmation of legality by the flag state. If not confirmed within a reasonable time, it may be confiscated, and the vessel expelled.⁴⁸⁴ Finally use of the *force majeure*/distress exception is no shield to inspection or notification (4.2.3).⁴⁸⁵ Vessels thus might be caught by provisions discussed.⁴⁸⁶

6.5.3. New Zealand

The *Fisheries Act 1996* (as amended and reprinted, 1 January 2016) includes provisions applicable to foreign vessels,⁴⁸⁷ while *Driftnet Prohibition Act 1991* (as amended and reprinted, 1 July 2013) targets driftnet fishing generally.⁴⁸⁸ These acts do not target IUU fishing *per se*, but more general objectives of sustainable use, prohibition of driftnet fishing, and implementation of international obligations.⁴⁸⁹

Advance entry notification, in a manner determined by New Zealand, is required.⁴⁹⁰ No penalty is provided for non-compliance, although probably a request to leave awaits upon

⁴⁸² *ibid* art. 3, para. 4.

⁴⁸³ *ibid* arts. 3, para. 3, 10-12 (enforcement - fines or confiscation provisions).

⁴⁸⁴ *ibid* art. 3, para. 6.

⁴⁸⁵ *ibid* art. 3, para. 5.

⁴⁸⁶ Discussing vessels that should not come into ports; “shall be instructed to leave the port immediately after having been inspected by surveillance parties and, as the case may be, provided with emergency assistance”, *ibid* art. 3, para. 3; Geirsson and Snæbjörnsson (n 476) 5 implies that the catch may be confiscated from those who entered under emergency provision and are then instructed to leave.

⁴⁸⁷ Fisheries Act 1996, Act No 88 1996 (Reprint as at 1 January 2016).

⁴⁸⁸ Driftnet Prohibition Act 1991, Act No 18 of 1991 (Reprint as at 1 July 2013).

⁴⁸⁹ Fisheries Act (n 487) preamble [b]. art. 8(1); Driftnet Prohibition Act (n 488) preamble. As of 5 June 2016, this will include New Zealand’s *PSMA* port state responsibilities in addition to the more general UNFSA duty, FAO, *Status: PSMA* (n 266).

⁴⁹⁰ Fisheries Act (n 487) art. 113ZD(1); “Details of quantity, state, and species of fish onboard must be provided” Ministry of Fisheries, ‘New Zealand Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated & Unreported Fishing’ (2004) 38 <<http://extwprlegs1.fao.org/docs/pdf/nze161857.pdf>>.

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arrival.⁴⁹¹ A fine could apply, if notification is an entry condition,⁴⁹² or for failing to provide information when lawfully requested to do so.⁴⁹³

Furthermore, any class of vessel may be prohibited entry if “necessary for the purpose of the conservation and management of fish, aquatic life, or seaweed”.⁴⁹⁴ Certain vessel types, by their nature, are deemed unsustainable. Individual vessels suspected to have undermined international CMMs are also directed not to enter.⁴⁹⁵ Therefore, vessels involved in historical IUU fishing or having supported IUU fishing may still be subject to a notice prohibiting port entry notwithstanding the lack of evidence upon arrival at port.

Again, an offence is only committed when a master, knowing that the notice applies to his/her vessel, enters port.⁴⁹⁶ The *Fisheries Act* does not consider the reasoning behind a notice decision, only the territorial conduct of entry in breach.

IUU fishing does not only result in offending vessels, but also offending catch. The New Zealand *Lacey Act* style provision is broader than the actual *Lacey Act*, applying to possession of any fish aboard a foreign vessel. Any foreign vessel visiting port carrying fish caught outside New Zealand is subject to the following:

- (1) *“No person shall possess any fish, aquatic life, or seaweed in New Zealand or New Zealand fisheries waters, on any vessel that is not a New Zealand ship, unless,-*
 - a. In the case of fish, aquatic life, or seaweed *taken outside New Zealand fisheries waters,-*
 - i. The fish, aquatic life, or seaweed was landed in any country other than New Zealand before being brought into New Zealand fisheries waters; or
 - ii. *The person has, before the entry into New Zealand fisheries waters, obtained the approval of the chief executive to possess that fish,*

⁴⁹¹ Further requirements apply under complementary border legislation, e.g. biosecurity and customs reporting, Ministry of Fisheries (n 490) 39.

⁴⁹² Fisheries Act (n 487) arts. 228(1), 252(5)(j) (penalty fine).

⁴⁹³ *ibid* arts. 230(1), 252(3)(m) (penalty fine).

⁴⁹⁴ *ibid* art. 113ZD(3).

⁴⁹⁵ *ibid* 113ZD(2)(a) or ejected if in-port (b).

⁴⁹⁶ *ibid* arts. 113ZD(4), 252(5)(hd) (penalty fine).

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aquatic life or seaweed, *and acted in accordance with such conditions as the chief executive may think fit to impose; or [...]*⁴⁹⁷

Conditions imposed could include those “relating to the taking, storage, transportation, recording, reporting, landing, and disposal of the fish aquatic life, or seaweed”.⁴⁹⁸ The *NPOA-IUU* notes that in “most cases the approval requires the vessel to carry and operate a Ministry of Fisheries-approved Automatic Location Communicator (ALC) immediately prior to, and at all times during, the trip”.⁴⁹⁹

This is an explicit variation of conditional entry and the prohibition of having defined property in the territory. Approval to bring resources into New Zealand is conditioned on extraterritorial use of an ALC, and those who fail to do so will not be acting in accordance with set conditions.

By itself, this is not prescribed conduct. Condition nonfulfilment is not an offence, but rather results in removal of the article 113(1)(a)(ii) exception to the offence of possessing fish aboard a foreign vessel within New Zealand’s territorial jurisdiction.⁵⁰⁰ This was put into practice in the case of *Omunkete Fishing* involving a vessel whose approval was revoked after new information of IUU fishing came to light.⁵⁰¹

This case also confirmed the wide discretion of the Ministry to impose “any” conditions for approval thought fit, for example compliance with CCAMLR CMMs and denial of approval for any IUU fishing conduct.⁵⁰² As the burden of proof is upon the defendant who has to

⁴⁹⁷ (emphasis added) *ibid* arts. 113(1), 2(1) (“possession means possession of, or control over, either jointly or on one’s own account,— [a] any fish, aquatic life, or seaweed; or [b] any vessel, container, package, thing, premises, or place in or on which the fish, aquatic life, or seaweed are found”); the exception under art. 113(1)(a)(i) is reliant upon other port states having sufficient control mechanisms in place to control the landing of IUU catch – a reliance which has proven unfounded and led to difficulties of IUU catch being imported into New Zealand Ministry of Fisheries (n 490) 41.

⁴⁹⁸ Fisheries Act (n 487) art. 113(2).

⁴⁹⁹ Ministry of Fisheries (n 490) 38.

⁵⁰⁰ Fisheries Act (n 487) art. 113(4).

⁵⁰¹ *Omunkete Fishing (Pty) Limited v Minister for Fisheries* [2008] CIV 2008-485-1310 (High Court of New Zealand (Wellington Registry)) [50] also noting any landing would then be an offence given the lack of approval.

⁵⁰² *ibid* 67–68.

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demonstrate an exception applies,⁵⁰³ those who breach their approval conditions will likely face the exceptionally high penalty fines.⁵⁰⁴

The jurisdictional analysis above rests on territorialisation, and thus offences are punishable by fines, or forfeitures.⁵⁰⁵ Property referred to includes ‘any vessel’ used,⁵⁰⁶ which would be vital to commit the offence of prohibited port entry, or possession of unauthorised fish aboard a foreign vessel.

The *Driftnet Prohibition Act* 1991 utilises coastal and PSJ to target vessel equipment, conduct prior to port entry, and fish caught through driftnetting. Generally, “No vessel in New Zealand fisheries waters shall have on board any driftnet”,⁵⁰⁷ or “transport [...] any fish or marine life taken using a driftnet”.⁵⁰⁸ This extends to port, whereby vessels and crew shall not land fish taken using driftnets, and driftnet vessels are prohibited visitation.⁵⁰⁹ Similarly, a vessel that “has within the preceding 3 months been engaged in driftnet fishing (whether within or outside New Zealand fisheries waters of the convention Area)” is prohibited port entry.⁵¹⁰ Extraterritorial conduct entry conditions and *Lacey Act* style provisions are again used to dissuade a particular practice.

Complementary powers for the respective DG include directing vessels to not enter internal waters or to leave.⁵¹¹ This extends to entry denial for driftnet fishing support vessels and even presumption of future conduct by the supply or supplied vessel.⁵¹² As with other states

⁵⁰³ And the prosecution need not assert the lack of exceptions applying, Fisheries Act (n 487) art. 113(5)(a).

⁵⁰⁴ *ibid* art. 252(3)(h), *ibid* arts. 228(1)(b), 252(5)(j) (penalty fine).

⁵⁰⁵ Fisheries Act (n 487) art. 225C(2) forfeiture – applicable to “conviction for an offence referred to in section 252(2) or (3) or (5)”, 255C(1)(a).

⁵⁰⁶ *ibid* art. 255(1).

⁵⁰⁷ Driftnet Prohibition Act (n 488) arts. 6, 2 (definition).

⁵⁰⁸ *ibid* arts. 7(1) (vessel), 7(2) (person).

⁵⁰⁹ *ibid* arts. 8 (landing), 10 (visit).

⁵¹⁰ *ibid* arts. 10(b), 28(1)(d) (defence if defendant can demonstrate “the vessel was not used for driftnet fishing in New Zealand fisheries waters of the Convention Area”).

⁵¹¹ *ibid* art. 12.

⁵¹² *ibid* art. 12(1)(b), “any foreign vessel is to be used to supply [...] acquired or to be acquired in New Zealand to any vessel engaged or to be engaged in driftnet fishing in New Zealand fisheries waters of the Convention Area” (note future tense!).

discussed above, subsequent offences result from territorial conduct, namely entry in contravention of that direction or failing to leave in a reasonable period.⁵¹³

Territorial enforcement includes seizure of fish transported or landed and vessels used or intended for use in the commission of offences against sections 4-10 (including the landing/visit provisions).⁵¹⁴ Owners or masters are fined for port entry or failure to leave violations.⁵¹⁵ Convictions for landing or possession of driftnets may carry forfeiture of vessel, gear and fish.⁵¹⁶ These are strict liability offences,⁵¹⁷ meaning detection of prior driftnet fishing has significant consequences for visiting foreign vessels.

6.5.4. The Marshall Islands

An external legislative review in 2011 found “no provisions in existing legislation” in comparison to international and regional agreements.⁵¹⁸ At most, designated ports⁵¹⁹ and in-port transshipment were incorporated,⁵²⁰ with port inspections focused on customs and immigration, not “IUU fishing related issues”.⁵²¹ Subsequent reform, including *Title 51 (Fisheries) Amendment Act of 2011*,⁵²² have closely followed the review’s proposals.⁵²³ PSMs are applied;

⁵¹³ *ibid* art. 12(2).

⁵¹⁴ 15(1)(a)-(b). this may be sold or disposed of by the DG to prevent spoilage or deterioration, art. 18.

⁵¹⁵ Both visit (10) or failure to follow direction (12), Driftnet Prohibition Act (n 488) art. 25(1)(iii) (fines for master and owner). Furthermore, *ibid* arts. 25(1)(a)(ii) (possession driftnets), 25(1)(i) and 25(2)(a) (landing fine).

⁵¹⁶ Driftnet Prohibition Act (n 488) art. 30 (covering offences arts. 4-9).

⁵¹⁷ *ibid* art. 27.

⁵¹⁸ MRAG Ltd., ‘Final Technical Report: Republic of the Marshall Islands Comprehensive Fisheries Legislation Review’ (ACPFish II 2011) CU/PE1/SI/10/001 76-77 (UNFSA), 77-84 (PSMA), 119 (PSMs within Sub-Regional Harmonised Minimum Terms and Conditions of Access) <<http://acpfish2-eu.org/uploads/projects/id29/Annex%201%20-%20RMI%20FTR.pdf>>.

⁵¹⁹ *ibid* 79; Ports of Entry Act, TTC 1966, as numerous amendment and consolidated until P.L. 2013-10 (codified, 43 Marshall Islands Revised Code 2014 ch2) § 202(1) (designated port and clearance required), §202(2)-(5) (port services further limited).

⁵²⁰ “requires 72 hours notice prior to arrival of vessel (Marine Resources Act 1997, s 63)” MRAG Ltd. (n 518) 96; now codified with 2011 increased fines, Fishing Access and Licensing Act, P.L. 1997-60 as amended P.L. 2011-63 (codified, 51 Marshall Islands Revised Code 2014 ch4) § 409.

⁵²¹ MRAG Ltd. (n 518) 131; subsequent 2013 reform clarifying ‘all vessels entering and departing a port of entry shall be subject to immigration inspection, customs inspection, agricultural inspection and quarantines, public health inspection and quarantines, and other administrative inspections authorized by law’ 43 MIRC 2014 (n 519) § 205(b), *ibid* § 205(c), concerned with port state control, not PSMs.

⁵²² Title 51 (Fisheries) Amendment Act of 2011 (PL 2011-63).

⁵²³ Annex 13 Draft Bill, MRAG Ltd. (n 518) 151.

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“[f]or the purpose of [1] promoting the effectiveness of international conservation and management measures adopted by sub regional, regional or global fisheries management organisations, treaties or arrangements and [2] combatting Illegal Unreported and Unregulated fishing”⁵²⁴

PSMA provisions on designated ports, inspection, notice, regulating/prohibiting port access, and regulating/prohibiting the use of port services, are reflected in national law conferring regulatory competence to the respective national authority.⁵²⁵ For port access/use, exercising discretion is promoted where extraterritorial conduct is reported, identified, or reasonably presumed as supporting IUU fishing or contravening international CMMs.⁵²⁶

Predating *PSMA*'s entry into force, the novelty of the practice discussed has since become limited. However, regulations may still combine port and coastal competence to provide for advance notice prior to entry into “its exclusive economic zone for the purpose of port access”.⁵²⁷ Furthermore, “[a]ny person who fails to comply with the provisions of this section or with any regulations made pursuant to this section commit an offence”, subject to fine.⁵²⁸

6.5.5. Mauritius

A dedicated port state control unit implements PSMs⁵²⁹ for the sole entry port, Port Louis.⁵³⁰ Its PSMs are based upon the *FAO Model Scheme*,⁵³¹ albeit with enforcement provisions not found therein. Failure to provide notice and all required information when entering Mauritian

⁵²⁴ Fisheries Enforcement Act 1997 (Codified, 51 Marshall Islands Revised Code 2014 ch5) § 506(1) (including discretion to prohibit entry of a vessel or fleet of vessels).

⁵²⁵ *ibid* § 506(2)(a),(e),(g)-(j) and the catch all “(m) [regulations] providing for any other measures that may be agreed by sub-regional or global fisheries organizations, treaty or arrangement”. Denial of entry was already provided in § 506(1), so requires no further regulation.

⁵²⁶ *ibid* §§ 506(1), 506(2)(h)-(j).

⁵²⁷ *ibid* §§ 506(2)(g).

⁵²⁸ *ibid* § 506(4).

⁵²⁹ Mauritius Ministry of Fisheries and Rodrigues, ‘National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (2010) 13–15. Note, its makeup demonstrates the overlap of fisheries governance with other border point regulations; Staff from Ministry of Fisheries and Rodrigues, Ministry of Agro Industry and Food Security, Ministry of Health and Quality of Life, Custom and Excise Department, Passport and Immigration Officer.

⁵³⁰ *ibid* 11, 45 only port defined under the Port Act. Port Mathurin is also defined in Schedule 1 of the Port Act but is in the autonomous island of Rodrigues and doesn't appear significant for foreign fishing vessel visits.

⁵³¹ *ibid* 43.

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maritime zones or ports is a finable offence for the master.⁵³² Providing false information in port would presumably be covered by the general provision in this regard.⁵³³

Submissions for port access are reviewed against RFMO/A IUU vessel lists, prohibiting listed vessels from landing or transshipment.⁵³⁴ Indeed, no landing or transshipment may occur without written clearance.⁵³⁵ Foreign vessels “involved in any fishing activity in contravention of any international fishery conservation and management measures”,⁵³⁶ regardless of whether Mauritius is a party, are inspected and denied services.⁵³⁷ Beyond denial, cases are referred to flag states.⁵³⁸ Only when a territorial element occurs, i.e. landing or transshipment without clearance, is a finable offence prescribed.⁵³⁹

Note however, the cross reference to a *Lacey Act* style provision:

“No person shall land, sell or have in his possession any fish he knows or has reasonable cause to believe [*overlying offence*] has been taken in contravention of any international fishery conservation and management to which Mauritius is a party [*underlying conduct*]”⁵⁴⁰

Fish are seized without compensation.⁵⁴¹ The complementary article 24 does not require knowledge of the underlying conduct. It prohibits the landing, import, export, transport, selling, receiving, acquiring or purchasing of “fish taken, possessed, transported or sold contrary to the law of one or more States to which Mauritius has entered into an agreement on a reciprocal or multilateral basis for the management of fisheries”.⁵⁴² Extraterritorial

⁵³² The Fisheries and Marine Resources Act 2007 (Act No 27 of 2007) arts. 53 (entry/exit maritime zones), 54 (entry port), 70(1)(d) (fines applicable upon conviction), 56 (owner jointly liable). See further advance notification of the National Coast Guard, following amendment to *The National Coast Guard Act*, art. 12A(2), contained in *ibid* art. 81.

⁵³³ FMR Act (n 532) art. 72(a) (finable offence).

⁵³⁴ *ibid* art. 57(3); implemented in practice, Mauritius Ministry of Fisheries and Rodrigues (n 529) 44.

⁵³⁵ FMR Act (n 532) art. 57(1)(b).

⁵³⁶ *ibid* art. 57(2)-(3).

⁵³⁷ *ibid* art. 57(3); “IUU listed vessels by any RFMO are not allowed to unload or tranship their catches at Port Louis. For example, transshipment facilities were denied to an ICCAT IUU listed vessel although Mauritius is not a member of ICCAT” Mauritius Ministry of Fisheries and Rodrigues (n 529) 51.

⁵³⁸ FMR Act (n 532) art. 57(3)(b)-(c).

⁵³⁹ *ibid* art. 70(1)(c).

⁵⁴⁰ *ibid* art. 17(2).

⁵⁴¹ *ibid* art. 17(4)-(6).

⁵⁴² *ibid* art. 24.

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conduct is not prohibited *per se*, but if the fruits of that conduct find their way to Mauritius, those in possession may be convicted and fined.⁵⁴³

Finally, subsidiary ministerial regulations include a broad mandate, e.g. “prescribing such other measures to combat illegal, unreported and unregulated fishing activities” as deemed appropriate.⁵⁴⁴ These may include imposing finable offences.⁵⁴⁵ To date, market state measures adopted under 74(1)(u) complement PSJ by regulating the ‘importer’.⁵⁴⁶

6.5.6. South Africa

The *Marine Living Resources Act 1998 (MLRA)*⁵⁴⁷ does not refer to IUU fishing explicitly.⁵⁴⁸ However, relevant international obligations are to be taken into account and so the *MLRA* now includes *PSMA* obligations.⁵⁴⁹ The act is rather timid, with similar provisions to states discussed above.⁵⁵⁰ Violation of international CMMs by foreign vessels is addressed through flag state and RFMO/A notification, not expansive PSJ.⁵⁵¹ This limitation was reconfirmed when charges against three Chinese vessels (art. 58(2)) for “infringements in terms [of] the International Conservation and Management Measures inside or outside South African waters”,⁵⁵² were dropped following confirmation that the catch had occurred outside South African waters.⁵⁵³

⁵⁴³ *ibid* art. 70(1)(c).

⁵⁴⁴ *ibid* art. 74(1)(z).

⁵⁴⁵ *ibid* art. 74(2)-(3).

⁵⁴⁶ Fisheries and Marine Resources (Import of Fish and Fish Products) Regulations 2012 (Government Notice No 27 of 2012, Legal Supplement to the Government Gazette of Mauritius No 25 of 8 March 2012, 171-205) Second Schedule, art. 4(1), import condition that fish do not originate from IUU fishing.

⁵⁴⁷ Marine Living Resources Act (No 18 of 1998, 395 Government Gazette 18930, Notice 747, as amended and consolidated until Marine Living Resources Amendment Act 2014 (No 5 of 2014, 587 Government Gazette 37659, Notice 383)).

⁵⁴⁸ *ibid* preamble.

⁵⁴⁹ *ibid* art. 2(i); South Africa acceded, 16 February 2016 FAO, *Status: PSMA* (n 266).

⁵⁵⁰ *MLRA* (n 547) arts. 45 (possession of prohibited gear), 44(1)(b) (possession of items used in prohibited methods), 44(2) (land or possess fish “taken by means in contravention of this Act”), 58(3) (possession of prohibited gear is a finable offence).

⁵⁵¹ *ibid* art 42(3), which can be expanded through ministerial implementing regulations art. 77(2)(o), and, art 58(2) (finable offence, but for South African flagged vessels only).

⁵⁵² DAFF, SANDF and SAMSA, ‘Media Statement: Inspection on Three Chinese Vessels at the East London Port’ (2016) 2 <<http://www.nda.agric.za/docs/media/MEDIA%20STATEMENTchinese%20vessels.pdf>>.

⁵⁵³ DAFF, SANDF and SAMSA, ‘Update on the Three Chinese Vessels That Were Detained at the East London Port’ (2016) <<http://www.nda.agric.za/docs/media/chinesevesselupdate.pdf>>.

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Rather, South Africa is included here to demonstrate the power of permit requirements and their enforcement mechanisms beyond denial of port privileges.⁵⁵⁴ Detailed regulations require permits for the possession or landing of various species,⁵⁵⁵ but the focus here is permits required for foreign fishing vessels to enter the EEZ and ports.⁵⁵⁶ This permit is not limited by reason of visit, nor catches (if any) aboard, but must be applied for by a local agent.⁵⁵⁷

Permit and application procedures provide a territorial nexus, whereby offences are committed within South Africa where no permit is held, or a condition is breached.⁵⁵⁸ This includes conditions of advance notice,⁵⁵⁹ products aboard being harvested in accordance with RFMO/A CMMs,⁵⁶⁰ co-operation with fishery control officers,⁵⁶¹ and accurate reporting.⁵⁶²

Confiscation was omitted from relevant global instruments but can be applied in South Africa.⁵⁶³ For example, IUU vessels may be denied a permit when verified against flag state

⁵⁵⁴ Previous report only mentions denial of entry or services, FAO, 'Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (FAO 2002) FAO Technical Guidelines for Responsible Fisheries 9 42.

⁵⁵⁵ E.g. deepwater species Regulations in Terms of the Marine Living Resources Act 1998 2015 (Government Gazette 19205, Government Notice R1111 as amended and consolidated until Government Gazette 39391, Government Notice 1091) art. 54, Annexure 12; The permit application is clear this also applies to foreign vessels South Africa, 'Application for a Permit for Prohibited Deepwater Species' <http://www.nda.agric.za/doaDev/sideMenu/fisheries/10_application_forms/docs/Prohibited%20Deep%20Water%20species.pdf>.

⁵⁵⁶ MLRA (n 547) art. 77(2)(j)-(l), ministerial powers of regulation relevant to entry into South African waters, navigation within waters and landing or possession of fish; see, Permit Conditions from Foreign Vessels Entering South African Exclusive Economic Zone (EEZ) 2011 (2012 Edition); furnish information to port prior to entry Terje Lobach, 'Measures to Be Adopted by the Port State in Combating IUU Fishing' [2000] FAO Fisheries Report No. 666 AUS:IUU/2000/15, para 28; National Ports Act 2005 (No 12 of 2005, 482 Government Gazette 27863, Notice 792) art. 11(g)(ii)-(iii) Ports Authority regulate and control entry/use of port.

⁵⁵⁷ As evident from the 'applicant' section, South Africa, 'Application for a Permit for a Foreign Vessel to Enter the Exclusive Economic Zone (EEZ)' <http://www.nda.agric.za/doaDev/sideMenu/fisheries/10_application_forms/docs/EEZ%20Appl.pdf>; according to a local agent, no port entry shall be permitted unless an agent has been appointed, Trade Ocean, 'The Port of Cape Town' (September 2014) <<http://tradeocean.co.za/wp-content/uploads/2015/08/Trade-Ocean-Port-Guide-Cape-Town-lowres.pdf>>.

⁵⁵⁸ MLRA (n 547)58(1)(a)(i), breach of section 13 (permits, for any 'activity' under the Act), is an offence, as is "(b) contravenes any other provision of this Act"; EEZ Permit Conditions (n 556) art. 13, failure to meet conditions is a material breach subject to revocation and possible criminal prosecution.

⁵⁵⁹ EEZ Permit Conditions (n 556) art. 1.

⁵⁶⁰ *ibid* art. 3.

⁵⁶¹ *ibid* arts. 5-7; MLRA (n 547) art. 56, cooperation with officials, in particular 56(5) offences for (a) obstructions/delays, (d) failure to comply and (e) furnishing false or misleading information.

⁵⁶² EEZ Permit Conditions (n 556) arts. 9 (reporting), 11 (landing).

⁵⁶³ MLRA (n 547) art. 51, include seizures 51(3)(c)(ii)- 51(3)(c)(iii), and arrests 51(3)(d).

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authorisation and RFMO/A documentation.⁵⁶⁴ Or vessels can lose the permit upon inspection in port, if they are found to have violated the terms of their permit through misreporting or breach of the conditions. The objectively determinative conduct is extraterritorial IUU fishing.⁵⁶⁵ However, legislatively the offence is a territorial violation of a condition of its permit to enter the EEZ/port, “issued on the understanding that all fishing activity pertaining to marine products on board has been caught in accordance with the management and conservation measures of the relevant Regional Fisheries Management Organizations”.⁵⁶⁶

A few examples are illuminative. Although involving coastal state EEZ rights, they equally apply in a port context. The *Lu Huang Yuan Yu 186*, traversing South African waters, was charged with entering the EEZ without authorisation or permit,⁵⁶⁷ and not immediately complying with lawful instructions.⁵⁶⁸ Lack of knowledge is immaterial; entry being taken as acceptance of relevant legislation.⁵⁶⁹ A seizure notice was reportedly prepared (article 51(3)(c)(ii)).⁵⁷⁰

However, another permit violation case involving Chinese vessels demonstrates the limits of territorialisation in South Africa. Having not applied for EEZ entry permits,⁵⁷¹ the masters of the *Fu Yuan Yu 7880*, *Fu Yang Yu* and *Run Da 617* were charged under the *MLRA* for possession of gear without a gear permit (600,000 ZAR fine) and, bar the *Run Da 617*, non-compliance

⁵⁶⁴ “[I]f the above-mentioned conditions are not met, the Department will refuse entry to a vessel wishing to enter South Africa’s Economic Exclusive Zone (EEZ) and subsequently access to port” DAFF, ‘Press Conference on Foreign Fishing Vessels: Speaking Notes for the Honourable Senzeni Zokwana, Minister of Agriculture, Forestry And Fisheries’ (2016).

⁵⁶⁵ Applying Dobson’s test of identifying an extraterritorial element, Dobson Natalie L., ‘The EU’s Conditioning of the “Extraterritorial” Carbon Footprint: A Call for an Integrated Approach in Trade Law Discourse’ (2017) 27 *Review of European, Comparative & International Environmental Law* 75, 85–86.

⁵⁶⁶ EEZ Permit Conditions (n 556) para. 3.

⁵⁶⁷ DAFF (n 564); *MLRA* (n 547) arts. 58(1)(a)(i), 51(1)(b). See also the *Chin Jen Wen*, a Taiwanese vessel which entered the EEZ without relevant permits, Dave Chambers, ‘Taiwanese Captain Pays R100,000 in Plea Deal on Fishing Charges’ (*TimesLIVE*, 20 September 2016) <<https://www.timeslive.co.za/news/south-africa/2016-09-20-taiwanese-captain-pays-r100000-in-plea-deal-on-fishing-charges/>>; SAMSAs, ‘Arrested Taiwanese Fishing Vessel Released from South Africa’ (*The 10th Province*, 27 September 2016) <<https://blog.samsa.org.za/2016/09/27/arrested-taiwanese-fishing-vessel-released-from-south-africa/>>.

⁵⁶⁸ *MLRA* (n 547) art. 56(2); DAFF, ‘Media Release: Inspection of Foreign Fishing Vessel, Lu Huang Yuan Yu, Registration Number 186’ (2016); SAMSAs, ‘Arrested Chinese Vessel Faces More Charges – to Remain in Custody until Fines Are Paid’ (*The 10th Province*, 18 May 2016) <<https://blog.samsa.org.za/tag/lu-huang-yuan-yu-186/>>.

⁵⁶⁹ EEZ Permit Conditions (n 556) para. 4.

⁵⁷⁰ DAFF (n 568).

⁵⁷¹ DAFF, SANDF and SAMSAs (n 552).

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with lawful instructions (50,000 ZAR fine).⁵⁷² Yet, with roughly 600 tonnes of catch, harvested extraterritorially, there were “no legal grounds to confiscate the fish as it was not fished in our waters”.⁵⁷³ Upon payment of the fines, the vessel departed, presumably with its suspected illegal catch.⁵⁷⁴

The most notable territorial ‘hook’ concerns vessels having applied for a permit. The skipper “must accurately report the weight of the catch on board by species”,⁵⁷⁵ and it must have been caught in accordance with RFMO/A CMMs.⁵⁷⁶ Thus, the Taiwanese *Chien Jui 102* allegedly undertook high seas shark finning,⁵⁷⁷ falsely reporting the amount aboard, and with a real fin-to-body weight ratio in breach of IOTC and ICCAT CMMs.⁵⁷⁸ Port inspection detected this, with the vessel found in breach of EEZ permit conditions. The vessel was seized and the skipper paid a record 1,500,000 ZAR fine, with 1.6 tons of dried shark fins and 5.1 tons of shark trunk discovered in-port being forfeited.⁵⁷⁹

Accurate in port reporting is again key for violations related to the use of port.⁵⁸⁰ The Korean flagged *MFV Oryong 371* and *MFV Oryong 373* both transhipped in-port greater quantities of fish than first reported in their access application.⁵⁸¹ The *MFV Oryong 373* also transhipped unreported species, and shark fins without the shark trunks – breaching IOTC and ICCAT

⁵⁷² *ibid.* Further fines for environmental pollution and degradation totalled 1.3 Million ZAR.

⁵⁷³ DAFF, SANDF and SAMSA (n 553) 1.

⁵⁷⁴ *ibid.* 2.

⁵⁷⁵ EEZ Permit Conditions (n 556) para. 9. “Any fish exceeding the 15% tolerance limit by species shall be considered to be deliberately mis-reported and may be confiscated. The skipper may also be liable to pay a fine in this regard”.

⁵⁷⁶ *ibid.* para. 3.

⁵⁷⁷ See also owner’s representative submission: Environmental Writer, ‘Taiwanese Boat to Be Blacklisted over Haul of Shark Fins’ *Cape Times* (16 March 2009) <<https://www.pressreader.com/south-africa/cape-times/20090316/281573761612304>>.

⁵⁷⁸ Department of Environmental Affairs and Tourism, ‘Department Seizes Taiwanese Flagged Vessel and Confiscates Tons of Sharks and Dried Shark Fin’ (2009) <<https://www.gov.za/environmental-affairs-and-tourism-taiwanese-flagged-vessel>>; Taiwan defended the vessel, Paula Walker, ‘Oceans in the Balance: As the Sharks Go, So Go We’ (2010) 17 *Animal Law* 97, 151–152.

⁵⁷⁹ Department of Environmental Affairs and Tourism, ‘Environmental Affairs and Tourism on Abalone Confiscation’ (6 April 2009) <<https://www.gov.za/environmental-affairs-and-tourism-abalone-confiscation>>.

⁵⁸⁰ EEZ Permit Conditions (n 556) para. 11.

⁵⁸¹ Department of Environmental Affairs and Tourism, ‘Two Korean-Flagged Vessels Fined R1 Million for Contravening South Africa’s Foreign Fishing Vessel Permit Conditions’ <<http://www.info.gov.za/speeches/2009/09050410151001.htm>>.

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CMMs.⁵⁸² The captain and first officer were sentenced to imprisonment, fined, and the fish forfeited.⁵⁸³

The *Der Horng 569*, or *Naham-4*, was in-port offloading and undertaking repairs, when discrepancies lead to further investigation and detention.⁵⁸⁴ Suspected of fishing contrary to RFMO/A CMMs, charges were prepared against the owner (Omani), along with the captain and engineer (Taiwanese) as representatives, including failure to co-operate, permit violations, and providing false or misleading information.⁵⁸⁵ It appears no criminal charges were eventually brought,⁵⁸⁶ however the fish (reportedly worth R5.6 million) was forfeited, along with the vessel.⁵⁸⁷

Finally, *MLRA* was amended by *Act 5 of 2014*, which develops legislation for small-scale fishing. However, in the Bill's history, the original ministerial draft was much more ambitious with interesting port state proposals.⁵⁸⁸ This draft has not yet been taken further as small-scale fishing provisions were singled out for legislation,⁵⁸⁹ following public consultation.⁵⁹⁰ Nonetheless, had the draft been adopted foreign vessels suspected of acting in contravention of CMMs to which South Africa is a CPC could have been subject to seizure and confiscation, i.e. of vessel and/or products (in contrast to reporting).⁵⁹¹ Indeed, port state enforcement responsibilities would have been added for RFMO/A CMMs to which South Africa is a CPC.⁵⁹² A new article 52A would have implemented some *PSMA* obligations, with additional

⁵⁸² *ibid.*

⁵⁸³ Michelle Jones, 'Korean Ships' Crews Fined R500 000 for Illegal Fishing' *Cape Times* (30 April 2009) <<https://www.pressreader.com/south-africa/cape-times/20090430/281698315692936>>; TRAFFIC, 'Seizures and Prosecutions: Vol. 16 No. 3 (March 1997) to Vol. 26 No. 2 (October 2014)' (2017) *Bulletin* (Compilation) 144.

⁵⁸⁴ At least four vessels have operated as the *Naham-4*, Stop Illegal Fishing, 'The Mystery of the *Naham-4*' (2015) 10 *Stop Illegal Fishing Case Study Series* <<https://stopillegalfishing.com/wp-content/uploads/2016/05/SIF-CS10-Naham-4.pdf>>.

⁵⁸⁵ Fatima Schroeder, 'Court Docks Fishing Vessel' (*IOL News*, 13 October 2013) <<https://www.iol.co.za/news/court-docks-fishing-vessel-1591196>>.

⁵⁸⁶ Stop Illegal Fishing (n 584) 2.

⁵⁸⁷ Schroeder (n 585); Stop Illegal Fishing (n 584).

⁵⁸⁸ Marine Living Resources Amendment Draft Bill (X-2013), 574 *Government Gazette* 36413, General Notice 434, 25 April 2013.

⁵⁸⁹ Marine Living Resources Amendment Bill (B30-2013), as introduced in the National Assembly (proposed section 75), 13 September 2013.

⁵⁹⁰ Meeting Report, 'Marine Living Resources Amendment Bill [B30B-2013]: Briefing by Department of Agriculture, Forestry and Fisheries' (*Parliamentary Monitoring Group*, 7 October 2013) <<https://pmg.org.za/committee-meeting/16474/>> accessed 2 August 2018.

⁵⁹¹ *MLRA* Amendment Draft (X-2013) (n 588) art. 29(a).

⁵⁹² *ibid.* art. 29(b).

prohibition of the import of fish or fish products illegally caught.⁵⁹³ This was complemented by a *Lacey Act* style offence with fines and/or imprisonment.⁵⁹⁴ Enforcement for other offences would be expanded to allow cumulative fines and imprisonment.⁵⁹⁵

6.5.7. Sub-conclusions

The *domaine réservé* basis of conditions for port privileges is further confirmed by the fact that beliefs, or reasonable presumption of extraterritorial conduct, is sufficient for prescription (6.5.4). Port entry denial may result from ministerial decisions upon conservation or management necessity – on a vessel (6.5.2), or class of vessels (6.5.3) basis. The prohibition on port visits by foreign driftnet fishing vessels extends beyond static conditions to include the belief a vessel might supply other driftnet vessels, in the past or the future (6.5.3). Like RFMO/A authorised vessel lists, states may unilaterally set an authorised vessel list, whereby conditions of registration become conditions of use (6.5.1). Interestingly, this prerogative over entry may be extended by coastal state jurisdiction to EEZ entry and advance notification (6.5.2, 6.5.6) or a combination e.g. advance notification of EEZ entry for the purpose of port access (6.5.4).

Objective territorial jurisdiction is utilised to punish any subsequent territorial conduct, being a failure to comply with prohibitions or not possessing authorisation (6.5.1, 6.5.3). Only where a territorial element occurs, e.g. landing without clearance (6.5.4) or ‘dwelling’ (6.5.2), does an enforceable offence occur. Extraterritorial conduct alone falls outside PSJ (6.5.6).

Failure to comply with conditions incorporated in a licence may result in fines, or port entry denial - port use then being an offence (6.5.1) - or it may remove a defence to a broadly defined ‘possession’ offence under objective territorial jurisdiction (6.5.3). Within South Africa, the offence is broadly defined as entry without a permit, with conditions of extraterritorial conduct imposed as conditions of the permit (6.5.7). Misreporting or

⁵⁹³ *ibid* art. 34.

⁵⁹⁴ *ibid* art 35(c).

⁵⁹⁵ *ibid* art. 35(a).

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extraterritorial conduct in breach of the conditions will trigger subsequent territorial conduct, i.e. a breach of the conditions applicable to authorisation.

Lacey Act style provisions or proposals have been introduced (6.5.1, 6.5.5, 6.5.6) to disincentivise extraterritorial conduct whenever a nexus to the state is provided by subsequent territorial presence of the vessel or catch. New Zealand has the broadest provision to date, the overlying offence simply being possession, the underlying conduct being extraterritorial catch with no permit (6.5.3). The same applies to ‘transportation’ of fish caught using driftnets.

Enforcement practice again confirms the diversity of tools used and the lack of limitation (6.5.1, 6.5.3, 6.5.4, 6.5.6). The *force majeure* exception is similarly limited to essential services before leaving port (6.5.2). Again, like in EU law, catch may be confiscated. Alternatively, vessel detention (6.5.6) demonstrates the lack of any prompt release limitation applying.

6.6. Conclusion

“For wild-caught fish, legality is inextricably linked to the ‘who, what, where, when, and how’ of harvest”⁵⁹⁶

Port states have responded to the pressures and responsibilities of addressing IUU fishing, be they pressures from domestic, foreign or international sources, by maximizing the rights to deny port privileges and reinforcing these by prescribing territorial offences. PSJ can be employed to impose unilateral standards on all visiting foreign vessels, foreign fisheries catch, or indeed targeted foreign vessels or catches. Extraterritorial fisheries conduct can be directly discouraged by prescription of conditions and withholding of port privileges. If denial of privileges is unsuccessful, conduct can be indirectly punished through penalties for in-port violations which ‘take account’ of the extraterritorial conduct but are framed around a territorial element.

This analysis is reconfirmed if a different perspective is taken, i.e. looking to *where* the norms of extraterritorial conduct fall and *where* the norms of territorial conduct fall. The

⁵⁹⁶ Cole, Engelke-Ros and Galatzan (n 11) 34.

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extraterritorial conduct of vessels has been channelled exclusively into the conditions for entry or use of port applying for foreign fishing vessels as well as for catches. The latter is in recognition of the possibility of support from transport vessels. The rules of state jurisdiction in international law are ill-equipped, and arguably not designed to deal with, the extent of extraterritoriality inherent in the prescription of, and eventual decision upon, conditions for granting port privileges.

National laws upon offences have thus focused upon the conduct of 'tainted' vessels within the port, or the landing and entrance of 'tainted' IUU catch. In this manner, extraterritorial conduct can be considered in order to assess the *status* of a vessel or catch. This status incorporates IUU vessel lists, non-cooperating third country lists, entry conditions based upon a suspected conduct or vessel condition (e.g. driftnet activity or status as stateless), or documentary burdens and evidentiary requirements as a matter of transnational entry privileges. Offences are then crafted around the subsequent territorial element of entering or using the port by a 'tainted' vessel or product in non-compliance with the conditions of the privilege granted. The same can be said of extraterritorial conduct that results in documentation being incomplete or inaccurate.

This is made possible because the international law question is framed as one of where the 'regulated conduct' has occurred, as opposed to what conduct the regulation seeks to apply and influence. If the rules of state jurisdiction continue to apply to the question what conduct is regulated as opposed to what conduct the regulation seeks to influence, then such gerrymandering through objective territorial jurisdiction can continue to be employed.

This could indeed spread outside the port state context to *any* cross-border conduct where such border crossing is a subsequent necessity for the individuals involved. The other side of the coin is that for such states the question who and what should be permitted within their state is of paramount importance. It naturally follows that any threat to the integrity of the control system implementing its conditions for port entry should be severely punished. In such a stalemate situation, the rules of jurisdiction provide for concurrency over exclusivity.

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7.1. Introduction

As a threat to the global interests in sustainable fisheries, the global development agenda includes eradicating IUU fishing by 2020.¹ States are encouraged to use all available means, including jurisdiction.² As confirmed in the analysis of global, regional and national port state measures (PSMs), the role of port states is to combat IUU fishing and related activities committed by whoever, and wherever.

Yet, PSMs combatting extraterritorial IUU fishing have brought the conflict between practice and state jurisdiction's limitations to the foreground. The proper functioning of international law demands a coherent system incorporating novel practice. The author of this manuscript aims to address this lack of clarity by answering the question:

What are the international legal bases and law of the sea limitations of port state measures, given the influence of state practice which has directly, or indirectly,

¹ (1.2.1); UNGA, 'Resolution 66/288: The Future We Want' (2012) A/RES/66/288 SDG 14.4.

² (3.2.2.3.2).

concerned foreign IUU fishing practice beyond the maritime zones of the coastal state in which the port is located?

As a question of interpretation and systemisation of PSJ under international law this raises three sets of sub-questions.³ The foregoing analysis therefore required three stages, namely (1) conceptualisation and justification of valid legal bases within the law of jurisdiction, (2) analysing the applicability of any subsequent law of the sea limitations, and finally, (3) a review of current PSMs to shed light on the interpretation of international instruments and customary law, so as to demonstrate the basis of the central thesis submitted.

The conclusions will therefore reflect on the key findings of the research and provide a restatement of the applicable international legal framework in light of port state practice (7.2-7.3). State practice to date demonstrates how port states have employed their jurisdictional rights to address extraterritorial IUU fishing or fishing-related conduct (7.4). The lack of any actorial or thematic limitation means these regulatory techniques may be employed in capacities beyond port states, and may be employed to address differing extraterritorial conduct. The final remarks will therefore contextualise the findings within broader research upon the unilateral pursuit of global interests and the author's thoughts on the future of port state jurisdiction (7.5).

7.2. The international legal bases of PSJ

An analysis of the permissive grounds of prescriptive and enforcement state jurisdiction, together with potential port state application, was provided.⁴ Variations of territorial jurisdiction provide the greatest potential for a sufficient nexus, particularly when transient presence and a 'territorial extension' conceptualisation are adopted.⁵ Beyond synergies with quasi-territorial coastal state enforcement, port state enforcement is simply territorial enforcement jurisdiction.

³ (1.2.2).

⁴ (2.2)-(2.4).

⁵ (2.3.5).

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However, the crux of the uncertainty within international law is that the practice of states upon port state jurisdiction demonstrates distinctions in jurisdiction which cannot be explained or justified by applying the grounds for prescriptive and enforcement state jurisdiction.⁶ PSMs deviate from the permissive grounds both in prescription and enforcement state jurisdiction.

Firstly, a prescriptive jurisdiction discrepancy arose during the analysis. Conditions attached to port privileges (entry/use) are extraterritorially unlimited, whilst port state offences followed the permissive grounds of state jurisdiction. Beyond 'sovereignty', literature provided supplementary evidence of the right to prescribe conditions but not an explicitly recognised legal basis in state jurisdiction.

Secondly, an enforcement paradox arose. Prescribed conditions of extraterritorial conduct can be enforced through the denial of port entry or services, but not more proportionate enforcement measures for minor infringements, or more onerous enforcement measures for serious infringements. In contrast, port state offences demonstrate a diversity of enforcement measures, but are limited to prescription over territorial conduct. The principles of enforcement state jurisdiction provide no answer for these universally held distinctions because territorial enforcement jurisdiction knows no such limitations.⁷

Thus, in the interest of legal coherence and preserving state jurisdiction's territorial/extraterritorial dichotomy,⁸ a doctrinal restatement was required. The lack of a novel basis advanced by states, combined with previous literature pointing to 'sovereignty', suggest that the case of PSJ is not a unique phenomenon requiring novel legal principles within international law. Instead, favour lays upon using existing principles of international law flowing from sovereignty which might, when applied to jurisdiction, have an explanatory role.

Domaine réservé is such a concept of international law. In exceptional cases a matter can be left to the discretion of the domestic sphere as opposed to a question of international law –

⁶ (Ch 2) terminology and 'state jurisdiction' distinction.

⁷ (2.5.1).

⁸ Essential for its objectives, (2.2.4), see (2.5.1).

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so long as other international rights and obligations are complied with. It has not yet been applied in the context of PSJ. However, its use in cases comparable to a vessel requesting entry suggests that cross-application to the entry of vessels and access to port services could provide the legal basis for port state prescription and limited enforcement concerning access. When the basis for an exercise of jurisdiction *is* a question of international law it must be answered by the application of international law relating to state jurisdiction. However, this does not presuppose all exercises must be a question of international law. And so, looking to broader general international law one can ask *when* the basis for an exercise of jurisdiction is a question of international law.

Thus, the central thesis of this manuscript was that PSJ must be re-systematised, jurisdiction being distinguished into *domaine réservé*-based jurisdiction and state jurisdiction. Global instruments leave space for this distinction, differentiating between the denial of port privileges and port state offences or the imposition of more onerous enforcement measures,⁹ but not delving beyond ‘sovereignty’ for legal bases.

The characteristics of prescribing and enforcing conditions of extraterritorial conduct for port access or services demand not only a legal basis under international law, but also why state jurisdiction’s limitations do not apply. Analogous application of the rules for other border control activities, where the definition of undesirable aliens and its enforcement through exclusion are a matter of *domaine réservé*, provided the answer.¹⁰

Rights of *domaine réservé* may be exercised by states through prescription and limited enforcement. Prescribing conditions for port entry is one way to exercise control over the entry of foreign vessels into the territory. But the condition’s legal basis does not thereby become a matter of prescriptive state jurisdiction under international law. Denial of entry is the way to exclude undesirable vessels from a state’s territory, but its legal basis does not thereby become a question of enforcement state jurisdiction under international law. As a

⁹ (ch 3). Furthermore, Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, opened for signature 22 November 2009, I-54133 (entered into force 5 June 2016) preamble and art. 4(1)(b) implies ‘adoption’ and ‘exercise’ of more onerous PSMs is a matter of international law, whilst adoption of entry conditions is a discretion triggering international law only in its ‘exercise’.

¹⁰ Unless conflicting with another obligation assumed under international law.

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matter preserved within the regulatory competence of states, the legal basis is its exceptional *domaine réservé* character. Given states may exercise rights to a lesser degree, denial of services, i.e. allowing limited entry, falls within the *domaine réservé* exception. This is *domaine réservé*-based jurisdiction.

In contrast, the prescription of port state offences – i.e. not conditions of port entry or services – falls outside the narrow *domaine réservé* exception. Its exercise must therefore be based on a permissive ground of state jurisdiction under international law.

Enforcement measures must be limited to the withholding or limiting of entry into the state's territory if they are to remain within the *domaine réservé*-based exception to the rules of state jurisdiction under international law. Other enforcement measures require a permissive ground of enforcement state jurisdiction, a precondition of which is valid prescriptive state jurisdiction.¹¹ This explains why enforcement is limited to denial of privileges in the case of conditions for port entry/use, but not so in respect of port state offences.¹²

Through this separation, the discrepancies found within both prescription and enforcement jurisdiction are no longer unanswered paradoxes but legally grounded distinctions reflective of the legal bases available. The sufficiency of state jurisdiction for port state offences will be returned to, but it should be emphasised here that these jurisdictional bases are not mutually exclusive. It is the combination of *domaine réservé*-based and state jurisdiction-based jurisdiction that provides the greatest extraterritorial effect a port state may have in practice.

In a wider context, the enforcement of the conditions prescribed for access to port privileges may therefore represent a further 'functional maritime frontier'. The border will materialise where control is exercised i.e. at port or the outer limit of internal waters, or against vessels proceeding through the territorial sea.¹³ For fisheries this could perhaps extend to the outer limit of the EEZ if conditions for the entry of fishing vessels into the EEZ becomes established.

¹¹ (2.2.2).

¹² Only in the former may extraterritorial conduct with no jurisdictional nexus to the port state have been legally prescribed but subsequently found lacking when the question becomes one of enforcement state jurisdiction.

¹³ Seline Trevisanut, 'The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea' (2014) 27 *Leiden Journal of International Law* 661, 673.

Extraterritorial entry conditions, paradoxically, reemphasize borders and territoriality for their legal basis, yet, establishes and enforces norms which are territorially unbound. Subsequent territorial elements or requests may be essential to trigger application. However, port states do not care where the offending IUU fishing occurs, so long as it occurs outside their coastal maritime zones. If not conflicting with another obligation of international law, the same jurisdiction techniques may be employed for norm-setting within any thematic area. Thus, port states are engaged in territorialisation. Yet, for the transboundary actors who are the subjects of port state regulation 'deterritorialisation' occurs. Fishing or fishing-related conduct will occur within a specific territory but may be non-compliant with the norms of multiple port state regulatory authorities.¹⁴ The results of their conduct under any port state laws will be settled, i.e. they will be denied port entry or services. The distinguishing factor will be whether territorialised application is triggered by a subsequent visit of the vessel or product to that port state.

7.3. PSJ limitations imposed by the law of the sea

Regardless of legal basis, PSJ must be exercised in compliance with obligations assumed under international law. This manuscript draws upon PSJ developments within international instruments, interstate disputes concerning the law of the sea, and finally a systematic application of other potentially applicable *UNCLOS* provisions, to provide an overview of LoS limitations and safeguards.¹⁵ Focus is placed on PSMs.

This manuscript submitted that increasing limitations are placed upon the discretion to exercise jurisdiction in respect of port state privileges. But, bar a few specific cases, limitations upon the maximum PSJ available are even less than previous proposals in literature or interstate disputes. Stringent limitations in practice may apply where treaties are applicable. However, PSMs and IUU fishing frequently fall outside the well-defined provisions of *UNCLOS* without subsequent global instruments or custom developing limitations further.

¹⁴ Deterritorialization being "detachment of regulatory authority from a specific territory" Catherine Brölmann, 'Deterritorialization in International Law: Moving Away from the Divide Between National and International Law' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007) 92.

¹⁵ (1.2.2) author's choice, noting other fields apply e.g. international trade law.

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7.3.1. Minimum PSJ in combatting IUU fishing

During the evolution of PSMs within global agreements, national prerogatives progressive developed into also including ‘facilitative’ jurisdiction. Finally, port states became an independent actor, subject first to a general duty (*UNFSA*) and now to specific minimum standards (*PSMA* and *RFMO/A CMMs*).¹⁶

States acting in other capacities than a port state should, or shall, take measures to assist, encourage, or compel, port states to implement their treaty-based responsibilities to exercise jurisdiction in combatting IUU fishing. Flag and market state practice is not analysed here, but port state practice complements and expands the reach and depth of this duty, including the application of *PSMA* standards against states not party to the *PSMA*.¹⁷

Port state responsibilities are focused on *domaine réservé*-based prescription of conditions for the use of port privileges and enforced via denial. The only exceptions are territorial, i.e. limited documentation requirements and minimum standards for inspection.¹⁸ Prescription and enforcement of port state offences remain within state discretion, and thus one cannot - yet- talk of obligations to exercise state jurisdiction.

Being well established in some regions, the generally accepted responsibilities of port states have increasing global application. This may evident an advance towards a customary duty in the future. Prescription of adequate PSMs to address vessels engaged in or supporting IUU fishing will be expected of ‘responsible’ port states, whether or not contracting parties to *PSMA* or *UNFSA*, or participant in an applicable *RFMO/A*.¹⁹ By holding port states not party to the *PSMA* or *UNFSA*, or a participant in an *RFMO/A* to account, UNGA resolutions and the response of third countries begin to demonstrate the *opinio juris* necessary for such a development. The spread of state practice in terms of prescription shows no sign of slowing or reversing.

¹⁶ (Ch 3).

¹⁷ (5.3.3.2)-(5.3.3.5), (6.3.1.5), e.g. Comoros and Sierra Leone.

¹⁸ (3.2.2.3.3).

¹⁹ An answer to Molenaar’s query on port state duties’ future, Erik J Molenaar, ‘Port and Coastal States’ in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 302.

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A customary duty would be one of due diligence, comparable to flag state responsibilities in this regard.²⁰ Nonetheless, difficulties in identifying non-compliance with due diligence obligations leave room for the continued contribution of unilateral PSMs targeting the more broadly defined and subjective ‘non-cooperation’ (7.5.2).

In a broader context, PSMs combatting IUU fishing are therefore an ideal candidate to apply Mills’ theory on obligatory jurisdiction beyond international crimes.²¹ Jurisdiction within international law has transformed from an exclusively positivistic rights-based approach towards a mandatory duty to exercise jurisdiction.

That reasoning could now be extended to obligatory *domaine réservé*-based jurisdiction for applicable treaty parties. Previous ICJ reasoning suggests nothing prevents states from binding themselves to principles and methods for a right of *domaine réservé*.²² This would include mandatory prescription and enforcement of a conditional port privileges framework to combat IUU fishing and related activities.

7.3.2. Maximum PSJ in combatting IUU fishing

Ports usually qualify as part of the territory of the state. Exceptionally, ports may be located within coastal maritime zones, but this does not have any material effect upon the enforcement jurisdiction available. When PSJ includes an extraterritorial element of prescription applicable to the conduct of foreign vessels upon the high seas or within foreign maritime zones, it must be compatible with the rights and obligations applicable therein. The

²⁰ *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion* [2015] ITLOS 21, ITLOS Rep 2015 4 [129–136, 148–150]; *The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China), Award* [2016] PCA 2013-19 (Arbitral Tribunal (UNCLOS, Annex VII)) [754]; *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, Separate Opinion of Judge Paik* [2015] ITLOS 21, ITLOS Rep 2015 102 [20–29]; *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion* [2011] ITLOS 17, ITLOS Rep 2011 10 [110–112, 117–120].

²¹ A Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187.

²² “[T]he question of the possibility of a State binding itself by agreement in relation to a question of domestic policy [...state] is sovereign for the purpose of accepting a limitation of its sovereignty” *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment* [1986] ICJ 5, ICJ Rep 1986 14 [259], sovereignty to regulate port access may be subject to rights of access granted to other states, *ibid* 214, 253.

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sufficiency of an extraterritorial 'element' in violating a high seas principle has been the primary source of contention.

7.3.3. Prescription limitations

Treaty-based PSJ would be only applicable amongst state parties and to the extent explicitly provided. PSMs, such as those mentioned within *UNFSA*, art. 23, are not treaty-based.²³ Equally, *UNCLOS* does not limit prescription applicable to internal waters and so the focus of this manuscript rests upon *UNCLOS*, Part VII. Italy's unsubstantiated claim for article 89 as a PSJ limitation was dismissed,²⁴ and it was reiterated that exclusive flag state jurisdiction is a red herring, incapable of conflicting with PSJ.²⁵ Port state practice and responsibilities concerning the high seas confirm the fallacy of this limitation, despite continued submission of such claims.

Freedoms of the high seas will not limit prescription of entry conditions or port state offences. They can however be used to challenge port state offences without a valid legal basis. These would (at least) violate the freedom of navigation and fishing,²⁶ an additional international wrong within *UNCLOS*'s compulsory dispute settlement provisions. Other limitations to residual PSJ are not codified and thus not within compulsory dispute settlement's scope.²⁷ Despite argumentation to the contrary, in-port enforcement of extraterritorial prescription with a valid legal basis will not violate the freedoms of the high sea. Equally, the extraterritorial 'effects' of port state prescription are insufficient to violate the freedoms of the high sea.²⁸

Alternatively, *UNFSA* parties may use the *UNFSA* dispute resolution provisions to challenge port state rights and responsibilities generally, or an RFMO/A PSM if relating to straddling or highly migratory fish stocks. The dispute settlement procedures provided for under the *PSMA*

²³ (2.3.4).

²⁴ (4.3.2).

²⁵ (4.3.3).

²⁶ (4.3.1.1.2), (4.3.1.2.2).

²⁷ (4.5).

²⁸ (4.3.1).

are limited to mutual consent, but the *PSMA* could nonetheless be used to elaborate upon the content of the obligations under the *UNFSA*.²⁹

If *domaine réservé*-based jurisdiction is rejected, extraterritorial conditions for port entry or use could be challenged. To argue otherwise would result in two unappealing alternatives. Firstly, one would have to conflate the freedoms of the high seas with the exclusive jurisdiction of the flag state to argue the freedoms only concern the exercise of enforcement jurisdiction. Alternatively, the extent of extraterritorial conditions prescribed for entry to port or access to services means there is persistent and widespread violation of *UNCLOS* by port states.

7.3.4. Enforcement limitations

Enforcement limitations to PSJ were largely dismissed during this analysis, or do not apply in the case study of PSMs. No customary right of entry limits enforcement.³⁰ The requirement of a vessel's voluntary entry into port will limit *UNCLOS*, art. 218-based jurisdiction, but is inapplicable to the enforcement of PSMs.³¹ Procedural requirements, such as due publicity, broadly cover pollution-related entry conditions, but for PSMs are limited to designation of ports and the adoption of recourse mechanisms by *PSMA* parties.³² *UNFSA* parties would however need to publicise applicable RFMO/A PSMs.³³

A limited *force majeure* or distress entry exception excludes enforcement over entry condition breaches, offences where entry condition breach is an essential element, and any offence closely linked to rendering assistance necessary for the preservation of human life. Equally, port state duties should not apply in *force majeure* or distress scenarios whereupon the duty to deny entry would threaten human life.

However, practice confirms the wide scope of discretion for port states in balancing competing interests.³⁴ Ad-hoc *force majeure* entry conditions, and narrow interpretation of

²⁹ (4.5).

³⁰ (4.2.2). However bilateral or multilateral agreements may limit this in practice.

³¹ (4.2.3).

³² See unpublicized EU elements, (6.3.2.1), and formally the USA, (6.2.4).

³³ (4.2.6).

³⁴ (5.3.3.1), (6.3.1.4), (6.3.2.1), (6.4.9), (6.5.2).

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entry into port or use of services essential to health and safety, abate any potential for abuse by IUU related vessels.³⁵ Preservation of human life does not extend to preservation of property, so confiscation is permitted if prescribed.

For in-port enforcement of PSJ, internal affairs³⁶ and an 'implied' limitation to enforcement jurisdiction were disputed due to the lack of treaty or customary basis.³⁷ Sovereign immunity of vessels will also require minimal application in the case of PSMs.³⁸ The freedom of choice in port state enforcement measures for fisheries cases can be distinguishable from the more limited coastal state EEZ fisheries enforcement (no imprisonment), or extraterritorial *UNCLOS*, art. 218-based PSJ enforcement (monetary penalties only).

Finally, several *UNCLOS* provisions will limit PSJ in explicitly defined cases. This includes those provisions requiring prompt release and the avoidance of undue delay; those limiting enforcement for collisions or any other incident of navigation; and those prohibiting enforcement action which endangers navigation, safety or the marine environment.³⁹ However, again contrasting with *UNCLOS*, art. 218-based PSJ, or EEZ fisheries law, extraterritorial PSMs are untouched. The exception which subsequent practice has sought to address is prompt notification of the flag state. This procedural requirement increasingly applies to PSMs denying port privileges.⁴⁰

7.3.5. General safeguards and limitations to maritime jurisdiction

Firstly, abuse of right provisions were consistently found within fisheries instruments. This applies also to PSMs prescription or enforcement. In the case of *UNFSA* parties, compulsory dispute resolution opportunities are provided.⁴¹ Three 'abuse of right' scenarios from general international law suggest that an arbitrary balancing of port and foreign state interests, resulting in injury to the other state, is required before an abuse of right claim can be raised.

³⁵ (6.3.1.4), conditions; (5.3.2.5), (6.5.2) inspections or expulsion.

³⁶ (4.2.4).

³⁷ (4.2.8), (6.4.10), (6.5.7).

³⁸ (4.2.5).

³⁹ (4.2.7), (4.3.4), (4.4.1).

⁴⁰ (4.2.6).

⁴¹ (4.4.3).

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When determining whether an abuse of right has occurred in the exercise of PSJ, one can take inspiration from the ‘reasonableness’ used by *UNCLOS* to balance the competing interests of a coastal state and flag states within the EEZ. The high ‘abuse’ threshold is difficult to demonstrate. But confiscation of property from a vessel entering the EU under *force majeure* or distress is questionable given the potential lack of any illegal activity within EU member states’ jurisdiction.⁴²

Secondly, during this review, non-discrimination against foreign vessels was fleshed out as only prohibiting unjustified discriminatory measures among foreign vessels.⁴³ In the application of its jurisdiction, as opposed to the vessel standards applied, port states may discriminate upon flag if the choice of flag presents a higher risk of non-compliance. Non-CNCP flagged or stateless vessels believed to have undertaken fishing activities may be presumed to have engaged in IUU fishing. This presumption may trigger the application of harsher PSMs, notably denial of port services, prioritisation for port state inspections, or invalidity of documentation necessary for access to port, port services or the market.⁴⁴

Justified discrimination also includes measures against all vessels flying the flag of a state that, by the use of non-discriminatory standards, is identified as a non-compliant⁴⁵ or non-cooperative⁴⁶ flag state. RFMO/As investigate whether a state is undermining regional CMMs through a failure to fulfil flag state duties over vessels active in the area. The USA – one of the two self-appointed global leaders in combatting IUU fishing - assesses whether flag states failed to address identified conduct, e.g. IUU fishing or high seas driftnet practices.⁴⁷ The EU – the other global leader- reviews whether a flag state failed to discharge its duties to combat IUU fishing as a flag, port, coastal or market state.⁴⁸

Unilaterally set conditions to ‘justifiably’ discriminate are therefore easily found, if consistent. To shield PSMs from discrimination claims, what is required of foreign states should be given

⁴² (6.3.1.4).

⁴³ (4.4.2).

⁴⁴ (5.3.2.4), (5.3.2.5), (5.3.2.7), (5.3.3), (5.3.4), (6.3.1.2).

⁴⁵ (5.3.3.4).

⁴⁶ (3.2.2.1.2), (3.2.2.5).

⁴⁷ (6.2.4).

⁴⁸ (6.3.1.5), (6.3.2.1), (6.5.4).

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due publicity. Detailed US practice is far superior to the EU process, which is developed through dialogue and not publicly accessible documentation. A light touch in terms of effects may also discourage complaints, in all cases denial of port privileges is the primary tool adopted against the offending state. It is only when a vessel undertakes additional in-port conduct, independent of its state's non-compliance/non-cooperation, that further port offences are committed and therefore more onerous enforcement measures applied.⁴⁹

7.4. State practice on PSJ: PSMs concerning extraterritorial IUU fishing or related activities

State practice used for re-systematisation of jurisdictional bases (7.2) also demonstrate that the permissive grounds of state jurisdiction are used to maximize the extraterritorial reach of port state offences. 'Influence of practice' has thus not only been necessary to distinguish *domaine réservé*-based PSMs. It has also demonstrated the stark reality that formal adherence to the law of state jurisdiction places little limitation on the ingenuity of port state territorialisation.

Once described as 'creeping jurisdiction' by the EU, denial of port entry based purely on extraterritorial conduct is now a consolidated power with increasingly concrete legal obligations. Unilateral conditions, such as a 'belief' of IUU fishing, or a belief the flag state failed to discharge its duties, are simply not adapted to territorial/extraterritorial conceptualisation. Actual vessel conduct may be irrelevant to the imposition of PSMs.

Enforcement measures beyond denial of port privileges are reserved for port state offences beyond nonfulfilment of entry conditions. However, by combining rights of state jurisdiction and *domaine réservé*, IUU fishing on the high seas is not itself subject to fines or confiscation of property, but subsequent minor territorial acts may trigger these. Thus, entering port in breach of explicit denial of entry (or without authorisation) is proscribed, subject to fines, confiscation or other enforcement measures necessary.⁵⁰ This territorial offence is structured around whether authorisation for territorial conduct has been granted. This territorialises the

⁴⁹ E.g. submission of falsified documentation (6.3.1.3), (6.4.10), (6.5.6).

⁵⁰ (6.4.10), (6.5.7).

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offence, despite the underlying extraterritorial preconditions which may determine the granting of such authorisation, such as advance notification or extraterritorial conduct.

However, this jurisdiction is limited by the necessity of not only violating entry conditions, but having been denied entry, proceeding to enter or use port facilities. Separation of acts means that those involved in extraterritorial IUU fishing, but who nonetheless follow entry procedures and any resulting decision, may not commit an offence and thus not be subject to enforcement beyond denial or expulsion.⁵¹ In practice, implementation may only occur in exceptional cases when a port/market is sufficiently attractive for the vessel crew to risk prosecution, or the crew suspects port entry/use will be undetected.

When authorisation/licensing/registration is required for all port use, subjective territorial state jurisdiction may be exercised to impose further offences because a substantial part of the offence will have occurred in the territory of the state.⁵² In these cases, extraterritorial conduct is not an offence *per se*. Such conduct may however be a finable offence because of a violation of one's licence.⁵³ Effects of conduct in question are felt extraterritorially, but the PSJ nexus is the initial territorial use and licensing thereof. Equally, this conduct may invalidate the licence, resulting in subsequent port entry/use being an offence comparable to above, or result in port entry/use in breach of its conditions. The latter is an objective territorial offence, as it is completed in the territory of the port state, and that is where the effects of a violation of the licence are felt.

Alternatively, where *domaine réservé*-rights and state jurisdiction rights are conflated, there is an increased possibility that port states are going beyond the limits of jurisdiction under international law. This was seen with the EU IUU vessel list, where confiscation applied in *force majeure* entry cases.⁵⁴ In such cases, the necessity of preventing IUU-listed vessels from abusing the *force majeure* entry exception to gain access could support acceptance of this practice. The balance of interests should however discourage further general conflation

⁵¹ (6.2.5), (6.5.6).

⁵² (2.3.1.1.)

⁵³ (6.4.3), (6.5.1).

⁵⁴ (6.3.1.4), (6.3.3).

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between *domaine réservé*-rights and state jurisdiction-based rights, and offences should be clearly defined.

Similarly, *domaine réservé*-based jurisdiction only extends to preventing port entry of undesirable vessels and conditioning of port entry and use. Vessel departures and therefore port exit conditions are subject to the ordinary requirements of state jurisdiction. 'Belief' of participation in IUU fishing may condition entry, but not condition exit. Global instruments are silent on exit conditions, but regional and unilateral practice⁵⁵ are limited to territorial static vessel conditions.⁵⁶

Of course, state jurisdiction may be exercised independently of port privilege conditions. Grounds for extraterritorial state jurisdiction have not been employed by port states,⁵⁷ but the territorial nexus inherent in PSJ's definition has been exploited to indirectly address extraterritorial IUU fishing when foreign vessels visit.

Firstly, wholly territorial prescription may punish known unsustainable practices, e.g. driftnet fishing, or impose inspection procedures for all - or targeted - foreign vessels in order to address the information gap exploited by IUU fishing. Prescription demonstrates that inspection may relate to any information, property of persons located or accessible within the territory.⁵⁸ Wholly territorial offences, e.g. failure to comply with inspection requests, promote cooperation and punish non-compliance.⁵⁹

Secondly, a high seas moratorium on driftnet fishing is supported through territorial static requirements for vessel or gear, namely the offence of entering port with a driftnet.⁶⁰ This contrasts with addressing vessels that are 'supporting' driftnet fishing, as the extraterritorial conduct in question requires the two-step combination of *domaine-réservé* and state

⁵⁵ (5.3.2.7).

⁵⁶ Advance exit notification is equally territorial, (6.5.2), (6.5.5).

⁵⁷ Indeed, see the necessity of a transfer of jurisdiction, (2.3.4), (2.4.1), (2.5.2.1.2), (6.3.1.3), (6.4.9).

⁵⁸ Equally outside fisheries, Bevan Marten, 'Port State Jurisdiction over Vessel Information: Territoriality, Extra-Territoriality and the Future of Shipping Regulation' (2016) 31 *The International Journal of Marine and Coastal Law* 470.

⁵⁹ E.g. (6.4.1).

⁶⁰ (3.2.2.2.2), (6.4.3), (6.4.4), (6.5.1), (6.5.3).

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jurisdiction above. Support vessels are denied entry, but only commit an offence when, ignoring that direction, they enter port (a territorial act).⁶¹

Furthermore, conceptualisation as a static requirement has expanded beyond tangible vessel/gear conditions to include intangible conditions fixed at the point of territorial presence. The bringing of a stateless vessel into port has been prescribed as a port state offence, enforceable through confiscation, fines or detention.⁶² The status of a vessel as 'stateless' is however an intangible question of whether a valid legal relationship exists between the vessel and a flag state. The offence of operating a stateless vessel can nonetheless be objectively confined to a matter occurring in-port.⁶³

Territorialisation also occurs through broad objective territorial jurisdiction.⁶⁴ The two limiting factors are that consequences should be a 'constituent element' of the crime and effects should be 'significantly' adverse. The latter is demonstrable through the effects of IUU vessels or products entering a state, namely risks to the market, consumer confidence, transparency, confidence in the legal system, or undermining explicit policy objectives of law. The three most prevalent mechanisms to fulfil the former are summarised here.

Firstly, port inspections and advance notifications were noted to shed light on extraterritorial conduct. In addition to offences of falsifying or concealing vessel markings or registration documentation,⁶⁵ the submission of incorrect or inaccurate catch documentation is an offence completed in port. Extraterritorial conduct contrary to what is recorded (e.g. harvesting at a different location) will be essential, but as the offence is limited by 'inaccurate submission', an objective territorial nexus arises. Conceivably any extraterritorial conduct may be territorialised in this manner, with comparable fines or confiscation possible.

Secondly, *Lacey Act* style provisions were extensive. Essentially, extraterritorial conduct will form the underlying conduct which 'triggers' an overlying territorial offence.⁶⁶ Overlying

⁶¹ (6.3.1.3), (6.4.10), (6.3.7).

⁶² (5.3.3.5), (6.3.1.3), (6.4.1), (6.4.9).

⁶³ Burden of proof may also be reversed e.g. failure to demonstrate valid flag state registration upon entry.

⁶⁴ (2.3.1.2).

⁶⁵ (6.3.1.3), (6.4.1), (6.4.4), (6.4.6), (6.4.9), (6.5.2), (6.5.5), (6.5.6).

⁶⁶ (6.2.2).

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territorial offences are broadly defined as landing, possession or importation, of 'tainted' property; in fisheries law it being the fish or the vessel.⁶⁷

The definition of 'tainted' property, which triggers the offences, may however include conditions of harvesting. For instance, the fish was caught extraterritorially, caught by IUU listed vessels, caught by stateless vessels, caught with driftnets, or caught in violation of foreign laws. 'Tainted' as in 'tainted vessels' includes how the vessel was used, e.g. whether it was used for IUU fishing. The necessity of (extraterritorial) underlying conduct defines provisions as objective territoriality.

Finally, authorisation exceptions are employed within objective territorial offences. New Zealand ports prohibit foreign vessels possessing any fish caught extraterritorially. An exception involves obtaining approval prior to entry, which, whilst not altering the jurisdictional analysis, can increase its extraterritorial effect in practice. Failure to fulfil conditions of extraterritorial conduct for that approval would invalidate any prior approval, thereby removing it as a defence to the offence. From the perspective of jurisdiction, this does not expand the initial offence of objective territorial jurisdiction. The offence remains the possession of fish caught extraterritorially, regardless of any prescribed defences. It does however demonstrate how territorial extension may *equally* apply through well-crafted *defence* provisions. Extraterritorial conduct is not territorialised as an underlying element of a territorial offence but rather an underlying element of a defence to a territorial offence. This may be just as effective.

To conclude, developments demonstrate not only the obvious expansion of state capacities in combatting IUU fishing, but equally the broadening of conduct targeted by state jurisdiction to avoid the limitations of extraterritorial jurisdiction.⁶⁸ As Kanehara noted, "not only actual conducts of illegal fishing but also navigation of fishing vessels itself is being the target of international or regional or national regulation".⁶⁹ To this, one may add prescription targeting

⁶⁷ (6.5.7), (6.4.10), not within treaty law, (3.2.2.4).

⁶⁸ Affirmatively answering Molenaar's query on future developments in more onerous enforcement measures, Molenaar (n 19) 302.

⁶⁹ Atsuko Kanehara, 'Environmental Protection of Ocean and Flag-State Jurisdiction' (2008) 14 <http://www.scj.go.jp/en/sca/activities/conferences/conf_8_projects/pdf/o1.pdf> accessed 18 October 2017.

the resulting catch, documentation, vessel gear, suspected vessels and support vessels. The same applies for vessels linked to a state purported to be failing to fulfil its obligations in respect of international fisheries law.

7.5. Concluding remarks

One hypothesis which stimulated this research, was that a novel basis of extraterritorial state jurisdiction was required for state practice in the global interest.⁷⁰ Findings are therefore briefly put in the context of the research group to ask whether the global interest in sustainable fisheries has implored more expansive jurisdictional assertions. Looking further ahead, this PhD manuscript concludes with a few comments upon the future of PSJ and possible research.

7.5.1. The relationship between global interests and state jurisdiction

The global interest in sustainable fisheries and combatting IUU fishing has contributed to stimulating practice. However, beyond linkages to denial of port privileges, port states have neither been provided with extraterritorial jurisdiction over IUU fishing, nor successfully claimed it. Laws are crafted for extraterritorial effect without the necessity of extraterritorial jurisdiction. At most, the global condemnation of IUU fishing has supported the legitimacy of territorialisation in the eyes of foreign states.

This analysis is a more cautious approach than arguing novel jurisdictional grounds. Nonetheless, a port state's strength comes from its territorial nature and the requests of foreign vessels to enter and use its ports. What is more, a global interest basis would simply not provide differentiations between *domaine réservé*-based PSMs and state jurisdiction-based PSMs. A global interest basis would, by definition, be a ground of state jurisdiction in international law. It would thus fail to explain the prescription discrepancies and enforcement paradoxes of port state practice.

⁷⁰ 'Home' (*UNI JURIS*) <<https://unijuris.sites.uu.nl/>>.

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The fact that 'IUU fishing' remains broadly descriptive and open to dispute,⁷¹ means limited chances remain for *opinio juris* to crystallise, either for a universal jurisdiction crime, or on a 'global interest' basis. PSMs are not always a suitable response.⁷² A lack of consensus would inevitably result in protests upon applicability, a poor starting point given the objectives of state jurisdiction.⁷³

Finally, argumentation raised by Guinea before ITLOS included an interest-based argument for extraterritorial jurisdiction. This was not jurisdiction for the global interest, but to protect its national "public interest", namely fisheries and customs from "unwarranted economic activities".⁷⁴ ITLOS's reasoning for rejection would be equally applicable by analogy if the global interest was, *as is the case here*, insufficiently precise and thus significantly tilted the balance of power at the expense of other states' right(s):

"recourse to the principle of 'public interest', as invoked by Guinea, would entitle a coastal State to prohibit any activities in the exclusive economic zone which it decides to characterize as activities which affect its economic "public interest" or entail "fiscal losses" for it"⁷⁵

Allowing port states the prerogative to exclude from their ports what they characterize as IUU activities is one thing. Granting rights of state jurisdiction, with its largely unlimited territorial enforcement jurisdiction, would be quite the other.

⁷¹ Differences upon definition of IUU fishing, and its wider context, FAO, 'Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally, Rome, 2-4 February 2015' (FAO 2015) FAO Fisheries and Aquaculture Report 1106 paras 13–21; Blaise Kuemlangan, Martin Tsamenyi and Matthew Camilleri, 'Defining Illegal, Unreported and Unregulated (IUU) Fishing' [2015] Background Paper 2 for the FAO Expert Workshop to estimate the magnitude of Illegal, Unreported and Unregulated fishing globally 24.

⁷² FAO, *Stopping Illegal, Unreported and Unregulated Fishing* (FAO 2002) 2, 20.

⁷³ (2.2.4).

⁷⁴ *M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea)*, Counter-Memorial submitted by Guinea [1999] ITLOS 2, ITLOS_f3_125-229 [109–117] arguing customary extraterritorial prescription and enforcement jurisdiction for "customs and contraband laws" (also claiming protective jurisdiction, enforcement necessity or implied jurisdiction); *M/V 'Saiga' (No 2) (Saint Vincent and The Grenadines v Guinea)*, Judgment [1999] ITLOS 2, ITLOS Rep 1999 10 [128].

⁷⁵ *M/V 'Saiga' (No. 2) Judgment* (n 74) [131]; and thus, United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art. 58(3), not a rule of international law compatible with UNCLOS, Part V; see, Camille Goodman, 'Rights, Obligations, Prohibitions: A Practical Guide to Understanding Judicial Decisions on Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone' (2017) 32 *The International Journal of Marine and Coastal Law* 1, 22–23.

7.5.2. The continued role for unilateralism

The jurisdictional rights espoused here are not thematically limited. Whilst advancing global interests and promoted by the international community in this study, PSJ could equally pursue imperialist national interests detrimental to foreign states or disruptive of international cooperation and multilateral solutions. The fact that international law presents few limitations to port state territorialisation should not therefore be assumed of normative benefit.

Firstly, within fisheries policy, unilateralism remains important in advancing the specific content of a port state's duty. Even if a customary due diligence obligation arose for port states, due diligence obligations generally face an accountability deficit with 'best possible effort' enough to meet one's obligations.⁷⁶ Unilateral practice against ports of non-compliance should follow a trajectory similar to PSMs being invoked against flags of non-compliance. Rather than attempting the difficult task of identifying non-compliance, unilateral practice will focus on identification of non-cooperating port states, which may include standards above and beyond the due diligence minimum.⁷⁷

Secondly, using PSMs within a process identifying non-cooperating market states provides open ground for developing novel standards. The *IUU Regulation* may target failures to discharge market state duties incumbent under international law, despite the lack of any duties which have sufficiently crystallised within international law.

PSMs may also target vessels using ports of non-compliance. For port states party to the *PSMA*, the question of identifying a port of non-compliance may be relatively straightforward. However, using an undesignated port of non-compliance, thereby undermining the minimum port state standards applicable under a global or regional agreement, is arguably also sufficient to meet the *UNFSA* standard of undermining CMMs. In this regard, *UNFSA* parties who are not party to the RFMO/A may nonetheless be expected to take some PSMs if failure

⁷⁶ 'The Role of Sustainable Natural Resources Management International Law Part II: Committees' (2016) 77 International Law Association Reports of Conferences 387, 423.

⁷⁷ Yoshinobu Takei, 'International Legal Responses to the Flag State in Breach of Its Duties: Possibilities for Other States to Take Action against the Flag State' (2013) 82 Nordic Journal of International Law 283, 313 discussing flag states and non-cooperating as opposed to finding non-compliance.

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to do so would undermine the RFMO/A's CMM on PSMs. Therefore, regionalism also holds the potential to expand adherence to agreed PSMs beyond state parties.

Thirdly, unilateralism remains necessary for agreed PSMs. General duties require implementation at the regional or national level as appropriate (e.g. sufficient inspection levels), regardless of flag state.⁷⁸ Global instruments equally preserve the prerogative to go further, i.e. to impose port state offences. Yet, perhaps the greatest freedom for unilateralism outside this explicit area is in the concept of IUU fishing itself. The list contained in *UNFSA*, art. 21(11) may provide some coherence as to what illegal fishing entails, but space remains for states and RFMO/As to unilaterally define IUU fishing within domestic/regional law.⁷⁹

7.5.3. The future of PSMs and PSJ

Banning vessels from port based on ownership was once regarded as a form of overreaching PSJ.⁸⁰ Yet, it is now represented within RFMO/A IUU vessel listing procedures,⁸¹ and the increasing port state practice, shows no sign of slowing. Nor does the importance placed thereon. Conditions for entry and use of services will continue to be employed where no substantial connection exists. This contrasts with port state offences where a substantial connection via the principles of state jurisdiction must be demonstrated.

Whilst port entry denial is exercisable in an ad hoc manner, port states will continue to prescribe unilateral conditions for exercising denial. Firstly, prescription can regulate or compel extraterritorial conduct without enforcement. Transferring ad hoc powers into detailed entry provisions provides publicity to extraterritorial conduct expected of foreign vessels visiting. Where port access or use is vital, vessels will comply with conditions set. Where a vessel has greater interest in the extraterritorial conduct that violates such conditions, the vessel remains discouraged from requesting entry. A reduction in the number

⁷⁸ Within international fisheries law generally, FAO, 'Global and Regional Processes' (COFI/2016/8 2016) Committee On Fisheries (Thirty-Second Session, Rome, 11-15 July 2016) para 44.

⁷⁹ E.g. US unilateralism contrasting with EU transposition of the IPOA-IUU definition; (6.2.4), (6.3.1).

⁸⁰ Bevan Marten, 'Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 137–138.

⁸¹ (5.3.3.1).

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of requests by non-compliant vessels will preserve port state resources otherwise spent on processing, investigating or prosecuting the vessel.

Equally, domestic interests, including predictability in access and use of ports by compliant vessels may stimulate prescribing detailed conditions. By prescribing conditions of extraterritorial conduct, port states will discourage foreign vessels from engaging in the defined extraterritorial conduct. At the same time, the port state will not undermine the confidence of other vessels vital for economic, social, employment, or food security concerns. Nonetheless, deliberately broad conditions are still included, such as “any other reason” to believe a vessel has been engaged in IUU fishing.

Prescription also demonstrates to foreign states that port states make full use of available jurisdiction in combatting IUU fishing. Treaty obligations including the *PSMA* are fulfilled, whilst more generally the chances of identification as ‘non-cooperating’ are reduced. Developing states can ill-afford not to adopt PSMs for fear dominant markets and ports will otherwise close their doors.

On the other hand, self-identified global leaders in the fight against IUU fishing will prescribe PSMs as inspirational practice, or to produce best practice for exportation to other jurisdictions. The PSMs now found within global instruments have been the result of a bottom-up process, inspired by unilateral practice. This will continue, as the EU recently reaffirmed the fight against IUU fishing as a priority and will contribute to the “FAO global programme to support” *PSMA* implementation.⁸² A pressing reality is the concern that IUU fishing and its products will simply redistribute to ports unwilling or unable to prescribe and enforce minimum standards.⁸³

⁸² EC, ‘Commitments 2017’ (2017) Our Ocean, Malta, 5-6 October 2017 51 <http://www.ourocean2017.org/sites/default/files/ooc-2017-list-of-commitments_en.pdf>; the EU will also host the *PSMA* assessment and review conference in 2020, as per *PSMA*, art. 24(2), FAO, ‘Report of the First Meeting of the Parties to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Oslo, Norway, 29-31 May 2017)’ (FAO 2017) FAO Fisheries and Aquaculture Report 1211 para 40.

⁸³ Antonia Leroy, Florence Galletti and Christian Chaboud, ‘The EU Restrictive Trade Measures against IUU Fishing’ (2016) 64 *Marine Policy* 82, 89.

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These trends will also apply outside of fisheries, including residual PSJ in merchant shipping,⁸⁴ the arctic system,⁸⁵ possible inclusion within the BBNJ Agreement,⁸⁶ and the use of PSJ beyond oceans governance. The UNSC's imposition of strengthened sanctions against North Korea in 2017 is just one example of the diffuse role of PSJ. In this case, regardless of flag, UN member states shall collectively deny port entry to any listed vessel suspected of assisting prohibited North Korean exports by sea.⁸⁷ Somewhat paradoxically given its own use of such PSMs, in 2018 the EU objected to the denial of port privileges extending to EU vessels when the US adopted this within its sanctions against Cuba and Iran.⁸⁸

Expansion will be found in linkages between IUU fishing and other concerns, notably working conditions, human trafficking, modern slavery, organised crime, drug trafficking, and other human rights concerns.⁸⁹ ILO highlighted the role of port states in identifying human rights

⁸⁴ E.g. recent examples; Erik J Molenaar, 'The Arctic, the Arctic Council, and the Law of the Sea' in Robert C Beckman and others (eds), *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (2017) 40–42 residual prescription, MoUs practice on residual PSJ, pp. 43.

⁸⁵ "As ice recedes [...] Arctic states need to decide whether they're prepared to see these routes controlled vicariously by controls exercised by non-Arctic port authorities at either end of these shipping routes or whether they want a special agreement that has them more in control" Alistar Graham, 'The Conundrum: Conserving Biodiversity in Areas Beyond National Jurisdiction' (2016) 2 WWF Magazine: The Circle 14, 16.

⁸⁶ For high seas marine protected areas, "flag State and the port State concerned could cooperate in the implementation and enforcement of the MPAs" Preparatory Committee established by General Assembly resolution 69/292, 'Chair's Streamlined Non-Paper on Elements of a Draft Text of an International Legally-Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction' Fourth Session of the Prepcom (10 – 21 July 2017) para 127. On responsibilities, "Mexico proposed a reference to port states' responsibility to implement measures adopted for a particular area" IISD, 'Prepcom 4 Highlights: Wednesday, 12 July 2017' (2017) 25 Earth Negotiations Bulletin 1, 1.

⁸⁷ See, UNSC, 'Resolution 2375' (2017) S/RES/2375 para 8 flag state or vessel non-cooperation with maritime interdiction of cargo vessels and inspections may result in listing by the Committee and the denial of entry to port by all member states ("unless in case of emergency, in case of return to the vessel's port of origination, or in case of direction by the Committee"); as per, UNSC, 'Resolution 2321' (2016) S/RES/2321. Similarly, see violating vessels prohibited from entering any member state port, UNSC, 'Resolution 2371' (2017) S/RES/2371 para 6; cross-referenced, UNSC, 'Resolution 2375' para 6 [sic 2371 (2016)].

⁸⁸ "The Regulation acknowledges that by their extra-territorial application, such instruments violate international law" Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom 2018 (OJ L 1991 , 7/8/2018, p 1–6) preamble[2], Annex[2-3].

⁸⁹ E.g. in a code of conduct for non-state actors and their supply chain governance, recommendations on labour issues are linked to IUU fishing due to the close correlation between the two and the 'related reputational threats', British Standards Institution, 'Exercising Due Diligence in Establishing the Legal Origin of Seafood Products and Marine Ingredients – Importing and Processing – Code of Practice' (BSI Standards Limited 2017) PAS 1550:2017 v.

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and labour violations, including forced labour via *PSMA* implementation.⁹⁰ PSMs may follow, moving beyond IUU fishing as a conservation and management issue to one including human security, human rights and transboundary crime. Within the EU-Thailand dialogue, “apart from the fishing issues, the Commission also believes that Thailand should also address promptly the human rights issues”.⁹¹

Furthermore, how will port state fisheries practice be integrated into a coherent and efficient system? To the greatest extent possible, *PSMA* parties should integrate and coordinate PSMs within broader PSC.⁹² Factors considered for targeting flag state fisheries governance differ from those in PSC, where a flag state’s detention rate is based upon ship safety or labour standards.⁹³ Fishing vessels are also often excluded from PSC MoUs, and the conventions MoUs seek to uphold.⁹⁴ Standards applicable and control officers’ expertise required will therefore differ.

Even within fisheries, subregional and regional differences have complicated the adoption of PSMs, most notably in the WCPFC. Subregional FFA members and the EU repeatedly tabled PSM proposals,⁹⁵ rejected by some for departure from the *PSMA*,⁹⁶ by others as imposing an “unnecessary and disproportionate burden of conservation on developing State ports”.⁹⁷

The broader issue is who pays for implementation. *PSMA* recognizes the assistance needs of developing countries for adoption and implementation,⁹⁸ with the Part 6 Working Group now

⁹⁰ *PSMA*, a key instrument of GAPfish project on forced labour, ILO, ‘GAPfish - A Global Action Programme against Forced Labour and Trafficking of Fishers at Sea’ (2015) 5 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_429359.pdf>.

⁹¹ Raf Casert, ‘EU Demands Thailand Address Slavery in Its Seafood Industry’ *AP News* (18 December 2015) <<https://apnews.com/98bff6da2e6d4906bfbf41fd8f2140ca/eu-demands-thailand-address-slavery-its-seafood-industry>>.

⁹² *PSMA* (n 9) art. 5(a).

⁹³ Takei (n 77) 306.

⁹⁴ (3.2.2.2.1).

⁹⁵ FFA, ‘Transcript- Wez Norris Press Conference’ (FFA 2015) WCPFC 12 Closing, 8th Dec 2015 2 proposing unilateralism given lack of WCPFC progress.

⁹⁶ Palau, Tonga, and Vanuatu, Elizabeth Havice, Mike McCoy and Liam Campling, ‘Port State Measures Agreement Enters into Force’ (2016) 9 FFA Trade and Industry News 5, 6.

⁹⁷ FFA, ‘FFA Fires off Grim Warning on Impacts of Inaction at WCPFC 11’ (FFA, 5 December 2014) <<https://www.ffa.int/node/1421>>.

⁹⁸ *PSMA* (n 9) art. 21.

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established.⁹⁹ The (proposed) Assistance Fund would only assist developing state parties,¹⁰⁰ but non-parties may seek differing FAO sources.¹⁰¹ Yet, if the capacity development ‘carrot’ and unilateral measures ‘stick’ are to be coherent, they should be mutually supportive. The FAO noted:

“Multiple requests from States for assistance were received by FAO over the past two years, including those affected by trade sanctions imposed by importing States or regional economic integration organizations due to non-compliance with set requirements”¹⁰²

Global actors like the EU might therefore wish to reconsider how effective PSMs are for stimulating mindset change, when the result is EU funding of responses to ‘last resort’ EU sanctions. Complementary funding may strengthen the legitimacy and effectiveness of PSMs, but equally it may be apparent that neither PSMs nor funding are always effective in stimulating mindset change.

7.5.4. Future research areas

Beyond analysis of future developments, literature may build on the findings of this study to query whether port states practice what they preach. Unilateral and RFMO/A PSMs are prescribed, with reported enforcement.¹⁰³ However, do states more generally enforce the laws they are prescribing? It may be the case that significant port state practice discussed above was prescribed in national laws to avoid the threatened denial of access to the EU’s ports and market. If, as practice suggests, prescription of PSMs will result in the lifting of any

⁹⁹ FAO, ‘First Meeting PSMA Parties 2017’ (n 82) para 32; Terms of Reference: Ad Hoc Working Group under Part 6 of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2017 para 2.

¹⁰⁰ FAO, ‘Report of the First Meeting of the Ad Hoc Working Group Established by the Parties to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Oslo, Norway, 1–2 June 2017)’ (FAO 2017) FAO Fisheries and Aquaculture Report 1212 Appendix 3, Draft Terms of Reference Funding Mechanisms under Part 6 of the FAO Agreement on Port State Measures to prevent, deter and eliminate illegal, unreported and unregulated fishing, paras. 4-5.

¹⁰¹ *ibid* 16–17 FAO global capacity development programme.

¹⁰² FAO, ‘Combatting Illegal, Unreported and Unregulated (IUU) Fishing’ (COFI/2016/5 Rev1 2016) Committee On Fisheries (Thirty-Second Session, Rome, 11-15 July 2016) para 4.

¹⁰³ Ministry of Foreign Affairs, Kingdom of Thailand, ‘Press Release: Thailand Prosecuted 7 Stateless Fishing Vessels’ (MFA, 15 February 2018) <<http://www.mfa.go.th/main/en/news3/6886/86734-Thailand-prosecuted-7-Stateless-Fishing-Vessels.html>>.

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EU yellow or red card under the *IUU regulation*, there may be little incentive to adequately enforce the newly prescribed PSMs.

Treaty-based responsibilities may be more visible, but difficulties include analysis of vast amounts of undisclosed data. Even where this data is available, states may be reluctant to keep records of cases where the obligations under the *PSMA* have not been fulfilled. For example, even evidence of implementation requested in the context of PSJ obligations concerning the non-proliferation of nuclear weapons was not forthcoming.¹⁰⁴

Research of practice excluded from this PhD manuscript may nonetheless confirm or refute the conclusions presented. Advisory RFBs were not analysed, yet their non-binding status leaves space for more progressive policies. PSMs within international trade agreements, such as *TPP*, could equally provide further insight into rights and responsibilities.¹⁰⁵

Alternatively, environmental law and ‘introduction from the sea’ within *CITES* could overlap with PSMs concerning imports. When defining “the marine environment not under the jurisdiction of any State”, the *CITES* CoP referenced *PSMA*. It also discussed the necessity of considering whether a specimen was “acquired and landed” through *IUU* fishing conduct before authorising import.¹⁰⁶ Beyond LoS and international trade law discussed elsewhere, PSJ offers a bounty of international law fragmentations through which to engage.

¹⁰⁴ 1718 Sanctions Committee (DPRK), ‘Final Report of the Panel of Experts Established Pursuant to Resolution 1874 (2009)’ (2014) S/2014/147 para 17.

¹⁰⁵ Trans-Pacific Partnership Agreement, 26 January 2016 (not in force) arts. 20.16(13), 20.16(14[c]); Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 21 February 2018 (not in force) arts. 20.16(13), 20.16(14[c]).

¹⁰⁶ *CITES*, Resolution Conf. 14.6 (Rev. CoP16) Introduction from the sea 2007 preamble, art. 3(i).

Samenvatting

Extraterritoriale havenstaatmaatregelen: de basis en grenzen van de unilaterale havenstaatjurisdictie ter bestrijding van extraterritoriale illegale, ongemelde en ongereguleerde visserij

Duurzame visserij is alleen mogelijk als de illegale, ongemelde en ongereguleerde visserij (IOO-visserij) wordt uitgebannen. In het eerste wettelijk bindende mondiale verdrag ter bestrijding van IOO-visserij, de Overeenkomst inzake Havenstaatmaatregelen (PSMA), staat de toepassing van havenstaatmaatregelen centraal. Naast artikel 218 van het Verdrag van de Verenigde Naties inzake het recht van de zee (UNCLOS) is havenstaatjurisdictie (HSJ) de meest gehanteerde vorm van jurisdictie met betrekking tot buitenlandse vaartuigen in of op weg naar een haven. De vraag die in dit proefschrift wordt gesteld is:

Waarin hebben internationale rechtsgrondslagen en het recht van de zee een beperkende werking voor havenstaatmaatregelen, gezien de invloed van de havenstatenpraktijk aangaande IOO-visserij door buitenlandse vaartuigen buiten de maritieme zones van de kuststaat waar de haven gelegen is?

Door middel van een doctrinaire synthese, analyse en herformulering van HSJ worden juridische onduidelijkheden weggenomen die de ontwikkeling van het internationaal recht mogelijk belemmeren. Juridisch positivisme vormt de theoretische basis van de in dit proefschrift toegepaste methodes.

Het recht van de zee behelst een *lex specialis* voor jurisdictie met betrekking tot het beheer van de oceanen, maar verwijst voornamelijk naar het internationaal publiekrecht (*lex generalis*) waar het havenstaten betreft. Daarom wordt in Hoofdstuk 2 de door staten onder internationaal recht uitgeoefende jurisdictie beschreven, met de doelstellingen van het huidige model voor de toekenning van jurisdictie. De gronden voor prescriptieve jurisdictie en handavings jurisdictie worden vastgesteld aan de hand van voorbeelden uit de HSJ. Bij het beschrijven van overtredingen tegen havenstaten en het opleggen van strengere maatregelen moeten staten voldoen aan de vereisten van de staat jurisdictie. Een bekende afwijking hiervan is het voorschrijven van voorwaarden voor haventoeegang en gebruik van

diensten, en het handhaven hiervan door middel van het weigeren van havenprivileges. Havenstaten kunnen gedragingen beschrijven die geheel in extraterritoriaal gebied plaatsvinden, en kunnen vaartuigen de haventoeegang weigeren, het gebruik van diensten weigeren, of vaartuigen uitzetten die verdacht worden van het schenden van welke voorwaarden dan ook, naar het oordeel van de havenstaat. Wat handhavings jurisdictie betreft, kunnen voorgeschreven voorwaarden voor havenprivileges enkel worden gehandhaafd door weigering van haventoeegang en diensten. Beschreven overtredingen van havenregels zijn onderworpen aan de klassieke discretie die strengere maatregelen behelst. Een onderscheid op basis van *domaine réservé* kan een coherente rechtsorde hervestigen met betrekking tot jurisdictie voor de toegang van buitenlandse vaartuigen tot havenstaatprivileges. Extraterritoriale HSJ binnen de internationale wetgeving voor jurisdictie wordt dan ook resystematised. HSJ kan worden uitgeoefend door het weigeren en aan voorwaarden binden van havenprivileges (jurisdictie op basis van *domaine réservé*) of door het beschrijven van overtredingen tegen havenstaten (staat jurisdictie).

In Hoofdstuk 3 wordt HSJ bekeken in de context van mondiale instrumenten. De invloed van het recht van de zee op jurisdictie betreft ten eerste de aard van HSJ, en meer specifiek de aard van havenstaatmaatregelen voor het bestrijden van IOO-visserij. Dit hoofdstuk laat zien dat een transformatieve verschuiving heeft plaatsgevonden binnen de HSJ aangaande de aanpak van extraterritoriale IOO-visserij. Een geleidelijke overgang naar bindende normen voor prescriptie en handhaving tekent zich af, uitmondend in de PSMA. Bepalingen binnen mondiale instrumenten erkennen HSJ als een discretionair recht dat kan worden uitgeoefend in het nationaal belang. Havenstaten kunnen ook een faciliterende rol spelen door ondersteuning te bieden aan dan wel druk uit te oefenen op andere jurisdicties. Bepalingen in mondiale instrumenten kunnen gecoördineerde handhaving door havenstaten erkennen als effectief middel in het beheer van oceanen. Ook kunnen zij, zoals in het geval van visserij, aan havenstaten een algemene verantwoordelijkheid opleggen met steeds specifiekere wordende, op verdragen gebaseerde verplichtingen voor verdragsluitende die partijen. In dit verband zouden havenstaten allereerst binnen hun binnenlandse rechtsorde een procedure moeten voorschrijven en uitvoeren waarmee zij de haventoeegang en het gebruik van een haven kunnen weigeren aan buitenlandse vaartuigen die worden verdacht van IOO-visserij en aanverwante activiteiten. Hiermee mandateren mondiale instrumenten bindende

havenstaatmaatregelen in het mondiaal belang. Om nadere overtredingen tegen havenstaten te beschrijven en te handhaven wordt discretie. Een faciliterende rol voor andere jurisdicties bestaat in het bieden van ondersteuning aan of het uitoefenen van druk op havenstaten.

Los van naast de ontwikkeling van havenstaatverplichtingen dient de vraag zich aan hoe de groeiende havenstatenpraktijk zich verhoudt tot en zich laat integreren in het wettelijk regime van UNCLOS. In Hoofdstuk 4 wordt de toepasbaarheid van het recht van de zee getoetst als regime dat een beperkende werking heeft op de eerder vastgestelde voorlopige (prima facie) jurisdictionele rechten en plichten. Een analyse van beperkingen voor handhavings jurisdictie behandelt een potentieel recht van haventoeegang, vrijwillige toegangseisen en een uitzondering voor toegang in geval van force majeure. Andere beperkingen voor de handhaving die in deze analyse aan bod komen, zijn beperkingen ten aanzien van binnenlandse kwesties, soevereine immuniteit, en strengere handhavingsmaatregelen. Praktische vereisten van HSJ zijn onder andere voldoende publiciteit, onmiddellijke kennisgeving aan de vlaggenstaat, en de onmiddellijke vrijlating van buitenlandse vaartuigen. Als het gaat om prescriptieve jurisdictie wordt de regelgeving inzake visserij op volle zee of in buitenlandse maritieme zones niet displaced door de territoriale aard van de handhaving. Beperkingen op de prescriptie in deze analyse raken onder andere de vrijheid van de volle zee, de ongeldigheid van aanspraken op soevereiniteit over de volle zee, exclusieve vlaggenstaatjurisdictie, en gevallen van botsingen of andere navigatie-incidenten. Thematische en overkoepelende bepalingen van algemene toepassing brengen beperkingen mee aangaande: handhaving waardoor navigatie in gevaar wordt gebracht; de veiligheid van het maritieme milieu; non-discriminatie van buitenlandse vaartuigen; en het verbod op misbruik van recht. Daarnaast vormt verplichte geschillenbeslechting voor derde partijen een kans voor uitdagen havenstatenpraktijk.

Hoofdstuk 5 inventariseert de instandhoudings- en beheersmaatregelen van regionale organisaties of regelingen voor visserijbeheer (ROVB's) en de Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). Havenstaatmaatregelen die van toepassing zijn op vaartuigen die de vlag voeren van niet-medewerkende niet-verdragsluitende partijen zijn de belangrijkste in het onderzoeken van de wettelijke grondslagen van en beperkingen voor HSJ. Regionale havenstaatmaatregelen kunnen worden

afgebakend aan de hand van de doelstellingen van de jurisdictie, te weten: een havenstaatverplichting; het verdragsgebied en/of de verdragsvissoorten; gedefinieerde vaartuigen; de visserijvangst en/of producten daarvan; en overtredingen tegen havenstaten die onderworpen zijn aan strengere handhavingsmaatregelen. Wat jurisdictionele verplichtingen betreft, zijn havenstaatmaatregelen in de ROVB-praktijk ontwikkeld op basis van de erkenning van een algemene havenstaatplicht om de doeltreffendheid van sub-regionale, regionale en mondiale instandhoudings- en beheersmaatregelen te bevorderen. Daarnaast is het "noodzakelijk dat niet-verdragsluitende partijen [...] de instandhoudings- en beheersmaatregelen toepassen die zijn aangenomen." Wanneer instandhoudings- en beheersmaatregelen havenstaatverplichtingen met zich meebrengen om minimumnormen op te leggen aan een vorm van visserij, dan zouden die minimumnormen ook moeten gelden voor niet-medewerkende niet-verdragsluitende partijen die worden bezocht door vaartuigen die activiteiten richten op het verdragsgebied en/of de verdragsvissoorten. Zo niet, dan is er sprake van het ondermijnen van regionale instandhoudings- en beheersmaatregelen. Ten aanzien van jurisdictionele rechten oefenen havenstaten sinds de jaren '30 van de vorige eeuw in de praktijk jurisdictie uit gebaseerd op het *domaine réservé*. Ze gebruiken dit voor het weigeren van privileges aan vaartuigen die een ROVB of diens instandhoudings- en beheersmaatregelen ondermijnen. Verschillende havenstaatmaatregelen en scenario's voor toepassing zijn de revue gepasseerd. Het extraterritoriale toepassingsbereik van deze maatregelen wordt echt duidelijk wanneer haventoeegang en het gebruik van een haven worden geweigerd in diverse gedefinieerde scenario's, waarin kan worden aangenomen maar niet hoeft te worden bewezen dat IOO-visserij heeft plaatsgevonden. Maar ook de betrokkenheid van een bepaalde vlaggenstaat kan aanleiding zijn voor de toepassing van havenstaatmaatregelen, of de geschiedenis van de vis of andere visserijproducten aan boord van het vaartuig. Daartegenover wordt in de regionale praktijk vrijwel niet opgetreden tegen overtredingen tegen havenstaten; dit wordt waar mogelijk overgelaten aan unilateraal optreden door verdragsluitende en medewerkende niet-verdragsluitende partijen. Niettemin moeten het behoud van gezag en de ruimte om dit te doen niet worden onderschat. Dit bevestigt bovendien dat er ook buiten het weigeren van havenprivileges staat jurisdictie bestaat, en dat deze in de toekomst kan worden gebruikt, of op nationaal niveau.

Hoofdstuk 6 behandelt de nationale praktijk en begint met de Verenigde Staten van Amerika en de Europese Unie. Als zelfbenoemde wereldleiders in de strijd tegen IOO-visserij zou het voor de hand liggen dat zij vooroplopen in het zover mogelijk verbreden van de jurisdictie. Beide identificeren unilateraal staten die hun jurisdictionele verantwoordelijkheden niet nakomen, maar alleen de EU identificeert niet-medewerkende havenstaten. Hun wetgevingsinitiatieven binnen HSJ zullen leiden tot geavanceerde praktijk, mogelijk gelijk aan of verder reikend dan het leiderschap van de EU. Tot slot wordt, omwille van de balans, de praktijk buiten het EU-identificatiekader geanalyseerd. Havenstaten voelen de druk om hun verantwoordelijkheid te nemen en IOO-visserij aan te pakken, of die druk nu afkomstig is uit binnenland, buitenland of internationale kringen. Als reactie hierop maximaliseren zij hun rechten om havenprivileges te weigeren. Ze handhaven deze rechten door de toepassing van maatregelen tegen territoriale overtredingen. Extraterritoriale visserij kan rechtstreeks worden ontmoedigd door het voorschrijven van voorwaarden voor haventoeegang en het weigeren van havenprivileges. Als het weigeren van privileges niet tot het gewenste resultaat leidt, kan de gedraging indirect worden bestraft. Dit krijgt vorm door het beschrijven overtredingen binnen havens die de extraterritoriale gedraging 'in aanmerking nemen' maar die een territoriaal gedragselement als uitgangspunt hebben. Het extraterritoriale gedrag van vaartuigen is exclusief opgenomen in de voorwaarden voor haventoeegang of gebruik van havens door vaartuigen. alsook in de voorwaarden voor het binnenbrengen van de vangst in de haven en het gebruik van havendiensten voor de vangst. Met dit laatste wordt expliciet rekening gehouden met mogelijke hulp van transportvaartuigen. De regels van staat jurisdictie in het internationale recht zijn slecht toegerust, en misschien ook niet ontworpen, om te 'dealen' met de reikwijdte van extraterritorialiteit die inherent is aan het beschrijven van en de uiteindelijke beslissing over voorwaarden voor het toekennen van havenprivileges. Nationale wetgeving ten aanzien van overtredingen heeft tot dusverre steeds de blik gericht op de interactie van 'besmette' vaartuigen binnen de haven, of het aan land brengen en de binnenkomst van 'besmette' IOO-visvangst. Hetzelfde kan worden gezegd over extraterritoriaal gedrag dat resulteert in onvolledigheid of onnauwkeurigheid van de documentatie van vaartuigen.

Hoofdstuk 7 sluit het proefschrift af met een bespiegeling over de voornaamste bevindingen van het onderzoek. Het levert een aanscherping op van het toepasselijke internationale

juridische kader in het licht van de havenstaatpraktijk. Het ontbreken van actorial of thematische beperkingen betekent dat deze vormen van regelgeving kunnen worden ingezet in andere jurisdictie capaciteiten dan havenstaten, en kan worden ingezet om verschillende vormen van extraterritoriaal gedrag aan te pakken. Zodoende zet dit hoofdstuk de bevindingen in de context van breder onderzoek naar het unilaterale nastreven van mondiale belangen en de gedachten van de auteur over de toekomst van havenstaatjurisdictie. HSJ biedt een heel scala aan 'fragmenten' van internationaal recht, waarmee andere auteurs aan de slag kunnen gaan en kunnen voortbouwen op dit onderzoek.

Dit proefschrift is een doctrinair positivistisch werkstuk over jurisdictie binnen het internationaal publiekrecht. Hierin zijn havenstaatmaatregelen op mondiaal, regionaal en nationaal niveau verzameld en geanalyseerd, vanuit de invalshoeken van staat jurisdictie en het regime van het recht van de zee. Door onderzoek van havenstaatmaatregelen aangaande (deels) extraterritoriaal gedrag van buitenlandse vaartuigen laat dit proefschrift zien dat opkomende trends van 'territoriale uitstrekking' binnen de internationale regelgeving voor jurisdictie ook toepasbaar is op overtredingen tegen havenregels. Het territoriale element van gedrag binnen een haven wordt beschreven als overtreding die het uitgangspunt vormt voor de toepassing van jurisdictie. Echter gedefinieerd extraterritoriaal gedrag blijft een essentieel onderliggend element, dat aanleiding kan zijn voor het toepassen van havenstaatmaatregelen vanwege een territoriale overtreding. Van de andere kant moet het voorschrijven en handhaven van voorwaarden voor havenprivileges afzonderlijk worden beschouwd als een *domaine réservé*-uitzondering op de staat jurisdictie, met het oog op het bewaren van de integriteit van de territorialiteit als ordering nexus. Beide moeten worden uitgeoefend in overeenstemming met de vrij specifieke, en daardoor smalle, beperkingen en waarborgen van het recht van de zee. Het proefschrift draagt een voorbeeld van de zee aan voor het debat over de aard van de positieve regelgeving ten aanzien van territoriale jurisdictie. Hiermee zal het niet alleen interessant zijn voor academici, onderzoekers en andere deskundigen op het gebied van havenstaatjurisdictie, regulering van de visserij en het recht van de zee, maar meer in het algemeen voor iedereen die zich bezighoudt met het recht van de jurisdictie.

BIBLIOGRAPHY

BOOKS

- Abass A, *Complete International Law: Text, Cases, and Materials* (2nd edn, OUP 2014).
- Bassiouni MC, *International Extradition: United States Law & Practice* (OUP 2007).
- Bassiouni MC, *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms, Volume 2* (Brill 2008).
- Bennett T and Strug J, *Introduction to International Law* (Juta 2013).
- Borg S, *Conservation on the High Seas: Harmonizing International Regimes for the Sustainable Use of Living Resources* (Edward Elgar Publishing 2012).
- Brugmann G, *Access to Maritime Ports* (Books on Demand 2003).
- Calley DS, *Market Denial and International Fisheries Regulation: The Targeted and Effective Use of Trade Measures Against the Flag of Convenience Fishing Industry* (Martinus Nijhoff Publishers 2011).
- Churchill RR and Lowe AV, *The Law of the Sea* (Manchester University Press 1988).
- Cogliati-Bantz VP, *Means of Transportation and Registration of Nationality: Transportation Registered by International Organizations* (Routledge 2015).
- Cryer R, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005).
- Dixon M, *Textbook on International Law* (7th edn, OUP 2013).
- Dugard J, *International Law: A South African Perspective* (4th edn, Juta 2011).
- Evans M, *International Law* (OUP 2010).
- Fayle CE, *A Short History of the World's Shipping Industry* (First published in 1993, Routledge 2006).

Gallagher AT and David F, *The International Law of Migrant Smuggling* (CUP 2014).

Gardiner RK, *International Law* (Pearson Education 2003).

Gavouneli M, *Functional Jurisdiction in the Law of the Sea* (Brill 2007).

Geiss R and Petrig A, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011).

Giacca G, *Economic, Social, and Cultural Rights in Armed Conflict* (OUP 2014).

Guilfoyle D, *Shipping Interdiction and the Law of the Sea* (CUP 2009).

Harrison J, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011).

Higgins R, *Problems and Process: International Law and How We Use It* (OUP 1994).

Hirst M, *Jurisdiction and the Ambit of the Criminal Law* (OUP 2003).

Inazumi M, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (Intersentia 2005).

ITLOS, *Digest of Jurisprudence: 1996-2016* (COMPACT MEDIA GmbH 2016).

Kasoulides GC, *Port State Control and Jurisdiction: Evolution of the Port State Regime* (Martinus Nijhoff Publishers 1993).

Kolb R, *The International Court of Justice* (Bloomsbury Publishing 2013).

Klein N, *Maritime Security and the Law of the Sea* (OUP 2011).

Mansell JNK, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer 2009).

Manusama K, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Martinus Nijhoff Publishers 2006).

BIBLIOGRAPHY

Marten B, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer 2014).

Meessen K, *Extraterritorial Jurisdiction in Theory and Practice: [Contains the Edited of a Symposium Held in Dresden Between 8 and 10 October 1993]* (Martinus Nijhoff Publishers 1996).

Merkouris P, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015).

Molenaar EJ, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International 1998).

Mossop J, *The Continental Shelf Beyond 200 Nautical Miles: Rights and Responsibilities* (OUP 2016).

Nordquist M, Nandan S and Rosenne S, *UN Convention on the Law of the Sea Commentary 1982 Online* (Brill 2013).

O'Keefe R, *International Criminal Law* (OUP 2015).

Orford A, *International Authority and the Responsibility to Protect* (CUP 2011).

Orrego Vicuña F, *The Changing International Law of High Seas Fisheries* (CUP 1999).

Palma MAE, Tsamenyi M and Edeson WR, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill 2010).

Papastavridis E, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart 2014).

Parameswaran B, *The Liberalization of Maritime Transport Services: With Special Reference to the WTO/GATS Framework* (Springer 2004).

Poulantzas NM, *The Right of Hot Pursuit in International Law* (Martinus Nijhoff Publishers 2002).

Pozdnakova A, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution* (Brill 2012).

Rayfuse RG, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff Publishers 2004).

Ringbom H, *The EU Maritime Safety Policy and International Law* (Brill 2008).

Roach JA and Smith RW, *Excessive Maritime Claims* (3rd edn, Martinus Nijhoff Publishers 2012).

Rosenne S, *The World Court: What It Is and How It Works* (Terry D Gill ed, 6th edn, Brill 2003).

Ryngaert C, *Jurisdiction in International Law* (2nd edn, OUP 2015).

Ryngaert C, *Unilateral Jurisdiction and Global Values* (Eleven International Publishing 2015).

Shaw M, *International Law* (7th edn, CUP 2014).

Small C, *Regional Fisheries Management Organisations: Their Duties and Performance in Reducing Bycatch of Albatrosses and Other Species* (BirdLife International 2005).

Tan AK-J, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (CUP 2005).

Tanaka Y, *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea* (Ashgate 2008).

Tanaka Y, *The International Law of the Sea* (2nd edn, CUP 2015).

United Nations Legislative Series, *Materials on the Responsibility of States for Internationally Wrongful Acts* (ST/LEG/SER B/25, United Nations 2012)
<http://legal.un.org/legislativeseries/documents/Book25/Book25.pdf>.

BIBLIOGRAPHY

Voetelink J, *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (Springer 2015).

Vrancken PHG, *South Africa and the Law of the Sea* (Martinus Nijhoff Publishers 2011).

Walker GK, *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention* (Brill 2011).

Yang H, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer 2006).

BOOK CONTRIBUTIONS, JOURNAL ARTICLES AND RESEARCH PAPERS

Abdulla AA, 'Flag, Coastal and Port State Jurisdiction over the Prevention of Vessel Source Pollution in International Law: Analysis of Implementation by the Maldives' (University of Wollongong 2011).

Akehurst M, 'Jurisdiction in International Law' (1972) 46 *British Year Book of International Law* 145.

Allott P, 'Power Sharing in the Law of the Sea' (1983) 77 *American Journal of International Law* 1.

Anderson D, 'Port State Powers in the Modern Law of the Sea', *Modern Law of the Sea: Selected Essays* (Martinus Nijhoff Publishers 2008) 267-286.

Anderson D, 'The Roles of Flag States, Port States, Coastal States and International Organisations in the Enforcement of International Rules and Standards Governing the Safety of Navigation and the Prevention of Pollution from Ships under the UN Convention on the Law' (1998) 2 *Singapore Journal of International & Comparative Law* 557.

Anderson RS and Carraway MD, 'Current Issues Arising in Lacey Act Prosecutions' (2015) 63 *United States Attorneys' Bulletin* 3.

Ásmundsson S, 'Freedom of Fishing on the High Seas, and the Relevance of Regional Fisheries Management Organisations (RFMOs)' (2015) 37 *NPAFC Newsletter* 2.

Attard D and Mallia P, 'The High Seas' in Malgosia Fitzmaurice and Norman A Martinez Gutierrez (eds), *The IMLI Manual on International Maritime Law: The Law of the Sea*, vol 1 (OUP 2014) 239-275.

Baere GD and Ryngaert C, 'The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy' (2013) 18 *European Foreign Affairs Review* 389.

Bang H-S, 'Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea' (2009) 40 *Journal of Maritime Law & Commerce* 291.

Bantekas I, 'Criminal Jurisdiction of States under International Law', *Max Planck Encyclopedia of Public International Law* (OUP 2011).

Barnes R, 'Article 25' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 222-226.

Barnes R, 'Article 27' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 229-237.

Barnes R, 'Flag States' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 304-324.

Barston R, 'United Nations Conference on Straddling and Highly Migratory Fish Stocks' (1995) 19 *Marine Policy* 159.

Bassiouni MC, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81.

Bassiouni MC, 'The History of Universal Jurisdiction and Its Place in International Law' in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2006) 39-63.

Beale JH, 'The Jurisdiction of a Sovereign State' (1923) 36 *Harvard Law Review* 241.

BIBLIOGRAPHY

Becker MA, 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' (2005) 46 *Harvard International Law Journal* 131.

Becker-Weinberg V, 'Article 225' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 1534-1537.

Becker-Weinberg V, 'Article 230' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 1547-1557.

Beckman RC, 'PSSAs and Transit Passage—Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS' (2007) 38 *Ocean Development & International Law* 325.

Bederman DJ, 'Counterintuiting Countermeasures' (2002) 96 *American Journal of International Law* 817.

Bell D, 'Port State Control v Flag State Control: UK Government Position' (1993) 17 *Marine Policy* 367.

Bennett A, 'That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act' (2012) 37 *The Yale Journal of International Law* 433.

Benvenisti E, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of Comparative Law* 295.

Bergin A and Aqorau T, 'The Federated States of Micronesia Arrangement for Regional Fisheries Access' (1997) 12 *The International Journal of Marine and Coastal Law* 37.

Bialostozky N, 'Extraterritoriality and National Security: Protective Jurisdiction as a Circumstance Precluding Wrongfulness' (2014) 52 *Columbia Journal of Transnational Law* 617.

Blaha F, 'Impacts of the European Commission Yellow Cards in the Pacific' (2015) 148 *SPC Fisheries Newsletter* 34.

Blakesley CL, 'United States Jurisdiction over Extraterritorial Crime' (1982) 73 *Journal of Criminal Law and Criminology* 1109.

Bodansky D, 'Protecting the Marine Environment from Vessel Source Pollution: UNCLOS III and Beyond' (1991) 18 Ecology Law Quarterly 719.

Boisson P, 'The History of Safety at Sea', *Safety at Sea. Policies, Regulations and International Law* (Reproduced, Edition Bureau Veritas 1999) reproduced <http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofSafetyatSea/Documents/P.%20Boisson%20History%20of%20safet%20at%20sea%20extract.htm>.

Boyle A, 'EU Unilateralism and the Law of the Sea' (2006) 21 The International Journal of Marine and Coastal Law 15.

Boyle A, 'Further Development of The Law of the Sea Convention: Mechanisms for Change' (2005) 54 International and Comparative Law Quarterly 563.

Brown BS, 'The Evolving Concept of Universal Jurisdiction' (2001) 35 New England Law Review 383.

Brown E, 'The M/V "Saiga" Case on Prompt Release of Detained Vessels: The First Judgment of the International Tribunal for the Law of the Sea' (1998) 22 Marine Policy 307.

Calster G van, 'Regulating the Internet: Prescriptive and Jurisdictional Boundaries to the EU's "Right to Be Forgotten"' (2015) SSRN Electronic Journal <http://papers.ssrn.com/abstract=2686111>.

Cameron I, 'International Criminal Jurisdiction: Protective Principle', *Max Planck Encyclopedia of Public International Law* (OUP 2007).

Caminos H, 'Contiguous Zone', *Max Planck Encyclopedia of Public International Law* (OUP 2013).

Caminos H 'Hot Pursuit', *Max Planck Encyclopedia of Public International Law* (OUP 2013) .

Chee CI, 'Jurisdiction of Port State Over Private Foreign Vessel in International Law' (1994) 39 The Korean Journal of International Law 55.

BIBLIOGRAPHY

Chircop A, 'Assistance at Sea and Places of Refuge for Ships: Reconciling Competing Norms' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 140–163.

Chiu R-H, Yuan C-C and Chen K-K, 'The Implementation of Port State Control in Taiwan' (2008) 16 *Journal of Marine Science and Technology* 207.

Churchill R, 'Coastal Waters' in David Joseph Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law: The Law of the Sea*, vol 1 (OUP 2014) 1-26.

Churchill R, 'Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships—What Degree of Extra-Territoriality?' (2016) 31 *The International Journal of Marine and Coastal Law* 442.

Churchill R, 'The 1982 United Nations Convention on the Law of the Sea' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 24-45.

Chynoweth P, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (2008) 28–38.

Colangelo AJ, 'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law' (2007) 48 *Harvard International Law Journal* 121.

Colangelo AJ, 'Universal Jurisdiction as an International "False Conflict" of Laws' (2009) 30 *Michigan Journal of International Law* 881.

Cole A, Engelke-Ros M and Galatzan J, 'More Than "Just" Paperwork Violations: Combatting IUU Fishing Through Enforcement of Seafood Traceability Schemes' (2015) 63 *United States Attorneys' Bulletin* 27.

Daffada A, 'The Protection of Trading Interests Act of 1980— Britain's Latest Weapon in the Fight Against United States Antitrust Laws' (1980) 4 *Fordham International Law Journal* 341.

D'Andrea A, 'The "genuine Link" Concept in Responsible Fisheries: Legal Aspects and Recent Developments"' (2006) 61 *FAO Legal Papers Online*.

Davidson JS, 'Freedom of Navigation on the High Seas: Sellers v. Maritime Safety Inspector' (1999) 14 *International Journal of Marine and Coastal Law* 439.

Davies G, 'International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism' (2012) 13 *German Law Journal* 1203.

de Coning E and Witbooi E, 'Towards a New 'fisheries Crime' Paradigm: South Africa as an Illustrative Example' (2015) 60 *Marine Policy* 208.

de La Fayette L, 'Access to Ports in International Law' (1996) 11 *International Journal of Marine and Coastal Law* 1.

Devine D, 'Port State Jurisdiction: A Judicial Contribution from New Zealand' (2000) 24 *Marine Policy* 215.

Dobson Natalie L., 'The EU's Conditioning of the "Extraterritorial" Carbon Footprint: A Call for an Integrated Approach in Trade Law Discourse' (2017) 27 *Review of European, Comparative & International Environmental Law* 75.

Donovan DF and Roberts A, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *The American Journal of International Law* 142.

'Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 *The American Journal of International Law* 439.

'Draft Convention on Jurisdiction with Respect to Crime (Comment: Article 5)' (1935) 29 *The American Journal of International Law* 519.

'Draft Convention on Jurisdiction with Respect to Crime (Comment: Article 7)' (1935) 29 *The American Journal of International Law* 543.

Dunfee GE, 'Territorial Status of Deepwater Ports' (1977) 15 *San Diego Law Review* 603.

BIBLIOGRAPHY

EC, 'The EU and FAO Closing the Door to Illegal Fish' (2006) 71 *European Maritime Affairs and Fisheries*.

EC, 'EU Markets Driving Good Governance in Fisheries' (2015) April 2015 *European Maritime Affairs and Fisheries*.

EC, 'The EU Leveraging Global Change for the Good Governance of Fisheries' (2015) 67 *European Maritime Affairs and Fisheries* 6.

Erceg D, 'Deterring IUU Fishing through State Control over Nationals' (2006) 30 *Marine Policy* 173.

Ferri N, 'Current Legal Developments: General Fisheries Commission for the Mediterranean' (2009) 24 *The International Journal of Marine and Coastal Law* 163.

Firestone J and Corbett JJ, 'Maritime Transportation: A Third Way for Port and Environmental Security' (2003) 9 *Widener Law Symposium Journal* 403.

Fitzgerald BF, 'Port State Jurisdiction and Marine Pollution Under UNCLOS III' (1995) 11 *MLAANZ Journal* 29.

Flothmann S and others, 'Closing Loopholes: Getting Illegal Fishing under Control' (2010) 328 *Science* 1235.

Ford RT, 'Law's Territory (A History of Jurisdiction)' (1999) 97 *Michigan Law Review* 843.

Franckx E, 'The "New" Arctic Passages and the "Old" Law of the Sea' in Henrik Ringbom (ed), *Jurisdiction over ships: post-UNCLOS developments in the law of the sea* (Brill 2015) 194-216.

Geneuss J, 'Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction' (2009) 7 *Journal of International Criminal Justice* 945.

Glazewski J, 'United States v. Bengis: A Victory for Wildlife Law and Lessons for International Fisheries Crime' (2014) 29 *The International Journal of Marine and Coastal Law* 173.

Green L, 'Legal Positivism' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2003) <https://plato.stanford.edu/entries/legal-positivism/>.

Greenwald P, 'Pollution Control at the Maritime Frontier: The Limits of State Extraterritorial Power' (1979) 19 Santa Clara Law Review 747.

Guilfoyle D, 'Article 89' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 687-689.

Guilfoyle D, 'Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force' (2007) 56 International and Comparative Law Quarterly 69.

Guilfoyle D, 'The High Seas' in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 203–225.

Hagan SA, 'Too Big to Tackle: The Persistent Problem of Pirate Fishing and the New Focus on Port State Measures' (2014) 37 Suffolk Transnational Law Review 109.

Hale C, 'Domestic Fisheries Enforcement' (2015) 63 United States Attorneys' Bulletin 23.

Hanich Q and Tsamenyi M, 'Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States' (2012) 27 The International Journal of Marine and Coastal Law 783.

Hare J, 'Port State Control: Strong Medicine to Cure a Sick Industry' (1997) 26 The Georgia Journal of International and Comparative Law 571.

Harrison J, 'Article 73' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 556-563.

Hartmann J, 'A Battle for the Skies: Applying the European Emissions Trading System to International Aviation' (2013) 82 Nordic Journal of International Law 187.

Hayashi M, 'The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention' (1995) 29 Ocean & Coastal Management 51.

Hayashi M, 'The Information Revolution and the Rules of Jurisdiction in Public International Law' in Myriam Dunn, Sai Felicia Krishna-Hensel and Victor Mauer (eds), *The Resurgence of*

BIBLIOGRAPHY

the State: Trends and Processes in Cyberspace Governance (Ashgate Publishing Ltd 2007) 59–83.

Hayashi M, 'The Straddling and Highly Migratory Fish Stocks Agreement' in Ellen Hey (ed), *Developments in International Fisheries Law* (Kluwer Law International 1999) 55-83.

He J, 'Enhancing Chinese Law and Practice to Combat Illegal, Unreported and Unregulated Fishing and Trade' (2016) 19 *Asia Pacific Journal of Environmental Law* 4.

Henriksen T, 'Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations' (2009) 40 *Ocean Development & International Law* 80.

Hixson K, 'Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States' (1988) 12 *Fordham International Law Journal* 127.

Hoffmann AJ, 'Freedom of Navigation', *Max Planck Encyclopedia of Public International Law* (OUP 2011).

Honniball AN, 'Private Political Activists and the International Law Definition of Piracy: Acting for "Private Ends"' (2015) 36 *Adelaide Law Review* 279.

Honniball AN, 'The Exclusive Jurisdiction of Flag States: A Limitation on Pro-Active Port States?' (2016) 31 *The International Journal of Marine and Coastal Law* 499.

Honniball AN, 'The "Private Ends" of International Piracy: The Necessity of Legal Clarity in Relation to Violent Political Activists' (2015) 13 *ICD Briefs*.

Honniball AN, 'What's in a Duty? EU Identification of Non-Cooperating Port States and Their Prescriptive Responses' (*forthcoming*) *The International Journal of Marine and Coastal Law*.

Hoppe H, 'Port State Control - An Update on IMO's Work' (2000) 1 *IMO News* 9.

Hosanee NM, 'A Critical Analysis of Flag State Duties as Laid down under Article 94 of the 1982 United Nations Convention on the Law of the Sea' (United Nations-Nippon Foundation Fellowship Thesis, Milan 2008).

Hosch G, 'Trade Measures to Combat IUU Fishing: Comparative Analysis of Unilateral and Multilateral Approaches' (International Centre for Trade and Sustainable Development (ICTSD) 2016).

Hosch G, *Assessing the IPOA-IUU* (2015)
http://www.stopillegalfishing.com/doc/publication/eng/assessing_the_IPOA-IUU.pdf.

Hutchinson T, 'Doctrinal Research' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor & Francis 2013) 7-33.

Ibarra-Pardo G, 'The Challenge of Implementing Domestic Trade Policy Measures: The Colombia Ports of Entry Case' (ICTSD 2010) ICTSD Information Note 3.

'Introductory Comment: Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 The American Journal of International Law 443.

Jamnejad M and Wood M, 'The Principle of Non-Intervention' (2009) 22 Leiden Journal of International Law 345.

Jardón L, 'The Interpretation of Jurisdictional Clauses in Human Rights Treaties' (2013) 13 Anuario Mexicano de Derecho Internacional 99.

Jellett JH, 'Harbours and Sea Works' (*Encyclopedia Britannica*, 26 April 2017)
<https://www.britannica.com/technology/harbor>.

Jia BB, 'The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges' (2014) 57 German Yearbook of International Law 1.

Jianye T, 'The Agreement on Port State Measures: A Commentary' (2009) China Oceans Law Review 312.

Kanehara A, 'Challenging the Fundamental Principle of the Freedom of the High Seas and the Flag State Principle Expressed by Recent Non-Flag State Measures on the High Seas' (2008) 51 Japanese Yearbook of International Law 21.

BIBLIOGRAPHY

Kanehara A, 'What Does a New International Legally Binding Instrument on Marine Biological Diversity of Areas beyond National Jurisdiction "Under the UNCLOS" Mean?' (2016) 59 *Sophia Law Journal* 53.

Kao S-M, 'International Actions Against IUU Fishing and the Adoption of National Plans of Action' (2015) 46 *Ocean Development & International Law* 2.

Kasoulides GC, 'Global and Regional Port State Regimes' in Henrik Ringbom (ed), *Competing Norms in the Law of Marine Environmental Protection* (Kluwer Law International 1997) 121-140.

Kassan S, 'Extraterritorial Jurisdiction in the Ancient World' (1935) 29 *The American Journal of International Law* 237.

Kaye S, 'The Proliferation Security Initiative in the Maritime Domain' (2006) 81 *International Law Studies* 141.

Keselj T, 'Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding' (1999) 30 *Ocean Development & International Law* 127.

Kiss A, 'Abuse of Rights', *Max Planck Encyclopedia of Public International Law* (OUP 2006).

Klein N, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation' (2007) 35 *Denver Journal of International Law and Policy* 287.

Klotz JC, 'Are Ocean Polluters Subject to Universal Jurisdiction - Canada Breaks the Ice' (1972) 6 *International Lawyer* 706.

Kojima C, 'Fisheries, Sedentary', *Max Planck Encyclopedia of Public International Law* (OUP 2008).

König D, 'Article 218' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 1487-1496.

Kontorovich E, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 Harvard International Law Journal 183.

Kontorovich E and Art S, 'An Empirical Examination of Universal Jurisdiction for Piracy' (2010) 104 American Journal of International Law 436.

Kopela S, 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons' (2016) 47 Ocean Development & International Law 89.

Krisch N, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 The American Journal of International Law 1.

Kritsiotis D and Simpson AWB, 'The Pitcairn Prosecutions: An Assessment of Their Historical Context by Reference to the Provisions of Public International Law' in Dawn Oliver (ed), *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP 2009) 93-130.

Kuemplangan B and Press M, 'Preventing, Deterring and Eliminating IUU Fishing' (2010) 40 Environmental Policy & Law 262.

Legatski RA, 'Port State Jurisdiction Over Vessel-Source Marine Pollution' (1977) 2 Harvard Environmental Law Review 448.

Leroy A, Galletti F and Chaboud C, 'The EU Restrictive Trade Measures against IUU Fishing' (2016) 64 Marine Policy 82.

Lowe AV, 'Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980' (1981) 75 The American Journal of International Law 257.

Lowe AV, 'The Right of Entry into Maritime Ports in International Law' (1976) 14 San Diego Law Review 597.

Lowe AV and Staker C, 'Jurisdiction' in Malcolm Evans (ed), *International Law* (OUP 2010) 313-339.

BIBLIOGRAPHY

Mann FA, 'The Doctrine of Jurisdiction in International Law Revisited After Twenty Years' in Académie de Droit International (ed), *Recueil des Cours 1984-III* (Martinus Nijhoff Publishers 1985) 9–116.

Marston G, 'Crimes by British Passengers on Board Foreign Ships on the High Seas: The Historical Background to Section 686(1) of the Merchant Shipping Act 1894' (1999) 58 *The Cambridge Law Journal* 171.

Marten B, 'Port State Jurisdiction in New Zealand: The Problem with Sellers' (2013) 2 *Victoria University College Law Review* 559.

Marten B, 'Port State Jurisdiction over Vessel Information: Territoriality, Extra-Territoriality and the Future of Shipping Regulation' (2016) 31 *The International Journal of Marine and Coastal Law* 470.

Marten B, 'Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 105-139.

Matz-Lück N and Fuchs J, 'Marine Living Resources' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 491-515.

McConnell ML and Gold E, 'The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment?' (1991) 23 *Case Western Reserve Journal of International Law* 83.

McDorman TL, 'Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention' (1997) 28 *Journal of Maritime Law and Commerce* 305.

McDorman TL, 'Regional Port State Control Agreements: Some Issues of International Law' (2000) 5 *Ocean and Coastal Law Journal* 207.

McDorman TL, 'Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 82–102.

Miller S, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20 *European Journal of International Law* 1223.

Mills A, 'Rethinking Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187.

Molenaar EJ, 'Arctic Fisheries Management' in Erik J Molenaar, Alex Oude Elferink and Donald Rothwell (eds), *Law of the Sea and the Polar Regions: Interactions Between Global and Regional Regimes* (Brill 2013) 243-266.

Molenaar EJ, 'Commentary on the FAO Preliminary Working Draft of July 2007 for a FAO Agreement on Port State Measures' (Royal Ministry of Fisheries and Coastal Affairs of Norway 2007).

Molenaar EJ, 'International Regulation of Central Arctic Ocean Fisheries' in Myron Nordquist, John Norton Moore and Ronán Long (eds), *Challenges of the Changing Arctic* (Brill 2016) 429–463.

Molenaar EJ, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi' (2004) 19 *The International Journal of Marine and Coastal Law* 19.

Molenaar EJ, 'New Maritime Zones and the Law of the Sea' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill 2015) 249–277.

Molenaar EJ, 'Non-Participation in the Fish Stocks Agreement: Status and Reasons' (2010) 26 *The International Journal of Marine and Coastal Law* 195.

Molenaar EJ, 'Port and Coastal States' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 280-303.

Molenaar EJ, 'Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement' in Dawn Russell and David VanderZwaag (eds), *Recasting Transboundary Fisheries Management Arrangements* (Martinus Nijhoff Publishers 2010) 369–386.

BIBLIOGRAPHY

Molenaar EJ, 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage' (2007) 38 *Ocean Development & International Law* 225.

Molenaar EJ, 'Port State Jurisdiction', *Max Planck Encyclopedia of Public International Law* (OUP 2014).

Molenaar EJ, 'The Concept of "Real Interest" and Other Aspects of Co-Operation through Regional Fisheries Management Mechanisms' (2000) 15 *The International Journal of Marine and Coastal Law* 475.

Molenaar EJ, 'The EC Directive on Port State Control in Context' (1996) 11 *The International Journal of Marine and Coastal Law* 241.

Morgan AL, 'The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action' (1996) 27 *Ocean Development and International Law* 5.

Nelson D, 'Maritime Jurisdiction', *Max Planck Encyclopedia of Public International Law* (OUP 2010).

NOAA-NFMS, 'Advances in Port State Control Measures' in OECD (ed), *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD Publishing 2004) 291-308.

O'Brien K, 'Article 300' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 1937-1943.

Oliver D, 'The Pitcairn Prosecutions, Paper Legal Systems, and the Rule of Law', *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP 2009) 23-38.

Oliver JT, 'Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction over Foreign-Flag Vessels in U.S. Ports' (2009) 5 *South Carolina Journal of International Law and Business* 209.

Orellana MA, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71 *Nordic Journal of International Law* 55.

Orrego Vicuña F, 'Coastal States' Competences over High Seas Fisheries and the Changing Role of International Law' (1995) 55 ZaöRV 520.

Ormond T, 'Enforcing EU Environmental Law Outside Europe? The Case of Ship Dismantling' (2009) 1 Environmental Law Network International Review 13.

Ortiz P, 'An Overview of the U.S. Lacey Act Amendments of 1981 and a Proposal for a Model Port State Fisheries Enforcement Act', *Ministerially-Led Task Force on Illegal, Unreported and Unregulated Fishing on the High Seas* (2005).

Oxman B, 'The Territorial Temptation: A Siren Song at Sea' 100 *The American Journal of International Law* 830.

Oxman BH, 'Jurisdiction of States', *Max Planck Encyclopedia of Public International Law* (OUP 2007).

Palma MA, 'Analysis of the Adequacy of the Philippine Legal, Policy, and Institutional Framework to Combat Illegal, Unreported and Unregulated Fishing' (University of Wollongong 2006).

Papanicolopulu I, 'A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea' in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Brill 2014) 387–404.

Papanicolopulu I, 'Human Rights and the Law of the Sea' in David Joseph Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law: The Law of the Sea*, vol 1 (OUP 2014) 509-532.

Park Y, 'Port State Measures Oppose Illegal High-Seas Salmon Fishing' 32 NPAFC Newsletter 7.

Parrish AL, 'Evading Legislative Jurisdiction' (2012) 87 *Notre Dame Law Review* 1673.

Pattaro E, 'Legal Doctrine and Legal Theory', *A Treatise of Legal Philosophy and General Jurisprudence Volume 4: Scientia Juris*, vol 4 (Springer 2005) 1-30.

BIBLIOGRAPHY

Paul L, 'Using the Protective Principle to Unilaterally Enforce Transnational Marine Pollution Standards' in RS Shomura and ML Godfrey (eds), *Proceedings of the Second International Conference on Marine Debris, 2-7 April 1989, Honolulu, Hawaii* (NOAA 1990) 1045-1074.

Payandeh M, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) 21 *European Journal of International Law* 967.

Petrig A, 'Looking at the Montreux Document from a Maritime Perspective' (2016) 2 *Maritime Safety and Security Law Journal*.

Philpott D, 'Sovereignty' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2016, 2016) <https://plato.stanford.edu/archives/sum2016/entries/sovereignty/>.

Pitcher TJ and Cheung WWL, 'Fisheries: Hope or Despair?' (2013) 74 *Marine Pollution Bulletin* 506.

Plaza F, 'The Future for Flag State Implementation and Port State Control' in Myron H Nordquist and John Norton Moore (eds), *Current Maritime Issues and the International Maritime Organization* (Martinus Nijhoff Publishers 1999) 199-219.

Priddy A, 'The Use of Weapons in Counterpiracy Operations' in Stuart Casey-Maslen (ed), *Weapons Under International Human Rights Law* (CUP 2014) 163-196.

Proelss A, 'Rescue at Sea Revisited: What Obligations Exist towards Refugees?', *Scandinavian Institute of Maritime Law Yearbook* (2008) 1-39.

Rajadurai A, 'Regulation of Shipping: The Vital Role of Port State Control' (2004) 18 *Australian and New Zealand Maritime Law Journal* 83.

Rayfuse R, 'The Role of Port States' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2015) 71-85.

Rayfuse R, 'To Our Children's Children's Children: From Promoting to Achieving Compliance in High Seas Fisheries' (2005) 20 *The International Journal of Marine and Coastal Law* 509.

Razak AA, 'Understanding Legal Research' (2009) 4 *Integration & Dissemination* 19.

Recent Developments, 'Protective Principle of Jurisdiction Applied to Uphold Statute Intended to Have Extra-Territorial Effect' (1962) 62 Columbia Law Review 371.

Ringbom H, 'Global Problem - Regional Solution? International Law Reflections on an EU CO2 Emissions Trading Scheme for Ships' (2011) 26 International Journal of Marine and Coastal Law 613.

Ringbom H, 'National Employment Conditions and Foreign Ships - International Law Considerations', *Scandinavian Institute of Maritime Law Yearbook* (Marlus 2015) 109-148.

Ringbom H, 'The European Union and International Maritime Law - Lessons for the Asia-Pacific Region?' (2016) 30 Australian and New Zealand Maritime Law Journal 67.

Ringbom H, 'You Are Welcome, But ... Places of Refuge and Environmental Liability and Compensation, with Particular Reference to the EU' (2004) CMI Yearbook 208.

Roach JA, 'Alternatives for Achieving Flag State Implementation and Quality Shipping' in Myron H Nordquist and John Norton Moore (eds), *Current Maritime Issues and the International Maritime Organization* (Martinus Nijhoff Publishers 1999) 151-176.

Roach JA, 'Today's Customary International Law of the Sea' (2014) 45 Ocean Development & International Law 239.

Rosenne S, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications', *Max Planck Encyclopedia of Public International Law* (OUP 2006).

Ryngaert C, 'The International Criminal Court and Universal Jurisdiction: A Fraught Relationship' (2009) 12 New Criminal Law Review 498.

Ryngaert C, 'Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) 9 International Criminal Law Review 187.

Ryngaert C, 'An Urgent Suggestion to Pour Old Wine into New Bottles: Comment on "A New Jurisprudential Framework for Jurisdiction"' (2015) 109 AJIL Unbound 81.

BIBLIOGRAPHY

Ryngaert C, 'The Concept of Jurisdiction in International Law' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (2015) 50–75.

Ryngaert C, 'Whither Territoriality? The European Union's Use of Territoriality to Set Norms with Universal Effects' in Cedric Ryngaert, Erik J Molenaar and Sarah Nouwen (eds), *What's Wrong with International Law?* (Brill 2015) 434–448.

Ryngaert C and Ringbom H, 'Port State Jurisdiction: Challenges and Potential' (2016) 31 *The International Journal of Marine and Coastal Law* 379.

Ryngaert C and Zoetekouw M, 'The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era' in Uta Kohl (ed), *The Net and the Nation State: Multidisciplinary Perspectives on Internet Governance* (CUP 2017) 185-201.

Scharf MP, 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States' (2001) 35 *New England Law Review* 363.

Schatz V, 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ' (2016) 47 *Ocean Development & International Law* 327.

Schatz VJ, 'Combating Illegal Fishing in the Exclusive Economic Zone Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State' (2016) 7 *Goettingen Journal of International Law* 383.

Schiferli RWJ, 'Regional Concepts of Port State Control: A Regional Effort with Global Effects' (1994) 11 *Ocean Yearbook Online* 202.

Schupp JM, 'The Clay Bill: Testing the Limits of Port State Sovereignty' (1994) 18 *Maryland Journal of International Law* 199.

Scott J, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *American Journal of Comparative Law* 82.

Scott J, 'The New EU "Extraterritoriality"' (2014) 51 *Common Market Law Review* 1343.

Serdy A, 'Changing Perspectives on the High Seas Freedom of Navigation?' in Malcom Clarke (ed), *Maritime Law Evolving* (Hart 2013) 23–41.

Serdy A, 'See You in Port: Australia and New Zealand as Third Parties in the Dispute between Chile and the European Community over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas' (2002) 3 *Melbourne Journal of International Law* 79.

Serdy A, 'The Shaky Foundations of the FAO Port State Measures Agreement: How Watertight Is the Legal Seal against Access for Foreign Fishing Vessels?' (2016) 31 *The International Journal of Marine and Coastal Law* 422.

Shearer I, 'Collisions at Sea', *Max Planck Encyclopedia of Public International Law* (OUP 2007).

Shelton D, 'Soft Law' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 68–80.

Shinkaretskaya GG, 'Content and Limits of "Domaine Reserve"' in Grigory Tunkin, Rüdiger Wolfrum and J Enno Harders (eds), *International law and municipal law: Proceedings of the German-Soviet Colloquy on Internal. Law at the Inst. fur Internal. Recht an d. Univ. Kiel, 4 to 8 May 1987* (Duncker & Humblot 1988) 123-131.

Simma B and Th. Müller A, 'Exercise and Limits of Jurisdiction' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 134–157.

Slaughter A-M and Burke-White W, 'The Future of International Law Is Domestic (or, The European Way of Law)' (2006) 47 *Harvard International Law Journal* 327.

Soons AHA, 'Law Enforcement in the Ocean' (2004) 3 *WMU Journal of Maritime Affairs* 3.

Spijkers O and Jevglevskaia N, 'Sustainable Development and High Seas Fisheries' (2013) 9 *Utrecht Law Review* 24.

Stigall DE, 'Ungoverned Spaces, Transnational Crime, and the Prohibition of Extraterritorial Enforcement Jurisdiction in International Law' (2013) 3 *Notre Dame Journal of International & Comparative Law* 1.

BIBLIOGRAPHY

Stokke OS and Vidas D, 'Regulating IUU Fishing or Combating IUU Operations?' in OECD (ed), *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD Publishing 2004) 19-48.

Stoll P-T and Vöneky S, 'The Swordfish Case: Law of the Sea v. Trade' (2002) 62 *ZaöRV* 21.

Stop Illegal Fishing, 'The Mystery of the Naham-4' (2015) 10 Stop Illegal Fishing Case Study Series <https://stopillegalfishing.com/wp-content/uploads/2016/05/SIF-CS10-Naham-4.pdf>.

Svantesson D, 'A Jurisprudential Justification for Extraterritoriality in (Private) International Law' (2015) 13 *Santa Clara Journal of International Law* 517.

Swaine ET, 'Reserving' (2006) 31 *Yale Journal of International Law* 307.

Swan J, 'Port State Measures to Combat IUU Fishing: International and Regional Developments' (2006) 7 *Sustainable Development Law & Policy* 38.

Swan J, 'Port State Measures: Examining the Value, Implementation and Challenges of Port State Measures for the Southern African Region' (2008) [wwwStopIllegalFishing.com](http://www.StopIllegalFishing.com).

Swan J, 'Port State Measures—from Residual Port State Jurisdiction to Global Standards' (2016) 31 *The International Journal of Marine and Coastal Law* 395.

Swan J, *Implementation of Port State Measures: Legislative Template: A Legislative Template. Framework for Procedures. The Role of RFMOs* (FAO 2016).

Tahindro A, 'Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks' (1997) 28 *Ocean Development & International Law* 1.

Takei Y, 'International Legal Responses to the Flag State in Breach of Its Duties: Possibilities for Other States to Take Action against the Flag State' (2013) 82 *Nordic Journal of International Law* 283.

Talmon S, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *European Journal of International Law* 417.

Tanaka Y, 'Navigational Rights and Freedoms' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 536-558.

Tanaka Y, 'Jurisdiction of States and the Law of the Sea' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing 2015) 110-150.

Tanaka Y, 'Protection of Community Interests in International Law: The Case of the Law of the Sea' (2011) 15 *Max Plank Yearbook of United Nations Law Online* 329.

Tasikas V, 'The Regime of Maritime Port Access: A Relook at Contemporary International and United States Law' (2007) 5 *Loyola Maritime Law Journal* 1.

Telesetsky A, 'Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime.' (2014) 41 *Ecology Law Quarterly* 939.

Telesetsky A, 'Scuttling IUU Fishing and Rewarding Sustainable Fishing: Enhancing the Effectiveness of the Port State Measures Agreement with Trade-Related Measures' (2015) 38 *Seattle University Law Review* 1237.

The Antarctic and Southern Ocean Coalition, 'Port State Control: An Update on International Law Approaches to Regulate Vessels Engaged in Antarctic Non-Governmental Activities' (XXVI ATCM 2003) IP-044-ASOC.

The Antarctic and Southern Ocean Coalition, 'The Use of Port State Measures to Improve Fisheries Compliance at the International Level: Issues and Instruments - the CCAMLR Case' (2006) CCAMLR-XXV/BG/29.

Theilen JT, 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' (2013) 28 *The International Journal of Marine and Coastal Law* 533.

BIBLIOGRAPHY

Thirlway H, 'The Sources of International Law' in Malcolm Evans (ed), *International Law* (OUP 2010) 95–140.

Treves T, 'Human Rights and the Law of the Sea' (2010) 28 *Berkeley Journal of International Law* 1.

Trevisanut S, 'The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea' (2014) 27 *Leiden Journal of International Law* 661.

Trümpler K, 'Article 8' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 84-96.

Tsamenyi M and Molenaar EJ, 'Satellite-Based Vessel Monitoring Systems International Legal Aspects & Developments in State Practice' (2000) *FAO Legal Papers Online*.

Tsamenyi M and others, 'The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective' (2010) 25 *The International Journal of Marine and Coastal Law* 5.

Tsimplis M, 'Shipping and the Marine Environment in the 21st Century' in Malcom Clarke (ed), *Maritime Law Evolving* (Hart Publishing Limited 2013) 95–128.

Uprety K and Maggio AR, 'Article 125' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 898-911.

Uprety K and Maggio AR, 'Article 131' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck 2017) 929-933.

van der Marel ER, 'An Opaque Blacklist: The Lack of Transparency in Identifying Non-Cooperating Countries under the EU IUU Regulation' in Lawrence Martin, Constantinos Salonidis and Christina Hioureas (eds), *Natural Resources and the Law of the Sea: Exploration, Allocation, Exploitation of Natural Resources in Areas under National Jurisdiction and Beyond* (Juris 2017) 237-256.

Van Dyke JM, 'Safe Harbour', *Max Planck Encyclopedia of Public International Law* (OUP 2010).

Van Gestel R, Micklitz H-W and Maduro MP, 'Methodology in the New Legal World' (2012) 2012/13 EUI Working Papers Law.

Van Hooydonk E, 'The Obligation to Offer a Place of Refuge to a Ship in Distress' (2003) CMI Yearbook 403.

Vigni P, 'Antarctic Maritime Claims: "Frozen Sovereignty" and the Law of the Sea' in Alex G Oude Elferink and Donald R Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff 2001) 85-104.

Walker P, 'Oceans in the Balance: As the Sharks Go, So Go We' (2010) 17 Animal Law 97.

Wang K-H, 'In Combating and Deterring IUU Fishing: Do RFMOs Work?' in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Brill 2014) 431-447.

Watkins D and Burton M, 'Introduction' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Taylor & Francis 2013) 1-6.

Witbooi E, 'Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context' (2014) 29 The International Journal of Marine and Coastal Law 290.

Wittich S, 'The PCIJ and the Modern International Law of Treaties' in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Brill 2013) 87-121.

Woodman G, 'Pitcairn Island Law: A Peculiar Case of the Diffusion of the Common Law' in Dawn Oliver (ed), *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP 2009) 63-92.

BIBLIOGRAPHY

Wright A, 'Beyond the Sea and Spector: Reconciling Port and Flag State Control over Cruise Ship Onboard Environmental Procedures and Policies' (2007) 18 *Duke Environmental Law & Policy Forum* 215.

Xiaodong Y, 'Jurisdiction', *Oxford Bibliographies* (2012).

Yee S, 'Universal Jurisdiction: Concept, Logic, and Reality' (2011) 10 *Chinese Journal of International Law* 503.

Zerk JA, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (2010) 59 *Corporate Social Responsibility Initiative Working Paper*.

Ziegler KS, 'Domaine Réservé', *Max Planck Encyclopedia of Public International Law* (OUP 2013).

REPORTS AND STATE PRESS RELEASES

Adikari M, 'Statement on the Recent Developments in Sri Lanka's National Fisheries Governance Policy by Mrs. Mangalika Adikari, Secretary of the Ministry of Fisheries & Aquatic Resources Development of the Government of Sri Lanka, at the Press Conference in Brussels on 27/04/2016 (on File with Author)' (2016).

American Law Institute, *Restatement (Fourth) the Foreign Relations Law of the United States* (2018).

American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (1987).

Australian Government Solicitor, 'Appendix D - Legal Advice' in House of Representatives: Standing Committee on Social Policy and Legal Affairs, *Troubled Waters: Inquiry into the arrangements surrounding crimes committed at sea* (Commonwealth of Australia 2013).

Bell FH, 'Agreements, Conventions and Treaties Between Canada and the United States of America with Respect to the Pacific Halibut Fishery' (1969) Report of the International Pacific Halibut Commission 50.

Cacaud P, 'The Case of Developing Countries' in Judith Swan and Dominique Gréboval (eds), *Report of the International Workshop on the Implementation of International Fisheries Instruments and Factors of Unsustainability and Overexploitation in Fisheries (Mauritius, 3-7 February 2003)* (FAO Fisheries Report No 700, FAO 2003).

'CCAMLR Performance Review Panel Report' (CCAMLR 2008).

CCAMLR, 'Report of the Thirty-Fifth Meeting of The Commission (Hobart, Australia, 17 to 28 October 2016)' (2016).

Christopher W, 'Letter of Submittal (US Secretary of State)' (1996) Treaty Doc 104-24 <https://www.congress.gov/104/cdoc/tdoc24/CDOC-104tdoc24.pdf>.

Churchill RR, 'The Meaning of the "genuine Link" Requirement in Relation to the Nationality of Ships' (International Transport Workers' Federation 2000).

Committee On Foreign Relations United States Senate, 'Fisheries Treaties And Port State Measures Agreements' (2014) S. Hrg. 113-482.

'Country Report of Poland on the Occasion of the 6th Annual Meeting of the Baltic Fisheries Commission (BAFICO) on 8/9 June 2000 in Rostock', in Gunnar Lundqvist, *The Development of Fishing Ports and the Future Requirements Regarding the Tasks of Fishing Ports in the Baltic Sea (Nordic Council of Ministers 2000)*.

DAFF, 'Media Release: Inspection of Foreign Fishing Vessel, Lu Huang Yuan Yu, Registration Number 186' (2016), <http://www.nda.agric.za/docs/media/INSPECTION%20OF%20FOREIGN%20FISHING%20VESSEL%20LU%20HUANG%20YUAN%20YU%20REGISTRATION%20NUMBER%20186..pdf>.

DAFF, 'Press Conference on Foreign Fishing Vessels: Speaking Notes for the Honourable Senzeni Zokwana, Minister of Agriculture, Forestry And Fisheries' (2016), <http://www.nda.agric.za/docs/media/FOREIGN%20VESSELS.pdf>.

BIBLIOGRAPHY

DAFF, SANDF and SAMSA, 'Media Statement: Inspection on Three Chinese Vessels at the East London Port' (2016),

<http://www.nda.agric.za/docs/media/MEDIA%20STATEMENTchinese%20vessels.pdf>.

DAFF, SANDF and SAMSA, 'Update on the Three Chinese Vessels That Were Detained at the East London Port' (2016) <http://www.nda.agric.za/docs/media/chinesevesselupdate.pdf>.

DEFRA, 'Important Information Regarding the Import of West African Fish Products into EU and UK Markets' (27 February 2013), <http://www.seafish.org/media/771007/letter%20to%20tuna%20importers%20130227.pdf>.

Delegation of Ukraine, 'Proposal by Ukraine to Amend CCAMLR Conservation Measure 10-05 on the Dissostichus Catch Documentation Scheme' (CCAMLR-XXXV/29 2016) CCAMLR-XXXV/29.

Department of Environmental Affairs and Tourism, 'Department Seizes Taiwanese Flagged Vessel and Confiscates Tons of Sharks and Dried Shark Fin' (2009) <https://www.gov.za/environmental-affairs-and-tourism-taiwanese-flagged-vessel>.

Department of Environmental Affairs and Tourism, 'Environmental Affairs and Tourism on Abalone Confiscation' (6 April 2009) <https://www.gov.za/environmental-affairs-and-tourism-abalone-confiscation>.

Department of Environmental Affairs and Tourism, 'Two Korean-Flagged Vessels Fined R1 Million for Contravening South Africa's Foreign Fishing Vessel Permit Conditions' <http://www.info.gov.za/speeches/2009/09050410151001.htm>.

Department of Fisheries and Aquatic Resources, 'Collection of High Seas Fishing Legislations in Sri Lanka' (2015) <http://fisheriesdept.gov.lk/v3/wp-content/uploads/2016/02/collection-of-high-seas-regulations-1.pdf>.

Department of Fisheries and Aquatic Resources, 'Sri Lanka National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2015), <http://extwprlegs1.fao.org/docs/pdf/srl161856.pdf>.

Department of Fisheries and Aquatic Resources, 'The Compendium of High Seas Fishing Legislations in Sri Lanka' (2016) <http://fisheriesdept.gov.lk/v3/wp-content/uploads/2016/08/compendium-of-Fisheries-act-2016.pdf>.

Department of Foreign Affairs and Trade, 'Australia Takes Action against Illegal Fishing' (2015) Joint Press Release https://foreignminister.gov.au/releases/Pages/2015/jb_mr_150728.aspx?ministerid=4.

Doulman DJ and Swan J, '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 2012) FAO Fisheries and Aquaculture Circular 1074.

EC, 'Commission Adopts Trade Measures against Faroe Islands to Protect the Atlanto-Scandian Herring Stock' (2013) Press release IP/13/785.

EC, 'Commission Communication of 28 May 2002: Community Action Plan to Eradicate Illegal, Unreported and Unregulated Fishing' (2002) COM(2002) 180 final.

EC, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Developing the International Dimension of the Integrated Maritime Policy of the European Union' (2009) COM(2009)536 final.

EC, *Handbook on the Practical Application of Council Regulation (EC) No. 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (The IUU Regulation)* (Mare A4/PS D(2009) A/12880 2009).

EC, 'Herring Dispute: EU Lifts Measures against the Faroe Islands' (2014) Press Release IP/14/931.

EC, 'Report to the Trade Barriers Regulation Committee: TBR Proceedings Concerning Chilean Practices Affecting Transit of Swordfish in Chilean Ports' (1999).

BIBLIOGRAPHY

EC, 'Screening Report Montenegro: Chapter 13 Fisheries' (2013) European Neighbourhood Policy And Enlargement Negotiations https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/montenegro/screening_reports/screening_report_montenegro_ch13.pdf.

EC, 'September Infringements Package: Key Decisions' (2015) Press Release, MEMO/15/5657.

EJF, 'All at Sea – The Abuse of Human Rights Aboard Illegal Fishing Vessels' (Environmental Justice Foundation: London 2010).

EU, 'Implementation and Evaluation of Regulation (EC) 1224/2009 Establishing a Union Control System for Ensuring Compliance with the Rules of the Common Fisheries Policy as Required under Article 118 and REFIT Evaluation of the Impact of the Fisheries Regulation' (Report from the Commission to the European Parliament and the Council 2017) COM(2017) 192 final.

EU, 'Strategic Goals and Recommendations for the EU's Maritime Transport Policy until 2018' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2009) COM(2009) 8 final.

EU-Japan, 'Joint Statement on Efforts to Combat Illegal, Unregulated and Unreported (IUU) Fishing' (2012) The Mission of Japan to the European Union <http://www.eu.emb-japan.go.jp/Fishing%20Agreement%202012.html>.

European Parliament resolution of 17 November 2011 on combating illegal fishing at the global level - the role of the EU 2011 (OJ C 153E, 31/5/2013, p 148–157).

FAO, 'FAO Inputs in Relation to Resolution A/Res/69/245 Concerning "Oceans and the Law of the Sea" for the Report of The Secretary-General to the Seventieth Session of the United Nations General Assembly' (2015) http://www.un.org/Depts/los/general_assembly/contributions_2015_2/FAO_Contribution.pdf.

FAO, 'GFCM Agreement: Status' (2015)
http://www.fao.org/fileadmin/user_upload/legal/docs/003s-e.pdf.

FAO, *Status (25/09/2018): Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO 2017)
http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf.

FAO, 'Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (FAO 2002) FAO Technical Guidelines for Responsible Fisheries 9.

FAO, 'Matters Concerning the Implementation of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2017) First Meeting of the Parties to the FAO Agreement on Port State Measures, Oslo 29-31 May 2017, PSMA/2017/4.

FAO, 'Progress Made with Regard to Measures Against Illegal, Unreported and Unregulated (IUU) Fishing, Including Port State Measures, Flag State Performance, Market State Measures and Development of a Comprehensive Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels' (COFI/2011/5 2010) Committee On Fisheries (Twenty-ninth Session, Rome, 31 January-4 February 2011).

FAO, 'Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing (Sydney, Australia, 15-19 May 2000)' (FAO 2001) FAO Fisheries Report 666.

FAO, 'Report of the Conference of FAO: Thirty-Sixth Session (Rome, 18-23 November 2009)' (2009) C 2009/REP.

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 2007) FAO Fisheries Report 846.

BIBLIOGRAPHY

FAO, 'Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Rome, 4-6 November 2002)' (FAO 2002) FAO Fisheries Report 692.

FAO, 'Report of the First Meeting of the Ad Hoc Working Group Established by the Parties to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Oslo, Norway, 1-2 June 2017)' (FAO 2017) FAO Fisheries and Aquaculture Report 1212.

FAO, 'Report of the Fortieth Session of the General Fisheries Commission for the Mediterranean (GFCM), St. Julian's, Malta, 30 May – 3 June 2016' (2017) GFCM Report 40.

FAO, 'Report of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters (Rome, Italy, 9-11 October 2000)' (FAO 2001) FAO Fisheries Report 637.

FAO, 'Report of the Second Session of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated (IUU) Fishing and Related Matters: Rome, 16-18 July, 2007' (2015) FAO Fisheries and Aquaculture Report 1124.

FAO, 'Report of the Technical Consultation on Illegal, Unreported and Unregulated Fishing (Rome, Italy, 2 -6 October 2000)' (FAO 2000) FAO Fisheries Report 634.

FAO, 'Report of the Technical Consultation to Draft a Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Rome, 23-27 June 2008, 26-30 January 2009, 4-8 May 2009 and 24-28 August 2009)' (FAO 2009) FAO Fisheries and Aquaculture Report 914.

FAO, 'Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Rome, 31 August – 2 September 2004)' (FAO 2004) FAO Fisheries Report 759.

FAO, 'Report of the Twenty-Seventh Session of the Asia-Pacific Fishery Commission, 19-21 September 2001' (2001) RAP/Publication 2001/18.

FAO, 'Report on the Twenty-fifth Session of the Committee on Fisheries' (FAO 2003) FAO Fisheries Report 702.

FAO, 'Report on the Twenty-sixth Session of the Committee on Fisheries' (FAO 2005) FAO Fisheries Report 780.

FAO, 'Report on the Twenty-seventh Session of the Committee on Fisheries' (FAO 2007) FAO Fisheries Report 830.

FAO, 'Report on the Twenty-eighth Session of the Committee on Fisheries' (FAO 2009) FAO Fisheries and Aquaculture Report 902.

FAO, 'Report on the Twenty-ninth Session of the Committee on Fisheries' (FAO 2011) FAO Fisheries and Aquaculture Report 973.

FAO, 'Report on the Thirtieth Session of the Committee on Fisheries' (FAO 2013) FAO Fisheries and Aquaculture Report 1012.

FAO, 'Report on the Thirty-first Session of the Committee on Fisheries' (FAO 2015) FAO Fisheries and Aquaculture Report 1101.

FAO, 'Report on the Thirty-second Session of the Committee on Fisheries' (FAO 2017) FAO Fisheries and Aquaculture Report 1167.

FAO, 'The Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels (Global Record)' (2016) Committee On Fisheries (Thirty-Second Session, Rome, 11-15 July 2016) COFI/2016/Inf.12.

FAO, 'The State of World Fisheries and Aquaculture 2018 - Meeting the Sustainable Development Goals' (2018).

FAO Western Central Atlantic Fishery Commission, 'Report of the Sixteenth Session of the Commission, Gosier, Guadeloupe, 20–24 June 2016' (FAO 2016) FAO Fisheries and Aquaculture Report 1162.

BIBLIOGRAPHY

'First Meeting of the Fifth Session of the Fourth Parliament of the Second Republic of Sierra Leone, Proceedings of the Sitting of the House Held Thursday, 1st June, 2017' (2017) Official Hansard Report 1(28).

Geirsson G and Snæbjörnsson A, 'Port State Measures in Iceland' (Ministry of Industries and Innovation 2016) <http://www.fao.org/3/a-bo562e.pdf>.

General Counsel of the US Department of Commerce, 'Views of the Department of Commerce on S. 850, the "Shark Conservation Act of 2009"' (29 August 2009) <https://www.legislative.noaa.gov/viewletters/S850-082609.pdf>.

Ghana, 'Fisheries Management Plan of Ghana: A National Policy for the Management of the Marine Fisheries Sector 2015-2019' <https://mofad.gov.gh/fisheries-management-plan-of-ghana-2015-2019/>.

Ghana, 'National Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing' (2014), http://www.fao.org/fishery/docs/DOCUMENT/IPOAS/national/Ghana/NPOA_IUU.pdf.

Havice E, 'US Seafood Import Monitoring Program: Briefing and Analysis for the Pacific Islands Forum Fisheries Agency' (2017) <https://www.ffa.int/system/files/Havice%202017%20-%20Brief%20on%20US%20Seafood%20Import%20Monitoring%20Program-%20FINAL.pdf>.

Havsmiljökommissionens, 'Havet - Tid För En Ny Strategi' (Miljö- och energidepartementet 2003) SOU 72 <https://www.regeringen.se/49bbb1/contentassets/dde3f3cace3f47f18730059038b667c7/kapitel-7---12-och-bilagor>.

Helms J, 'Report [To Accompany Treaty Doc. 104-24]' (1996) <https://www.congress.gov/104/crpt/erpt20/CRPT-104erpt20.pdf>.

High Seas Task Force, 'Closing the Net: Stopping Illegal Fishing on the High Seas' (Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University 2006).

IATTC (Submitted by The EU), Proposal IATTC-92 G-1 For an IATTC Scheme for Minimum Standards for Inspection in Port 2017.

IATTC, '92nd Meeting (Mexico City, Mexico 24-28 July 2017): Minutes of Meeting' (2017).

Iceland, '[Government Submission of Bill With Comments] Frumvarp Til Laga Um Breyting á Lögum Nr. 22/1998, Um Veiðar Og Vinnslu Erlendra Skipa í Fiskveiðilandhelgi Íslands, Með Síðari Breytingum (Hafnríkisaðgerðir)' (Lagt fyrir Alþingi á 144 löggjafarþingi 2014–2015 2015) Þingskjal 626 — 418 Mál <http://www.althingi.is/alttext/pdf/144/s/0626.pdf>.

IISD, 'High Seas Fisheries Conference Highlights: Thursday, 22 July 1993' (1993) 7 Earth Negotiations Bulletin.

IISD, 'Summary of the 29th Session of the FAO Committee on Fisheries: 31 January - 4 February 2011' (2011) 29 Earth Negotiations Bulletin 1.

IMO, 'Status of Treaties' Printed: 21/09/2018
<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf>.

IMO (J Thullen), 'Report of the Committee on the Fishing Sector' (ILO 2007) Provisional Record, International Labour Conference, Ninety-sixth Session, Geneva, 2007 12.

Institute of International Law, 'Resolution: Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes' (2005).

ILO Special Action Programme to Combat Forced Labour (DECLARATION/SAP-FL), Sectoral Activities Department (SECTOR), 'Caught at Sea: Forced Labour and Trafficking in Fisheries' (ILO 2013).

IOTC (Australia Submission), Proposed Resolution on Vessels Without Nationality: Explanatory Memorandum 2016 (IOTC–2016–S20–PropN[E]).

Joint Ministerial Declaration (Third Joint Ministerial Conference of the Paris and Tokyo Memoranda of Understanding, Vancouver, 3-4 May 2017).

BIBLIOGRAPHY

Joint Statement Between the European Commission and the United States Government on Efforts to Combat Illegal, Unreported and Unregulated (IUU) Fishing, Washington 7 September 2011.

Koehler H, 'A Survey of RFMO Vessel Monitoring Systems and Set of Best Practices' (IOTC-2016-CoC13-Inf03 2016) ISSF Technical Report 2016-02.

Koh TTB, 'A Constitution for the Oceans' (1982) Remarks by President of the Third United Nations Conference on the Law of the Sea https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf.

Komatsu M, 'The Importance of Taking Cooperative Action Against Specific Fishing Vessels That Are Diminishing Effectiveness of Tuna Conservation and Management Measures', Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing Sydney, Australia, 15-19 May 2000 (FAO Fisheries Report No 666, FAO 2001).

'Korea – Expansion of Port State Inspections to Eliminate IUU Fishing' (The Japan Ship Owners' Mutual Protection & Indemnity Association 2014) Japan P&I News No. 663-14/02/27 https://www.piclub.or.jp/joyx3ct10-373/?action=common_download_main&upload_id=3820.

Koskenniemi M, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) Report of the Study Group of the International Law Commission A/CN.4/L.682.

Leggett JA, Elias B and Shedd DT, 'Aviation and the European Union's Emission Trading Scheme' (2012) CRS Report for Congress R42392.

Lobach T, 'Measures to Be Adopted by the Port State in Combating IUU Fishing' (2000) FAO Fisheries Report No. 666 AUS:IUU/2000/15.

Lobach T, 'Port State Control of Foreign Fishing Vessels' (2003) FAO Fisheries Circular No. 987.

Marine Living Resources Amendment Bill (B30-2013), as introduced in the National Assembly (proposed section 75), 13 September 2013.

Marine Living Resources Amendment Draft Bill (X-2013), 574 Government Gazette 36413, General Notice 434, 25 April 2013.

Mauritius Ministry of Fisheries and Rodrigues, 'National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2010), <http://oceanconomy.govmu.org/English/Publication/Documents/Documentation/table.pdf>

.

Meeting Report, 'Marine Living Resources Amendment Bill [B30B-2013]: Briefing by Department of Agriculture, Forestry and Fisheries' (Parliamentary Monitoring Group, 7 October 2013) <https://pmg.org.za/committee-meeting/16474/>.

MFA, 'Thailand's Progress in Combating IUU Fishing' (Ministry of Foreign Affairs (Thailand) (European Union Division) 2016) Press Release <http://www.mfa.go.th/main/en/media-center/14/63733-Thailand%E2%80%99s-Progress-in-Combating-IUU-Fishing.html>.

Ministry for Foreign Affairs, 'Statement by the Government of Iceland on EU Threats against the Faroe Islands and Iceland' (Government Offices of Iceland, 16 August 2013) <https://www.government.is/news/article/?newsid=80318764-fb94-11e7-9423-005056bc4d74>.

Ministry of Fisheries and Aquaculture Development, 'Medium Term Expenditure Framework (MTEF) For 2016-2018: Programme-Based Budget Estimates' (2016).

Ministry of Fisheries, 'New Zealand Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated & Unreported Fishing' (2004) <http://extwprlegs1.fao.org/docs/pdf/nze161857.pdf>.

Ministry of Industries and Innovation, 'Cooperation and Diplomacy, Not Illegal Sanctions, Are Needed to Manage the Mackerel Stock' (Government Offices of Iceland, 9 August 2013) <https://www.government.is/news/article/?newsid=e14fa3b8-fb88-11e7-9423-005056bc4d74>.

BIBLIOGRAPHY

Ministry of Oceans and Fisheries, 'National Plan of Action of the Republic of Korea to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2014) http://www.fao.org/fishery/docs/DOCUMENT/IPOAS/national/KoreaRep/NPOA_IUU_Korea_Republic.pdf.

MRAG Ltd., 'Final Technical Report: Republic of the Marshall Islands Comprehensive Fisheries Legislation Review' (ACPFish II 2011) CU/PE1/SI/10/001 <http://acpfish2-eu.org/uploads/projects/id29/Annex%201%20-%20RMI%20FTR.pdf>.

National Fisheries Authority, 'PNG and the Fight Against IUU Fishing' (2015) <http://www.fisheries.gov.pg/PolicyandRegulation/Legislation/tabid/86/Default.aspx>.

NILOS, 'Study on the Labour Market and Employment Conditions in Intra-Community Regular Maritime Transport Services Carried out by Ships under Member States' or Third Countries' Flags Aspects of International Law' (2008) TREN/G01/380-2006.

NOAA, 'Fish and Fish Product Import Provisions of the Marine Mammal Protection Act' (2016) 81 Federal Register 54389.

NOAA, 'Fisheries Off West Coast States and in the Western Pacific; Atlantic Highly Migratory Species; Fisheries of the Northeastern United States; Implementation of the Shark Finning Prohibition Act' (2002) 68 Federal Register 6194.

NOAA, 'High Seas Driftnet Fishing Moratorium Protection Act: Identification and Certification Procedures To Address Illegal, Unreported, and Unregulated Fishing Activities and Bycatch of Protected Living Marine Resources' (2011) 76 Federal Register 2011.

NOAA, 'Improving International Fisheries Management: January 2017 Report to Congress' (2017).

NOAA, 'Magnuson-Stevens Fishery Conservation and Management Act Provisions: Implementation of the Shark Conservation Act of 2010' (2016) 81 Federal Register 42285.

NOAA, 'Magnuson-Stevens Fishery Conservation and Management Act: Seafood Import Monitoring Program' (2016) 81 Federal Register 88975.

NOAA, 'Notification to Mexican Fishing Vessels Subject to Port Denial under the High Seas Driftnet Fishing Moratorium Protection Act' (2017).

NOAA-NFMS, '2004 Report to Congress Pursuant to the Shark Finning Prohibition Act of 2000 (Public Law 106-557)' (2004).

NOAA-NFMS, '2015 Report of the Secretary of Commerce to the Congress of the United States Concerning U.S. Actions Taken on Foreign Large-Scale High Seas Driftnet Fishing' (2015).

Nuyts A, 'Study on Residual Jurisdiction: Review of the Member States' Rules Concerning the "Residual Jurisdiction" of Their Courts in Civil and Commercial Matters Pursuant to the Brussels I and II Regulations' (EC) General Report JLS/C4/2005/07-30-CE)0040309/00-37 http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

OECD Competition Committee, 'Competition in Ports and Port Services' (OECD 2011) DAF/COMP(2011)14 JT03313551.

Office of the United States Trade Representative, 'Letter to TPP Depository' (30 January 2017).

Palin C and others, 'Compliance of Imports of Fishery and Aquaculture Products with EU Legislation' (European Parliament's Committee on Fisheries 2013) IP/B/PECH/IC/2012-087.

Park J-H, 'Korea's Fisheries Sector Assessment' (WWF-Korea 2016) http://awsassets.wwfkr.panda.org/downloads/kfr_2016_eng_compressed.pdf.

Philippines, 'National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2013), <http://extwprlegs1.fao.org/docs/pdf/phi159012.pdf>.

'Position Paper on the Proposed "Code of Conduct for NGOs Involved in Migrants" Rescue at Sea"' (Associazione per gli Studi Giuridici sull'Immigrazione 2017) https://www.asgi.it/wp-content/uploads/2017/07/Draft-ASGI-Position-Paper_Final_EN.pdf.

Presidential Task Force on Combating IUU Fishing and Seafood Fraud, 'Action Plan for Implementing the Task Force Recommendations' (2015).

BIBLIOGRAPHY

Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (COM(2012) 332 final 2012/0162 (COD)).

'Report of the AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction' (2009) Council of the European Union doc 8671/09.

'Report of the Standing Committee on Implementation and Compliance (SCIC)', in CCAMLR, Report of the Thirty-First Meeting of the Commission (Hobart, Australia, 23 October-1 November 2012) (2012).

Rose GL and Tsamenyi M, 'Universalising Jurisdiction over Marine Living Resources Crime' (2013) WWF Report.

The Pew Charitable Trusts, 'Port State Performance: Putting Illegal, Unreported and Unregulated Fishing on the Radar' (2010) <http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Report/iuu-port-state-performance-iuu-on-the-radar.pdf>.

'The PNG Catch Documentation Scheme National Plan of Action', in Irina Kireeva, Technical Report: Technical Assistance on Trade Facilitation and Standards for Papua New Guinea (ACPFish2 2013) <http://www.fisheries.gov.pg/Portals/0/PNG%20Catch%20Documentation%20Scheme%20ational%20Action%20Plan.pdf>.

TRAFFIC, 'Seizures and Prosecutions: Vol. 16 No. 3 (March 1997) to Vol. 26 No. 2 (October 2014)' (2017) Bulletin (Compilation).

UK Board of Trade, 'Archtor (S.S)' (1912) Wreck Report 160.

UN, Status (15/03/2018): 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 1995
<https://treaties.un.org/doc/Publication/MTDSG/Volume II/Chapter XXI/XXI-7.en.pdf>.

UN, Status (09/08/2018): United Nations Convention on the Law of the Sea
<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf>.

UNGA, 'Law of the Sea: Report of the Secretary-General' (UNGA 49th Sess 1994) A/49/631.

UNGA, 'Note Verbale Dated 22 May 2006 from the Permanent Missions of Argentina, Chile, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Mexico and Peru to the United Nations Addressed to the Secretariat' (UNFSA Review Conference, 22-26 May 2006) A/CONF210/2006/12.

UNGA, 'Oceans and the Law of the Sea: Report of the Secretary-General' (UNGA 61st Sess 2006) A/61/63.

UNGA, 'Report of the Resumed Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks' (2010) A/CONF210/2010/7.

UNGA, 'Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks' (2006) A/CONF210/2006/15.

UNGA, 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its first meeting' (2000) A/55/274.

UNGA, 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fourth meeting' (2003) A/58/95.

UNGA, 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its sixth meeting' (2005) A/60/99.

BIBLIOGRAPHY

UNGA, 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its ninth meeting' (2008) A/63/174.

UNGA, 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its eleventh meeting' (2010) A/65/164.

UNGA, 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its twelfth meeting' (2011) A/66/186.

UNGA, 'Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifteenth meeting' (2014) A/69/90.

UNGA, 'Second Report on the Provisional Application of Treaties by Juan Manuel Gómez-Robledo, Special Rapporteur' (ILC 66th Sess 2014) A/CN.4/675.

US Department of State, 'Collection of Sources on Entry into Port under Force Majeure', Archive (2009) <https://2001-2009.state.gov/s/l/2007/112701.htm>.

WCPFC, US - Proposal for CMM on Vessels without Nationality 2009 (WCPFC-TCC5-2009/DP-04 (Rev1)).

POLICY AND DECISIONS OF INTERNATIONAL ORGANISATIONS

Castries (St. Lucia) Declaration on Illegal, Unreported and Unregulated Fishing, adopted by the 2nd Special Meeting of the CRFM Ministerial Council held in Castries, St. Lucia (28 July 2010).

CCAMLR, *Policy to Enhance Cooperation between CCAMLR and Non-Contracting Parties* (as amended, 2008) 1999.

CCAMLR, Resolution 14/XIX *Catch Documentation Scheme: implementation by Acceding States and non-Contracting Parties* 2000.

CCAMLR, Resolution 15/XXII *Use of ports not implementing the Catch Documentation Scheme for *Dissostichus spp.** 2003.

CCAMLR, Resolution 19/XXI *Flags of non-compliance** 2002.

CCAMLR, Resolution 25/XXV *Combating illegal, unreported and unregulated fishing in the Convention Area by the flag vessels of non-Contracting Parties* 2006.

CCAMLR, Resolution 32/XXIX *Prevention, deterrence and elimination of IUU fishing in the Convention Area* 2010.

CCAMLR, Resolution 35/XXXIV *Vessels without nationality* 2015.

CCAMLR, *System of Inspection* (adopted CCAMLR-VII, as amended to CCAMLR-XXVI) 2017.

CCSBT, *Compliance Plan* 2014.

CCSBT, *Compliance Plan* 2017.

CCSBT, *Action Plan* 2000.

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

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

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

FAO, 'Resolution 15/93: Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas' (1993) C 93/REP Report of the Conference of FAO Twenty-seventh Session (Rome, 6-24 November 1993).

FAO, 'Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem' (Report of the Reykjavik Conference on Responsible Fisheries in the Marine Ecosystem 2001) FAO Fisheries Report 658.

FAO, 'The 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing', *Adopted by the FAO Ministerial Meeting on Fisheries, Rome, Italy, 12 March 2005* (FAO Fisheries Report

BIBLIOGRAPHY

No 778, Appendix E 2005)

<http://www.fao.org/tempref/docrep/fao/008/a0078e/a0078e00.pdf>.

FAO, 'Voluntary Guidelines for Catch Documentation Schemes' (FAO 2017).

FAO, 'Voluntary Guidelines for Flag State Performance' (FAO 2015).

GFCM, Resolution GFCM/40/2016/2 *for a mid-term strategy (2017–2020) towards the sustainability of Mediterranean and Black Sea fisheries* 2016.

ICCAT, Resolution 14-11 *Establishing guidelines for the cross-listing of vessels contained on IUU vessel lists of other tuna RFMOs on the ICCAT IUU vessel list in accordance with Recommendation 11-18* 2014.

ILO, 'Guidelines for Port State Control Officers Carrying out Inspections under the Work in Fishing Convention, 2007 (No. 188)' (International Labour Office 2011).

ILO, 'Recommendation (No. 199) Concerning the Work in the Fishing Sector' (2007) adopted 96th ILC session (14 Jun 2007), R119.

IMO, 'Guidelines On Places of Refuge for Ships in Need of Assistance' (2004) Resolution A943(23).

IMO, 'Procedures for Port State Control, 2011' (2011) Resolution A1052(27).

IMO, 'Regional Co-Operation in the Control of Ships and Discharges' (1991) IMO Resolution A682(17).

Kristiansen A, 'The Faroe Islands Call on the EU to Drop Threats and Return to Consultations' (*Ministry of Fisheries*, 17 June 2013) <http://www.fisk.fo/fo/kunning/tidindi/the-faroe-islands-call-on-the-eu-to-drop-threats-and-return-to-consultations/>.

NASCO, 'Fishing for Salmon in International Waters' Resolution of the Council of NASCO at its Seventh Annual Meeting (Helsinki 12-15 June 1990) CNL(90)49.

NASCO, 'Fishing for Salmon on the High Seas' Resolution of the Council of NASCO at its Ninth Annual Meeting (Washington DC, 9-12 June 1992) CNL(92)54.

NEAFC, Recommendation 1:2016 *On Conservation and Management Measures for Deep and Shallow Pelagic Redfish in the Irminger Sea and adjacent waters in the NEAFC Convention Area for 2016* 2015.

NEAFC, Recommendation 15:2016 *On the conservation and management of North-East Atlantic Mackerel in NEAFC Regulatory Area in 2016* 2016.

NPAFC, 'Terms of Reference Committee on Enforcement (ENFO)' Amended July 24 2015.

Paris MoU, 'Strategic Plan 2012-2017 REV'
[https://www.parismou.org/system/files/Strategic%20Plan%202012-2017%20REV%20\(final\).pdf](https://www.parismou.org/system/files/Strategic%20Plan%202012-2017%20REV%20(final).pdf).

Preparatory Committee established by General Assembly resolution 69/292, 'Chair's Streamlined Non-Paper on Elements of a Draft Text of an International Legally-Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction' Fourth Session of the Prepcom (10 – 21 July 2017).

RECOFI, 'Status of IPOA-IUU and Port State Measures in the RECOFI Area and Preparation for the Arabian Sea International Workshop' (Eighth Meeting of the Working Group on Fisheries Management Cairo (Arab Republic of Egypt 8-10 December 2014)) RECOFI:WGF8/2014/6.

SADC, 'Statement of Commitment by SADC Ministers Responsible for Marine Fisheries on Illegal, Unreported and Unregulated Fishing' (2008).

SIOFA, *Resolution on Data Collection concerning the high seas in the Southern Indian Ocean* 2004.

UNGA, 'Outcome of the Ad Hoc Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction and Co-Chairs' Summary of Discussions' (2015) A/69/780.

BIBLIOGRAPHY

UNGA, 'Report of the Preparatory Committee Established by General Assembly Resolution 69/292' (2017) A/AC287/2017/PC4/2.

UNGA, 'Resolution 46/215: Large-Scale Pelagic Drift-Net Fishing and Its Impact on the Living Marine Resources of the World's Oceans and Seas' (1991) UN Doc A/Res/46/215.

UNGA, 'Resolution 60/31: Sustainable Fisheries [...]' (2005) A/RES/60/31.

UNGA, 'Resolution 61/105: Sustainable Fisheries [...]' (2006) A/RES/61/105.

UNGA, 'Resolution 62/177: Sustainable Fisheries [...]' (2007) A/RES/62/177.

UNGA, 'Resolution 63/112: Sustainable Fisheries [...]' (2008) A/RES/63/112.

UNGA, 'Resolution 64/72: Sustainable Fisheries [...]' (2009) A/RES/64/72.

UNGA, 'Resolution 65/38: Sustainable Fisheries [...]' (2010) A/RES/65/38.

UNGA, 'Resolution 66/288: The Future We Want' (2012) A/RES/66/288.

UNGA, 'Resolution 66/288: The Future We Want' (2012) A/RES/66/288.

UNGA, 'Resolution 66/68: Sustainable Fisheries [...]' (2011) A/RES/66/68.

UNGA, 'Resolution 67/79: Sustainable Fisheries [...]' (2012) A/RES/67/79.

UNGA, 'Resolution 68/71: Sustainable Fisheries [...]' (2013) A/RES/68/71.

UNGA, 'Resolution 69/109: Sustainable Fisheries [...]' (2014) A/RES/69/109.

UNGA, 'Resolution 70/235: Oceans and the Law of the Sea' (2015) A/RES/70/235.

UNGA, 'Resolution 70/75: Sustainable Fisheries [...]' (2015) A/RES/70/75.

UNGA, 'Resolution 71/123: Sustainable Fisheries [...]' (2016) A/RES/71/123.

UNGA, 'Resolution 71/257: Oceans and the Law of the Sea' (2016) A/RES/71/257.

UNGA, 'Resolution 72/72: Sustainable Fisheries [...]' (2017) A/RES/72/72.

UNGA, 'Resolution 72/73: Oceans and the Law of the Sea' (2017) A/RES/72/73.

UNGA, 'Revised Negotiating Text: Prepared by the Chairman of the Conference' (United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks 1993) A/CONF164/13/Rev1.

UNGA, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (2015) A/RES/70/1.

United Nations Conference on Environment & Development, 'Agenda 21: Programme of Action for Sustainable Development' (1992) A/CONF151/26/Rev1/Voll.

WECAFC, Resolution WECAFC/14/2012/1 *On strengthening the implementation of international fisheries instruments* 2012.

WECAFC, Resolution WECAFC/15/2014/9 *On the Implementation of the Port State Measures Agreement and the FAO Voluntary Guidelines on Flag State Performance in The Region* 2014.

World Commission on Environment and Development, 'Our Common Future' (Annex 1987) Development and International Co-operation: Environment UNGA A/42/427.

World Summit on Sustainable Development, 'Johannesburg Declaration on Sustainable Development' (2002) A/CONF199/20 (Res 1, Annex).

World Summit on Sustainable Development, 'Plan of Implementation of the World Summit on Sustainable Development' (2002) A/CONF199/20 (Res 2).

MISCELLANEOUS

'Abuja MoU' <http://www.abujamou.org/index.php>.

American Association of Port Authorities, 'Glossary of Maritime Terms' <http://www.aapa-ports.org/advocating/content.aspx?ItemNumber=21500>.

BIBLIOGRAPHY

'APFIC Port Inspection of Fishing Vessels Training Course' (FAO, Asia-Pacific Fishery Commission) <<http://www.fao.org/apfic/training/port-inspection-training/en/>> accessed 13 March 2018.

'Black Sea MoU' <http://www.bsmou.org/>.

Blaha F, 'China in IUU Fishing' (*Francisco Blaha*, 14 April 2016) <http://www.franciscoblaha.info/blog/2016/4/14/china-in-iuu-fishing>.

Bolatagici L, 'Fight against IUU Fishing Improves - Fiji Times Online' (*The Fiji Times ONLINE*, 10 May 2016) <http://www.fijitimes.com/story.aspx?id=373394>.

Cacaud P, 'Development of Harmonized Terms and Definitions for IOTC Conservation and Management Measures' (IOTC 2016).

'Caribbean MoU' <http://www.caribbeanmou.org/>.

CCAMLR, 'Non-Contracting Parties' (*CCAMLR: Commission for the Conservation of Antarctic Marine Living Resources*) <https://www.ccamlr.org/en/compliance/non-contracting-parties>.

Chambers D, 'Taiwanese Captain Pays R100,000 in Plea Deal on Fishing Charges' (*TimesLIVE*, 20 September 2016) <https://www.timeslive.co.za/news/south-africa/2016-09-20-taiwanese-captain-pays-r100000-in-plea-deal-on-fishing-charges/>.

Chunghwa Telecom Co., Ltd, entrusted by Ministry of Transportation and Communication (ROC), 'Taiwan's Development of Port State Control' (*MTNet*) http://eng.mtnet.gov.tw/psc_eng/index.html.

'Denmark Supports Faroe Islands in Appeal against EU Fishing Sanctions' (*The Copenhagen Post Online*, 19 August 2013) <http://cphpost.dk/news/eu/denmark-supports-faroe-islands-in-appeal-against-eu-fishing-sanctions.html>.

DOALOS, 'UNCLOS at 30', http://www.un.org/depts/los/convention_agreements/pamphlet_unclos_at_30.pdf.

Dodge WS, 'The Customary International Law of Jurisdiction in the Restatement (Fourth) of Foreign Relations Law' (*Opinio Juris*, 8 March 2018) <http://opiniojuris.org/2018/03/08/the-customary-international-law-of-jurisdiction-in-the-restatement-fourth-of-foreign-relations-law/>.

Editor, 'What Is the Difference Between a Port, Quay, Pier and Wharf?' (*The Shipping Law Blog*, 2011) <http://www.theshippinglawblog.com/2011/10/what-is-difference-between-quay-pier.html>.

EJF, 'Bold Action Taken by Korea to Combat Illegal, Unreported and Unregulated (IUU) Fishing Shows EU IUU Regulation Is Working' (*Environmental Justice Foundation*, 29 January 2015) <https://ejfoundation.org/index.php>.

EJF, 'Pirate Fishing Exposed: The Fight Against Illegal Fishing in West Africa and the EU' (2012) <https://ejfoundation.org//resources/downloads/Pirate-Fishing-Exposed.pdf>.

Environmental Writer, 'Taiwanese Boat to Be Blacklisted over Haul of Shark Fins' *Cape Times* (16 March 2009) <https://www.pressreader.com/south-africa/cape-times/20090316/281573761612304>.

Fajardo T, 'Transnational Environmental Crime: A Challenging Problem but Not yet a Legal Concept' (*Völkerrechtsblog*, 15 February 2017) <https://voelkerrechtsblog.org/transnational-environmental-crime-a-challenging-problem-but-not-yet-a-legal-concept/>.

FAO Fisheries and Aquaculture Department, 'About IPOA-IUU' (FAO) <http://www.fao.org/fishery/ipoa-iuu/about/en>.

FAO Fisheries and Aquaculture Department, 'Regional Fishery Bodies (RFB)' (FAO) <http://www.fao.org/fishery/rfb/en>.

FAO Legal Office, 'Membership of FAO' <http://www.fao.org/legal/home/fao-members/en/>.

FAO, 'FAOLEX' <http://www.fao.org/faolex/en/>.

BIBLIOGRAPHY

FAO, 'Groundbreaking Treaty on Illegal Fishing Approved' (*FAO News Article*, 25 November 2009) <http://www.fao.org/news/story/en/item/37627/icode/>.

FAO, 'Port State Measures Agreement' (FAO) <http://www.fao.org/fishery/psm/agreement/en>.

FAO, 'PORTLEX' <http://www.fao.org/fishery/psm/collection/en>.

Ford R, 'Tuna Imports Held Following Warnings of "Illegal Fishing"' <http://www.thegrocer.co.uk/buying-and-supplying/categories/fresh/tuna-imports-held-following-warnings-of-illegal-fishing/238499.article>.

Fraser J, 'Trinidad and Tobago's IUU Fishing Yellow Card from EU Sign of Deeper Problem' (*Seafood Source*) <https://www.seafoodsource.com/features/trinidad-and-tobago-iuu-fishing-yellow-card-from-eu-sign-of-deeper-problem>.

'Global Fishing Watch' (*Global Fishing Watch*) <http://globalfishingwatch.org/>.

'Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels' (FAO) <http://www.fao.org/global-record/information-system/en/>.

'Healthy and Safe Seas - EU Backs United Nations Resolutions on Sustainable Fisheries and the Law of the Sea' (*European Commission - Fisheries*, 12 September 2014) https://ec.europa.eu/fisheries/healthy-and-safe-seas-eu-backs-united-nations-resolutions-sustainable-fisheries-and-law-sea_en.

Honniball AN, *Port State Jurisdiction Beyond Oceans Governance: The Closure of Ports to Qatar in the 2017 'Gulf Crisis'* (2017) <https://www.ejiltalk.org/port-state-jurisdiction-beyond-oceans-governance-the-closure-of-ports-to-qatar-in-the-2017-gulf-crisis/>.

ILO, 'NORMLEX' <http://www.ilo.org/dyn/normlex/en/f?p=1000:1:::NO:::>

IMO, 'STCW-F Convention Background' <http://www.imo.org/en/OurWork/HumanElement/Pages/STCW-F-Convention.aspx>.

'Indian Ocean MoU' <http://www.iomou.org/>.

Jones M, 'Korean Ships' Crews Fined R500 000 for Illegal Fishing' *Cape Times* (30 April 2009)

<https://www.pressreader.com/south-africa/cape-times/20090430/281698315692936>.

Julien C and Shepherd J, 'Faroe Islands Initiate WTO Dispute Settlement Procedures against European Union' (*International Law Office*, 7 March 2014)

<https://www.internationallawoffice.com/Newsletters/International-Trade/European-Union/King-Spalding-LLP/Faroe-Islands-initiate-WTO-dispute-settlement-procedures-against-European-Union>.

'Latin American Agreement of Viña Del Mar'

<http://alvm.prefectura naval.gov.ar/cs/ciala/home?Lang=1374097586996>.

'Mediterranean MoU' <http://www.medmou.org/>.

NMFS, 'Illegal Fishing: Not in Our Ports' (2016)

http://www.nmfs.noaa.gov/stories/iuu/docs/now_port_state_handout_v1_11_16.pdf.

National Oceanic and Atmospheric Administration (NOAA), 'Seaward Limit of Laws' (NOAA)

http://www.gc.noaa.gov/gcil_seaward.html.

'Pacific Halibut: Stock Status and Biology' (IPHC) <https://iphc.int/management/science-and-research/pacific-halibut-stock-status-and-biology>.

Paris MoU, 'Organisation' <https://www.parismou.org/about-us/organisation>.

Parrish A, 'Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law' (*Opinio Juris*, 6 September 2018)

<http://opiniojuris.org/2018/09/06/remaking-international-law-personal-jurisdiction-and-the-fourth-restatement-of-the-foreign-relations-law/>.

'PNG Fishing Manager Addresses EU Yellow Card Concerns' (*Undercurrent News*)

<https://www.undercurrentnews.com/2015/09/25/png-fishing-manager-addresses-eu-yellow-card-concerns/>.

'Riyadh MoU' <https://www.riyadh mou.org/>.

BIBLIOGRAPHY

Romano CPR, 'The International Judiciary in Context: A Synoptic Chart (Version 3.0)' [2004] The Project on International Courts and Tribunals http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf.

SAMSA, 'Arrested Chinese Vessel Faces More Charges – to Remain in Custody until Fines Are Paid' (*The 10th Province*, 18 May 2016) <https://blog.samsa.org.za/tag/lu-huang-yuan-yu-186/>.

SAMSA, 'Arrested Taiwanese Fishing Vessel Released from South Africa' (*The 10th Province*, 27 September 2016) <https://blog.samsa.org.za/2016/09/27/arrested-taiwanese-fishing-vessel-released-from-south-africa/>.

'Seaport' <http://www.thefreedictionary.com/seaport>.

Schatz V, 'The Battle against Transnational Fisheries Crime: Jurisdictional Challenges' (*Völkerrechtsblog*, 3 March 2017) <http://voelkerrechtsblog.org/the-battle-against-transnational-fisheries-crime/>.

Schatz VJ and Honniball AN, *The C-Star's Odyssey and the International Law of the Sea* (2017) <http://voelkerrechtsblog.org/the-c-stars-odyssey-and-the-international-law-of-the-sea/>.

Schroeder F, 'Court Docks Fishing Vessel' (*IOL News*, 13 October 2013) <https://www.iol.co.za/news/court-docks-fishing-vessel-1591196>.

'Solomon Islands Prime Minister Announces Supports for New Fisheries Act' (*Tri Marine Group*, 3 February 2015) [http://www.trimarinegroup.com/news/press/Trimarine Announcement 020315.html](http://www.trimarinegroup.com/news/press/Trimarine%20Announcement%20020315.html).

'Solomons, PNG and Tuvalu Tuna Industries Warned to Comply with Regulations' (*ABC News*, 3 February 2015) <http://www.abc.net.au/news/2015-02-03/tuna-industries-in-solomon-islands2c-png-and-tuvalu-warned-to-/6066732>.

'The Fisheries Commission: History' (*Joint Fish: Joint Russian-Norwegian Fisheries Commission*) <http://www.jointfish.com/eng/THE-FISHERIES-COMMISSION/HISTORY>.

'Tokyo MoU' <http://www.tokyo-mou.org/>.

Trade Ocean, 'The Port of Cape Town' (September 2014) <http://tradeocean.co.za/wp-content/uploads/2015/08/Trade-Ocean-Port-Guide-Cape-Town-lowres.pdf>.

'U.S. Raises Bar on Seafood Imports to Further Curb Illegal Fishing, Fraud' (NOAA, 8 December 2016) <http://www.noaa.gov/media-release/us-raises-bar-on-seafood-imports-to-further-curb-illegal-fishing-fraud>.

'United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks' http://www.un.org/depts/los/fish_stocks_conference/fish_stocks_conference.htm.

UN/DOALOS, 'Page: Preparatory Committee Established by General Assembly Resolution 69/292' <http://www.un.org/depts/los/biodiversity/prepcom.htm>.

US Coast Guard, 'Port State Control' (*Foreign & Offshore Compliance Division (CG-CVC-2)*) <http://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Inspections-Compliance-CG-5PC-/Commercial-Vessel-Compliance/Foreign-Offshore-Compliance-Division/PSC/>.

van der Marel ER, 'ITLOS Issues Its Advisory Opinion on IUU Fishing' *The JCLOS Blog* (21 April 2015) <http://site.uit.no/jclos/2015/04/21/itlos-issues-its-advisory-opinion-on-iuu-fishing/>.

van der Marel ER, 'The Due Diligence Obligations of the Flag State with Respect to Its Fishing Vessels and the Environment' (*The JCLOS Blog*, 18 October 2016) <http://site.uit.no/jclos/2016/10/18/the-due-diligence-obligations-of-the-flag-state-with-respect-to-its-fishing-vessels-and-the-environment/>.

Vanhoutte A and Kuemlangan B, 'A Global Movement to Protect Ocean Resources' (*Impakter*, 11 January 2017) <http://impakter.com/global-movement-protect-ocean-resources/>.

Young M, 'Catch of the Day: The TPP Might Be Good News for Sustainable Fisheries' (*The Conversation*, 19 November 2015) <http://theconversation.com/catch-of-the-day-the-tpp-might-be-good-news-for-sustainable-fisheries-50837>.

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