A reflection on the 2015 ITLOS Advisory Opinion: the issue with speaking of a flag State responsibility for 'IUU fishing' in the EEZ

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"A reflection on the 2015 ITLOS Advisory Opinion: the issue with speaking of a flag State responsibility for *'IUU fishing'* in the EEZ"

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Abstract: In 2015, the International Tribunal of the Sea (ITLOS) issued its first Advisory Opinion as a full court on the request of the Sub-Regional Fisheries Commission (SRFC). In its reply to the first of the questions put to it, the ITLOS held that flag States have the 'responsibility to ensure' that their vessels are not engaged in Illegal, Unreported and Unregulated (IUU) fishing in the Exclusive Economic Zones (EEZ) of SRFC Member States. As this obligation derives directly from the United Nations Convention on the Law of the Sea (UNCLOS), several commentators referred to an obligation for UNCLOS States Parties to ensure that their ships do not conduct IUU fishing in foreign EEZ in general, and not only in the EEZ of SRFC Member States. While such a generalization is desirable for the achievement of sustainable fisheries internationally, the use of term of 'IUU fishing' should nevertheless be avoided in this context. Indeed, this concept only has real functional applicability for High Seas fisheries, whereas its applicability is limited in the context of EEZ fisheries. Furthermore, the UNCLOS does not contain a definition of IUU fishing, which means that its definition must be found elsewhere in order to be applicable to UNCLOS Member States. As there are only a limited number of situations where it is the case, it is preferable to speak of a flag State responsibility for illegal fishing and illegal fishing-related activities – rather than for 'IUU fishing'– in order to achieve better generalization.

En 2015, le Tribunal international de la mer (TIDM) a rendu son premier avis consultatif en tant que juridiction plénière à la demande de la Commission Sous-Régionale des Pêches (CSRP). Dans sa réponse à la première des questions qui lui étaient posées, le TIDM a estimé que les États du pavillon ont " l'obligation de veiller " à ce que leurs navires ne pratiquent pas la pêche illégale, non déclarée et non réglementée (INN) dans les zones économiques exclusives (ZEE) des États membres de la CSRP. Comme cette obligation découle directement de la Convention des Nations Unies sur le droit de la mer (CNUDM), plusieurs commentateurs ont fait référence à une obligation pour les États parties à la CNUDM de s'assurer que leurs navires ne pratiquent pas la pêche INN dans les ZEE étrangères en général, et non pas seulement dans les ZEE des États membres de la CSRP. Si une telle généralisation est souhaitable pour la réalisation d'une pêche durable au niveau international, l'utilisation du terme " pêche INN " doit néanmoins être évitée dans ce contexte. En effet, ce concept n'a une réelle applicabilité fonctionnelle que pour la pêche en haute mer, son applicabilité étant limitée lorsqu'il s'agit de la pêche dans les ZEE. En outre, la CNUDM ne contient pas de définition de la pêche INN, cette définition devant donc être trouvée ailleurs pour être applicable aux États membres de la CNUDM. Puisqu'il n'y a qu'un nombre limité de situations où tel est le cas, il est préférable de parler d'une obligation de l'État du pavillon vis-à-vis de la pêche illégale et des activités

illégales liées à la pêche – plutôt que de la “ pêche INN ” – afin d'obtenir une meilleure généralisation.

Keywords: IUU fishing, illegal fishing activities, EEZ, 2015 ITLOS Advisory Opinion, flag States obligation

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1. INTRODUCTION

In 1883, the English scientist Thomas Huxley famously declared at the Great International Fisheries Exhibition of London that 'all the great sea-fisheries [were probably] inexhaustible',[1] reflecting a tendency of the past to view the oceans as an infinite reservoir of resources. Nowadays, however, the illusion of oceans inexhaustibility has long since dissipated, replaced by the realization of the progressive collapse of various world fisheries.[2] The great threat that overfishing poses to marine ecosystems, economies and food security is now evident,[3] making the achievement of sustainable fisheries[4] internationally a common interest of the international community. This is notably reflected in the integration of the sustainable use of ocean resources as the 14th Sustainable Development Goal of the United Nations 2030 Agenda.[5] However, the state of international fisheries is still far from satisfactory, as shown by the 2020 report 'The State of World Fisheries and Aquaculture' of the Food and Agriculture Organization of the United Nations (hereinafter FAO). In 2017, 59.6 percent of marine fish stocks were exploited at the maximum sustainable yield[6] (hereinafter MSY), while only 6.2 percent of stocks could potentially support an increase of captures. Moreover, 34.2 percent of fish stocks were classified as being fished at biologically unsustainable levels that same year, representing an increase of 24.2 percent from the middle of the 1970s.[7]

As stated in a 2004 Report of the United Nations Secretary, one of, if not the 'main obstacle in achieving sustainable fisheries in both areas under national jurisdiction and the high seas' is what has been termed Illegal, Unreported and Unregulated Fishing, or IUU fishing.[8] Roughly described, IUU fishing is an 'umbrella term' covering various fishing activities that do not meet international, regional or national sustainable fisheries standards.[9] Such undesirable fishing

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[1] Smith, T. D. *Scaling Fisheries: the science of measuring the effects of fishing, 1855–1955* (Cambridge: Cambridge University Press, 1994), 53.

[2] The collapse of world fisheries and its consequences are a well-documented phenomenon today. See notably: Cury, P., P. Fréon and C. Mullon. 'The dynamics of collapse in world fisheries'. *Fish and Fisheries* 6 (2005), 111-120; Barrowman, N. J, Hutchings J. A. and Myers R. A. 'Why do fish stocks collapses? The example of cod in Atlantic Canada'. *Ecological Applications* 7(1) (1997), 91-106.

[3] Food and Agriculture Organization of the United Nations. 'The State of World Fisheries and Aquaculture 2020 - Sustainability in action'. 2020, available at: https://doi.org/10.4060/ca9229en, 2, 7-9.

[4] According to the United States Committee on Ecosystem Management for Sustainable Marine Fisheries, sustainable fishing designated 'fishing activities that do not cause or lead to undesirable changes in biological and economic productivity, biological diversity, or ecosystem structure and functioning from one human generation to the next.' See: United States National Research Council. 'Sustaining Marine Fisheries'. 1999, available at: https://doi.org/10.17226/6032, 2.

[5] United Nations, General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, 21 October 2015, Goal 14, 23-24.

[6] The maximum sustainable yield is a biological concept which can be understood as being '[t]he highest theoretical equilibrium yield that can be continuously taken (on average) from a stock under existing environmental conditions without significantly affecting the reproduction process.' See: Food and Agriculture Organization of the United Nations. 'Indicators for sustainable development of marine capture fisheries'. 1999, available at: https://www.fao.org/in-action/globefish/publications/details-publication/en/c/344016/, Annex 1, 36.

[7] FAO, 'The State of World Fisheries and Aquaculture 2020' (n. 3), 7.

[8] United Nations, General Assembly, Oceans and the Law of the Sea, Sustainable Fisheries, including through 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, and Related Instruments, Report of the Secretary-General, A/59/298, 26 August 2004, para. 36.

[9] Rosello, M. *IUU Fishing as a Flag State Accountability Paradigm: Between Effectiveness and Legitimacy* (Leiden: Brill Nijhoff, 2021), 1.

activities can occur in all parts of the ocean,[10] but the international attention seems to have focused more on those that take place in the High Seas rather than those conducted in the Exclusive Economic Zones (hereinafter EEZs) of coastal States.[11]

Yet, EEZs are of paramount importance for the preservation of marine living resources and for the achievement of sustainable fisheries globally. In fact, about 90% of fish stocks of commercial importance are located within EEZs.[12] Moreover, the major part of the so-called IUU fishing seems to be occurring in these areas of the sea. The 2006 report of the ministerially-led Task Force on IUU Fishing on the High Seas indicates that, of the estimated USD 4 to USD 9 billion annual revenues generated by IUU fishing, USD 2.75 billion to USD 7.75 billion originates in the EEZs of coastal States.[13] This is due in part to the challenge that effectively policing and protecting fisheries in the EEZ represents. While even developed coastal States such as the United States struggle to do so,[14] the lack of resources of developing coastal States has rendered their EEZs all the more vulnerable to unsustainable fishing practices.[15] This is especially the case for West African Countries: with fisheries rich waters and little to no monitoring on their part, their EEZs attract fishing fleets often poorly controlled by their flag States. This lack of both control and monitoring enables those fleets to engage in undesirable fishing activities that have devasting consequences on regional economies and ecosystems.[16] In the face of this dramatic situation, it is clear that a solution based solely on the monitoring and enforcement capabilities of coastal States is not a credible one.[17] Whereas Liberia engaged in a creative collaboration with Sea Shepherd to face the problem,[18] the West African Sub-Regional Fisheries Commission (hereinafter SRFC) [19] turned to the International Tribunal of the Sea (hereinafter ITLOS) in search of a legal solution.

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[10] Edeson W.R., M. A. Palma and M. Tsamenyi. *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Leiden: Brill Nijhoff, 2010), 37.
[11] Schatz, V. J., 'Combating Illegal Fishing in the Exclusive Economic Zone – Flag State Obligations in the Context of the Primary Responsibility of the Coastal State'. *Goettingen Journal of International Law* 7(2) (2016), 383-414, 385.
[12] International Union for Conservation of Nature and Natural Resources. 'Towards sustainable fisheries law: a comparative analysis'. 2009, available at: https://www.iucn.org/content/towards-sustainable-fisheries-law-a-comparative-analysis, 3.
[13] High Seas Task Force, 'Closing the Net: Stopping Illegal Fishing on the High Seas'. 2006, available at http://www.oecd.org/sd-roundtable/papersandpublications/39375276.pdf, 3.
[14] Allen, C. H. 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices'. *Ocean Development and International Law* 20 (1989), 309-341, 311.
[15] Harrison, J., and E. Morgera. 'Article 63' in *United Nations Convention on the Law of the Sea: A Commentary*, ed. A. Proelss (Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2017), 506-513, 505; Agnew D.J., Pearce J., Pramod G., Peatman T., Watson R., et al. 'Estimating the Worldwide Extent of Illegal Fishing'. *PLoS ONE* 4(2): e4570 (2009), 1-8, 4.
[16] Ndiaye, T. M. 'Illegal, Unreported and Unregulated Fishing: Responses in General and in West Africa'. *Chinese Journal of International Law* 10(2) (2011), 373–405, 374, 376-377.
[17] Schatz, V. J. 'Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ'. *Ocean Development & International Law* 47(4) (2016), 327-345, 328.
[18] Sea Shepherd Global, 'Partnership with African Coastal States to Eradicate IUU Fishing in their Sovereign Waters by 2020'. 2017, available at: https://oceanconference.un.org/commitments/?id=17190
[19] The Sub-Regional Fisheries Commission [hereinafter SRFC] is an inter-governmental fisheries cooperation organization composed of seven West African States, namely Cabo Verde, The Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone. The organization aims at reinforcing the cooperation between its Member States and at harmonizing their national policies regarding the preservation, conservation and exploitation of marine living resources. Website available at: https://spcsrp.org/en/presentation

In March 2013, the SRFC submitted a request for an advisory opinion to the ITLOS and asked, among four total questions, 'what are the obligations of the flag state in cases where […] (IUU) fishing activities are conducted within the exclusive economic zone of third-party states' and '[t]o what extent shall the flag state be held liable for IUU fishing activities conducted by vessels sailing under its flag'.[20] Approximately two years later, on the 20 April 2015, the ITLOS rendered its first advisory opinion as a full court in *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (hereinafter 2015 Advisory Opinion). In the said advisory opinion, the ITLOS determined that flag States 'have the responsibility to ensure that vessels flying their flag do not conduct IUU fishing activities within the [EEZ] of the SRFC Member States'[21] under the *UN Convention on the Law of the Sea*[22] (hereinafter UNCLOS).

While the ITLOS limited the scope of its finding to IUU fishing happening within the EEZ of the SRFC Member States,[23] a number of commentators have raised the possibility of a more general application of its conclusions.[24] In this respect, the existence of an obligation for States Parties to the UNCLOS to ensure that their ships do not engage in 'IUU fishing' in foreign EEZs would be of great importance in achieving sustainable fishing internationally. Indeed, the lack of effective control of their vessels by flag States has been identified as one of the fundamental causes of IUU fishing.[25] In this context, it seems reasonable to assume that the clarification of an existing flag State obligation, for the breach of which UNCLOS Member States may be held liable,[26] will provide an incentive for them to better control and regulate ships sailing under their flags. Furthermore, the UNCLOS is by far the most important legally binding international instrument governing fisheries. With 168 States Parties,[27] this treaty is 'as close as it is possible to get to have a generally accepted set of laws that apply to fisheries related issues'[28] and can thus be seen as being the main instrument to address undesirable fishing practices.[29]

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[20] ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory opinion of 20 April 2015, ITLOS Reports 2015, 4, 8.
[21] *Ibid*., para. 124.
[22] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 [hereinafter UNCLOS].
[23] ITLOS, *Request for an Advisory Opinion* (n. 20), paras. 69, 87.
[24] See notably: Siti Noor Malia Putri, A. 'The State Responsibility on the IUU Fishing : the Reflection of the 2015 ITLOS Advisory Opinion on IUU Fishing and Its Relevance to Indonesia'. *Indonesia Law Review*, 8(2) (2018), 221-238; Schatz, 'Fishing for Interpretation' 2016 (n. 17), 327-345; Gao, J. 'The ITLOS Advisory Opinion for the SRFC'. *Chinese Journal of International Law*, 14(4) (2015), 735-756; Babu, R. R. 'State responsibility for illegal, unreported and unrelated fishing and sustainable fisheries in the EEZ: some reflections on the ITLOS Advisory Opinion of 2015'. *Indian Journal of International Law* 55(2) (2015), 239–264; Becker, M. A. 'Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)'. *The American Journal of International Law* 109(4) (2015), 851-858.
[25] Food and Agriculture Organization of the United Nations. 'Illegal, Unreported and Unregulated (IUU) fishing'. (no date), available at: https://www.fao.org/fishery/en/iuu-fishing
[26] ITLOS, *Request for an Advisory Opinion* (n. 20), paras. 145-150.
[27] Correct as of the 14 February 2022. See at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#1
[28] Ásmundsson, S. 'Freedom of Fishing on the High Seas, and the Relevance of Regional Fisheries Management Organisations (RFMOs)'. In *Challenges of the Changing Arctic: Continental Shelf, Navigation, and Fisheries*, eds. Ronàn Long, John Norton Moore and Myron H. Nordquist (Leiden: Brill Nijhoff, 2016), 509–521, 514.
[29] S. N. M. Putri, 'The State Responsibility on the IUU Fishing' 2018 (n. 24), 221-238, 236.

However, while some commentators have talked about a flag State responsibility for 'IUU fishing' in foreign EEZ under the UNCLOS,[30] this paper aims at demonstrating that the use of the term of 'IUU fishing' in this context should be avoided. This paper is organized in three large sections, some additional sub-sections and a conclusion. First of all, we will begin with some necessary preliminary considerations on the EEZ and its legal regime, on one hand, and on the legal meaning of 'fishing' on the other hand. These will be examined in Section 2. In Section 3, we will determine that the IUU fishing concept, when applied in the EEZ, is characterized by illegality. To do so, we will start by identifying the most generally accepted definition of IUU fishing. Then, we will examine the applicability of such definition in the EEZ. Section 3 will then conclude by arguing for the use of the expression 'illegal fishing and illegal fishing-related activities' rather than 'IUU fishing' when referring to flag States obligations in regards to EEZ fisheries. Finally, in Section 4, we will explore how the use of the term 'IUU fishing' may limit the responsibility of UNCLOS Member States for the undesirable conducts of their fishing vessels in foreign EEZ to certain situations only.

2. PRELIMINARY CONSIDERATIONS: THE EEZ AND FISHING IN THE CONTEXT OF THE UNCLOS

Some elements need to be examined before considering both the applicability of the IUU fishing concept in the EEZ and the applicability of a IUU fishing definition to UNCLOS Member States. These elements are, on the one hand, the EEZ and its legal regime and, on the other hand, the legal meaning of 'fishing' under the UNCLOS.[31] With respect to the EEZ, a special attention should be given to coastal States obligations with regard to the conservation and management of marine living resources. Indeed, while the UNCLOS grants some exclusive rights to coastal States over them, it also gives the said States the primary responsibility for their conservation and management.[32] In order to meet such responsibility, coastal States are notably 'required to adopt the necessary laws and regulations'.[33] Considering this, as well as the fact that IUU fishing contains an 'illegal' element, the applicability of such a concept in the EEZ cannot be considered without first examining some at coastal States obligations for the conservation and management of marine living resources therein.

[30] See notably: Babu, '[S]ome reflections on the ITLOS Advisory Opinion of 2015' 2015 (n. 24), 239–264; Becker, 'Request for an Advisory Opinion' 2015 (n. 24), 851-858.
[31] Although an examination of the legal meaning of the term 'fishing vessel' is also relevant, it will not be addressed in this paper due to length limitations. For more information on this matter, see for example: Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 34-35.
[32] Harrison, J., and E. Morgera. 'Article 61' in *United Nations Convention on the Law of the Sea: A Commentary*, ed. A. Proelss (Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2017), 480-493, 482.
[33] ITLOS, *Request for an Advisory Opinion* (n. 20), para. 104.

2.1. The EEZ and coastal States responsibility to conserve and manage marine living resources therein

The definition and legal regime of the EEZ are contained in the Part V of the UNCLOS and have, for the most part, become part of customary international law.[34] This zone represents an 'area beyond and adjacent to the territorial sea'[35] with a maximum extension of 200 nautical miles.[36] The EEZ is a *sui generis* zone: it is subject to a very specific legal regime which provides a defined number of 'sovereign rights' to the coastal State while still preserving some fundamental freedoms of the High Seas, notably the freedom of navigation.[37] The concept of sovereign rights should be understood as being 'an extract from the broader concept of sovereignty'.[38] Therefore, sovereign rights must be differentiated from territorial sovereignty. Whereas territorial sovereignty is comprehensive, unless exceptions, the sovereign rights are exclusive rights limited *ratione materiae* to certain given matters, as determined by the UNCLOS.[39] Over these said matters, the coastal State has legislative and enforcement jurisdiction.[40] This jurisdiction is not limited *ratione personae*: coastal States have jurisdiction over their own nationals in their EEZ, but also over nationals of other States when undertaking activities covered by their sovereign rights.[41]

With respect to marine living resources, Article 56(1)(a) of the UNCLOS provides that coastal States have 'sovereign rights for the purpose of exploring and exploiting, conserving and managing' them in their EEZ. This entails that with these sovereign rights comes a responsibility to conserve and manage marine living resources.[42] In this regard, the basic obligations of the coastal States are set out in Article 61 of the UNCLOS.[43] Paragraph 2 of this Article provides an obligation for coastal States to take conservation and management measures in regards to all marine living resources within their EEZ.[44] These measures are aimed at ensuring that marine living resources are 'not endangered' by over-exploitation.[45] Although coastal States have a degree of discretion in choosing the conservation and management measures to ensure such objective, paragraph 1 of Article 61 requires them to adopt a specific one: the determination of the allowable catch of marine living resources in their EEZ.[46] For each species, the determination of their total allowable catch must be made on the basis of the

[34] Roach, J. A. 'Today's Customary International Law of the Sea'. *Ocean Development & International Law* 45(3) (2014), 239-259, 246-247.
[35] UNCLOS, 1982 (n. 22), Art. 55.
[36] *Ibid.*, Art. 57.
[37] Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone' 2016 (n. 11), 383-414, 387-388.
[38] Proelss, A. 'Article 56' in *United Nations Convention on the Law of the Sea: A Commentary*, ed. A. Proelss (Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2017), 418-437, 424.
[39] Tanaka, Y. *The international law of the sea* (Cambridge: Cambridge University Press, Third edition, 2019), 153-154.
[40] *Ibid*.
[41] *Ibid*.
[42] Harrison/Morgera, 'Article 61' 2017 (n. 32), 482.
[43] *Ibid.*
[44] ITLOS, *Request for an Advisory Opinion* (n. 20), para. 96.
[45] The term 'endangered' is not defined under the UNCLOS. According to Bucke, the term can be understood as referring to a 'reduction in abundance that amount commercial extinction, or, more strictly, to reduction of such magnitude that a species is likely to become endangered unless protective action is taken.' Burke, W. W. 'U.S fishery management and the new law of the sea'. *American Journal of International Law*, 76(1) (1982), 24-55, 30.
[46] Harrison/Morgera, 'Article 61' 2017 (n. 32), 486-487.

MSY.[47] Enshrined in paragraph 3, the MSY can therefore be seen as the upper limit beyond which exploitation levels are no longer sustainable, and which should not be exceeded by coastal States.[48] When determining their conservation and management measures, coastal States must also consider 'the best scientific evidence available' to them,[49] 'any generally recommended international minimum standards'[50] as well as the impact of fishing 'on species associated with or dependent upon' the one harvested.[51]

In addition to their obligations regarding the conservation of marine living resources, coastal States also must strive to ensure their 'optimum utilization' in their EEZ pursuant to Article 62(1).[52] In order to do so, paragraph 2 of this Article requires coastal States to determine their harvesting capabilities and to give other States access, through agreements or other arrangements, to the surplus of the allowable catch they cannot harvest themselves.[53] In doing so, coastal States should take into consideration 'all the relevant factors'.[54] The paragraph 3 sets out an illustrative list of such factors.[55] To fulfil all of these obligations, Article 62(4) requires coastal States to put in place laws and regulations. The paragraph also contains a non-exhaustive list of matters which may be regulated by the coastal State.[56] To ensure compliance with said laws and regulations, Article 73(1) allows coastal States to take the necessary enforcement measures, 'including boarding, inspection, arrest and judicial proceedings'.

In regard to fish stocks occurring in the EEZ of multiple coastal States or both on the EEZ and the High Seas, the ITLOS found in its 2015 Advisory Opinion that coastal States are obliged to ensure their sustainable management[57] while they occur in their EEZ.[58] This means that, in addition to the obligations detailed hereabove,[59] the UNCLOS places upon coastal States obligations to cooperate with other States concerned with these stocks. Such obligations are

[47] Fuchs, J., and N. Matz-Lück. 'Marine Living Resources'. In *The Oxford Handbook of the Law of the Sea*, eds. A. G. Oude Elferink, D. R. Rothwell, K. N. Scott and T. Stephens (Oxford: Oxford University Press, 2015), 491-515, 498.
[48] Harrison/Morgera, 'Article 61' 2017 (n. 32), 485.
[49] UNCLOS, 1982 (n. 22), Art. 61(2).
[50] *Ibid.*, Art. 61(3).
[51] *Ibid.*, Art. 61(4).
[52] Harrison, J., and E. Morgera. 'Article 62' in *United Nations Convention on the Law of the Sea: A Commentary*, ed. A. Proelss (Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2017), 493-506, 497.
[53] UNCLOS, 1982 (n. 22), Art. 62(2).
[54] *Ibid.*, Art. 62(3).
[55] Harrison/Morgera, 'Article 62' 2017 (n. 52), 499.
[56] ITLOS, *The M/V 'Virginia G' Case (Panama v. Guinea-Bissau)*, Judgement of 14 April 2014, ITLOS Reports 2014, 4, para. 213.
[57] According to the ITLOS, 'sustainable management' must be understood as 'conservation and development' under UNCLOS, as it considers that 'the ultimate goal of sustainable management of fish stocks [under UNCLOS] is to conserve and develop them as a viable and sustainable resource.' See: ITLOS, *Request for an Advisory Opinion* (n. 20), paras. 190-191.
[58] *Ibid.*, paras. 182-185, 207.
[59] *Ibid*., para. 208.

contained in Article 61(2),[60] Article 63[61] and, in regards to highly migratory species as listed in Annex I of the UNCLOS, in Article 64(1).[62]

2.2. The legal meaning of *'fishing'* under the UNCLOS

Unlike the EEZ, the term 'fishing' is mentioned but not directly defined in the UNCLOS.[63] In order to shed light on its possible legal meaning under this treaty, the following section examines some of the existing definitions in the conventional international law of the sea as well as some of the ITLOS judgments related to fisheries. Although 'fishing' has not been uniformly defined in international treaty law,[64] it is however possible to draw some general lines from existing definitions. According to Edeson, Palma and Tsamenyi,[65] the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (hereinafter Wellington Convention) of 1989[66] is one of the first international convention attempting to define 'fishing'. Article 1(c) of the Wellington Convention reads:

> "driftnet fishing activities" means:
>
> (i) catching, taking or harvesting fish with the use of a driftnet;
>
> (ii) attempting to catch, take or harvest fish with the use of a driftnet;
>
> (iii) engaging in any other activity which can reasonably be expected to result in the catching, taking or harvesting of fish with the use of a driftnet, including searching for and locating fish to be taken by that method;
>
> (iv) any operations at sea in support of, or in preparation for any activity described in this paragraph, including operations of placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons;
>
> (v) aircraft use, relating to the activities described in this paragraph, except for flights in emergencies involving the health or safety of crew members or the safety of a vessel; or
>
> (vi) transporting, transhipping and processing any driftnet catch, and cooperation in the provision of food, fuel and other supplies for vessels equipped for or engaged in driftnet fishing.

The use of the words 'driftnet fishing activities' in Article 1(c) of the Wellington Convention suggests that this convention is intended to apply to more activities than what 'driftnet fishing' would cover. This is further confirmed by the text of the sub-section vi of this Article, which states that 'driftnet fishing activities' also mean activities of '[emphasis added] cooperation in

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[60] *Ibid.*, para. 207(i)
[61] *Ibid.*, para. 207(ii). In its 2015 Advisory Opinion, the ITLOS only examined UNCLOS Art. 63(1), which requires coastal States in whose EEZ the same fish stock occurs to 'seek to agree' among themselves on the measures necessary to ensure the sustainable development of that stock. The ITLOS did not examine the obligation contained in UNCLOS Art. 63(2), as the application of this article was outside the scope of its jurisdiction in the present case (see *ibid.*, para. 200). Nevertheless, this article contains a similar obligation to cooperate for States fishing for a fish stock in the High Seas and coastal States in whose EEZ that fish stock also occurs. See: Harrison/Morgera, 'Article 63' 2017 (n. 15), 510.
[62] ITLOS, *Request for an Advisory Opinion* (n. 20), para. 207(iii).
[63] See for example: UNCLOS, 1982 (n. 22), Arts. 1(4), 19(2)(i), 60(3), 61(3), 61(5), 62(4), 63(2), 66(2), 66(3), 66(5) and 67(2).
[64] Bouloy, J. 'L'exploitation des ressources halieutiques (la pêche)'. In *Traité de droit international de la mer*, eds. M. Forteau and J. M. Thouvenin (Nanterre: Editions A. Pedone, 2017), 703-741, 704.
[65] Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 36.
[66] Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 24 November 1989. Document consulted at: https://www.treaties.mfat.govt.nz/search/details/t/1877 [hereinafter Wellington Convention].

the provision of food, fuel and other supplies for vessels equipped for or engaged in *driftnet fishing*'. However, Edeson et al. have pointed out that, since then, several international instruments have adopted similar broad definitions to directly designate fishing, and not fishing activities.[67] While some authors support this expanded definition of fishing in the international law of the sea,[68] another approach seems to distinguish between what would be fishing *stricto sensu* and other activities related to fishing.[69]

This second approach has notably been adopted in the FAO *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*[70] (hereinafter PSMA), a treaty of particular importance in the context of IUU fishing as it is currently the only binding international instrument specifically targeting it.[71] Article 1(c) of the PSMA refers to fishing as 'searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish'. On the other hand, 'any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea' is covered by the term 'fishing related activities'.[72] There are seventy Parties to the PSMA,[73] whereas the treaties defining 'fishing' broadly have been ratified by a much smaller number of States.[74] It can therefore be argued that the narrower definition of 'fishing' contained in the PSMA is its most internationally accepted definition.

In the context of the UNCLOS, the ITLOS seems to have rejected the idea of a broad definition of fishing in its judgment in the *M/V 'Virginia G' Case*. In this case, the ITLOS had to consider, *inter alia*, whether Guinea-Bissau had jurisdiction, under Articles 56(1)(a) and 62(4) of the UNCLOS, to regulate the supply of fuel to – or *bunkering* of – foreign vessels engaged in fishing in its EEZ.[75] In this regard, the ITLOS found that the UNCLOS provides

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[67] Edeson et al. mention notably the 'WCPF Convention, Art. 1(d); SEAFO Convention, Art. 1(h); Southern Indian Ocean Fisheries Agreement, Art. 1(g).' See: Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 36, footnote 77. Could also be mentioned the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, 14 November 2009, 2899 UNTS, Art. 1(g) [hereinafter SPRFMO Convention]; the Convention for the Conservation of Southern Bluefin Tuna, 10 May 1993, 1819 UNTS, Art. 2(b) [hereinafter CCSBT Convention] and the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, 11 February 1992, Art. II(3). Document consulted at: https://npafc.org/convention/ [hereinafter NPAFC Convention].

[68] See for example: Salmon, J. *Dictionnaire de droit international public* (Brussels: Bruylant, 2001), 816.

[69] See for example: J. Bouloy, who makes a difference between 'traditional catching operations' and 'directly related operations'. Translated from french: 'opérations traditionnelles de capture' and 'opérations directement liées'. See at: Bouloy, 'L'exploitation des ressources halieutiques (la pêche)' 2017 (n. 64), 704.

[70] Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 22 November 2009. Document consulted at: https://www.fao.org/port-state-measures/background/parties-psma/en/ [hereinafter PSMA]. The PSMA aims at eliminating IUU fishing by denying vessels engaged in it the use of its States Parties ports to land their catches. See: FAO, 'The State of World Fisheries and Aquaculture 2020' (n. 3), 95.

[71] FAO, 'The State of World Fisheries and Aquaculture 2020' (n. 3), 95.

[72] PSMA, 2009 (n. 70), Art. 1(d).

[73] Correct as of 14 February 2022. See at: https://www.fao.org/port-state-measures/background/parties-to-the-psma/fr/.

[74] In comparison, the Wellington Convention has 12 Parties, the WCPF Convention has 25 Parties, the SEAFO Convention has 6 Parties, the Southern Indian Ocean Fisheries Agreement has 10 Parties, the SPRFMO Convention has 15 Parties, the CCSBT Convention has 5 Parties and the NPAFC Convention has 5 Parties. Correct as of 14 February 2022. See at: https://www.ecolex.org.

[75] Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone' 2016 (n. 11), 383-414, 391.

coastal States with jurisdiction to regulate activities having a 'direct connection to fishing' in their EEZ, holding that 'such connection to fishing exists for the bunkering of foreign vessels fishing in the exclusive economic zone'. [76] In support of its conclusion, the ITLOS explains having been guided by the definitions of 'fishing' and 'fishing related activities' contained in the PSMA and other international instruments.[77] In addition to using the same terminology as the PSMA, the ITLOS also cites Article 1(d) of the PSMA to provide examples of support activities directly connected to fishing, or 'fishing-related activities'.[78] Therefore, it is clear that the ITLOS considers the activities contained in Article 1(d) of the PSMA as being activities related to fishing, and not fishing *per se*, thus rejecting a broader definition of fishing.

In view of the above developments, it can be argued that 'fishing' under the UNCLOS refers narrowly to what could be called 'capture activities'.[79] Regarding the targets of such capture activities, it seems generally accepted that 'fishing' designates the capture of all species of marine living resources that may be caught. Bouloy, for instance, makes use of the expression 'any living organism likely to be caught'.[80] In the PSMA, the term of 'fish' used in Article 1(c) means 'all species of living marine resources […]'.[81] This idea is also clearly reflected in the text of the UNCLOS. For example, Article 62(4)(b) of the UNCLOS allows coastal States to determine '[…] the species which may be caught […]' in their EEZ,[82] and its letter d to fix '[…] the age and size of fish and other species that may be caught'.[83] A precision is however to be made in regard to benthic organisms. The marine living resources which the UNCLOS considers as 'belonging to the sedentary species'[84] fall into the scope of its Part VI – governing the Continental Shelf – and not into the scope of its Part V.[85] According to Article 77(4), marine living resources that are to be considered as sedentary are the organisms 'which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil'.

[76] ITLOS, *The M/V 'Virginia G' Case (Panama v. Guinea-Bissau)* (n. 56), para. 215.
[77] *Ibid.*, para. 216.
[78] *Ibid.*
[79] Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 21.
[80] Bouloy, 'L'exploitation des ressources halieutiques (la pêche)' 2017 (n. 64), 703. Translated from french: 'tout organisme vivant susceptible d'être pêchés'.
[81] PSMA, 2009 (n. 70), Art. 1(b).
[82] UNCLOS, 1982 (n. 22), Art. 62(4)(b).
[83] *Ibid.*, Art. 62(4)(d).
[84] *Ibid.*, Art. 77(4).
[85] *Ibid.*, Arts. 68, 77(4). See also: Proelss, 'Article 56' 2017 (n. 38), 436-437.

3. THE ILLEGAL CHARACTER OF IUU FISHING IN THE EEZ

3.1. Paragraph 3 of the IPOA-IUU as the reference definition of IUU fishing

The UNCLOS does not provide for a definition of IUU fishing, which is quite logical given that the emergence and development of the concept only took place during the 1990s.[86] It is generally accepted that the first formal mention of the term IUU fishing was in 1997, at the Sixteenth Session of the Commission for the Conservation of Antarctic Marine Living Resources.[87] From 1999 onwards, the term then made its appearance in the context of various international organizations, notably the FAO and the International Maritime Organization (hereinafter IMO), as well as of the UN General Assembly.[88] However, it was not until the adoption of the 2001 FAO *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing*[89] (hereinafter IPOA-IUU) that IUU fishing was formally defined for the first time.[90]

The IPOA-IUU was developed within the framework of the *Conduct for Responsible Fisheries*[91] (hereinafter CCRF), another soft-law instrument aiming at guiding States on how to adapt their fisheries legislation to achieve a more sustainable use of marine living resources.[92] Despite the non-binding nature of the IPOA-IUU,[93] the definition of IUU fishing it contains has become its most generally accepted.[94] It has notably been incorporated into conventional international law via Article 1(e) of the PSMA. Moreover, the text of paragraph 3 of the IPOA-IUU has also been adopted by various States,[95] the European Union[96], the Organization for Economic Co-operation and Development[97] as well as several regional fisheries management

[86] Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 25-28.
[87] *Ibid.*, 27. See also: Edeson, W. 'The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of Non-Legally Binding Instrument'. *International Journal of Marine and Coastal Law*, 16(4) (2001), 603-624, 605.
[88] Doulman, D.J. 'Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action.' 2020, Document AUS:IUU/2000/4, available at : https://www.fao.org/3/y3274e/y3274e06.htm, para. 40.
[89] Food and Agriculture Organization of the United Nations. International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, adopted on 23 June 2001. Document consulted at: https://www.fao.org/documents/card/en/c/71be21c9-8406-5f66-ac68-1e74604464e7 [hereinafter: IPOA-IUU].
[90] Serdy, A. *The New Entrants Problem in International Fisheries Law* (Cambridge: Cambridge University Press, 2016), 142.
[91] Food and Agriculture Organization of the United Nations. Code of Conduct for Responsible Fisheries, adopted on 31 October 1995. Document consulted at: https://www.fao.org/fishery/en/publication/56346?lang=en.
[92] Sodik, D. M. 'Non-Legally Binding International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing'. *Australian International Law Journal*, 15(1) (2008), 129-164, 130-131.
[93] Edeson, 'The Legal Context of Non-Legally Binding Instrument' 2001 (n. 87), 603-624, 608-609.
[94] Sodik, 'Non-Legally Binding International Fisheries Instruments' 2008 (n. 92), 129-164, 132; Vidas, D. 'IUU Fishing or IUU Operations? Some Observations on Diagnosis and Current Treatment'. In *Bringing New Law to Ocean Waters*, eds. D. D. Caron and H. N. Scheiber (Leiden: Brill Nijhoff, 2004), 125-144, 127.
[95] Edeson et al. mention Ghana, the Republic of Korea and New Zealand as examples. See at: Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 17, footnote 131.
[96] European Union, 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, 29 October 2008, Official Journal of the European Union, L 286/1, Art. 2(2)-(4).
[97] Organisation for Economic Co-operation and Development, 'Combatting Illegal, Unreported and Unregulated Fishing. Where countries stand and where efforts should concentrate in the future'. 2018, available at:

organizations[98] (hereinafter RFMO). Regarding the SRFC Member States, they are no exception to the majority as the definition of IUU fishing they have adopted at Article 2(4) of the *Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the maritime areas under the jurisdiction of the SRFC's Member States*[99] (hereinafter MCA Convention) is a verbatim reproduction of the paragraph 3 of the IPOA-IUU.[100] In view of these elements, IUU fishing will be considered here as defined in the IPOA-IUU. However, it should be noted that other definitions of IUU fishing exist.[101]

3.2. The scope of *'fishing activities'* under the IPOA-IUU

Paragraph 3 of the IPOA-IUU defines IUU fishing using the terms 'fishing activities'. As it has been argued in Section 2.2 in relation to Article 1(c) of the Wellington Convention, the use of the words 'fishing activities' suggests that the definition of IUU fishing in the IPOA-IUU is intended to encompass both fishing *stricto sensu* and other activities related to fishing. What is certain, however, is that this definition is limited to vessels activities and States conduct in relation to the supervision of said activities. This definition does not include some more distant operations which are often linked to IUU fishing, such as tax evasion, drug trafficking or trafficking in persons.[102]

The academic commentary generally supports the idea that paragraph 3 of the IPOA-IUU encompasses both fishing *stricto sensu* and some other 'fishing-related activities'. Vidas, for example, considers that IUU fishing includes bunkering as well as transshipment at sea.[103] The FAO Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally drew up a list of activities considered to be IUU fishing which comprises, *inter alia*, 'transshipping and transporting in contravention of applicable laws' and '[f]ishing and fishing related activities, including transhipping, in the area of a regional fisheries management organization […]'.[104] Furthermore, Rosello expressly argues that IUU fishing 'should be interpreted broadly' in order 'to include transhipment operations.'[105] Finally, Edeson

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https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/FI(2017)16/FINAL&docLanguage=En, 15.

[98] For example: South Pacific Regional Fisheries Management Organisation, SPRFMO Convention, 2009 (n. 67), Art. 1(j); Northwest Atlantic Fisheries Organization, Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 28 September 2007, Art. 3. Document consulted at: https://www.ecolex.org/details/treaty/amendment-to-the-convention-on-future-multilateral-cooperation-in-the-northwest-atlantic-fisheries-tre-160039/?q=Amendment+to+the+Convention+on+Future+Multilateral+Cooperation+in+the+Northwest+Atlantic+Fisheries&type=treaty&xdate_min=&xdate_max

[99] Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the maritime areas under the jurisdiction of the SRFC's Member States, 8 June 2012. Document consulted at: http://spcsrp.org/spcsrp/sites/default/files/csrp/documents/csrp2012/csrp-CMA_version_originale_juin_2012_fr.pdf [hereinafter the MCA Convention].

[100] ITLOS, *Request for an Advisory Opinion* (n. 20), para. 92.

[101] See notably the United States of America definition of IUU fishing: United States, 50 CFR (2018) § 300.201. Document consulted at: https://www.law.cornell.edu/cfr/text/50/300.201

[102] Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 20.

[103] Vidas, 'IUU Fishing or IUU Operations?' 2004 (n. 94), 125-144, 128.

[104] Food and Agriculture Organization of the United Nations. 'Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally'. 2015, available at: https://ebcd.org/wp-content/uploads/2014/11/577-Report_of_the_FAO_workshop_on_IUU-2015-FEG.pdf, Annex 7, 30.

[105] Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 28.

et al. provide examples of State practice that also support a broad interpretation of IUU fishing, such as that of States bilateral agreements considering transshipment at sea by foreign licensed fishing vessels to be illegal fishing.[106]

On the other hand, a first reading of the PSMA could lead to the assumption that a broad interpretation of IUU fishing is in contradiction with its provisions. Indeed, the PSMA differentiates between what is considered to be IUU fishing and what is termed 'fishing related activities in support of such fishing'.[107] However, upon closer examination, it is clear that in order to 'prevent, deter and eliminate IUU fishing through the implementation of effective port State measures',[108] the PSMA is intended to be applied equally to both IUU fishing and fishing-related activities in support of IUU fishing.[109] This leads to the conclusion that a broad interpretation of IUU fishing, which includes also 'fishing-related activities', is consistent with the objectives of the PSMA. In view of these elements, it will be considered here that the IPOA-IUU definition of IUU fishing refers both to fishing *stricto sensu* and some 'fishing-related activities.'

3.2.1. What are 'fishing-related activities' under the UNCLOS?

Given the purpose of this paper and the conclusions reached in previous Sections 2.2 and 3.2, it seems necessary to examine here what might be considered 'fisheries-related activities' under the UNCLOS. In that respect, some of the ITLOS judgments provide a relatively clear answer. Indeed, the question of whether an activity is sufficiently connected to fishing to be regulated by coastal States on the basis of their sovereign rights has arisen in several of the ITLOS judgments. In this regard, it seems reasonable to assume that an activity for which such connection to fishing has been found under the UNCLOS can be considered a 'fishing activity' under the IPOA-IUU.

With respect to the bunkering of foreign fishing vessels in the EEZ, the question of coastal States jurisdiction to regulate it first arose in the *M/V 'Saiga'* cases.[110] In its 1997 judgment as well as in its 1999 judgment, the ITLOS held that it was not necessary for it to determine whether the regulation of this activity fell within coastal States competence.[111] However, the dissenting opinions of President Mensah,[112] Vice-President Wolfrum and Judge Yamamoto[113] indicate that the 1997 judgment can be interpreted as implicitly recognizing coastal States jurisdiction to regulate the bunkering of all fishing vessels in their EEZ. While

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[106] Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 40. See also: 42, 43-44, 46.
[107] See for example: PSMA, 2009 (n. 70), Arts. 3(1), 3(3), 5(b), 9(1), 9(4), 9(5), 12(3)(b), 12(3)(c), 15(a)(i), 18(1), 20(2), 20(4), 20(5) and 20(6).
[108] *Ibid.* Art. 2.
[109] *Ibid*. Arts. 1(j), 3(1), 3(3), 5(b), 9(1), 9(4), 9(5), 11(1)(a), 11(1)(b), 12(3)(b), 12(3)(c), 15(a)(i), 18(1), 20(2), 20(4), 20(5) and 20(6). The only parts of the PSMA where 'IUU fishing' is mentioned without 'fishing related activities in support of such fishing' are in the preamble and in Art. 2, which sets out the objective of the PSMA.
[110] ITLOS, *The M/V 'SAIGA' Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 4 December 1997, ITLOS Reports 1997, 16; ITLOS, *The M/V 'SAIGA' Case (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, 10.
[111] ITLOS, *The M/V 'SAIGA' Case (Saint Vincent and the Grenadines v. Guinea)* (n. 110), para. 59; ITLOS, *The M/V 'SAIGA' Case (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, (n. 110), paras. 138.
[112] ITLOS, *The M/V 'SAIGA' Case (Saint Vincent and the Grenadines v. Guinea)*, Dissenting Opinion of President Mensah, ITLOS Reports 1997, 39, para. 21.
[113] ITLOS, *The M/V 'SAIGA' Case (Saint Vincent and the Grenadines v. Guinea)*, Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, ITLOS Reports 1997, 46, para. 20.

this conception was contested at the time, the matter received a clear and definitive answer in the *M/V 'Virginia G' Case.* As mentioned in Section 2.2, the ITLOS in this case concluded that coastal States have jurisdiction to regulate activities directly connected to fishing in their EEZ, and held that the bunkering of foreign vessels engaged in fishing possesses such connection.[114]

In support of its conclusion in this judgment, the ITLOS indicates having informed itself by the definitions of 'fishing related activities' included in the PSMA and other international instruments.[115] The fact that the ITLOS directly quoted the text of Article 1(d) of the PSMA led commentators to suggest that the Tribunal implicitly recognized all activities contained therein to fall within the scope of coastal States jurisdiction.[116] Regarding the transshipment of marine living resources in the EEZ, Schatz argues that the coastal States competence to regulate this activity was already implicitly recognized in the *Juno Trader Case*. Schatz explains that although the ITLOS did not directly examine coastal States competence in this judgment, it did take into consideration Guinea-Bissau transshipment laws to support its reasoning. For him, this constitutes an implicit recognition of the conformity of Guinea-Bissau's legislation with the UNCLOS.[117]

Some precision should also be added in regard to the one-board processing and transport of marine living resources in the EEZ. In cases where marine living resources have not been landed in port, these 'fisheries-related activities' are fully covered by the sovereign rights of coastal States.[118] Nevertheless, if the catches have been landed in a port *prior* to the entrance of the concerned vessel into an EEZ, such activities should be considered as mere transiting and are thus covered by flag States freedom of navigation under Article 58(3) of the UNCLOS.[119] This means that, in this latter case, coastal States cannot fully regulate the on-board processing of catches or their transporting in their EEZ. Rather, the legislation they can adopt is limited to requiring the vessels concerned to notify their entry into the EEZ and, while the ships are in the EEZ, to allow inspection of their catches and to secure the 'stowing of fishing gear'.[120] In light of the above developments, it will be considered here that, in the context of the UNCLOS, 'fishing-related activities' should be understood as referring to the activities listed in Article 1(d) of the PSMA.

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[114] ITLOS, *The M/V 'Virginia G' Case (Panama v. Guinea-Bissau)* (n. 56), paras. 215, 217, 223.
[115] *Ibid.*, para. 216.
[116] Proelss, 'Article 56' 2017 (n. 38), 426; Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone' 2016 (n. 12), 383-414, 392.
[117] ; Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone' 2016 (n. 12), 383-414, 389-390, citing: ITLOS, *The 'Juno Trader' Case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, Judgment of 18 December 2004, ITLOS Reports 2004, 17, paras. 90, 95.
[118] Proelss, A. 'Article 58' in *United Nations Convention on the Law of the Sea: A Commentary*, ed. A. Proelss (Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2017), 444-457, 450.
[119] *Ibid.*; Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone' 2016 (n. 11), 383-414, 390, 392, citing ITLOS, *The 'Monte Confurco' Case (Seychelles v. France)*, Judgement of 18 December 2000, ITLOS Report 2000, 86, paras. 81-83.
[120] Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone' 2016 (n. 11), 383-414, 392.

3.3. The limited applicability of the IUU fishing concept in the context of EEZ fisheries

Despite the visible popularity of the definition of IUU fishing provided by the IPOA-IUU, its imperfections have been continuously underlined by commentators and have led to quite diverse interpretations of its paragraph 3. For Molenaar, it contains the definitions of three distinct elements.[121] On the other hand, Edeson et al. argue that it does not provide a definition, but rather 'a description or an explanation' of illegal fishing, unreported fishing and unregulated fishing.[122] According to Rosello, however, paragraph 3 of the IPOA-IUU is neither a description nor a definition. She states that it constitutes an 'interpretative framework or "lens" […] integrated by two distinct lens filters',[123] one purely legal and the other one containing 'legal and non-legal features.'[124] In spite of this heterogeneity of opinions, IUU fishing as envisaged by the IPOA-IUU is generally regarded as a more appropriate concept for High Seas fisheries than for EEZ fisheries. In the latter context, it is indeed preferable to speak about illegal fishing and illegal fishing-related activities rather than IUU fishing.

3.3.1. The 'illegal fishing' element

IUU fishing is composed of three elements – illegal fishing, unreported fishing, and unregulated fishing – which are addressed by paragraphs 3.1, 3.2 and 3.3 of the IPOA-IUU respectively. Under paragraph 3.1 of the IPOA-IUU, illegal fishing refers to fishing 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.

Theilen, Ventura, Siti Noor Malia Putri, and Rosello have pointed out that paragraph 3.1 of the IPOA-IUU actually deals with two distinct types of situations: the violations of national laws and the violations of international obligations.[125] First of all, paragraph 3.1 of the IPOA-IUU covers cases where the fishing activity of a vessel is in violation of the applicable national laws. These laws may have been established by the State having legislative jurisdiction over a vessel flying its flag, but also by a State having legislative jurisdiction over fishing activities

[121] Molenaar, E. J. 'CCAMLR and Southern Ocean Fisheries'. *International Journal of Marine and Coastal Law*, 16(3) (2001), 465-500, 483.
[122] Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 37.
[123] Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 21-22.
[124] *Ibid.*, 22.
[125] *Ibid.*; S. N. M. Putri, 'The State Responsibility on the IUU Fishing' 2018 (n. 24), 221-238, 228; Ventura, V. A. M. F. 'Tackling illegal, unregulated and unreported fishing: the ITLOS Advisory Opinion on Flag State Responsibility for IUU fishing and the principle of due diligence'. *Revista de Direito Internacional (Brazilian Journal of International Law)*, 12(1) (2015), 50-66, 51; Theilen, J. T. 'What's in Name: The Illegality of Illegal, Unreported and Unregulated Fishing'. *International Journal of Marine and Coastal Law*, 28(3) (2013), 533-550, 536-539. Although neither Ventura nor S.N.M. Putri elaborate on the issue, they summarize illegal fishing to a violation of national laws and/or international obligations.

themselves when they are undertaken in certain areas of the sea.[126] In addition, paragraph 3.1 also covers cases where a State conduct is in violation of its international obligations in relation to fishing activities.[127] Illegal fishing can therefore exist in a variety of forms, with its scope depending on the applicable law.

In the EEZ, both flag and coastal States have basis for jurisdiction over vessels engaged in fishing or fishing-related activities.[128] With regard to flag States, they retain what could be termed as a 'parallel jurisdiction' over the said vessels in the EEZ by virtue of Articles 58(2) and 92(1) of the UNCLOS.[129] Pursuant to Article 92(1), flag States have an 'exclusive jurisdiction' in the High Seas. Following Article 58(2), this jurisdiction is extended to the EEZ in so far as it is not incompatible with the Part V of the UNCLOS. This means that the flag States retain their legislative jurisdiction over their vessels engaged in fishing or fishing-related activities within the EEZ, and that they have the right to enforce their legislation over these ships, 'provided that the exercise of such powers is not incompatible with […] coastal State[s] rights'.[130] Therefore, it could theoretically be a situation where a flag State has enacted laws governing the activities of its fishing vessels that are stricter than those adopted by a coastal State to regulate its EEZ fisheries. Practically, however, such benevolent flag States are relatively rare. Furthermore, the ease with which a ship can be reflagged to another State with less stringent legislation means that such situations hardly ever occurs.[131] Thus, it will be considered here that, in the context of EEZ fisheries, the scope of illegal fishing is essentially determined by the national legislation adopted by coastal States in the exercise of their sovereign rights.[132]

3.3.2. The 'unreported fishing' element

With respect to unreported fishing, paragraph 3.2 of the IPOA-IUU provides:

> 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.

[126] It is generally accepted by commentators that the 'waters under the jurisdiction of a State' referred to in paragraph 3.1 of the IPOA-IUU include the EEZ. See notably: Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 37.
[127] With respect to coastal States obligations in this matter, see Section 2.1 hereabove. As for flag States obligations, see notably: Schatz, 'Fishing for Interpretation' 2016 (n. 17), 327-345.
[128] Theilen also mentions that the nationality of crew members is an accepted basis for jurisdiction over them according to both scholarly opinion and the practice of States. See at: Theilen, 'The Illegality of Illegal, Unreported and Unregulated Fishing' 2013 (n. 125), 533-550, 536. Although being relevant in regard to the 'violation of national laws', this last basis for jurisdiction will not be addressed in this paper due to length limitations. Nevertheless, its existence does not change the fact that the scope of IUU fishing in the EEZ is primary determined by the national laws of coastal States.
[129] Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone' 2016 (n. 11), 383-414, 395.
[130] Handl, G. 'Flag State Responsibility for Illegal, Unreported and Unregulated Fishing in Foreign EEZs'. *Environmental Policy and Law*, 44(1-2) (2014), 158-171, 159.
[131] Theilen, 'The Illegality of Illegal, Unreported and Unregulated Fishing' 2013 (n. 125), 533-550, 537.
[132] Edeson/Palma/Tsamenyi. Promoting Sustainable Fisheries 2010 (n. 10), 38.

Commentators have pointed out that the text of paragraph 3.2 of the IPOA-IUU overlaps with illegal fishing and, for some authors, with both unregulated and illegal fishing. With regard to paragraph 3.2.1 of the IPOA-IUU, it is fairly obvious from its text that it refers to a special case of illegal fishing under paragraph 3.1.1.[133] Indeed, fishing activities are said to be classified as unreported fishing if they are not reported or misreported 'in contravention of national laws and regulations.'[134] This means that while the fishing activities *per se* may not be illegal, it is the failure to report them or their misreporting which amounts to a violation of national laws.[135] Given that any fishing activity conducted in violation of national laws constitutes illegal fishing under paragraph 3.1.1 of the IPOA-IUU,[136] not reporting or misreporting catches in contravention of national law is therefore merely a form of illegal fishing.[137]

In relation to paragraph 3.2.2, however, the academic commentary is more divided. For Theilen and Rosello, the entirety of paragraph 3.2 of the IPOA-IUU constitute a sub-category of illegal fishing, including its paragraph 3.2.2.[138] While Rosello does not elaborate further on the issue, Theilen reaches this conclusion by considering that paragraph 3.2.2 of the IPOA-IUU refers only to States that are members of an RFMO. According to him, States members of an RFMO have an obligation '*vis-à-vis*' the RFMO to adopt its reporting procedure in their national legislation. It follows that the non-adoption of such a procedure constitutes a violation by the States of their international obligations. Therefore, such State conduct qualifies as illegal fishing under paragraph 3.1 of the IPOA-IUU.[139] Serdy reaches the same conclusion, but he argues that a State conduct qualifying as unreported fishing under paragraph 3.2.2 is illegal because it 'will lead or amount to a breach of the flag State's duty found in Article 119, paragraph 2 of UNCLOS to exchange information including catch and effort statistics.'[140] On the other hand, Sodik considers paragraph 3.2.2 to be a sub-set not only of illegal fishing, but also of unregulated fishing in the cases where 'they are no rules requiring the reporting of catches.'[141] Edeson et al. come to a similar conclusion, although they prefer to talk about an *overlap* between paragraph 3.2.2 and paragraph 3.1.2 on the one hand, and between paragraph 3.2.2 and paragraph 3.3.1 on the other.[142] For the scope of this paper, it is not necessary to

[133] This conclusion is generally supported by the academic commentary. See: Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 22; Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone' 2016 (n. 11), 383-414, 385, footnote 9; Serdy, *The New Entrants Problem in International Fisheries Law* 2016 (n. 90), 145; De Coning, E. and E. Witbooi. 'Towards a new 'fisheries crime' paradigm: South Africa as an illustrative example'. *Marine Policy* 60 (2015), 208-215, 209; Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 44; Theilen, 'The Illegality of Illegal, Unreported and Unregulated Fishing' 2013 (n. 125), 533-550, 541.
[134] IPOA-IUU, 2001 (n. 89), para. 3.2.1
[135] Serdy, *The New Entrants Problem in International Fisheries Law* 2016 (n. 90), 145.
[136] Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 44.
[137] Theilen, 'The Illegality of Illegal, Unreported and Unregulated Fishing' 2013 (n. 125), 533-550, 541.
[138] Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 22; Theilen, 'The Illegality of Illegal, Unreported and Unregulated Fishing' 2013 (n. 125), 533-550, 541.
[139] *Ibid.*, Theilen.
[140] Serdy, *The New Entrants Problem in International Fisheries Law* 2016 (n. 90), 145-146.
[141] Sodik, 'Non-Legally Binding International Fisheries Instruments' 2008 (n. 92), 129-164, 134.
[142] Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 45.

decide between these two approaches. It is sufficient to conclude here that unreported fishing does not exist as an independent category.[143]

3.3.3. The 'unregulated fishing' element

The third component of IUU fishing is referred to as unregulated fishing. Paragraph 3.3 of the IPOA-IUU reads:

> 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.

Unregulated fishing is therefore mainly characterized by the absence of regulation, either in a specific area of the sea, for a type of fish stock, or for a type of vessel.[144] In the EEZ, such a legal void would therefore primarily reflect a failure of governance by the coastal State.[145] Indeed, the fact that coastal States have sovereign rights over marine living resources in their EEZ means that they have to authorize and regulate all fishing and fishing-related activities within this zone, regardless of the nationality of the vessels engaged in them.[146] Nevertheless, a lack of governance on the part of coastal States is better capture by 'illegal fishing' under paragraph 3.1 of the IPOA-IUU.[147] This is particularly evident with respect to coastal States Parties to the UNCLOS. Indeed, as recalled by the ITLOS in its 2015 Advisory Opinion, the coastal States have the responsibility to take conservation and management measures for *all* marine living resources within their EEZ under the UNCLOS,[148] including fish stocks that also occur within other EEZ or in the High Seas.[149] To meet this responsibility, coastal States are notably required to put in place the necessary legislation and regulation pursuant to Article 62(4) of the UNCLOS.[150] Therefore, an absence of regulation governing fisheries in the EEZ may result in or lead to a violation of their international obligations by a coastal State.[151] As such State conduct may qualify as 'illegal fishing' under paragraph 3.1 of the IPOA-IUU, it follows that IUU fishing, when taking place in the EEZ of coastal States, is essentially what the IPOA-IUU refers to as illegal fishing.[152]

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[143] It is unclear whether Edeson et al. consider the unreported category of the IPOA-IUU to exist as an independent one. Nevertheless, it should be noted that they fail to provide an example where unreported fishing is not a subset of either illegal fishing or unregulated fishing. See: *ibid.*, 44-47.
[144] Edeson/Palma/Tsamenyi. *Promoting Sustainable Fisheries* 2010 (n. 10), 48.
[145] *Ibid.*
[146] Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 27.
[147] *Ibid.*
[148] ITLOS, *Request for an Advisory Opinion* (n. 20), para. 96.
[149] Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 26-27.
[150] ITLOS, *Request for an Advisory Opinion* (n. 20), para. 104.
[151] Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 26-27.
[152] Several commentators appear to have reached the same conclusion, either by considering that the unregulated element is only appropriate in the context of high seas fisheries, or by referring directly to illegal fishing in their respective examination of IUU fishing in the EEZ. See notably: Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 26-28; Serdy, *The New Entrants Problem in International Fisheries Law*

3.3.4. A plea for the use of the expression 'illegal fishing and illegal fishing-related activities' rather than the term 'IUU fishing'

On the basis of the considerations set out in Sections 3.3.1, 3.3.2 and 3.3.3, it can be concluded that the reference to an obligation for UNCLOS Member States to ensure that their vessels do not engage in 'IUU fishing' in a foreign EEZ is an undesirable complication that actually refers to a more specific situation. Indeed, when applying the IUU fishing concept to the EEZ, it is evident that only the 'illegal fishing' component is relevant. Under paragraph 3.1 of the IPOA-IUU, illegal fishing designates fishing *stricto sensu* and fishing-related activities that are in violation of either national laws or international obligations. Since the obligation of flag States is to ensure that *vessels flying their flag* do not engage in 'illegal fishing' under paragraph 3.1 of the IPOA-IUU,[153] it follows that only the violation of national laws need to be considered. Indeed, the relevant international obligations in this context are only binding on States, not on private actors.[154] Furthermore, the analysis in Section 3.3.1 shows that these national laws are, in the context of EEZ fisheries, essentially the laws and regulations adopted by coastal States on the basis of their sovereign rights. It follows that UNCLOS States Parties 'responsibility to ensure' that their vessels do not engage in IUU fishing in foreign EEZ denotes an obligation for these States to ensure that their vessels do not conduct fishing or fishing-related activities in contravention of the legislation adopted by coastal States on the basis of their sovereign rights. In other words, UNCLOS Member States have an obligation to ensure that ships flying their flag do not engage in 'illegal fishing or illegal fishing-related activities' in foreign EEZ.[155]

4. THE LIMITED APPLICABILITY OF AN IUU FISHING DEFINITION TO UNCLOS MEMBER STATES

In addition to causing an undesirable complication, it is argued here that the use of the term 'IUU fishing' carries the risk of limiting the responsibility of UNCLOS Member States for the undesirable conduct of their fishing vessels in foreign EEZ to certain situations only. Indeed, as it has been noted by Judge Lucky in his Separate Opinion, the UNCLOS does not contain a definition of IUU fishing.[156] This means that in order to examine what obligations States Parties to the UNCLOS have with respect to IUU fishing *as such*, its definition must be found elsewhere. There are roughly three different situations in which such a definition may be

2016 (n. 90), 147-151; Schatz, 'Combating Illegal Fishing in the Exclusive Economic Zone' 2016 (n. 11), 383-414, 385, footnote 9; Theilen, 'The Illegality of Illegal, Unreported and Unregulated Fishing' 2013 (n. 125), 533-550; Sodik, 'Non-Legally Binding International Fisheries Instruments' 2008 (n. 92), 129-164, 134.

[153] ITLOS, *Request for an Advisory Opinion* (n. 20), para. 89, 124.

[154] Theilen, 'The Illegality of Illegal, Unreported and Unregulated Fishing' 2013 (n. 125), 533-550, 538. Furthermore, as noted by Schatz, the capacity of the UNCLOS to place obligations directly on private actors is generally rejected by scholarly opinion. See: Schatz, 'Fishing for Interpretation' 2016 (n. 17), 327-345, 330.

[155] The same conclusion seems to have been reached by Judge Paik in its Separate Opinion. See: ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Separate Opinion of Judge Paik, ITLOS Reports 2015, 102, paras. 14, 16. In addition, it appears that Judge Lucky acknowledged the illegal character of IUU fishing occurring in the EEZ in his Separate Opinion. See: ITLOS, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Separate Opinion of Judge Lucky, ITLOS Reports 2015, 88, para. 29. To an extent, this notion of the illegality of IUU fishing within the EEZ has also been acknowledged by ITLOS. See: ITLOS, *Request for an Advisory Opinion* (n. 20), para. 94.

[156] ITLOS, *Request for an Advisory Opinion*, Separate Opinion of Judge Lucky (n. 155), para. 29.

applicable to UNCLOS Member States: (1) where a State is party to a legally binding instrument that provides a definition of IUU fishing, (2) where a State is member of a RFMO that has taken a binding decision containing one, and (3) where legislation adopted by a coastal State in the exercise of its sovereign rights includes a definition of IUU fishing and considers it an infringement in its EEZ.

With respect to the first situation (1), the primary example of such treaty is the PSMA. As it has been mentioned above, this treaty has been ratified by seventy States. This arguably makes it by far the most ratified international instrument containing a binding definition of IUU fishing.[157] Nevertheless, only a little over a third of UNCLOS Member States are also parties to the PSMA.[158] Considering this, it can reasonably be assumed that not all of the States Parties to the UNCLOS are bound by a treaty incorporating a definition of IUU fishing. As for the second type of situation (2), it concerns States that are members to a very specific type of RMFO. While several RFMO have an advisory role, others have been empowered to take decisions binding on their members.[159] Amongst these latter, some have adopted decisions that both include a definition of IUU fishing and require from their members to take measures against it.[160] In order to meet their obligations in this regard, States members of such RFMO must consider IUU fishing as it has been defined in the said decisions. However, this situation arguably concerns an even smaller number of UNCLOS Member States than the first one: not all States Parties to the UNCLOS are members of RFMO, not all of RFMO can take binding decisions and not all of those having such powers have adopted a decision that includes a definition of IUU fishing.

Finally, (3) a definition of IUU fishing can be applicable to UNCLOS Member States in the specific case where their vessels are conducting fishing or fishing-related activities in an EEZ where IUU fishing has been explicitly defined and prohibited by the legislation adopted by the coastal State on the basis of its sovereign rights. Pursuant to Article 58(3) of the UNCLOS, flag States are indeed required to comply with the laws and regulations adopted by the coastal States in the exercise of their sovereign rights. As noted by Proelss, the mention of 'in so far as they are not incompatible with this Part' in the text of Article 58(3) means that if coastal States were to adopt legislation 'not covered by the scope of [their] sovereign rights', such laws and regulations would not be applicable to other States.[161] In this respect, it follows from the conclusion of the ITLOS in its 2015 Advisory Opinion that defining and prohibiting IUU fishing is indeed covered by coastal States sovereign rights. In this regard, the Separate Opinion of Judge Lucky provides some valuable additional insight and is therefore taken into account, where appropriate, in the following analysis.

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[157] See for example: *supra* footnotes 73, 74 and 98.
[158] Correct as of 14 February 2022. See *supra* footnotes 27 and 73.
[159] Swan notably mentions: 'WCPFC (2000), SEAFO (2001), CCSBT (1994), IOTC (1993)'. Swan, J. 'Decision-making in Regional Fishery Bodies or Arrangements: the evolving role of RFBs and international agreement on decision-making processes'. 2004, available at: https://www.marinespecies.org/imis.php?module=ref&refid=97934&basketaction=add, 10, footnote 63.
[160] See for example: Western Central Pacific Fisheries Commission. 'Conservation and Management Measures (CMMs) and Resolutions of the Western Central Pacific Fisheries Commission (WCPFC) - Compiled 7 Apr 2022 - 10:01'. 2022, available at: https://www.wcpfc.int/system/files/booklets/31/CMM%20and%20Resolutions.pdf, 122.
[161] Proelss, 'Article 58' 2017 (n. 118), 456.

As noted by the ITLOS, the MCA Convention contains a definition of IUU fishing at its Article 2(4) – whose text is a verbatim reproduction of the paragraph 3 of the IPOA-IUU.[162] In its Separate Opinion, Judge Lucky considers it clear that defining IUU fishing is within the competence of coastal States.[163] As the ITLOS further notes, IUU fishing so defined must also be made an infringement in the legislation of SRFC Member States by virtue of Article 31(1) of the MCA Convention.[164] Furthermore, Article 25(1) of the same convention obliges its States Parties to take 'all the necessary measures to prevent, deter and eliminate [IUU] fishing'.[165] It follows that the MCA Convention - which applies in the EEZ of SRFC member states - can be said to prohibit IUU fishing in these areas. As noted by Judge Lucky in his Separate Opinion, the MCA Convention is in conformity with the UNCLOS and thus applicable 'not only to SRFC States but to other States whose vessels carry out fishing activities in the EEZ of the SRFC States.'[166] Therefore, a definition of IUU fishing contained and prohibited in the EEZ by the national legislation of a coastal State is applicable to UNCLOS Member States in the cases where their vessels are engaged in fishing or fishing-related activities in this area. However, it seems reasonable to assume that not all coastal States parties to the UNCLOS have adopted legislation defining IUU fishing and prohibiting it in their EEZ. It follows that an obligation for flag States to ensure that their vessels do not engage in IUU fishing *as such* only exists under the UNCLOS either for a limited number of its Member States, or for all of them but in a limited number of EEZ.

5. CONCLUSION

While some of the literature has been addressing the responsibility of UNCLOS Member States in regard to undesirable fishing practices of their vessels in foreign EEZ as an obligation to ensure that their vessels do not engage in 'IUU fishing' in these zones, this paper has given at least two reasons to avoid the use of the term 'IUU fishing' in this context. First of all, the concept of IUU fishing is a concept that has a functional applicability only for High Seas fisheries. In this context, the 'unregulated' element can indeed encompass situations where either the legal assessment or the legal enforcement is complicated – for example in the cases of vessels fishing in a RFMO managed areas and flying the flag of a non-member State.[167] In the EEZ, however, 'unregulated fishing' is essentially 'illegal fishing', as the failure of governance by the coastal State leads to or amount to a violation of its international obligations. Considering this, the IUU fishing concept should generally be avoided when speaking of EEZ fisheries. This is even more true in regard to the obligation for UNCLOS Member States to ensure that their vessels do not engage in undesirable fishing practices in foreign EEZ. As demonstrated in this paper, such activities are, in the EEZ, essentially activities in violation of the laws and regulations adopted by the coastal States in the exercise of their sovereign rights.

[162] ITLOS, *Request for an Advisory Opinion* (n. 20), para. 92.
[163] ITLOS, *Request for an Advisory Opinion*, Separate Opinion of Judge Lucky (n. 155), para. 31.
[164] ITLOS, *Request for an Advisory Opinion* (n. 20), para. 93.
[165] *Ibid.*
[166] ITLOS, *Request for an Advisory Opinion*, Separate Opinion of Judge Lucky (n. 155), para. 30.
[167] Rosello, *IUU Fishing as a Flag State Accountability Paradigm* 2021 (n. 9), 23-26.

Therefore, it is more accurate and appropriate to refer directly to an obligation for UNCLOS States Parties to ensure that their vessels do not engage in illegal fishing or illegal fishing-related activities in foreign EEZ. A second reason to avoid the use of the term 'IUU fishing' in this context is the fact that using this term may limit the aforementioned responsibility of UNCLOS Member States only to situations where a definition of IUU fishing is applicable. Given that undesirable fishing practices can occur in the EEZ of every coastal State, this risk should be avoided altogether by referring instead to an obligation for UNCLOS States Parties to ensure that their vessels do not engage in illegal fishing or illegal fishing-related activities in foreign EEZ.

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