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**An Analysis of the International Legal Framework on
Illegal, Unreported and Unregulated Fishing in the
Light of the ITLOS Advisory Opinion**

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Introduction

In April 2015 the International Tribunal for the Law Of the Sea has adopted the advisory opinion n°21/2015 on the topic of illegal, unreported and unregulated fishing. It has formulated this advisory opinion after the request of an advisory opinion sent by the Sub-Regional Fisheries Commission, which is a regional fisheries management organization; its request was followed by other twenty-two States and other international organizations. The Sub-Regional Fisheries Commission asked the Tribunal for clarifications on some matters regarding illegal, unreported and unregulated fishing; in particular, the organization posed questions concerning the rights and obligations that coastal and flag States have in the fight against illegal fishing, the rights and obligations of coastal States in ensuring conservation and management of fisheries resources in a shared area, and the extent to which international organizations are liable in case of infringement in this area.

The Tribunal responded through its advisory opinion, and stated that it is the coastal State that has responsibility for making sure that conservation and management laws and regulations are respected in its waters of jurisdiction, that the flag State has a “due diligence” obligation in respect to the conservation and anti-illegal fishing norms in the relevant third State’s waters. Plus, it affirmed that the coastal State has both the right and obligation to seek cooperation with the other relevant states, either directly or through Regional Fisheries Management Organizations, to create and ensure conservation and management plans. Finally the Tribunal asserted that the liability of an international organization for the breach of a norm regulating fishing in a third State’s waters of jurisdiction by one of its member States depends on the extent to which it has a more or less exclusive competence in that field.

This advisory opinion by the International Tribunal for the Law Of the Sea has brought me to analyse the whole international legal framework in illegal, unreported and unregulated fishing, which has started in 1982 with the second United Nations Convention for the Law Of the Sea, and is still on-going, with the last international agreement been made in 2012, the Minimal Conditions for Access, within the Sub-Regional Fisheries Commission.

Illegal, unreported and unregulated fishing is a very serious issue in the global context, and has increased significantly in the last two decades; the major causes are the incredible advances in fishing technologies, along with the surplus of these technologies, and the increase in the demand for fisheries product, along with its economic gains.

This paper is structure as follows: the first chapter will give an overview of illegal, unreported and unregulated fishing in itself, the second chapter will illustrate the international legal framework regulating fishing and the third and last chapter will describe and analyse the advisory opinion made by the International Tribunal for the Law Of the Sea.

Ultimately, the objective of this paper is to provide a more holistic comprehension of the international legal framework of the law of the sea concerning IUU fishing, and will shed light to the advisory opinion issued by the ITLOS regarding the rights and obligations of the flag State, coastal and port State in the field of IUU fishing.

Chapter 1

Illegal, Unreported and Unregulated (IUU) Fishing – an overview

1.1. Definition and description

IUU fishing is illegal, unreported, unregulated fishing that occurs when fishers conduct fishing activities in violation of the laws of a fishery under the jurisdiction of a coastal state, or in high seas under the jurisdiction of a regional organization or international law.

In the United Nation's Food and Agriculture Organization (FAO) International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, the definition of IUU fishing is the following:

“Illegal fishing refers to activities:

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;

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

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

Unreported fishing refers to fishing activities:

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

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.

Unregulated fishing refers to fishing activities:

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

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”¹

¹ FAO International Plan of Action to Prevent, Deter, Eliminate IUU Fishing (FAO, 2001), para. 3.1

The working of pirate ships is mainly the same everywhere; these ships, or sometimes real and proper fleets, are generally owned by companies, even Multinational Companies (hereinafter MNCs), that usually operate in distant places with respect to where their pirate ships fish. However, illegal fishing is also very much practiced by local companies and fishermen. These ships usually work away from the coast and most importantly away from ports, from which inspections can start. These ships are big and with the use of refrigerators are able to store fish for long. After catching fish, they either transfer their catch to other bigger boats at sea, which in turn re-supply and re-fuel the pirate ships, in order to be able to stay at sea without having to re-enter ports, or, if they are simply owned by local companies and fishermen, they return to ports and sell the fish there. The ports in which they sell their catch are not advanced and often very weak at controlling catches, so generally the illegal catches go undetected. These ships operate in waters belonging to states that either are very rich of precious or profitable fish or where their sea-patrol and enforcement power is weak; this makes the waters of East and West Africa and the oceans around the Pacific Islands the most targeted by illegal fishing ships.

Furthermore, ships that conduct illegal, unreported or unregulated fishing, frequently disregard of marine protected areas established by e.g. states or Regional Fisheries Maritime Organizations (hereinafter RFMOs) in order to protect and help and favour the recovery of depleted or over-exploited fish, and they harvest in those areas.

1.2. Some statistics

In an analysis² studying illegal and unreported catches within the EEZ of 54 countries and 15 high seas regions, the level of IUU was highest in the Eastern Central Atlantic and lowest in the Southwest Pacific.² Illegal and unreported fishing can have very significant effects on stocks: there is a positive correlation between regional estimates of illegal and unreported fishing and the number of depleted stocks in those regions.² The number one reason for this is that IUU fishing clearly is a cause of the over-exploitation thus reduction of fish stocks.

Furthermore, researches in time have shown that there is a link between IUU fishing and effectiveness of governance: countries that are most affected by IUU fishing are the ones that have a poor governance and a poor effectiveness of enforcement of law and low index for the rule of law.

Furthermore, in addition to the above written statistics, according to estimates made by *Nature Communications*³, the annual globe catch is roughly 109 million metric tons (of fish), which is a 30%

² Agnew DJ, Pearce J, Pramod G, Peatman T, Watson R, et al. *Estimating the Worldwide Extent of Illegal Fishing* (PLoS ONE, 2009)

³ Website nature.com: <https://www.nature.com/articles/ncomms10244>

higher than the 77 million metric tons officially reported by more than 200 countries and territories.⁴ This therefore means that 32 million metric tons of fish catch derive from IUU fishing.

1.3. Causes

A. ECONOMIC REASON

One of the main causes of illegal, unreported and unregulated fishing is the economic issue behind it: there is a strong economic incentive for pirate fishermen mainly because many fish species are of high value. Some fish species are specifically of high market value while others have become such because of their over-exploitation in time and therefore their current short supply. Therefore engaging in IUU fishing give fishers an incentive because it gives them the possibility to fish species that are otherwise banned to fish and of high value. Moreover, with the increasing demand for fish, fuelled for example by higher disposable incomes that enable an increase in food consumption, there will be more incentives for fishers to engage in IUU activities, which give ‘extra supply’ of fish.

Furthermore, from the fishermen’s viewpoint, IUU fishing is a very strong temptation as it gives them the opportunity to avoid being taxed or pay duties for the fish they caught.

However, it must be said that another economic reason for why some fishermen engage in IUU activities is self-sustainment: in some parts of the world, in very poor countries such as is Central Western African and Eastern African countries, people engage in unregulated or unreported fishing activities as a means to sustain their families and their villages. This is a phenomenon that has spread more in the last decades due to the fact that fish stocks all around the world have been significantly reduced by over fishing, and therefore fish is now less abundant and fishermen in poor coastal areas that rely mainly on food from the seas and that are therefore the most vulnerable to a reduction in fish stocks, are forced to rely on unreported or unregulated fishing.

B. LACK OF FLAG STATE CONTROL

Another main cause of illegal, unreported and unregulated fishing is not a driving force of it but a major reason why it exists: lack of an effective and successful flag State control. In fact, “if full and effective flag State control existed, the incidence of IUU fishing would be greatly reduced”.⁵

When a fishing vessel is constructed and wants to be able to operate it has to be registered by a State, which then gives the authorization to the vessel that assumes the State’s flag; here is where the problem

⁴ Website phys.org: <https://phys.org/news/2016-01-percent-global-fish-unreported.html>

⁵ Organization for Economic Co-operation and Development, *Why fish piracy persists: the economics of illegal, unreported and unregulated fishing* (OECD, 2005), page 108

arises. First of all, not every state has effective enforcement measures of its marine laws, and does not have a sufficient sea-patrolling force in order to control its flag State's vessels, therefore all those vessels whose flag state is of an ineffective State in this area, hence failing to meet their obligations under national and international law when it comes to control, supervision and law enforcement, they are already more independent and more able to perform IUU fishing activities without being detected or punished. In some States ineffectiveness of enforcement translates into absence of harsh fines and penalties, which inevitably decreases the value of the opportunity cost of engaging in IUU fishing. Furthermore, another problem is that regarding the registration of fishing vessels, it is possible and actually easy to re-flag those vessels, without having remarkable restrictions. This of course is an incentive for any fishing company or fisherman who wants to engage in IUU fishing activities to re-flag their vessel in a State that has low control and enforcement power and/or is a tax haven; this phenomenon is called 'flag of convenience'.

"Another issue with the legal systems' assessment of fines and penalties is that it is often based on the 'ability to pay'; given that fishers often have little income compared to the societal costs of their action and that the true owners of vessels are often disguised, this could work against the deterrence effect".⁶

All of this is therefore an increase in the chance of success, which is a higher rate of return, of fishermen conducting IUU fishing activities, as governments and regional organizations fail to regulate adequately and most importantly enforce national or international laws.

C. LACK OF FLAG STATE CONTROL - WHY

The States that most of all lack of flag State control are the poorest ones, namely LECD and developing countries. These States are the ones that suffer the most from IUU fishing, since, as opposed to OECD or other rich countries, they cannot afford or have great difficulties in setting up costly sea-patrolling forces and fisheries controlling structures in order to enact MCS (Monitoring, Control and Surveillance) operations. They are costly not only in their purchase, but in their operational and maintenance costs as well.

There are various reasons for why poor states are the ones that lack effective flag state control, and these are: lack of investments in this area, lack of funds, lack of capacity, poor level of governance and corruption. Plus, usually there are insufficient and inadequately trained personnel in the relevant authorities, and the authorities' motivation to invest in relevant personnel is poor; financially weak States set other priorities.⁷

⁶ Organization for Economic Co-operation and Development, *Why fish piracy persists: the economics of illegal, unreported and unregulated fishing* (OECD, 2005), page 39

⁷ Website World Ocean Review: <http://worldoceanreview.com/en/wor-2/fisheries/illegal-fishing/>

D. OTHER CAUSES OF IUU

Finally, there are also other more in-detail causes of illegal, unreported and unregulated fishing. These are:

Unreported fishing is very hard to track;

It is generally difficult to have a complete frame of the quantity of fish stocks and populations in various marine areas; a reason for this is that some species are migratory;

Many countries have subsidies for fishermen, which translates in greater fleets than is actually needed: there is therefore an overcapacity of fishing equipment and materials. Furthermore the problem of excess fishers is difficult to deal with, as they may find it difficult to find alternative employment opportunities; “Measures to deal with IUU fishing when the perpetrators suffer extreme poverty can be very challenging; under these circumstances penalties may not be a sufficient disincentive to IUU fishing”.⁸

1.4. Risks, threats & consequences

The risks, threats and consequences of illegal, unreported and unregulated fishing are environmental, economic and social, having direct as well as indirect consequences.

A. ECONOMIC

The major direct economic consequence of illegal, unreported and unregulated fishing is the direct loss in terms of Gross Domestic Product and Gross National Product; according to Oceana, an international organization focused on the conservation of oceans, the global economic loss due to illegal, unreported and unregulated fishing lies between \$10 and \$23 billion per year.⁹ These numbers refer to the value loss of the illegal catches that could be otherwise made by legally operating fishers. These value losses are created by the loss of output and revenue by fishermen and legal companies, which contribute to GDP, and by the loss of landing, port and other fees and taxes, which contribute to government revenues.

Furthermore, there are both short-term and long-term economic consequences of IUU fishing: a short-term consequence is the reduced number of fish stocks, which might translate into less work for legal fisheries thus lower employment and lower income. While the long-term consequence is more serious, as the over-exploitation of fish stocks, to which IUU fishing contributes greatly, will deplete fish populations, and this might force some legal fisheries to stop operating; this would bring even higher economic costs.

⁸ Organization for Economic Co-operation and Development, *Why fish piracy persists: the economics of illegal, unreported and unregulated fishing* (OECD, 2005), page 39

⁹ Stiles M., Kagan A., Shaftel E., and Lowell B., *Stolen Seafood: the impact of pirate fishing on our oceans* (OCEANA, 2013)

“There are also social costs associated with IUU fishing, as it can affect the livelihoods of fishing communities, particularly in developing countries, and because many of the crew on IUU fishing vessels are from poor and underdeveloped parts of the world, often working under inadequate social and safety conditions”.¹⁰ Furthermore, the over exploitation of fish populations made by IUU fishing forcibly has an impact on coastal communities, especially in poor countries, which see themselves deprived of their main means of subsistence.

B. ENVIRONMENTAL

Illegal, unreported and unregulated fishing has a remarkable impact on marine species and ecosystems, and poses a threat to their sustainability.

One of the main reasons why IUU fishing poses a threat to marine resources is that numerous stocks of fish are already being over-exploited by legal fishing activities, therefore IUU fishing increases this exploitation and puts further pressure on fish populations, some of which are already at critical levels.

The environmental effects of IUU are both direct and indirect. The direct impacts on the environment are the over-exploitation and depletion of fish species and the destruction of marine eco-systems. The main indirect impact on the environment derives from the bycatch phenomenon. The bycatch is the incidental catch of unwanted fish, marine mammals or seabirds which get caught in fishing nets that fishers use for specific types of fish or shellfish; fishers conducting IUU activities make extensive use of fishing nets as a fishing technique, which are responsible for the bycatch phenomenon. Bycatch has a negative impact on bio-diversity and majorly increases the mortality of marine animals like turtles and sharks, which now are endangered species.

Furthermore, IUU fishing has an even higher negative environmental than legal, extensive fishing, as IUU vessels conduct fishing activities even in marine protected areas such as marine reserves, and this poses an even greater threat to endangered, threatened species or to vulnerable marine ecosystems (VME). By doing this, “IUU fishing undermines national and regional efforts to conserve and manage fish stocks and, as a consequence, inhibits progress towards achieving the goals of long-term sustainability”.¹¹

¹⁰ Organization for Economic Co-operation and Development, *Why fish piracy persists: the economics of illegal, unreported and unregulated fishing* (OECD, 2005), page 35

¹¹ Website FAO: <http://www.fao.org/fishery/iuu-fishing/en>

Chapter 2

The international legal framework

2.1. Introductory basis of marine protection and conservation and IUU fishing

“The dark oceans were the womb of life: from the protecting oceans life emerged”.¹² The words of Arvid Pardo, considered as one of the fathers of the law of the seas, tell us how essential the oceans are for humans and their existence, therefore it is straightforward to say that a healthy marine environment ensures a solid basis for life. “Hence rules of international law governing the oceans are of particular importance in the international community”.¹³

Marine living resources are crucial because they are an important source of sustenance for human beings and by far the main one for many coastal communities, therefore their exploitation and conservation is a major matter in the law of the sea.

Marine living resources though serve a dual interest: they are important for the entire world community but also for the pursue of national interests as they are important for the industries of countries. Therefore the conservation of the above said resources is a matter of humankind’s and national interests: “thus the rules of international law on this subject rest on the tension between the protection of community interests and the promotion of national interests.”¹⁴

Early codifications in international law of regulations regarding marine living resources focused on marine sovereignty of nations and the economic exploitation of marine resources rather than a sensible and sustainable use of them. “Rising awareness of the threat that overfishing poses to marine life did not become a focal point before the 1970s”,¹⁵ and became central to international law only with the 1982 United Nations Convention on the Law Of the Sea, (the UNCLOS II). The development of the concepts of sustainability of the marine environment thus the concepts of illegal, unreported and unregulated fishing, influenced progressively the codification of laws, treaties and regulations regarding fisheries management world-wide.

¹² United Nations General Assembly 22nd Session, First Committee, 1515th Meeting, A/C.1/PV.1515, 1 November 1967, p. 2, para. 7. ; in Tanaka, Y., “The international law of the sea”, 2012, Cambridge University Press

¹³ Tanaka, Y., “The international law of the sea”, 2012, Cambridge University Press, Preface – page XV

¹⁴ Tanaka, Y., “The international law of the sea”, 2012, Cambridge University Press, page 220

¹⁵ Nele Matz-Luck and Johannes Fuchs, “Marine Living resources”, in Rothwell, Oude Elferink, Scott and Stephens, *The Oxford handbook of THE LAW OF THE SEA* (2015, Oxford University Press), page 492

2.2. Evolution and nowadays framework of the international legal setting of Illegal, Unreported and Unregulated (IUU) fishing

The international law framework regarding the conservation of fisheries and illegal, unreported and unregulated fishing is made up of various instruments, which are treaties, conventions, regulations and agreements that regulate fishing activities and serve as tools when dealing with IUU fishing. This chapter will list and analyse the main ones.

2.2.1. The 1982 United Nations Convention on the Law Of the Sea

The first international treaty that has as its objective, among others, to regulate the exploitation of marine living resources and deals with their management, conservation and even provides for enforcement measures for infringements, is United Nations Convention on the Law of the Sea, signed in Montego Bay in 1982 (hereinafter ‘LOSC’).

Already for the Exclusive Economic Zone (hereafter EEZ) of coastal States the LOSC specifically provides for measures for the conservation and management of the living resources. Articles 61 and 62 deal with this, and, regarding the management of marine living resources, they specify that the coastal State has the duty to determine the total allowable catch for its living resources, and that it has to do it “taking into account the best scientific evidence available to it”,¹⁶ plus it has to use its living resources at an optimum level. As regarding the conservation of marine living resources, article 61 states that the reason behind determining the total allowable catch is also to preserve or even restore fish populations that are caught.

The LOSC goes even more into detail when dealing with the regulation of fishing activities within the EEZ, and differentiates its provision according to the type marine species, which have been divided into four categories: highly migratory species, marine mammals, anadromous species and catadromous species.

Another important provision in the LOSC, stated in article 62, is the duty of other States that have been granted access to the EEZ of a coastal State for fishing activities, to respect and obey the conservation measures taken by the coastal State, which practically means that other States have to respect the total allowable catch imposed by the coastal State.

For infringements of laws and regulations within another State’s EEZ, for example illegal fishing, the LOSC provides for the coastal State a series of enforcement measures and penalties such as inspections, arrests or detentions that it can apply to the foreign flag State vessel (art. 73).

¹⁶ United Nations Convention on the Law Of the Sea II (UNGA, 1982), Art. 61(2)

As for the EEZ, the LOSC has made provisions in order to regulate fishing activities on the high seas. According to LOSC article 87, vessels flying a flag from whatever state have the freedom of fishing on the high seas; however, the LOSC puts two main conditions for fishing. First, fishing activities must be done in a respectful way towards other States, meaning that vessels coming from one flag state must take into account the interests of other flag state vessels, thus they cannot abuse of high seas marine living resources and cannot prevent other vessels from conducting the same fishing activities in that area. Second, fishing activities are subject to section 2 of Part VII of the LOSC, which deals with the conservation and management of the living resources on the high seas.

According to section 2, coastal States do have the right to fish on the high seas, though they must conduct fishing activities in conformity, *inter alia*, of the norms and provisions laid out for the EEZ; this means that coastal States must take into account and comply with the different provisions that deal with the above cited four different categories of marine living species.

Furthermore, and very importantly, while the responsibility for the management and conservation of marine living resources in the EEZ are allocated to coastal States, on the high seas all the States share the responsibility, both at an individual and at a joint level. In fact, it is stated that it is a contracting party's duty to cooperate with other States when dealing with the conservation and management of marine living resources (art. 117). In this matter, the LOSC goes more into detail introducing the duty for States to create regional or sub-regional fisheries organizations, which have a management function, in order to be able to fully cooperate on the high seas (art. 118).

Regarding jurisdiction and responsibilities on the high seas, according to LOSC, "every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag".¹⁷ In addition, it is only the coastal State who has full jurisdiction over vessels flying its flag, and, except in exceptional circumstances, the flag State is the only one authorized to inspect a vessel.

The meaning and implications of management and conservation of marine living resources of the LOSC and its provisions have been deepened and increased by other posthumous agreements and regulations.

2.2.2. Sub-Regional Fisheries Commission 1985

The Sub-Regional Fisheries Commission (hereinafter SRFC) is a very important international institution as it is the first regional (or in this case sub-regional) fisheries management organization, as first mentioned by the LOSC, to be created.

¹⁷ United Nations Convention on the Law Of the Sea II (UNGA, 1982), Art.94 (1)

The SRFC's area of interest and jurisdiction is in the central-East Atlantic Ocean, and it is an organization that comprises Seven member states: Cape Verde, The Gambia, Mauritania, Guinea, Guinea-Bissau, Sierra Leone and Senegal. The SRFC Convention of 1985 establishes the organization's purposes and goals, and it is exclusively aimed at "the preservation, conservation and management of fishery resources".¹⁸ It does this by creating a system of governance that is sustainable for the management of marine living resources, and through various actions such as conducting monitoring, control and surveillance activities in the waters in which it has jurisdiction, and give support in the legal, institutional and operational field against illegal, unreported and unregulated fishing.

2.2.3. FAO Agreement To Promote Compliance With International Conservation and Management Measures by Fishing Vessels on The high Seas of 1993

After the LOSC, there followed a numerous different treaties regarding the conservation of marine living resources and specifically regarding fishing activity. The first one after LOSC has been the FAO International Agreement To Promote Compliance With International Conservation and Management Measures by Fishing Vessels on The High Seas of 1993, (hereinafter Compliance Agreement). This Agreement is legally binding, and it came into force in 2003. The Compliance Agreement was made for high seas fishing activities, placing its focus on flag state responsibility and international cooperation, and is an attempt to strengthen them.

For the conformity and respect of the Compliance Agreement, being an FAO instrument, the latter entrusts FAO with the leadership of the international coordination. However, some roles are also assigned to Regional Fisheries Management Organizations.

With respect to UNCLOS, the Compliance Agreement lays out the flag States' responsibility in more depth. "The failure to exercise flag State responsibility is a major cause of IUU fishing, and the Compliance Agreement has extensive provisions relating to this".¹⁹ Concerning this matter, article III of the Agreement refines it. First of all, it states that the flag State is responsible of making sure that every fishing vessel flying its flag is appropriately registered and can be readily identified (para. 6). Secondly, no party shall allow vessels to engage in fishing activities without authorization (para. 2) and most importantly no party shall give authorization to vessels unless it is able to effectively exercise its responsibilities under the agreement (para. 3).

One of the main standpoints of the Compliance Agreement is stated in paragraph 1 of Art. III, which states that "each party shall take whatever necessary measures to ensure that fishing vessels flying its flag

¹⁸ Agreement Establishing a Sub Regional Fisheries Commission (Permanent Secretariat of the SRFC, 1985), Art. 5

¹⁹ Swan, J., *Decision-making in Regional Fishery Bodies or Arrangements: the evolving role of RFBs and international agreement on decision-making processes*. FAO Fisheries Circular. No. 995. Rome, (FAO, 2004) available at: <http://www.fao.org/docrep/006/y5357e/y5357e00.htm>

does not engage in any activity that undermines the effectiveness of international conservation and management measures”.²⁰

Furthermore in art. III, the Compliance Agreement tackles the problem of flags of convenience by stating that contracting parties cannot authorize to fish on the high seas vessels that were previously registered in another state and that have undermined the effectiveness of international conservation and management measures (para. 5(a)).

Lastly, contracting parties are compelled to take enforcement measures against vessels flying their flag that breaches the provisions of this agreement, and they are authorized to sanction these vessels (para. 8).

As regarding cooperation among states and between states and international or regional organization, provisions are refined in arts. V-VII; the objective is to create a global management operation on the high seas, thus implicitly stating that the oceans are everyone’s duty. Art. V affirms that states have to cooperate in order to comply with and enact what is said in the Agreement, including in particular the “exchange information, including evidentiary material, relating to activities of fishing vessels in order 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”.²¹ Furthermore, States may independently cooperate with one another, and are able to make arrangements concerning port State measures for purposes of investigation of the other State’s(s’) fishing vessels that are suspected of having engaged in fishing activities that again compromise the ‘effectiveness of international conservation and management measures’.

Being, according to this Agreement, the FAO the main international co-ordinator, art. VI affirms that every state, for the sake of cooperation in information exchange, must make ‘readily available’ to FAO in-detail information on their flag state’s fishing vessels that are entitled and authorized to fish on the high seas. In order to pursue this purpose, art. IV states that each contracting party may take whatever necessary measures for registering all vessels fishing on the high seas.

Art. VII obliges states to cooperate with developing countries so that the latter are able to fulfil what is required from them from this treaty, and it opens to regional fisheries management organizations in order to do this.

2.2.4. The United Nations 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

The United Nations Agreement For The Implementation Of The Provisions Of The United Nations

²⁰ FAO Agreement To Promote Compliance With International Conservation and Management Measures by Fishing Vessels on The high Seas of (FAO, 1993), Art. III (1a)

²¹ Ibid. Art. V (1)

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 (hereinafter Fish Stocks Agreement) drafted in 1995 is an international agreement made under the United Nations framework, and it entered into force in 2001.

The Fish Stocks Agreement is an international instrument made for the conservation and management of marine living resources, focusing on straddling and highly migratory fish stocks on the high seas, and it comes up with “an implementation regime for the LOSC Convention with regard to straddling and highly migratory fish stocks and a framework for international co-operation in the conservation and management of those fish stocks”.²²

This agreement is very significant because attributes to regional or sub-regional fisheries management organizations a great importance and gives them a leading role in the coordination for the cooperation for the international conservation and management schemes, in this case for straddling and highly migratory species. Even, the Fish Stocks Agreement affirms that, in order to properly cooperate, States have to adhere completely either to the conservation and management schemes made by the regional organizations or directly become members of one of it (art. 8(3)). Plus, only member States of the regional organizations or adherents to their schemes can have access to fishery resources (art. 8(4)). Furthermore, it is declared that through and within regional or sub-regional organizations, States have to establish monitoring, control, surveillance and enforcement programmes (art. 10).

As regards the responsibility of the flag States, the Fish Stocks Agreement reaffirms what was previously established in the Compliance Agreement, though it has a few updates. First, it gives more rights to coastal States in order to react to fishing activities conducted outside the EEZ that are unauthorized. Second, contracting parties now have a larger play in the surveillance, controlling and monitoring activities of fishing vessels on the high seas flying their flag in order to enforce the management and conservation of international measures (art. 18(3)). Furthermore, the Fish Stocks Agreement states that authorized inspectors from member States are allowed to make on board inspection of fishing vessels flying another party State’s flag in order to verify compliance with national and sub-regional or regional conservation and management schemes (art. 21).

The Fish Stocks Agreement introduces the measures made by the port State against fishing vessels that are not in compliance with the conservation and management measures of the regional area. In particular, a port State may inspect vessels and examining gears and documents; plus, it can prohibit, through the relevant port authorities, the landing, selling and transshipment of all the vessel’s catches where it has been found that the latter has performed fishing activities that have compromised and gone against management and conservation measures of the regional high seas area (art. 23).

²² Organization for Economic Co-operation and Development, *Why fish piracy persists: the economics of illegal, unreported and unregulated fishing* (OECD, 2005), page 111

2.2.5. The FAO International Plan of Action to Prevent, Deter, Eliminate IUU Fishing of 2001

The UN FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter IPOA-IUU) of 2001 is an international agreement made under the FAO framework, and “serves as an example of a non-binding instrument that gives guidance on the implementation of LOSC and FSA”.²³ It is a non-binding, voluntary instrument and it derives from the FAO Code of Conduct for Responsible Fisheries of 1995. It has the specific objective to combat and contrast IUU fishing; being voluntary its implementation by States is then made through National Plans of Action, which were agreed to be made by 2004. In order to achieve its purpose, the IPOA-IUU provides for a set of clear measures, which are the provisions themselves, that States can choose to adopt. The IPOA-IUU provides for provisions relating to the responsibilities of all states and of flag States, to coastal and port State measures, to market related measures and to RFMOs.

As for the first responsibility of all States, the IPOA-IUU first of all encourages all States to ratify the LOSC, the FAO Compliance Agreement and the UN Fish Stocks Agreement, and declares that States who have not ratified the above said international instruments should behave in accordance with them (para. 11). It then affirms that every State has the responsibility to take measures *per se* or collaborate with RFMOs in order to ensure that vessels flying their flag do not engage or support in IUU activities (para. 18). Plus, it even demands States to “discourage their nationals from flagging fishing vessels under the jurisdiction of a State that does not meet its flag State responsibilities”;²⁴ this provision goes directly to counteract the ‘flags of convenience’ phenomenon.

Another responsibility attributed to all States, which is also a novelty under international law, is that States have to refrain from giving economic aid such as subsidies to vessels, companies or even persons that are engaged in IUU fishing activities (para. 23).

Regarding flag state responsibilities and procedures linked to fishing vessels such as their registration and authorization, the IPOA-IUU is consistent with the FAO Compliance Agreement and the UN Fish Stocks Agreement. However it presents some novelties, in particular, against the flags of convenience phenomenon, the IPOA-IUU affirms that Flag States should deter fishing vessels from changing their flying flag in order to be able to not comply with management or conservation measures (para. 38). Furthermore, the IPOA-IUU imposes flag States a precise checklist to be made when dealing with transshipment of catches made by vessels flying their flag; this checklist is to report at a national institutional level or at a regional international level and comprehends, *inter alia*, the date and location of

²³ Nele Matz-Luck and Johannes Fuchs, “Marine Living resources”, in Rothwell, Oude Elferink, Scott and Stephens, *The Oxford handbook of THE LAW OF THE SEA* (2015, Oxford University Press), page 505

²⁴ FAO International Plan of Action to Prevent, Deter, Eliminate IUU Fishing (FAO, 2001), para. 19

the transshipment, the weight by species caught and in-detail information about the fishing vessel (para. 49).

Concerning coastal State measures, the IPOA-IUU encourages the former to adopt a series of measures in order to prevent, deter and eliminate IUU fishing in their waters of jurisdiction. In particular, some of these measures are the cooperation and information exchange with RFMOs or other States and the avoidance of licensing fishing vessels to fish in its seas if it had previously been involved in IUU fishing (para. 51).

As regards port State measures, the IPOA-IUU strengthens what was already asserted in the UN Fish Stocks Agreement. In particular, it affirms that, prior to the access to the port, the vessels must be required by the port State to provide advance notice of their port access, and a series of detailed information for the port State to determine whether or not the fishing vessel might have been involved in IUU fishing activities (para. 55). Furthermore, the IPOA-IUU wants to strengthen the cooperation of States regarding port State measures, and requires States to cooperate among them, within the relevant RFMOs, and develop a uniformed programme of measures for port State control of fishing vessels and action against them in case they are guilty of IUU fishing activities (para. 62).

A complete novelty of the IPOA-IUU is the introduction of internationally agreed market-related measures against IUU fishing. Within this section, it has been affirmed that States have to impede with all means necessary the trade or import of fish that have been caught by vessels engaged in IUU fishing (para. 66). Plus, regarding specific species that are over exploited such as highly valued species, States are asked to enact specific measures to extinguish economic incentives for vessels engaged in IUU fishing for those species (para. 70). Furthermore, States are asked to improve the transparency of the fish market, in order to, *inter alia*, increase the traceability of fish and their product derivatives (para. 71). Ultimately, the Plan of Action wants to actively discredit and discourage IUU fishing, thus States are required to take measures to make sure that all actors involved in the fisheries market and its trade are aware of the “detrimental effects of doing business with vessels identified as engaged in IUU fishing”.²⁵

The IPOA-IUU reaffirms the obligations that States have to cooperate with regional or sub-regional fisheries management organization, and has a full section for provisions regarding them. On this topic, the IPOA-IUU is consistent with the FAO Compliance Agreement and the UN Fish Stocks Agreement, though it goes further into detail and has some updates. It asserts that States have to establish regional organizations where none currently exist (para. 78), and reiterates the fact that non-member States have to ensure both compliance with RFMOs’ measures and that their flag state vessels do not undermine such measures (para. 79). Furthermore, the IPOA-IUU strongly encourages adherent parties to RFMOs to strengthen their means of combating IUU fishing and even to develop new innovative ways to facilitate

²⁵ FAO International Plan of Action to Prevent, Deter, Eliminate IUU Fishing (FAO, 2001), para. 73

the purpose of this Plan of Action; such ways are public awareness and observer programmes and the development of their own plans of action (para. 80).

Other novelties are the creation of objectives of institutional and policy strengthening within RFMOs (para. 82), the encouragement by member states of RMFOs to non-member States in order to join RFMOs (para. 83) and the adoption of appropriate measures at the Organization level where a member State of an RFMO fails to ensure that fishing vessels flying its flag are not engaged in IUU fishing (para. 84).

2.2.6. EU Council Regulation 1005/2008 & EU Common Fisheries Policy 2013

Against illegal, unreported and unregulated fishing, the European Union as well has made its move. In 2008 the EU Council adopted a regulation, *No. 1005/2008*, which creates a common system at an EU level made for preventing, deterring and eliminating IUU fishing (hereinafter EC Regulation); it entered into force in 2010. This regulation is inspired by the IPOA-IUU, and is in line with its provisions.

The EC Regulation straight away gives a definition of what being engaged in IUU means by stating the precise actions that make a vessel guilty of being involved in IUU fishing; these include the use of non-compliant or prohibited gear, being a stateless vessel and fishing protected species, in closed areas, or without authorization and licence (art. 3).

In respect to the IPOA-IUU there are some novelties, and there are some the latter's measures that have been strengthened.

The EC Regulation states that no access to member States' ports can be granted to fishing vessels if they do not meet the requirements set down by the regulation, and that transshipment made at sea between third country vessels and member state vessels is prohibited: they can only be made on land in ports (art. 4). Furthermore, it affirms that States must guarantee a certain number of inspections of fishing vessels per year, and some categories of fishing vessels are to be always inspected; during vessels inspections, officials are authorized to conduct a very detailed inspection, and are authorized to examine every single part of the vessels (arts. 7,10).

The EC Regulation introduces the coding of the need of catch certificates. It asserts that, since the importation or transshipment within the EU of fish caught in an IUU manner is banned, in order to have a full knowledge of the fish imported, member States can only import fish having a catch certificate, which has to be in conformity with the regulation (art. 12).

Furthermore, in regards of catch certificates, the EC Regulation states that, in order for them to be accepted, they have to have a 'reference' from the flag State of the vessel of provenience, and this reference must assert the full validity of the catch certificate; plus, the Commission will cooperate with third countries in matter of administration and implementation of the provisions of catch certificates made

in the EC Regulation (art. 20).

Regarding the identification of IUU-engaged fishing vessels and possible suspects, the EC Regulation follows the path of the IIPOA-IUU. However, it introduces a “Community Alert System”, which is the creation of a mechanism that alerts all member States of a well-founded reason to believe an engagement in IUU and non compliance to regional conservation and management schemes by third-country vessels (art 23), and, following the communication received, member States can take measures to carry out a verification of their own of the third-country fishing vessels and their products and even identify previous transshipment or exports made by those third-country fishing vessels (art. 24). In this regard, another novelty made by the EC Regulation is the establishment of a “Community IUU vessel list”, which is a full and in-detailed list of third country fishing vessels engaged in IUU fishing and whose flag States failed to give evidence of the innocence of the fishing vessel (art. 27). Furthermore, the Regulation states that within the list, RFMOs’ lists of IUU fishing vessels have to be included and update every year (art. 30), therefore ensuring a further cooperation with international efforts made by regional management organizations.

The EC Regulation also introduces the concept of ‘emergency measures’, in which, whenever a third country is found to be acting in contravention of the conservation and management schemes, the European Commission can adopt emergency measures as a counter-action, and these measures may include the complete ban from access to member States’ ports for vessels of the guilty third country and the prohibition for member States’ vessels to fish in that third country’s waters (art. 36).

Finally, the EC Regulation has very specific and harder enforcement measures and sanctions in respect to its predecessor treaties and agreements on this matter. It identifies and describes the concept of ‘serious infringements’, and has specific hard measures for enforcement against them. When a fishing vessel or a natural person is suspected or caught while engaged in IUU fishing, there are precise enforcement measures that authorities have to follow, and these include the re-routing to port of the fishing vessel, the impound of all gears and the suspension of the fishing licence (art. 43). Plus, concerning sanctions, these too are more dissuasive than previous ones, and they include administrative sanctions of up to a minimum of eight times the value of the fishery products obtained, and even the use of criminal sanctions (art. 44).

The EU Common Fisheries Policy, revised in 2013, is an important regulation within the European Union framework to be mentioned and linked to the EC Regulation, as it recalls and makes reference to the latter regulation in its section dedicated to the fight against IUU fishing, for example when talking of ‘serious infringements’ the EU CFP means the actions listed by the EC regulation (art. 4(31)). Plus, on the whole, it makes principles regarding the conservation and management of fisheries resources and the sustainable exploitation of marine resources a general policy to be followed by the European Union as a whole.

2.2.7. FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing of 2009

Starting from the UN Fish Stocks Agreement, the reliance on port-States and measures taken by them as a means to counteract IUU fishing activities has increased a lot, and the main reason is because it has found to be efficient. The FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter FAO Port State Agreement) of 2009 is a binding agreement made within the UN FAO framework and it entered into force in June 2016. It is specifically made to further regulate and increase the strength, area of action and efficacy of port States as a means to combat IUU fishing. Infact, in its preamble the FAO Port State Agreement states that there is a need for “increasing coordination at the regional and interregional levels to combat IUU fishing through port State measures”,²⁶ since contracting parties recognize that “port State measures provide a powerful and cost-effective means of preventing, deterring and eliminating IUU fishing”.²⁷

Regarding port entry, the FAO Port State Agreement affirms that parties must request detailed information regarding the fishing vessel from the latter prior to its entry into port, and only if all information leads to no suspects of engagement in IUU fishing and if, independently from the information received, the port State does not suspect the fishing vessel of being engaged in IUU, the latter can enter the port (arts. 8,9).

Concerning the use of ports by fishing vessels, the FAO Port State Agreement states that contracting Parties are allowed to deny any landing, transshipping, and even packaging and processing of fish products by fishing vessels whenever the latter does not have a valid fishing authorization, caught the fish in contravention of whatever applicable law and of course whenever it is suspected of being involved in IUU fishing (art. 11).

The FAO Port State Agreement goes into detail when it comes to inspections and follow-up actions, and has a section on it. In this section, it is stated that Parties have to inspect a minimum amount of vessels per year and they have to collaboratively determine the minimum requirements in order to initiate an inspection, and priority must be given to vessels that follow in particular categories such as vessels suspected of being engaged in IUU fishing and vessels for which there is a request of inspection from an RFMO (art. 12). Moreover, in case of inspection, inspectors have to, *inter alia*, examine all areas of the vessels that are of relevance, all fishing equipment and all relevant documents, and the master of the vessel has to give all the necessary assistance to the inspectors (art. 13). After an inspection, where there is enough evidence to suspect the fishing vessel of being involved in IUU fishing, the port State will have to not only deny the former the landing, transshipping, packaging and processing of fish products, but also deny its refuelling, resupply and maintenance operations (art 18). Plus, in this section it is stated that Parties have to ensure a proper training of inspectors in order to correctly fulfil their role (art. 17).

²⁶ FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing (FAO, 2009), Preamble

²⁷ Ibid, Preamble

Finally, in the FAO Port State Agreement, there is a provision both for developing States and the role of flag States. Concerning the role of latter, the agreement provides that every flag State must ensure that its fishing vessels cooperate with port States and their inspections; when it believes that one of its fishing vessels has been engaged in IUU fishing, it must request the port State in which the vessel wants to enter to inspect it (art. 20).

As for developing States, the agreement requires from contracting Parties that they give their help to developing countries in order for the latter to, *inter alia*, improve their ability to implement port State measures, and it requires Parties to cooperate to create funding mechanisms to give financial aid to developing countries in order for them to be able to effectively implement the agreement (art. 21).

2.2.8. MCA Convention (within the Sub-Regional Fisheries Commission) 2012

Of particular importance regarding the SRFC is the convention that the latter organization has set up and ratified, which is the Minimal Conditions for Access and Exploitation of Marine Resources convention (hereinafter MCA convention), within the maritime boundaries of the sub-region. The establishment of this convention is important because it deals directly with fisheries management and one of its major aims is establishing a better exploitation mechanism of fisheries resources. The revised version of the MCA convention, dated 2012, takes into account all the previously-agreed treaties made by the international community, which were made after its original ratification in 1993.

The MCA Convention reaffirms the LOSC principle that a non-member state may be authorized by a member state of the SRFC to authorize fishing activities within its territory, though the non-member state vessel must land all of its catch in a member State's port (art. 4(1)). The Convention establishes strict rules as for the issuance of fishing licences to vessels, plus it sets out very precise rules regarding the management of fisheries, in particular the fact that member States when authorizing vessels to fish they must consider a broad list of conservation and management policies and measures relating to various aspects such as the regulations of fishing areas and periods, and the protection of endangered species (art. 9(1)).

The MCA Convention is a very relevant international instrument when dealing with IUU fishing, and it contains an entire section dedicated to the fight against IUU fishing. Within this section, it is stated that member States have to be fully engaged to actively prevent, deter and eliminate IUU fishing, with all due measures (art. 25(1)). This is to be done not only individually but at an international co-operative level, by working together (between member States) in order to, for instance, conduct joint surveillance operations and create and a programme for the training of agents (art. 25(3)). Furthermore, concerning the fight against IUU fishing, the MCA Convention places great importance to ports and port-state measures. In particular in this regard, member states have to identify and choose ports that are able both to receive

non-member state fishing vessels and to enact inspections and control procedures of all the landings and catches (art. 26). Plus, and very importantly, the convention affirms that fishing vessels suspected or found to be engaged in IUU fishing are to be denied the shipment and landing of catches and even the entry into member States' ports (art. 29).

Of particular importance of the MCA Convention is that it allows “the SRFC permanent secretary to bring a given legal matter before the International Tribunal for the Law Of the Seas for advisory opinion”.²⁸ This is central for the purpose of this thesis as it is the permanent secretary of the SRFC that has activated the International Tribunal for the Law Of the Sea by requesting an advisory opinion from it, which will be discussed in the following chapter.

²⁸ Convention On The Determination Of The Minimal Conditions For Access And Exploitation Of Marine Resources Within The Maritime Areas Under Jurisdiction Of The Member States Of The Sub-Regional Fisheries Commission (SRFC) (Permanent Secretariat SRFC, 2012), Art. 33

Chapter 3

The ITLOS and the advisory opinion n°21/15

3.1. The International Tribunal for the Law Of the Sea

In the LOSC, there was established an international tribunal that would have dealt exclusively with the settlement of disputes regarding the law of the seas; this was the International Tribunal for the Law Of the Sea (hereinafter ITLOS). Art. 287(1) of the LOSC provides that the ITLOS is one of the main choices of proceedings through which undergo in case of settlement of disputes between States.

The ITLOS is a permanent judicial body instituted in accordance with Annex VI of the LOSC, which is the ITLOS statute in which all of its structure and functions are described. The ITLOS is based in Hamburg, Germany, though it can exercise its functions anywhere else it thinks appropriate (art. 1). Its body is composed of 21 members, who are independent, and they are elected from people “enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea”;²⁹ the members are elected by secret ballot and their term of office is of nine years, with the possibility of being re-elected (arts. 4(4) & 5(1)). The tribunal is open to any State party to the LOSC convention, and it is also open to other entities such as International Organizations and RFMOs (art. 20). The jurisdiction of ITLOS concerns all matters and disputes regarding the application or the interpretation of the LOSC or any other international agreement that relates to it, and it also concerns all matters and disputes regarding the application or the interpretation of treaties or agreements that confer jurisdiction on the tribunal (art. 21).

Among its judiciary functions, the ITLOS has an advisory function as well. According to article 138 of the Rules of The Tribunal, it can give an advisory opinion on any legal question regarding the law of the sea, either stated in the LOSC or in any other international agreement that provides for the submission of a request for an advisory opinion to the tribunal, and has to be transmitted by the appropriate authorized body.

²⁹ Statute Of The International Tribunal For The Law Of The Sea, Annex VI UNCLOS II 1982 (UNGA, 1982), Art. 2(1)

3.2. The request for an advisory opinion

In March 2013, the permanent secretariat of the SRFC, on behalf of the SRFC and pursuant to its legal capabilities and functions stated in the 1985 SRFC convention and the 1993 MCA Convention revised in 2012, has issued to the ITLOS a request for an advisory opinion regarding the legal stand-point (i.e. jurisdiction, empowerments etc.) of the SRFC regarding IUU fishing.

The reason why the SRFC sent to the ITLOS a request for an advisory opinion is to know precisely what are their up-to-date rights and obligations in this field. The questions that the SRFC raised in its request to the ITLOS were the following:

1. “What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone (EEZ) of third party States?”
2. To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag?
3. Where a fishing licence is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?
4. What are the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest, especially the small pelagic species and tuna?”³⁰

Where question 2 makes reference to fishing vessels on the high seas and where question 3 raises the doubt for the responsibility of an infringement of a coastal State’s fisheries legislation by a fishing vessel whose flag State is party to an international agency along with the coastal State.

The request for an advisory opinion made by the SRFC is aimed at “supporting the SRFC Member States to enable them to derive the greatest benefit from the effective implementation of the relevant international legal instruments and at ensuring that the challenges they are facing from IUU fishing are better met”.³¹

The SRFC request for an advisory opinion was a symptom of the fact that the whole international community had concerns regarding the precise and practical rights and obligations regarding flag State and port or coastal State control. In fact, following the SRFC, other twenty-two States parties to the LOSC submitted written statements to the ITLOS for an advisory opinion, including the United States (as a party to the UN Fish Stocks Agreement), the European Union (as a party to the LOSC) and other International Organizations such as the UN and the FAO.

³⁰ Request For An Advisory Opinion To the International Tribunal For The Law Of The Sea – ITLOS: Written Statement (2013, Permanent Secretariat SRFC)

³¹ Convention On The Determination Of The Minimal Conditions For Access And Exploitation Of Marine Resources Within The Maritime Areas Under Jurisdiction Of The Member States Of The SRFC (MCA Convention) – Technical Note (Permanent Secretariat SRFC, 2013), Ch. V

3.3. The advisory opinion n°21/15

Following all of the requests for an advisory opinion of both RFMOs and States parties to the UNCLOS, the ITLOS, after having unanimously decided that it had the appropriate jurisdiction to give an advisory opinion and having declared that the requisites for issuing an advisory opinion stated in art. 138 of the Rules of the Tribunal were met, it has decided to reply to the request made by the SRFC and has issued in April 2015 an advisory opinion (n° 21/2015) regarding illegal, unreported and unregulated fishing activities.

3.3.1. Description and provisions

Concerning the first question on the flag State obligations whenever IUU fishing activities are conducted in the EEZ of third party States, the ITLOS has made various statements. First of all it clarifies that the answer it gives are to be intended specifically for the EEZ of SRFC members and not for the whole international community (paras 87, 89).

Second, the tribunal stated that, within the EEZ, the responsibility for the management and conservation of marine living resources falls on the coastal State, which has to adopt laws, regulations and enforcement procedures in order to fulfil the above said obligation (para. 104). Furthermore the tribunal affirms that it is also responsibility of the coastal State to take necessary measures to prevent, deter and eliminate IUU fishing within its EEZ (para. 106).

Third, the ITLOS asserted that it is flag States' responsibility "to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities".³²

Lastly, the tribunal affirms that flag States who are third party States to the SRFC and to the MCA Convention have a "due diligence" obligation, as opposed to an obligation "of result", this meaning that the flag States are not obliged to ensure that their fishing vessels comply with SRFC conservation and management schemes, but they are obliged to put their maximum effort in order to be actively preventing IUU fishing ships of flying their flag (para. 129).

Regarding the second question on the extent of the liability of third party States for the engagement in IUU fishing by vessels flying their flag, the ITLOS has made two main points, which are stated in paragraph 146.

The first point made is that, on the basis of the Articles on the Responsibility of States for Internationally Wrongful Acts, a failure to comply with laws and norms of the SRFC in the EEZ of its member States regarding IUU fishing activities by fishing vessels is not ascribable to their flag States; therefore flag

³² International Tribunal For The Law Of The Sea Advisory Opinion n°21/2015 (2015, ITLOS), para. 124

States are not liable and responsible for fishing vessels flying their flag who engage in IUU fishing within the EEZ of SRFC member States (para. 146).

The second point made is that flag States are though liable and responsible if they do not comply and meet its obligations of “due diligence” concerning their efforts, with all necessary measures, to prevent IUU fishing vessels to fly their flag (para. 146). Plus, the liability of a flag State is not dependant of whether the failure to meet its “due diligence” obligation has happened on a frequent basis or is just an isolated episode: whatever the frequency, a flag State is always in breach and therefore liable (para. 150).

Concerning the third question on the liability of the flag State or of the international agency for an infringement of a coastal State’s fisheries legislation by a fishing vessel whose flag State is party to an international agency, the ITLOS has made a statement following some important passages. First it observed that its jurisdiction for this case is limited to the EEZ of member States of the SRFC, and that therefore the extent of this argument is confined to international organizations and flag States that have made an agreement with States party to the MCA Convention for accessing fishing resources in their EEZ (para. 154). The tribunal then pointed out that only the EU has concluded agreements with the SRFC members States, and thus it is the only liable international organization (para. 167). Furthermore, the tribunal stated that “the liability of an international organization for an internationally wrongful act is linked to its competence”,³³ and in this case, since the EU has exclusive competence of fisheries access agreements, it is the EU as an international organization that “may be held liable if a member State fails to comply with such obligation and the organization did not meet its obligation of “due diligence”.³⁴ The Tribunal asserted that, in general, an international organization is liable and responsible for this question’s case only if in the relevant fisheries access agreement there are provisions concerning the responsibility for such violation, otherwise the general rules of international laws would have to be applied (para. 170). The Tribunal finally stated that, regarding the SRFC, where an international organization makes an agreement for the access to fishing resources with and within the SRFC and is exercising exclusive competences, the international organization will automatically become bound to the single flag State’s obligations, and it has to ensure that its member States’ fishing vessels do not engage in IUU fishing activities in the EEZ of the coastal State, and ensure compliance with its fisheries regulations (para. 172). Furthermore, the Tribunal added that, consequently, “only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States”.³⁵

As regards the fourth question on the rights and obligations of the coastal State for ensuring the sustainable management of fishing stocks that are shared or of common interest (especially small pelagic species and tuna), the ITLOS has answered the following. Since it was a broad question, the ITLOS first

³³ International Tribunal For The Law Of The Sea Advisory Opinion n°21/2015 (2015, ITLOS), para. 168

³⁴ Ibid. para. 168

³⁵ Ibid. para. 173

laid down its understanding of the principle of sustainable management, which are embedded in the LOSC, and asserted that “the ultimate goal of sustainable management of fish stocks is to conserve and develop them as a viable and sustainable resource”,³⁶ therefore interpreting it as meaning “conservation and development” (para. 191). Then, the Tribunal stated the rights and obligations that that SRFC member States as coastal States have in ensuring the conservation and management of shared stocks, which are enshrined in the LOSC. These are: the right and obligations to seek to cooperate directly or through RFMOs in order to take the necessary agreed measures for the above said scope, and, regarding highly migratory species, to do the same in order to, *inter alia*, reach the objective of optimum utilization of such species.³⁷ Concerning tuna species, the rights and obligations are the same, though the Tribunal added that the SRFC member States must take measures for the conservation and optimum utilization of them which are consistent and compatible with the ones that have been adopted by the regional organization of competence, and must be extended beyond their respective EEZs (para. 207(iii)). Furthermore, the ITLOS stated that the management and conservation measures have to be “based on the best scientific evidence available to the SRFC Member States and, when such evidence is insufficient, they must apply the precautionary approach”.³⁸

3.3.2. An analysis of the advisory opinion

One of the first issues to point out is that the request for an advisory opinion is a proof of the fact that international law regulating IUU fishing is not without unclear elements and uncertainties. This is proven most importantly by the fact that a request for an advisory opinion has not been issued only by the SRFC but also by many other member of the international community, from States to international organizations.

The advisory opinion is of interest from a dual point of view; first, from a procedural point of view and secondly from a substantial point of view.

It is of great interest from a procedural point of view as it is the first advisory opinion to be made because it was activated by Art. 38 of the Tribunal’s Rules, which states that the Tribunal has an advisory function as well, therefore legitimizing it. Plus, it is the first time that the ITLOS worked on this opinion as a full court, since usually it was the Seabed authority chamber that dealt with advisory opinions. Ultimately, the fact that the ITLOS has welcomed the requests for an advisory opinion even by States not party to the LOSC, such as the USA, has confirmed the pivotal role of the ITLOS in all matters of the law of the sea even outside and exceeding the limits of the LOSC.

³⁶ Ibid. para. 190

³⁷ See Articles 61(2), 61(3) and 64(1) of the LOSC

³⁸ International Tribunal For The Law Of The Sea Advisory Opinion n°21/2015 (2015, ITLOS), para. 208(ii)

From a substantial and thus practical point of view, the advisory opinion presents various characteristics that are of interest in order to make an analysis on it.

The ITLOS, in conformity with the LOSC, regarding the first two questions, attributes to coastal States the primary responsibility for the management and conservation of the marine living resources in their waters of jurisdiction (up to the EEZ); plus, they have the duty to adopt norms and regulations for fishing and access to fisheries resources by third States' fishing vessels, in order to comply with their obligation of management and conservation of their marine living resources in their waters.

Conversely, the ITLOS confers to flag States the obligation of "due diligence", meaning that they have the responsibility to ascertain that fishing vessels flying their flag do not engage in IUU fishing activities or simply do not respect conservation and management schemes of third State's jurisdictional waters. This means that while coastal States have an obligation of result, i.e. a result of having a well-updated system of norms, regulations and enforcement procedures, flag States have an obligation of ascertaining the legality of the behaviour of their fishing vessels.

In my opinion, there are a few negative sides linked to this distinction. On the one side coastal States are *de facto* responsible for their actions if not done in conformity of international law concepts of sustainable fisheries and the conservation and management of fisheries, and therefore being obliged to be actively working for the implementation and creation of conservation, management and enforcement schemes and procedures.

On the other hand flag States, however, are just under a "due diligence" obligation; even if the taking into account by the Tribunal of the obligations of "due diligence" "reinforces previous international case law (the Pulp Mills case in Argentina v. Uruguay)",³⁹ it does not sufficiently reinforce the previous laws and regulations coded under international law that deal with flag State responsibility, which are already not so clear since members of the international community have appealed to the ITLOS in order to better clarify them. The Tribunal has though given a wide interpretation of the meaning of "due diligence" and listed a number of measures that a flag State should adopt in order to follow this type of obligation (e.g. art. 94 of the LOSC); however, it also defines the term "due diligence" a "variable concept"⁴⁰ meaning that it is a notion that may change in time: measures that are nowadays considered as being of due diligence may not be anymore so in the future, for example in the light of new scientific or technological discoveries.⁴¹ Though this therefore means that the Tribunal itself is implicitly attributing to the advisory opinion a temporary and not final and complete answer on the matter, which leaves us with uncertainties pending.

³⁹ Feitosa Ventura V. A. M., *Tackling Illegal, Unregulated and Unreported Fishing: The ITLOS Advisory Opinion on Flag State Responsibility for IUU Fishing and the Principle of Due Diligence* (Revista de Direito Internacional, Brasilia, vol. 12, n. 1, 2015)

⁴⁰ International Tribunal For The Law Of The Sea Advisory Opinion n°21/2015 (2015, ITLOS), para. 132

⁴¹ Nicchia, G., Pesca illegale, non dichiarata e non regolamentata (INN): considerazioni a margine del parere consultivo n°21 ITLOS, in Del Vecchio A. and Marrella F. (a cura di) *International law and maritime governance : current issues and challenges for regional economic integration organizations : proceedings of the fifth ordinary Conference of the International association for the law of the sea* (Editoriale Scientifica, 2016), page 70

The ITLOS confirms that the violation of an obligation of “due diligence” is an unlawful act when it is provable that the engagement in IUU fishing activities by fishing vessels is the result of a lack of effort and action by the flag States; however in my opinion this is a volatile and not precise statement as it may be very difficult to determine the actual effort that a flag State has put in in order to prevent one of its vessels to engage in IUU fishing and breach international conservation and management norms and regulations. As a prove to the fact that there is no precise statement on this topic, it is to be recalled that the Tribunal itself has underlined the fact that since there are no specific provisions on flag State responsibility in both the LOSC and the MCA Convention, the matter falls on the norms of general international law.

Ultimately on these first two questions, “the ITLOS essentially denied to stipulate any concrete “measure” that flag states are obliged to undertake in fulfilling the “due diligence” principle, and this could theoretically shield flag states against compensation claims”⁴² wherever they would have to prove their efforts putted for the prevention of flagging vessels engaged in IUU fishing under their flag. It follows that coastal States may have been sceptical in the acknowledgment of the opinion, as they might have been waiting for more precise clarifications on the role of flag States in terms of their responsibilities.

Concerning question three of the request for an advisory opinion, which is on the role of international agencies, the ITLOS underlines that this matter exclusively involves the international organizations to which their members States have delegated full powers, i.e. those international organizations that have exclusive competences on this matter;⁴³ in practical terms this means the European Union only, as it is the only international organization that has exclusive competences in the field of agreements with third States for access to fisheries resources and that is a contracting party of the LOSC. In particular, the European Union has exclusive competences in matters of conservation and management of fisheries resources, thus it is its duty to make agreements with other States for this matter; member States though still exercise jurisdiction on their flag State vessels, in particular regarding sanctions and enforcement procedures.⁴⁴ In such contest, whenever the European Union (in this case) signs an agreement with the SRFC or one of its member States, in this case, regarding access to fisheries resources, “the obligations of the flag State become the obligations of the international organization”,⁴⁵ thus it is the European Union that may be held liable for a breach of the obligations required a fishing vessel of one of its member States. It follows

⁴² Feitosa Ventura V. A. M., *Tackling Illegal, Unregulated and Unreported Fishing: The ITLOS Advisory Opinion on Flag State Responsibility for IUU Fishing and the Principle of Due Diligence* (Revista de Direito Internacional, Brasilia, vol. 12, n. 1, 2015)

⁴³ See Arts. 305(1) and 306 of the LOSC (United Nations Convention on the Law Of the Sea II of 1982)

⁴⁴ Nicchia, G., *Pesca illegale, non dichiarata e non regolamentata (INN): considerazioni a margine del parere consultivo n°21 ITLOS*, in Del Vecchio A. and Marrella F. (a cura di) *International law and maritime governance : current issues and challenges for regional economic integration organizations : proceedings of the fifth ordinary Conference of the International association for the law of the sea* (Editoriale Scientifica, 2016), page 71

⁴⁵ International Tribunal For The Law Of The Sea Advisory Opinion n°21/2015 (2015, ITLOS), para. 172

that the Tribunal therefore attributes the same regime of responsibility both to the flag State and to the European Union, enshrining that the latter as well is under obligations of “due diligence”.⁴⁶ It must be said though that the EU, with its regulations and its common fisheries policy, has a complete legal framework for the regulation of IUU fishing, however by being a global menace, IUU fishing has to be dealt with effectively and completely at a global level, and is not very effective if dealt with at a regional level (like the EU) only.⁴⁷

Concerning the reply to question four of the request for an advisory opinion, the principle of due diligence rises again as it entails not only an internal pursue of the sustainability of marine living resources, but also an external one, meaning the right and the same time the obligation to cooperate with other States in order to pursue this objective at an international and possibly global scale. In fact, this cooperation objective is enshrined in the reply to question four of the request, and the Tribunal applies it to the conservation and management of shared stocks and stocks of interest. The ITLOS thus asserts that the duty for States to “seek an agreement” with other States in order to find and apply appropriate measures for the conservation and management of shared stocks and stocks of interest are embodied within the obligation of “due diligence”. Nevertheless, in my opinion, yet again there is the problem with the generality of the due diligence obligation. The Tribunal states the due diligence obligation requires a number of technicalities, such as the fact that States must consult each other in good faith and that the consultations must be substantial and relevant, and that they must be the expression of the will of States to put in their maximum effort, therefore giving some guidelines on what does due diligence imply; however it is still too general and unclear, as it does not require for practical conclusions and practical results, plus, and in my opinion most importantly, it does not state what are the possible sanctions for not finding an appropriate agreement between States.

Dissatisfactions aside, the advisory opinion has made some developments and entails some positive elements: it created the basis for future advisory opinions as a whole tribunal, and this would be positive since by being able to discuss cases and give opinions as a whole, the ITLOS will be able to give more precise, detailed and even more in-depth analysis and judgement, which will only help the international community for international law of the sea affairs. Plus, being this the first time in which the Tribunal of reference of the law of the seas has activated its advisory function and adopted an opinion as a whole, it has put the basis for the creation of a possible custom for future questions and doubts of States, IOs and RFMOs.

⁴⁶ Nicchia, G., Pesca illegale, non dichiarata e non regolamentata (INN): considerazioni a margine del parere consultivo n°21 ITLOS, in Del Vecchio A. and Marrella F. (a cura di) *International law and maritime governance : current issues and challenges for regional economic integration organizations : proceedings of the fifth ordinary Conference of the International association for the law of the sea* (Editoriale Scientifica, 2016), 73

⁴⁷ *Ibid.*, page 66

Second, the opinion has been given by the Tribunal “with lenses of two different regimes of international law: principles of State responsibility and of international environmental law”,⁴⁸ making it more complete and more optimal, as it is considerate of more issues and in a way makes it more sustainable.

Furthermore, it is important to highlight that still, through this advisory opinion, the ITLOS has provided a guidance for the interpretation and application of the LOSC and other agreements, and this “may allow SRFC member States, and other States affected by IUU fishing, to exert greater pressure on flag states, particularly flag states of convenience, that do not live up to their responsibilities under UNCLOS”.⁴⁹

On balance, this advisory opinion has built another layer of decisions made by the ITLOS that intensifies and amplifies the international legal framework for the responsibilities and obligations in matter of marine resources within the law of the sea.

⁴⁸ Feitosa Ventura V. A. M., *Tackling Illegal, Unregulated and Unreported Fishing: The ITLOS Advisory Opinion on Flag State Responsibility for IUU Fishing and the Principle of Due Diligence* (Revista de Direito Internacional, Brasília, vol. 12, n. 1, 2015)

⁴⁹ Website American Society of International Law (ASIL): <https://www.asil.org/insights/volume/19/issue/8/itlos-advisory-opinion-coastal-and-flag-state-duties-ensure>

Conclusion

Illegal, unreported and unregulated fishing is a dangerous and serious phenomenon that is undermining the conservation and management of fish stocks around the world and ultimately the sustainability for one of the most precious and important resource for human sustainment.

Having analysed the evolution of the international legal framework on IUU fishing from its beginning in 1982 with UNCLOS II (the LOSC) up to nowadays, we have seen how there has been an increase in the matters and in the number of regulations, agreements thus provisions and norms and their extension and depth in the field of IUU fishing and in the strengthening of these in order to combat IUU fishing and counter-act it. However, notwithstanding this, there still remained unclear points, doubts and questions on the rights, obligations and enforcement powers of States and international organizations regarding IUU fishing, thus leading to uncertainties for possible actions to be taken. A prove of this is the request for an advisory opinion made by the SRFC and followed by other numerous States to the ITLOS, asking the latter clarifications on various points.

The ITLOS, as this thesis has described, has issued an advisory opinion and it has shed light on the questions pending by the SRFC, namely on the responsibilities and rights of the coastal States and the obligations of the flag States, without forgetting the role and responsibility of international agencies such as the EU.

The advisory opinion, even though it is not without negative sides and can be criticized for various issues, it marks an important stand-point in the law of the sea and it has created a new layer in the international legal framework against IUU fishing. However, only the future will tell us if this advisory opinion has done its job and will last through time, or if further clarifications by the ITLOS are needed for unsolved questions or for future questions on this matter.

Ultimately, there will be for sure new steps in the law of the sea regarding IUU fishing and the role of the ITLOS will be fundamental for the interpretation and resulting consolidations of new regulations regarding the governance of the ocean and its resources.

As a last statement for this thesis, I would like to quote the words of a famous marine biologist, Dr. Sylvia Earle:

“Protect the oceans as if your life depends on it, because it does”.

Bibliography

Monographies:

Organization for Economic Co-operation and Development, *Why fish piracy persists: the economics of illegal, unreported and unregulated fishing* (OECD, 2005).

Rothwell, Oude Elferink, Scott and Stephens, *The Oxford handbook of the law of the sea* (Oxford University Press, 2015).

Tanaka, Y., *The international law of the sea* (Cambridge University Press, 2012).

Articles, book chapters and blog posts:

Agnew DJ, Pearce J, Pramod G, Peatman T, Watson R, et al. *Estimating the Worldwide Extent of Illegal Fishing* (PLoS ONE, 2009).

Babu R., *State responsibility for illegal, unreported and unrelated fishing and sustainable fisheries in the EEZ: some reflections on the ITLOS Advisory Opinion of 2015*, Indian Journal of International Law vol. 55, pages 239-269 (Springer, 2015).

Feitosa Ventura V. A. M., *Tackling Illegal, Unregulated and Unreported Fishing: The ITLOS Advisory Opinion on Flag State Responsibility for IUU Fishing and the Principle of Due Diligence* (Revista de Direito Internacional, Brasilia, vol. 12, n. 1, 2015).

Nicchia, G., *Pesca illegale, non dichiarata e non regolamentata (INN): considerazioni a margine del parere consultivo n°21 ITLOS*, in Del Vecchio A. and Marrella F. (a cura di) *International law and maritime governance : current issues and challenges for regional economic integration organizations : proceedings of the fifth ordinary Conference of the International association for the law of the sea* (Editoriale Scientifica, 2016).

Romé van der Marel E., *ITLOS issues its Advisory Opinion on IUU Fishing* (The JCLOS Blog, 2015).

Rosello M., *Cooperation and unregulated fishing: interactions between customary international law, and the European Union IUU fishing regulation*, Marine Policy Vol. 84, Pages 306-312 (Elsevier, 2017).

Stanciu S., Feher A., *The Fight against Illegal, Unreported and Unregulated Fishing* Scientific, Papers Animal Science and Biotechnologies, (Agroprint Timisoara, 2010).

Stephens, T., *ITLOS Advisory Opinion: Coastal and Flag State Duties to Ensure Sustainable Fisheries Management*, in ASIL Insights, vol. 9, issue 8, 16 April 2015, available at:

<https://www.asil.org/insights/volume/19/issue/8/itlos-advisory-opinion-coastal-and-flag-state-duties-ensure> [last accessed 12/05/18].

Stokke O. S., *Trade measures and the combat of IUU fishing: Institutional interplay and effective governance in the Northeast Atlantic*, Marine Policy Vol. 33, Pages 339-349 (Elsevier, 2008)

Sumaila, Alder and Keith “The Costs of Being Apprehended for Fishing Illegally: Empirical Evidence and Policy Implications”, in *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD, 2004)

Documents:

Agreement Establishing a Sub Regional Fisheries Commission (Permanent Secretariat of the SRFC, 1985).

Convention On The Determination Of The Minimal Conditions For Access And Exploitation Of Marine Resources Within The Maritime Areas Under Jurisdiction Of The Member States Of The Sub-Regional Fisheries Commission (SRFC) (Permanent Secretariat SRFC, 2012).

Convention On The Determination Of The Minimal Conditions For Access And Exploitation Of Marine Resources Within The Maritime Areas Under Jurisdiction Of The Member States Of The SRFC (MCA Convention) – Technical Note (Permanent Secretariat SRFC, 2013).

EU Council Regulation 1005/2008 (EU Council, 2008).

EU Common Fisheries Policy (European Commission, 2013).

FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing (FAO, 2009).

FAO Agreement To Promote Compliance With International Conservation and Management Measures by Fishing Vessels on The high Seas of (FAO, 1993).

FAO International Plan of Action to Prevent, Deter, Eliminate IUU Fishing (FAO, 2001).

FAO, *The State of World Fisheries and Aquaculture 2016. Contributing to food security and nutrition for all* (FAO, 2016).

International Tribunal For The Law Of The Sea – Rules Of The Tribunal (ITLOS, adopted in 1997, amended 2009).

International Tribunal For The Law Of The Sea Advisory Opinion n°21/2015 (2015, ITLOS).

Request For An Advisory Opinion To the International Tribunal For The Law Of The Sea – ITLOS: Written Statement (2013, Permanent Secretariat SRFC).

Statute Of The International Tribunal For The Law Of The Sea, Annex VI UNCLOS II 1982 (UNGA, 1982).

Stiles M., Kagan A., Shaftel E., and Lowell B., *Stolen Seafood: the impact of pirate fishing on our oceans*

(OCEANA, 2013).

Swan, J., *Decision-making in Regional Fishery Bodies or Arrangements: the evolving role of RFBs and international agreement on decision-making processes*. FAO Fisheries Circular. No. 995. Rome, (FAO, 2004) available at: <http://www.fao.org/docrep/006/y5357e/y5357e00.htm> [last accessed 08/05/2018].

The United Nations 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, 1993).

United Nations Convention on the Law Of the Sea II (UNGA, 1982).

Webography

Website American Society of International Law (ASIL): <https://www.asil.org/> [last accessed 12/05/18]

<http://www.fao.org/news/story/en/item/417286/icode/> [last accessed 23/04/18]

<https://www.greenpeace.org/archive-international/en/campaigns/oceans/which-fish-can-I-eat/pirate-fishing/> [last accessed 21/04/18]

<https://www.greenpeace.org/archive-international/en/campaigns/oceans/pirate-fishing/Blacklist1/About-the-blacklists/Definition-of-IUU-fishing/> [last accessed 21/04/18]

<http://www.fao.org/fishery/iuu-fishing/en> [last accessed 22/04/18]

https://en.wikipedia.org/wiki/Illegal,_unreported_and_unregulated_fishing [last accessed 14/04/18]

<http://worldoceanreview.com/en/wor-2/fisheries/illegal-fishing/> [last accessed 18/04/18]

<https://www.conserve-energy-future.com/causes-effects-solutions-of-overfishing.php> [last accessed 18/04/18]

<https://phys.org/news/2016-01-percent-global-fish-unreported.html> [last accessed 15/04/18]

<https://www.nature.com/articles/ncomms10244> [last accessed 15/04/18]

Sintesi dell'elaborato di laurea

Il fenomeno della pesca illegale, non dichiarata e non regolamentata (INN), è cresciuto notevolmente negli ultimi Trent'anni ed è molto diffuso a livello globale, diventando quindi una questione molto seria e problematica. La necessità per la comunità internazionale e quindi per il diritto internazionale di ostacolarlo e di eliminarlo è essenziale per la salvaguardia delle risorse marine e quindi per la sostenibilità della specie umana, essendo queste tra le più importanti fonti di sostentamento dell'umanità.

Nell'Aprile del 2015 il Tribunale internazionale del diritto del mare (ITLOS) ha adottato il parere consultivo, n°21/2015, riguardante la pesca INN. Il Tribunale ha formulato questo parere per via di una richiesta da parte della Sub-Regional Fisheries Commission (SRFC), un'organizzazione regionale di gestione della pesca (ORGP), seguita poi da altre richieste per un parere consultivo da parte di venti due Stati e alcune organizzazioni internazionali.

Il suddetto parere consultivo dell'ITLOS mi ha spinto ad analizzare l'intero quadro legale internazionale sulla pesca INN, che ha mosso i suoi primi passi nel 1982 con la seconda convenzione delle Nazioni Unite sul diritto del mare (UNCLOS), e che è tuttora in costruzione.

Questa tesi è strutturata nel seguente modo: il primo capitolo dà una visione sia generica che più dettagliata sulla pesca INN, descrivendone caratteristiche, cause e conseguenze. Il secondo capitolo illustra il quadro legale internazionale che regola la pesca INN, e fornisce un dettagliato riassunto dei principali strumenti internazionali come trattati e accordi su questo tema. Il terzo capitolo infine descrive ed analizza il parere consultivo del Tribunale internazionale del diritto del mare, spiegando anche la richiesta di un parere consultivo da parte della SRFC e quindi come sia stata attivata la funzione consultiva del Tribunale.

In definitiva, l'obiettivo di questa tesi è fornire una più onnicomprensiva visione del quadro legale internazionale sulla pesca INN, e di fare luce sul parere consultivo emesso dal Tribunale riguardante i diritti e gli obblighi dello Stato di bandiera, dello Stato costiero e dello Stato di approdo.

La pesca illegale, non dichiarata e non regolamentata si presenta quando i pescherecci svolgono attività che sono violano le leggi di gestione e conservazione delle risorse ittiche, sotto la giurisdizione dello Stato costiero o, se si verifica in alto mare, sotto la competenza di una ORGP o semplicemente in contravvenzioni delle leggi del diritto internazionale.

Dei dati statistici rilevanti che riguardano la pesca illegale sono: la presenza più grande di attività di pesca INN, che si trova nelle acque dell'Oceano Atlantico Centro-Orientale, e la quantità annuale di risorse ittiche pescate illegalmente, che è del 30% rispetto a quelle legali e pari a 77 milioni di metri cubi di pesce.

Le motivazioni che portano alla pesca INN sono molteplici, le principali sono sicuramente: i motivi economici e l'assenza di controllo da parte dello Stato di bandiera. Una delle ragioni trainanti dello svolgere attività di pesca INN è il guadagno economico che i pescherecci possono trarne; l'incentivo è forte perché molte specie di pesci, specialmente le più pregiate e quelle a rischio estinzione, quindi più rare, sono di alto valore economico e quindi pescando illegalmente i pescherecci possono venderne di più di quella merce rara o pregiata, e inoltre non pagare le tasse e quindi avere un guadagno ancora maggiore. Inoltre, con una richiesta mondiale di prodotti ittici sempre più alta, le navi da pesca pirata cercano di soddisfare il più possibile la domanda e quindi ancora una volta ne ricavano il massimo.

Dall'altra parte, l'assenza di controllo da parte dello Stato di bandiera è un fattore determinante per la riuscita da parte dei pescherecci di condurre attività di pesca INN. Molti Stati di bandiera sono paesi in via di sviluppo e non dispongono delle risorse necessarie per prevenire e combattere efficacemente il fenomeno della pesca illegale come una forza di pattugliamento di mare e di porto per riuscire a controllare, supervisionare e attuare misure di esecuzione contro le navi da pesca che battono la loro bandiera. Questo problema assume inoltre un carattere più importante a causa del fenomeno della 'bandiera di comodo', che si presenta quando le navi da pesca cambiano la loro bandiera di Stato e si registrano sotto la bandiera di un altro Stato più povero ed impossibilitato a far rispettare alle proprie navi le leggi e regolamentazioni sulla pesca.

I rischi e le conseguenze provocate dalla pesca INN sono maggiormente di natura economica ed soprattutto ambientale, e sono molto serie. Riguardo le conseguenze economiche il dettaglio più rilevante è la quantità di denaro globale che gli Stati e anche le imprese ittiche, specie quelle locali e più piccole, perdono ogni anno a causa della pesca INN: degli studi indicano che il valore di perdita annuale varia dai \$10 ai \$23 miliardi. Un'altra conseguenza economica è la riduzione del lavoro da parte di imprese ittiche che a causa del sovra sfruttamento delle risorse ittiche da parte di altre imprese che operano illegalmente si vedono ridurre l'offerta, e di conseguenza il loro guadagno e quindi potenzialmente un aumento della disoccupazione.

I rischi e le conseguenze ambientali sono ancor più seri, poiché la pesca INN è una minaccia per la sostenibilità degli eco-sistemi marini. Uno dei motivi è che molte specie marine sono già sovra-sfruttate dalle attività di pesca illegale, quindi la pesca INN incrementa questo sfruttamento e mette ancor più pressione alle popolazioni ittiche, impoverendole e mettendone molte a rischio di estinzione. Un altro motivo importante è il fenomeno delle 'catture accessorie', che si verifica soprattutto nelle attività di pesca INN, in quanto le navi da pesca pirata utilizzano degli strumenti di pesca inadatti e pensati non per la pesca mirata ma per catturare il più possibile; questo ha un impatto assai negativo sulla biodiversità.

Il quadro generale internazionale sulla pesca INN è composto da vari strumenti, che sono trattati, regolamentazioni, convenzioni, e accordi e che regolano le attività di pesca ad un livello globale. Il primo e principale trattato è stato l'UNCLOS del 1982, che ha creato una normativa sulle attività di pesca, sia

per quanto riguarda la zona economica esclusiva (ZEE), che in alto mare, e cioè nelle acque internazionali. L'UNCLOS sancisce che nella ZEE lo Stato costiero ha l'obbligo di stabilire il totale ammissibile di catture delle risorse ittiche che possa permettere una gestione sostenibile e conservazione delle suddette risorse. Per quanto riguarda l'alto mare, l'UNCLOS decreta che tutti gli Stati hanno la responsabilità di gestione e conservazione delle risorse ittiche, sia ad un livello individuale che congiunto; la convenzione statuisce infatti che gli Stati hanno il dovere di cooperare tra loro, sia tra loro di persona che attraverso la creazione di ORGP.

A seguito dell'UNCLOS, nel 1993 si concluse l'accordo di conformità della FAO riguardo le misure di conservazione e gestione da parte delle navi da pesca nell'alto mare. Rispetto alla Convenzione del 1982, quest'accordo va più in profondità e nel dettaglio per quanto riguarda la responsabilità dello Stato di bandiera. In particolare, l'accordo FAO afferma che lo Stato di bandiera ha l'obbligo di: tenere a registro tutte le navi da pesca battenti la sua bandiera, attuare qualsiasi misura necessaria per assicurarsi che le sue navi da pesca non siano coinvolte in attività di pesca INN, e di cooperare con altri Stati per rispettare le normative dell'accordo.

Nel 1995 fu firmato l'accordo ONU sugli stock ittici focalizzato in particolare sulle specie migratorie e trans-zonali. La novità importante di quest'accordo è l'attribuzione alle organizzazioni regionali e sub-regionali di un ruolo di rilievo e da conduttore principale per la cooperazione internazionale per la conservazione e gestione delle popolazioni ittiche.

Il piano d'azione internazionale contro la pesca INN della FAO del 2001 è il primo vero e proprio strumento legale internazionale interamente dedicato alla lotta e alla prevenzione della pesca illegale. Sebbene non sia vincolante, presenta delle linee guida di novità per combattere la pesca INN. In particolare, il piano d'azione richiede agli Stati di non aiutare economicamente navi, imprese o persone coinvolte nella pesca INN, e di scoraggiare le proprie navi da pesca dal cambiare lo Stato di bandiera al fine di poter non rispettare le norme di conservazione e gestione delle risorse ittiche.

Anche l'Unione Europea nel 2008 ha adottato un regolamento per far fronte alla pesca illegale. Tra le sue normative più rilevanti, il regolamento stabilisce che l'approdo negli Stati membri da parte di navi da pesca straniera è vietato se queste ultime non soddisfano i requisiti delle normative europee riguardo il tipo e la quantità delle catture, che il trasbordo in mare di risorse ittiche è proibito, e che gli Stati membri devono garantire un numero minimo annuale di ispezioni di navi a pesca, ritenendo però che alcune categorie di navi da pesca vadano sempre ispezionate.

Nel 2009 fu firmato un terzo accordo in ambito FAO, l'accordo sulle misure di competenza dello Stato di approdo, anch'esso focalizzato sulla prevenzione e l'eliminazione della pesca INN. Fra le novità che presenta, l'accordo prevede che gli Stati contraenti richiedano alle navi da pesca delle informazioni dettagliate come specificazioni sulla nave stessa e il tipo, la quantità e il luogo delle catture prima del loro approdo al porto, e negare loro l'accesso in caso le informazioni da esse ricevute facciano pensare ad un coinvolgimento in attività di pesca INN.

Infine, nel 2012 fu ratificata la convenzione sui requisiti minimi per l'accesso e lo sfruttamento di risorse marine, all'interno della SRFC. In particolare, la convenzione afferma che gli Stati membri devono essere pienamente impegnati nella lotta contro la pesca INN, e condurre insieme delle operazioni per questo fine. Inoltre, la convenzione stabilisce che gli Stati membri devono condurre delle ispezioni regolari a tutte le navi da pesca che approdano ai loro porti, e che in caso di sospetto di un coinvolgimento nella pesca INN, lo Stato membro deve impedire lo scarico e il commercio delle risorse ittiche catturate. Di particolare importanza è la disposizione che consente alla SRFC di richiedere un parere consultivo all'ITLOS.

Il Tribunale internazionale del diritto del mare è un organo giudiziario permanente, istituito dall'UNCLOS, in concordanza con l'annesso VI della convenzione UNCLOS. Il Tribunale ha sede ad Amburgo, ed è composto da 21 membri indipendenti. Tra le sue funzioni giudiziarie è prevista anche la funzione consultiva; l'UNCLOS prevede che l'ITLOS sia la prima scelta procedurale in caso di risoluzione delle controversie tra Stati. Inoltre, il Tribunale è aperto e può appellato da qualsiasi Stato contraente della convenzione UNCLOS.

Nel Marzo 2013, la SRFC ha emesso una richiesta per un parere consultivo al Tribunale internazionale del diritto del mare riguardante la sua posizione in termini legali e quindi i propri diritti e le proprie responsabilità inerenti alla pesca INN. In particolare la SRFC ha posto quattro domande al Tribunale: quali sono i diritti e gli obblighi dello Stato di bandiera laddove attività di pesca INN vengano condotte nella ZEE di Stati terzi, qual è il grado di responsabilità attribuibile allo Stato di bandiera in caso di attività di pesca INN svolte da navi sotto la sua bandiera, l'ATTRIBUIBILITÀ della responsabilità alle organizzazioni internazionali in caso di violazioni delle norme di pesca di uno Stato terzo da parte di uno Stato membro, e infine quali sono i diritti e gli obblighi dello Stato costiero nel garantire una gestione sostenibile delle specie marine condivise e trans-zonali.

Dopo aver deciso all'unanimità di avere l'appropriata giurisdizione per poter rilasciare un parere consultivo, il Tribunale internazionale del diritto del mare, nell'Aprile 2015 ha emesso il parere consultivo n°21/2015 sulla pesca INN, per rispondere alla richiesta fatta dalla SRFC e dagli altri membri della comunità internazionale.

Riguardante la prima domanda, il Tribunale ha ribadito che nella ZEE è dello Stato costiero la responsabilità della conservazione e gestione delle risorse ittiche, e quindi dell'adottare delle leggi, regolamentazioni e norme al fine di soddisfare il suddetto scopo. Riguardo allo Stato di bandiera, l'ITLOS ha dichiarato che sia sua la responsabilità di assicurarsi che le navi sotto la sua bandiera non partecipino e non si coinvolgano in attività di pesca INN, attribuendo ad esso un obbligo di 'dovuta diligenza', a differenza di un obbligo di 'risultato' che viene attribuito allo Stato costiero.

Concernente la seconda domanda, il Tribunale ha affermato che lo Stato di bandiera non può essere decretato responsabile e quindi punibile per lo svolgimento di attività di pesca INN da parte delle navi

battenti la sua bandiera; tuttavia, l'ITLOS attribuisce allo Stato di bandiera la responsabilità di impegnarsi attivamente per assicurarsi che le navi battenti la sua bandiera non svolgano attività di pesca INN.

Riguardante la terza domanda, il Tribunale ha stabilito che la propria giurisdizione per questo caso è limitata alla ZEE dei soli Stati membri della SRFC, e ha precisato che l'unica organizzazione internazionale a cui poter fare riferimento è l'Unione Europea, in quanto è l'unica ad avere degli accordi di pesca con gli Stati membri della SRFC. Per questo caso, l'ITLOS ha dichiarato che, poiché la presa di accordi di pesca con Stati terzi rientra nelle competenze esclusive dell'UE, gli obblighi dello Stato membro (e cioè dello Stato di bandiera) diventano obblighi dell'organizzazione internazionale, e quindi quest'ultima può essere tenuta responsabile per il mancato adempimento del suo obbligo di 'dovuta diligenza'.

Concernente la quarta ed ultima domanda, il Tribunale ha affermato che lo Stato costiero ha il diritto e l'obbligo di cooperare con gli altri Stati pertinenti, o direttamente o attraverso ORGP per creare e garantire degli efficaci piani di conservazione e gestione delle specie condivise e trans-zonali. Inoltre, l'ITLOS ha precisato che le misure di conservazione e gestione delle suddette specie devono essere basate sulle migliori prove scientifiche disponibili.

Il parere consultivo del Tribunale internazionale del diritto del mare è di interesse da un duplice punto di vista: quello procedurale e quello sostanziale.

Da un punto di vista procedurale è di grande interesse in quanto è stato il primo parere consultivo ad essere rilasciato dal Tribunale per intero, e non soltanto dalla Camera per le controversie dei fondali marini. Inoltre, il fatto che l'ITLOS abbia accolto la richiesta di un parere consultivo da parte della SRFC e degli altri membri della comunità internazionale ha confermato il suo ruolo centrale per le questioni in materia del diritto del mare.

Da un punto di vista sostanziale, il parere consultivo presenta alcuni elementi interessanti da analizzare, sia negativi che positivi.

Tra essi, in primo luogo il Tribunale conferisce allo Stato costiero e allo Stato di bandiera due obblighi distinti: al primo viene attribuito un obbligo di risultato, ovvero la responsabilità di gestione e conservazione delle risorse marine, mentre al secondo viene attribuito solo un obbligo di dovuta diligenza, ovvero la responsabilità di assicurarsi che le navi da pesca battenti la sua bandiera non violino le leggi e norme della pesca di Stati terzi. A mio parere ci sono degli svantaggi legati a questa distinzione perché se lo Stato costiero è colui che si deve impegnare attivamente per proteggere l'ambiente marino e ne risponde in primis per una gestione non corretta, dall'altra parte lo Stato di bandiera è molto più libero sia da mansioni che da responsabilità; quindi si crea una disparità di compiti tra questi due tipi di funzione di Stato che a mio avviso è sbilanciata. Inoltre, il Tribunale definisce il termine "di dovuta diligenza" come un "concetto variabile", e quindi mutabile nel tempo; a mio parere la mancata definizione chiara e concreta di questo concetto può in futuro rendere molto difficile la verificabilità dell'impegno effettivo di uno Stato di bandiera nel svolgere il suo obbligo.

In secondo luogo, il Tribunale, anche nel caso della cooperazione tra Stati per la conservazione e la gestione degli stock ittici condivisi e migratori, conferisce agli Stati l'obbligo di dovuta diligenza. Sebbene il Tribunale abbia stabilito delle linee guida su cosa implichi di fatto l'obbligo di dovuta diligenza, a mio avviso questo concetto rimane ancora troppo generico e non chiaro, visto che di fatto non stabilisce quali siano per esempio dei risultati pratici da raggiungere negli accordi fra gli Stati, e non fornisce delle possibili sanzioni da implementare in caso di inadempimento a questo obbligo.

Critiche a parte, il parere consultivo presenta degli elementi interessanti anche positivi.

In primo luogo, il parere del Tribunale, emesso dall'intero organo, è stato formulato usando due lenti di due regimi diversi: il principio della responsabilità dello Stato e il diritto internazionale sull'ambiente, rendendolo più completo e ottimale, essendo riguardoso di più elementi e questioni, quindi rendendolo in un certo senso più sostenibile.

In secondo luogo, è importante sottolineare che attraverso questo parere consultivo l'ITLOS abbia fornito una guida per l'interpretazione e l'applicazione dell'UNCLOS e di altri accordi internazionali riguardo la pesca INN, e questo può consentire gli Stati membri della SRFC e altri Stati colpiti dal fenomeno della pesca INN, di esercitare una pressione maggiore sugli Stati di bandiera che non soddisfano i loro obblighi.

Nel complesso il parere consultivo ha creato un altro strato di decisioni prese e pareri dati dall'ITLOS che intensificano e ampliano il quadro legale internazionale per ciò che concerne i diritti e gli obblighi in materia di pesca e risorse ittiche nell'ambito del diritto internazionale del mare.

Infine, ci saranno di sicuro nuovi passi avanti nel diritto internazionale del mare riguardante la pesca INN, e il ruolo dell'ITLOS sarà fondamentale per l'interpretazione e le conseguenti consolidazioni di nuove norme e leggi concernenti la governance dell'oceano e delle sue risorse.

Come nell'elaborato di laurea, in conclusione, vorrei riportare una frase di una famosa biologa marina Statunitense, la Dott.ssa Sylvia Earle:

“Protegete gli oceani come se ne andasse della vostra vita, perché è così”.