

MYKOLAS ROMERIS UNIVERSITY
FACULTY OF LAW
INSTITUTE OF INTERNATIONAL AND EUROPEAN UNION LAW

MARIUS GRIKŠAS
INTERNATIONAL MARITIME LAW PROGRAMME

COMBATTING ILLEGAL, UNREPORTED AND UNREGULATED FISHING: MEASURES
BY THE EUROPEAN UNION WITHIN THE FRAMEWORK OF INTERNATIONAL LEGAL
INSTRUMENTS

Master Thesis

Supervisor –
Dr Skirmantė Klumbytė

Vilnius, 2013

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INTRODUCTION

Illegal, unreported and unregulated (IUU) fishing is a worldwide phenomenon, which has been recognized as one of the major threats to the global sustainability of fisheries resources and overall food security.¹ The current IUU fishing losses worldwide are estimated between \$10 and \$23.5 billion annually, constituting between 11 and 26 million tons of catch.² Since IUU activities became more conspicuous in the late 20th century, a vast number of scholars and experts discussed its complex causes, enormous extent, and devastating consequences. Some of the authors, internationally acclaimed for their analysis of IUU fishing, are D. Agnew, R. Baird, M. Tsamenyi, W. Edeson, D. Sodik, and G. Hosch. Analysis of their studies and articles, concerning the methods used to combat IUU fishing by the contemporary global and regional regulation, is essential for assessing the international struggle against IUU activities.

The European Union (EU), being the leading importer of fish and having fishing fleets in every ocean of the world, considers itself as having major responsibility in promoting the sustainability of fisheries resources and preventing, deterring and eliminating IUU fishing, whereas its economic interest is obvious.³ This stance is best illustrated by the adoption of Regulation No. 1005/2008 on the 29th of September, 2008 (EU IUU Regulation), which is considered to be the first comprehensive legislation of compulsory manner, directed solely at addressing the threats posed by IUU fishing. Together with several other IUU-related legal instruments, the EU IUU Regulation supplements the Common Fisheries Policy (CFP) – a legislation system through which EU countries are jointly managing their fisheries. Both the CFP and the EU IUU Regulation have been criticized for failing to achieve their goals. However, no author has yet presented a comprehensive study, comparing the set of EU regulations against IUU fishing and its origin to the global international instruments and practice of combating IUU activities. Thus, an evaluation of methods used by the EU to combat IUU fishing and the progress of their development, including their comparison with the contemporary international instruments, is needed in order to assess the EU's flaws in its struggle against IUU practices.

The research object of this study – international and EU instruments and measures related to combating IUU fishing. The subject is the quality of these measures and instruments in

¹ M.Tsamenyi, M.Palma, B.Milligan. The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective // The International Journal of Marine and Coastal Law. 2010, No.25. P.5–31.

² D.Agnew, J.Pearce, G. Pramod. Estimating the Worldwide Extent of Illegal Fishing // PLoS ONE. 2009. Vol.4, Issue 2. P.1-8.

³ G.Proutidre-Maulion. From Resource Conservation to Sustainability: An Assessment of Two Decades of The European Union's Common Fisheries Policy // Ocean and Coastal Law Journal. 2005. Vol.11. P.37-46.

terms of their comprehensiveness, purposefulness, the current progress of implementation, and achieved results.

The hypothesis of this study is that the EU has failed to create a system of instruments, efficiently combating IUU activities.

The objective of this study is to analyse and evaluate methods used by the EU for tackling IUU fishing in the context of related contemporary international instruments. This objective shall be obtained by achieving the following goals:

1. To define the concept of IUU fishing and demonstrate its severity in terms of extensive scope, complex drivers, and devastating impacts;
2. To examine the contemporary international instruments concerning fisheries and IUU fishing, and assess the effectiveness and weaknesses of main methods, proposed against IUU activities;
3. To familiarize with the EU's common fisheries system and analyse the development of the community IUU regulation;
4. To break down and assess core methods used by the EU against IUU fishing in terms of their implementation progress, consistency with related international instruments, and advancement compared to international practice.

Due to the theoretical-analytical format of this study, a content (or textual) analysis of legal documentation is used as the prime empirical method of research. Statistical data is also evaluated to understand trends of IUU activities and assess the state of global fisheries. Furthermore, the findings of other studies and articles are analysed and employed.

The first stage of this study presents a modern definition of IUU fishing. Statistical data is used to determine the global extent of IUU activities. The primary driving forces behind IUU fishing, identified most commonly by various authors, are then introduced. Finally, the devastating impacts of IUU activities are indicated, in order to emphasize the significance of means, used against illegal fishing, including the present study.

The second stage discusses the global legal and policy framework regulating fisheries and IUU fishing since its emergence in the late 20th century. A set of contemporary legally binding treaties, referred to as *hard law*, and non-binding, voluntary instruments, or *soft law*, is examined in chronological time order:

1. The 1982 UN Convention on the Law of the Sea (UNCLOS-III);
2. The 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement);
3. The 1995 United Nations Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stock Agreement);

4. The 1995 FAO Code of Conduct for Responsible Fisheries (FAO Code of Conduct);
5. The 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)
6. The 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (FAO Port State Measures Agreement).

The core methods of combatting IUU activities are further drawn up and evaluated. Flag state measures are argued to have the largest potential for eradicating IUU fishing, yet the sufficiency of their coverage by the global community is questioned. A lack of market-related measures is also addressed, yet their considerable implementation on a regional level is appraised. The work of Regional Fisheries Management Organizations (RMFOs) is assessed as being controversial in terms of applying measures against IUU fishing on the high seas. Finally, a set of recently presented modern port state measures is recognized as the most comprehensive tool heretofore applied by international instruments for tackling IUU activities.

A further part of this study analyses the system of fisheries regulation and IUU-related instruments, applied by the EU since the start of this century. The modern CFP is firstly presented in order to understand how the collective fishing system of EU states works and what its weaknesses are. The set of IUU regulations implemented by the EU is then analysed and evaluated. Being the core anti-IUU instrument, the EU IUU Regulation is given most emphasis and is examined in depth. The EU Control Regulation and the EU Fishing Authorizations Regulation are further presented as means of supplementing both the CFP and the EU IUU Regulation.

The final and fundamental part of this study is an analysis of the core methods used by the EU to combat IUU activities:

1. Port State Measures;
2. Catch Certification Scheme;
3. Community Black list;
4. Non-Cooperating Third Country List;
5. Measures against EU nationals.

The listed methods are evaluated in terms of their consistency with international instruments, their improvement or constricting of the methods applied globally and regionally, and the current progress made by member states and the European Commission (Commission). In essence, this part contains the author's critical evaluation of the EU IUU regulation system in the framework of international instruments, presented descriptively in prior sections.

Finally, several suggestions are listed and serve a practical meaning for this study. The application of these specific measures does not require radical changes to the IUU regulation system, yet have major potential to improve the current state of IUU fishing.

I. UNDERSTANDING THE CONCEPT OF ILLEGAL, UNREPORTED AND UNREGULATED FISHING

Defining IUU Fishing

The most commonly used definition of IUU fishing emerges from the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), presented by the Food and Agriculture Organization (FAO) of the United Nations in 2001:

Illegal fishing refers to activities conducted by national or foreign vessels in waters under the jurisdiction of a state without permission or in contravention of its laws and regulations; or by vessels flying the flag of states that are parties to a regional fisheries management organization (RFMO), conducted in violation of the laws of the relevant fishery, national laws and regulations, or applicable international law;⁴

Unreported fishing refers to fishing activities, which have not been reported, or have been misreported, to a relevant national authority or RFMO, in contravention to applicable laws and regulations;⁵

Unregulated fishing refers to fishing activities conducted by vessels without nationality, or vessels flying the flag of a country which is not a party to the RFMO, governing the relevant fishing area or species.⁶

Although the terminology used by different authors to define IUU fishing varies, the general idea is consistent - IUU fishing is a set of activities with the common aim of circumventing regulation, applicable on the high seas, in coastal state waters, or in areas regulated by RFMOs.

The Scope of IUU Fishing

In order to fully understand the severity of problems caused by IUU fishing, a look at the current and historical scope of IUU fishing and the state of global fisheries is essential. As estimated by the first and, so far, the only worldwide analysis of the extent of IUU fishing, conducted by the experts of the Fisheries Centre of the University of British Columbia together with the Marine Recourses and Fishing Consultants (MRFC), the "<...> current illegal and unreported fishing losses worldwide are between \$10 bn and \$23.5 bn annually, representing

⁴ FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing // Rome: FAO, 2001., Article 3.1.

⁵ *Idem*, Article 3.2.

⁶ *Idem*, Article 3.3.

between 11 and 26 million tonnes".⁷ The FAO recently indicated that the overall global capture fisheries production remains at about 90 million tons annually.⁸ Considering the presented rough data, IUU fishing catches constitute for more than 20 percent (18,5 million tones / 90 million tons) of the overall reported catch across the globe. A separate study indicated that in the coastal waters of countries like Sierra Leone or Liberia, the scope of illegal fishing reaches up to 80 percent of all fishing operations.⁹ Undoubtedly, these numbers heavily influence the overall ever-deteriorating state of world fisheries. According to the FAO, the level of fully exploited stocks reached 57 percent in 2009, whereas overexploited stocks increased from 10 percent in 1974 to nearly 30 percent in 2012.¹⁰ These numbers show that, at present, more than half of overall global fish catch species are left with no room for further expansion, whereas one third of species produce lower yields than their potential and are in need of rigid management plans to restore full and sustainable productivity. Therefore, the scope of IUU activities is enormous and has significant influence on the overall poor state of global fisheries.

The Drivers of IUU Fishing

In order to understand the causes of IUU fishing, a brief study of the decision-making process, used by people choosing to engage in IUU activities, is necessary. A fisher's decision on IUU fishing should first and foremost be evaluated in the framework of any criminal activity and the economic reasons behind it. According to such models, the main direct drivers and motivators for choosing to act illegally or not are: (1) benefits arising from illegal activity; (2) probability of illegal activity being detected; (3) penalty for getting caught; (4) cost of engaging in avoidance activities; (5) degree of one's moral and social standing and possible effect to it by engaging in illegal activity.¹¹ A fisherman is less likely to engage in IUU fishing given that his benefits from legal fishing, financial profit in particular, are at least reasonable, whereas one, who is unable to make a living from legal fishing, has a huge incentive to fish illegally. Similarly, one is less likely to fish illegally in case of high level of enforcement or a set of strict regulations in place, compared to a fisherman operating in a less legally constrained environment. Also, the more severe penalties are applied - the lower the likelihood of illegal fishing. Finally, morality and social standing depend heavily on the person's inner traits, combined with the surrounding cultural viewpoints and philosophy, thus at times might be more

⁷ D.Agnew, J.Pearce, G. Pramod. Estimating the Worldwide Extent of Illegal Fishing // PLoS ONE. 2009. Vol.4, Issue 2. P.1-8.

⁸ FAO. The State of World Fisheries and Aquaculture 2012. Rome: FAO, 2012, P.6.

⁹ G.Hosch. Analysis of the implementation and impact of the FAO Code of Conduct for Responsible Fisheries since 1995 // FAO Fisheries Circular No. C1038. 2008.

¹⁰ *Same as* ⁸, P.11.

¹¹ U.Sumaila, J.Alder, H.Keith. Global scope and economics of illegal fishing // Marine Policy. 2006, No.30. P.696–703.

difficult to affect than other, purely economic and materialistic motives to fish illegally. Although oversimplified, these five steps result in one's decision to act illegally or discourage one to act so.

The theoretical decision-making process by potential IUU fishing participants is altered by a number of factors in today's global environment. First of all, (1) the high market value of IUU fish - a benefit-driven cause of illegal fishing. The economic incentive here is self-evident - many species of fish, particularly overexploited ones, are in short supply, thus of high value. Furthermore, current trends suggest that the numbers of fully exploited and overexploited fish stocks are increasing. Factoring in the rapid global population growth, increasing awareness of health aspects and higher disposable incomes - fish prices are likely to increase further in the future.¹² (2) The lack of effective port state control is another significant driver of IUU fishing. The FAO has stated that ineffective port state control is perceived as the main cause of IUU fishing.¹³ Port states often have insufficient information to identify and track vessels engaged in IUU fishing, whereas these vessels are free to move to other regions to avoid sanctions, due to a regional focus of port state measures.¹⁴ However, our study shall further show the significant advance of the global community in terms of implementing sufficient port state measures to combat IUU activities. Another acknowledged cause of IUU fishing is (3) excessive fishing capacity, which creates incentives for operators from developed countries to continue exploiting their vessels in illegal markets rather than generate losses by not using or selling them to scrap yards for a low price. This practice is further encouraged by the ease of re-flagging vessels - a method often used to aggravate the tracking of company structures and identifying the beneficial owners of vessels fishing illegally.¹⁵ The practice of re-flagging continues to persist due to weak requirements for flag states to exercise control over their vessels and is often based on state consent.¹⁶ Therefore, (4) weak flag state control is another cause of IUU fishing. *Flags of Convenience* (FOCs) often offer minimal standards for vessels and provide tax shelters – both of which contribute to IUU activities being potentially dangerous to parties involved, in terms of low safety requirements. Vessels may also be reflagged to states which are not members of a RFMO to avoid compliance with the conservation and management measures in place.

¹² C.Schmidt. Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing // Paper for the Conference on the Governance of High Seas Fisheries and the UN Fish Agreement: Moving from Words to Action, St. John, 2005.

¹³ J.Swan. International Action and Responses by Regional Fishery Bodies or Arrangements to Prevent, Deter And Eliminate Illegal, Unreported and Unregulated Fishing // FAO Fisheries Circular No. C996. 2004.

¹⁴ The Pew Charitable Trusts. Port state performance: Putting Illegal, Unreported and Unregulated Fishing on the Radar // The Pew Report, Brussels. 2010.

¹⁵ Same as ¹³.

¹⁶ R.Baird. Illegal, Unreported and Unregulated Fishing: an Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence // Melbourne Journal of International Law. 2004, Vol.5, Issue 2. P.299-334.

Historically, (5) low sanctions against illegal fishing and (6) insufficient level of monitoring, control and surveillance have been identified as causes of IUU fishing, yet this study shall further present the recent tendency of modern legal instruments addressing these issues in a reasonable manner. Therefore, the presented factors are the most frequently identified causes of IUU fishing, which form a ground for IUU activities to prosper when given insufficient regard.

The Impacts of IUU Fishing

IUU fishing has been recognized by the global community as a major issue due to its devastating environmental, economic and social consequences. These illegal practices are first of all (1) harmful to the recovery of fish populations and ecosystems. Fish and fishery products represent a significant part of protein and essential micronutrients for a balanced nutrition and good health of the majority of global population.¹⁷ IUU fishing disregards law and compliance with conservation and management measures by national fisheries and RFMOs. This inhibits sustainable exploitation and rebuilding efforts of fish stock, making the problem of future global food security more severe. Furthermore, due to its illicit nature, IUU fishing negatively affects the accuracy of fish stock assessments.¹⁸ The miscalculation of biomass distorts fish stock statistics, thus making future conservation and management measures less effective. Fragile marine ecosystems and vulnerable species are also more likely to be damaged during IUU fishing.¹⁹ (2) Distorted competition is another major consequence of illegal fishing, having harmful economic and social effect to legal fishers. By putting honest fishers at an unfair disadvantage, IUU fishing undermines them and their communities economically, thus giving even more incentives to bypass the fish management measures and laws in place. The negative impact is most harmful to the livelihoods of fishing communities in developing countries.²⁰ Their struggle to eradicate poverty and achieve sustainable livelihoods is aggravated, as they rely solely on fishing to survive. Furthermore, the level of IUU fishing in developing countries tends to be higher than the overall global average. For instance, total estimated catches in West Africa are 40 percent higher than reported catches.²¹ Consequently, the sustainable management of marine ecosystems in developing countries is impacted even more severely and has a devastating effect on these communities. As many crew members of illegal fishing vessels are from poor and

¹⁷ FAO. The State of World Fisheries and Aquaculture 2012. Rome: FAO, 2012, P.82.

¹⁸ C.Schmidt. Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing // Paper for the Conference on the Governance of High Seas Fisheries and the UN Fish Agreement: Moving from Words to Action, St. John, 2005.

¹⁹ I.Escobar, J.Seligny, N.Yagi. Key Observations and Findings by the Workshop Chairs // Report for the OECD Workshop on IUU Fishing Activities. Paris, 2004.

²⁰ Same as ¹⁷, P.94.

²¹ D.Agnew, J.Pearce, T.Peatman. The Global Extent of Illegal Fishing // Project by the MRAG and University of British Columbia. 2008

underdeveloped parts of the world, (3) poor living and dangerous working conditions is a severe problem resulting from the particularity of IUU fishing. As indicated by reports of such organizations as Greenpeace, International Labour Organization (ILO), and International Transport Workers' Federation (ITF), illegal fishing is associated with poor working conditions, low vessel standards, and lower levels of education of crew members.²² Having no alternative job possibilities, fishers from developing countries are forced to risk their health and life, and are deprived of the possibility to alter their working conditions in IUU fishing vessels. Therefore, IUU activities hinder the progress of achieving sustainable fisheries and threaten the global food security, while carrying devastating consequences to developing countries and exposing workers to unacceptably risky conditions.

Conclusion

IUU fishing refers to a set of activities with the common aim of circumventing regulation, applicable on the high seas, in coastal state waters, or in areas regulated by RFMOs. With an estimate of IUU activities of more than 20 percent of all global catches, constituting between \$10 billion and \$23.5 billion annually, its enormous scope and influence on the deteriorating state of world fisheries is unquestionable. The fundamental theoretical driver of IUU activities is the financial gain, generated by a significant demand of fish stocks in shortage. In practice, the main globally identified causes of IUU fishing are:

1. The lack of effective port State control;
2. Excessive fishing capacity;
3. Weak flag State control;
4. Insufficient level of monitoring, control and surveillance;
5. Low sanctions against illegal fishing.

IUU fishing has been recognized to cause devastating environmental, economic and social consequences. The most severe impacts of IUU practices appear in terms of: harming the recovery of fish populations and ecosystems due to non-compliance with relevant regulation and misrepresenting fish stock statistics; putting honest fishers at an unfair disadvantage by distorting competition, and exposing workers to dangerous working conditions in IUU vessels. Therefore, due to its extensive scope and devastating consequences, IUU fishing needs to be addressed globally, in a more sufficient manner.

²² C.Schmidt. Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing // Paper for the Conference on the Governance of High Seas Fisheries and the UN Fish Agreement: Moving from Words to Action, St. John, 2005.

II. THE MODERN INTERNATIONAL LEGAL AND POLICY FRAMEWORK REGULATING FISHERIES AND IUU FISHING

Having understood the concept of IUU fishing, familiarized with the forces behind its far reaching extent, and recognized the devastating effect it brings to the sustainability of global fisheries, it is essential to comprehend the core contemporary global actions taken against IUU fishing. For the purpose of this study, the modern international framework regulating fisheries and IUU fishing shall be understood as a set of legally binding and non-binding instruments of regional and international scope, designed to either directly combat IUU activities, or having significant effect for its future regulation. The main methods of combating IUU fishing, introduced by or originated from the presented instruments, shall then be distinguished, analysed, and evaluated.

The United Nations (UN) has acted as a pioneer and a pacemaker in the global conservation of marine resources and the worldwide struggle against IUU fishing. Operating through, among other institutions, its Food and Agriculture Organization (FAO), the UN introduced a set of 6 international instruments, which form the base of global IUU regulation. Our analysis shall begin by addressing UNCLOS-III – a core *hard law* instrument which introduced, among other topics, the fundamental measures of managing global marine resources. The FAO Compliance Agreement shall then be introduced as a global attempt to solve the inconsistencies of UNCLOS-III, essentially concerning the lack of adequate flag state responsibility. The UN Fish Stock Agreement shall be further introduced as a method to regulate high seas fisheries – an issue lacking sufficient regulation by previous instruments. The FAO Code of Conduct shall then be presented as the first *soft law* instrument, providing detailed benchmark standards for global fisheries management. Afterwards, the first international contemporary instrument, designed solely for tackling IUU fishing – the IPOA-IUU – shall be analysed. Finally, the FAO Port State Measures Agreement shall be presented as the most modern and comprehensive instrument, providing provisions on port state measures against IUU fishing, and the final instrument forming the global IUU regulation in the framework of the UN.

UNCLOS-III²³

UNCLOS-III is an international treaty, which is a rudimentary document to all instruments further examined by this study. This agreement has resulted from the third UN Conference on the Law of the Sea, which took place between 1973 and 1982. Adopted in 1982, UNCLOS-III came into force in 1994, a year after Guyana became the 60th nation to ratify the

²³ This section is based on the text of the United Nations Convention on the Law of the Sea // OJ. 1998, L179.

agreement. According to the UN Division for Ocean Affairs and the Law of the Sea (DOALOS), as of 23rd of January, 2013, 164 countries and the EU have joined the treaty.²⁴

UNCLOS-III provides a comprehensive legal framework for the regulation of all aspects of sea resources and uses of the oceans. Some of the main global marine issues addressed by the treaty include territorial sea limits, economic jurisdiction, navigational rights, conservation, management and protection of living marine resources and marine environment, and others. For the purpose of this study, UNCLOS-III shall be presented in terms of provisions on international cooperation, efficient conservation of living resources, and other articles, which affect the practice of IUU fishing.

UNCLOS-III does not directly name or address the problem of illegal fishing, but rather provides some guidelines for the overall global management of fisheries. Articles 19(2)(i) and 21(1)(d, e) reserve the exclusive fishing rights for coastal states in their territorial seas, yet no specific associated responsibilities are presented. Guidelines on fisheries management in the exclusive economic zone (EEZ), however, are addressed more profoundly. Articles 61 and 62 provide the general provisions regarding fisheries management in EEZ, including the responsibility of coastal states to determine the allowable catches and their obligation to give access to surpluses of allowable catches to other states, especially developing ones. Yet, the language of UNCLOS-III, in terms of requirements for states to set the allowable catches within their EEZs and use adequate scientific evidence for fisheries utilization, has been argued to be vague and ambiguous, thus raising questions about the strength of these provisions.²⁵ Furthermore, Article 73 presents the right of coastal states to take specific measures in the exercise of their sovereign rights to manage living resources in the EEZ, including boarding, inspection, arrest and judicial proceedings, with limitations in terms of prompt release of arrested individuals upon providing a reasonable security and the prohibition of imprisonment. The right to pursuit, beyond EEZ limits, a vessel which allegedly violated the regulations and laws of a state is presented in Article 111. In regard to fisheries management on the high seas, Article 116 provides the right for all states to engage in such fishing with consideration to their treaty obligations, the rights and duties of coastal states, and other provisions provided by UNCLOS-III. Article 117 instructs states to adopt measures to their nationals for the conservation of marine resources in the high seas, whereas Articles 118 and 119 call for international cooperation for the

²⁴ United Nations website. Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 23 January 2013 // http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea; retrieved 6 January 2013

²⁵ T.Zachary. Saving Fisheries on the High Seas: The Use of Trade Sanctions to Force Compliance with Multilateral Fisheries Agreements // Tulane Environmental Law Journal. 2006, Vol.20, Issue 1. P.43-96.

mentioned cause, by exchanging relevant statistics and other available data among themselves and by establishing subregional or regional fisheries organizations. The duty of states to cooperate among themselves and RFMOs is also introduced in Articles 63 and 64.

UNCLOS-III also presented the concept of *genuine link* between a flag country and vessels flying its flag, yet no definition of such link is present. It has been argued that provisions on flag state control presented by UNCLOS-III are too general in nature and are rather conceptual than constructive in reality.²⁶ However, this agreement was the first to develop the concept of nation's responsibility to ensure its vessels comply with fishing conservation regulations on the high seas. Consequently, the state's obligation to exercise control over its vessels has become a principal of customary international law.²⁷

UNCLOS-III was the first agreement to present a comprehensive set of fishing regulations and address the problem internationally.²⁸ By advocating cooperation and coordination for the management and conservation of fisheries, UNLOS-III provided a gateway for other international instruments, including those tackling IUU fishing. Furthermore, by granting exclusive fishing right authority to coastal states up to 200 nautical miles offshore, UNCLOS-III has extended the reach of laws to cover most of the richest fishing grounds across the world.²⁹ Although its impact on IUU fishing is complicated to assess, UNCLOS-III is a praiseworthy instrument applied by the global community to tackle overfishing and seek sustainable fisheries.

FAO Compliance Agreement³⁰

The FAO Compliance Agreement is an international treaty, approved during the 27th session of the FAO Conference in 1993. Having entered into force in 2003, the treaty currently only has 39 members, including the EU.³¹ This agreement was intended to correct the practice of reflagging vessels to non-parties of global and regional fisheries management agreements, in order to circumvent conservation and management measures in place.³² By

²⁶ R.Baird. *Illegal, Unreported and Unregulated Fishing: an Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence* // Melbourne Journal of International Law. 2004, Vol.5, Issue 2. P.299-334.

²⁷ *Idim*.

²⁸ J.Talhelm. *Curbing International Overfishing and the Need for Widespread Ratification of the United Nations Convention on the Law of the Sea* // North Carolina Journal of International Law and Commercial Regulation. 2000, Vol.25, Issue 2. P.381-418.

²⁹ T.Zachary. *Saving Fisheries on the High Seas: The Use of Trade Sanctions to Force Compliance with Multilateral Fisheries Agreements* // Tulane Environmental Law Journal. 2006, Vol.20, Issue 1. P.43-96.

³⁰ This section is based on the text of the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas // OJ. 1996, L177.

³¹ FAO Fisheries and Aquaculture Department website. *Parties to the FAO Compliance Agreement* // http://www.fao.org/fileadmin/user_upload/legal/docs/1_012s-e.pdf; retrieved 4 January 2013.

³² G.Moore. *FAO: The Food and Agriculture Organization of the United Nations Compliance Agreement* // International Journal of Marine and Coastal Law. 1995. Vol. 10, Issue 3. P.412-425.

definition, fishing in areas governed by international or regional organizations without being their member or not complying with their fisheries provisions by other means, falls within the scope of unregulated fishing. Hence, the FAO Compliance Agreement is one of the first international instruments addressing IUU fishing in a tangible manner. Although concentrating on the problem of vessel reflagging, it also addressed a number of other issues, relevant to the period when UNCLOS-III just came into force.

Article III of the FAO Compliance Agreement presents the notion of flag state responsibility, addressed solely to combat the practice of vessel reflagging. In essence, flag states are obligated to ensure that their vessels do not engage in activities conflicting with international conservation and management measures. This is to be achieved by only allowing authorized vessels to participate in fishing activities. Fishing vessels must provide requested relevant information to the flag state, have orderly history of fishing, be readily identified, and a sufficient link between the vessel and the state should exist. The FAO Compliance Agreement supplements the concept of *genuine link* introduced by UNCLOS-III, by explaining that such link must allow states to effectively exercise responsibilities or simply have reasonable control over its vessels.³³

Further provisions of the FAO Compliance Agreement are designed to ensure proper flow of information regarding high seas fisheries activities.³⁴ States are obliged to keep a record of their fishing vessels and make relevant information readily available to other states and the FAO. Cooperation between the FAO, states, and non-parties, in particular, developing countries, in terms of technical assistance and exchange of information, is encouraged by further articles. Finally, FAO Compliance Agreement calls for establishing a global record of fishing vessels, authorized to fish on the high seas. Consequently, the High Seas Vessels Authorization Record (HSVAR) has been presented in 1995 and is being updated ever since.³⁵

Although the FAO Compliance Agreement provides sufficient improvements to provisions by UNCLOS-III regarding flag state responsibility and had potential to substantially impact the management of global fisheries, the reluctance of states to become parties to this treaty prevents the possibility to assess its success in sustaining fisheries and combating IUU practices. The principle of *Pacta Tertiis*, or the rule that a treaty does not provide rights or rules

³³ Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas // OJ. 1996, L177., Article III(3).

³⁴ G.Moore. FAO: The Food and Agriculture Organisation of the United Nations Compliance Agreement // International Journal of Marine and Coastal Law. 1995. Vol.10, Issue 3. P.412-425.

³⁵ FAO Fisheries and Aquaculture Department website. Fishery Records Collections High Seas Vessels Authorization Record (HSVAR) // <http://www.fao.org/fishery/collection/hsvar/en>; retrieved 4 Jan 2013.

to third parties, hinders it from exhibiting its full potential.³⁶ However, as this study shows further, some provisions of FAO Compliance Agreement have been successfully adopted and implemented by other international and regional instruments.

UN Fish Stock Agreement³⁷

The UN Fish Stock Agreement, adopted in 1995, is an international treaty, which provides principles for the conservation and management of fish stock on the high seas. This agreement was intended to regulate fishing activities in areas ranging outside EEZs of 200 nautical miles, set out in UNCLOS-III, by elaborating on the principles of state cooperation and optimum utilization of fisheries, initially presented by UNCLOS-III. To achieve its objective of ensuring long-term conservation and sustainable use of fisheries in the high seas, the treaty presents a framework for cooperation directly between states, essentially through subregional or regional organizations, based on the precautionary approach and best available scientific information.³⁸ The UN Fish Stock Agreement came into force in 2001 and had 80 members at the time of writing.³⁹ Although the two largest fishing states – China and Peru –⁴⁰ are reluctant to become members, other top fishing countries, such as Indonesia, the EU, the United States, India, Japan, and Russia, have joined the treaty. Therefore, contrary to the FAO Compliance Agreement, The UN Fish Stock Agreement achieved significant international approval and altered the global practice of high seas fishing.

The role and responsibility of regional fisheries bodies to ensure protection of stocks in the high seas is the fundamental part of the agreement.⁴¹ Although direct cooperation between states, in terms of high seas fisheries, is touched upon throughout the treaty, the priority of using regional organizations and agreements is apparent. Article 8(5) obliges states to establish such organizations or agreements in unregulated areas and for unregulated species.

³⁶ R.Baird. *Illegal, Unreported and Unregulated Fishing: an Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence* // *Melbourne Journal of International Law*. 2004, Vol.5, Issue 2. P.299-334.

³⁷ This section is based on the text of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks // OJ. 1998, L189.

³⁸ United Nations website. The Overview of the UN Fish Stock Agreement // http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm; retrieved 6 January 2013.

³⁹ United Nations website. Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 23 January 2013 // http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea; 6 January 2013.

⁴⁰ European Commission website on marine affairs and fisheries. Facts and figures on the Common Fisheries Policy. Basic statistical data // http://ec.europa.eu/information_society/newsroom/cf/mare/itemdetail.cfm?item_id=8732; 2012. Retrieved 4 January 2013.

⁴¹ L.Juda. *The United Nations Fish Stocks Agreement* // *Yearbook of International Co-operation on Environment and Development*. London: Earthscan Publications, 2001.

Moreover, further articles require states to join these organizations or participate in relevant agreements in order for vessels to fish in their regulated areas. In essence, the UN Fish Stock Agreement ensures that all areas of the high seas, in which a fishing interest exists, are covered by regional organizations or agreements, and obliges fishing activities to fulfil sufficient standards for stock management and conservations in place.

Further articles, concerning flag state obligations and rights, state that in high seas areas, covered by regional organizations and agreements, the possible enforcement measures are not limited to a fishing vessel's flag state.⁴² Authorized vessels of regional organizations or agreements are entitled to board and inspect fishing vessels of state parties to the UN Fish Stock Agreement. If violations are validated by procedures, indicated in article 21, ultimately the flag state is to take measures against the vessel according to its law, including proceedings to impose penalties. The prevention of any activities undermining relevant fishing regulations is to be achieved by means listed in Article 18, most important being: fishing licenses, a national record of authorized fishing vessels, requirement for sufficient fishing and identification of gear, catch verification, and a system of monitoring, control and surveillance (MCS) of such vessels.

Port states are also provided with the enforcement roles under the agreement. Article 23(2) states that fishing vessels may be subject to port state inspections of documentation, fishing gear and catch, whereas legislation forbidding landings and transshipment of illegal catches may be adopted. These port state measures represent a change of previous practice of flag states having exclusive control over ships on the high seas.

The UN Fish Stock Agreement has been designed to address the problem of straddling stock fisheries in areas outside national jurisdiction – an issue recognized by UNCLOS-III, yet lacking satisfactory regulation. The adoption of the agreement gave immediate results, as existing RMFOs modified their working practices to sufficiently fulfil new provisions, and at least two new RMFOs have been established right away: the South East Atlantic Fisheries Organization (SEAFO) and the Western and Central Pacific Tuna Commission (WCPFC).⁴³ Subsequently, RMFOs became major contributors to efficient fisheries conservation and management, whereas their significance to the fight against IUU fishing is ever-growing. However, the reluctance of some states to join the treaty, most importantly China and Peru, is a significant drawback. The fact, that several important international fisheries remaining outside the range of RMFOs, is alarming.

⁴² L.Juda. The United Nations Fish Stocks Agreement // Yearbook of International Co-operation on Environment and Development. London: Earthscan Publications, 2001.

⁴³ FAO Fisheries and Aquaculture Department website. United Nations Fish Stock Agreement // <http://www.fao.org/fishery/topic/13701/en>; retrieved 6 January 2013.

*FAO Code of Conduct*⁴⁴

The FAO Code of Conduct, adopted in 1995 by an FAO conference, presents principles and international standards for responsible practices to ensure effective conservation, management and development of marine resources. Being global in scope, the code addresses fishing activities in all waters. It applies to all persons and organizations, concerned with the conservation, management and development of fisheries resources.⁴⁵ Although being legally non-binding, a number of provisions of the code are based on and complement the binding international treaties discussed earlier, namely UNCLOS-III, the FAO Compliance Agreement and the UN Fish Stock Agreement.

The general principles listed in the code in essence call for ensuring effective conservation and management of fisheries resources while engaging in fishing, harvesting, handling, processing and distributing fish and fishery products. Article 6(3) is of essential importance to the prevention of IUU fishing, as it requires states to preclude over-fishing and excess fishing – frequent outcomes of IUU practices. Among other notions, the code calls for states to create legal and institutional mechanisms to ensure all parties involved in fisheries comply with the long-term conservation and sustainability programs in place. International cooperation is also encouraged, with specific importance once again given to the role of RMFOs. Usage of best scientific evidence and the precautionary approach, as well as striving for overall transparency, while making decisions on fisheries management, is embraced. The code presents flag state control provisions by emphasizing the importance of monitoring, control and surveillance (MSC) networks, whereas the role of port states is somewhat ignored.

The Code is complemented by 15 technical guidelines, which provide guidance on implementation of specific provisions.⁴⁶ Also, four international plans of action addressing areas of concern have been established in the framework of the code: IPOA–Sharks (1999), IPOA–Seabirds (1999), IPOA–Capacity (1999) and IPOA–IUU (2001).⁴⁷ The action plan on combating IUU fishing received most international attention and is significant to the purpose of the present study, thus shall be addressed profoundly in a separate section.

The fact that an increasing number of national regulations regarding fisheries management refer to the FAO Code of Conduct in their preambles, and many international organizations have endorsed the code, its purpose of spreading the message of responsible

⁴⁴ This section is based on the text of the FAO Code of Conduct for Responsible Fisheries // Rome: FAO, 1995.

⁴⁵ D.Sodik. Non-Legally Binding International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing // Australian International Law Journal. 2008, Vol.15, Issue 1. P.129-164.

⁴⁶ G.Hosch. Analysis of the implementation and impact of the FAO Code of Conduct for Responsible Fisheries since 1995 // FAO Fisheries Circular No. C1038. 2008.

⁴⁷ *Idim.*

fisheries may be evaluated as obtained.⁴⁸ The Code's impact on IUU fishing is best assessed by analysing its IPOA-IUU.

IPOA-IUU⁴⁹

The IPOA-IUU, endorsed in 2001 by the FOA Committee on Fisheries (COFI), is the first global instrument solely intended to combat IUU fishing. Although developed within the framework of the FAO Code of Conduct and being voluntary and legally non-binding in nature, IPOA-IUU sources many of its provisions from binding international agreements discussed previously - UNCLOS-III, the FAO Compliance Agreement and the UN Fish Stock Agreement. In essence, the IPOA-IUU is a set of fundamental, previously presented provisions regarding sustainable fisheries, many of which were elaborated on by presenting more detailed regulation directed at IUU activities.

Flag state measures presented by the IPOA-IUU are comprised of provisions on fishing vessel registration, their record, and authorization to fish. This section has been drawn from the FAO Compliance Agreement and the UN Fish Stock Agreement without significant alteration. Similarly, coastal state measures, called upon by IPOA-IUU, are drawn from UNCLOS-III and slightly modified from targeting all vessels undermining fish conservation measures to those specifically participating in IUU fishing. On the other hand, port state measures provided by the IPOA-IUU are expanded upon significantly as compared to the provisions addressed in an abstract manner in previous international instruments. The plan directs port states to require fishing vessels, seeking permission to enter a port, to provide their authorization to fish and detailed information on the fishing trip and quantities of fish, whereas the port state should provide general information about the vessel and its catch to the flag state or a relevant regional organization. The plan also calls for states to establish a national strategy for port state control, yet no specific due dates are presented. The IPOA-IUU provisions regarding port state responsibilities led to the publication of a Model Scheme on Port State Measures to Combat IUU fishing, which subsequently developed into a binding international instrument on port state measures.⁵⁰

The IPOA-IUU also emphasizes the importance of using effective market-related measures in accordance to regulations by the World Trade Organization (WTO). This concept has already been notionally addressed in the FAO Code of Conduct, yet the plan, more specifically, calls for states to prevent any fish, caught by identified IUU vessels, to be exported

⁴⁸ G.Hosch. Analysis of the implementation and impact of the FAO Code of Conduct for Responsible Fisheries since 1995 // FAO Fisheries Circular No. C1038. 2008.

⁴⁹ This section is based on the text of the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing // Rome: FAO, 2001.

⁵⁰ Same as ⁴⁸

from or imported to their territories. Although the intention of using WTO-consistent trade measures to achieve transparency in fish trade is praiseworthy, the offered measures are too general. A lack of specific market-related actions or methods, which may be used by states, is apparent in the IPAO-IUU.

The significance of RMFOs, firstly presented by UNCLOS-III and afterwards expanded by the FAO Compliance Agreement and the FAO Code of Conduct, is also acknowledged by the IPOA-IUU. States are to institutionally strengthen the capacity of RMFOs to combat IUU fishing, whereas the RMFOs should implement mandatory reporting of IUU activities, cooperate in terms of information exchange on IUU and supporting vessels, keep record of such vessels and vessels authorized to fish, and develop action plans. Although RMFOs are provided with a list of measures against IUU fishing, specific enforcement measures such as boarding and inspections by authorized vessels are absent.

The IPOA-IUU calls for states to implement National Plans of Action (NPOA) as soon as possible (but not later than in three years), in order to achieve the objectives of the plan and integrate them into their fisheries management programs and budgets. The concept of NPOA for IUU fishing was a new development, seeking national effort in combating IUU activities. A number of NPOAs have been developed based on the provisions of IPOA-IUU, including the European Commission Community action plan of 2002, which serves most importance to the present study and shall be addressed in detail in further sections of this study.

The IPAO-IUU was the first and only international instrument, compounding available modern tools for combating IUU fishing. While many of the provisions are repetitive of what is found in previous international instruments, the IPAO-IUU is praiseworthy for renewing the focus on efforts to combat IUU activities.⁵¹

The offered combination of flag, port, and coastal state measures had a potential to become a powerful weapon against illegal fishing. However, these measures would only function successfully if states implemented them into their national legislation appropriately.⁵² The FAO informed that not more than 25 NPOAs have been established by 2005.⁵³ Therefore, although the IPOA-IUU presents a set of valuable tools for fighting IUU activities, the plan's non-binding nature prevents its measures from achieving their full capacity.

⁵¹ W.Edeson. The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument // The International Journal of Marine and Coastal Law. 2001, Vol.16, No.4. P.603-623.

⁵² I.Boto, C.Peccerella, S.Scalco. Resources on Illegal, Unreported and Unregulated (IUU) fishing // A Reader from Brussels Rural Development Briefings. Brussels, 2009.

⁵³ FAO. Regional Workshop on the Elaboration of National Plans of Action to Prevent, Deter And Eliminate Illegal, Unreported and Unregulated Fishing – Certain Countries of The Near East Region // FAO Report No. 793. Port-of-Spain, 2005.

FAO Port State Measures Agreement⁵⁴

The FAO Port State Measures Agreement was adopted during an FAO Conference in 2009, as a response to the continuing detrimental effect of IUU fishing upon fish stocks and related global harm. The agreement obliges its parties to adopt minimum port state measure requirements in terms of, inter alia, port entry and vessel inspections, and cooperate in doing so with a number of concerned parties.

A total of 25 instruments of ratification, acceptance, approval or accession are required for the agreement to enter into force.⁵⁵ At the time of writing, 5 states, including the EU, have committed to the agreement by applying one of these instruments.⁵⁶ 20 other countries have signed the agreement, thus expressing supporting it and taking the first step towards its ratification.

Adopting such agreement is a logical decision by the international community, as the FAO Port State Measures Agreement is the first global instrument calling for specific compulsory requirements in regard to IUU fishing from port states. Although all previously discussed *hard law* instruments provide certain rights to port states in acting against vessels undermining fisheries regulations in place, only the FAO Compliance Agreement presents a brief compulsory duty to inform a flag state of such vessels in Article 5(2). On the other hand, port state obligations have been presented by discussed *soft law* instruments, yet the legally non-binding nature of both FAO Code of Conduct and IPAO-IUU did not compulsively enforce these obligations to port states.

The core of the FAO Port State Measures Agreement is compiled from provisions binding port states to follow minimum standards for port entry and fishing vessel inspections. Article 7 obligates port states to designate ports which may be used by fishing vessels and have sufficient capacity to exercise inspections. Further Articles require port states to only grant entry for vessels which provide sufficient information, detailed in the agreement, thus proving not to be involved in IUU activities. For vessels in ports, inspections are to be conducted by port state representatives, trained according to listed guidelines, in a matter described in the agreement. Although a specific number of annual inspections is not provided, states are to agree on it through, inter alia, RMFOs and FAO. States are encouraged to exchange all related information among themselves and with RMFOs and the FAO, electronically.

⁵⁴ This section is based on the text of the Agreement on Port State measures to prevent, deter, and eliminate Illegal, Unreported and Unregulated fishing // OJ. 2011, L191.

⁵⁵ FAO Fisheries and Aquaculture Department website. Port State Measures Agreement // <http://www.fao.org/fishery/topic/166283/en>; retrieved 6 January 2013.

⁵⁶ FAO Fisheries and Aquaculture Department website. Port State Measures Agreement: Status // http://www.fao.org/fileadmin/user_upload/legal/docs/2_037s-e.pdf; retrieved 4 January 2013.

The Agreement is focused on port state measures, yet several flag state obligations and requirements of developing states are also present. Article 20 requires flag states to request inspections to suspected IUU vessels (carrying their flag), encourage their vessels to use designated ports only, and, most importantly, take outright enforcement actions against proved IUU participants and report results to related parties and organizations. Further articles instruct states to provide assistance to developing countries, in matters related to fulfilling this agreement. This objective is to be achieved by establishing sufficient funding mechanisms and a working group regulating them.

The FAO Port State Measures Agreement presents the most comprehensive set of port state tools against IUU activities to this day. Although the agreement is widely supported, only a few states have yet ratified it. Further ratification process by the largest fishing states shall determine whether its implementation is at risk. When implemented, the port state provisions shall supplement other global measures applied for combating IUU fishing.

The Evaluation of Methods used to Combat IUU fishing

The modern global regulation system of fisheries and IUU fishing, established with guidance of the UN throughout a period of three decades, presented a set of methods for states to ensure sufficient conservation and sustainability of fisheries, and combat IUU activities. The presented international instruments offer a set of measures for flag states, port states, and RMFOs, also touching upon the notions of market-related provisions and comprehensive cooperation on national, regional and international levels. An evaluation of these methods is needed to recognize the main pathways available to tackle IUU fishing.

Flag State Measures

Every international instrument, discussed so far, has given certain regard to flag state measures. The FAO Compliance Agreement has been established for the sole purpose of fighting the practice of vessel reflagging - a consequence of inadequate management of fishing vessels by several disingenuous states. Yet, the lack of effective flag state control has been argued to be the main cause of IUU fishing.⁵⁷

According to the current international regulation, a flag state has the responsibility of controlling fishing activities of a vessel in the waters of its national jurisdiction, on the high seas, and in waters under jurisdiction on another state. However, some of the recently discussed international fisheries regulation instruments have provided certain rights to take action for states

⁵⁷ K.Bray. A Global Review of Illegal, Unreported and Unregulated (IUU) Fishing // Report for the Expert Consultation on Illegal, Unreported and Unregulated Fishing by the Government of Australia in Cooperation with FAO. Sydney, 2000.

against vessels carrying other flags.⁵⁸ In accordance to UNCLOS-III, flag states have exclusive responsibility over their vessels in waters under their jurisdiction, thus no other state has the right to control these activities to this day. However, flag states are no longer the only parties that may take action over their vessels in the high seas, as the UN Fish Stock Agreement introduced possible enforcement measures by RMFOs and port states. The flag state is also obliged to take measures, according to its law, against its vessels, which are indicated to have violated fisheries provisions in place. Furthermore, in waters and ports of other states, fishing vessels may be subject to inspections in accordance to the FAO Port State Measures Agreement, which can lead to a ban of using ports or fishing in particular areas.

FOCs continue to be a significant issue in the context of global fisheries management, as the current state of the law fails to address the issue in a meaningful way.⁵⁹ A study indicated that in 2005 over 1000 large fishing vessels have continued to fly recognized FOCs in spite of large-scaled global and regional efforts to combat IUU fishing.⁶⁰ Although UNCLOS-III introduced the concept of *genuine link* (at least an *economic link*) between a vessel and its state, the definition is considered to be too broad and states were free to interpret it. The FAO Compliance Agreement tried to narrow the definition, explaining that this link should allow states to have reasonable control over their vessels, yet the reluctance of targeted flag states to sign the treaty, already discussed in previous sections, diminished the potential of this agreement. The major struggle and inability of the global community to solve the problem of FOCs is best illustrated by the FAO going so far as stating that this problem has no potential to be solved within the foreseeable future, thus different measures than combating the FOC practice should be applied.⁶¹ However, yet another attempt at combating FOCs has been introduced by the FAO in 2011. Three Technical Consultations on Flag State Performance have been organized to set up voluntary criteria for assessing the performance of flag States in 2011, 2012, and 2013.⁶² Yet, no specific voluntary outcomes have yet been communicated by the FAO relating to these consultations.

The UN Fish Stock Agreement signals a change from exclusive flag state control over its vessels towards a more sophisticated system of spread control in areas outside EEZs. However, due to a lack of political will of some states, fishing vessels are still allowed to be

⁵⁸ FAO Fisheries and Aquaculture Department website. Flag State Responsibilities // <http://www.fao.org/docrep/005/Y3536E/y3536e07.htm#fn39>; retrieved 7 January 2013.

⁵⁹ J.Ferrell. Controlling Flags of Convenience: One Measure to Stop Overfishing of Collapsing Fish Stocks // Environmental Law. 2005, Vol.35, Issue 2. P.323-390.

⁶⁰ M.Gianni, W.Simpson. The Changing Nature of High Seas Fishing // Report for the Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers' Federation, and WWF International. 2005.

⁶¹ FAO Fisheries and Aquaculture Department website. Flag State Responsibilities // <http://www.fao.org/docrep/005/Y3536E/y3536e07.htm#fn39>; retrieved 7 January 2013.

⁶² FAO. The State of World Fisheries and Aquaculture 2012. Rome: FAO, 2012. P.95.

registered in territories without any link to the vessel or control of its fishing activities.⁶³ Considering the already discussed situation of increasing IUU activities, and the incapability of global community to oblige all states to reject providing FOCs (or *open registers*) by joining the FAO Compliance Agreement, it is evident that the modern global flag state measures have been applied insufficiently.

Port State Measures

All six discussed international instruments refer to specific rights of port states in regard to vessels, undermining fisheries conservation and management regulations in place. However, in regard to IUU fishing, the obligations of port states, presented in the IPOA-IUU, and the FAO Port State Measures Agreement, are most significant. Although in a legally non-binding manner, IPOA-IUU directed port states to designate ports, require, among other documents, authorization to fish and details on fish quantities on board from entering vessels, and establish a national strategy for port state control. The FAO Port State Measures Agreement adopted and elaborated on these measures by obliging states to designate ports, require a detailed list of minimum information from entering vessels, exercise inspections by trained inspectors in a manner described in detail, on the minimum level agreed with RMFOs, FAO or otherwise, and exchange all related information electronically.

In evaluating the power of ports state measures, presented by the modern international regulations, it is important to stress that none of the provisions are yet legally binding to states. The only *hard law* instrument presenting port state obligations, FAO Port State Measures Agreement, is not yet in force, whereas *soft law* obligations are non-binding by definition. Estimates show that only 1 in 4 cases of port entry requests are being processed sufficiently by port states as RMFOs contracting parties.⁶⁴ It is safe to say that non-party port states are even more reluctant to cooperate because of additional related expenditures. Furthermore, studies show that cooperating states frequently have insufficient information on IUU-listed vessels.⁶⁵ This, however, is more associated with the inability of RMFOs to coordinate sufficiently and the reluctance of some flag states to discontinue operations of IUU vessels – problems that shall be discussed further. All in all, the current international regulations, solely regarding port state obligations, are comprehensive and seem sufficient, yet lack binding manner to reach full potential.

⁶³ FAO. The State of World Fisheries and Aquaculture 2012. Rome: FAO, 2012. P.95.

⁶⁴ The Pew Charitable Trusts. A comparison of RFMO port State measures with the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing // The Pew Report, Brussels. 2010.

⁶⁵ *Idim.*

Measures on the High Seas - Regional Fisheries Management Organizations (RFMOs)

When assessing measures related to IUU activities on the high seas, it is important to state that the major part of global fisheries resources are under the control of at least one RFMO.⁶⁶ RFMOs are international organizations formed by states in order to achieve sustainable conservation and management of specific fish species in areas with fishing interest. As already mentioned in preceding sections, UNCLOS-III urged states to establish such organizations to achieve sufficient conservation of marine resources on the high seas. Furthermore, the UN Fish Stock Agreement directed states to cover all zones beyond EEZs by either a RFMO or a fish stock conservation and management agreement, whereas authorized vessels were entitled to board and inspect fishing vessels. Therefore, when analysing the contemporary international regulation of high seas fisheries, the work and measures of RFMOs constitute the core of such regulation.

In contrast to other Regional Fisheries Bodies (RFBs), which only have an advisory mandate, RFMOs have a management mandate, thus are entitled to adopt fisheries conservation and management measures that are compulsory for their members.⁶⁷ Currently, there are 44 RFBs worldwide, 20 of which are RFMOs.⁶⁸ Having in mind that only around 10 percent of fish harvest is estimated to be taken beyond the limits of EEZs of coastal states⁶⁹, which constitute the major part of RFMOs covered areas, for the purpose of this study regional organizations and agreements shall be analysed in brief terms.

Although many RFMOs have difficulty in estimating the extent of IUU activities in their convention areas, it is widely declared that IUU fishing is moderating in such areas as the Northeast Atlantic Ocean, managed by the North East Atlantic Fisheries Commission (NEAFC) since 1982.⁷⁰ The members of NEAFC: EU, Denmark, Russian Federation, Iceland and Norway, have all agreed upon specific measures to reach their objective – to optimal conservation and utilization of fisheries resources and eradicate IUU fishing in the convention area.⁷¹ The commission has implemented 29 binding recommendations on fishing restrictions, technical measures and gathering statistics, the execution of which is maintained by a detailed Scheme of Control and Enforcement. The scheme is constantly updated and includes strict provisions on authorization to fish, usage of gear, a system of monitoring fisheries, inspections at sea, port state

⁶⁶ A.Willock, M.Lack. Follow the leader: Learning from experience and best practice in regional fisheries management organizations // Report for the WWF International and TRAFFIC International. 2006.

⁶⁷ FAO Fisheries and Aquaculture Department website. What are Regional Fishery Bodies (RFBs)? // <http://www.fao.org/fishery/topic/16800/en>; 7 January 2013.

⁶⁸ *Idim*.

⁶⁹ FAO. The State of World Fisheries and Aquaculture 2012. Rome: FAO, 2012. P.94.

⁷⁰ *Idim*, P.96.

⁷¹ North East Atlantic Fisheries Commission website. About the Work of NEAFC // <http://www.neafc.org/about>; retrieved 14 January 2013.

control, infringements, and measures to promote compliance by non-contracting party fishing vessels.⁷² The commission has also established a list of IUU vessels, which are not allowed to fish in the convention area and enter designated ports of NEAFC members.

The North East Atlantic Ocean is known to be one of the most abundant fishing areas across the globe, yet studies estimate that its scope of IUU fishing is about 9 percent - one of the lower estimates in the world oceans.⁷³ Undoubtedly, the NEAFC, managing about one third of the whole North East Atlantic Ocean, is a significant contributor to this achievement. The commission might be considered as a model of implementing modern international instrument of regulating fisheries and combating IUU fishing.

In accordance with the discussed international instrument, RFMOs have adopted a number of measures to combat IUU activities. Several RMFOs have established lists identifying vessels involved in IUU fishing, records of fishing vessels, vessel monitoring systems, boarding and inspection procedures, port inspection schemes, trade-related measures, and other provisions.⁷⁴ Subsequently, these organizations became important participants in the global struggle against IUU fishing. However, it has been argued that RMFOs have failed to achieve their goals, as 67% of fish stock managed by RMFOs is either depleted or overfished.⁷⁵ Considering the fact that RMFOs have been established for the purpose of their stock conservation, a failure is evident. Furthermore, a separate study on the progress made by RMFOs indicated that their authorized fleets are oversized, stocks under catch limits are overfished, and an absence of stock rebuilding strategies and a lack of precaution are evident.⁷⁶ Therefore, although some progress was made by RMFOs in regulating high seas fisheries, especially the success of the NEAFC, there is still much work to be done in order for RMFOs to fully achieve their goals.

Market-related Measures

The concept of using market-related measures in the fight against IUU activities has been introduced by the IPOA-IUU. The core purpose of these measures is to eliminate the economic incentive for IUU vessels by preventing fish caught illegally from reaching markets.

⁷² North East Atlantic Fisheries Commission website. Expanded Table of Contents // <http://www.neafc.org/scheme/contents>; retrieved 14 January 2013.

⁷³ D.Agneu, J.Pearce, G. Pramod. Estimating the Worldwide Extent of Illegal Fishing // PLoS ONE. 2009. Vol.4, Issue 2. P.1-8.

⁷⁴ M.Tsamenyi, M.Palma, B.Milligan. The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective // The International Journal of Marine and Coastal Law. 2010, No.25. P.5-31.

⁷⁵ S.Suzuki, D.Pauly. Failing the High Seas: a Global Evaluation of Regional Fisheries Management Organization // Independent review: University of British Columbia. 2010.

⁷⁶ A.Willock, M.Lack. Follow the leader: Learning from experience and best practice in regional fisheries management organizations // Report for the WWF International and TRAFFIC International. 2006.

The IPOA-IUU calls for applying multilateral trade-related measures, such as catch documentation and certification requirements, consistent with the WTO provisions and international law. However, the plan emphasizes that such measures are only to be used in exceptional circumstances. The high potential of using market measures against IUU fishing and the apparent lack of such regulation at international level has already been argued.⁷⁷ Although several RFMOs and the EU eventually applied market-related measures to their systems of combating IUU activities⁷⁸, the fact that such measures were only proposed by a *soft law* instrument in a cautious manner indicates a lack of its regulation in the contemporary international framework.

Conclusion

The objective to ensure effective conservation and management of fisheries and the global battle against IUU fishing has long been pioneered and led by the UN, through its FAO. Since UNLCLOS-III was established in 1982, the notion of sustainable fisheries has been addressed by the global community in an unseen manner. The concept of IUU fishing and the international struggle against it has also emerged, and several international instruments addressing it have consequently been developed.

The analysis of six contemporary international instruments addressing global fisheries and IUU activities indicated several core methods proposed by the global community to combat IUU fishing. Flag state responsibility and measures have been the focal point of combating IUU activities, yet the usage of FOCs is prospering in the global fishing and shipping business to this day. The unwillingness of states to adopt flag state measures against their vessels, and the inability of the global community to oblige countries to apply such measures, signals that flag state responsibility is addressed insufficiently. On the other hand, port state measures against IUU activities have been delivered in a comprehensive manner. Their effectiveness in practice shall only be apparent after the FAO Port State Measures Agreements comes into force, yet, its potential for tackling illegal fishing has been widely acknowledged. Finally, market-related measures have been addressed by international instruments in a cautious manner, in fear of them deteriorating to barriers of trade. Although the potential of using such measures against IUU activities has been argued to be extensive, a shortage of related regulation by the international instruments is visible.

⁷⁷ T.Zachary. Saving Fisheries on the High Seas: The Use of Trade Sanctions to Force Compliance with Multilateral Fisheries Agreements // Tulane Environmental Law Journal. 2006, Vol.20, Issue 1. P.43-96.

⁷⁸ G.Hosch. Analysis of the implementation and impact of the FAO Code of Conduct for Responsible Fisheries since 1995 // FAO Fisheries Circular No. C1038. 2008.

III. THE FRAMEWORK OF REGULATION ON FISHERIES MANAGEMENT AND COMBATING IUU FISHING BY THE EUROPEAN UNION

The EU accounts for 5,7 percent of the total global catches, making it the fourth largest producer of fish in the world after China, Peru, and Indonesia.⁷⁹ Although community fishing vessels operate worldwide, more than 70 percent of EU catches are taken in the Eastern Atlantic.⁸⁰ An estimate of IUU fishing in community waters is unavailable, yet it has been assessed that illegal fishing amounts for approximately 9 percent in the Eastern Atlantic, which is one of the lowest quantities for such an abundant fishing area.⁸¹ However, the NEAFC has already been argued to be the major contributor for sustaining a relatively low level of IUU activities in the Eastern Atlantic, which is its convention area.⁸² Furthermore, the second most significant EU fishing area – the Eastern Central Atlantic, constituting almost 10 percent of its catches⁸³, is acknowledged to have the largest IUU average in the world – 37 percent.⁸⁴ A lack of data on the IUU levels in the third largest EU fishing area – the Mediterranean, constituting almost 9 percent of its total catches⁸⁵, has been acknowledged by a study, yet IUU estimates for bluefish tuna in the area are said to be high.⁸⁶ Therefore, the EU fishing areas provide diverse estimates of IUU activities. Although the largest area is acknowledged to have a relatively low average of IUU fishing, it is difficult to determine the contribution level of EU compared to the RMFO, covering the area. Further estimates of IUU levels in EU fishing areas are needed.

The EU is also the largest market for imported fish and fisheries products, constituting 40 percent of total world fisheries imports.⁸⁷ Estimates show that by 2020, the EU will still lead the global imports of fisheries with approximately 22%.⁸⁸ These numbers indicate that the EU is and shall remain in a position of great power to control the flow of IUU-related fisheries by using market-related measures – a concept addressed in the previous sections.

The EU has implemented many instruments regarding fisheries since its establishment by the Treaty of Rome in 1957, most important and comprehensive of which,

⁷⁹ European Commission website on marine affairs and fisheries. Facts and figures on the Common Fisheries Policy. Basic statistical data // http://ec.europa.eu/information_society/newsroom/cf/mare/itemdetail.cfm?item_id=8732; 2012. Retrieved 4 January 2013.

⁸⁰ *Idim*.

⁸¹ D.Agnew, J.Pearce, G. Pramod. Estimating the Worldwide Extent of Illegal Fishing // PLoS ONE. 2009. Vol.4, Issue 2. P.1-8.

⁸² See section “The Evaluation of Methods used to Combat IUU fishing“ on Measures on the High Seas.

⁸³ *Same as* ⁷⁹.

⁸⁴ D.Agnew, J.Pearce, T.Peatman. The Global Extent of Illegal Fishing // Project by the MRAG and University of British Columbia. 2008

⁸⁵ *Same as* ⁷⁹.

⁸⁶ *Same as* ⁸⁴.

⁸⁷ FAO. The State of World Fisheries and Aquaculture 2012. Rome: FAO, 2012. P.16.

⁸⁸ I.Lutchman, S.Newman, M.Monsanto. An Independent Review of the EU Illegal, Unreported and Unregulated Regulations // Independent review: Institute for European Environmental Policy. 2012.

concerning IUU fishing, have been presented since the start of the 21st century. For the purpose of this study, familiarizing with the EU's common fisheries management system, applied since 2002, is significant. Also, it is essential to analyse a set of instruments composing the EU system of combating IUU fishing. By doing so, the main methods used by the EU in regard to IUU activities shall be drawn, compared to the discussed international instruments, and evaluated in terms of their success, potential, and specific recommendations for improvement.

The Common Fisheries Policy (CFP)⁸⁹

The CFP is a framework of regulations, through which EU countries are jointly managing their fisheries. The birth of the CFP is perceived differently among authors, ranging from 1957 when the treaty establishing the EU was drafted⁹⁰, to 1983 when the first fisheries conservation component and the total allowable catch (TAC) system was first agreed upon by members of the EU.⁹¹ It is generally agreed, however, that a significant CFP reform has been implemented in 2002, after the Commission has repeatedly concluded, that the EU's fisheries policy has failed to ensure sustainable exploitation of resources. For the purpose of this study, the modern version of CFP shall be analysed in coherency with the global struggle against IUU fishing.

EC Regulation 2371/2002 introduced the modern fisheries policies used by EU member states in terms of rules for sustainable fisheries, national enforcement measures, regulations of fishing fleet capacity, funding and technical support initiatives, market-related measures, and aquaculture development.⁹² Several significant sections of the contemporary CFP system are explored further.

Rules for Sustainable Fisheries

In essence, the CFP presents regulations aimed at relieving the burden on fish stocks by limiting fishing input and output, and enforces technical rules on how and where vessels may fish.⁹³ The input of fishing refers to the catch limits, whereas the output represents fishing efforts. Catch limits are aimed to determine the quantity of specific fish stock which is allowed to be taken during a particular time period. These limits are expressed in total allowable

⁸⁹ This section is based on the text of Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

⁹⁰ R.Churchill, D.Owen. *The EC Common Fisheries Policy*. Oxford: Oxford University Press, 2012. P.3.

⁹¹ J.Raakjaer. *A Fisheries Management System in Crisis; the EU Common Fisheries Policy*. Aalborg: Aalborg University Press, 2009, P.13.

⁹² European Commission website on marine affairs and fisheries. *The common fisheries policy (CFP)* // http://ec.europa.eu/fisheries/cfp/index_en.htm; 9 January 2013

⁹³ European Commission website on marine affairs and fisheries. *Fishing effort* // http://ec.europa.eu/fisheries/documentation/publications/cfp_factsheets/fishing_effort_en.pdf; retrieved 9 January 2013.

catches (TACs), which are suggested by the Commission and are set annually (for most stocks) by the Council of Fisheries Ministers, in line with multi-annual plans. The TACs are set on the basis of scientific advice of The Scientific, Technical and Economic Committee for Fisheries and The International Council for the Exploration of the Sea, and are shared between EU countries through quotas, in stable relation to each other.⁹⁴ Fishing effort, referred to by the CFP, is the size of a vessel multiplied by the time allowed to spend fishing (either GT/days or kW/days). Being essential to the prevention of overfishing, fishing efforts are included in every multi-annual plan.⁹⁵ Finally, technical measures are constantly applied by the Commission, in terms of, inter alia, closed fishing areas and periods, usable gear, and limits on bi-catches. The Commission distinguishes its actions to protect endangered species and limitation of bottom trawl usage as more significant measures applied.⁹⁶ Therefore, regulation of catch limits, fishing effort, and technical measures are the main instruments applied by the CFP to ensure sustainable fisheries.

Regulation of Fishing Fleet Capacity

Chapter III of EC Regulation 2371/2002 is intended to limit the overall fishing fleet capacity of the EU. States are obliged to maintain their fishing fleet under the capacity level present on the 1st of January, 2003, by compensating any addition to their fleet by a withdrawal of vessels with at least the same capacity. The objective of fishing fleet reduction is stimulated by financial assistance to complying states (Article 16), and ensured by establishing a community fishing fleet register (Article 15). A detailed electronic fleet register is currently available and is updated every three months. Recent estimates indicate that the EU fishing fleet capacity is declining in terms of both tonnage and engine power by nearly 2 percent annually for last two decades, and the total number of fishing vessels has declined from 106 729 in 1995, to 83 014 in 2011.⁹⁷

Funding and Technical Support Initiatives

In accordance to the CFP, funding to the fishing industry and coastal communities is managed by the European Fisheries Fund (EFF). With a budget of €4,3 billion for the period

⁹⁴ European Commission website on marine affairs and fisheries. TACs and quotas // http://ec.europa.eu/fisheries/cfp/fishing_rules/tacs/index_en.htm; retrieved 9 January 2013

⁹⁵ European Commission website on marine affairs and fisheries. Fishing effort // http://ec.europa.eu/fisheries/documentation/publications/cfp_factsheets/fishing_effort_en.pdf; retrieved 9 January 2013.

⁹⁶ European Commission website on marine affairs and fisheries. Facts and figures on the Common Fisheries Policy. Basic statistical data // http://ec.europa.eu/information_society/newsroom/cf/mare/itemdetail.cfm?item_id=8732; 2012. Retrieved 4 January 2013.

⁹⁷ European Commission website on marine affairs and fisheries. Facts and figures on the Common Fisheries Policy. Basic statistical data // http://ec.europa.eu/information_society/newsroom/cf/mare/itemdetail.cfm?item_id=8732; 2012. Retrieved 4 January 2013.

of 2007-2013, the EEF provides financial assistance to national authorities, vessel owners, and many other micro, small or medium-sized public and private sector participants willing to apply.⁹⁸ Funds are then allocated to applicants who provide a sufficient and effective fisheries strategic plan and program, which meets the CFP objectives in terms of (1) fleet adjustment, (2) development of aquaculture, processing and marketing, and inland fishing sectors, (3) measures of common interest, (4) development of fisheries areas, and (5) technical assistance.⁹⁹ Furthermore, considering the sound importance of scientific advice to EU's fisheries management, the CFP is allocating €50 million annually since 2001 for helping national authorities to collect economic and biological data on fisheries.¹⁰⁰ The Commission has proposed to establish a new maritime and fisheries fund for the period of 2014-2020, as part of the ongoing CFP reform.¹⁰¹ In essence, the new European Maritime and Fisheries Fund (EMFF) would only grant support to environmentally-friendly initiatives, whereas a strict control mechanism would prohibit questionable funding.

Market-related Measures

Being the world's largest importer of fisheries products and a significant player in terms of catch volume in the global fisheries market, the EU is involved, through the CFP, in every stage of its fishing industry. Full traceability of fish products is ensured by regulating appropriate labelling through marketing standards, which are revised constantly.¹⁰² In essence, all fish products sold in the EU have to meet rigorous food and hygiene standards. Recent EU market-related measures against IUU fishing products, related to the CFP and emerging from other international instruments, shall be presented in a further section.

Aquaculture Development

Aquaculture is the farming of fish and other living organisms, which already provides half of all fish consumed globally.¹⁰³ Advocated through funding by the EEF, aquaculture has been given more significant regard by the Commission, which proposed a comprehensive strategy for the future of European aquaculture. The strategy is aimed at creating

⁹⁸ European Commission website on marine affairs and fisheries. The European fisheries fund (EFF) // http://ec.europa.eu/fisheries/cfp/eff/index_en.htm; retrieved 9 January 2012.

⁹⁹ European Commission website on marine affairs and fisheries. European Fisheries Fund: Fact Sheet // http://ec.europa.eu/fisheries/documentation/publications/cfp_factsheets/european_fisheries_fund_en.pdf; retrieved 9 January 2013.

¹⁰⁰ European Commission website on marine affairs and fisheries. Data collection // http://ec.europa.eu/fisheries/cfp/fishing_rules/data_collection/index_en.htm; retrieved 9 January 2013.

¹⁰¹ Commission Proposal COM/2011/0804 final of 2 Dec 2011 for a regulation of the European Parliament and of the Council on the European Maritime and Fisheries Fund.

¹⁰² European Commission website on marine affairs and fisheries. The market for fisheries products // http://ec.europa.eu/fisheries/cfp/market/index_en.htm; retrieved 9 January 2013

¹⁰³ European Commission website on marine affairs and fisheries. Aquaculture – fish farming // http://ec.europa.eu/fisheries/cfp/aquaculture/index_en.htm; retrieved 9 January 2013

consistent and clear policies by mutual cooperation, in order to achieve sustainable development of European aquaculture.¹⁰⁴ Although one fifth of all EU fish production comes from aquaculture and 65 000 people are employed by this sector, its total output in Europe has been steady since 2000, while globally it grew by one third.¹⁰⁵ Therefore, considering the significant importance of the aquaculture sector to sustainable fisheries of global and EU fisheries, and the somewhat stagnant growth of EU aquaculture output for more than a decade, the implementation of a new European aquaculture strategy is greatly anticipated.

Criticisms of the CFP and the Need for Reform

Although having great political and economic importance, the CFP is widely condemned of failing to achieve its goals.¹⁰⁶ The CFP is said to have failed to reach, among others, its essential aims of securing effective conservation, management, and development of living aquatic resources, and achieving a fair standard of living for fishing communities.¹⁰⁷ In essence, the Commission agreed with the wide-scale criticism of its CFP, and proposed yet another reform of its common fisheries system in 2009, which is on-going currently.¹⁰⁸ As the newest reform of the CFP does not essentially influence the EU anti-IUU measure system, an analysis of the CFP reform does not fall under the objectives of this study.

EU Regulation on IUU Fishing

The 2002 European Community Plan of Action for the Eradication of IUU Fishing (EU Action Plan)¹⁰⁹

The EU Action Plan has been presented by the Commission in 2002, to implement the provisions of the IPOA-IUU. The European community has played a significant role in establishing the IPOA-IUU, thus no time was wasted to fulfil its call for implementing a NPOA no later than in 2004. A plan to eradicate IUU fishing has been communicated by the commission, which contained 15 actions divided into levels of community, regional, and international measures, and measures in partnership with developing countries.¹¹⁰

¹⁰⁴ Communication from the Commission COM/2009/0162 final of 8 April 2009: Building a sustainable future for aquaculture - A new impetus for the Strategy for the Sustainable Development of European Aquaculture.

¹⁰⁵ European Commission website on marine affairs and fisheries. Aquaculture – fish farming // http://ec.europa.eu/fisheries/cfp/aquaculture/index_en.htm; retrieved 9 January 2013.

¹⁰⁶ R.Churchill, D.Owen. The EC Common Fisheries Policy. Oxford: Oxford University Press, 2012.P.0(Foreword).

¹⁰⁷ J.Raakjaer. A Fisheries Management System in Crisis; the EU Common Fisheries Policy. Aalborg: Aalborg University Press, 2009.P.15-16.

¹⁰⁸ Commission Green Paper COM/2009/0163 final of 22 April 2009 on the Reform of the Common Fisheries Policy.

¹⁰⁹ This section is based on the text of Communication from the Commission COM/2002/0180 final of 28 May 2002: Community action plan for the eradication of illegal, unreported and unregulated fishing.

¹¹⁰ *Idim*.

The community-level measures are addressed at (1) controlling nationals who use flags of convenience, (2) promoting the implementation of international arrangements on fisheries sustainability, (3) terminating any business relations of IUU fishers with related parties, and (4) enhancing public awareness on combating IUU fishing. The plan directs to define responsibilities of states in regard to their nationals (either captains or ship owners), who engage in IUU fishing using flags of convenience, and ban the practice of chartering IUU-involved vessels. The implementation of international arrangements on sustainable fisheries is suggested to be stimulated by banning trade of fisheries products taken in violation of these arrangements. Any business relations of IUU fishers are called to be discontinued by adding them to the infringement list of the control regulation. Finally, information and public awareness programs regarding the struggle against IUU fishing are encouraged by the plan.

The second part of EU Action Plan is directed at regional fisheries organizations in terms of (5) promoting detailed control plans, (6) strict conservation and management measures, (7) advanced IUU vessel identification systems, (8) renewed action plans, (9) improved data collection methods, and (10) a reform of certification system. Progressive control and inspection plans are to be proposed by the European Community to RFOs that lack sufficient regulation. Also, conservation and management measures for the high seas are to be provided by the EU in order to limit unregulated fishing as much as possible. Furthermore, the Community is to present objective criteria for identifying IUU activities and encourage the exchange of information about IUU vessels, whereas RMOs shall be called upon to adopt sufficient action plans to eradicate IUU fishing and implement procedures for collecting accurate data on IUU activities (trade, catches, landings, etc.). Finally, fisheries certification and documentation requirements are sought to be standardized by reforming the present chaotic system.

The measures at international level are listed as (11) the EU commitments to provide the community fleet register to the FAO, (12) participate in the network of monitoring agencies (MCS Network), (13) to convene international conferences to define a substantial link between a state and a vessel, and (14) to negotiate an international agreement on port state rights and responsibilities. Establishing a Community fleet register is a regulation applied by the FAO Compliance Agreement. Being a member of this agreement, the EU is providing the authorized vessel register to the FAO in order to improve the exchange of relevant fisheries information. Furthermore, the Commission is to become a member of the International Monitoring, Control, and Surveillance (IMCS) Network in order to strengthen international cooperation. IMCS Network currently has more than 50 members (mostly countries and some organizations) and provides a possibility for professionals to share information on monitoring of fisheries and IUU

activities across the globe.¹¹¹ Finally, the community is undertaking to convene two international conferences - first to define a substantial link between a state and a vessel, and second to adopt an international agreement on port state measures against IUU fishing. The first conference is directed solely at implementing Article 91(1) of UNCLOS-III regarding the definition of genuine link - an issue the international community is impotent to resolve for three decades. Whereas the second conference addresses a lack of compulsory port state measures proposed by the international instruments discussed earlier.

The final part of the plan refers to (15) helping developing countries to combat IUU fishing. Particular essence is given to those countries which have signed fisheries agreement with the EU and the community vessels are using their waters as fishing grounds. Technical and financial assistance in terms of MCS is to be provided on a case by case basis for every developing country.

The EU Action Plan is the first instrument by the EU directed solely at combating IUU fishing. Although voluntary in nature, the plan addresses the main sores of the global struggle against IUU fishing and produces a pathway for further binding regulation to be implemented. The success of applying the discussed provisions shall be presented in further sections of this study.

The 2007 EU Formal Strategy to Prevent, Deter, and Eliminate IUU Fishing (EU Strategy)¹¹²

The EU Strategy has been communicated by the Commission to the European Parliament in 2007, presenting a shift of emphasis from ensuring effective flag state implementation by the EU states, to addressing the rest of the supply chain and focusing on better enforcement and deterrent sanctions. The commission directs to integrate a new trade regime, establish black lists of states hosting flags of non-compliance, determine maximal levels of sanctions, cooperate with international organizations and the European Fisheries Control Agency (EFCA), and intensify the work of RMFOs in waters of developing countries.¹¹³ The current impacts and drivers of IUU activities are also presented by the EU Strategy in detail.

The impacts of IUU fishing are determined as environmental damage, socio-economic consequences, and undermining ocean governance. The sustainability of fisheries is said to be damaged by misreporting catches and targeting juveniles, whereas marine habitats as

¹¹¹ European Commission website on marine affairs and fisheries. Data collection//

http://ec.europa.eu/fisheries/cfp/fishing_rules/data_collection/index_en.htm; retrieved 9 January 2013

¹¹² This section is based on the text of Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee And the Committee Of The Regions COM/2007/0601 final of 17 October 2007 on a new strategy for the Community to prevent, deter and eliminate Illegal, Unreported and Unregulated fishing.

¹¹³ *Idim.*

endangered by by-catch while fishing with prohibited methods. Economically, IUU operators are noted to provide unacceptable working and living conditions to workers, thus creating unfair competition and reducing the market share of fair fishers - particularly devastating phenomenon for coastal communities in developing countries. These devastating impacts are declared to be caused by high profitability, lack of efficient governance of IUU activities. The substantial profits are generated due to low operating costs and exceeding catch limits (which are low due to overcapacity of fishing fleets). Ineffective governance is caused by states which run open registers and encourage the practice of flag-hopping - a regular change of flags to circumvent regulations. The listed impacts and drivers of IUU fishing are further targeted by the regulations offered by the EU Strategy.

The EU Strategy proposes a number of actions against IUU fishing. Firstly, the Commission offers to introduce a comprehensive trade regime for imported fisheries products. This regime would only allow products certified as legal by the flag state to enter into the EU. Secondly, the Commission proposes to identify and establish lists of states hosting flags of convenience thus providing insufficient supervisions on its fishing vessels. Furthermore, trade measures are to be applied upon these states as means of persuading them to exercise adequate control. Thirdly, an update of EU framework on control, inspection, and enforcement is called upon by the Commission. This framework is to be targeted at EU fishing vessels by applying stricter measures against nationals responsible for IUU fishing, and determining the maximal levels of sanctions for serious infringements of the CFP. Furthermore, the Commission calls upon better cooperation for investigating IUU activities through the EFCA. Mutual cooperation between the CFCA, EU states, and the FAO should lead to establishing a global register of fishing vessels and an international network for MSC activities. Finally, the Commission directs to expand measures against IUU fishing in the high seas through RMFOs, intensify financial support to coastal developing states, and promote the ratification of the ILO convention on work in the fishing sector.

Similarly to the EU Action Plan, the EU Strategy is a non-binding instrument designed as a pathway for future compulsory regulations. As a continuation of the EU Action Plan, The EU Strategy further elaborated the notion of market-related measures and renewed control regulations, both of which were later incorporated in EU's legally-binding regulations. Further sections of this study shall analyse the transition to and importance of mentioned regulations for the modern IUU regulation by the EU.

EU Council Regulation No. 1005/2008, establishing a Community system to prevent, deter, and eliminate illegal, unreported and unregulated fishing (EU IUU Regulation)¹¹⁴

The EU IUU Regulation is the first compulsory instrument by the EU, intended solely to provide a framework for overcoming IUU fishing. Adopted in 2008 by the Council, the EU IUU Regulation implements the EU strategy to combat IUU fishing by elaborating on provisions and notions provided by the CFP, the EU Action Plan, the EU Strategy, and international agreements and regulations. After entering into force on the 1st of January, 2010, it formed the core of EU's framework of combating IUU fishing, together with Regulation 1224/2009, which shall be analysed in a further part of this study.

Separate sections of the EU IUU Regulation introduce detailed methods and measures of addressing IUU activities. A precise list of actions, which are identified as IUU fishing and may be considered as serious infringements, is provided foremost. The second chapter is dedicated to port state measures designed to execute control over third-country fishing vessels. A catch certification scheme for importation and exportation of fisheries products is provided by further provisions. A relatively new notion of a community alert system is then briefly presented. The fifth section provides provisions on the identification of IUU fishing vessels, with the core measure of establishing an IUU vessel list. Further section presents the concept and measures regarding non-cooperating third countries, and a blacklist of such states is discussed. Separate chapters are dedicated to measures against EU nationals engaged in IUU fishing and sanctions against IUU vessels and non-cooperating third countries. Finally, the implementation of provisions on vessel sightings, adopted by RMFOs, is discussed, and mutual assistance among the Commission, EU states, and third countries is directed by the final part of the EU IUU Regulation. The core elements of this regulation shall be further analysed.

List of Presumed IUU Activities

The EU IUU Regulation defines IUU fishing by using somewhat similar wording as in IPOA-IUU and any other document concerning IUU activities. However, a list of twelve actions presumed as IUU activities is provided onward. The following actions are presumed as IUU-related: (1) fishing without an appropriate license; (2) failing to properly record and report catch-related data; (3) violating area, season, quota or depth restrictions; (4) fishing prohibited stock; (5) using inappropriate fishing gear; concealing (6) identity or (7) investigation evidence; (8) interrupting inspections; (9) exploiting undersized fish; (10) transshipping IUU catch or participating in joint fishing operations with IUU vessels; (11) undermining RMFO's regulations; (12) operating a stateless vessel (without nationality). Such decision is unprecedented, as

¹¹⁴ This section is based on the text of Council Regulation (EC) No. 1005/2008 of 28 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

previously introduced regulatory instruments presented a broader description which was exposed to speculation, whereas a precise list is more practical, yet much more difficult to construct.

Port State Measures

The EU IUU Regulation provides a comprehensive range of obligatory measures intended for port states, in terms of access to ports and port inspections. Fishing vessels are only allowed to enter ports which are designated by member states and transmitted to the Commission in a timely manner. A prior notice of three working days is determined for third country fishing vessels seeking to enter a port, and a list of general information on the vessel and catch on board is required. The authorization to enter a port is granted if the mentioned information is provided in a sufficient manner and is accompanied by a catch certificate for fish products on board. Masters of third country vessels are obliged to provide quantity and information on the date and place of catch for all fishery products landed and transhipped in a port, whereas member states are to keep copies of these declarations for at least three years after sending them to the Commission each quarter. Port inspections should be executed for at least 5 percent of landing and transshipment operations in designated ports, whereas vessels sighted, reported, or identified engaging in IUU activities shall be subject to inspections during every port visit. The inspectors (officials) are said to have a right to examine all parts of the vessel and catch on board without interference. In case of confirmed infringements, the port state shall not authorize any landing or transshipment of the catch in question.

The EU IUU Regulation is the first instrument providing an extensive set of provisions, compulsory for port states. As already mentioned, all discussed international regulation instruments, concerned with sustainable fisheries and IUU fishing, have touched upon some port state rights, yet an apparent lack of port state obligations has been evident. The FAO Port State Measures Agreement, however, has the capacity of closing this loophole by offering a comprehensive collection of global port state measures, yet it has not entered into force to date. It is important to note that a number of RFMOs have also adopted some form of port state measures which are currently in force. However, a recent study has indicated that the port state measures adopted by RMFOs are not sufficiently comprehensive, ineffective and not transparent enough to cover all IUU fishing activity and tackle the global problem.¹¹⁵ Therefore, the EU IUU Regulation is thus far the only major instrument to offer comprehensive port state measures in a legally binding manner.

¹¹⁵ The Pew Charitable Trusts. Port state performance: Putting Illegal, Unreported and Unregulated Fishing on the Radar // The Pew Report, Brussels. 2010.

Catch Certification Scheme

The purpose of the catch certification scheme, presented by the EU IUU Regulation, is to prohibit importation and exportation of fishery products obtained from IUU fishing. The importation of fishery products to the EU is only allowed if a catch certificate is provided by the master of the fishing vessel. The certificate must contain all relevant information, specified in the annex of EU IUU Regulation, has to be validated by the flag state of the vessel, and verified by the EU member state. The catch certificate of exported or indirectly imported fisheries products must also be verified by a relevant member state. Verifiable documentation is also required for products constituting one single consignment, which are transported to the EU from a third country (or have been processed there) other than the flag state. Catch certificates, prepared in conformity with market-related measures applied by RMFOs, are accepted as sufficient by the EU IUU Regulation. In order to verify a catch certificate, the competent authority of a member state is given wide control powers which include examining the product, verifying the provided data, examining records of the operators, inspecting means of transport and storage places, and carrying out official enquiries. The importers are also required to present the mentioned catch certificates three days prior to the estimated time of arrival, yet this duty is not applicable for approved economic operators – importers with a significant clean record of importation, who keep the catch documentation for future reference instead (4 companies at present¹¹⁶).

An additional instrument of protecting the EU market from IUU products is the community alert system. The Commission may issue an alert if sufficient information is obtained, causing doubt about the compliance of a vessel or a third state with applicable laws and regulations. Upon such alerts, member states are obligated to re-verify previous, and verify all current certificates of consignments with the vessel or the third state alerted on. This system is meant to serve as a supplementary instrument to prohibit IUU products from questionable sources, yet the system is still not established by the Commission, thus hindering the opportunity to assess its success.

At international level, fish traceability through supply chains is perceived as useful for IUU fishing deterrence.¹¹⁷ The catch certification system originated from the IPOA-IUU, which called for states to take all necessary steps to prevent fish caught by IUU vessels to enter their markets. Furthermore, the adoption of multilateral catch documentation and certification

¹¹⁶ European Commission website on marine affairs and fisheries. Approved economic operators // http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/approved_economic_operators_en.pdf; retrieved 11 January 2013.

¹¹⁷ M. Borit, P.Olsen. Evaluation framework for regulatory requirements related to data recording and traceability designed to prevent illegal, unreported and unregulated fishing // Marine Policy. 2010, No.36. P.96-102.

requirements for fisheries products was proposed by the same regulation, which is the exact technique the EU applied. The EU Plan of Action addressed a need to adopt rules banning trade of fishery products taken in breach of international agreement, whereas the EU Strategy called for the introduction of a trade regime which grants access to the EU only for products, certified as legal by the flag state of the importer. Catch documentation systems have been adopted by several RFMOs prior to the EU, however, they were mainly designed for gathering of catch statistics.¹¹⁸ Therefore, the catch certification system, influenced by the provisions of IPAO-IUU, is not a new phenomenon in the global struggle against IUU fishing, yet its strict regulations on member state verification of certificates is a relatively new approach at the international scale.

Although implementing the catch certification scheme was a praiseworthy step by the EU, the *Seta No. 73* study conducted by the Environmental Justice Foundation (EJF) in 2012 disclosed the main flaws of this market-related measure in practice.¹¹⁹ The study centres around an incident occurred in March 2011, when the EJF provided photographic and GPS positioning evidence to the Commission and Spain's Ministry of Environment, Rural and Marine Affairs (MARM), about the IUU nature of fisheries products carried by a reefer heading to Spain. Although the evidence was later confirmed by three involved coastal states, after an initial seizure, the MARM released the products to the operators, justifying their action on counter-evidence received from the flag state of the fishing vessel (Republic of Korea). The MARM also denied the disclosure of the flag state evidence, referring to it as commercially sensitive information (in conformity with Article 37(4) of Commission Regulation 1010/2009). In essence, the MARM acted in accordance to the EU IUU Regulation, firstly by accepting and examining relevant evidence from an NGO - the EJF (Article 49(2)), initially seizing the catch and later releasing it to the operators after the infringements were disproved by the flag state (Articles 17(6) and 43(e)). However, there is significant suspicion that Spain used lapses of relevant regulation to circumvent them in a legal manner. The study arrived at two main conclusions relevant to the catch certification system: (1) the flag state assurance is insufficient without adequate evidence; and (2) the member state verification process is not regulated enough and is subject to oversight. Therefore, the *Seta No. 73* case provided an opportunity to review the implementation of the EU catch certification scheme and indicated inaccuracies which should be cleared by the EU in the future.

¹¹⁸ United Nations website. Harmonization of Catch Documentation Schemes // <ftp://ftp.fao.org/docrep/fao/meeting/013/k2250e.pdf>; COFI, 2008. Retrieved 9 January 2013

¹¹⁹ Environmental Justice Foundation. Through the Net: The Implementation of the EU Regulation to Prevent, Deter and Eliminate IUU Fishing // Briefing by the EJF. Las Palmas, 2012.

Community IUU Vessel List

The EU IUU Regulation introduces an instrument of blacklisting confirmed IUU fishing vessels. The provisions present a somewhat cautious method of enrolment to the IUU vessel list, as an extensive procedure of alleging, presuming, and proving IUU activity is implied. The Commission is to keep a file of all alleged IUU offenders and update it with newly received information. In case of a clear ground for presuming a vessel engaged in IUU fishing, the Commission is to address the flag state of the vessel by providing all relevant information, issuing an official request to investigate the alleged violation, and take immediate enforcement action in case an infringement is proven. A vessel shall be included in the IUU vessel list if its flag state does not comply with the procedures called upon by the Commission, after its operator or owner was granted a chance to defend his case. A vessel flying the flag of a member state is removed from the list when effective sanctions have been applied against IUU activities in question, whereas the Commission shall only consider removing a third country vessel if the owner proves that IUU activities were avoided for at least two years, and no links are present to any other IUU-related activity. The list is to be updated every three months, and any RFMO IUU lists should be adopted by the Community IUU vessel list, by including and removing IUU vessels identified by RMFOs. IUU listed vessels shall be sanctioned, thus prevented from realizing the illegally obtained products in and beyond the EU.

A list of actions in respect of fishing vessels included in the IUU vessel list is provided by the EU IUU Regulation. IUU listed vessels shall not be granted authorization to fish in community waters, whereas current authorizations and permits shall be withdrawn. Third country vessels shall not be chartered, supplied, authorized to change the crew, or granted an EU member state flag. Community vessels shall not cooperate with them, whereas their capture certificates shall not be accepted or validated. Furthermore, these vessels shall not be granted access to EU ports, unless accepted that the illegal catch and gear is confiscated. Altogether, the listed actions safeguard the prevention of EUU-listed vessels to profit from their illegal actions in foreseeable way.

The instrument of blacklisting proven IUU vessels has originated from the IPAO-IUU, which called for states to exchange information on IUU vessels and make available, at least on an annual basis, information on, inter alia, records on vessels engaged in IUU fishing. Several RFMOs have established similar IUU vessel lists, and prescribed a wide range of measures against the violators.¹²⁰ The NEAFC, for instance, has been using the IUU vessel list

¹²⁰ M.Tsamenyi, M.Palma, B.Milligan. The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective // *The International Journal of Marine and Coastal Law*. 2010, No.25. P.5–31.

(The A and B List Scheme) since 2005, which is very similar to the EU IUU vessel list in terms of implication procedures and sanctions used against violators. The NEAFC IUU vessel list is said to have virtually eradicated illegal fishing by third country vessels in its regulatory area.¹²¹ Therefore, initially proposed by the IPOA-IUU, the method of blacklisting IUU-related vessels is not a new phenomenon in the global struggle against IUU fishing, yet has provided affirmative results for RFMOs and has major potential for the EU.

The first Union list of IUU vessels has been established by the Commission in 2010¹²², and then amended in 2011¹²³ and 2012¹²⁴. The Commission itself has not yet determined a single IUU vessel, thus failing to implement Article 29(3) which directs to update the list of IUU vessels obtained by the EU every three months. The Commission rather collects the information from updated list of RFMOs annually, as directed by the EU IUU Regulation Article 30(2). Initially, 86 IUU-related vessels have been enrolled into the Community IUU list, yet the number declined to 69 in 2012. Therefore, although the instrument of listing IUU vessels has been implemented by the EU, the fact that no IUU vessels have yet been identified by the Commission independently, but rather compiled from lists by RMFOs, indicates that there is still significant work to be done in terms of improving the procedure of IUU vessel determination.

Non-cooperating Third Countries

The EU IUU Regulation introduces a notion of non-cooperating third countries and presents the rules for identifying and sanctioning them. In general, a third country may be identified as non-cooperating if it fails to take action against IUU fishing, imposed by international law to it as a flag, port, coastal, or market state. The recurrence of IUU activities in such states and by their vessels or nationals, and the access of IUU fisheries products to their markets shall serve as main indicators of a state's level of performance. Also, states shall be evaluated in terms of their cooperation with the Commission, willingness of becoming members of relevant RMFOs, and ratification of international fisheries instruments, namely UNCLOS-III, the UN Fish Stock Agreement, and the FAO Compliance Agreement. Failing to achieve a satisfactory execution of mentioned anti-IUU measures may lead to being notified about the possibility of identification as a non-cooperating country. Further non-cooperation after being

¹²¹ North East Atlantic Fisheries Commission website. NEAFC A and B Lists // <http://www.neafc.org/mcs/iuu>; retrieved 15 January 2013 and European Parliament Committee of Fisheries Report 2010/2210(INI) of 5 May 2011 on combating illegal fishing at the global level - the role of the EU.

¹²² Commission Regulation (EU) No. 468/2010 of 28 May 2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing.

¹²³ Commission Regulation (EU) No. 724/2011 of 25 July 2011 on amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing.

¹²⁴ Commission Regulation (EU) No. 1234/2012 of 19 December 2012 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing.

warned may lead to being included in a community list of non-cooperating third countries and sanctioned according to measures listed in the EU IUU Regulation.

A list of actions against non-cooperating third countries, designed to discontinue their IUU-tolerant operations, is presented by the EU IUU Regulation. Firstly, a non-cooperating state shall be prohibited to import all fisheries products, or a given stock or specific species. Fishing vessels flying the flag of such states shall be forbidden to be purchased or chartered by community operators, whereas the community vessels shall not be reflagged or exported to such countries. All private trade arrangements, enabling EU nationals to use fishing possibilities of such countries, or any joint fishing operations shall be banned. Finally, all standing bilateral fisheries agreements or fisheries partnership agreements shall be withdrawn, whereas new ones shall be prohibited. Hence, any relations between the EU and a listed non-cooperated state in terms of fisheries activity shall be suspended.

The tool of sanctioning or even identifying non-cooperating countries in terms of IUU measures has not been addressed by any of the presented international fisheries instruments. Several RMFOs have established procedures to impose and have imposed trade-restrictive measures against countries (both members and third countries) that fail to comply with their conservation and management provisions.¹²⁵ However, the EU IUU Regulation presents broader guidelines for identifying, listing, and sanctioning IUU vessels.

No country has yet been identified as non-cooperating by the EU, thus the Community list of non-cooperating states has not been established. However, at the end of 2012, the Commission officially notified eight third countries, namely Belize, Cambodia, Fiji, Guinea, Panama, Sri Lanka, Togo and Vanuatu, about the possibility of being identified as such countries.¹²⁶ The responses from responsible authorities of warned countries are currently being analysed by the EU, whereas further action by the Commission is anticipated.

Immediate Enforcement Measures and Sanctions

The EU IUU Regulation introduces a list of immediate enforcement measures against parties suspected of serious infringements. Member states are instructed to cease the fishing activities of the offender, reroute the vessel to a port or other transportation to a separate locations for further investigation, order a bond, seize the fishing gear and catch, and suspend the

¹²⁵ M.Tsamenyi, M.Palma, B.Milligan. The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective // The International Journal of Marine and Coastal Law. 2010, No.25. P.5–31.

¹²⁶ Commission Decision No. C354/1 of 15 November 2012 on notifying the third countries that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

authorization to fish. Article 44 orders to sanction persons responsible for serious infringements by reasonable administrative sanctions. Also, maximum values of sanctions for serious infringements are directed to be at least five times the value of the fishery products in question, whereas the level is increased to at least eight times in case of a repeated serious infringement within a period of five years. A list of less strict accompanying sanctions is also provided, and alternative criminal sanctions are indicated as suitable.

Measures Against EU Nationals

The EU IUU Regulation prescribes primary responsibility for fishing vessel operations to their flag states, yet the liability of member states for IUU-related actions of their nationals is not undermined. EU states are called upon to cooperate among themselves and with third countries through competent national authorities, and take all appropriate measures and sanctions against their nationals engaged in IUU fishing in any way. EU nationals are prohibited to sell or export any fishing vessel to IUU-related parties, and public funding is disallowed for them. Other provisions in regard to EU nationals are of facultative nature, thus least relevant for the current study.

The concept of imposing liability on nationals for acting in contradiction to fisheries conservation and management measures has been first introduced in UNCLOS-III (Article 117). However, the general idea that flag states have the primary responsibility for the actions of vessels flying its flag has been and still is predominant. Although other international instruments concerning fisheries and IUU fishing did not expand on the notion of liability of nationals, the EU explicitly stated it as one of the objectives in the EU Plan of Action and incorporated it into its later formal strategy against IUU fishing. Both means of applying national responsibility proposed by the EU Plan of Action have been accomplished: the duty of member states to include infringements by their nationals to a register and employ the point system for serious infringements to, inter alia, the wrongdoing of their nationals, has been included by the control Regulation; vessels involved in IUU fishing were prohibited to be chartered by the EU IUU Regulations. The EU Strategy, however, stated as one of its actions, to impose stricter measures against nationals responsible for IUU fishing beyond community waters, yet the control Regulation was centered on the infringements by nationals of the CFP (violations in community waters). Therefore, the presentation and development of national responsibility for IUU actions by the EU is a significant step for the global struggle against IUU fishing, yet applied measures are slightly less explicit from the initially proposed ones.

The EU Fisheries Control System

The EU's approach to fisheries control has been substantially modernized by implementing the Control Regulation (Regulation No 1224/2009), which entered into force on the 1st of January, 2012, thus replacing the outdated legal framework established in Council Regulation No 2847/93. The Control Regulation was later elaborated by presenting detailed rules for its implementation (Regulation 404/2011). A final piece of the EU control package of the CFP and IUU fishing is the Fishing Authorizations Regulation (Regulation No 1006/2008), laying down rules on permitting community vessels to engage in fishing activities outside EU waters. The core provisions of the EU fisheries control system regulations shall be analysed further.

EU Council Regulation No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (EU Control Regulation)¹²⁷

The EU Control Regulation has been established in order to strengthen the control over provisions of the CFP and bring the system into line with strong measures of the EU IUU Regulation. The control system is aimed at tracking every part of the fisheries production chain by inspections at sea, in ports, during transportation, in factories, and on markets. Detailed regulations on various aspects of the CFP are presented, including the conditions to access community waters and recourses, control and monitoring of fisheries activities, inspection powers, and measures to ensure compliance with EU fisheries and IUU regulations.

Conditions to Access Community Waters

The general conditions to access community waters and recourses are presented in terms of rules for obtaining fishing licenses and authorization, marking fishing gear, and vessel detection technology. Fishing vessels are to be traceable by using the Vessel Monitoring System (VMS), the Automatic Identification System (AIS), and the Vessel Detection System (VDS). Other new monitoring technologies for vessels and traceability tools for fisheries products, such as genetic analysis, are also encouraged by the EU Control Regulation.

Control and Monitoring System of Fisheries

The control and monitoring system of fisheries activities presented by the EU Control Regulation is compiled of measures for controlling fishing opportunities, fleet management, multiannual plans, technical measures, and marketing. The control of fishing opportunities is executed by applying several types of measures: ensuring sufficient usage of logbooks and transshipment or landing declarations (also by electronic means); controlling fishing

¹²⁷ This section is based on the text of Council Regulation (EC) No. 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy.

effort by assessing notifications of fishing gear usage and fishing effort reports, exchanging mentioned information, and ensuring timely closure of fisheries. The control of fleet management is performed by ensuring the existing fishing capacity and the engine power of the community fishing fleet stays in accordance with relevant listed regulations. The pursuance of multiannual plans by states is ensured by allowing transshipment operations exclusively in designated ports, using real time monitoring of quotas that reach a certain threshold, and applying national control action programs. Presented technical provisions provide rules on fishing gear and retrieval of lost gear, control of fishing in restricted areas by the fisheries monitoring centre of the coast member state, and real-time closure of fisheries by either the member state or the Commission. A set of provisions controlling the marketing of fisheries products is applied by the Control Regulation, introducing rules on the standardization of fisheries marketing in the EU, full traceability of fisheries products, and post-landing activities. The first sale of fisheries products (except less than 30 kg for private consumption) are to be made at an auction centre or to a registered buyer, whereas relevant sales notes or take-over declarations shall be completed and transmitted to the member state in whose territory the first sale takes place in conformity with directed terms.

Vessel Inspections and Proceedings

The Control Regulation also presents a comprehensive set of measures in regard to vessel inspections and proceedings against violators. The scope of inspections is expanded from port inspections described in the EU IUU Regulations, to inspections at sea, during transport, on processing locations and during the selling operations of fisheries products. Member states are to keep an updated list of official inspectors who are prescribed a wide range of rights when performing inspections, inter alia, checking all parts of the fishing vessel and questioning responsible personnel. Furthermore, community inspectors are provided similarly extensive rights when carrying out inspections in EU waters, and for community fishing vessels beyond the EU. According to the Control Regulation, a member state has the right to inspect: (1) own fishing vessels in all EU waters under the sovereignty of another member state; (2) fishing vessels of other EU state in all EU waters outside the sovereign waters of that state if authorized by the coastal state or in accordance to a specific control and inspection program; (3) fishing vessels of other member states in international waters; (4) and both own and other EU vessels in waters of third countries in accordance to international agreements. Beside the serious infringements noted in the EU IUU Regulation, the Control Regulation introduces several other serious infringements: (1) failing to transmit a landing declaration or sales note when landing catch in a third country; (2) manipulating the engine of a vessels, (3) and misreporting catches in accordance to a multiannual plan of more than 500 kg or 10% of the catch. The Control

Regulation, however, does not complement the list of immediate enforcement measures, provided by the EU IUU Regulation.

Measures to Ensure Compliance

In order to ensure compliance with the Council Regulation member states are called upon to systematically use administrative, criminal and other measures against the violators of the CFP and apply a system of *penalty* points, whereas the Commission is to employ a set of financial and other sanctions. In essence, EU states are free and encouraged to apply any sanctions of their choice, as long as the offenders are deprived of economic benefit from violating regulations and the fine is proportionate to the financial gain achieved by committing the infringement. Member states are also to apply a point system, by which a holder of a fishing license who makes a serious infringement is assigned a number of points, which shall be transferred to the future holder of the fishing license. Collecting a specific number of points will suspend the fishing license for a period ranging from two months, to a permanent withdrawal for 5 suspensions, yet the points may be deleted if the offences are not recommitted in 3 years. The Commission may fully or partly suspend community financial assistance to member states that cause threat to the EU fisheries conservation regime by non-complying with relevant regulations. Furthermore, the Commission might close specific fisheries for member states that fail to act in accordance with provisions of a multiannual plan. Deductions of quotas and fishing efforts may also be applied to EU states that exceed them. Overfished amounts of quotas are to be determined and deducted from the quotas of the following year(s), by multiplying the amount by a given multiplying factor from 1,0 to 2,0. Higher percentages of overfished landings provide a higher factor, whereas an additional 1,5 multiplier is applied for repeated overfishing within two years, overfishing of a stock subject to a multiannual plan, or the offence is proven to cause a serious threat for the conservation of a given stock. Similarly, in case of exceeded fishing effort in a given geographical area, the amount exceeded is multiplied by a factor based on the percentage of excess and deducted from the fishing effort allocated for that member state in the following year(s). The Commission may execute additional deductions of quotas and fishing effort for member states failing to comply with relevant regulation in different ways. Therefore, the Council Regulation broadens the rights of the Commission and member states in terms of implementing sanctions for violators by presenting a comprehensive system of applicable penalties.

Council Regulation (EC) No 1006/2008 of 29 September 2008 concerning authorizations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters (EU Fishing Authorizations Regulation)¹²⁸

The EU Fishing Authorizations Regulation presents procedures to be followed when granting fishing authorizations for community vessels to engage in fishing operations outside community waters, and third country vessels to fish in EU waters. Such authorizations are granted in terms of criteria associated with international obligations entered into by the EU and additional provisions. In general, the EU may enter into international agreements on fisheries with third countries, whereas these agreements authorize community vessels to fish in third countries or third country vessels to fish in EU waters.

When granting authorizations for community vessels to fish outside EU waters, the flag member state shall transmit an application for its fishing vessels to the Commission. The application shall then be verified by the Commission, if the eligibility criteria are complied with, and transmitted electronically to the third country for approval or denial. An approved authorization may later be suspended or withdrawn by the third country.

When granting authorizations for third country vessels to fish in community waters, the competent authorities of the third country shall electronically submit to the Commission the application for fishing authorizations for their vessels. The Commission shall then examine these applications in accordance to the eligibility criteria and considering the fishing opportunities allocated to the third country. After an authorization is granted and third country vessel fishing operations are proceeding in EU waters, member states shall notify the Commission about any sighted infringements by third country vessels. In case of infringements, no fishing permits shall be issued to fishing vessels of that state for a period not exceeding twelve months.

The EU Fishing Authorizations Regulation lists several eligibility criteria for confirming fishing authorizations to third country vessels in Community waters. First and foremost, a vessel must be eligible to carry out fishing operations under the agreement concerned and, where applicable, is included in the list of vessels that may fish under that agreement. The vessel is to have fulfilled the conditions under the agreement during the period of 12 months without fail. Yet, if the vessel has been subject to sanctions for serious infringements or considered suspected of such breaches, it will only be eligible in case its owner has changed and a guarantee for the fulfilment of agreed conditions is provided. Also, the vessel must not be included in an IUU list, and all required data under the agreement concerned about the vessel is

¹²⁸ This section is based on the text of Council Regulation (EC) No. 1006/2008 of 29 September 2008 concerning authorizations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters.

available. Finally, the application should be consistent to the rules listed in the EU Fishing Authorizations Regulation in order for it to be processed.

The eligibility criteria for community vessels, seeking to fish in third countries, are compiled from all criteria listed for third country vessels, and several other points are enclosed. The data about the vessel contained in the community fleet register and the community fishing authorization information system must be complete and accurate. Furthermore, the vessel must have a valid fishing license in accordance to relevant community regulation. Finally, all data about the vessel, required under the concerned agreement, must be available, whereas the application for fishing authorization must meet the requirements of the concerned agreement.

In essence, the EU Fishing Authorizations Regulation is designed to further embed the fundamental notion of responsible fishing in the high seas, presented by the UN Fish Stock Agreement. The Regulation ensures that no community vessel shall be allowed to fish outside EU waters without the permission of the Commission, thus prohibiting the possibility of violating international rules on high seas fisheries. Also, the abuse of the CFP regulations by third country vessels is interrupted by denying the right of possible violators to start fishing in Community waters.

The Evaluation of Methods used by the EU to Combat IUU fishing

Having analysed the EU's comprehensive system of fisheries management and anti-IUU regulation, several distinctive methods of combating IUU activities stand out. These methods shall be further evaluated in terms of their improvement on (or downgrading of) measures previously introduced by international instruments. Furthermore, the consistency of EU's anti-IUU methods with international regulation shall be assessed. The success of these methods shall also be estimated by evaluating the current advancement by member states in terms of applying the methods, considering the relatively brief time period that has passed from the implementation of the latest EU IUU regulations. Finally, several suggestions for future pathways of combating IUU within the framework of the EU shall be presented.

Port State Measures

The EU has applied a comprehensive set of regulations on port state measures through its EU IUU Regulation, in force since 1st of January, 2010. Furthermore, the EU became one of the first members of the FAO Ports States Agreement and publically advocated other states to follow.¹²⁹

¹²⁹ European Parliament Committee of Fisheries Report 2010/2210(INI) of 5 May 2011 on combating illegal fishing at the global level - the role of the EU.

Improvement on International Instruments

The global community has been reluctant to use port state measures against violators of fisheries conservation rules and IUU-related vessels until the notion was brought up by the IPOA-IUU. The concept of applying minimum port state control standards was relatively new, as prior international instruments only addressed specific rights which port states might exercise. However, due to the non-binding nature of the IPOA-IUU regulation, port state measures were not presented in a compulsory manner until the presentation of the FAO Port State Measures Agreement in 2009. The fact that this agreement is not yet in force indicates that the EU managed to outpace the global community by implementing a set of binding port state measures in 2010. Controlling fisheries transactions in ports has become one of the preferred methods for the EU to exercise sufficient control over fisheries activities since.

The port state measures introduced by the EU IUU Regulation have substantially elaborated on previously introduced provisions. The fact that no other valid international instrument presents compulsory measures for port states indicates an improvement on its own. All core port states measures stated in the IPOA-IUU are referred to in the EU IUU Regulation, whereas some of them are elaborated on (e.c. a 3-day prior notice is applied and the range of required vessel information is expanded). The EU IUU Regulation also touches upon every essential port state provision included in the FAO Port State Measures Agreement, yet the agreement is composed in a more comprehensive and detailed manner. The indication that 5 percent of landing and transshipment operations in EU ports are to be inspected is an improvement, as no specific amount of inspections is prescribed by the FAO Ports State Measures Agreement. However, it is important to note that the EU was one of the first states to become a member of the FAO Ports State Measures Agreement and has strongly insisted third states to act similarly.¹³⁰ Considering the fact that the set of EU measures on port state rights and obligations is the first such international instrument of compulsory manner, and having in mind that these measures include (in some cases - elaborate on) all essential provisions presented in prior international instruments, the EU regulation represents a significant improvement of global port state measures.

It is important to state that apart from the analysed international instruments, several RMFOs have established some form of port state measures. However, a study comparing the efficiency of these RMFO port state measures to the provisions of FAO Port State Measures Agreement indicated that these RMFOs failed to apply a comprehensive and effective set of port

¹³⁰ European Parliament Committee of Fisheries Report 2010/2210(INI) of 5 May 2011 on combating illegal fishing at the global level - the role of the EU.

state measures and need to align their measures to the FAO Agreement.¹³¹ These findings indicate that RMFOs have not yet applied port state regulations as comprehensive as the FAO Agreement, thus studying their relation to the EU regulation is unnecessary.

Consistency with International Instruments

The general rule that states have jurisdiction over vessels in their ports has long been agreed upon in the international law.¹³² Furthermore, under customary international law, coastal states may designate which of their ports are open to international trade.¹³³ The UN Fish Stock Agreement states the right of a coastal state to exercise its sovereignty over its ports (Article 23(4)), meaning that conditions for accessing these ports may be prescribed. Having in mind that the core port state measures set out in the EU IUU Regulation constitute designation of ports, requiring notifications, certifications, and vessel inspections, these measures are in general consistent with international instruments.

The consistency is also confirmed by the stated fact that the EU port state regulation is implementing several international instruments, namely, the UN Fish Stock Agreement, the IPOA-IUU, and the FAO Port State Measures Agreement. The EU IUU Regulation implements the rights of port states to inspect documents, gear and catch on board, and to adopt regulations for national authorities to prohibit landings and transshipment by suspected fisheries violators, set out in the UN Fish Stock Agreement. The implementation of port state regulations of the IPOA-IUU and the FAO Port State Agreement has been touched upon in the previous section.

It is difficult to identify any inconsistency of the EU ports state regulations with the relevant international instruments. It has been argued that the EU IUU Regulation does not explicitly restate the provisions of the UN Fish Stock Agreement and the IPOA-IUU in terms of not implementing the port state control measures in a discriminative manner of a particular state.¹³⁴ However, the addition of such cautious provisions to the EU port state measures (and subsequently to practically all measures of EU IUU Regulation) would undermine its stringent manner - a trait which distinguishes the regulation from other discussed international instruments.

¹³¹ The Pew Charitable Trusts. Port state performance: Putting Illegal, Unreported and Unregulated Fishing on the Radar // The Pew Report, Brussels. 2010.

¹³² R.Baird. Illegal, Unreported and Unregulated Fishing: an Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence // Melbourne Journal of International Law. 2004, Vol.5, Issue 2. P.299-334.

¹³³ M.Tsamenyi, M.Palma, B.Milligan. The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective // The International Journal of Marine and Coastal Law. 2010, No.25. P.5-31.

¹³⁴ *Idim.*

Advancement by Member States

It is difficult to assess the advancement by EU member states in applying the port state measures set out by the EU IUU Regulation by conducting a desktop study, as the responsible authorities do not provide such information to the general public. However, some conclusions may be drawn from a study conducted by the Institute for European Environmental Policy on the implementation of the EU IUU Regulation by states during the first 18 months of its validity.¹³⁵ By analysing the responses of 6 EU states to a questionnaire on port state measure implementation, it has been concluded that: (1) all respondent states have implemented a scheme of inspecting third country vessels; (2) all entering vessels have provided a valid catch certificate; (3) no IUU-listed vessel has been detected in member ports; (4); there have been no challenges for implementing a prior notice for third country vessels to enter ports; and (5) in 5 sampled states, no vessel has been denied access to port in accordance to the EU IUU Regulation.¹³⁶ Although these responses provide a positive picture on the implementation of port state measures by some EU states, the fact that only 6 of 20 approached states completed the questionnaire, signals the reluctance of responsible authorities to share their achievements. Furthermore, none of the member states provided a breakdown of inspected fishing vessels between 2010 and 2011.¹³⁷ Although the present study indicates some positive signs, the unwillingness of competent member state authorities to share the progress of implementing port measures publically results in a lack of information for assessing their advancement.

Conclusions and Suggestions

The set of port state measures applied by the EU IUU Regulation is generally consistent with international fisheries and IUU-related instruments. These measures touch upon every core method applied to port states by international instruments, elaborating upon several of them. On paper, the EU regulation contains the most comprehensive and sufficient set of port state measures against IUU fishing to date, and is the strongest part of the overall EU anti-IUU system.

It is difficult to determine the effectiveness of EU port state measures since their implementation in practice due to a lack of related information. It would be beneficial for the EU to oblige the competent member state authorities to provide information on the implementation of port state measures, in order to determine possible flaws and improvements of its regulation.

¹³⁵ I.Lutchman, S.Newman, M.Monsanto. An Independent Review of the EU Illegal, Unreported and Unregulated Regulations // Institute for European Environmental Policy. 2012.

¹³⁶ *Idim.*

¹³⁷ *Idim.*

Catch Certification Scheme

The community catch certification scheme has been laid down in the EU IUU Regulation for the purpose of suspending the import and export flows of products obtained by IUU fishing. The community alert system has also been presented as an additional instrument to ensure the efficiency of the catch certification process for vessels and states which are suspected of wrongdoings. These two instruments form the EU system of market related measures against IUU fishing.

Comparison to Measures by International Instruments

It has been argued that trade measures used against IUU products may serve as disguised barriers to trade, in case *IUU* is defined in an incautious manner.¹³⁸ A similar sense of cautiousness is rendered by the only international instrument addressing market-related measures - the IPOA-IUU. The plan offers to apply multilateral catch documentation and certification requirements consistent with WTO regulation, whereas trade-related measures are to be applied only in exceptional circumstances, in a fair, transparent and non-discriminatory manner. Several catch documentation systems have been adopted by RFMOs prior to the EU, yet were mainly designed for gathering catch statistics and tracking trade.¹³⁹ The community alert system, however, is a relatively new concept, not referred to by any international instrument prior to the EU IUU Regulation.

Considering the fact that market-related measures have not been addressed by any international agreement in a compulsory manner, the addition of a catch certificate system and a community alert system to the EU IUU Regulation is by itself an advancement in the global battle against IUU fishing. In comparison to the general ideas presented in the IPOA-IUU, the EU market-related measures are considerably more comprehensive. The EU Plan of Action addressed a need to adopt rules banning trade of fishery products taken in breach of international agreements, whereas the EU Strategy called for the introduction of a trade regime which grants access to the EU only for products, certified as legal by the flag state of the importer. By presenting such detailed rules for banning the flow of IUU products across its borders, which additionally require member states to verify catch certificates, the EU fully fulfilled its own objectives and elaborated on them. Therefore, the catch certification scheme laid down in the EU

¹³⁸ L.Chavez. *Illegal, Unreported and Unregulated Fishing: WTO-Consistent Trade Related Measures to Address IUU Fishing* // Report for the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO. Sydney, 2000.

¹³⁹ United Nations website. *Harmonization of Catch Documentation Schemes* //

<ftp://ftp.fao.org/docrep/fao/meeting/013/k2250e.pdf>; COFI, 2008. Retrieved 9 January 2013 and M.Tsamenyi, M.Palma, B.Milligan. *The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective* // *The International Journal of Marine and Coastal Law*. 2010, No.25. P.5–31.

IUU Regulation is the first mandatory instrument of such kind, thus carries considerable importance in the global struggle against IUU fishing.

Consistency with International Instruments

As already discussed, the IPOA-IUU encouraged states to implement multilateral catch documentation and certification requirements - the exact measures the EU applied through its EU IUU Regulation. Although the market measures applied by some RMFOs serve different purposes than the EU scheme, thus having minor importance for our study, it is worth noting that the catch certificate template presented in the annex of EU IUU Regulation is similar to five other models offered by RMFOs.¹⁴⁰ Therefore, there are no apparent inconsistencies between the EU market-related measures and international instruments regarding fisheries and IUU fishing.

Although being generally consistent with relevant international instruments, the EU catch certification scheme may be prone to challenges in regard to practical implementation. It has been argued that due to the flag state validation of catch certificates for foreign vessels fishing in waters of coastal states, the access of such catch to the EU may be subject to actions of states, over which the coastal state has no control.¹⁴¹ In accordance to the EU IUU Regulation, the coastal state (non-EU) may not be able to influence the decision of a member state to verify a catch certificate, validated by an irresponsible flag state, whose vessels acted in breach of the coastal state's regulations. This exact scenario has occurred in the *Seta No. 73* case, presented in a previous section of this study, thus demonstrating the flaws of applied regulation. Further uncertainty is caused by the lack of requirement for EU vessels to submit a prior notice of arrival to their national ports.¹⁴² Such vessels will not submit validated catch certificates, thus a pathway for unregulated catch is left by the EU IUU Regulation. Finally, concerns have been raised with respect to the possible inability to implement a costly system of catch certification, compatible with the EU, by developing states.¹⁴³ However, at least 90 EU trading partners have confirmed the implementation of compatible catch certifications systems by January 2011.¹⁴⁴ Such significant number of confirmations during the first year of the EU IUU Regulation validity proves that concerns on costly implementation were unreasonable. Therefore, although no direct inconsistencies of the EU market measures against IUU-related products and relevant

¹⁴⁰ M.Tsamenyi, M.Palma, B.Milligan. The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective // *The International Journal of Marine and Coastal Law*. 2010, No.25. P.5–31.

¹⁴¹ *Idim.*

¹⁴² *Idim.*

¹⁴³ *Idim.*

¹⁴⁴ Chatham House (Royal Institute of International Affairs) website. The EU's strategy to combat IUU fishing // <http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/130111bodin.pdf>; 13 January 2013.

international agreements are present, several concerns regarding its practical implementation have been addressed and proven in practice.

Advancement by the Commission and Member States

The community alert system has not been established yet. Although the Commission should have applied such system by the 1st of January, 2010, no advancement has been achieved to this day. There is no information provided by the Commission on the timeline for the implementation of the alert system, whereas the causes of not applying such system are unclear. The EU catch certification scheme became valid and compulsory for member states since the 1st of January, 2010. By 2011, all member states have notified the Commission about the successful implementation of the regulation, whereas several import consignments have been denied entry to the EU, due to their IUU nature.¹⁴⁵ Similarly to the case of EU port state measures, information on the application of the EU catch certification scheme is not obtainable by a desktop review, as responsible institutions of member states do not provide relevant information to the general public. However, the IEEP study, discussed previously, indicates that no apparent fish product trade distortions have emerged since the implementation of the EU IUU Regulation. This signals the ineffectiveness of the EU catch certification system since its implementation. Similar conclusions are drawn from the *Seta No. 73* case presented in a previous section of this study. The catch certificate validation process by the flag state is argued to be flawed, due to insufficient regulation on required evidence, whereas the member state verification process is said to lack transparency due to confidentiality of related processes.¹⁴⁶

A recent study on the advance of fish and fish product traceability in the EU presented a modern, scientific method of determining the origin of fish stock by using advanced technologies, including genetic sampling.¹⁴⁷ Significant achievements of the *FishPopTrace* project, which applies molecular technologies to achieve improvements in fisheries product traceability and related MCS policies, have been highlighted widely.¹⁴⁸ This modern approach to tracing fish may have significant impact on the EU catch certification system, as by further elaborating on the scientific method, questionable catch certificates might become easily verifiable.

¹⁴⁵ Chatham House (Royal Institute of International Affairs) website. The EU's strategy to combat IUU fishing // <http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/130111bodin.pdf>; 13 January 2013.

¹⁴⁶ Environmental Justice Foundation. Through the Net: The Implementation of the EU Regulation to Prevent, Deter and Eliminate IUU Fishing // Briefing by the EJF. Las Palmas, 2012.

¹⁴⁷ G.Caryalho, E.Aoidh, J.Martinsohn. Traceability of Fish Populations and Fish Products: Advances and Contribution to Sustainable Fisheries // FishPopTrace Project Introduction. 2011.

¹⁴⁸ FishPopTrace (a collaborative project involving 15 research groups specialized in fish population genetics website) website. About // <https://fishpoptrace.jrc.ec.europa.eu/about>; 20 January 2013.

Conclusions and Suggestions

The introduction of the catch certification system and the community alert system is a praiseworthy stride by the EU in its struggle against IUU fishing. Although not being an entirely new concept in the global perspective, the presented market-related system was the first compulsory instrument of such magnitude. In practice, however, the catch certification system encountered severe challenges and is in need of further improvement. The community alert system has not been applied at all, whereas the Commission did not provide any timetables or reasoning for the non-fulfilment of its commitment.

Several suggestions for the improvement of the EU market-related measure system are apparent from the presented analysis. Firstly, (1) the Commission should implement the community alert system in practice, or at least set a timeframe for its gradual application. Secondly, (2) the system of catch certificate verification by an EU state should be revised by adding an additional transparency mechanism - a possibility to conduct independent inspections of questionable verifications by an impartial work group. (3) A system for a coastal state to challenge the verification of catch certificates for fish caught by foreign vessels in its waters, in breach of its regulations, should be added to the EU IUU Regulation. The Commission may be obliged to conduct a mentioned independent inspection in case of an official request by a coastal state. Furthermore, (4) the scheme for catch certificate validation by the flag state should include an additional requirement to provide electronic evidence confirming information on vessel location and sightings, specified in the catch report and certificate. Article 12(4) of the EU IUU Regulation specifies that flag state authorities must have the power to attest such information, thus the change does not carry major additional costs. Finally, (5) further development of molecular technologies, used for tracing the origin of fish stocks, should be fostered by the EU through its EFF, or its EMFF when implemented. Applying a scientific method for examining questionable catch certificates would undoubtedly raise the transparency level of the EU catch certification system, whereas other types of adaptation may serve for the benefit of the whole CFP (accurate statistics, reproduction of fish species, aquaculture development, etc.).

Community Black list

One of the core instruments presented by the EU IUU Regulation is the establishment of a community blacklist for IUU-related vessels. A detailed process of enrolling a vessel to the community blacklist is introduced, whereas the owner or the operator of such vessel is ensured to be heard after an official intention of blacklisting is provided by the Commission. Fishing vessels listed in IUU lists formed by RMFOs are automatically added to the community list and sanctioned accordingly. Applied sanctions isolate listed vessels from community ports and deprive their catch from being marketed in the EU.

Comparison to Measures by International Instruments

The concept of recording vessels engaged in IUU fishing has first been introduced by the IPOA-IUU. States were called upon to compose IUU vessel lists through RMFOs on, at least, an annual basis. At least 8 RMFOs have developed listing procedures and established relevant blacklists prior to the EU.¹⁴⁹ Although the Commission accomplished the goal of establishing an IUU vessel list proposed by the IPOA and exceeded the task of renewing it annually, by assigning a periodicity of 3 months, no significant improvement from relevant regulations applied by RMFOs is observable. Contrariwise, some IUU listing systems used by RMFOs, e.c. the NEAFC *A and B List Scheme*, provides a more comprehensive method of dividing violators into two lists, which has proved to bring considerable success in practice.¹⁵⁰ Therefore, although the implementation of the community blacklist is yet another measure aggravating the operations of IUU vessels, no elaboration has been obtained by the Commission on regionally applied blacklisting systems.

Consistency with International Instruments

Although a source of scholarly discussion, the presumption that states are entitled to prescribe and enforce circumstances for port entry is generally accepted in the international law.¹⁵¹ Consequently, establishing a list of ineligible vessels for port entry is one of such circumstances, which does not contravene with international instruments. Considering the constricted manner of addressing the concept of IUU blacklists by the IPOA-IUU, the EU managed to apply fully consistent related regulations. However, the consistency between blacklisting procedures applied by RMFOs and the EU has been evaluated conversely by separate studies. Although these systems have been argued to be consistent by some,¹⁵² others stress the slow nature and political background of RMFOs blacklisting procedures.¹⁵³ However, a similarly cumbersome nature of the EU regulation has been evident in practice and shall be further discussed in the upcoming section of this study. In general, the EU regulations on IUU listings are consistent to international law and regulations applied by RMFOs.

¹⁴⁹ M.Tsamenyi, M.Palma, B.Milligan. The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective // *The International Journal of Marine and Coastal Law*. 2010, No.25. P.5–31.

¹⁵⁰ North East Atlantic Fisheries Commission website. NEAFC A and B Lists // <http://www.neafc.org/mcs/iuu>; retrieved 15 January 2013 and European Parliament Committee of Fisheries Report 2010/2210(INI) of 5 May 2011 on combating illegal fishing at the global level - the role of the EU.

¹⁵¹ A.Abdulrazaq, S.Kader. Right of Ship Access to Port State Under International Law: All Bark with No Bite // *Australian Journal of Basic and Applied Sciences*. 2012, No.6. P.214-222.

¹⁵² *Same as* ¹⁴⁹

¹⁵³ I.Lutchman, S.Newman, M.Monsanto. An Independent Review of the EU Illegal, Unreported and Unregulated Regulations // *Independent review: Institute for European Environmental Policy*. 2012.

Advancements by the Commission

The first community IUU vessel list has been established by the Commission four months after the EU IUU Regulation came into force on the 1st of January, 2010. The blacklist has been amended twice since, after periods of 14 and 17 months respectively. All three versions of the IUU vessel list contained vessels, exclusively blacklisted by RMFOs, whereas the overall number of listed vessels has declined. Although the Commission has pursued its commitment to add vessels blacklisted by RMFOs each year (EU IUU Regulation, Article 30(2)), the obligation to update the community blacklist every three months (EU IUU Regulation Article 29(3)) has not been carried out. Furthermore, the fact that no single IUU vessel has yet been identified exclusively by the EU signals that the applied system is cumbersome and ineffective.

Conclusions and Suggestions

The community IUU vessel list, as it stands today, is a compilation of vessels, blacklisted by RMFOs. The fact that no single IUU vessel has yet been identified exclusively by the EU is troublesome, as a significant time period has now passed since the implementation of relevant regulation. The EU blacklist is subject to the practices of RMFOs. Although some RMFO IUU vessel lists have achieved significant progress in eliminating illegal practices (e.c. NEAFC blacklist discussed previously), the blacklisting procedures differ across RMFO¹⁵⁴ and relevant decisions occasionally have a political background.¹⁵⁵ Therefore, the current form of the community IUU list is solely dependent on questionable procedures by RMFOs, over which the EU has little power, yet assigns significant authority.

Two actions are suitable for the improvement of the current EU IUU listing system. Firstly, instead of automatically adding vessels blacklisted by RMFOs to the community list, a comprehensive verification system by the Commission should be applied. The Commission ought to investigate questionable cases of blacklisting and provide similar conditions for owners or operators to defend as they have when indented to be IUU-listed by the Commission itself (in accordance to the EU IUU Regulation, Article 27(2,3)). The feasibility of blacklisting procedures would hereby be assessed, making the whole EU blacklisting system more transparent. Furthermore, the EU should allocate more effort to identifying IUU-related vessels and enrolling them into the Community list without the help of RMFOs.

¹⁵⁴ European Parliament Committee of Fisheries Report 2010/2210(INI) of 5 May 2011 on combating illegal fishing at the global level - the role of the EU.

¹⁵⁵ I.Lutchman, S.Newman, M.Monsanto. An Independent Review of the EU Illegal, Unreported and Unregulated Regulations // Independent review: Institute for European Environmental Policy. 2012.

Non-Cooperating Third Country List

The EU IUU Regulation also introduces a concept of blacklisting third countries, which fail to comply with existing international and EU instruments against IUU activities. A detailed list of criteria, on which a level of compliance by a third country is determined, is delivered by the regulation. In case a third country is intended to be identified as non-cooperating, adequate time to remedy the situation and defend its case is ensured by the EU IUU Regulation. If, however, a third country is enrolled into the non-cooperating country list, strict sanctions are to be applied, including the isolation of its fishing fleets from community ports and waters, a ban of marketing fish caught by its vessels, and a termination of any standing fisheries agreements and partnerships, including private trade arrangements.

Comparison to Measures by International Instruments

None of the discussed international instruments addresses the concept of listing and sanctioning non-cooperating countries for incompliance with IUU regulation. Several RMFOs have implemented some market-related measures against specific unsubmitive states.¹⁵⁶ The Commission, however, concluded through its EU Plan of Action, that current measures against countries hosting flags of non-compliance lack multilateral nature and are ineffective. Thus, a mechanism of identifying such states has been proposed. On paper, the EU system of blacklisting countries is more comprehensive, imposes a wider array of sanctions, and is more transparent in terms of a detailed process of identifying, hearing, listing, and delisting violators. Therefore, the implementation of such system is a significant advancement by the EU.

Consistency with International Instruments

Similarly to the case of blacklisting IUU vessels, the list of non-cooperating countries corresponds to the same international law presumption, that states are entitled to determine circumstances for port entry.¹⁵⁷ A question of consistency with other international non marine-related law instruments, addressing issues related to embargoes and other prohibitions of commerce with chosen countries might arise, yet it does not fall under the scope of this study. The global instruments regarding fisheries and IUU fishing, discussed by this study, do not address the notion of listing non-cooperating states. Therefore, the list of non-complying third countries, introduced by the EU, is consistent with related international instruments.

¹⁵⁶ M.Tsamenyi, M.Palma, B.Milligan. The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective // *The International Journal of Marine and Coastal Law*. 2010, No.25. P.5–31.

¹⁵⁷ A.Abdulrazaq, S.Kader. Right of Ship Access to Port State Under International Law: All Bark with No Bite // *Australian Journal of Basic and Applied Sciences*. 2012, No.6. P.214-222.

Advancements by the Commission

The non-cooperating third country list has not been established by the Commission yet. However, differently than with the case of the community alert system, some progress has been achieved in regard to blacklisting states. As already discussed, 8 third countries have been identified as possible non-cooperating states at the end of 2012, in accordance with Article 32 of the EU IUU Regulation. The Commission considers information about further investigations on these states as confidential,¹⁵⁸ thus the current progress of defensive process of the accused states is unknown. According to the EU IUU Regulation, sanctions may not be applied to any country before a blacklist is presented, thus no measures against possibly non-cooperating states have yet been applied.

Conclusions and Suggestions

It is difficult to assess the efficiency of an anti-IUU measure which has not yet been implemented in practice. However, the delay for listing and sanctioning non-cooperative states is justifiable, as appropriate time for alleged countries to defend their cases is provided as part of the notification process. On paper, the non-cooperating country list and sanctions are consistent with international instruments, are more comprehensive and advanced than similar measures used on a regional level, and possess significant potential.

The Commission should provide information on the progress of third country allegations in order for member states and their nationals to better prepare for possible consequences for a state being listed on the non-cooperating country register and possible consequences.

Measures Against EU Nationals

It is by nature a difficult task for states to control the activities of their nationals beyond their territories or in vessels carrying flags of other nations. The EU acknowledged the importance of state control over nationals by including such instruments in its EU Action Plan and EU Strategy. However, the final binding version of measures against EU nationals is somewhat notional and incomplete.

The only explicit compulsory indication presented by the EU-IUU Regulation concerning EU nationals is the prohibition of selling or exporting fishing vessels to IUU-related operators (Article 40(2)). Other related measures set out in the EU-IUU Regulation call for states to identify and prosecute nationals involved in IUU activities, yet are presented in an abstract and facultative manner. Another related measure is the instruction for states to establish and

¹⁵⁸ I.Lutchman, S.Newman, M.Monsanto. An Independent Review of the EU Illegal, Unreported and Unregulated Regulations // Independent review: Institute for European Environmental Policy. 2012.

update national registers of infringements by their vessels and nationals, set out in the EU Control Regulation (Article 93). These national registers should accompany the point system for infringements, discussed in a previous section, whereas no timeline is presented for their establishment. Finally, the relevant EU regulations lack tools for controlling nationals, operating beyond its territory. The only related measures are set out in the EU Fishing Authorizations Regulation, yet they do not apply to EU nationals, but are rather flag state measures concerning vessels fishing outside the EU. Therefore, the measures presented by the EU against their nationals, related to IUU activities, are mostly facultative and abstract, whereas the operations of nationals outside the EU lack sufficient control.

Comparison to Measures by International Instruments

As discussed, flag state responsibility has been a predominant notion in international instruments concerning fisheries and IUU fishing. However, since a general idea of imposing liability on nationals for acting in contradiction to fisheries conservation and management measures has been first introduced by UNCLOS-III (Article 117), no other international instrument significantly elaborated on it. Therefore, although EU measures against IUU-related nationals are somewhat abstract and lenient, they are relatively new in the global struggle against IUU fishing.

Consistency with International Instruments

Jurisdiction based on nationality, often referred to as *the active nationality principle*, is widely recognized in international law.¹⁵⁹ Furthermore, the discussed international instruments concerning fishing and IUU activities refer to such measures in an optional and superficial manner, whereas no specific limitations are presented. Therefore, relevant measures introduced by the EU are consistent with international instruments.

Advancements by Member States

A desktop study of the advancements by member states in terms of implementing EU measures against IUU-related nationals exposed a lack of relevant available information. There are no signs of new national registers of infringements being implemented by member states, whereas no estimates on prevented charters of IUU-related vessels are available. Further information from member states is necessary to assess their advancements in a sufficient manner.

¹⁵⁹ W.Edeson. Tools to Address IUU Fishing: The Current Legal Situation // Report for the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO. Sydney, 2000.

Conclusions and Suggestions

The set of measures against nationals related to IUU activities that are applied by the EU through its regulations presents a modern approach, previously touched upon international instruments only in a superficial manner. A shortage of available information on the implementation of national measures by EU states hinders the possibility to assess their effectiveness in practice. However, a lack of control over EU nationals, operating beyond EU territory, is evident and causes concern.

In order to improve the current situation, the EU should implement the first action addressed in its EU Action Plan. An article should be inserted in the EU Control Regulation, defining the responsibilities of EU states in relation to their nationals engaging in IUU activities. This would force states to act against violators of their nationality and ensure such actions are prevented, in order to avoid respective sanctions. Thus, the instructions for states to take measures, for their nationals to act in accordance with relevant fisheries regulation, presented by international instruments and the EU, would be formalized and, consequentially, accomplished.

CONCLUSIONS

1. Three core methods of combating IUU activities are drawn up from the contemporary international instrument analysis. Their evaluation concludes that the unwillingness of countries to adopt flag state measures against their vessels, and the inability of the global community to oblige countries to apply such measures, is evidence of insufficient flag state regulation of IUU activities. Port state measures are delivered in a comprehensive manner and their effectiveness in practice is presumed to become extensive after the FAO Port State Measures Agreement comes into force. Finally, although applying market-related measures against IUU activities has significant potential, a shortage of related regulation by the international instruments is visible, mainly due to the possibility of creating unfair trade barriers.
2. Port state measures introduced by the EU are generally consistent with international instruments. Although the FAO Port State Measures Agreement is composed in a more comprehensive manner, it is not yet in force, thus making the EU port states measures substantially more elaborated than the current compulsory international provisions. Yet, in order to estimate their effectiveness in practice, more information from member states on their implementation is needed.
3. The introduction of the catch certification system and the community alert system is a praiseworthy stride by the EU in its struggle against IUU fishing. Although not being an entirely new concept in the global perspective, the presented market-related system was the first compulsory instrument of such magnitude. In practice, however, the catch certification system encountered severe challenges and is in need of further improvement. The community alert system has not been applied at all, and the Commission did not provide any timetables or reasoning for the non-fulfilment of its commitment.
4. The community IUU vessel list, as it stands today, is a compilation of vessels, blacklisted by RMFOs, with no significant elaboration. Although consistent to international instruments, the EU blacklist is subject to questionable practices of RMFOs. The fact that no single IUU vessel has yet been identified exclusively by the EU is troublesome and indicates the inefficiency of the applied method.
5. On paper, the non-cooperating country list and sanctions are consistent with international instruments, are more comprehensive and more advanced than similar measures used on a regional level, and possess significant potential. Although the measure has not yet been implemented in practice, the delay for listing and sanctioning non-cooperative states is

justifiable. A further evaluation of the list's efficiency in practice, based on additional information on the current processes from the commission, is needed.

6. A lack of control over EU nationals operating beyond the EU territory is evident. Other measures against nationals related to IUU activities have previously been touched upon international instruments only in a superficial manner, thus the EU elaborates on them significantly. However, a shortage of available information on the implementation of national measures by EU states hinders the possibility to assess their effectiveness in practice.
7. All in all, the hypothesis that the EU has failed to create a sufficient system of instruments combating IUU fishing has been confirmed by the analysis. Although, on paper, the core elements of anti-IUU regulation seem comprehensive and sufficient, the study of their practical implementation concludes a considerably low progress by the Commission and the member states.

SUGGESTIONS

1. The Commission should implement the community alert system in practice, or at least set a timeframe for its gradual application
2. The system of catch certificate verification by an EU state should be revised by adding an additional transparency mechanism – a possibility to conduct independent inspections of questionable verifications by an independent work group
3. A system for a coastal state to challenge the verification of catch certificates for fish caught by foreign vessels in its waters, in breach of its regulations, should be added to the EU IUU Regulation. The Commission may be obliged to conduct a mentioned independent inspection in case of an official request by a coastal state.
4. The scheme for catch certificate validation by the flag state should include an additional requirement to provide electronic evidence confirming information on vessel location and sightings, specified in the catch report and certificate. Article 12(4) of the EU IUU Regulation specifies that flag state authorities must have the power to attest such information, thus the change does not carry major additional costs.
5. Further development of molecular technologies, used for tracing the origin of fish stocks, should be fostered by the EU through its EFF (or through the EMFF when established). Applying a scientific method for examining questionable catch certificates would raise the transparency level of the EU catch certification system, whereas other types of adaptation may serve for the benefit of the whole CFP (accurate statistics, reproduction of fish species, aquaculture development, etc.).
6. The Commission should investigate questionable cases of blacklisting IUU vessels by RMFOs, prior to incorporating them into the EU IUU vessel list. Owners and operators should have similar conditions to defend as when indented to be IUU-listed by the Commission itself (in accordance to the EU IUU Regulation, Article 27(2,3)).
7. An article should be inserted in the EU Control Regulation, defining the responsibilities of EU states in relation to their nationals engaging in IUU activities. This would force states to act against violators of their nationality and ensure such actions are prevented, in order to avoid respective sanctions.

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SUMMARY

Illegal, unreported and unregulated (IUU) fishing is a worldwide phenomenon, resulting in major fisheries losses, and threatening the global sustainability of fisheries resources and overall food security. After becoming more conspicuous in the late 20th century, the problem of IUU fishing has been addressed internationally, mainly through the Food and Agriculture Organization of the United Nations (FAO). A set of six core international legally binding and non-binding instruments, intended to regulate fisheries and combat IUU activities, has been presented since.

The European Union (EU) has been exceptionally active in the global struggle against IUU activities. Being the leading importer and a large producer of fish, and having fishing fleets in every ocean of the world, the EU has a major responsibility and a significant economic incentive to combat IUU fishing. Since 2002, the EU has established and elaborated on a set of legal anti-IUU instruments, complementing its system of common fisheries management. However, an analysis of applied measures, presented by the EU IUU regulation system in the framework of relevant international instruments, reveals their significant flaws and complexity of practical implementation.

This study analyses the international and EU instruments and measures related to combating IUU fishing, in order to assess their quality in terms of comprehensiveness, purposefulness, the current progress of implementation, and achieved results. By using a content analysis of legal instruments, evaluating statistical data, and interpreting relevant studies and articles by other authors, the hypothesis of insufficient IUU regulation by the EU is confirmed. The EU market-related measures are argued to have failed in practice, as the community alert system has yet been implemented, whereas the catch certification system encountered severe challenges and is in need of further improvement. The community IUU vessel list is said to be dependent on questionable listings by Regional Fisheries Management Organizations (RMFOs), while the non-cooperating country list has yet provided considerable results. A lack of control over EU nationals operating beyond the EU territory is also evident. Finally, although EU port state measures are argued to have elaborated on provisions of international instruments, information on their implementation by member states is insufficient. Several suggestions to improve the current EU IUU regulation are subsequently presented at the end of this study.

SANTRAUKA

Neteisėta, nedeklaruojama ir neregamentuojama (NNN) žvejyba yra pasaulinio masto reiškinys, nešantis didžiulius nuostolius žuvininkystės sektoriui, bei keliantis grėsmę žuvies išteklių išsaugojimui ir visuotinei maisto saugai. Tarptautiniame lygmenyje dėmesys NNN žvejybos problemai buvo pradėtas skirti 20-ojo amžiaus pabaigoje, pagrinde Jungtinių Tautų maisto ir žemės ūkio organizacijos (MŽŪO) pastangomis. Nuo to laiko buvo pristatyti šeši esminiai, teisiškai įpareigojančio arba neįpareigojančio pobūdžio, tarptautiniai instrumentai, skirti tvarios žuvininkystės reglamentavimui bei kovai prieš NNN veiklą.

Europos Sąjunga (ES) yra išskirtinai aktyvi tarptautinėje kovoje prieš NNN žvejybą. Būdama stambiausia pasaulyje žuvies importuotoja bei viena didžiausių žuvies gamintojų pagal sužvejojimą, o taip pat turėdama žvejybos laivyną, veikiantį visuose pasaulio vandenynuose, ES turi svarbią pareigą bei svarią ekonominę paskatą kovoti prieš NNN veiklą. Nuo 2002 metų, ES taiko bei tobulina NNN žvejybai pažaboti skirtą teisinių instrumentų bazę, kuri papildo ES bendrąją žuvininkystės politiką. Tačiau atlikta ES pristatytų priemonių analizė, susijusių tarptautinių instrumentų kontekste, atskleidžia esminius šių priemonių trūkumus bei jų praktinio įgyvendinimo sudėtingumą.

Šis darbas pristato tarptautinių ir ES instrumentų, skirtų NNN žvejybos pažabojimui, analizę, kuri įvertina jų kokybę pagal išsamumo, tikslingumo, įgyvendinimo praktikoje pažangos, bei pasiektų rezultatų kriterijus. Hipotezė, jog NNN žvejybos reglamentavimas ES rėmuose yra nepakankamas, patvirtinama naudojant teisinių instrumentų kontent-analizę, statistinių duomenų vertinimą, bei interpretuojant aktualius mokslinių tyrimų bei straipsnių rezultatus. ES rinkos priemonės prieš NNN veiklą iš esmės nepasiteisino, kadangi bendrijos išpėjimo sistema iki šiol nėra taikoma praktikoje, o sugautų žuvų kiekio sertifikavimo sistema susidūrė su esminiais sunkumais ir ją reikia tobulinti. NNN žvejybą vykdančių laivų bendrijos sąrašo sudarymo tvarka yra priklausoma nuo abejotinų sprendimų, kuriais regioninės žvejybos valdymo organizacijos (RŽVO) įtraukia laivus į analogiškus savo registrus. Tuo tarpu bendrijos nebendradarbiaujančiųjų trečiųjų šalių nustatymo sistema iki šiol nepasiekė apčiuopiamų rezultatų. Taip pat, akivaizdžiai stinga tinkamos kontrolės ES nacionalinių subjektų, užsiimančių žvejyba už ES teritorinių vandenių, atžvilgiu. Galiausiai, nors uosto valstybės priemonės pristatytos ES rėmuose atrodo pranašesnės už tarptautinių instrumentų pagrindu taikomas priemones, šiuo metu trūksta informacijos apie jų įgyvendinimą ES narių praktikoje. Šio darbo pabaigoje yra pateikiama keletas pasiūlymų, pagerinti esamą ES NNN žvejybos reglamentavimą.