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*Pacta Tertiis* and Regional Fisheries Management Mechanisms: the IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal[[1]](#endnote-1)

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International fisheries management since the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS),[[2]](#endnote-2) and more particularly under the 1995 UN Fish Stocks Agreement,[[3]](#endnote-3) especially Articles 8 to 13 and 17, elements of which are discussed more fully below, is now based on regional (and subregional, although the distinction is fairly meaningless) fisheries management organisations (hereinafter RFMOs) or arrangements. The difference between organisations and arrangements is that organisations are generally created by or under a treaty that confers on them international legal personality separate from those of their member States, whereas arrangements can come about either through a treaty that does not create an organisation, such as the Central Bering Sea Pollock Convention,[[4]](#endnote-4) or the instrument under which it is brought into being is not of treaty status, such as the informal arrangements that began in 1997 among the European Union (or Community as it was until 2009), the Faroe Islands (belonging to Denmark), Iceland, Norway and the Russian Federation on North-East Atlantic herring.[[5]](#endnote-5) The last possibility can be largely ignored,[[6]](#endnote-6)  because the rule *pacta tertiis nec nocent nec prosunt* is part of the law of treaties, namely the basic principle that treaties – and, by extension, obligations under them like international fisheries regulations – bind only their parties and not third States without their consent.[[7]](#endnote-7)

At the risk of oversimplifying the basic legal framework applying to international fisheries, in essence it requires States participating in those fisheries to cooperate so as to maintain stocks at, or restore them to, the size supporting the maximum sustainable yield.[[8]](#endnote-8)  Under Annex II to the Fish Stocks Agreement that size is a lower limit rather than a target, but the principle of cooperation, to which it adds more detail, is essentially the same.[[9]](#endnote-9)

***Pacta tertiis* and bilateral treaties**

Although the bulk of this article is about RFMOs and how their catch or effort limits are divided on the high seas, it should not be overlooked that the *pacta tertiis* rule might also have a role to play in a bilateral context in the exclusive economic zone (EEZ). To see how, let us suppose that States A and B are neighbours on land or separated by less than 400 nautical miles of ocean, so that their entitlements to 200-mile EEZs overlap, which they have not yet delimited by negotiating a maritime boundary as required by Article 74 of UNCLOS. State C has an access agreement with A for its fishing vessels to be permitted to fish in the EEZ of A but has no similar agreement with B, so its vessels must stay out of B’s EEZ. This is no mere flight of fancy, as there is much less than 400 miles between Svalbard, an archipelago belonging to Norway, and Russia’s Franz Josef Land, where until recently there was no agreed boundary and some of the parties to the Spitsbergen Treaty[[10]](#endnote-10) if not Norway itself take the view that it entitles them to fish in the EEZ around Svalbard.[[11]](#endnote-11) This can be seen in the map [below][on the next page].

[take in here if it fits, or otherwise at top of next page, the 2011 treaty map, from https://treaties.un.org/doc/Treaties/2011/10/20111006%2011-40%20AM/Maritime%20delimitation%20line%20between%20the%20Parties%20in%20the%20Barents%20Sea%20and%20the%20Arctic%20Ocean.pdf]

Be that as it may, let us further imagine that C’s vessels have been fishing on grounds within the part of the area of overlapping entitlements that is closer to the coast of A than to B, and the fishing has not elicited any protests or other dissuasive action from B. But now suppose that A and B decide to delimit their boundary by a treaty, and for whatever reason do so in a way that results in the whole of the overlapping area going to B, so that C’s fishing grounds cease to be part of A’s EEZ. This is not what happened in the 2010 treaty delimiting the Norway/Russia maritime boundary,[[12]](#endnote-12) but again it is not fanciful, as Norway has just such a treaty with Iceland in which the whole of the area of overlap between Jan Mayen and Iceland is accorded to Iceland.[[13]](#endnote-13) So what would the position have been if foreign vessels had been fishing with Norway’s consent in that area but not Iceland’s? (This was not in fact the case, as the treaty’s preamble makes clear that Norway was planning to declare an exclusive fishery zone around Jan Mayen but had not yet done so.) The delimitation treaty between A and B is from C’s perspective *res inter alios acta*, so would the *pacta tertiis* rule apply? In other words, is it open to C to say that the boundary between A and B in effect is in the wrong place, and thus C is not bound by it, so that its vessels can continue to fish their habitual grounds? Common sense dictates that the answer must surely be no, yet it is quite difficult to point to any principle that could lead to this conclusion. None of the exceptions in Articles 35 to 38 of the Vienna Convention on the Law of Treaties covers the situation,[[14]](#endnote-14) so we are thrown back on the uncertainties of the institution that was famously left out of that Convention, namely the objective regime. Yet even that, as will be seen in the multilateral context below,[[15]](#endnote-15) does not necessarily meet its requirements, so it may be that boundary treaties generally, on land as well as at sea, are a tacitly recognised exception to the rule. An alternative analysis would be that the treaty does not in fact change C’s underlying legal position: formerly it could fish those grounds only with the consent of any State whose EEZ it might be, and the treaty does nothing to alter that in theory; what has changed in practice is that B chose not to enforce its right to exclude C from the grounds for fear of negatively affecting its relations with A, but now that this is no longer a danger, it will cease to exercise that forbearance.

In the real world, C would be likely to have reminded A and B of its interests, and it would be sensible for the delimitation treaty to include a clause specifying a phasing out rather than abrupt cessation of C’s fishing access, possibly along the lines of the proposal relating to the area between six and twelve nautical miles from the baselines narrowly rejected by the Second United Nations Conference on the Law of the Sea.[[16]](#endnote-16) There is, however, no obligation to do so.

**The multilateral context**

The *pacta tertiis* rule complicates life considerably for States in an RFMO when they agree on catch or effort limits, whether in settlement of a dispute over these or as the outcome of a trouble-free negotiation. This is because, even if each participating State thereafter adheres to its limits, the overall total is safe from being exceeded only as long as no newcomer emerges on the scene and demands a share for itself. The newcomer is in a strong bargaining position, because on the high seas there is freedom of fishing by Articles 87 and 116 of UNCLOS, which reflect customary international law.[[17]](#endnote-17) True, that freedom is subject to the important qualification that it must be exercised with due regard for the interests of other States exercising the freedom, including the member States of the RFMO,[[18]](#endnote-18) and to the duties of cooperation in Articles 117 and 118.[[19]](#endnote-19) There is also paragraph 3 of Article 119, which requires States concerned to “ensure that conservation measures and their implementation do not discriminate in form or fact against the fishermen of any State.” This is precisely the situation that bedevilled the southern bluefin tuna fishery in the 1990s, when Australia, Japan and New Zealand came to successive agreements to reduce their catches in order to halt and reverse the overfishing of this species, only to find that Taiwan and South Korea were negating that reduction by developing fisheries of their own on a significant scale, and Indonesia too was taking large quantities of it on the spawning ground as a bycatch from its fishery for other tuna species.[[20]](#endnote-20) The fact that the spawning ground was located in Indonesia’s EEZ rather than on the high seas adds two further dimensions beyond the scope of this article, namely the degree to which by Article 116(b) fishing in the EEZ takes precedence over that on the high seas, and the economic question of how much leverage a State in Indonesia’s position is able to exercise to turn its potential to destroy the stock into a large agreed share of the catch.[[21]](#endnote-21)

Australia, Japan and New Zealand could not simply tell Korea, Indonesia and Taiwan not to catch SBT while continuing to fish it themselves – this would have both been discriminatory and bespoken a lack of cooperation. But the result in effect was to make Japan in particular much less willing to support the annual renewal of the catch limit it had negotiated with Australia and New Zealand, and even if this had not been so, the three States faced a dilemma: should they adhere to their original limits, which were now too high for the stock to recover given the increased pressure on it from the newcomers’ fishing, or should they reduce their own catch further to accommodate it? And how could they persuade the newcomers to restrain their catch in the interest of the stock’s recovery, who might well decline to do so on the basis that they played no part in its initial depletion? The duty of cooperation suggests that all States involved in the fishery have a continuing obligation to negotiate mutual restraint of their catch, but this would be a never-ending process, as one newcomer after another made use of the *pacta tertiis* rule to begin fishing and extract a high price for that cooperation.

The UN Fish Stocks Agreement was not yet in force at the time, but it is far from certain that it would have made much of a difference. The relevant provisions here are Articles 8 and 17 and to a lesser extent 11. Article 8(4) of the 1995 Agreement restricts access to a fishery to those States and entities prepared to become members of or cooperate with the RFMO:

Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.

This works well among its 84 parties,[[22]](#endnote-22) but note the last two sentences of the immediately preceding paragraph 3, by which the membership terms may not preclude States having a real interest in the fisheries concerned from participation; nor may they be applied in a manner which discriminates against any such State or group of States.[[23]](#endnote-23)

What does or does not constitute a real interest is a difficult question,[[24]](#endnote-24) but even its definitive resolution would not help if the Agreement itself does not apply to the other 115 or so States of the world thanks to the *pacta tertiis* rule, unless it, or at least the provisions concerned, can be said to have acquired the force of custom. Although these days there is a reasonably strong argument to be made for the case that they have,[[25]](#endnote-25) it would also cover Article 11 of the Agreement, which is significant less for the criteria it contains[[26]](#endnote-26) than for the fact that they are specifically directed at allocation to new entrants, putting paid to any idea that existing participants can arbitrarily decide that no other State has a “real interest” and shut the door to a fishery so that no others can come in after them.

The danger here is that RFMOs will in practice try to overcome the rule by stressing paragraph 4 of Article 8 and not mentioning paragraph 3, in effect hoping that no one notices it.[[27]](#endnote-27) This might be termed an overzealous application of another provision of the Agreement:

*Article 17  
Non-members of organizations and non-participants in arrangements*

1. A State which is not a member of a subregional or regional fisheries management organization or is not a participant in a subregional or regional fisheries management arrangement, and which does not otherwise agree to apply the conservation and management measures established by such organization or arrangement, is not discharged from the obligation to cooperate, in accordance with the Convention and this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks.

2. Such State shall not authorize vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks which are subject to the conservation and management measures established by such organization or arrangement.

3. […]

4. States which are members of such organization or participants in such arrangement shall exchange information with respect to the activities of fishing vessels flying the flags of States which are neither members of the organization nor participants in the arrangement and which are engaged in fishing operations for the relevant stocks. They shall take measures consistent with this Agreement and international law to deter activities of such vessels which undermine the effectiveness of subregional or regional conservation and management measures.

In part this reinforces the duty of cooperation: the non-member’s choice is to join the RFMO, abide by its measures or refrain from fishing the stocks it manages. But paragraph 4 is somewhat problematic to the extent that it contemplates deterring activities of vessels flagged to non-parties to the Agreement (as distinct from non-members of the RFMO that are party) that “undermine the effectiveness of subregional or regional conservation and management measures”. For if such a body adopts catch or effort limits, then *any* non-member catch or effort will potentially undermine the effectiveness of such measures, and if members are collectively over their limit, there is no warrant for treating catch by non-members any differently from that by members, yet members’ overcatch is usually treated quite leniently. An example is that, although the International Commission for the Conservation of Atlantic Tunas (ICCAT) imposes a 25 per cent penalty in certain of its fisheries on members who exceed their quota in two consecutive management periods,[[28]](#endnote-28) this was extended to first three and then four years for the overcatch by the European Community (as it then was) of Atlantic bluefin tuna at ICCAT’s 2007 and 2008 meetings respectively, for which no compelling reason was given.[[29]](#endnote-29) Though it did not go so far as to oppose the 2007 recommendation, this led one prominent member of ICCAT to lament its “overall picture of persistent compliance lapses” and “unwillingness to apply the available corrective instruments, namely quota penalties.”[[30]](#endnote-30)

Possibly we are meant to read the qualifying phrase “consistent with this Agreement and international law” to include the *pacta tertiis* rule, but if that is so, it reduces the RFMO’s room for manoeuvre. Of course little fishing is done directly by States, most such activity being carried out by private persons, so measures to deter the latter will not amount to imposing obligations on non-parties to the RFMO’s constituent treaty, even if it imposes negative consequences on them.

Even so, what this highlights is a tendency often displayed by RFMOs to treat the duty of cooperation as flowing only in one direction: non-members have a duty to cooperate with members through the RFMO, but not *vice versa*, and that duty is often expressly or impliedly conceived as able to be discharged in only one way, namely by taking zero catch, i.e. staying out of the fishery. So when a would-be new member expresses a desire to be allocated some quota and a willingness to cooperate with the competent RFMO to that end, to deny that it has a real interest is counterproductive: an RFMO that purports to exclude all others from a fishery it manages is not cooperating with that prospective new entrant and thus is in no position to complain of non-cooperation from it in return.

This might not be an issue if the Fish Stocks Agreement has made RFMO treaties into objective regimes, but it has been demonstrated that this is not true of the Agreement itself,[[31]](#endnote-31) and the same is surely true of individual RFMO treaties, as they fall short of the meeting the requirement that they must operate in the interests of all States in general, not simply the members of the regime.[[32]](#endnote-32)

Attempts to overcome this dilemma usually take one of two forms. One relies on the fact that fishing is economically viable only if there is a market in which to sell the fish, so where the RFMO’s members include the major market States for the species in question, it can exert a powerful influence on the incentive to fish for non-members, though only on those fishing to generate export income, not those fishing merely to supply their own domestic markets. This potentially raises issues of international trade law considered later in this paper; suffice it for the moment to note that in principle a well-designed measure should survive scrutiny by a World Trade Organization (WTO) panel; since the chapeau of Article XX of the General Agreement on Tariffs and Trade (GATT)[[33]](#endnote-33) makes the decisive factor not discrimination as such, but arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Thus, where the interloper is genuinely uncooperative, discrimination on the basis of that lack of cooperation would be justified if the RFMO itself has been cooperative – something that ought to go without saying, but as observed above, all too frequently does not. To date the *Shrimp-Turtle case*,[[34]](#endnote-34) where the clumsy design of the scheme made the outcome inevitable, is the only trade measure imposed for fisheries management reasons ever found in breach of the GATT by a WTO panel, the only other case where this issue arose having been settled: the Chile-EU swordfish dispute.[[35]](#endnote-35) Under a looser definition one could add to these the latest iteration of the *Tuna-Dolphin* dispute between Mexico and the United States,[[36]](#endnote-36) where it was not a trade measure as such, but a labelling requirement aimed indirectly at reducing dolphin bycatch in the capture of tuna that was found to function as a technical barrier to trade, as well as the import ban imposed as a retaliatory measure for what the EU saw as the Faroe Islands’ inadequate fisheries mismanagement in their dispute on mackerel and herring, settled in 2014.[[37]](#endnote-37) (Breaches have also been found in several other cases relating to products of fisheries,[[38]](#endnote-38) but the measures at issue there were ones of quarantine, marketing and anti-dumping, not of fisheries management.)

The *pacta tertiis* rule does however make certain other measures vulnerable to a WTO challenge, namely those aimed at the flawed concept of IUU fishing, standing for illegal, unreported and unregulated fishing, that has emerged in the last two decades as a preoccupation within RFMOs sometimes verging on the obsessive. The IUU acronym has permeated not just UN General Assembly and fisheries commission resolutions – an entire section, paragraphs 64 to 94, running to well over four pages of the General Assembly’s most recent resolution on fisheries,[[39]](#endnote-39) is devoted to IUU fishing, which is also mentioned in paragraphs 99, 105, 106, 116, 117 and 164, to say nothing of the associated preambular paragraphs – but even some newer treaty texts.[[40]](#endnote-40) Lately this infection has spread to judicial and arbitral decisions, the Award in the *South China Sea Arbitration* endorsing[[41]](#endnote-41) the interpretation by the International Tribunal for the Law of the Sea (ITLOS) of the obligation of due regard to the rights and duties of the coastal State in its EEZ that is required of other States exercising their rights and performing their duties there by Article 58, paragraph 3 of UNCLOS as including a duty “to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities.”[[42]](#endnote-42) Although, for reasons flowing from the definition of IUU fishing discussed below, this is expressed in unnecessarily broad terms, the Award is on firmer ground in laying down that “anything less than due diligence by a State in preventing its nationals from *unlawfully* fishing in the exclusive economic zone of another would fall short of the regard due pursuant to Article 58(3) of the Convention.”[[43]](#endnote-43)

But as early as 2004 Australia was suggesting in the annual General Assembly debate on Oceans and the Law of the Sea that the acronym had begun to outlive its usefulness and that “IUU fishing is not one problem but three, each of which requires separate international responses.”[[44]](#endnote-44)

Since the problems grouped under the term IUU fishing are real enough, it is worth dwelling briefly on the definition to show why the international fisheries policy community’s overconcentration on the phenomenon (or, more accurately, as the imprecision is part of the problem, phenomena) is often unhelpful. The term’s origin was in an agenda item at the 1997 annual meeting of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),[[45]](#endnote-45) but it was not defined either there or by the General Assembly in its first resolution that mentioned it.[[46]](#endnote-46) It was left to Article 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing[[47]](#endnote-47) (IPOA) to define each of the elements:

3.1 Illegal fishing refers to activities:

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

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

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

3.2 Unreported fishing refers to fishing activities:

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

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

3.3 Unregulated fishing refers to fishing activities:

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

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

When a concept takes this many words (after the first colon) to define, that in itself is a clue that something is likely to have gone wrong. Broken up into its three constituent elements, individually, their definitions are reasonable, but even so, it is hard to escape the conclusion that the drafters have let the work they put into them largely go to waste. For the IPOA’s great weakness is that, apart from the introductory text and a single mention in paragraph 72 of assistance to a State in “deterring trade in fish and fish products illegally harvested in its jurisdiction,” all the measures within it are aimed simply at “IUU” fishing without any further distinction among its elements. The same is true of the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing,[[48]](#endnote-48) which recently (2016) entered into force.[[49]](#endnote-49) Clearly, though, some of the identified problems and measures to counter them touch on only one or two elements. In particular, illegal fishing raises no *pacta tertiis* issues because each of its three subparagraphs concerns either only two States or one State and a vessel flagged to a second State.

While unreported fishing does not fit neatly into the schema alongside illegal and unregulated fishing, it makes sense to think of it as fishing that would be legal if it were reported, so that the only offence at domestic level is failure to report or misreporting it, while on the international plane the same acts or omissions lead to a breach by the flag State of its duty under UNCLOS Article 119, paragraph 2 to exchange information including catch and effort statistics.[[50]](#endnote-50) A rational policy response must start from the reasons for the reporting obligation: that any fisheries management authority – whether a coastal State in its EEZ or a commission on the high seas – needs the scientists advising it to know as precisely as possible as inputs for their mathematical models not just the tonnage of each species that has been landed, but also the distribution by size, age and sex of the fish making up the catch, where they were caught, by what gear and how much effort has been expended to this end, as well as equivalent statistics for fish caught but discarded rather than landed.[[51]](#endnote-51) Ultimately, for high seas stocks, the benefit flows to the whole international community, in particular those States that have some chance of fishing a given stock profitably if it is maintained at or above, or restored to, the proper size, and which thus have a legitimate interest in being kept up to date with what happens to it. The duty to report hence falls on all States exercising the high seas freedom of fishing, whether or not they are members of (or cooperating with) the relevant RFMO, where one exists – Article 119, paragraph 2 makes no such distinction. Although it is not quite as easy to draw the conclusion that Article 119 embodies a customary rule as it is for the preceding articles which mirror provisions of the 1958 Fishing Convention,[[52]](#endnote-52) the late Professor Burke has pointed out[[53]](#endnote-53) that it does not go far if at all beyond the obligation identified by the ICJ in the *Fisheries Jurisdiction Cases*, applying customary international law: “to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources”.[[54]](#endnote-54) It accordingly follows that there is no *pacta tertiis* problem here either.

That leaves unregulated fishing, and the main objection to the way its definition is formulated is in fact centred on the *pacta tertiis* rule. The general problem, dissecting the recurrent phrase in the IPOA “prevent, deter, and eliminate IUU fishing,” is that, while it is easy to see from the previous discussion why States would wish to prevent, deter, and eliminate illegal and unreported fishing, calling for the “eliminat[ion]” of unregulated fishing is a different matter, all the more so in view of paragraph 3.4, which undercuts paragraph 3.3 by stating that not all unregulated fishing is necessarily bad:

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

This is understandable, as few if any States actually forbid their vessels to fish in parts of the high seas where no RFMO yet exists, or where one that does exist has only partial species coverage and the vessels are fishing for species outside its mandate.

The situation is not helped by paragraph 3.3.1 of the definition of unregulated fishing (“in a manner that is not consistent with or contravenes the conservation and management measures of that organization”), because, if a State is neither a member of the RFMO nor a cooperating non-member that has agreed to abide by the conservation measures even though it has no say in adopting them,[[55]](#endnote-55) then to say that either the State or the fishing by its vessels “contravenes” such measures defies the basic principle that international fisheries regulations, deriving their force as they do from the treaty that created the RFMO, bind only the parties to that treaty and not third States without their consent – although that is tempered for the parties to the UN Fish Stocks Agreement, as we have seen. A similar observation may be made about the closing words of paragraph 79, which calls on States that are not members of a commission to:

…give effect to their duty to cooperate by agreeing to apply the conservation and management measures established by that regional fisheries management organization, or by adopting measures consistent with those conservation and management measures, and should ensure that vessels entitled to fly their flag do not undermine such measures.

This leads back to the same difficulty as was encountered with Article 17, paragraph 4 of the Fish Stocks Agreement, but it is worse because, at least as among its parties, the Agreement itself supplies the necessary third-party consent, but the IPOA, as an instrument not of treaty status, cannot perform the same function. The last part, on ensuring that vessels of their flag do not undermine the relevant measures, would be an obligation flowing naturally and consequentially from a State’s agreement to apply those measures referred to earlier in the paragraph, and possibly the text as a whole is intended to be understood this way, but it cannot exist as an obligation independent of that agreement.

This is not merely a problem of drafting, as it might have been if the phrase “eliminate illegal, unreported and unregulated fishing” had been chosen for the sake of euphony, and what States really wanted to eliminate was not unregulated fishing as such, but rather the very possibility of it, by ending the *unregulatedness* of fishing wherever it remains. The mundane reality that this does not lend itself to incorporation in an acronym like IUU has made it all too easy to overlook the fact that this would be well worth doing, as a necessary step in ending the tragedy of the high seas commons that makes overexploitation and depletion of a renewable resource economically rational in the absence of property rights.[[56]](#endnote-56) Once the fishing is subjected to regulation, the main regulatory measures can be expected to be such that contravention of them (by those to whom they apply) makes the fishing illegal, which as demonstrated above is unproblematic. Yet, there is no evidence that this is what States meant. Rather, it is the underlying concept itself that is faulty, as the better explanation for what has been happening is that, consciously or not, many States seem to favour eliminating unregulated fishing by assimilating it to illegal fishing, at least when it is carried out by others. To take just one example, the 2007 strategy against IUU fishing of the European Community (as it then was) contains these revealing passages:

While 75% of world fish stocks are either fully or over-exploited by *legal* fisheries, IUU fishing represents the hidden force which threatens to [exacerbate the] situation.[[57]](#endnote-57)

This Communication describes the main characteristics of the IUU phenomenon, and outlines the core elements of a new strategy to ensure that in future, fisheries *crime* does not pay.[[58]](#endnote-58)

IUU fishing…represents the *theft* of common fisheries resources and results in considerable losses to those fishermen who do abide by the rules.[[59]](#endnote-59)

The EU fishing industry faces fierce competition from IUU operators who disregard all obligations *legal* operators take on.[[60]](#endnote-60)

This attitude survives into the 2008 Regulation itself, whose preamble says “Transhipments at sea…constitute a…way for operators carrying out IUU fishing to dissimulate the *illegal* nature of their catches.” [[61]](#endnote-61) The focus on criminality is justified by the definition for illegal fishing and by extension unreported fishing, but the assumption that unregulated fishing is also illegal is groundless. Most commentators on IUU fishing unaccountably pass over this point in silence, although there has been one recent attempt to sidestep the problem by analysing unregulated fishing as just another species of illegal fishing– unconvincingly, in the present writer’s view, as it is forced to trivialise the crucial qualitative difference between breach of some clear rule and the vague notion of acts incompatible with ill-defined “responsibilities” of States.[[62]](#endnote-62)

The author has dealt elsewhere with several consequences of this defect,[[63]](#endnote-63) but for present purposes it is sufficient to highlight just two, one of which is that, when a fishery commission acts against IUU fishing, from the IPOA’s definition this must be in support of its own conservation measures. But that needs measures to have been adopted at or before that time, otherwise the cart is put before the horse: without them, logically nothing but unreported fishing could pose a problem at all. That did not trouble the Indian Ocean Tuna Commission (IOTC), which had not established either catch or effort limits when it passed a resolution[[64]](#endnote-64) expressing concern about existing IUU fishing; all it had done to that point was make mere statements of intent to limit fishing capacity. But no such measures were actually taken before it passed another resolution addressed only to non-members, asking them to reduce their 2002 fishing effort below that of 1999 and provide their 1999 catch and effort data and number of vessels as yardsticks to measure their compliance.[[65]](#endnote-65)

This amounts to States urging disciplines on others that they are not prepared to accept for themselves. It may be part of the price of ending open access to fisheries,[[66]](#endnote-66) but they seem curiously reluctant to make the argument for it, and what is missing is any debate on what conditions would justify this step, particularly where it redounds to the benefit of the members of the RFMO, often the very States that caused the depletion of the stock that serves to justify the measure, at all others’ expense. Thus it is primarily the subterranean nature of the process that threatens to discredit the goal and hence its achievement.

Compelling though the economic case is for closing depleted fisheries to new entrants, as the only means of ensuring sufficient incentive to reverse the depletion, the legal considerations run wider. This being another way to describe assimilation of unregulated to illegal fishing as something to be eliminated, it may be why those who gain from policies to entrench exclusive access rights are reluctant to acknowledge and defend them openly, preferring to pursue them silently under cover of the “fight against IUU fishing”,[[67]](#endnote-67) creating guilt by association with its other components.

The other possible consequence linked to the *pacta tertiis* rule of ignoring the distinction between illegal and unregulated fishing is to weaken the justification for trade-restrictive measures against fishing that is merely unregulated. For instance, Article 12, paragraph 1 of the EU Regulation[[68]](#endnote-68) prohibits importation into the EU of “fishery products obtained from IUU fishing.”[[69]](#endnote-69) For illegal and unreported fishing that would probably survive a challenge under the GATT, as long as a similar prohibition on the EU’s own vessels – i.e. those of its Member States – were being rigorously enforced (or, where an import ban is imposed collectively by members of an RFMO, an equivalent ban on landings applies to miscreant vessels flagged to any of its members). As hinted at, however, by the otherwise welcome observation in the EU strategy that “The EU can only be seen as a credible actor against IUU fishing in the international arena if it is able to demonstrate that illegal fishing…by EU vessels and operators, is being adequately tackled.”,[[70]](#endnote-70) the fulfilment of this condition has up to now been open to doubt. This risks the measure being found not to be “made effective in conjunction with restrictions on domestic production or consumption”, as Article XX(g) of GATT requires if the defence of measures “relating to the conservation of exhaustible natural resources” is to succeed. This would have been the major point of vulnerability to the European challenge at the WTO of Chile’s ban on port calls by Spanish vessels fishing on the high seas for swordfish beyond its EEZ. Chile had no limit on its own catch (production) of swordfish beyond a restriction of the proportion of the catch represented by fish below a certain size threshold.[[71]](#endnote-71)

With such practical doubts even for illegal fishing, there is even less reason for confidence in making the same claim in respect of unregulated fishing, which may fail the test of the chapeau of GATT Article XX, shielding only measures “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail...”. This would invalidate trade barriers used by one State to exert pressure on another State to pursue a policy that the first State is not itself willing to adopt. Yet that is the essence of trying to eliminate unregulated fishing by trade bans: asserting a right to fish a stock while denying the same right to others.

**Conclusion**

The lack of differentiation among the elements of IUU fishing within first the IPOA and then the Port State Measures Agreement obscures the policy responses needed, by treating as one what are really several different problems calling for as many distinct solutions. While it may be conceded that the blurring served and probably continues to serve a useful purpose in the original CCAMLR context, where it gets around the problem that not all members accept that in Antarctica there are coastal States, that excuse is not available in other RFMOs and the United Nations. Moreover, equating “unregulated” with “illegal”, though in economic terms perhaps a necessary condition for any lasting solution to overfishing, is something that should be done openly and after proper debate, not unwittingly or by terminological sleight of hand.

What does unite most elements of IUU fishing as defined by the IPOA is that the fishing occurs outside the framework of, or contrary to the obligations accepted through, the competent RFMO. As previously noted, and as some States are beginning to realise,[[72]](#endnote-72) members have a weak political and legal case for insisting on non-members living by rules that they themselves repeatedly prove unwilling to enforce against each other, discriminating against outsiders while excusing each other’s overfishing, leaving non-member violators, if this is not an oxymoron, to face negative consequences that flag States that are members, along with their vessels, usually escape.[[73]](#endnote-73)

What is unsatisfactory is not the ending of open access as a solution to the tragedy of the high seas fisheries commons, but only the current state of affairs in which hostility to undifferentiated IUU fishing is being used, deliberately or not, as a cloak to conceal consolidation of their oligopoly by fishing States, who are succeeding both in avoiding being held to account to other States for their past over-exploitation, and in keeping off the agenda any prospect of compensation for those States affected by the loss of freedom of fishing. If rebuilding of stocks requires abolition of the residual freedom of high seas fishing, which the author would not dispute, then attention needs to turn to how States are to be persuaded of this, and in particular to work out a widely accepted method for deciding who can close a stock to new entrants and on what grounds. Without this a legitimate goal risks being discredited by being reached via an illegitimate short-cut that disregards the *pacta tertiis* rule.

1. This article is an elaborated version of a presentation under the title “*Pacta Tertiis* and Regional Fisheries Management Mechanisms” at the Persistent Challenges and Recent Developments in International Fisheries Law Workshop held at the K.G. Jebsen Centre for the Law of the Sea, University of Tromsø, on 23 September 2015. [↑](#endnote-ref-1)
2. Montego Bay, 10 December 1982; 1833 United Nations Treaty Series (UNTS) 3. [↑](#endnote-ref-2)
3. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995); 2167 UNTS 3. [↑](#endnote-ref-3)
4. Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (Washington DC, 16 June 1994) 34 *International Legal Materials* 67. Even its meetings have since 2010 become virtual: see the website for the most recent one posted at <[*http://www.afsc.noaa.gov/REFM/CBS/19th\_annual\_conference.htm*](http://www.afsc.noaa.gov/REFM/CBS/19th_annual_conference.htm)> (visited on 8 October 2016). [↑](#endnote-ref-4)
5. See on the initial 1997 arrangement P. Ørebech, K. Sigurjonsson and T.L. McDorman, “The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement”, (1998) 13 *International Journal of Marine and Coastal Law (IJMCL)* 119 at 124. [↑](#endnote-ref-5)
6. But not entirely: see the problems caused by vessels from South Africa and Belize as non-parties to the 1998 Arrangement between the Government of Australia and the Government of New Zealand for the Conservation and Management of Orange Roughy on the South Tasman Rise recounted in E.J. Molenaar, “The South Tasman Rise Arrangement of 2000 and other Initiatives on Management and Conservation of Orange Roughy”, (2001) 16 IJMCL 77 at 81-82; the text of that instrument is no longer available online, but the successor arrangement of 2000 is reprinted *ibid*. at 119-124. [↑](#endnote-ref-6)
7. See Article 34 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969); 1155 UNTS 331, which is taken as codifying the pre-existing customary law: “A treaty does not create either obligations or rights for a third State without its consent.” [↑](#endnote-ref-7)
8. UNCLOS, *supra* n 2, Articles 61(3), 63, 64 and 119(1)(a). [↑](#endnote-ref-8)
9. UN Fish Stocks Agreement, *supra* n 3, Articles 7 and 8 *passim*. [↑](#endnote-ref-9)
10. Treaty concerning the Archipelago of Spitsbergen (Paris, 2 February 1920); 2 *League of Nations Treaty Series* 7. [↑](#endnote-ref-10)
11. # See generally R. Churchill and G. Ulfstein, “The Disputed Maritime Zones around Svalbard”, in M.H. Nordquist, J. Norton Moore and T.H. Heidar (eds), *Changes in the Arctic Environment and the Law of the Sea* (Leiden, Boston: Martinus Nijhoff Publishers, 2010), 551-593.

    [↑](#endnote-ref-11)
12. But see now the Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean (Murmansk, 15 September 2010); to appear in UNTS vol 2791. [update before publication?] [↑](#endnote-ref-12)
13. Agreement between Norway and Iceland on the Continental Shelf Between Iceland and Jan Mayen (Oslo, 22 October 1981); 2124 UNTS 247, Article 1 read in conjunction with the preamble, whose second paragraph states this as the effect on the EEZ boundary of the Agreement between Norway and Iceland on Fishery and Continental Shelf Questions (Reykjavik, 28 May 1980); 2124 UNTS 225, even though it is not apparent from the text of the latter. [↑](#endnote-ref-13)
14. *Supra* n 7. [↑](#endnote-ref-14)
15. See *infra* text at n 31and the commentary on Article 34 of the Draft articles on the law of treaties with commentaries, inUN, *Yearbook of the International Law Commission 1966*, Vol II (New York: UN, 1967)187 at 231 (corresponding to Article 38 of the Vienna Convention). [↑](#endnote-ref-15)
16. See paragraph 3 of the proposal of 22 April 1960 by Canada and the United States, reproduced in UN doc A/CONF.19/8, *Second United Nations Conference on the Law of the Sea, Official records, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, Annexes and Final Act, Geneva, 17 March – 26 April 1960*, 173. This would have extended to 31 October 1970 access to that six-mile-wide belt for any State whose vessels had “made a practice of” fishing there from 1953 to 1957. [↑](#endnote-ref-16)
17. S.B. Kaye, *International Fisheries Management* (The Hague and London: Kluwer Law International, 2001), at 322. [↑](#endnote-ref-17)
18. UNCLOS, *supra* n 2, Art 87(2). [↑](#endnote-ref-18)
19. These state:

    *Article 117  
    Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas*

    All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

    *Article 118  
    Co-operation of States in the conservation and management of living resources*

    States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end. [↑](#endnote-ref-19)
20. See “Annual Review of SBT Fisheries by Republic of Korea” (Attachment K-3 to CCSBT, *Report of the Eighth Annual Meeting, 15–19 October 2001, Miyako, Japan*, <*https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs\_english/meetings/meeting\_reports/ccsbt\_08/report\_of\_ccsbt8.pdf*> (visited on 21 December 2016)); “Review of Taiwan SBT Fishery of 1999/2000” (Attachment F-5 to CCSBT, *Report of the Seventh Annual Meeting, 18–21 April 2001, Sydney, Australia*, <*https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs\_english/meetings/meeting\_reports/ccsbt\_07/report\_of\_ccsbt7.pdf*> (visited on 21 December 2016)); *Summary report of the second FAO Expert Consultation on Interactions of Pacific Tuna Fisheries, Shimizu, Japan, 23-31 January 1995* (FAO Fisheries Report No 520; Rome: FAO, 1995), at 11. [↑](#endnote-ref-20)
21. See J.A. Gulland, *Some Problems of the Management of Shared Stocks* (FAO Fisheries Technical Paper No 206) (Rome: FAO, 1980), at 16; C. Southey, “The International Fishery: A Proposal Based on the New Welfare Economics”, in L.M. Alexander (ed), *The Law of the Sea: The United Nations and Ocean Management: Proceedings of the Fifth Annual Conference of the Law of the Sea Institute, June 15 – June 19, 1970, University of Rhode Island* (Kingston: University of Rhode Island, 1971), 53 at 58. [↑](#endnote-ref-21)
22. See the Status List maintained by the Treaty Section of the UN Secretariat, at *<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\_no=XXI-7&chapter=21&clang=\_en>* (visited on 19 December 2016). [↑](#endnote-ref-22)
23. The full text of Article 8(3) is as follows:

    Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement. States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned. [↑](#endnote-ref-23)
24. See on this E.J. Molenaar, “The Concept of "Real Interest" and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms”, (2000) 15 IJMCL 475. [↑](#endnote-ref-24)
25. Evidence of this can be found for example in Australia’s statement in the debate on Oceans and the Law of the Sea at the 2005 session of the UN General Assembly (“Statement by Senator Robert Ray[,] Parliamentary Adviser to the Australian Mission to the United Nations”, <*http://www.unny.mission.gov.au/unny/il\_281105.html*> (visited on 20 December 2016)), expounding “Australia’s strong view that States have an obligation to either join relevant RFMOs where entitled to do so, or to otherwise refrain from fishing in the RFMO regulated area unless they agree to apply all relevant conservation measures.” In the 2006 session the same words were repeated almost verbatim (“Statement to the 61st session of the UN General Assembly Plenary 7 December 2006[,] Agenda item 71(a) & (b): Oceans and the Law of Sea and Sustainable fisheries[,] Delivered by HE Frances Lisson[,] Ambassador and Deputy Permanent Representative[,] Permanent Mission of Australia to the United Nations”, <*http://www.unny.mission.gov.au/unny/il\_071206.html*> (visited on 20 December 2016)). [↑](#endnote-ref-25)
26. Headed “New members or participants”, this provision states that:

    In determining the nature and extent of participatory rights for new members of a subregional or regional fisheries management organization, or for new participants in a subregional or regional fisheries management arrangement, States shall take into account, *inter alia*:

    (a) the status of the straddling fish stocks and highly migratory fish stocks and the existing level of fishing effort in the fishery;

    (b) the respective interests, fishing patterns and fishing practices of new and existing members or participants;

    (c) the respective contributions of new and existing members or participants to conservation and management of the stocks, to the collection and provision of accurate data and to the conduct of scientific research on the stocks;

    (d) the needs of coastal fishing communities which are dependent mainly on fishing for the stocks;

    (e) the needs of coastal States whose economies are overwhelmingly dependent on the exploitation of living marine resources; and

    (f) the interests of developing States from the subregion or region in whose areas of national jurisdiction the stocks also occur. [↑](#endnote-ref-26)
27. In 2012 and 2014 the author was in attendance at gatherings where the Executive Secretary of the Northeast Atlantic Fisheries Commission (NEAFC, created by the Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries (London, 18 November 1980); 1285 UNTS 129), gave presentations notable for that glaring omission. [↑](#endnote-ref-27)
28. Recommendation 96-14, “Recommendation Regarding Compliance in the Bluefin Tuna and North Atlantic Swordfish Fisheries” (Annex 5-14 to ICCAT, *Tenth Special Meeting of the Commission, San Sebastian, November 22-29, 1996*), in ICCAT, *Report for biennial period, 1996-97 Part I (1996) - Vol.1*, <*https://www.iccat.int/Documents/BienRep/REP\_EN\_96-97\_I\_1.pdf>* (visited on 19 December 2016), 95. [↑](#endnote-ref-28)
29. Recommendation by ICCAT in regard to Compliance with the Multi-Annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean (Recommendation 07-04), in “Recommendations Adopted by ICCAT in 2007” (Annex 5 to ICCAT, *Proceedings of the 20th Regular Meeting of the International Commission for the Conservation of Atlantic Tunas (Antalya, Turkey – November 9 to 18, 2007)* (hereinafter ICCAT20 Report)), in ICCAT, *Report for biennial period 2006-07 Part II (2007) - Vol.1* (hereinafter ICCAT Reports 2007/1), <*https://www.iccat.int/Documents/BienRep/REP\_EN\_06-07\_II\_1.pdf*> (visited on 19 December 2016), at 152; Recommendation amending the Recommendation by ICCAT to Establish a Multiannual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean (Recommendation 08-05), in “Recommendations Adopted by ICCAT in 2008” (Annex 5 to ICCAT, *Proceedings of the 16th Special Meeting of the International Commission for the Conservation of Atlantic Tunas (Marrakech, Morocco – November 17 to 24, 2008)*), in ICCAT, *Report for biennial period 2008-09 Part I (2008) - Vol.1*, <*https://www.iccat.int/Documents/BienRep/REP\_EN\_08-09\_I\_1.pdf*> (visited on 19 December 2016), 196 at 198 (subparagraph 14(d)). [↑](#endnote-ref-29)
30. “Supplemental Statement by the United States to the Compliance Committee” (Appendix 10 to ICCAT, *Report of the Meeting of the Conservation and Management Measures Compliance Committee* (Annex 10 to ICCAT20 Report)), in ICCAT Reports 2007/1, *supra* n 29, 249 at 249. [↑](#endnote-ref-30)
31. R. Rayfuse, “The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?” (1999) 20 *Australian Yearbook of International Law* 253. [↑](#endnote-ref-31)
32. As noted by R. Barnes, “Entitlement to Marine Living Resources in Areas beyond National Jurisdiction”, in A.G. Oude Eflerink and E.J. Molenaar (eds), *The International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments* (Leiden, Boston: Martinus Nijhoff Publishers, 2010), 83 at 134. [↑](#endnote-ref-32)
33. Article XX lists below the opening words “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:” a series of justificatory purposes for departing from the ordinary GATT rules. Since 1995 GATT has been maintained in force among Members of the WTO pursuant to the Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994), 1867 UNTS 3, Article II (2) and (4). [↑](#endnote-ref-33)
34. WTO doc WT/DS58/R (15 May 1998), *United States – Import Prohibition of Certain Shrimp and Shrimp Products*. [↑](#endnote-ref-34)
35. WTO doc WT/DS193/4 (3 June 2010), *Chile – Measures Affecting the Transit and Importation of Swordfish, Joint Communication from the European Union and Chile.* [↑](#endnote-ref-35)
36. WTO doc WT/DS381/R (15 September 2011), *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*. [↑](#endnote-ref-36)
37. WTO doc WT/DS469/3 (25 August 2014), *European* *Union – Measures on Atlanto-Scandian Herring: Joint Communication from Denmark in respect of the Faroe Islands and the European Union*. [↑](#endnote-ref-37)
38. WTO docs WT/DS18/R (12 June 1998), *Australia – Measures Affecting Importation of Salmon*; WT/DS231/R (29 May 2002), *European Communities – Trade Description of Sardines*; WT/DS335/R (30 January 2007) *United States – Anti-Dumping Measure on Shrimp from Ecuador*; WT/DS337/R (16 November 2007), *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*; WT/DS404/R (11 July 2011), *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*; WT/DS422/R (8 June 2012), *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*; WT/DS429/R (17 November 2014), *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam.* [↑](#endnote-ref-38)
39. UN doc A/RES/71/123 (date), *Sustainable fisheries, including through the 1995 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, and related instruments*. [currently available only as A/71/L.24 despite adoption on 17 Nov, will need updating] [↑](#endnote-ref-39)
40. Apart from the FAO Port State Measures Agreement itself, *infra* n 10, see: Southern Indian Ocean Fisheries Agreement (Rome, 7 July 2006), <*http://www.fao.org/fileadmin/user\_upload/legal/docs/035t-e.pdf*> (visited on 20 December 2016), Article 6(1)(i), Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (Auckland, 14 November 2009), <*https://www.sprfmo.int/assets/Basic-Documents/Convention-web.pdf*> (visited on 20 December 2016), 7th preambular paragraph and Articles 8(i), 23(1)(d), 24 (1)(c), 27(1)(d) and (f) and 31(3)); Northwest Atlantic Fisheries Commission (NAFO) doc GC Doc. 07/4, Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (Annex 17 to NAFO doc GC Doc. 07/4, *R**eport of the General Council, 24-28 September 2007, Lisbon, Portugal*), <*http://archive.nafo.int/open/gc/2007/gcdoc07-04.pdf*> (visited on 20 December 2016), last preambular paragraph and Articles I(j) and VI(9); Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean (Tokyo, 24 February 2012), <*http://npfc.r-cms.jp/files/user/docs/Convention%20Text.pdf*> (visited on 21 December 2016), last preambular paragraph and Articles 1(k), 7(2)(d) and (g) and 16(1)(c). A heartening exception is the extensive 2006 amendments to the NEAFC treaty, which entered into force in 2013: <*https://www.neafc.org/system/files/Text-of-NEAFC-Convention-04.pdf*> (visited on 20 December 2016). [↑](#endnote-ref-40)
41. Permanent Court of Arbitration Case Nº 2013-19, *In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People’s Republic of China, Award, 12 July 2016*, <*https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf*> (visited on 20 December 2016), at 293-294 (paragraphs 743-744). [↑](#endnote-ref-41)
42. In *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015*, ITLOS Reports p.4 at xx [page number to be supplied in due course] (paragraph 124). The first two questions on which ITLOS was asked for its advisory opinion were: (1) What are the obligations of the flag State in cases where illegal, unreported and unregulated (IUU) fishing activities are conducted within the Exclusive Economic Zone of third party States? (2) To what extent shall the flag State be held liable for IUU fishing activities conducted by vessels sailing under its flag? [↑](#endnote-ref-42)
43. *South China Sea Arbitration Award*, *supra* n 41, at 294 (paragraph 744) (emphasis added). [↑](#endnote-ref-43)
44. This point is common to the statement by Senator John Tierney, Parliamentary Adviser to the Australian Delegation to the United Nations, made on 16 November 2004, extracted in (2006) 25 *Australian Yearbook of International Law* at 485 and the corresponding statement made the following year by Senator Ray, *supra* n 25. [↑](#endnote-ref-44)
45. See CCAMLR, *Report of the Sixteenth Meeting of the Commission, Hobart, Australia, 27 October – 7 November,1997*, <*https://www.ccamlr.org/en/system/files/e-cc-xvi.pdf*> (visited on 20 December 2016), at 8-13. [↑](#endnote-ref-45)
46. Resolution 54/32 (UN doc A/RES/54/32 (19 January 2000)), paragraph 10 (see also the 13th preambular paragraph). [↑](#endnote-ref-46)
47. Adopted by the FAO’s Committee on Fisheries at its 24th Session on 2 March 2001 and endorsed by the 120th Session of the FAO Council on 23 June 2001, <*http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM*> (visited on 20 December 2016). [↑](#endnote-ref-47)
48. Rome, 22 November 2009 (the date of its approval by the FAO Conference at its Thirty-sixth Session in Resolution No 12/2009), *<http://www.fao.org/fileadmin/user\_upload/legal/docs/037t-e.pdf*> (visited on 20 December 2016). [↑](#endnote-ref-48)
49. See the online status list maintained by the depositary at <*http://www.fao.org/fileadmin/user\_upload/legal/docs/037s-e.pdf*> (visited on 13 June 2016). [↑](#endnote-ref-49)
50. The exact text of this provision is: “Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.” [↑](#endnote-ref-50)
51. Articles 2(a) and 3 of Annex I to the UN Fish Stocks Agreement, *supra* n 3, set out in some detail the minimum requirements to facilitate effective stock assessment. [↑](#endnote-ref-51)
52. Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958; 559 UNTS 285). [↑](#endnote-ref-52)
53. W.T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Oxford: Clarendon Press, 1994) at 99. [↑](#endnote-ref-53)
54. *Fisheries Jurisdiction Cases (United Kingdom of Great Britain and Northern Ireland* v. *Iceland; Federal Republic of Germany* v. *Iceland)*, ICJ Reports 1974, pp. 3 at 31 (paragraph 72) and 175 at 200 (paragraph 64) respectively. [↑](#endnote-ref-54)
55. Such formalised procedures exist in ICCAT, “Resolution by ICCAT on Becoming a Cooperating Party, Entity or Fishing Entity” (Annex 5-17 to ICCAT, *Report of the Fifteenth Regular Meeting of the Commission, Madrid, Spain - November 14 to 21, 1997*), in ICCAT, *Report for biennial period 1996-97 Part II (1997) - Vol.1*), 79, as well as in the Indian Ocean Tuna Commission, IOTC doc IOTC/S/04/99/R[E], *Report of the Fourth Session of the Indian Ocean Tuna Commission, Kyoto, Japan, 13–16 December 1999* (Victoria: IOTC, 2000), at 47 (Appendix XI: Resolution 99/04 On the Status of Co-operating Non-contracting Parties), the Commission for the Conservation of Southern Bluefin Tuna, “Resolution to Establish the Status of Co-operating Non-Member of the Extended Commission and the Extended Scientific Committee” (Attachment 7 to CCSBT, *Report of the Extended Commission of the Tenth Annual Meeting of the Commission, 7-10 October 2003, Christchurch, New Zealand* (Appendix 3 to CCSBT, *Report of the Tenth Annual Meeting of the Commission, 7-10 October 2003, Christchurch, New Zealand*, <*https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs\_english/meetings/meeting\_reports/ccsbt\_10/report\_of\_ccsbt10.pdf*> (visited on 20 December 2016))), the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean has its Conservation and Management Measure 2009-11, “Cooperating Non-Members”, <*https://www.wcpfc.int/system/files/CMM%202009-11%20%5BCooperating%20non-Members%5D\_0.pdf>* (visited on 20 December 2016) (the third iteration of a measure originally adopted in 2004), the Inter-American Tropical Tuna Commission, IATTC Resolution C-07-02, Criteria for Attaining the Status of Cooperating Nonparty or Fishing Entity in IATTC, <*https://www.iattc.org/PDFFiles2/Resolutions/C-07-02-Cooperating-non-party-status.pdf*> (visited on 20 December 2016) (an updated version of a resolution originally adopted in 2004) and the South Pacific Regional Fisheries Management Organisation (SPRFMO) with its Decision 1.02, Rules for Cooperating non-Contracting Parties, <*https://www.sprfmo.int/assets/Meetings/Meetings-2013-plus/Commission-Meetings/1st-Commission-Meeting-2013-Auckland-New-Zealand/Annex-D-Decision-1.02-Rules-for-cooperating-non-contracting-parties.pdf*> (visited on 20 December 2016), adopted at its very ﬁrst meeting in 2013 although since amended. The same status in NEAFC is applied for via Article 34 of its 2008 Scheme of Control and Enforcement as most recently amended in 2015, <*http://www.neafc.org/system/files/NEAFC%20Scheme%20of%20Control%20and%20Enforcement%202016-PDF.pdf* > (visited on 20 December 2016), also the latest in a succession of instruments containing such a provision. [↑](#endnote-ref-55)
56. G. Hardin, “The Tragedy of the Commons”, (1968) 162 *Science* 1243 at 1244. [↑](#endnote-ref-56)
57. Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: On a new strategy for the Community to prevent, deter and eliminate Illegal, Unreported and Unregulated fishing*, 17 October 2007, COM(2007) 601 final, at 2 (emphasis in original). [↑](#endnote-ref-57)
58. *Ibid*. (emphasis added). [↑](#endnote-ref-58)
59. *Ibid*., at 4 (emphasis added). [↑](#endnote-ref-59)
60. *Ibid*. (emphasis added). [↑](#endnote-ref-60)
61. Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999, 11th preambular paragraph (emphasis added). The definitions of illegal fishing (Article 2(2)), unreported fishing (Article 2(3)) and unregulated fishing (Article 2(4)) follow those of the IPOA, *supra* n 9, with only insignificant differences, except that there is no equivalent of paragraph 3(4) of the IPOA, *supra*, text between nn 47 and 48. [↑](#endnote-ref-61)
62. J.T. Theilen, “What’s in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing”, (2013) 28 IJMCL 533. [↑](#endnote-ref-62)
63. A. Serdy, *The New Entrants Problem in International Fisheries Law* (Cambridge: Cambridge University Press, 2016), Chapter 3, with which parts of this contribution unavoidably overlap. [↑](#endnote-ref-63)
64. IOTC doc IOTC/S/04/99/R[E], *supra* n 48, at 42 (Appendix VIII: Resolution 99/01 On the Management of Fishing Capacity and on the Reduction of the Catch of Juvenile Bigeye Tuna by Vessels, including Flag of Convenience Vessels, Fishing for Tropical Tunas in the IOTC Area of Competence). [↑](#endnote-ref-64)
65. Resolutions Adopted by the Sixth Session of IOTC (Appendix IX to IOTC doc IOTC-S-06-01R[E], *Report of the Sixth Session of the Indian Ocean Tuna Commission, Victoria, Seychelles, 10-14 December 2001* (Victoria: IOTC, 2002)), in IOTC doc IOTC-S-06-01R[E], 35 at 39 (Resolution 01/04 On Limitation of Fishing Effort of Non Members of IOTC Whose Vessels Fish Bigeye Tuna, 2nd preambular paragraph and operative paragraphs 1 and 2). [↑](#endnote-ref-65)
66. The case for this is made in G.R. Munro, “The Management of Shared Fish Stocks”, in *Papers Presented at the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks - Bergen, Norway, 7-10 October 2002* (Rome: FAO, 2003; FAO Fisheries Report 695 (Supplement)), 2 at 19ff. [↑](#endnote-ref-66)
67. A phrase that to the author’s dismay is still to be found in General Assembly resolutions among others, most recently in both the preamble and paragraph 65 of Resolution 71/123, *supra* n 38. [↑](#endnote-ref-67)
68. *Supra* n 5. [↑](#endnote-ref-68)
69. The compatibility of the EU regulation with WTO rules was raised in 2010 at the annual informal meeting of the States Parties to the UN Fish Stocks Agreement (UN doc ICSP9/UNFSA/INF.4, “Ninth round of Informal Consultations of States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 16–17 March 2010), Report”, <*http://www.un.org/Depts/los/convention\_agreements/fishstocksmeetings/icsp9report.pdf*> (visited on 20 December 2016), at 7 (paragraph 20)), but the reasons for the doubts were left unstated, and the issue has not been aired in any subsequent meetings of the States Parties. [↑](#endnote-ref-69)
70. EU strategy, *supra* n 50, at 8. [↑](#endnote-ref-70)
71. See M.A. Orellana, “The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO”, (2002) 71 *Nordic Journal of International Law* 55 at 60. [↑](#endnote-ref-71)
72. The EU’s implicit admission quoted *supra*, text at n 62, attests to this. [↑](#endnote-ref-72)
73. An example in point is that NAFO’s IUU list scheme, Northwest Atlantic Fisheries Organization Conservation and Enforcement Measures 2016 (NAFO doc NAFO/FC Doc. 16/1), <*https://www.nafo.int/Portals/0/PDFs/fc/2016/fcdoc16-01.pdf?ver=2016-02-19-063654-467*> (visited on 20 December 2016), at 71-76 (Chapter VIII, Non-Contracting Party Scheme), as well as the IUU vessel list at <*https://www.nafo.int/Fisheries/IUU*> (visited on 20 December 2016), applies only to non-member vessels. [↑](#endnote-ref-73)