

LEGAL OPINION ON
COMPLIANCE AND CORRECTIVE MEASURES IN THE GFCM SYSTEM *

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ACRONYMS

CCAMLR = Convention for the Conservation of Antarctic Marine Living Resources

CITES = Convention on International Trade in Endangered Species of Wild Fauna and Flora

CPS = Contracting Party, cooperating non-contracting Party, entity or fishing entity

FAO = Food and Agriculture Organization of the United Nations

GATT = General Agreement on Tariffs and Trade

GFCM = General Fisheries Commission for the Mediterranean

ICCAT = International Commission for the Conservation of Atlantic Tunas

IOTC = Indian Ocean Tuna Commission

IUU = Illegal, unregulated and unreported

NCP = Non-contracting Parties, entities or fishing entities

PWG = Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures

RFMO = Regional fisheries management organization

TBT = Agreement on Technical Barriers to Trade

UNCLOS = United Nations Convention for the Law of the Sea

WTO = World Trade Organization

1. Terms of Reference

The consultants are requested to answer the following questions:

(1) (a) Does the General Fisheries Commission for the Mediterranean¹ have competence to impose corrective measures / sanctions (including but not limited to trade measures) against member States and/or particular vessels for failure to comply with recommendations? (b) How do the legal basis and relevant agreements setting up and defining the functioning of the GFCM impact (limit or facilitate) certain legally binding decisions taken by these organisations, focusing on the adoption of corrective measures or sanctions regime?

(2) What type of corrective measures / sanctions (including but not limited to trade measures) would be permissible under the GFCM agreement and under general international law?

(3) What would be the legal consequences of corrective measures / sanctions for the sanctioned entities and for member States under the GFCM agreement and under general international law?

When considering questions (1) to (3), particular consideration should be given to the compliance mechanisms established by the International Commission for the Conservation of Atlantic Tunas², highlighting relevant similarities and differences. The analysis should address *inter alia* the legal basis for establishing a compliance mechanism in ICCAT and how that compares with GFCM basic texts (*i. e.*, legal instruments that define its mandate, objectives and functions, and include the Agreement and Rules of Procedure). Compliance mechanism of other, especially areas based regional fisheries management organizations³, should also be considered, if that contributes to arguments for the setting up of corrective measures / sanctions by GFCM.

(4) Could the imposition of sanctions by the GFCM result in conflicting obligations for member States, in relation to other applicable international instruments, in particular the Food and Agriculture Organization of the United Nations⁴ Constitution (and other relevant documents), the General Agreement on Tariffs and Trade⁵, the Agreement on Technical Barriers to Trade⁶ and the United Nations Convention on the Law of the Sea⁷?

¹ Hereinafter: GFCM.

² Hereinafter: ICCAT.

³ Hereinafter: RMFO.

⁴ Hereinafter: FAO.

⁵ Hereinafter: GATT.

⁶ Hereinafter: TBT.

⁷ Hereinafter: UNCLOS.

(5) In the affirmative, how can these conflicts of norms be avoided, minimised, or resolved?

Analysis should include clear arguments addressing any identified concerns about legal feasibility of setting up a GFCM compliance mechanism mandating GFCM to impose corrective measures / sanctions.

2. General Rules of International Law Relevant for All Questions

2.A. General Rules on State Responsibility

According to a well-established rule of customary international law, every international wrongful act of a State entails the international responsibility of that State⁸. There is an internationally wrongful act of a State when conduct, consisting of an action or omission, is attributable to the State under international law and constitutes a breach of an international obligation of the State⁹.

These rules apply, *inter alia*, to obligations in force for States Parties to international treaties, including those concluded for the regulation of fisheries, such as the Agreement establishing the GFCM (Rome, 1949). Similar rules apply to the responsibility of international organizations¹⁰, such as the European Union, which exercises an exclusive competence with regard to the conservation and management of marine living resources¹¹.

The legal consequences arising for the State responsible for an internationally wrongful act are, as the case may be, the following: to cease the wrongful act, if it is continuing, and offer appropriate assurances and guarantees of non-repetition, if circumstances so require¹²; to re-establish the situation which existed before the wrongful act was committed, provided that it is not materially impossible and it does not involve a burden out of proportion to the benefit deriving from re-establishment instead of compensation¹³; to compensate for the damage caused, insofar as the damage is not made good by re-establishment¹⁴; to give satisfaction for the injury caused – that is to

⁸ Art. 1 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in United Nations, *Yearbook of the International Law Commission*, 2011, II, part 2, p. 26.

⁹ Art. 2 of the articles quoted *supra*, note 8.

¹⁰ See the *Draft Articles on the Responsibility of International Organizations*, in United Nations, *Yearbook of the International Law Commission*, 2011, II, part 2, p. 40.

¹¹ As declared by the (then) European Economic Community on 7 December 1984, at the time of signature of the United Nations Convention on the Law of the Sea, "(...) in the field of sea fishing it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and to enter into external undertakings with third states or competent international organisations".

¹² Art. 30 of the articles quoted *supra*, note 8.

¹³ Art. 35 of the articles quoted *supra*, note 8.

¹⁴ Art. 36 of the articles quoted *supra*, note 8.

acknowledge the breach, express regret, formally apologize or comply with other appropriate modalities of satisfaction –, insofar as the injury cannot be made good by re-establishment or compensation¹⁵; to be subjected to countermeasures commensurate to the injury, taking into account the gravity of the internationally wrongful act and the rights in question¹⁶. The possibility to resort to countermeasures is particularly important for the purposes of this study.

In the case of fisheries, according to the advisory opinion rendered by the International Tribunal for the Law of the Sea on 2 April 2015 on the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, the responsibility of a State does not arise from any failure of vessels flying its flag to comply with the rules concerning fishing activities “as the violation of such laws and regulations by vessels is not *per se* attributable to the flag State”. The liability of the flag State arises instead from its failure to comply with its due diligence obligations concerning¹⁷, in particular the obligation to take the necessary measures to ensure that its nationals and vessels flying its flag are not engaged in illegal fishing activities¹⁸.

An important remark is that the conditions for the existence of an internationally wrongful act or the content or implementation of international responsibility of States can be governed by special rules of international law (*lex specialis*)¹⁹, as established by relevant treaties. For example, human rights treaties can entail that rehabilitation is granted to the victim of a gross violation; treaties for the protection of the environment can be understood in the sense that compensation for environmental damage²⁰ is included among the measures of reparation.

It is a matter of fact that several treaties relating to fisheries provide for special regimes regarding the responsibility of States Parties, which, for example, establish particular mechanisms for ensuring compliance and addressing cases of non-compliance. The consequences of non-compliance can fall on Parties or on nationals and ships flying their flag or on both. These special regimes will

¹⁵ Art. 37 of the articles quoted *supra*, note 8.

¹⁶ Arts. from 49 to 54 of the articles quoted *supra*, note 8, which establish several conditions relating to resort to countermeasures.

¹⁷ Para. 146 of the 2015 advisory opinion.

¹⁸ *Ibidem*, para. 124. The Tribunal also found that an international organization which exercises an exclusive competence in fisheries matters is under an obligation to ensure that vessels flying the flag of its member States comply with the obligations arising from the agreements it has concluded and is consequently liable for a failure to do so (*ibidem*, paras. 172 and 173).

¹⁹ Art. 55 of the articles quoted *supra*, note 8.

²⁰ Environmental damage can be considered as a “measurable adverse change in a natural or biological resource or measurable impairment of a natural or biological resource service which may occur directly or indirectly”: see Guid. 9 of the 2008 Guidelines on Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area, adopted under Decision IG 17/4 of the Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona, 1976; amended in 1995).

be considered hereunder, insofar as they are relevant for the case of GFCM. However, it should not be forgotten that the general regime of State responsibility remains applicable if special rules do not exist.

2.B. Present Trends in General Fisheries Law

Any attempt to determine whether treaty rules on fisheries are complied with and what are the consequences of non-compliance should be carried out also in light of the general trends in international fisheries law, as resulting from customary international law and multilateral instruments of global acceptance.

It is a matter of the fact that the traditional concept of freedom of the sea has more disadvantages than advantages if it is applied to fisheries. It is well known that where the fishing effort exceeds the rate of natural reproduction of the resources, the yield of the fishery decreases. Conservation measures need often to be adopted to achieve the objective of reaching an intensity of fishing which approaches as closely as possible the optimum sustainable yield from a determined fishery. On the high seas, these kinds of technical measures of restraint (such as closed areas, closed seasons, quotas, minimum size of nets, etc.) should be agreed upon by all the interested States. However, given that treaties are binding only upon Parties, it is difficult to apply a conservation scheme agreed under a multilateral treaty to fishing vessels flying the flag of non-Party States (for example, a flag of convenience)²¹. What are the means for preventing the conservation measures agreed upon by most interested States from being frustrated by a few countries which enjoy the benefits of such measures without burdening themselves with the corresponding duties?

A further obstacle towards a sustainable fisheries regime is the persistence of illegal, unregulated and unreported fishing²². When fishing goes unchecked, decisions on fisheries become fundamentally flawed, leading to the non-achievement of management goals and the loss of social and economic opportunities. IUU fishing prevents *bona fide* fishers from carrying out their activities, which can lead to the collapse of local fisheries, especially small-scale fisheries in developing countries. Due to lack of effective control by some flag States²³, IUU fishing has today become a

²¹ “A treaty does not create either obligations or rights for a third State without its consent” (Art. 34 of the 1969 Vienna Convention on the Law of Treaties).

²² Hereinafter: IUU fishing. “Illegal, unreported and unregulated (IUU) fishing is a serious threat to fisheries and fisheries-dependent communities, marine ecosystems and societies at large” (HUTNICZAK & DELPEUCH, *Combating Illegal, Unreported and Unregulated Fishing – Where Countries Stand and where Efforts Should Concentrate in the Future*, doc. OECD TAD/FI(2017)16/FINAL, 2018, p. 9).

²³ “Robust enforcement of fisheries regulations is challenging, in part because investment in MCS [= monitoring, control and surveillance] systems is generally not keeping up with fleet capacity and its harvest capabilities. The lack of effective state control over vessels is still considered one of the main causes of IUU fishing” (HUTNICZAK & DELPEUCH, *Combating* cit., p. 46).

global activity, taking advantage of weaknesses in legislation or enforcement²⁴ and affecting many markets around the world²⁵.

While in 2014 the FAO Committee on Fisheries adopted the voluntary Guidelines for flag State performance, as an instrument to prevent, deter and eliminate IUU fishing through the effective implementation of flag State responsibility, the Guidelines have a non-mandatory character and need to be strengthened by appropriate mechanisms.

This is the reason why the 2030 Agenda for Sustainable Development, adopted in 2015 by the United Nations General Assembly under Resolution 70/1, sets forth, as a goal, to

“(…) effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics²⁶”.

In the annual resolutions on sustainable fisheries, the United Nations General Assembly has repeatedly stressed the dangers created by IUU fishing. For instance, in Resolution 77/118 of 9 December 2022, it declared itself

“particularly concerned that illegal, unreported and unregulated fishing continues to constitute a serious threat to fish stocks and marine habitats and ecosystems, to the detriment of sustainable fisheries as well as the food security and the economies of many States, particularly developing States, (…)

concerned that some operators increasingly take advantage of the globalization of fishery markets to trade fishery products stemming from illegal, unreported and unregulated fishing and make economic profits from those operations, which constitutes an incentive for them to pursue their activities²⁷”.

It is particularly relevant for the purposes of this opinion that the General Assembly, *inter alia*, urged States to develop within RFMOs processes to assess performance by States in implementing obligations relating to fisheries and to adopt internationally agreed market-related measures:

²⁴ “IUU fishing operators constantly adapt to the changing mix of economic incentives and regulatory environments. Their ability to swiftly move between jurisdictions enables them to exploit any weaknesses and loopholes in the relevant laws and enforcement systems” (HUTNICZAK & DELPEUCH, *Combatting* cit., p. 55).

²⁵ “IUU fishing is inherently a global activity. As seafood is one of the most traded food commodities (…), products deriving from IUU fishing can fraudulently end up on consumers’ plates in any country. Operators engaged in IUU fishing also move from one jurisdiction to another in search of higher profits, targeting areas where regulations and enforcement are weaker” (HUTNICZAK & DELPEUCH, *Combatting* cit., p. 15).

²⁶ Goal 14.4.

²⁷ Preamble.

“The General Assembly (...) Urges States to take effective measures, at the national, subregional, regional and global levels, to deter the activities, including illegal, unreported and unregulated fishing, of any vessel which undermines conservation and management measures that have been adopted by subregional and regional fisheries management organizations and arrangements in accordance with international law²⁸; (...)

Urges States, individually and collectively through regional fisheries management organizations and arrangements, to develop appropriate processes to assess the performance of States with respect to implementing the obligations regarding fishing vessels flying their flag set out in relevant international instruments²⁹; (...)

Encourages States, with respect to vessels flying their flag, and port States, to make every effort to share data on landings and catch quotas, and in this regard encourages regional fisheries management organizations and arrangements to consider developing open databases containing such data for the purpose of enhancing the effectiveness of fisheries management; (...)

Urges States, individually and through regional fisheries management organizations and arrangements, to adopt and implement internationally agreed market-related measures in accordance with international law, including principles, rights and obligations established in World Trade Organization agreements, as called for in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing³⁰.

In view of the persistence of IUU fishing, since the adoption of the UNCLOS (Montego Bay, 1982), a number of multilateral treaties of global scope of application have been concluded for the strengthening of cooperation among the States that are interested in the exploitation of marine living resources. This may also be seen as a way to implement the objective of proper conservation and management of marine living resources, put forward in the UNCLOS, in particular in Art. 61, as regards the exclusive economic zone, and in Arts. from 117 to 120, as regards the high seas. Notably, Art. 118 recalls the establishment of RFMOs as the appropriate way to cooperate for the conservation of marine living resources.

The following instruments of global scope of application, which were adopted after the UNCLOS, should be taken into consideration as evidence of the importance of achieving a sustainable fisheries regime.

2.B.i. The Compliance Agreement

The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas³¹ was approved in 1993 in Rome by the FAO

²⁸ Para. 93.

²⁹ Para. 95.

³⁰ Para. 110.

³¹ Hereinafter: Compliance Agreement.

Conference. Today 44 States and one international organization (the European Union) are Parties to it.

The Compliance Agreement aims at preventing the practice of reflagging fishing vessels to circumvent conservation measures. The preamble recalls that “the failure of flag States to fulfil their responsibility with respect to fishing vessels entitled to fly their flag”, as well as “the practice of flagging or reflagging vessels as a means of avoiding compliance with international conservation and management measures for living marine resources”, “are among the factors that seriously undermine the effectiveness of such measures”. Accordingly, the Compliance Agreement sets forth “the duties of every State to exercise effectively its jurisdiction and control over vessels flying its flag, including fishing vessels and vessels engaged in the transshipment of fish”.

Under the Compliance Agreement, which applies to fishing vessels on the high seas³², the Parties are under the basic obligation to comply with the principle of flag State responsibility, whereby

“each Party shall take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures”³³.

The other obligations set forth in the Compliance Agreement relate to the exercise of flag State responsibility. For example, Parties must not authorize any fishing vessel previously registered in the territory of another Party that has undermined the effectiveness of conservation and management measures to be used for fishing on the high seas³⁴. Parties are under an obligation to apply such sanctions of sufficient gravity as to be effective in securing compliance with the requirements of the Agreement³⁵. Other provisions deal with compulsory authorizations for fishing vessels, records of fishing vessels, transmission of information to the FAO for subsequent circulation to all Parties.

The Compliance Agreement is a sign of a new way to understand the regime of fisheries on the high seas. All States retain their traditional right to sail ships flying their flag on the high seas, as granted by Art. 90 of the UNCLOS, and to give their flag to vessels fishing on the high seas. However, this right is made conditional to the obligation to exercise flag State responsibility: to allow vessels

³² Art. II, para. 1.

³³ Art. III, para. 1, a.

³⁴ Art. III, para. 5.

³⁵ Art. III, para. 8. The importance of this provision lies in the fact that Parties are obliged to establish and apply sanctions relating to activities which take place on the high seas and not in their own jurisdictional waters.

flying the national flag to undermine the effectiveness of international conservation and management measures is to be considered a breach of an international obligation. This important corollary to the right to fish on the high seas was not spelled out in the UNCLOS and is a welcome addition to the body of international law of the sea.

2.B.ii. The Code of Conduct for Responsible Fisheries

As regards the instruments of soft law, in 1995 the FAO Conference unanimously adopted the Code of Conduct for Responsible Fisheries³⁶. It aims at providing “a necessary framework for national and international efforts to ensure sustainable exploitation of aquatic living resources in harmony with the environment”³⁷.

While the Code of Conduct has a voluntary character, in many cases its rules have been confirmed by relevant States’ practice, in particular several treaties relating to fishing activities. Today it can be said that the Code of Conduct contains a number of provisions which have orientated the progressive development of international fisheries and can be considered as belonging to customary international law.

This is the case of the general principle of responsible fisheries, which is a way to integrate the concept of sustainable development into the field of fisheries:

“States and users of living aquatic resources should conserve aquatic ecosystems. The right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources”³⁸.

The Code of Conduct calls States, in co-operation with regional fisheries management organizations³⁹, to establish effective mechanisms to ensure compliance with conservation and management measures:

“Within their respective competences and in accordance with international law, including within the framework of subregional or regional fisheries conservation and management organizations or arrangements, States should ensure compliance with and enforcement of conservation and management measures and establish

³⁶ Hereinafter: Code of Conduct.

³⁷ FAO, Preface to the Code of Conduct.

³⁸ Art. 1.

³⁹ Hereinafter: RFMO. A RFMO is an intergovernmental fisheries organization or arrangement, as appropriate, that has the competence to establish conservation and management measures relating to a given fishery region, stock or combination of the two. Today there are 17 different RFMOs regulating fishing in almost all ocean basins (see BARKLEY, *Evaluating Compliance and Enforcement Mechanisms of Regional Fisheries Management Organizations*, 2022, p. 9).

effective mechanisms, as appropriate, to monitor and control the activities of fishing vessels and fishing support vessels”⁴⁰.

All States have an obligation to fish in a responsible manner and to establish an effective legislative and administrative framework for that purpose⁴¹, including sanctions which are adequate in severity:

“States should ensure that laws and regulations provide for sanctions applicable in respect of violations which are adequate in severity to be effective, including sanctions which allow for the refusal, withdrawal or suspension of authorizations to fish in the event of non-compliance with conservation and management measures in force”⁴².

Flag States are called to ensure that vessels flying their flag do not undermine conservation and management measures adopted at the international level:

“States authorizing fishing and fishing support vessels to fly their flags should exercise effective control over those vessels so as to ensure the proper application of this Code. They should ensure that the activities of such vessels do not undermine the effectiveness of conservation and management measures taken in accordance with international law and adopted at the national, subregional, regional or global levels. (...)”⁴³.

Notably, the obligation not to undermine conservation and management measures adopted at the international level is considered by the Code of Conduct as having a general character. It also binds non-Parties to a treaty establishing a RFMO, insofar as they allow “free riders” vessels to fish in violation of measures agreed within the RFMO:

“States which are members of or participants in subregional or regional fisheries management organizations or arrangements should implement internationally agreed measures adopted in the framework of such organizations or arrangements and consistent with international law to deter the activities of vessels flying the flag of non-members or non-participants which engage in activities which undermine the effectiveness of conservation and management measures established by such organizations or arrangements”⁴⁴.

The responsibility to take enforcement measures is mainly vested with the flag State⁴⁵. The coastal State⁴⁶ and the port State⁴⁷ also are called to co-operate in ensuring that fishing operations are carried out in a responsible manner within their respective jurisdiction.

⁴⁰ Art. 6.10.

⁴¹ Art. 7.7.1.

⁴² Art. 7.7.2.

⁴³ Art. 6.11.

⁴⁴ Art. 7.7.5.

⁴⁵ Arts. from 8.2.1 to 8.2.10.

⁴⁶ Art. 8.1.1.

⁴⁷ Arts. 8.3.1 and 8.3.2.

Several provisions of the Code of Conduct⁴⁸ aim at striking a fair balance between liberalization of trade under the instruments adopted within the World Trade Organization⁴⁹, on the one hand, and sustainable development of fisheries, on the other. In particular,

“The provisions of this Code should be interpreted and applied in accordance with the principles, rights and obligations established in the World Trade Organization (WTO) Agreement⁵⁰”.

“International trade in fish and fishery products should not compromise the sustainable development of fisheries and responsible utilization of living aquatic resources”⁵¹.

“States should ensure that measures affecting international trade in fish and fishery products are transparent, based, when applicable, on scientific evidence, and are in accordance with internationally agreed rules”⁵².

“Fish trade measures adopted by States to protect human or animal life or health, the interests of consumers or the environment, should not be discriminatory and should be in accordance with internationally agreed trade rules, in particular the principles, rights and obligations established in the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade of the WTO”⁵³.

2.B.iii. The Fish Stocks Agreement

Another instance of the trend towards strengthening multilateral cooperation in the field of conservation of marine living resources is the Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks⁵⁴, opened for signature in 1995 in New York. Today 93 States and one international organization (the European Union) are Parties to it.

The Fish Stocks Agreement confirms the general principle that coastal States and States fishing on the high seas are under a duty to cooperate to conserve and manage straddling and highly migratory fish stocks⁵⁵. It requires Parties to “establish appropriate cooperative mechanisms for effective monitoring, control, surveillance, and enforcement”⁵⁶.

⁴⁸ Arts. from 11.2.1 to 11.3.8.

⁴⁹ Hereinafter: WTO.

⁵⁰ Art. 11.2.1.

⁵¹ Art. 11.2.2.

⁵² Art. 11.2.3.

⁵³ Art. 11.2.4.

⁵⁴ Hereinafter: Fish Stocks Agreement.

⁵⁵ Art. 5.

⁵⁶ Art. 10, h.

The Fish Stocks Agreement contains provisions that fully derogate from the traditional principle of freedom of fishing on the high seas⁵⁷. On the one hand, all States having a real interest in the fisheries concerned have the right to become members of a subregional or regional fisheries management organization or participants in such an arrangement⁵⁸. On the other, 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 an organization or arrangement (so-called cooperating non-Parties), have access to the fishery resources to which those measures apply⁵⁹.

A Party may authorize a vessel to use its flag for fishing on the high seas “only where it is able to exercise effectively its responsibilities in respect of such vessel”. The obligation to ensure enforcement of the measures is primarily vested in the flag State⁶⁰. However, powers are also given to other Parties. In any high seas area covered by a subregional or regional fisheries management organization or arrangement, any State Party to the organization or arrangement may board and inspect vessels flying the flag of another State Party for the purpose of ensuring compliance with conservation and management measures⁶¹. On notification by the inspecting State that there are clear grounds for believing that a vessel has engaged in any activity contrary to the conservation and management measures, the flag State shall either fulfil its obligation to take enforcement action or authorize the inspecting State to take such enforcement action as the flag State may specify⁶². This provision aims at giving the possibility of replacing a possibly inactive flag State.

With respect to fisheries, the idea underlying the Fish Stocks Agreement seems to be that the high seas is no longer the province of *laissez-faire*, governed by a practically indiscriminate freedom of fishing. Instead, it is an area where the principle of sustainable development applies, which can lead to the exclusion of those States which persistently undermine the conservation and management measures agreed upon by the others⁶³. In this regard, the Fish Stocks Agreement takes a step forward and brings an evident, but welcome, encroachment on the traditional principle of freedom of the high

⁵⁷ “... the provisions of the FSA [= Fish Stocks Agreement] fully derogate from the principle of freedom of the sea, as far as fishing is concerned” (FERRI, *Conflicts over the Conservation of Marine Living Resources*, Torino, 2015, p. 69).

⁵⁸ Art. 8, para. 3.

⁵⁹ Art. 8, para. 4.

⁶⁰ Art. 19.

⁶¹ Art. 21, para. 1.

⁶² Art. 21, para. 7.

⁶³ “It is undisputed that third States, even if not a Party to the FSA [= Fish Stocks Agreement], have a duty to take into account multilateral conservation and management measures agreed upon within RFMOs, as part of the duty to cooperate in the conservation of marine resources on the high seas. What remains subject to dispute is whether said measures are binding in their entirety upon them, or whether they can adopt similar or equivalent while fishing in the regulatory zone” (VEZZANI, *Jurisdiction in International Fisheries Law – Evolving Trends and New Challenges*, Milano, 2020, p. 266).

seas, as States which are not willing to comply with the conservation and management measures can be excluded from fishing on the high seas⁶⁴. This important achievement was not spelled out in the UNCLOS.

2.B.iv. The IUU Fishing Plan of Action

In 2001, the FAO Committee on Fisheries approved by consensus and the FAO Council endorsed the Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing⁶⁵. The objective of the IUU Fishing Plan of Action, which is a voluntary instrument⁶⁶ and includes detailed definitions of illegal⁶⁷, unreported⁶⁸ and unregulated⁶⁹ fishing, is to provide States with comprehensive, effective and transparent measures by which to act, including through appropriate RFMOs, to prevent, deter and eliminate IUU fishing.

The IUU Fishing Plan of Action calls for a comprehensive and integrated approach against IUU fishing, building on the primary responsibility of the flag State:

“(…) In taking such an approach, States should embrace measures building on the primary responsibility of the flag State and using all available jurisdiction in accordance with international law, including port State measures, coastal State measures, market-related measures and measures to ensure that nationals do not support or engage

⁶⁴ This was duly stressed in a speech made on 15 September 1998 by Ms. West, the Deputy Assistant Secretary for Oceans, Fisheries and Space of the United States of America: “Let us be clear about the import of this proposition – the living resources of the sea are no longer open to ‘free for all’ harvesting. If a regional fisheries organization has set rules to regulate high seas fishing, only those States whose vessels abide by the rules may participate in the fishery. (...) Today, the freedom to fish on the high seas today carries a clear duty – to cooperate in the conservation of fishery resources. In short, the Agreement is the international community’s declaration that free riders whose fishing activities undermine the effectiveness of regional conservation measures will no longer be tolerated” (*American Journal of International Law*, 1999, p. 496). On this question see SCOVAZZI, *The Evolution of International Law of the Sea: New Issues, New Challenges*, in Hague Academy of International Law, *Recueil des cours*, vol. 286, 2001, p. 142.

⁶⁵ Hereinafter: IUU Fishing Plan of Action. For another FAO instrument on this subject see the 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing.

⁶⁶ Para. 4.

⁶⁷ “Illegal fishing refers to activities: conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations; conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization” (para. 3.1).

⁶⁸ “Unreported fishing refers to fishing activities: which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization” (para. 3.2).

⁶⁹ “Unregulated fishing refers to fishing activities: in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law” (para. 3.3).

in IUU fishing. States are encouraged to use all these measures, where appropriate, and to cooperate in order to ensure that measures are applied in an integrated manner⁷⁰.

Under the IUU Fishing Plan of Action, the flag State should ensure, before it registers a fishing vessel, that it can exercise its responsibility that the vessel does not engage in IUU fishing⁷¹, should avoid flagging vessels with a history of non-compliance⁷², should deter vessels from reflagging for the purpose of non-compliance with conservation and management measures⁷³ and should take all practicable steps to prevent “flag hopping”, that is to say, the practice of repeated and rapid changes of a vessel’s flag for the purpose of circumventing conservation and management measures⁷⁴. *Inter alia*, conditions under which an authorization is issued should also include, where required, vessel monitoring systems and catch reporting conditions, reporting for transshipping, where it is permitted, observer coverage, maintenance of fishing and related log books, marking of fishing vessels in accordance with internationally recognized standards, and the vessel having a unique and internationally recognized identification number that enables it to be identified regardless of changes in registration or name over time⁷⁵.

Appropriate measures, as specified in the IUU Fishing Plan of Action, should be implemented also by coastal States⁷⁶ and port States⁷⁷.

The IUU Fishing Plan of Action lists a number of monitoring, control and surveillance measures that should be linked to fishing activities from their commencement to the catch of fish, from the point of landing fish to its final destination, namely:

“developing and implementing schemes for access to waters and resources, including authorization schemes for vessels;

maintaining records of all vessels and their current owners and operators authorized to undertake fishing subject to their jurisdiction;

implementing, where appropriate, a vessel monitoring system (VMS), in accordance with the relevant national, regional or international standards, including the requirement for vessels under their jurisdiction to carry VMS on board;

⁷⁰ Para. 9.3.

⁷¹ Para. 35.

⁷² Para. 36.

⁷³ Para. 38.

⁷⁴ Para. 39. States are also called to cooperate in making available to FAO and, as appropriate, to other States and relevant regional or international organizations, information about vessels deleted from their records or whose authorization to fish has been cancelled and to the extent possible, the reasons therefor (para. 29).

⁷⁵ Para. 47.

⁷⁶ Para. 51.

⁷⁷ Paras. from 52 to 64.

implementing, where appropriate, observer programmes in accordance with relevant national, regional or international standards, including the requirement for vessels under their jurisdiction to carry observers on board;

providing training and education to all persons involved in MCS operations;

planning, funding and undertaking MCS operations in a manner that will maximize their ability to prevent, deter and eliminate IUU fishing;

promoting industry knowledge and understanding of the need for, and their cooperative participation in, MCS activities to prevent, deter and eliminate IUU fishing;

promoting knowledge and understanding of MCS issues within national judicial systems;

establishing and maintaining systems for the acquisition, storage and dissemination of MCS data, taking into account applicable confidentiality requirements;

ensuring effective implementation of national and, where appropriate, internationally agreed boarding and inspection regimes consistent with international law, recognizing the rights and obligations of masters and of inspection officers, and noting that such regimes are provided for in certain international agreements, such as the 1995 UN Fish Stocks Agreement, and only apply to the parties to those agreements⁷⁸.

Specific provisions of the IUU Fishing Plan of Action relate to the adoption of sanctions and the avoidance of economic incentives:

“States should ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under its jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing. This may include the adoption of a civil sanction regime based on an administrative penalty scheme. States should ensure the consistent and transparent application of sanctions⁷⁹”.

“States should, to the extent possible in their national law, avoid conferring economic support, including subsidies, to companies, vessels or persons that are involved in IUU fishing⁸⁰”.

Notably, internationally agreed trade-related measures are an important component of the IUU Fishing Plan of Action. States should take all steps necessary, consistent with international law, to prevent fish caught by vessels identified by the relevant RFMO to have been engaged in IUU fishing being traded or imported into their territories⁸¹. While unilateral action should be avoided, trade-related measures should only be used in exceptional circumstances, where other measures have proven unsuccessful to prevent, deter and eliminate IUU fishing, and only after prior consultation

⁷⁸ Para. 24.

⁷⁹ Para. 21.

⁸⁰ Para. 23.

⁸¹ Para. 66.

with interested States⁸². Moreover, States should ensure that measures on international trade in fish and fishery products are transparent, based on scientific evidence, where applicable, and are in accordance with internationally agreed rules⁸³.

The IUU Fishing Plan of Action identifies two categories of trade-related measures, namely catch documentation requirements and import and export controls or prohibitions:

“Trade-related measures to reduce or eliminate trade in fish and fish products derived from IUU fishing could include the adoption of multilateral catch documentation and certification requirements, as well as other appropriate multilaterally-agreed measures such as import and export controls or prohibitions. Such measures should be adopted in a fair, transparent and non-discriminatory manner. When such measures are adopted, States should support their consistent and effective implementation”⁸⁴.

Transparency of markets to allow the traceability of fish or fish products is a pre-condition for trade-related measures⁸⁵. Large categories of people, such as importers, transshippers, buyers, consumers, equipment suppliers, bankers, insurers, other services suppliers and the public in general, are involved in achieving this objective⁸⁶.

Cooperation within RFMOs is crucial in the fight against IUU fishing and involves several kinds of measures:

“States, acting through relevant regional fisheries management organizations, should take action to strengthen and develop innovative ways, in conformity with international law, to prevent, deter, and eliminate IUU fishing. Consideration should be given to including the following measures:

institutional strengthening, as appropriate, of relevant regional fisheries management organizations with a view to enhancing their capacity to prevent, deter and eliminate IUU fishing;

development of compliance measures in conformity with international law;

development and implementation of comprehensive arrangements for mandatory reporting;

establishment of and cooperation in the exchange of information on vessels engaged in or supporting IUU fishing;

development and maintenance of records of vessels fishing in the area of competence of a relevant regional fisheries management organization, including both those authorized to fish and those engaged in or supporting IUU fishing;

⁸² Para. 66.

⁸³ Para. 67.

⁸⁴ Para. 69.

⁸⁵ Para. 71.

⁸⁶ Para. 73.

development of methods of compiling and using trade information to monitor IUU fishing;

development of MCS, including promoting for implementation by its members in their respective jurisdictions, unless otherwise provided for in an international agreement, real time catch and vessel monitoring systems, other new technologies, monitoring of landings, port control, and inspections and regulation of transshipment, as appropriate;

development within a regional fisheries management organization, where appropriate, of boarding and inspection regimes consistent with international law, recognizing the rights and obligations of masters and inspection officers;

development of observer programmes;

where appropriate, market-related measures in accordance with the IPOA [= International Plan of Action];

definition of circumstances in which vessels will be presumed to have engaged in or to have supported IUU fishing;

development of education and public awareness programmes;

development of action plans;

and where agreed by their members, examination of chartering arrangements, if there is concern that these may result in IUU fishing⁸⁷.

The members of a RFMO may agree on appropriate measures against States not ensuring the prevention of IUU fishing by vessels flying their flag (notably, the IUU Fishing Plan of Action does not distinguish between States Parties or non-Parties to a RFMO agreement):

“When a State fails to ensure that fishing vessels entitled to fly its flag, or, to the greatest extent possible, its nationals, do not engage in IUU fishing activities that affect the fish stocks covered by a relevant regional fisheries management organization, the member States, acting through the organization, should draw the problem to the attention of that State. If the problem is not rectified, members of the organization may agree to adopt appropriate measures, through agreed procedures, in accordance with international law”⁸⁸.

2.B.v. The Port State Agreement

The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing⁸⁹ was approved by the FAO Conference in 2009 in Rome. Today 77 States and one international organization (the European Union) are Parties to it.

⁸⁷ Para. 80.

⁸⁸ Para. 84.

⁸⁹ Hereinafter: Port State Agreement.

The Parties, deeply concerned by the continuation of IUU fishing and recognizing the primary responsibility of flag States, declare their will to use all available jurisdiction in accordance with international law, including port State measures, coastal State measures and market-related measures, to ensure that their nationals do not support or engage in illegal, unreported and unregulated fishing⁹⁰.

The objective of the Port State Agreement is to prevent vessels engaged in IUU fishing from using ports and landing their catches and, consequently, to prevent products derived from IUU fishing from reaching national and foreign markets, reducing the incentive to continue such an activity⁹¹.

Parties, in their capacity as port States, are bound to apply the Port State Agreement in respect of vessels not entitled to fly their flag that are seeking entry to their ports or are in one of their ports⁹². After receiving the required information⁹³, as well as such other information as it may require to determine whether the vessel requesting entry into its port has engaged in IUU fishing or fishing-related activities in support of such fishing, Parties are called to decide whether to authorize or deny the entry of the vessel into its port and to communicate this decision to the vessel or to its representative⁹⁴, as well as, in case of denial, to the flag State of the vessel and, as appropriate and to the extent possible, relevant coastal States, RFMOs and other international organizations⁹⁵. When a Party has sufficient proof that a vessel seeking entry into its port has engaged in IUU fishing or fishing-related activities in support of such fishing, in particular has been included on a list of vessels having engaged in such fishing or fishing-related activities adopted by a relevant RFMO in accordance with the rules and procedures of such organization and in conformity with international law, the Party is bound to deny that vessel entry into its ports⁹⁶.

Where a vessel has entered one of its ports, in specific cases, *inter alia* if a Party has reasonable grounds to believe that the vessel was engaged in IUU fishing or fishing related activities in support of such fishing, it shall deny that vessel the use of the port for landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including refuelling and resupplying, maintenance and drydocking⁹⁷.

⁹⁰ Preamble.

⁹¹ “‘Ports of convenience’ that are known for limited inspection capacity or corrupt officials provide opportunities for IUU landed products to enter the seafood market” BARKLEY, *Evaluating* cit., p. 22).

⁹² Art. 3, para. 1.

⁹³ See Art. 8. Annex A to the Port State Agreement specifies what information has to be provided in advance by vessels requesting port entry.

⁹⁴ Art. 9, para. 1.

⁹⁵ Art. 9, para. 3.

⁹⁶ Art. 9, para. 4.

⁹⁷ Art. 11, para. 4.

Parties are also bound to inspect the number of vessels in their ports required to reach an annual level of inspections sufficient to achieve the objective of the Port State Agreement and to seek to agree on the minimum levels for inspection of vessels through, as appropriate, RFMOs, FAO or otherwise⁹⁸, following a scale of priority set forth in the Port State Agreement⁹⁹. The results of each inspection must be transmitted to the flag State of the inspected vessel and, as appropriate, to relevant Parties and States, including those States for which there is evidence through inspection that the vessel has engaged in IUU fishing or fishing-related activities in support of such fishing within waters under their national jurisdiction and the State of which the vessel's master is a national, as well as relevant RFMOs and FAO and other relevant international organizations¹⁰⁰. Where, following port State inspection, a flag State Party receives an inspection report indicating that there are clear grounds to believe that a vessel entitled to fly its flag has engaged in IUU fishing or fishing related activities in support of such fishing, it is under an obligation to immediately and fully investigate the matter and, upon sufficient evidence, to take enforcement action without delay in accordance with its laws and regulations¹⁰¹.

2.B.vi. The Subsidies Agreement

After more than twenty years of negotiation, the Agreement on Fisheries Subsidies¹⁰² was adopted in 2022 in Geneva within the WTO. It has not yet entered into force.

The Subsidies Agreement prohibits harmful fisheries subsidies, which are a key factor for the depletion of living resources due to overfishing and IUU-fishing and can take various forms¹⁰³. It applies to subsidies within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures that are specific, within the meaning of Art. 2 of that Agreement, to marine wild capture fishing and fishing-related activities at sea¹⁰⁴.

⁹⁸ Art. 12, paras. 1 and 2. Annex B to the Port State Agreement provides for Port State inspection procedures.

⁹⁹ Art. 12, para. 3.

¹⁰⁰ Art. 15.

¹⁰¹ Art. 20, para. 4.

¹⁰² Hereinafter: Subsidies Agreement. See BECERRA SANCHEZ, *The Present and Future of the 2022 WTO Agreement on Fisheries Subsidies*, in *New York University Journal of International Law and Politics*, 2022, p. 165; HOEKMAN, MAVROIDIS & SASMAL, *Managing Externalities in the WTO: The Agreement on Fisheries Subsidies*, Robert Schuman Centre Working Paper RSC 2022/76.

¹⁰³ For example, subsidies to construction, renovation or upgrading of vessels, subsidies to the purchase of machines and equipment for vessels, subsidies to the purchase of fuel, ice or bait, as well as price support of fish caught.

¹⁰⁴ Art. 1.

The Subsidies Agreement prohibits the granting or maintaining of subsidies to a vessel or operator engaged in IUU fishing¹⁰⁵, for fishing regarding an overfished stock¹⁰⁶ and for fishing outside of the jurisdiction of a coastal State and outside the competence of a relevant RFMO¹⁰⁷. As regards other subsidies that can also contribute to overcapacity and overfishing, such as subsidies for fishing stocks the status of which is unknown, the Subsidies Agreement only provides that Parties “shall take special care and exercise due restraint¹⁰⁸. Negotiations will continue with a view to making recommendations to the WTO Ministerial Conference for additional provisions that would achieve a comprehensive agreement on fisheries subsidies, including through further disciplines on certain forms of fisheries subsidies that contribute to overcapacity and overfishing and recognizing that appropriate and effective special and differential treatment for developing country Parties and least developed country Parties¹⁰⁹.

Parties are bound not to grant or maintain any subsidy to a vessel or operator engaged in IUU fishing or fishing-related activities in support of IUU fishing¹¹⁰. A vessel or operator is considered to be engaged in IUU fishing if an affirmative determination thereof is made by a coastal Party, for activities in areas under its jurisdiction, a flag State Party, for activities by vessels flying its flag or a relevant RFMO¹¹¹. The prohibition of subsidies applies at least as long as the sanction resulting from the determination triggering the prohibition remains in force, or at least as long as the vessel or operator is listed by an RFMO, whichever is the longer¹¹².

Moreover, Parties are bound not to grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock¹¹³. A fish stock is overfished if it is recognized as overfished by the coastal Parties under whose jurisdiction the fishing is taking place or by a relevant RFMO in areas and for species under its competence, based on best scientific evidence available to it¹¹⁴.

¹⁰⁵ Art. 3, para. 1.

¹⁰⁶ Art. 4.

¹⁰⁷ Art. 5, para. 1.

¹⁰⁸ Art. 5, paras. 2 and 3.

¹⁰⁹ Decision of WTO Ministerial Conference of 17 June 2022, para 2. If comprehensive disciplines are not adopted within four years of the entry into force of the Subsidies Agreement, and unless otherwise decided by the WTO General Council, the Subsidies Agreement shall stand immediately terminated (Art. 12 of the Subsidies Agreement).

¹¹⁰ Art. 3, para. 1. For a period of two years from the date of entry into force of the Subsidies Agreement, this prohibition does not apply to subsidies granted or maintained by developing country Parties, including least-developed countries, within their exclusive economic zone (Art. 3, para. 8).

¹¹¹ Art. 3, para. 2.

¹¹² Art. 3, para. 4.

¹¹³ Art. 4, para. 1. For a period of two years from the date of entry into force of the Subsidies Agreement, this prohibition does not apply to subsidies granted or maintained by developing country Parties, including least-developed countries, within their exclusive economic zone (Art. 4, para. 4).

¹¹⁴ Art. 4, para. 2.

The Subsidies Agreement can be seen as a way to implement sustainable development goal 14.6 of the 2030 Agenda for Sustainable Development (2015 United Nations General Assembly Resolution 70/1). It encourages States to prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, to eliminate subsidies that contribute to IUU fishing and to refrain from introducing new such subsidies.

2.B.vii. Conclusions on Present Trends in General Fisheries Law

The review carried out above, however lengthy it may seem, is important to show that, according to present trends in general fisheries law, States are under a customary obligation to cooperate for the conservation and sustainable management of living marine resources, wherever they are found in the oceans and seas. Fishing must be carried out in a responsible way and States that undermine the effectiveness of conservation and management measures agreed at the international level can be excluded from high seas fisheries. Flag, port and coastal States, through RFMOs, are called to put in place appropriate monitoring, control and surveillance measures. If violations occur, the flag State is under an obligation to adopt sanctions that have an adequate deterrent effect and deprive offenders of the benefits accruing from IUU fishing. Also RFMOs are called to establish and implement follow-up measures. In this regard, different kinds of measures can be envisaged, including trade-related measures, such as import or export controls that affect flag States responsible for the internationally wrongful conduct of allowing or tolerating IUU fishing. A trend towards the exclusion of owners of IUU fishing vessels from State subsidies is also developing.

Any analysis of specific regional fisheries regimes, included the Mediterranean one, should be carried out having in mind that the context of the present trend in general fisheries law goes in one precise direction: the effectiveness of conservation and management measures should not be undermined¹¹⁵ and IUU fishing should be prevented and deterred, including through follow-up and corrective measures. RFMOs are the main actors in this context¹¹⁶.

¹¹⁵ “(...) it can be observed that the development of international law in this field represents a paradigm shift from the laissez-faire system of the freedom of fishing to conservation and sustainable use of marine living resources through international cooperation” (TANAKA, *The International Law of the Sea*, 4th ed., Cambridge, 2023, p. 348).

¹¹⁶ “RFMOs play a key role in global fisheries governance. Bringing together countries with a common interest in managing a particular fish stock or the fish resources of a particular region and agreeing to adoption of binding CMMs [= conservation and management measures], they are the primary mechanism for cooperation between fishing countries and coastal states in line with the requirements and responsibilities under UNCLOS (...) and the United Nations Fish Stock Agreement (...)” (HUTNICZAK & DELPEUCH, *Combating* cit., p. 56).

3. Some Relevant RFMOs

Besides the GFCM, two RFMOs are particularly relevant for the purposes of this opinion, namely the International Commission for the Conservation of Atlantic Tunas¹¹⁷ and the Indian Ocean Tuna Commission¹¹⁸.

3.A. GFCM

The Agreement for the Establishment of the GFCM (Rome, 1949; subsequently amended several times) has today twenty-three Parties, including the European Union, and six “cooperating non-contracting Parties”¹¹⁹. The GFCM is an international organization put under the general authority of the Food and Agriculture Organization of the United Nations¹²⁰ according to Art. XIV of the FAO Constitution.

Accordingly, also the GFCM is called to share the fundamental FAO objectives, as reflected in the FAO Constitution, in particular “the conservation of natural resources and the adoption of improved methods of agricultural production”¹²¹. The FAO determination in combating IUU fishing has been widely proven by the promotion of the Compliance Agreement¹²², the Code of Conduct¹²³, the IUU Fishing Plan of Action¹²⁴ and the Port State Agreement¹²⁵. All GFCM instruments must consequently be interpreted in the light of the subsequent FAO practice in ensuring the establishment of measures to prevent and deter IUU fishing¹²⁶.

The Parties to the GFCM Agreement declare themselves determined to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems and recognize the economic, social and nutritional benefits deriving from the sustainable use of such resources and that, under international law, States are required to cooperate in their conservation and management and the protection of their ecosystems¹²⁷. Conscious of the need to avoid adverse impacts on the marine

¹¹⁷ Hereinafter: ICCAT.

¹¹⁸ Hereinafter: IOCT.

¹¹⁹ According to Art. 1 (e), cooperating non-contracting Party means “a Member or Associate Member of the Organization [= FAO] and such non-member States as are members of the United Nations or any of its specialized agencies not formally associated as a Contracting Party with the Commission which abides by measures referred to in Article 8 (b)”.

¹²⁰ Hereinafter: FAO. See the preamble of the GFCM Agreement.

¹²¹ Art. I, para. 2 (c). The term “agriculture” and its derivatives include fisheries and marine products (Art. XVI).

¹²² *Supra*, para. 2.B.i.

¹²³ *Supra*, para. 2.B.ii.

¹²⁴ *Supra*, para. 2.B.iv.

¹²⁵ *Supra*, para. 2.B.v.

¹²⁶ See Art. 31, para. 3 (b), of the Convention on the Law of Treaties (Vienna, 1969).

¹²⁷ Preamble.

environment, preserve biodiversity and minimize the risk of long-term or irreversible effects of the use and exploitation of living marine resources, the Parties also declare themselves determined to cooperate effectively and take action to prevent, deter and eliminate IUU fishing¹²⁸. Notably, the fight against IUU fishing is referred to in the preamble of the GFCM Agreement itself.

The Agreement applies to “all marine waters of the Mediterranean Sea and the Black Sea”¹²⁹, that is to both the high seas and marine areas under national sovereignty or jurisdiction (marine internal waters, territorial seas, fishing zones, ecological protection zones or exclusive economic zones, as the case may be).

The GFCM is entitled to adopt “recommendations” on conservation and management measures aimed at ensuring long term sustainability of fishing activities, in order to preserve the marine living resources, as well as the economic and social viability of fisheries and aquaculture. In adopting such recommendations, the GFCM must give particular attention to measures to prevent overfishing and minimize discards, paying particular attention to the potential impact on small-scale fisheries and local communities¹³⁰. The GFCM is also called to formulate appropriate measures based on the best scientific advice available, taking into account relevant environmental, economic and social factors¹³¹, and – what is important for the purposes of this study –

“to take the appropriate measures to ensure compliance with its recommendations to deter and eradicate illegal, unreported and unregulated fishing activities”¹³².

Under Art. 8 (b), the GFCM can formulate and recommend appropriate measures for various purposes, namely: the conservation and management of living marine resources; to minimize impacts for fishing activities on living marine resources and their ecosystems; to adopt multiannual management plans based on an ecosystem approach to fisheries to guarantee the maintenance of stocks above levels which can produce maximum sustainable yield and consistent with actions already taken at national level; to establish fisheries restricted areas for the protection of vulnerable marine ecosystems, including but not limited to, nursery and spawning areas; to ensure, if possible through electronic means, the collection, submission, verification, storing and dissemination of data and information, consistent with relevant data confidentiality policies and requirements; to take action

¹²⁸ Preamble.

¹²⁹ Art. 3, para. 1. On regional cooperation in the Mediterranean see SCOVAZZI, *International Cooperation as regards Protection of the Environment and Fisheries in the Mediterranean Sea*, in *Anuario de Derecho Internacional*, 2018, p. 301.

¹³⁰ Art. 5 (a).

¹³¹ Art. 5 (b).

¹³² Art. 5 (f).

to prevent, deter and eliminate IUU fishing, including mechanisms for effective monitoring, control and surveillance; to resolve situations of non-compliance, including through an appropriate system of measures.

The “recommendations” referred to in Art. 8 (b), are adopted by a two-thirds majority of Parties present and voting¹³³, and, despite their name, have a binding nature. Parties are under an obligation to give effect to such recommendations¹³⁴, unless they cast an objection to them within 120 days from the date of notification¹³⁵. Parties are bound to transpose adopted recommendations into national laws, regulations or appropriate legal instruments and to report annually to the GFCM indicating how they have implemented them¹³⁶. Moreover – what is particularly important for the purposes of this study –

“Each Contracting Party shall take measures and cooperate to ensure that their duties as flag States and port States are fulfilled in accordance with relevant international instruments to which it is a party and with recommendations adopted by the Commission”¹³⁷.

“The Commission, through a process leading to the identification of cases of non-compliance, will address Contracting Parties which fail to comply with recommendations adopted by the Commission with a view to resolving situations of non-compliance”¹³⁸.

“The Commission shall define through its Rules of Procedure appropriate measures which may be taken by the Commission when Contracting Parties are identified as being in prolonged and unjustified non-compliance with its recommendations”¹³⁹.

The last provision clearly states that the GFCM has a broad margin of discretion in identifying what kinds of measures may be adopted in the regrettable case that Parties do not comply with binding recommendations in a prolonged and unjustified manner. The provision also implies that the GFCM is called to take a decision on such an important subject.

¹³³ Art. 13, para. 1. In RFMOs *consensus* is the alternative to majority decision-making: “The advantages of consensus-based decision-making include the protection of the interests of minority views within the RFMO and the creation of a sense of ownership over the managed resource, which in principle should improve compliance (...). Although it is the most co-operative decision-making model, it has its limitations as, if there is misalignment of interests and competing positions, it tends to support the status quo by impeding the decision-making process (...). As a consequence, final recommendations tend to be toned down and not fully aligned with the original scientific advice” (HUTNICZAK & DELPEUCH, *Combatting* cit., p. 63). “Where decisions are taken by consensus, this may mean that adverse compliance decisions are effectively vetoed by the non-compliant participant” (*Approaches to Evaluate and Strengthen RFMO Compliance Processes and Performance – A Toolkit and Recommendations*, 2022, p. 18).

¹³⁴ Art. 14, para. 1.

¹³⁵ Art. 13, para. 3.

¹³⁶ Art. 14, para. 3.

¹³⁷ Art. 14, para. 4.

¹³⁸ Art. 14, para. 5.

¹³⁹ Art. 14, para. 2.

The GFCM is also called to identify and address sanctions to non-Parties that adversely affect the objective of the GFCM Agreement. It is explicitly stated in the GFCM Agreement that such sanctions may include non-discriminatory market-related instruments¹⁴⁰.

The GFCM recommendations so far adopted relate to a broad range of matters (for example, driftnets, closed seasons, fisheries restricted areas, mesh size, management of demersal fisheries¹⁴¹, transshipment, plans of actions, red coral, incidental by-catch of seabirds or turtles, conservation of monk seal). Particularly notable are the recommendations establishing fisheries restricted areas in order to protect vulnerable marine ecosystems¹⁴².

Disputes between two or more GFCM Parties concerning the interpretation or application of the Agreement may be settled according to the means specified in Art. 19. The main means is arbitration, with the consent in each case of all parties to the dispute. However, it is questionable whether this provision can be applied to disputes between a GFCM Party and the organization, including disputes relating to measures decided by the GFCM against that Party. An *ad hoc* agreement would be needed for submitting such a dispute to a settlement body.

3.B. ICCAT

The International Convention for the Conservation of Atlantic Tunas (Rio de Janeiro, 1966) was concluded for the objective of maintaining the populations of tuna and tuna-like fishes found in the Atlantic Ocean at levels which permit the maximum sustainable catch for food and other purposes¹⁴³. 51 States and one international organization (the European Union) are parties to it¹⁴⁴. The status of cooperating non-contracting Party, entity or fishing entity has been granted to five States. The Convention provides for the establishment of the International Commission for the Conservation of Atlantic Tunas¹⁴⁵.

¹⁴⁰ Art. 14, para. 2. This provision has been implemented by Rule XIX of the GFCM Rules of procedure (see *infra*, para. 5.A.ii).

¹⁴¹ For instance, Recommendation GFCM/29/2005/1 on the management of certain fisheries exploiting demersal and deepwater species prohibits the use of towed dredges and trawl nets fisheries at depths beyond 1000 m.

¹⁴² See Recommendation GFCM/30/2006/3, which prohibits fishing with towed dredges and bottom trawl nets within “Lophelia reef off Capo Santa Maria di Leuca”, the “Nile delta area cold hydrocarbon seeps” and the “Eratosthenes Seamount”, Recommendation GFCM/41/2017/3 on the fisheries restricted area in the Jabuka/Pomo Pit area in the Adriatic Sea, Recommendation GFCM/44/2021/3 on the establishment of a fisheries restricted area in the Bari Canyon in the southern Adriatic Sea, Recommendation GFCM/44/2021/5 on the establishment of a fisheries restricted area to protect spawning aggregations and deep-sea sensitive habitats in the Gulf of Lion.

¹⁴³ Preamble.

¹⁴⁴ Unlike the GFCM Agreement, only the European Union, and not its member States, is a party to the ICCAT Convention.

¹⁴⁵ Hereinafter: ICCAT.

While ICCAT is not an international organization put under the FAO general authority according to Art. XIV of the FAO Constitution¹⁴⁶, its constituent instrument envisages a “working relationship” between the ICCAT and the FAO¹⁴⁷. To that end, in 1973, FAO and ICCAT concluded an agreement to ensure cooperation by consultation, coordination of effort, mutual assistance and joint action in fields of common interest.

Since the areas to which the ICCAT Convention applies are “all the waters of the Atlantic Ocean, including the adjacent seas”¹⁴⁸, the Mediterranean and the Black Seas fall under the geographical scope of the application of it. In 2022 a letter of agreement “to work cooperatively” has been signed by GFCM and ICCAT. It provides that specific activities of mutual interest include, *inter alia*,

“(…) Exchange of relevant information on IUU fishing activities carried out in their respective Convention areas;

Enhanced communication at the level of the respective scientific and technical bodies, including the compliance committees; (…)

ICCAT recommendations designed to maintain populations of tuna and tuna-like fishes at levels which permit the maximum sustainable catch become effective for all Parties six months after the date of notification¹⁴⁹, unless they present an objection¹⁵⁰. Moreover,

“The Contracting Parties undertake to collaborate with each other with a view to the adoption of suitable effective measures to ensure the application of the provisions of this Convention and in particular to set up a system of international enforcement to be applied to the Convention area except the territorial sea and other waters, if any, in which a state is entitled under international law to exercise jurisdiction over fisheries”¹⁵¹.

3.C. IOTC

According to the Agreement for its establishment (Rome, 1993), the Indian Ocean Tuna Commission¹⁵² is an organization which is responsible for the management of highly migratory, transboundary and straddling tuna and tuna-like species in the Indian Ocean. It counts 30 members, including the European Union. Like the GFCM, it was set up under Art. XIV of the FAO Constitution.

¹⁴⁶ See *supra*, para. 3.A.

¹⁴⁷ Art. XI, para 1.

¹⁴⁸ Art. I.

¹⁴⁹ Art. VIII, para. 2.

¹⁵⁰ See Art. VIII, para. 3.

¹⁵¹ Art. IX, para. 3.

¹⁵² Hereinafter: IOTC.

IOTC's objective is to ensure the conservation and sustainable development of fisheries, by also taking into account "the special interests of developing countries in the Indian Ocean Region to benefit equitably from the fishery resources"¹⁵³. Special emphasis is put in the constituent instrument on transfer of technology, training and capacity building, in order to ensure the equitable participation of all members, including those in the region which are developing countries¹⁵⁴.

Procedures concerning conservation and management measures and amendment of the Rules of procedure correspond to those of the GFCM, as far as the required majority and the possibility to cast objection are concerned¹⁵⁵. From a terminological point of view, it is worth noting that the binding acts enacted by this organization are denominated "resolutions" and not "recommendations" as in the case of some other RFMOs.

4. General Aspects on Compliance and Follow-up Mechanisms

4.A. Compliance Procedures

As it has been recognised in the last decades of the 20th century, fisheries regimes must be completed by compliance mechanism that have proven to be useful tools to assist RFMO Parties in meeting their obligations and in discouraging violations. While the responsibility of law enforcement lies with flag, coastal, port and market States Parties, as the case may be, oversight regarding the compliance by Parties with the obligations arising from the constituent agreement falls also on the RFMO.

Although each compliance mechanism has its own peculiarities, in general, RFMOs entrust with the task of assessing compliance specific bodies, called compliance committees¹⁵⁶. They are not mandated to take decisions, rather to provide advice to the conference of the Parties of RFMOs (which usually corresponds to the RFMO commission) on the level of compliance with the obligations in force and to submit to its recommendations to address cases of non-compliance. Also, in view of the scale and the remoteness of many fishing activities, the Parties are usually entrusted with the task of collecting reliable data and information for the compliance process.

¹⁵³ Preamble.

¹⁵⁴ Art. V, 2 (b).

¹⁵⁵ On objections cast so far see HOLMES, *To Improve Indian Ocean Tuna Sustainability, Manager Should Make Fundamental Changes*, 2023.

¹⁵⁶ "It can be difficult to rely on accurate self-reporting from members when external verification is not possible" (BARKLEY, *Evaluating* cit., p. 10).

Usually, the RFMO chooses which obligations are to be assessed and the frequency of the assessment, basing itself on the nature of the obligation, the consequences arising from breaches and the impact of the obligation on the conservation and management of the resources. Priority is given to major infractions, such as those that have a strong impact on the conservation of resources (for example, the non-compliance with the provisions on quotas, non-selective gear, fishery restricted areas, catch data reporting, vessel monitoring systems or observer programs).

A compliance assessment should not only identify areas of non-compliance, but also underline the relevant reasons. In certain cases, non-compliance could be due to easily identifiable reasons, such as the high number of legal obligations, their ambiguous interpretation or the lack of financial means and technical equipment within a given State Party. In other cases, non-compliance could be wilful, in the sense of voluntary activities carried out by vessels flying the flag of a given State and tolerance by this State of such an illegal practice.

The compliance process should be well-defined in its legal aspects. The operations should be undertaken in a transparent way, showing the will to ensure the general and effective implementation of the agreed measures.

Compliance assessment processes need to be supported by follow-up mechanisms to determine if the States concerned are taking action relating to areas of non-compliance and to ascertain whether the responses are adequate in addressing serious compliance issues. As it has been remarked in a recent report,

“without a feedback system that promotes cooperation among RFMO participants in ensuring that non-compliance is addressed, the compliance process will lose value. If non-compliance is identified but there is no mechanism for ensuring such infractions are effectively addressed through RFMO actions or domestic processes, or that infractions result in minimal consequences, participants may no longer see the value in such compliance assessment processes¹⁵⁷”.

This report outlines five general areas to consider in evaluating and strengthening RFMOs compliance assessment processes:

“(1) ensuring that the governance process is well defined;

(2) that its operations are undertaken transparently and with a goal of demonstrating the effectiveness of and continual improvement in the implementation of the agreed management actions;

¹⁵⁷ *Approaches* cit., p. 19.

- (3) that there is a robust follow-up process on compliance that allows demonstration of progress over an extended period of time;
- (4) that the compliance process is based on clearly identified priority obligations; and
- (5) that there are pre-agreed responses to non-compliance”¹⁵⁸.

4.B. Non-Compliance Follow-up Mechanisms

Once a given vessel or State has been identified as non-compliant, measures of follow-up to non-compliance should be adopted by the RFMO concerned. They have a different nature. Some of them are addressed to vessels and are intended to sanction owners, including, if possible, beneficial owners (e. g., IUU vessels list; prohibition of subsidies); others are addressed to States, be they Parties, cooperating non-Parties or non-Parties (e. g., trade restrictions). Some follow-up measures prohibit IUU vessels from fishing; others prohibit trade in seafood products. Some follow-up measures aim at preventing further non-compliance (e. g., catch documentation schemes; technical assistance and capacity building); others aim at sanctioning those responsible for wrongful acts.

In fact, not all RFMOs have adopted follow-up measures¹⁵⁹ and consequent provisions for imposing corrective measures on Parties or cooperating non-Parties for not complying with adopted conservation and management measures. RFMOs vary in the extent and nature of compliance reviews, the use of measures when non-compliance is identified and their reporting to the public on detected non-compliance and follow-up actions. However, the application of measures when infractions are found through compliance review is crucial to increasing the incentive to comply. Moreover, public information on identified non-compliance and follow-up actions, including sanctions, has a deterrent impact on transgressors by imposing the cost of adverse publicity¹⁶⁰.

Follow-up measures are expected to be of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such illicit activities. Relevant factors to evaluate the gravity of non-compliance instances are, *inter alia*, the risk to the conservation of the stocks concerned, the frequency of non-compliance and whether some corrective action has been taken to address the problem.

¹⁵⁸ *Approaches* cit., p. 5.

¹⁵⁹ On follow-up measures in general see FERRI, *Conflicts* cit.

¹⁶⁰ HUTNICZAK & DELPEUCH, *Combatting* cit., p. 67.

4.B.i. Listing of Vessels

A typical follow-up measure is the inscription of a non-compliant vessel in a IUU list (so-called blacklist), which is periodically updated and reviewed by RFMO compliance committees. Positive listing, that is the drawing up of a list of vessels authorized to fish (so-called whitelist), has also been used by RFMOs.

At least twelve RFMOs have developed listing procedures for vessels that have been found to carry out IUU fishing¹⁶¹. As a consequence of listing, Parties and cooperating non-Parties must adopt a number of measures against blacklisted vessels, aimed at making it unprofitable to fish in the waters to which the RFMO Agreement is applicable without abiding by its rules. Some of them can be qualified as trade sanctions.

For instance, among such measures, the following can be adopted by Parties or cooperating non-Parties: refusing to authorize blacklisted vessels to fish in waters under their jurisdiction; prohibiting the vessels flying their flag from participating in fishing activities with any blacklisted vessel; prohibiting the supply of provisions, fuel or other services to such vessels; prohibiting entry into their ports of such vessels; prohibiting the chartering of such vessels; refusing to entitle such vessels to fly their flag; prohibiting landing and import of fish from onboard or traceable to such vessels; encouraging importers, transporters and other sectors concerned to refrain from negotiating transshipment of fish with such vessels¹⁶²; prohibiting subsidies to such vessels¹⁶³. Although it is generally provided that vessels can be listed without any nationality requirement, in practice non-Parties' vessels are predominantly listed¹⁶⁴. It should be added that some RFMOs have agreed to reciprocal recognition of each other's lists¹⁶⁵.

Since 2004, at least three RFMOs (the Interamerican Tropical Tuna Commission, the Western and Central Pacific Fisheries Commission and the South-East Atlantic Fisheries Organization) have issued resolutions also providing for the inclusion in their respective lists of vessels under the control

¹⁶¹ The list of blacklisted vessels can be read on each organization's website, as well as in a comprehensive database maintained by Trygg Mat Tracking, a Norwegian not-for-profit organization (www.iuu-vessels.org).

¹⁶² See, for instance, Northwest Atlantic Fisheries Organization, *Conservation and Enforcement Measures 2020*, Article 54. NAFO/COM Doc. 20-01.

¹⁶³ This is fully in line with the recently adopted subsidies Agreement (*supra*, para. 2.B.vi).

¹⁶⁴ This is also due to the fact that, according to the applicable conservation measures, vessels sailing under the flag of a third State are presumed to carry out IUU fishing if they are found fishing in the regulatory area, or if they refuse to allow boarding and inspection: see for instance, ICCAT, Recommendation 18/08 to Establish a List of Vessels Presumed to Have Carried Out IUU Fishing Activities in the ICCAT Convention Area, 2018, para. 1; Northwest Atlantic Fisheries Organization, *Conservation and Enforcement Measures 2020* cit., Article 49. For other examples, see PALMA, TSAMENYI & EDESON, *Promoting Sustainable Fisheries - The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing*, Leiden - Boston, 2010, p. 212.

¹⁶⁵ PALMA, TSAMENYI & EDESON, *Promoting* cit., p. 216.

of the owner of an IUU vessel¹⁶⁶. It is also required that the vessels authorized to fish for species regulated by the RFMOs to have no history of IUU fishing: the new owner must demonstrate that the previous owners and operators involved in IUU fishing have no legal, beneficial or financial interest in, or control over, the vessel¹⁶⁷. However, the implementation of these measures has been quite problematic, due to the difficulties for member States to agree on the criteria and procedures to identify beneficial owners¹⁶⁸. Some States, and part of the doctrine, have also criticized actions against entire fleets for violation by one single vessel as unfair¹⁶⁹.

As regards the listing procedure, generally it is the member States that communicate to the Secretariat of the competent RFMO information about the vessels suspected of IUU fishing, and available evidence. Before the decision concerning the inclusion in the list is taken, sufficient time is given to the interested flag State to provide its comments and evidence. Recourse against the listing can be instigated before the domestic courts of the State implementing the sanctions¹⁷⁰. Some RFMOs have also introduced a de-listing mechanism¹⁷¹.

In principle, listing in a blacklist entails an obligation for the flag State to institute legal proceedings against the owner or other persons responsible for transgressions, impose adequate sanctions and report to the RFMO on the steps taken to investigate and eliminate the relevant IUU activities. This can be a serious deterrent for vessels normally operating in legality. However, being listed or not listed often does not affect very much the activities of vessels accustomed to operating in total illegality¹⁷². Beneficial owners could escape the consequences of listing by reflagging and

¹⁶⁶ See, for instance, South-East Atlantic Fisheries Organization, Conservation measure 08/06, para. 3 (j). For some critical remarks, see PALMA, TSAMENYI & EDESON, *Promoting* cit., p. 213.

¹⁶⁷ See, for instance, Inter-American Tropical Tuna Commission, Resolution C-11-05 (Amended) on the Establishment of a List of Longline Fishing Vessels Over 24 Meters (LSTLFVs) Authorized to operate in the Eastern Pacific Ocean, para. 4 (d).

¹⁶⁸ PALMA, TSAMENYI & EDESON, *Promoting* cit., p. 214.

¹⁶⁹ *Ibidem*.

¹⁷⁰ WOLFRUM, *Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations*, in *German Law Journal* 2008, p. 2059.

¹⁷¹ See, for instance, Northwest Atlantic Fisheries Organization, *Conservation and Enforcement Measures 2020* cit., Article 53 (2); Recommendation 18/08 by ICCAT to Establish a List of Vessels Presumed to Have Carried Out IUU Fishing Activities in the ICCAT Convention Area', paras. 13-17.

¹⁷² See HOSCH, *Increasing Compliance with Conservation and Management Measures of the Indian Ocean Tuna Commission*, 2018, p. 11.

renaming the vessel¹⁷³. Moreover, States could perceive the listing of vessels flying their flag as a sign of poor performance in meeting their responsibilities¹⁷⁴.

4.B.ii. Other Non-trade Related Measures

Another kind of corrective measure affecting non-compliant States as well as vessels flying their flag is a quota reduction applied to compensate for the non-compliant activities. However, this measure is of limited effect in the case of GFCM, which seldom allocates fish quotas¹⁷⁵.

As a follow-up measure of general character, public accessibility of RFMO websites and data showing records of non-compliance should be mentioned. It can be an incentive to improve rates of compliance by vessels and States granting their flag to them.

4.B.iii. Trade-related Measures in General

Different in kind are trade-related measures¹⁷⁶. They imply the cooperation by market States, in addition to flag, coastal and port States¹⁷⁷, and the use of market tools to detect illegal seafood along the supply chain in an effort to achieve full traceability of fish products¹⁷⁸. These measures seem today in line with the preference of consumers who increasingly ask for food traceability, in particular fish.

It is important to stress that market State jurisdiction in fishery matters is not regulated by the law of the sea. International fisheries law comes into play only indirectly, so long as import bans or labelling requirements take into account the illegal (or unsustainable) nature of harvesting. This also explains why port State measures, albeit highly intertwined and capable of restricting the introduction

¹⁷³ “Their other drawback is that vessels, instead of masters and beneficial owners are listed. The perpetrators of – often – serial fraud walk free, and escape most direct consequences, except the known and manageable hassle of renaming and reflagging listed fishing vessels” (HOSCH, *Increasing* cit. p. 11).

¹⁷⁴ “Compliance committees invariably spend a lot of their time debating the inclusion or release of vessels from such lists, while Secretariats are tasked with collecting background information, evidence, and managing and collating correspondence with flag states, who have the general and shared uncanny trait of shielding their vessels from listing, as a listing is wrongly perceived as – and generally wrongly laid out as – a stain on flag state performance. IUU vessel lists are primarily interpreted as flag state performance score boards, instead of a simple sanctioning mechanism against rogue vessels” (HOSCH, *Increasing* cit. p. 11).

¹⁷⁵ The only case seems to be Recommendation GFCM/43/2019/3 which allocates annual quotas for turbot fisheries in the Black Sea.

¹⁷⁶ See CALLEY, *Market Denial and International Fisheries Regulation – The Targeted and Effective Use of Trade Measures against the Flag of Convenience Fishing Industry*, Leiden, 2012.

¹⁷⁷ It has been remarked that “at the level of MCS [= monitoring, control and surveillance] proper, implementation is devolved to the largest degree to CPCs [= contracting Parties and cooperating non-contracting Parties] in their roles as coastal, flag and port states – with little current involvement of market states, owing to the persisting infancy of trade-based management and enforcement tools” (HOSCH., *Increasing* cit. p. 10).

¹⁷⁸ Trade-related measures can also “operate upstream, restricting access to services to IUU vessels (for example, access to marine insurance)” (HUTNICZAK & DELPEUCH, *Combating* cit., p. 38).

of fish catches onto the market, are not constructed as market-related measures, due to the specific legal status of foreign vessels calling at ports¹⁷⁹.

According to the approach of the IUU Fishing Plan of Action, trade-related measures are considered as a subcategory of market-related measures. More precisely, the expression “trade-related measures” is used with regard to controls on the importation and exportation of goods, through catch documentation schemes and trade sanctions¹⁸⁰. It is noteworthy that these measures do not generally apply to purely domestic supply chains, in which fish is landed in ports from ships flying the flag of the port State and is processed and consumed in the same State. Other market-related measures are those regulating the transport, storage and marketing of fish and fish products, through *inter alia* eco-labelling, bans on sale of endangered species or specimens not respecting minimum size requirements, etc. In principle, these measures differ from purely trade-related measures in that they regulate indistinctly foreign and domestic products. However, this distinction is quite vague, since all market measures are liable to have a (more or less direct) impact on trade.

It is possible to identify two different groups of trade-related restrictions and sanctions, depending on whether they apply to all imports, or just to specific targeted States or vessels.

The first group of measures decided by RFMOs pursue conservation goals by banning trade in protected species, undersized specimens or products obtained with prohibited fishing methods. Measures of this kind can be qualified as “trade-related” so long as they consist of import bans and their exclusive aim is to affect international trade. However, in most cases, such measures are construed instead as “other market-related measures,” since the prohibition against importing certain species or products is normally associated with that of introducing into commerce the same domestically harvested species or products.

The second group of measures consists of trade sanctions, designed to prohibit the import (and transshipment) of fish and fish products caught either by individual vessels that have been blacklisted for fishing in contravention of applicable conservation and management measures or by all vessels flying the flag of countries held responsible for supporting IUU fishing.

¹⁷⁹ HOSCH, *Trade Measures to Combat IUU Fishing. Comparative Analysis of Unilateral and Multilateral Approaches*, International Centre for Trade and Sustainable Development, Issue paper, 2016, p. 7, note 8, observing that the Port State Measures Agreement “has been conceived as a non-trade measure to combat IUU fishing. In the PSMA [= Port State Measures Agreement], IUU fishing is addressed at the level of the fishing operation of which port entry and landing are the final actions”.

¹⁸⁰ See on the point ROSE & TSAMENYI, *Universalising Jurisdiction over Marine Living Resources Crime*, pp. 60-62; PHELPS BONDAROFF, REITANO & VAN DER WERF, *The Illegal Fishing and Organized Crime Nexus: Illegal Fishing as Transnational Organized Crime*, Geneva - Amsterdam, 2015.

As also acknowledged by the IUU Fishing Plan of Action, market-related measures include the enactment and application of legislation that sanctions conducting business or trading in fish or fishery harvested by vessels identified as engaged in IUU fishing “whether by the State under whose jurisdiction the vessel is operating or by the relevant regional fisheries management organizations in accordance with its agreed procedures”¹⁸¹. Among these measures, statutes punishing this conduct as a crime have a higher deterrent effect.

Although it is generally agreed that multilateral solutions should be preferred, the measures under discussion continue to be adopted unilaterally by States or regional economic integration organizations. In particular, unilateral market measures have been adopted by the European Union and the United States, which are the largest markets for fish.

Trade-related measures are increasingly being enacted at a multilateral level by RFMOs – including those to whom Mediterranean States are Parties – to ensure that fish products originating from IUU or unsustainable fishing are not introduced onto the market. The most significant examples are provided by tuna organizations, *in primis* ICCAT.

While a few RFMOs, like the South Pacific Regional Fisheries Management Organization, are expressly empowered by their constituent instrument to adopt trade-related measures¹⁸², their implementation by RFMOs can be justified as an implied power even if not expressly foreseen in their founding treaties¹⁸³.

The ICCAT practice¹⁸⁴ has shown that trade-restrictive measures are quite effective in achieving required compliance. These measures have the potential to disrupt trade and determine severe economic impacts in the identified State. The fact that ICCAT is a species-based RFMO does not *per se* mean that other area-based RFMOs, for example GFCM, would not be entitled to adopt similar measures, if there were a need to do so (actually, ICCAT is both a species-based and an area-based organization).

However, in some cases, proposals for the introduction of trade-restrictive measures were met with opposition. For instance, in the context of the Convention for the Conservation of Antarctic

¹⁸¹ IUU Fishing Plan of Action, paras. 73 and 74.

¹⁸² Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (Auckland, 2009), Article 8 (g): “The Commission shall, in accordance with the objective, principles and approaches, and specific provisions of this Convention, exercise the following functions: (...) develop and establish effective monitoring, control, surveillance, compliance and enforcement procedures, including non-discriminatory market-related and trade-related measures”.

¹⁸³ The most notable example is provided by ICCAT, whose constituent instrument does not mention trade measures.

¹⁸⁴ *Infra*, para. 4.B.iv.

Marine Living Resources (Canberra, 1980)¹⁸⁵, in 2006 the then European Community made a proposal to introduce trade sanctions, to be implemented as a last resort when all other measures had proven unsuccessful to induce compliance by States (both Parties and non-Parties) with conservation measures. When submitted to the Commission (2007), the proposal was agreed by all members but Argentina¹⁸⁶. Attended that all the decisions of the Commission on matters of substance shall be taken by consensus¹⁸⁷ (which is not the case within GFCM), the proposal was not approved. The European Community submitted again its proposal for approval at the following annual meetings of the Commission in 2008, 2009, 2011, 2012, 2013, and again in 2014 in the form of a proposal for international discussion. However, Argentina always reaffirmed its firm opposition, joined by a few States which reversed their position and expressed some perplexities on some specific issues. As a consequence of this, the European Union proposal was finally dropped.

It is worth analysing the arguments submitted by Argentina to justify its position. Indeed, Argentina was far from denying in absolute terms the consistency of trade-related measures with WTO law. Quite appropriately, it expressed the view that the mere circumstance that trade sanctions are decided by an international organization does not imply *ipso facto* WTO consistency¹⁸⁸. After pointing out that WTO adjudicatory bodies had not yet tackled the issue, it held that, in order to comply with WTO law, even those measures adopted by international organizations need to meet all the requirements under Art. XX of the GATT¹⁸⁹. Not devoid of interest is the remark concerning the lack of timeliness in the removal of sanctions against the State. Argentina deplored

“the fact that identification or revision of a measure proposed by the European Community should be made on an annual basis, that is in fact too long a time. Thus it should be reminded that, in principle, WTO takes a decision on immediate situations, particularly in the case of lifting of measures, in which case WTO considers that as soon as circumstances which caused its adoption have changed, those measures must be removed”¹⁹⁰.

Another set of arguments made by the Argentinean delegation intended to demonstrate that the proposal for trade-related measures was not consistent with the CCAMLR regime. In this perspective it held that a sanctioning system would run against the spirit of the Antarctic Treaty System, which is based on cooperation:

¹⁸⁵ Hereinafter: CCAMLR.

¹⁸⁶ CCAMLR, *Report of the Twenty-Sixth Meeting of the Commission*, 2007, para. 13.29.

¹⁸⁷ Art. XII, para. 1.

¹⁸⁸ See on the point *infra*, para. 6.E.

¹⁸⁹ CCAMLR, *Report of the Twenty-Seventh Meeting of the Commission*, 2008, para 13.75; CCAMLR, *Report of the Twenty-Eight Meeting of the Commission*, 2009, para. 12.98.

¹⁹⁰ CCAMLR, *Report of the Twenty-Eight Meeting of the Commission*, 2009, para. 12.98.

“if trade sanctions were to be applied, this would mean that both the Member concerned and CCAMLR have failed to find even the least bit of common ground to achieve compliance within an atmosphere of cooperation. Such a situation should be deemed untenable within the Antarctic Treaty System where cooperation is paramount”¹⁹¹.

The specificity of CCAMLR was also underlined by the Russian Federation. While expressing its willingness to work toward reaching a consensus, the Russian delegation emphasized that “CCAMLR is not a Regional Fisheries Management Organisation, therefore an automatic transfer of the current practices of such organisations is not acceptable in the context of CCAMLR”¹⁹².

Another objection made by Argentina concerned the fairness of a sanction mechanism which would be detrimental to developing countries, considering that shipowners from rich countries often seek flags of convenience from developing countries to carry out IUU fishing activities¹⁹³. A similar criticism was made by Brazil, pursuant to which “the argument that the non-discriminatory nature of the measure would be guaranteed by its application both to Member and non-Member States of the Commission would hardly prevail, since the measure would, for the most part, affect developing countries”¹⁹⁴. Also Namibia criticized the European proposal as unfair, supporting more targeted sanctions against IUU fishing vessels and their beneficial owners. According to the African State,

“these proposed trade-related measures could unfairly punish many law-abiding companies and individuals, as they will also be prohibited from exporting their products should one of the vessels from their respective countries be found to be involved in IUU fishing. In our view, such indiscriminate punishment of the vessels and/or companies is not the best approach to combat IUU fishing, as it could negatively affect the economies of the Flag States concerned and has the potential to even destabilise those countries”¹⁹⁵.

The case concerning the opposition to trade-related measures in the context of CCAMLR, while significant, should be examined in the light of its specific context. Not only the positions of the minority of States contrary to the European proposal were expressed in a period (2007-2014) where the practice of trade sanctions by RFMOs was relatively limited (to the point that Argentina emphasized that the European Community had not offered any evidence of such “alleged practice”¹⁹⁶). Most importantly, one should consider that CCAMLR, which is a treaty concluded within the so-called Antarctic system, has some peculiarities which distinguish it from other treaties,

¹⁹¹ CCAMLR, *Report of the Twenty-Sixth Meeting of the Commission*, 2007, para. 13.34. See also CCAMLR, *Report of the Twenty-Sixth Meeting of the Commission*, 2011, para. 12.51.

¹⁹² CCAMLR, *Report of the Twenty-Seventh Meeting of the Commission*, 2008, para. 13.77.

¹⁹³ CCAMLR, *Report of the Twenty-Sixth Meeting of the Commission*, 2011, para. 12.51.

¹⁹⁴ CCAMLR, *Report of the Thirty-Second Meeting of the Commission*, 2012, para. 142.

¹⁹⁵ CCAMLR, *Report of the Thirty-Third Meeting of the Commission*, 2014, para. 3.74.

¹⁹⁶ CCAMLR, *Report of the Twenty-Seventh Meeting of the Commission*, 2008, para 13.75.

like those establishing the ICCAT or the GFCM. Among them, not irrelevant is the voting system based on *consensus*, by virtue of which it appears difficult to even imagine the possibility of sanctions against a member State.

4.B.iv. Listing of States

Some RFMOs have also enacted rules providing for the blacklisting of States involved in IUU fishing, in most cases non-cooperating third States. Once a State is included in the blacklist, member States are prohibited from importing covered species harvested by its fishing fleet. This kind of measures are intended to be put in place only when other corrective measure have proven to be insufficient¹⁹⁷.

However, thus far, the only RFMO which has implemented trade sanctions by including some States in the blacklist is ICATT. In 1996, ICCAT sanctioned certain non-member States (Belize, Honduras and Panama), whose vessels had been found fishing in the area under the jurisdiction of the organization, by requiring member States not to import bluefin tuna from them¹⁹⁸. According to available data, ICCAT trade sanctions have had a substantial impact in reducing IUU fishing by large-scale tuna longline vessels flying flags of convenience¹⁹⁹. Less frequently, ICCAT has also enacted import embargoes on seafood products against member States²⁰⁰. In particular, in 1999-2004 Equatorial Guinea, was sanctioned by ICCAT, of which it was a member, for exceeding its bluefin catch quota. Obvious enough, the effectiveness of multilateral trade measures depends on the membership of the enacting organization and can be undermined by the existence of non-compliance port States and end-markets.

For the sake of completeness, it is worth noting that – albeit not expressly foreseen in the Convention – since 1985 multilateral trade sanctions have been also adopted in the context of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 1973)²⁰¹. In many instances, the Conference or the Standing Committee have recommended the suspension of trade in one or more listed species for countries that it has determined to have persistently failed to comply with their obligations concerning trade in specimens of species included

¹⁹⁷ “The very fact that listed vessels are still sighted means that their operators enjoy landing facilities and, possibly, open markets for imports. It is therefore evident at that point that compliance measures in place do not suffice” (FERRI, *Conflicts* cit., p. 160).

¹⁹⁸ The bans have been lifted after the targeted States have joined the organization or have made sufficient efforts to contrast IUU fishing.

¹⁹⁹ Hosch, *Trade* cit., p. 18.

²⁰⁰ *Ibidem*, p. 14.

²⁰¹ Hereinafter: CITES. This practice has been codified by the 2007 Resolution Conf. 14.3 (CITES Compliance Procedures).

in Appendix II.

4.B.v. Catch Documentation Schemes

Catch documentation schemes (or trade documentation schemes²⁰²) enable seafood products to be traced from the point of catch to the point of final sale to prevent products derived from IUU fishing from entering the supply chain. Several RFMOs have adopted trade documentation mechanisms to allow importing States to establish the origin and the legality of the products as they enter trade. In particular, under these mechanisms, covered fish and fish products are allowed to enter the territory of a State Party (be it the State in whose ports they are caught, the processing State, or the end market State), only if they are accompanied by one or more certificates.

Several catch documentation schemes have been developed under the auspices of RFMOs to denote a

“system that tracks and traces fish from the point of capture through unloading and throughout the supply chain. A CDS [catch documentation scheme] records and certifies information that identifies the origin of fish caught and ensures they were harvested in a manner consistent with relevant national, regional and international conservation and management measures. The objective of the CDS is to combat IUU fishing by limiting access of IUU fish and fishery products to markets”²⁰³.

Catch documentation schemes represent the most effective means for customs officials to identify violations whenever the illegality of the catch cannot be detected by examining the visible characteristics of the fish specimens (fish size or species). Otherwise, it would be very costly to obtain the necessary information (determination of the nature of the specimens in the presence of “look-like species” or of the geographical origin of the catch through DNA analysis).

Documentation schemes to monitor trade in fish and fish products were adopted starting from the 1990s, also as a consequence of the expansion of refrigeration techniques. The first of them was established in 1992 by ICCAT, concerning Atlantic bluefin tuna²⁰⁴. Multilateral catch documentation schemes have been then established (under different terminology) by several other RFMOs, like the

²⁰² The expression “trade documentation scheme” is often used in its more generic and comprehensive meaning, to encompass both all the schemes established by RFMOs and the CITES permits system (HOSCH, *Trade* cit., p. 9). For another terminological approach, distinguishing among catch certificate, catch documentation and trade documentation schemes, see ELVESTAD & KVALVIK, *Implementing the EU-IUU Regulation: Enhancing Flag State Performance through Trade Measures*, in *Ocean Development and International Law*, 2015, p. 243. For the present purposes, the “catch documentation scheme” formula will be used to include all documentation systems elaborated by RFMOs, independently of whether they require fish and fish products to be accompanied by catch certificates alone, or also by other certificates tracing the post-harvesting phases.

²⁰³ *Report of the Expert Consultation on Catch Documentation Schemes*, FAO Fisheries and Aquaculture Report No. 1120, 2015.

²⁰⁴ See ICCAT, Recommendation 18-13, *infra*, para. 5.B.v.

Commission for Southern Bluefin Tuna²⁰⁵ and the Commission for the Conservation of Antarctic Marine Resources²⁰⁶, to require that catches be accompanied by documentation containing detailed information such as the harvesting vessel's name and the catch location and data. However, overall, they still cover a small percentage of world fish catch volume²⁰⁷.

Under these systems, each member State must authorize governmental officials to validate catch and other trade certificates, which are also deposited in a centralized (online) registry administered by the competent RFMO. Catch documentation is generally validated by the flag State of the catching vessel and provided to the first buyer once the catch is unloaded. In the most sophisticated systems, trade certificates are then issued and validated by port States, processing States and end-market States, to trace the movement of products through international trade²⁰⁸.

As noted by Hosch, a CDS is a “self-enforcing mechanism”²⁰⁹, since it determines the market exclusion of illegally caught and traded fish, without the need to resort to embargo measures. The circumstance that uncertified fish cannot be put into the market of all States implementing a multilateral scheme reduces demand for illegal non-certified products and therefore determines a fall in the final price, with the result of rendering illegal fishing less lucrative. However, catch documentation schemes are potentially vulnerable to fraud and do not function in cases where illegal catches are landed in ports of convenience and absorbed by markets of convenience²¹⁰.

It appears that the implementation of such schemes has been, thus far, quite successful in detecting and deterring the underreporting and misreporting of catches. For instance, thanks to the ICATT's scheme, underreporting of Atlantic bluefin tuna has been almost eliminated, thus favouring the recovery of affected tuna stocks²¹¹. It is fitting to note that compliance with catch documentation schemes is also mandated by some of the most recent bilateral trade agreements²¹².

The FAO Sub-Committee on Fish Trade has encouraged the adoption of this kind of trade-related measures. After some years of negotiations, in July 2017 the FAO Conference approved a set of Voluntary Guidelines on Catch Documentation Schemes, which were finally adopted by the FAO

²⁰⁵ Commission for Southern Bluefin Tuna, 2019 Resolution on the Implementation of a CCSBT Catch Documentation Scheme.

²⁰⁶ CCAMLR, Catch Documentation Scheme for *Dissostichus* spp, Conservation Measure 10-05, 2018.

²⁰⁷ See HOSCH, *Trade* cit., p. 11.

²⁰⁸ *Ibidem*.

²⁰⁹ *Ibidem*, p. 22.

²¹⁰ *Ibidem*, p. 12.

²¹¹ *Ibidem*, p. 18.

²¹² See for instance: Free Trade Agreement between the European Union and the Republic of Singapore, Art. 12, para. 8 (b) (*Official Journal of the European Union*, No. L 294 of 14 November 2019).

Conference in July 2017, as a tool against the continued threat to marine habitats and ecosystems represented by IUU fishing and against the negative impact that these activities have on food security and State economies, particularly in developing regions. This document represents a guideline for both RFMOs and domestic legislators willing to establish such schemes in order to prevent fish derived from IUU fishing from entering trade and market, by tracking the fish “from sea to plate”.

The Guidelines indicate that catch documentation schemes should be based on six principles (and describe in detail how such principles should be applied), namely they should:

- “Be in conformity with the provisions of relevant international law;
- not create unnecessary barriers to trade;
- recognize equivalence;
- be risk-based;
- be reliable, simple, clear and transparent; and
- be electronic, if possible”²¹³.

The Guidelines encourage the adoption of electronic systems to validate and verify catch certificates²¹⁴ and contain, as an Annex, information elements for catch certificates and additional information along the supply chain.

4.B.vi. Other Trade-related Measures

Other trade-related measures, which are less trade-restrictive than catch documentation systems, are eco-labelling and other environment-related information programmes²¹⁵. They represent a highly effective means to assist consumers in making informed choices, but without banning from the market products that fail to meet the requirements set forth by said schemes. Although some exporting States consider them as a disguised restriction on trade, voluntary eco-labelling schemes can make an important contribution to the promotion of sustainable fishing and have been encouraged by the FAO²¹⁶.

Traceability and labelling schemes have been also debated in a number of international fora, although, to date, fewer results than expected have been achieved. Among them, it is worth

²¹³ Paras. from 3.1 to 3.6.

²¹⁴ Sections 1.5, 3.6 and 4.6.

²¹⁵ PALMA, TSAMENYI & EDESON, *Promoting* cit., p. 195.

²¹⁶ FAO, *Guidelines for the Ecolabelling of Fish and Fish Products from Marine Capture Fisheries*, 2009. This document provides guidance to both States and RFMOs.

mentioning the tracking and verification system put into place under the Agreement on the International Dolphin Conservation Program, administered by the Inter-American Tropical Tuna Commission. This multilateral system aims at certifying tuna harvested in the Agreement Area as “dolphin safe”²¹⁷. It is based on a tuna tracking form, on which every link in the supply chain must be documented by competent national authorities of the States under whose jurisdiction the fish is caught, transported, unloaded, processed, and marketed²¹⁸.

Another prominent example is provided by the CITES, whose Parties have agreed on a quasi-universal labelling system for the identification of caviar²¹⁹.

5. Compliance and Follow-up Mechanisms in the Relevant RFMOs

In the following paragraphs special attention will be devoted to the provisions on compliance and follow-up applying within the three selected RFMOs.

5.A. GFCM

5.A.i. Cooperation by Parties

The fight against IUU fishing involves both the GFCM and its member States. As regards the latter, in 2017, under Recommendation GFCM/41/2017/7, the GFCM adopted a regional plan of action to combat IUU fishing in the GFCM area of application. It binds Parties and cooperating non-Parties to take measures to ensure that nationals who are subject to their jurisdiction do not support or engage in IUU fishing²²⁰, to take measures to identify and discourage their nationals from flagging fishing vessels under the jurisdiction of a State that does not meet its flag state responsibilities²²¹ and to avoid conferring any legal, financial or administrative support, including subsidies, on natural and legal persons that are involved in IUU fishing²²². The regional plan lists a number of “serious violations”²²³, binding Parties and cooperating non-Parties to ensure that sanctions against vessels engaged in IUU fishing activities as well as nationals under their jurisdiction are of sufficient severity

²¹⁷ AIDCP Tuna Tracking System, last amended on 23 June 2015.

²¹⁸ PALMA, TSAMENYI & EDESON, *Promoting* cit., p. 227.

²¹⁹ Adopted in April 2000, the system has come into effect in 2002 and has been revised several times later on (CITES Resolution Conf. 12.7, Conservation and Trade in Sturgeons and Paddlefish).

²²⁰ Para. 9.

²²¹ Para. 11.

²²² Para. 12.

²²³ Para. 15.

to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing²²⁴.

According to Recommendation 41/2017/7, Parties and cooperating non-Parties are bound to undertake comprehensive and effective monitoring, control and surveillance of fishing from its commencement, through the point of landing, to final destination²²⁵. Moreover, the regional plan specifies flag State²²⁶, coastal State²²⁷ and port State²²⁸ responsibilities. Specific provisions aim at establishing “market-related measures relating to fishery products”²²⁹, including the “drafting in due course a catch documentation scheme”²³⁰. It is important for the purposes of this opinion to point out that market Parties and cooperating non-Parties are bound to collaborate with the GFCM Secretariat to achieve efficient market-related measures to prevent, deter and eliminate IUU fishing:

“The CPC market states shall:

- a) take all steps that are necessary, and consistent with international law, to prevent that fish caught by vessels that are suspected or proven to have engaged in IUU fishing be traded or imported within their territories;
- b) take steps to improve the transparency of their markets for the purpose of allowing the traceability of fish and fish products;
- c) collaborate with each other as well as with the GFCM Secretariat to achieve efficient market-related measures that can prevent, deter and eliminate IUU fishing in the region; and
- d) further collaborate with competent organizations for the purpose of monitoring and analysing existing regional markets and trade flows and the strengthening of legal fish marketing measures”²³¹.

An important instance of domestic regime against IUU fishing is given by the European Union legislation, including Council Regulation 1005/2008 of 29 September 2008 establishing a system to prevent, deter and eliminate illegal, unreported and unregulated fishing²³² and Council Regulation 1224/2009 of 20 November 2009 establishing a control system for ensuring compliance with the rules of the common fisheries policy²³³.

²²⁴ Para. 14.

²²⁵ Para. 16.

²²⁶ Paras. 17 to 27.

²²⁷ Para. 28.

²²⁸ Paras. 29 to 35. Recommendation MCS-GFCM/40/2016/1 sets forth a regional scheme on port State measures to combat IUU fishing activities in the GFCM area of application.

²²⁹ Paras. 36 to 38.

²³⁰ Para. 37, a.

²³¹ Para. 38.

²³² *Official Journal of the European Union* No. L 286 of 29 October 2008.

²³³ *Official Journal of the European Union* No. L 343 of 22 December 2009.

5.A.ii. Compliance Committee

As regards, actions carried out by GFCM, Annex I to the GFCM Rules of Procedure provides the reference framework of the Compliance Committee, which is entrusted with a number of tasks:

“1. There shall be established a Compliance Committee which shall, in particular:

a) assess, on the basis of all available information, compliance by Contracting Parties, Cooperating non-Contracting Parties and relevant non-Contracting Parties with recommendations adopted by the Commission in accordance with Article 8(b) of the Agreement;

b) request clarifications and express concern to Contracting Parties, Cooperating non-Contracting Parties and non-Contracting Parties in cases of non-compliance, *prima facie*, with recommendations adopted by the Commission in accordance with Article 8(b) of the Agreement;

c) submit to the attention of the Commission cases in which Contracting Parties or Cooperating non-Contracting Parties are not compliant with recommendations adopted by the Commission in accordance with Article 8(b) of the Agreement, or cases in which activities by non-Contracting Parties undermine the effectiveness of such recommendations and adversely affecting the objective of the Agreement, in order to facilitate their identification as foreseen by the applicable recommendation concerning the identification of non-compliance;

d) provide additional information, as it considers appropriate or as may be requested by the Commission, relating to the implementation and compliance with recommendations adopted by the Commission in accordance with Article 8(b) of the Agreement, as well as with the provisions of the Agreement;

e) provide independent advice on an institutional and legal basis and submit reports to the Commission to facilitate the adoption of recommendations in accordance with Article 8(b) of the Agreement, including in connection with aspects related to monitoring, control and surveillance, and technical assistance and capacity building activities to support these aspects;

f) undertake other functions or responsibilities as may be conferred on it by the Commission”.

The present GFCM Rules of Procedure already provide for a set of follow-up measures which range from measures of technical assistance for the non-compliant Parties or cooperating non-Parties to non-discriminatory market-related measures:

“1. If the Commission determines through the Compliance Committee that a Contracting Party or a Cooperating non-Contracting Party has been in prolonged and unjustified non-compliance with recommendations adopted in accordance with Article 8(b) of the Agreement, to the extent that it undermines their effectiveness, or that a non-Contracting Party has systematically engaged in activities which undermine the effectiveness of such recommendations and adversely affect the objective of the Agreement, it may take the following measures to resolve the situation of non-compliance:

a) appropriate corrective measures towards the fulfilment by Contracting Parties or Cooperating non-Contracting Parties of the implementation of recommendations adopted in accordance with Article 8(b) of the Agreement, pursuant to Article 14 of the Agreement, as stated below:

- technical assistance and capacity building programmes to address the main problems of the relevant Contracting Party or Cooperating non-Contracting Party;

- derogations to the implementation of given recommendations, subject to the adoption of a multiannual process that shall identify remedies to non-compliance applying to relevant Contracting Parties and Cooperating non-Contracting Parties to ensure its full implementation;

b) non-discriminatory market-related measures against Cooperating non-Contracting Parties and non-Contracting Parties, consistent with international law, to monitor transshipment, landings and trade with a view of preventing, deterring and eliminating illegal, unreported and unregulated fishing including, where appropriate, catch documentation schemes²³⁴.

The above provision seems questionable under two respects.

First, it distinguishes between the action that the GFCM can take towards Parties and cooperating non-Parties, on the one hand, and that against cooperating non-Parties and non-Parties, on the other hand, by envisaging the adoption of market-related measures only against the latter States. As will be seen further²³⁵, the discrimination in the establishment of trade sanctions is not in conformity with WTO law.

Second, as far as member States are concerned, the Rules of Procedure provide for the taking of “corrective measures”, understood as incentives offered to the non-compliant Parties or cooperating non-Parties, including technical assistance and derogations to the implementation of given GFCM recommendations. Since the list of measures contained in Rule XIX, 1 (a), is introduced by the formula “as stated below”, it shall be considered exhaustive. Consequently, if the GFCM were to establish trade-related measures against a Party or a cooperating non-Party, such measures could be questioned as taken *ultra vires*.

In the light of the preceding considerations, it is advisable that the above Rule is amended if a trade-restrictive sanctioning scheme is adopted in the future.

²³⁴ Rule XIX.

²³⁵ *Infra*, para. 6.B.

In 2014, the GFCM adopted Recommendation GFCM/38/2014/2 concerning the identification of non-compliance²³⁶. It recalls “the obligation of all contracting Parties, cooperating non-contracting Parties and non-contracting Parties to respect the GFCM conservation and management measures when fishing in the GFCM area of application”²³⁷ and the awareness of “the necessity for coordinated and timely actions by all contracting Parties, cooperating non-contracting parties and non-contracting parties to ensure the enforcement of GFCM conservation and management measures”²³⁸. This wording may be understood in the sense that GFCM Parties assume that cooperating non-contracting Parties are bound by their commitment to abide by measures recommended under Art. 8 (b)²³⁹ and non-contracting Parties are bound by the rule of customary international law that prohibits the undermining of the effectiveness of conservation measures adopted by a RFMO.

Recommendation 38/2014/2, which is based on Arts. 5 (b), 8 (b) and 13 of the GFCM Agreement, addresses cases of non-compliance by both GFCM Parties and non-Parties, including cooperating non-Parties. Each year, the GFCM, through the Compliance Committee, is called, *inter alia*, to:

“Conduct, consistent with sub-paragraphs (iii) and (iv), a process of identification of cases of non-compliance by contracting parties that have not met their obligations under the GFCM Agreement in respect of the GFCM conservation and management measures, in particular, by failing to take the required measures and actions or to exercise effective control according to national rules and regulations to ensure compliance with conservation and management measures by the vessels flying their flag”²⁴⁰;

“Conduct, consistent with subparagraphs (iii) and (iv), a process of identification of cases of non-compliance by cooperating non-contracting parties and non-contracting parties that have failed to discharge their obligations under international law to cooperate with the GFCM in the management of marine living resources when fishing in the GFCM area of application, in particular, by failing to take measures or to exercise effective control according to national rules and regulations to ensure that their vessels do not engage in any fishing- or fisheries-related activity that undermines the effectiveness of GFCM conservation and management measures”²⁴¹.

²³⁶ Recommendation 38/2014/2 amends and repeals previous Recommendation GFCM/34/2010/3.

²³⁷ Preamble.

²³⁸ Preamble.

²³⁹ See the definition of cooperating non-contracting Party (*supra*, note 119).

²⁴⁰ Para. 1, i.

²⁴¹ Para. 1, ii.

The process of identification of cases of non-compliance is carried out in the light of all available and verifiable information and may lead, as appropriate, to requests for clarifications, letters of concern or letters of identification²⁴².

The process can have two different outcomes:

“The CoC [= Compliance Committee] shall evaluate the response of contracting parties, cooperating non-contracting parties and non-contracting parties to letters of identification, together with any new information, and propose to the Commission to decide upon one of the following actions:

a) the revocation of the identification; or

b) the continuation of the identification status of the contracting party, cooperating non-contracting party and non-contracting party. In these cases, the Commission shall recommend appropriate measures aiming at resolving situations of non-compliance, including non-discriminatory trade measures, to deter non-compliance by identified contracting parties, cooperating non-contracting parties or non-contracting parties”²⁴³.

The reading of this provision clearly shows that the Compliance Committee is bound to recommend appropriate measures to deter cases of identified non-compliance and that such measures may include “non-discriminatory trade measures”. This implies that the GFCM, while not bound to do so, is empowered to adopt recommended non-discriminatory trade measures²⁴⁴.

5.A.iii. Listing

Listing of IUU vessels is the type of follow-up measure predominant within the GFCM.

Whitelisting of certain vessels is today regulated by Recommendation GFCM/33/2009/6 concerning the establishment of a GFCM record of vessels over 15 metres authorized to operate in the GFCM area of application²⁴⁵. The Secretariat maintains the authorized vessels list²⁴⁶. Parties and cooperating non-Parties authorize vessels flying their flag to operate in the GFCM area of application

²⁴² See para. 1 (iii), (iv) and (v). Parties and cooperating non-contracting Parties are encouraged to “externally” co-operate in the process: “Contracting parties and cooperating non-contracting parties are encouraged jointly and individually to request the contracting parties, cooperating non-contracting parties and non-contracting parties concerned to rectify any act or omission identified so as not to diminish the effectiveness of the GFCM management measures. In addition, they shall cooperate to the greatest extent possible throughout the identification process to draw the attention of contracting parties, cooperating non-contracting parties and non-contracting parties to the need to implement in good faith the duty to cooperate in the conservation and management of marine living resources, consistent with international law” (para. 4).

²⁴³ Para. 5.

²⁴⁴ On trade-related corrective measures see *infra*, paras. from 4.B.iii to 4.B.vi.

²⁴⁵ It amended previous Recommendation GFCM/29/2005/2 and has been amended by Recommendation GFCM/44/2021/18.

²⁴⁶ Para. 4.

only if they are able to fulfil, in respect of these vessels, the requirements and responsibilities under the GFCM Agreement and its conservation and management measures²⁴⁷.

Blacklisting is today regulated by Recommendation GFCM/44/2021/19 on the establishment of a list of vessels presumed to have carried out IUU fishing²⁴⁸. Appropriately, the recommendation emphasizes the need to ensure that the identification of the vessels carrying out IUU fishing activities follows agreed procedures and is made in a fair, transparent and non-discriminatory manner²⁴⁹.

Recommendation 44/2021/19 provides that States shall transmit to the GFCM Secretariat every year, at least 120 days before the GFCM annual session, information on vessels (including those flying the flag of Parties) presumed to be carrying out IUU fishing activities. Upon receipt of such information, the GFCM Secretariat shall promptly send it to all concerned States, requesting them to investigate on the alleged IUU activity and monitor the relevant vessels²⁵⁰. Furthermore, the Secretariat shall request the flag State to notify the owner of the vessel concerned and transmit all the evidence supporting the presumption of IUU fishing, so that the flag State can communicate its comments, including evidence showing that the vessel was not engaged in IUU fishing²⁵¹. Vessel owners must also be notified by the flag State that they have been included in the draft IUU vessel list and informed of the consequences that may result from being confirmed in the GFCM IUU vessel list²⁵². The obligation to inform the interested owners is incumbent upon the flag State also in case the vessel is finally blacklisted²⁵³. While ensuring that vessel owners are duly informed, the procedure established by Recommendation 44/2021/19 might be improved by offering to them, as well as to captains, the opportunity to be heard.

On a yearly basis, the GFCM includes a vessel into, or removes it from, the GFCM IUU vessel list, in the light of new information and evidence and upon request of the Compliance Committee²⁵⁴. An accelerate delisting procedure is set for, to allow intersessional modifications of the GFCM IUU vessel list upon request of the flag State²⁵⁵.

²⁴⁷ Para. 5 (a).

²⁴⁸ Recommendation 44/2021/19 repeals previous Recommendation 33/2009/8.

²⁴⁹ Preamble.

²⁵⁰ Para. 4.

²⁵¹ Paras. 5 and 6.

²⁵² Para. 8.

²⁵³ Para. 14, a.

²⁵⁴ Paras. from 11 to 13.

²⁵⁵ Paras. from 22 to 26.

The inclusion of a vessel into the GFCM IUU vessel list implies that all Parties and cooperating non-Parties shall take the necessary measures to:

“a) ensure that the fishing vessels, support vessels, refuelling vessels, mother ships and cargo vessels flying their flag do not engage in fishing activities, fish processing operations nor participate in any transshipment or joint fishing operations with vessels included in the GFCM IUU vessel list, nor assist them in any way, except in case of force majeure;

b) ensure the inspection of vessels in the GFCM IUU vessel list if such vessels are otherwise found in their ports, to the extent practicable, and ensure the possibility to refuse port access to a ship that is in the GFCM IUU vessel list, except in the case of force majeure or for inspection purposes only;

c) prohibit the chartering of a vessel included in the GFCM IUU vessel list and encourage importers, transporters and other sector concerned to ban the transactions and the transshipment of any fish caught by vessels included in the GFCM IUU vessel list;

d) ensure that none of their nationals, whether a natural or legal person subject to their jurisdiction, benefit from supporting or engaging in IUU fishing activities (e.g. operators, effective beneficiaries, owners, logistic and service providers, including insurance providers and other financial service providers);

e) collect and exchange with other CPCs any appropriate information with the aim of searching for, controlling and preventing false documentation (including import/export certificates) from vessels included in the GFCM IUU vessel list; and

f) monitor vessels included in the GFCM IUU vessel list and promptly submit any information to the GFCM Secretariat related to their activities and possible changes of name, flag, call sign and/or registered owner²⁵⁶.

Furthermore, all Parties and cooperating non-Parties different from the flag State must take the following measures against the listed vessels: ensuring that they are not authorized to land, refuel, resupply or engage in other commercial transactions; prohibiting the entry into their ports to vessels, except in case of force majeure; refusing to grant their flag to them, except if a vessel has changed owner and/or operator and sufficient evidence has been provided to demonstrate that the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel, or if the flag Party or cooperating non-Party, after considering all relevant facts, determines that granting the vessel its flag will not result in any IUU fishing activity; and prohibiting the imports, landing and/or transshipment of any fish from them²⁵⁷.

²⁵⁶ Para. 15.

²⁵⁷ Para. 16.

As to the flag States whose vessels appear in the list, they must “take all necessary measures to eliminate relevant IUU fishing activities including, as appropriate, cancelling the registration and/or the fishing licence(s) of the vessels, and inform the GFCM Secretariat of the measures taken”²⁵⁸.

Since 1996 the GFCM has collaborated with ICCAT on matters concerning tuna and tuna-like fish stocks and incorporates in its list those vessels included in the IUU vessel list by ICCAT, following the procedure under Recommendation 44/2021/19.

5.A.iv. Catch Documentation Schemes

A catch documentation scheme is another follow-up measure adopted by the GFCM, even if occasionally and provisionally. Under Recommendation GFCM/44/2021/17 a catch certificate scheme has been established for turbot fisheries in the Black Sea. While currently the scheme is in a pilot phase, the GFCM at its forty-sixth session in 2023 is expected to adopt a permanent GFCM catch documentation scheme for turbot, to be implemented starting from 1 January 2025. In any case, account should be taken of the presence in GFCM practice of an instance of catch documentation scheme, that is a measure of fundamental importance for the effective implementation of trade-related measures.

5.A.v. The Ongoing Discussion on “Appropriate Measures”

Today a review process is being undertaken by the GFCM, as emphasized in the GFCM 2030 Strategy, adopted in 2020, which includes an explicit commitment for the adoption of “a sanction scheme targeting cases of non-compliance, including reported infringements by fishing vessels operating in fisheries restricted areas”²⁵⁹. Before that, the need to improve the compliance mechanism and introduce more effective measures to deter non-compliance had been highlighted in the context of the second performance review of the GFCM, carried out in 2019 by an external panel of experts.

In the same period, GFCM has adopted three resolutions²⁶⁰ aimed at improving the performance of the GFCM through follow-up measures.

²⁵⁸ Para. 14 (b).

²⁵⁹ Action D of output 2.1 (Full compliance with GFCM recommendations achieved) of Target 2 (Compliance and enforcement: a level playing field to eradicate IUU fishing).

²⁶⁰ Resolutions are not mentioned in the GFCM Agreement. While it is clear that they are not binding for member States (as contrasted to GFCM recommendations), their legal value is not clarified in the Rules of Procedure. By adopting resolutions, the Commission can certainly make its views known to States and suggest a line of action without imposing any legal obligation on them. It is also argued that resolutions can produce binding effects if they have an organizational character or are addressed to subsidiary bodies, like the Compliance Committee.

The first is Resolution GFCM/43/2019/5 on a compliance assessment scheme for the implementation of Recommendation 38/2014/2²⁶¹. Recognizing that “compliance with GFCM conservation and management measures is critical to the success of the GFCM”²⁶², Resolution 43/2019/5 stresses that cases of non-compliance should be addressed in a concrete, transparent and non-discriminatory manner, in accordance with the principle of proportionality and taking into account the need to remain flexible in dealing with the individual situations of each contracting party and cooperating non-contracting party”²⁶³, given that “not all non-compliance cases are of the same level of severity and impact on the effectiveness of GFCM conservation and management measures or on the work of the GFCM”²⁶⁴.

Resolution 43/2019/5 requests the GFCM Secretariat, in preparation of the session of the Compliance Committee, to produce a compliance assessment scheme for each Party or cooperating non-Party concerned²⁶⁵. The scheme includes, for each individual case of non-compliance, a categorization and evaluation of severity, based on the criteria set in the Annex (category A: conservation and/or management measures²⁶⁶; category B: reporting requirements²⁶⁷; category C: monitoring, control and surveillance measures²⁶⁸) and assesses the level of severity of each individual case of non-compliance in accordance with the definitions provided in the Annex (minor non-compliance²⁶⁹; significant non-compliance²⁷⁰), taking into account mitigating²⁷¹ or aggravating²⁷²

²⁶¹ On Recommendation 38/2014/2 see *supra*, para. 5.A.ii.

²⁶² Preamble.

²⁶³ Preamble.

²⁶⁴ Preamble.

²⁶⁵ Para. 1.

²⁶⁶ Including, *inter alia*, failure to respect effort/catches/landings limits, failure to restrict fleet size or other capacity measures, failure to implement spatio-temporal closures, failure to implement minimum conservation reference size restrictions and failure to implement gear restrictions.

²⁶⁷ Including, *inter alia*, failure to report or delay in reporting data and other required data and failure to submit or delay in submitting reports.

²⁶⁸ Including, *inter alia*, failure to exercise port state control, including port inspection requirements, failure to exercise flag state control and failure to implement monitoring, control and surveillance measures, including, *inter alia*, catch documents/statistical document programmes (transshipment control), and vessel monitoring system requirements.

²⁶⁹ Failures which are first time or infrequent and do not significantly impact the work of the Compliance Committee or diminish the effectiveness of GFCM conservation and management decisions.

²⁷⁰ Non-compliance issues reflect a systematic disregard by the relevant CPCs [= contracting Parties and cooperating non-contracting Parties] of GFCM measures or infrequent (and even first time) violations that individually or collectively have a significant impact on the objectives of the GFCM or its subsidiary bodies or diminish the effectiveness of GFCM conservation and management measures. These non-compliance issues could include frequent non-reporting or insufficient reporting that impact on the Compliance Committee ability to effectively evaluate the compliance of a CPC.

²⁷¹ Including, *inter alia*, the extent to which available capacity-building and assistance programmes have been used by a CPC [= contracting Parties and cooperating non-contracting Parties] to improve its ability to meet its GFCM obligations and any action taken by a CPC to address its non-compliance or by a third party CPC in response to the non-compliance of another CPC's vessel.

²⁷² Including, *inter alia*, non-compliance that is repeated, frequent, numerous, and/or severe in degree, scope, and/or effect, individually or cumulatively and lack of effective corrective action by the flag CPC or by the third party CPC, if appropriate.

considerations²⁷³. Highest priority should be given to determining and addressing significant non-compliance, although responsive action may also be warranted in other cases²⁷⁴.

Resolution 43/2019/5 mandates the Compliance Committee to propose to the GFCM appropriate measures with regard to the categories and gravity of non-compliance.

The second instrument worth of consideration is Resolution GFCM/44/2021/11 on the follow-up of the second GFCM performance review, which also establish as a priority the improvement of the process for the identification of non-compliance set forth in Recommendation 38/2014/2, by ranking instances of non-compliance as a function of their seriousness²⁷⁵. This Resolution reiterates the necessity to identify a list of proportionate measures to address different categories of non-compliance cases identified by the Compliance Committee. Among them, emphasis is put on the duty of States to inform the GFCM of actions intended and planned to resolve their instances of non-compliance²⁷⁶.

In the same session, the GFCM adopted Resolution GFCM/44/2021/13 on appropriate measures to deter non-compliance, whose purpose is to establish measures with regard to the categories and the gravity of non-compliance, as referred to in the annex to Resolution 43/2019/5²⁷⁷.

Under Resolution 44/2021/13, the result of the compliance assessment made by the GFCM Secretariat for each Party or cooperating non-Party may lead to a sanction, according to the gravity of the non-compliance²⁷⁸. For Parties or cooperating non-Parties falling under non-compliance categories A and B, the Secretariat is asked to send letters of identification in relation to the recurrent situation of non-compliance or the lack of information submitted to the Compliance Committee²⁷⁹. The Secretariat is also called to assist the concerned Party or cooperating non-Party in developing a roadmap for the adequate implementation of its obligations²⁸⁰. For Parties or cooperating non-Parties falling under non-compliance category C, the Secretariat is asked to inform the Compliance Committee and the GFCM about their efforts in ensuring full compliance²⁸¹.

²⁷³ Para. 2.

²⁷⁴ Para. 5.

²⁷⁵ Para. 35.

²⁷⁶ Para. 35.

²⁷⁷ Para. 1.

²⁷⁸ Para. 2.

²⁷⁹ Para. 3.

²⁸⁰ Para. 4.

²⁸¹ Para. 5.

For cases of confirmed non-compliance, Resolution 44/2021/13 asks the Compliance Committee to “recommend to the GFCM the adoption of appropriate measures in relation to the category and the gravity of non-compliance among those listed in the annex to Resolution GFCM/43/2019/5”²⁸². Before being categorized as cases of non-compliance, the Secretariat and Compliance Committee are bound to investigate all possible cases and to consult with the Party or cooperating non-Party concerned on the causes of such incidences and on possible solutions²⁸³. The Compliance Committee is also asked to develop a compliance scoreboard that reflects the compliance assessments produced by the Secretariat, taking into account both the category and the gravity of situations of non-compliance by Parties or cooperating non-Parties. The scoreboard is made publicly available on the GFCM website, in a manner consistent with GFCM data confidentiality policy and procedures²⁸⁴.

Resolution 44/2021/13 asks the Compliance Committee to categorize under category A with a “significant non-compliance” any confirmed incidence of non-authorized vessels operating within fisheries restricted areas and adopt deterrent sanctions accordingly, including listing the non-compliant vessels in the provisional GFCM list of vessels presumed to have carried out illegal, unreported and unregulated fishing in the GFCM area of application (GFCM IUU vessel list) and to categorize under category B with a “significant non-compliance” any confirmed incidence where, after being consulted by the GFCM Secretariat on such incidence, the Party or cooperating non-Party still does not provide the required information about the implementation of monitoring, control and surveillance measures in fisheries restricted areas or still does not report information about vessels operating in such areas in the list of authorized vessels²⁸⁵. This approach appears particularly appropriate in order to foster transparency and predictability in decision making.

While suggesting the adoption of appropriate measures, as a reaction to instances of confirmed non-compliance, Resolution 44/2021/13 does not indicate what kind of measures should be taken, in order to address the most serious and persistent cases of non-compliance or lack of cooperation. Rather, it invites the Compliance Committee to

“discuss, at its fifteenth session, on the appropriate measures that the GFCM should recommend in relation to cases of confirmed non-compliance, in order to adopt an annex containing these measures as relating to the relevant category and gravity of non-compliance”²⁸⁶.

²⁸² Para. 7.

²⁸³ Para. 9.

²⁸⁴ Para. 8.

²⁸⁵ Para. 11.

²⁸⁶ Para. 6.

At its fifteenth session, held in 2022 in Larnaca, the Compliance Committee started a discussion on appropriate measures for cases of confirmed non-compliance that will be finalized after an analysis on the practice of other RFMOs:

“In the ensuing discussions, questions were raised as to whether sanctions could be adopted by RFMOs against situations of non-compliance, what legal basis would permit the adoption of sanctions and what kind of sanctions would be admissible under international law, if any. Reference was made to the ongoing work of the GFCM to promote positive measures to increase compliance, such as the provision of technical assistance to CPCs [= contracting Parties and cooperating non-contracting Parties], and there was consensus that this work should continue into the next intersessional period. There was also agreement on working during the next intersessional period on preparing a technical report analysing the practices of other RFMOs. The GFCM Secretariat was invited to liaise, to the maximum extent possible, with the Secretariats of other RFMOs to collect pertinent information and present it within the context of this technical report, which would be submitted at the session of the Commission in 2023 to support the ongoing discussions on the implementation of Resolution GFCM/44/2021/13”²⁸⁷.

This discussion on measures that are crucial to ensure the effectiveness of the GFCM system will hopefully find its outcome in the forthcoming meeting of the GFCM.

5.B. ICCAT

5.B.i. Compliance Committee

In 2008, ICCAT established a process for the review and reporting of compliance information (Recommendation 08-09), asking Parties and cooperating non-Parties, entities or fishing entities to submit to the Secretariat documented information that indicates non-compliance with conservation and management measures, as well as the findings of any investigation taken in relation of allegations of non-compliance. Notably, non-governmental organizations are granted the right to submit reports on issues of non-compliance:

“Non-governmental organizations may submit reports on non-compliance with ICCAT conservation and management measures to the Secretariat at least 120 days before the annual meeting for circulation to the CPCs [= contracting Parties and cooperating non-contracting Parties, entities or fishing entities]. Organizations submitting reports may request to present such reports to the Compliance Committee and the Permanent Working Group. In adopting the Agendas for meetings of the respective bodies CPCs shall determine if such presentations can be accommodated”²⁸⁸.

²⁸⁷ FAO GFCM, *Report of the Fifteenth Session of the Compliance Committee*, 2022, para. 11.

²⁸⁸ Para. 5.

In 2011, ICCAT enlarged the mandate of the Compliance Committee and required it to make recommendations to it to address issues of non-compliance or lack of cooperation with conservation and management measures (Recommendation 11-24²⁸⁹).

In 2016, ICCAT adopted Resolution 16-17 establishing a schedule of actions to improve compliance and co-operation with ICCAT measures. The ICCAT non-compliance process is divided into three steps. The first step is the “determination of category of non-compliance”, which includes category A (Conservation and/or management)²⁹⁰, category B (reporting requirements)²⁹¹ and category C (monitoring, control and surveillance measures)²⁹². The second step is the “determination of the severity of non-compliance”, which includes “minor non-compliance” and “significant non-compliance”, as well as mitigating and aggravating considerations.

The third step is the “application of actions to address compliance failures, where warranted”. Upon a determination that non-compliance has occurred pursuant to the first step and that further action by ICCAT is warranted pursuant to the second step, actions should be taken or required in one or more of the following categories: enhanced reporting requirements, restrictions on fishing activities, additional monitoring, control and surveillance requirements, and/or, as a last resort, trade restrictive measures.

In that regard, Resolution 16-17 provides a non-exhaustive, non-prioritized list of actions that could be taken or required by type of non-compliance. In case of category A non-compliance, the following actions are listed:

- “- Additional reporting requirements, possibly including more frequent catch reporting;
- Fishery restrictions, possibly including: reduction in quota allocation(s), additional quota/catch limit reductions;
- Enhanced MCS [monitoring, control and surveillance] requirements, possibly including: enhanced reporting requirements, limitations on at sea transshipment, increased port sampling and/or inspection, increased

²⁸⁹ Para. 3, f.

²⁹⁰ This category includes failure to limit catches/landings to agreed limits, failure to restrict fleet size or other capacity measures to agreed limits, failure to implement time/area closures, failure to implement minimum size restrictions and failure to implement gear restrictions/limitations.

²⁹¹ This category includes failure to report or delay in reporting statistical and other required data and failure to submit or delay in submitting reports.

²⁹² This category includes failure to implement MCS [= monitoring, control and surveillance] measures, including, *inter alia*, catch documentation schemes/statistical document programs, observer programs, transshipment controls, and VMS [= vessel monitoring system] requirements, failure to exercise port CPC [= Contracting Parties and cooperating non-contracting Parties, entities or fishing entities] controls, including port inspection requirements and failure to exercise flag CPC controls.

observer requirements, enhanced VMS [= vessel monitoring system] requirements (fleets covered or polling rate used);

- Fishery restrictions, possibly including: individual vessel quota requirements, bycatch retention limit requirements, size class limitations, fleet capacity limits or reductions, time and/or area restrictions, gear restrictions or requirements;

- Trade restrictive measures”.

In case of category B non-compliance, the following actions are listed:

- “- Additional reporting requirements, possibly including: more frequent reporting, submission of a data improvement and/or reporting plan with required reporting on implementation;

- Enhanced MCS requirements, possibly including: increased observer coverage requirements for data collection, increased port sampling requirements, enhanced VMS requirements (fleets covered or polling rate used);

- Fishery restrictions, possibly including: allocation or quota/catch limit reductions, limitations/reductions in fleet capacity levels, increased port inspection, limitations on or loss of right to implement certain ICCAT recommendations, such as to charter or conduct at sea transshipment;

- Trade restrictive measures”.

In case of category C non-compliance, the following actions are listed:

- “- Additional reporting requirements, possibly including: more frequent reporting, submission of a performance improvement plan with required reporting;

- Enhanced MCS requirements, possibly including: increased observer coverage requirements, possibly including use of ICCAT observers, increased port controls, such as more frequent port calls, expanded inspection requirements, and/or designation of authorized ports, limitations on or prohibition of at sea transshipment, enhanced VMS requirements (fleets covered or polling rate used);

- Fishery restrictions, possibly including allocation or quota/catch limit reductions, limitations/reductions in fleet capacity levels, restrictions on posting vessels to the authorized vessel list, placement of vessels on the IUU vessel list, requirement to specify individual vessel quotas

- Trade restrictive measures”.

Suffice here to notice that this third step is lacking in the corresponding GFCM Resolution 43/2019/5²⁹³.

²⁹³ *Supra*, para. 5.A.v.

5.B.ii. Listing

In 2021, ICCAT, desiring to streamline and improve IUU listing procedures and requirements in previous ICCAT recommendations and resolutions, adopted Recommendation 21-13, establishing a list of vessels presumed to have carried out IUU fishing activities. CPCs are bound to take all necessary measures, under their applicable legislation to:

“– ensure that the fishing vessels, support vessels, refuelling vessels, the mother-ships and the cargo vessels flying their flag do not assist in any way, engage in fishing processing operations or participate in any transshipment or joint fishing operations with vessels included on the IUU Vessels List;

– ensure that IUU vessels are not authorized to land, tranship re-fuel, re-supply, or engage in other commercial transactions; prohibit the entry into their ports of vessels included on the IUU list, except in case of force majeure, unless vessels are allowed entry into port for the exclusive purpose of inspection and effective enforcement action;

– ensure the inspection of vessels on the IUU list, if such vessels are otherwise found in their ports, to the extent practicable;

– prohibit the chartering of a vessel included on the IUU vessels list;

– refuse to grant their flag to vessels included in the IUU list, except if the vessel has changed owner and the new owner has provided sufficient evidence demonstrating the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel, or having taken into account all relevant facts, the flag CPC determines that granting the vessel its flag will not result in IUU fishing;

– prohibit the import, or landing and/or transshipment, of tuna and tuna-like species from vessels included in the IUU list;

– encourage the importers, transporters and other sectors concerned, to refrain from transaction and transshipment of tuna and tuna-like species caught by vessels included in the IUU list;

– collect and exchange with other CPCs any appropriate information with the aim of searching for, controlling and preventing false documentation (including import/export certificates) regarding tunas and tuna-like species from vessels included in the IUU list; and

– monitor vessels included in the IUU list and promptly submit any information to the Executive Secretary related to their activities and possible changes of name, flag, call sign and/or registered owner”²⁹⁴.

The ICCAT Secretary will ensure publicity of the IUU vessel list through electronic means, by placing it, along with any additional supporting information on the vessels and IUU activities, on a dedicated portion of the ICCAT website²⁹⁵.

²⁹⁴ Para. 9.

²⁹⁵ Para. 10.

5.B.iii. Fishing Prohibitions

In 2011, ICCAT adopted Recommendation 11-15 on penalties applicable in case of non-fulfilment of reporting obligations. It provides that CPCs that do not report data, including zero catches, for one or more species for a given year, in accordance with data reporting requirements, are prohibited from retaining such species as of the year following the lack or incomplete reporting, until such data have been received by the ICCAT Secretariat²⁹⁶.

5.B.iv. Trade-restrictive Measures

Already in 2006, ICCAT adopted Recommendation 06-13 concerning trade-restrictive measures²⁹⁷. It is based on the assumptions that

“trade restrictive measures should be implemented only as a last resort, where other measures have proven unsuccessful to prevent, deter and eliminate any act or omission that diminishes the effectiveness of ICCAT conservation and management measures; (...)

trade restrictive measures should be adopted and implemented in accordance with international law, including principles, rights and obligations established in World Trade Organization (WTO) Agreements, and be implemented in a fair, transparent and non-discriminatory manner. on trade”²⁹⁸.

Under Recommendation 06-13, Parties and cooperating non-Parties, entities or fishing entities²⁹⁹ that import tuna and tuna-like fish or fish products or in whose ports those products are landed shall identify such products, collect and examine the relevant import, landing or associated data, in order to submit the relevant information in a timely manner to the ICCAT Secretariat for distribution to the other CPCs to collect any additional element in order that the Commission can identify each year vessels that caught and produced such tuna or tuna-like species products, farming facilities, tuna and tuna-like species of the products, areas of catch, product weight by product type and points of export³⁰⁰. The ICCAT, through its subsidiary bodies (the Compliance Committee or the Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures³⁰¹), shall identify each year the CPCs that have failed to discharge their obligations under the ICCAT Convention in respect of conservation and management measures, as well as the non-contracting

²⁹⁶ Para. 3. Resolution 15-09 established guidelines for the implementation of Recommendation 11-15.

²⁹⁷ Recommendation 06-13 repeals Resolution 03-15 concerning trade measures.

²⁹⁸ Preamble.

²⁹⁹ In this paragraph: CPCs.

³⁰⁰ Para. 1.

³⁰¹ In this paragraph: PWG.

Parties, entities or fishing entities³⁰² that have failed to discharge their obligations under international law to co-operate with ICCAT in the conservation and management of tuna and tuna-like species.

In deciding whether to make identification, all relevant matters should be considered, including the history, as well as the nature, circumstances, extent, and gravity of the act or omission that may have diminished the effectiveness of conservation and management measures³⁰³. The ICCAT is called to request the CPCs and NCPs concerned to rectify the act or omission identified. Subsequent to the notification, CPCs and NCPs concerned are granted the opportunity to respond to the ICCAT in writing with regard to the identification decision and other relevant information, for example, evidence refuting the identification or, where appropriate, a plan of action for improvement and the steps they have taken to rectify the situation³⁰⁴. The Compliance Committee or the PWG should evaluate the response of the CPCs or NCPs, together with any new information, and propose to the ICCAT to decide upon one of the following actions, namely the revocation of the identification, the continuation of the identification status or the adoption of non-discriminatory trade restrictive measures³⁰⁵.

As regards the measures that can be adopted, Recommendation 06-13 provides that, in the case of CPCs, actions such as the reduction of existing quotas or catch limits should be implemented to the extent possible before consideration is given to the application of trade restrictive measures and that trade measures should be considered only where such actions either have proven unsuccessful or would not be effective³⁰⁶. Trade restrictive-measures, consistent with Parties international obligations, are decided by the ICCAT in the form of a recommendation, pursuant to Art. VIII of the ICCAT Convention³⁰⁷.

CPCs shall notify the Commission of any measures that they have taken for the implementation of the non-discriminatory trade-restrictive measures adopted by ICCAT³⁰⁸. The Compliance Committee or the PWG review each year all trade-restrictive measures adopted. Should the review show that the situation has been rectified, they recommend to the Commission the lifting

³⁰² In this paragraph: NCPs.

³⁰³ Para. 2.

³⁰⁴ Para. 3.

³⁰⁵ Para. 6.

³⁰⁶ Para. 6.

³⁰⁷ Para. 7. This means that the recommendation has a binding character, unless for Parties having cast an objection. On the trade-restrictive measures so far adopted by the ICCAT see *supra*, para. 4.B.iv.

³⁰⁸ Para. 8.

of such measures. This decision should also take into consideration whether the CPCs or NCPs concerned have taken concrete measures capable of achieving lasting improvement of the situation³⁰⁹.

5.B.v. Catch Documentation Schemes

In 2012, ICCAT adopted Recommendation 12-09 in order to establish a process for the future adoption of a catch certification scheme for tuna and tuna-like species. Recommendation 12-09 recognizes the impact that market factors have on the fishery and underlines the complementary role that importing States also have in the control of the catches of tuna and tuna-like species to ensure compliance with ICCAT conservation and management measures³¹⁰. However, it also recognizes that properly tracing tuna and tuna-like species from the point of capture to their final import has significant operational and technical aspects that would need to be addressed for any effective catch certification scheme³¹¹.

In 2018, a bluefin tuna catch documentation scheme for the purpose of identifying the origin of any bluefin tuna was adopted by ICCAT under Recommendation 18-13. It provides that any landing, transfer, delivery, harvest, domestic trade, import, export or re-export of bluefin tuna without a completed and validated bluefin tuna catch document or bluefin tuna re-export certificate is prohibited³¹². Catching vessel masters, trap operators or operators of farms are bound to complete the bluefin tuna catch document by providing the required information and request validation of it by an authorized government official³¹³. Operators who are responsible for the re-export are bound to complete the bluefin tuna re-export certificate and request validation of it by an authorized government official³¹⁴.

CPCs are bound to communicate a copy of all validated documents or certificates to the competent authorities of the country where the bluefin tuna will be domestically traded, transferred into a cage or imported, as well as to the ICCAT Secretariat³¹⁵. CPCs shall ensure that their competent authorities take steps to identify each consignment of bluefin tuna landed in, domestically traded in, imported into or exported or re-exported from their territory and request and examine the validated

³⁰⁹ Para. 9.

³¹⁰ Preamble.

³¹¹ Preamble.

³¹² Para. 3.

³¹³ Paras. 11 and 13.

³¹⁴ Paras. 15 and 16.

³¹⁵ Para. 19.

documentation of each consignment of bluefin tuna³¹⁶. Annexes to Recommendation 18-13 specify all the data to be included in the relevant documentation.

Recommendation 18-13 was amended in 2021 by Recommendation 21-19, providing that CPCs shall validate the bluefin tuna catch document only when all the information contained in it has been established to be accurate as a result of the verification of the consignment, when the accumulated validated amounts are within their quotas or catch limits of each management year and when the products comply with other relevant ICCAT provisions of the conservation and management measures.

In 2022, Recommendation 22-16 established an electronic bluefin tuna catch document and provided that paper documents will no longer be accepted³¹⁷. It notes the ability of electronic catch documentation systems to detect fraud and deter IUU shipments, expedite the validation and verification process of bluefin tuna catch documents, prevent erroneous information entry, reduce pragmatic workloads and create automated links between Parties including exporting and importing authorities³¹⁸.

5.C. IOTC

5.C.i. Compliance Committee

Art. X of the IOTC Convention sets a monitoring mechanism, whereby each member must transmit to the Commission an annual statement on the actions it has taken under its domestic law, to implement the constituent instrument and the binding acts enacted by the organization. Such statement must be transmitted to the Secretary of the Commission no later than 60 days before the annual session of the Commission³¹⁹. Pursuant to Art. X, para. 3, members shall cooperate through the Commission in the establishment of “an appropriate system to keep under review the implementation of conservation and management measures (...) taking into account appropriate and effective tools and techniques to monitor the fishing activities”.

In 2002, the IOTC established a Compliance Committee to monitor the implementation of the IOTC Agreement and conservation and management measures, in order to detect cases of non-compliance and assist in enhancing compliance capacity. Furthermore, in 2017 a permanent Working Party on the Implementation of Conservation and Management Measures was established, which is

³¹⁶ Para. 22.

³¹⁷ Para. 2.

³¹⁸ Preamble.

³¹⁹ Art. X, para. 3.

composed of fisheries compliance officers, scientists, fisheries managers, fishing industry representatives and other interested stakeholders³²⁰. This advisory body assists the Compliance Committee to alleviate its workload and time pressure.

The non-compliance mechanism is regulated by Resolution 10/10 concerning market-related measures. As far as the procedural aspects are concerned, the listing procedure is based on the typical “yellow and red card” approach. The identification of non-compliance by Parties, cooperating non-Parties and non-Parties is made by the Compliance Committee, taking into account national implementation reports and, as appropriate, any other relevant information³²¹. Like in other compliance system, the Commission notifies the reasons for the identification, offering to the identified State (or international organization, in the case of the European Union) the opportunity to respond and provide evidence³²². The answers of the identified State are evaluated by the Compliance Committee, which recommends actions to be taken by the Commission, including the revocation of the identification, the reduction of quotas or non-discriminatory trade-related measures³²³. On a yearly basis the Compliance Committee must carry out a review of market-related measures and recommend to the Commission the lifting of the said measures if it deems that the situation of non-compliance has been rectified.

The Commission has undergone two reviews of its performance in 2007 and 2013, which have also prompted a debate on how to solve gaps and deficiencies in the compliance system to make it more effective. In this connection, it is important to note that the proposal made by the European Union to amend the Compliance Committee Terms of Reference and Rules of Procedure (contained in the Appendix V of the IOTC Rules of Procedure), after having been endorsed by the Compliance Committee itself, was finally adopted with minor changes by the Commission at its 27th session in May 2023³²⁴. This is a long-awaited amendment, if one considers that the European Union proposal had been first circulated in 2018. Overall, the revision improves the IOTC system, by introducing a better structured and integrated approach for the evaluation of non-compliance.

The revised Compliance Committee Terms of Reference and Rules of Procedure³²⁵, at Annex A, identify different compliance statuses, namely “compliant”, “partially compliant” and “capacity building in progress”; two different categories of the “non-compliant” status are also identified,

³²⁰ Resolution 17/02, Working Party on the Implementation of Conservation and Management Measures.

³²¹ Para. 2, b.

³²² Para. 3.

³²³ Para. 5.

³²⁴ *Report of the 27th Session of the Indian Ocean Tuna Commission*, 2023, para. 90.

³²⁵ Annex A to Appendix V to the IOTC Rules of Procedure.

depending on which are the conducts attributable to the Party or cooperating non-Party. For instance, a State is deemed to be “non-compliant category 1” if it has failed to meet a reporting or submission deadline by more than 15 days, while it is considered “non-compliant category 2” if it has failed to respect a catch limit deduction resulting from an over-catch. In relation to each compliance status, Annex A identifies possible follow-up actions to be taken by the identified State (or international organization in the case of the European Union) and by the Compliance Committee, to be endorsed by the Commission³²⁶.

However, concerning the reaction to non-compliance, there has been no progress at all towards more effective sanctions. Indeed, the very word “sanctions” has been replaced by the more neutral and all-encompassing expression “follow-up actions” in the provision which identifies as one of the tasks of the Compliance Committee, the one of developing “a scheme of incentives and, where appropriate, other follow-up actions including a mechanism for their application to encourage compliance by all CPCs [= Parties and contracting non-Parties]”³²⁷.

Most of the follow-up actions indicated in Annex consists in corrective measures to be adopted by the non-compliant Party or cooperating non-Party, such as providing additional information, submitting a plan on how it intends to address non-compliance, enhance the monitoring of its fleet, amending its legislation, etc. As concerns follow-up actions to be taken by the IOTC, the Annex mainly refers to incentives (provision of capacity building and technical assistance), and in certain cases to not better specified “other remedies”. While not certainly encouraging the adoption of sanctions like import bans or quota reductions, Annex A appears however flexible enough to allow for the adoption by the Commission of those follow-up measures envisaged by Resolution 10/10.

Another relevant innovation concerns the Provisional IOTC Provisional Compliance Report, elaborated by the Compliance Committee with the assistance of the Secretary. This Report records

“any compliance issues identified, including an assessment of compliance status in accordance with Annex A. The IOTC Provisional Compliance Report shall record suggested follow-up actions in respect of compliance issues identified, in accordance with Annex A, including timeframes for implementation”³²⁸.

Where appropriate, it shall also include recommendations to the Commission regarding:

“i) any remedial action taken, or proposed to be taken, by the CPC [= Parties or cooperating non-Parties];

³²⁶ *Infra*, para. 5.C.iv.

³²⁷ Para. 3 (b), (iv).

³²⁸ Para. 5 (b).

ii) priority obligations to be reviewed for the next compliance assessment cycle, during the process described in paragraphs 4, 5 and 6; and

iii) other responsive action, including incentive measures which may be considered by the Commission as appropriate³²⁹.

The IOTC Provisional Compliance Report is used by the Commission as the basis for the adoption of the IOTC Final Compliance Report, with amendments as required.

5.C.ii. Listing

The procedure for the listing of IUU fishing vessels is set forth by Resolution 18/03 and is not characterized by significant differences distinguishing it from that followed by other RFMOs. A couple of elements are however worth noting. First, Resolution 18/03 binds the flag State to notify not only the owner, but also the operator and the master of the concerned vessel, of the fact of its inclusion in the IOTC Draft IUU Vessel List³³⁰ and subsequently in the IOTC IUU Vessel list³³¹. Second, beyond receiving information about alleged IUU fishing activities by Parties and cooperating non-Parties, the IOTC Executive Secretary can also receive information and intelligence from third States and non-State actors (“third parties”)³³².

The typical sanctions are adopted against the owners and operators of the listed vessels, which include prohibiting the import, landing or transshipment of tuna and tuna-like species from the blacklisted vessels, prohibiting the chartering of such vessels, prohibiting entry into ports, etc.³³³.

5.C.iii. Fishing Prohibitions

The IOTC has also in place a specific mechanism of fishing prohibition applicable in case of non-fulfilment of reporting obligations. Under Resolution 18/07,

“Following the review carried out by the Compliance Committee, the Commission at its annual session, according to the guidelines attached (Annex I), and after having given due consideration to the relevant information provided by the concerned CPCs [= contracting Parties and cooperating non-Parties] in these cases, may consider to prohibit CPCs that did not report nominal catch data (exclusively), including zero catches, for one or more species for a given year, in accordance with the Resolution 15/02, paragraph 2 (or any subsequent revision), from retaining such species as of the year following the lack or incomplete reporting until such data

³²⁹ Para. 5 (d).

³³⁰ Para. 9 (a).

³³¹ Para 20, a, mentioning only the owner and operator of the vessel.

³³² Para. 7. This notion has been interpreted as including non-governmental organizations: see, for instance, IOTC circular 2023-53, concerning a vessel activity notification from Environmental Justice Foundation.

³³³ Para. 21.

have been received by the IOTC Secretariat. Priority shall be given to situations of repeated non-compliance. Any CPC unable to meet these reporting obligations owing to engagement in civil conflict shall be exempt from this measure. The CPC concerned will work with the IOTC Secretariat to identify and implement possible alternative methods for data collection, using established FAO data collection methods³³⁴.

The co-existence of two different regimes has been criticized by an author, according to whom non-reporting of data should have been included within the general regime of Resolution 10/10, instead of falling under a separate more lenient compliance regime³³⁵.

5.C.iv. Trade-restrictive Measures

The IOTC is one of those RFMOs that have established a mechanism providing for trade-sanctions in case of non-compliance with conservation and management measures.

The IOTC Convention does not contain specific provisions on follow-up measures, even if a saving clause attributes to the Commission the power to “adopt decisions and recommendations, as required, with a view to furthering the objectives of this Agreement”³³⁶. In any case, already in 1999, the organization adopted a resolution (still into force), foreseeing trade-restrictive measures aimed to prevent and eliminate fishing activities by large scale flag of convenience longline vessels³³⁷.

It is currently the above-mentioned Resolution 10/10³³⁸ which, if all other measures to encourage compliance have not been successful, empowers the IOTC to take market-related measures to be “adopted and implemented in accordance with international law, including principles, rights and obligations established in WTO Agreements, and be implemented in a fair, transparent and non-discriminatory manner”³³⁹. Even if not further detailed, the expression “market-related measures” may be interpreted as encompassing proportionate trade-restrictive measures, notably import bans. It should be noted however that there has been no use of trade sanctions in the practice of the organization so far.

Trade-related measures may be taken against Parties and cooperating non-Parties, which have failed to abide by conservation and management measures, and against non-Parties which have failed to discharge their obligations under international law not to undermine the effectiveness of IOTC

³³⁴ Resolution 18/07 on Measures Applicable in Case of Non-Fulfilment of Reporting Obligations in the IOTC, para. 3.

³³⁵ HOSCH, *Increasing* cit., p. 15.

³³⁶ Art. V, para. 3.

³³⁷ Resolution 99/02, Calling for Actions against Fishing Activities by Large Scale Flag of Convenience Longline Vessels, para. 7, instructing the IOTC Secretariat “to prepare possible measures including trade restrictive measures to prevent or eliminate FOC [= flags of convenience]”.

³³⁸ *Supra*, para 5.C.i.

³³⁹ Preamble.

conservation and management measures³⁴⁰. In particular, trade-related measures are intended to address non-compliance by States in their quality as flag States³⁴¹.

Resolution 10/10 foresees trade-related measures also against Parties. However, pursuant to its para. 5, in the case of Parties and cooperating non-Parties, before considering the adoption of trade-restrictive measures, the Commission should implement actions such as the reduction of existing quotas or catch limits, unless it appears clear that they would not be effective.

5.C.v. Catch Documentation Schemes

Negotiations are still ongoing for the establishment of a IOTC catch documentation scheme³⁴².

6. The Consistency of Trade-related Measures with WTO Law

Thanks also to improved transport and refrigeration techniques, fish and fish products are among the most traded food commodities: around 40 percent of the world fish catch is traded internationally³⁴³ – a trade amounting to more than US\$ 140 billion³⁴⁴.

The entire seafood supply chain – from the harvesting vessel to the final consumer’s kitchen – is increasingly complex and globalized. It involves many different actors (importers, transporters, buyers, food processors, equipment suppliers, distributors, insurers, etc.), often operating under the jurisdiction of States other than the flag, coastal or port States. In particular, it is quite common for the most commercially exploited species, like salmon or tuna, to be processed in countries where labour costs are low, and then re-exported and introduced in processed form onto the markets of other countries³⁴⁵. IUU fishing and subsequent activities along the supply chain are not rarely carried out by transnational criminal organizations and are frequently associated with other crimes, such as bribery, fraud, falsification of documents, smuggling and the laundering of proceeds from illegal

³⁴⁰ Para. 2 (a).

³⁴¹ *Ibidem*.

³⁴² See *Report of the Eighth Meeting of the Catch Documentation Scheme Working Group*, 2023.

³⁴³ FAO, *FAO Yearbook. Fishery and Aquaculture Statistics 2017*, p. 43.

³⁴⁴ *Ibidem*, p. 47 (detailed data by country, by continent and by fish product available).

³⁴⁵ PALMA, TSAMENYI & EDESON, *Promoting cit.*, p. 173.

harvesting³⁴⁶. This explains the interest devoted to the topic by both Interpol³⁴⁷ and the Conference of the Parties of the United Nations Convention against Transnational Organized Crime³⁴⁸.

The adoption of controls and sanctions by the transit, processing and end-market States therefore plays a critical role in combating IUU fishing and can be used as a lever to promote compliance with international fisheries law. In fact, impeded market access for illegally harvested products and the possibility of punishment for their illegal import or handling makes IUU fishing a riskier and less profitable activity.

As noted above, both the IUU Fishing Plan of Action³⁴⁹ and the 1995 FAO Code of Conduct³⁵⁰ encourage all States to adopt effective measures aimed at preventing IUU catches from entering the seafood supply chain³⁵¹. Furthermore, in 2008 the FAO Subcommittee on Fish Trade adopted Technical Guidelines for Responsible Fish Trade, in order to implement the relevant provisions of the Code of Conduct and provide assistance in the drafting of laws and regulations relating to the fish trade.

This being established, in the following paragraphs special attention will be devoted to the compatibility of trade-restrictive measures with WTO law. Indeed, possible conflict between trade restrictions for fish products and WTO law has received great attention in legal scholarship, due also to several remarkable cases submitted to the WTO dispute settlement machinery.

It should be emphasized that trade-related measures decided by RFMOs (or under multilateral environmental agreements) have never been challenged before the WTO. Although all WTO reports concerning environment-related measures restricting trade in fish products tackle unilateral measures, their analysis is relevant to establish which characteristics trade sanctions should have to comply with the WTO Agreements.

Import restrictions, catch documentation schemes and labelling requirements may give rise

³⁴⁶ See on the point ROSE & TSAMENYI, *Universalising cit.*, p. 60; PHELPS BONDAROFF, REITANO & VAN DER WERF, *The Illegal cit.*

³⁴⁷ See the Project Scale launched by Interpol to combat fisheries crimes. More in general, on illegal wildlife trafficking see ZIMMERMANN, *The Black Market for Wildlife: Combating Transnational Organized Crime in the Illegal Wildlife Trade*, in *Vanderbilt Journal of Transnational Law*, 2003, p. 1657.

³⁴⁸ See the UNODC Global Programme for Combating Wildlife and Forest Crime and the UNODC Global Maritime Crime Programme. On the applicability to fishery crimes of the United Nations Convention on Transnational Crimes see OANTA, *Illegal Fishing as a Criminal Act at Sea*, in PAPASTAVRIDIS & TRAPP, *La criminalité en mer - Crimes at Sea*, Leiden - Boston, 2014, p. 179; TELESETSKY, *Laundering Fish in the Global Undercurrents: Illegal, Unreported, and Unregulated Fishing and Transnational Organized Crime*, in *Ecology Law Quarterly*, 2015, p. 979.

³⁴⁹ Paras. from 65 to 76.

³⁵⁰ Art. 11, paras. 2 and 3.

³⁵¹ See, among others, ELVESTAD & KVALVIK, *Implementing cit.*, p. 241.

to potential normative conflicts with WTO law, in particular with the GATT provisions banning trade restrictions and discrimination among member States and with the Agreement on Technical Barriers to Trade.

6.A. The WTO “Case-Law” Relating to Trade Restrictions for Fish Products

The need to strike a proper balance between trade liberalization and environmental protection was clearly perceived by the drafters of the Charter of the International Trade Organization (Havana, 1948; it never entered force). The Charter contained exceptions aimed at safeguarding animal and plant life or health and at protecting natural resources from depletion³⁵². Most importantly, it contained a safeguard clause expressly allowing States to take measures “in pursuance of any inter-governmental agreement that relates solely to the conservation of fisheries resources, migratory birds or wild animals”³⁵³. However, a similar provision was not included in the GATT-WTO system.

While it was mainly starting from the 1990s that the trade-and-environment debate broke out in the GATT/WTO system³⁵⁴, the interplay between trade liberalization and the protection of the environment still remains one of the most controversial areas of international economic law³⁵⁵. Several WTO complaints have been brought by States claiming of having suffered commercial harm amounting to a breach of WTO Agreements as a consequence of the adoption of unilateral trade measures aimed at preserving marine species³⁵⁶. In this context, WTO panels and the Appellate Body have been called upon many times to decide whether said measures could be justified under the general exceptions set forth by Art. XX of the GATT. As known, this Article, in its relevant part, provides as follows:

“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

³⁵² See, also for an analysis of the *travaux préparatoires*, CHARNOVITZ, *Exploring the Environmental Exceptions in GATT Article XX*, in *Journal of World Trade*, 1991, p. 41; FERRI, *Conflicts* cit., p. 172.

³⁵³ Art. 45, para. 1 (a), (x). See also Art. 70, para. 1 (d).

³⁵⁴ On the sporadic discussions about the relationship between trade and the environment in the two previous decades see FERRI, *Conflicts* cit., p. 184.

³⁵⁵ In the immense literature on this topic see, *inter alia*, ESTY, *Greening the GATT: Trade, Environment, and the Future*, Washington, 1993; BROWN WEISS & JACKSON (eds.), *Reconciling Environment and Trade*, Ardsley, 2001; BIANCHI, *The Impact of International Trade Law on Environmental Law and Process*, in FRANCONI (ed.), *Environment, Human Rights & International Trade*, Oxford - Portland, 2001, p. 105; MACMILLAN, *WTO and the Environment*, London, 2001; VRANES, *Trade and the Environment. Fundamental Issues in International Law, WTO Law, and Legal Theory*, Oxford, 2009; PAVONI, *Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the ‘WTO-and-Competing-Regimes’ Debate?*, in *European Journal of International Law*, 2010, p. 649. A limited contribution to the understanding of the underlying legal problems has been given by the Committee on Trade and Environment, created with the establishment of WTO in 1995.

³⁵⁶ CALLEY, *Market Denial and International Fisheries Regulation. The Targeted and Effective Use of Trade Measures against the Flag of Convenience Fishing Industry*, Leiden - Boston, 2012.

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) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health; (...)

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour (...);

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”.

A highly debated question tackled by the WTO dispute settlement machinery has been whether a State may take into account things located or actions occurring beyond its jurisdiction, to justify restrictions to free trade under Art. XX. While the consideration of non-product-related processes and production methods is certainly allowed under letter (e), empowering States to ban the importation of products made using prison labour, the other general exceptions are open to various interpretations³⁵⁷.

6.A.i The *Tuna/Dolphin* Saga

The first of a series of cases evidencing a clash between free trade and environmental protection is the *Tuna/Dolphin I (Mexico v. United States)* case, in which a panel was asked to assess whether a measure adopted by the United States, prohibiting the importation of yellowfin tunas caught using fishing techniques that resulted in the incidental injury or killing of dolphins, was consistent with WTO law. More precisely, in applying the Marine Mammal Protection Act, the United States administration had banned the import of yellowfin tuna and tuna products from Mexico, based on the fact that the average incidental dolphin-killing rate by vessels flying the flag of Mexico exceeded a threshold calculated upon the United States average rate in the same period. It bears noting that, differently from other maritime areas, in the Tropical Eastern Pacific Ocean, schools of tunas and dolphins generally swim alongside one another. Taking advantage of this circumstance, fishermen encircle dolphins at the surface with purse-seine nets, in order to capture the tuna below. However,

³⁵⁷ MANZINI, *Environmental Exceptions on Art. XX GATT 1994 Revised in the Light of the Rules of Interpretations of General International Law*, in MENGOZZI (ed.), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, Milano, 1999, p. 811; BARTELS, *Applicable Law in WTO Dispute Settlement Proceedings*, in *Journal of World Trade*, 2001, p. 499.

this technique results in many incidental killings of or serious injuries to dolphins.

The Panel found that the measure was contrary to Art. XI of the GATT and that it was not justified under Art. XX. In its view, the measure was neither “necessary” for the preservation of animal life under Art. XX (b), nor sufficiently related to the conservation of an exhaustible natural resource under Art. XX (g)³⁵⁸. The Panel reached this conclusion through what Jakir has called a “straightforward refusal of extraterritoriality”³⁵⁹, by arguing that Art. XX (b) and XX (g), could not be invoked to preserve animal life or natural resources outside the jurisdiction of the market State³⁶⁰.

Similar conclusions, in the sense of an unjustified violation of Art. XI of the GATT, were reached by another Panel in a “twin” case brought by the (then) European Economic Community and the Netherlands against the United States³⁶¹. Both the complainants and the respondent took their position on the legitimacy of measures intended to protect animals beyond the jurisdiction of the State invoking Art. XX, by using the language of extraterritoriality. The United States maintained that there was “no jurisdictional limitation on Article XX (g)”³⁶² based on two main arguments. On the one hand, it argued that the interpretation was supported by the *travaux préparatoires* or, better, by the fact that, when the GATT was negotiated, several international agreements already existed that allowed for import restrictions for the protection of animals or plants beyond the boundaries of the importing State. On the other hand, the United States argued that the interpretation supporting the existence of a jurisdictional limitation would have led to unacceptable results:

“many high seas resources never entered any country’s jurisdiction. [T]hus no contracting party could act to protect these resources, despite the international consensus that these resources need protection and should be conserved”³⁶³.

³⁵⁸ GATT Panel Report, U.S.-Tuna (Mexico), *United States - Restrictions on the Imports of Tuna*, DS21/R, 3 September 1991, unadopted.

³⁵⁹ JAKIR, *The New WTO Tuna Dolphin Decision: Reconciling Trade and the Environment?*, in *Croatian Yearbook of European Law and Policy* 2013, p. 148.

³⁶⁰ GATT Panel Report, U.S.-Tuna (Mexico), paras. from 5.24 to 5.34. The Panel reached this conclusion concerning paragraph b, based on the analysis of the drafting history, notably the elimination of the final part of an earlier formulation (“measure necessary to protect human, animal and plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing countries”), which had been considered superfluous (paras. 5.25 and 5.26). Even less convincing is the Panel’s reasoning to reject the “extraterritorial” application of Article XX (g): in the Panel’s view, “[a] country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production or consumption is under its jurisdiction. This suggests that Article XX (g) was intended to permit contracting parties to take trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction” (para. 5.31).

³⁶¹ GATT Panel Report, U.S.-Tuna (EEC), *United States - Restrictions on the Imports of Tuna*, DS29/R, 16 June 1994, unadopted. The European Economic Community had been embargoed according to the same statute as an intermediary nation, exporting yellowfin tuna and products imported from countries, such as Mexico, subject to a direct prohibition on imports.

³⁶² Paras. from 3.28 to 3.34.

³⁶³ Para. 3.34.

Conversely, the European Economic Community and the Netherlands alleged that sub-paras. (b) and (d) of Art. XX did not have extra-jurisdictional effect and had to be interpreted in accordance with “the relevant rules of customary international law, including the basic principle that a law should not be interpreted as having extra-jurisdictional effect, in accordance with the duty of non-intervention, unless there were explicit indications to the contrary”³⁶⁴.

Like the other Panel in the “twin” *US-Tuna (Mexico)* case, the Panel found in favour of the complainants. Although never adopted by the Dispute Settlement Body, both decisions attracted much criticism, in international public opinion and in much of the doctrine, for sacrificing environmental values in pursuance of free trade³⁶⁵. However, the latter report is more nuanced than the former, and has been even described by Jakir as “letting out [a] little ray of sunshine for the environment”³⁶⁶. The Panel report holds that the text of Art. XX does not absolutely rule out the possibility of restrictive measures relating “to things or actions outside the territorial jurisdiction of the party taking the measure”³⁶⁷, and affirms there is “no valid reason supporting the conclusion that the provisions of Art. XX (g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision”³⁶⁸. Despite these openings, in a very hasty passage the Panel restricted the scope of these statements concerning Art. XX (g) by referring exclusively to the United States’ power to adopt measures aimed at conserving dolphins, “which the United States pursued within its jurisdiction over its nationals and vessels”³⁶⁹. Furthermore, relying on a systematic interpretation of the provision, the panel held as follows:

“[i]f however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired”³⁷⁰.

The tuna saga continued with what is generally referred to as the *Tuna Dolphin II* case,

³⁶⁴ Para. 3.38. The same argument was repeated by the majority of third intervening countries, notably Australia (paras. 4.3. and 4.12) and Costa Rica (para 4.28). Although more sympathetic towards United States environmental concerns, New Zealand maintained that the measure was contrary to the principle of non-intervention in the domestic or territorial jurisdiction of other States (paras. from 4.36 to 4.40). Canada was the only State not to exclude *a priori* that the exception under Art. XX (d) could be applied extra-jurisdictionally (para. 4.22).

³⁶⁵ Cfr. PETERSMANN, *International Trade Law and International Environmental Law – Prevention and Settlement of International Disputes in GATT*, in *Journal of World Trade*, 1993, p. 43.

³⁶⁶ JAKIR, *The New WTO Tuna Dolphin Decision* cit., p. 149.

³⁶⁷ GATT Panel Report, *US-Tuna (EEC)*, para. 5.16.

³⁶⁸ Para 5.20. See also paras. 5.31 and 5.32

³⁶⁹ Para. 5.20.

³⁷⁰ Para. 5.26. In relation to Art. XX (b), the same reasoning is repeated at paras. 5.38 and 5.39.

revolving around the labelling of tuna products as “dolphin safe”³⁷¹. Under the United States Dolphin Protection Consumer Information Act, as originally passed in 1990, tuna harvested with purse-nets in the Eastern Tropical Pacific Ocean could not be certified, unlike the tuna taken with the same technique in other marine zones. The Act was amended in 1997, to allow for the labelling as dolphin safe of tunas caught in compliance with a future dolphin-safe labelling scheme, to be adopted under the Agreement on the International Dolphin Conservation Programme administered by the Inter-American Tropical Tuna Commission, to which both Mexico and the United States were Parties³⁷². This alternative scheme was put in place in 2001, conditioning the granting of the label upon the rate of injuries and incidental killings of dolphins, regardless of the fishing technique used³⁷³.

Mexico complained that the unilateral measure by the United States was a technical regulation not complying with Art. 2 of the TBT. The WTO Panel found that the United States Dolphin Protection Consumer Information Act afforded the same treatment to domestic and imported products and that it pursued the legitimate objective of informing consumers and contributing to the protection of dolphins in relation to the impact of unsustainable fishing techniques. However, it concluded that the United States measure was more trade-restrictive than necessary to fulfil its legitimate objectives, and was thus in breach of Art. 2, para. 2, of the TBT³⁷⁴.

It bears stressing that the panel accepted the argument made by the United States, that the dolphin-safe provisions pursued a “legitimate objective,” *i. e.* to ensure adequate information to consumers and “contribut[e] to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins”³⁷⁵. In other words, the panel took the view that the objective of protecting animal life and health under Art. 2,

³⁷¹ WTO Panel Report, US-Tuna II (Mexico), *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, 15 September 2011; WTO Appellate Body Report, US-Tuna II (Mexico), *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012. For some comments: JAKIR, *The New WTO Tuna Dolphin Decision* cit.; MULL, *Making Sense of ‘Mandatory Measures’ in the TBT Agreement. Why the Majority Panel’s Determination in U.S. Tuna II Rendered the Distinction Between Technical Regulations and Standards to Be Meaningless*, in *Georgetown International Environmental Law Review*, 2013, p. 367; MAVROIDIS, *Last Mile for Tuna (to a Safe Harbor) What is the TBT Agreement all About?*, EUI Working Paper RSCAS 2018/03.

³⁷² International Dolphin Conservation Program Act, Public Law 105-42, 15 August 1997, sect. 5.

³⁷³ Resolution to Establish Procedures for AIDCP Dolphin-Safe Tuna Certification, 2001, on which see PALMA, TSAMENYI & EDESON, *Promoting* cit., p. 227.

³⁷⁴ Art. 2, para. 2, of the TBT reads as follows: “Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products”.

³⁷⁵ WTO Panel Report, US-Tuna II (Mexico), para. 7.373.

para. 2, of the TBT also applies to animals living outside the market State's jurisdiction, while rejecting Mexico's contention that the labelling scheme was unlawful because it aimed at influencing extraterritorial conducts³⁷⁶.

This approach was confirmed in the appeal stage³⁷⁷. Without entering further into the details of this complex case, it must be added that the first report of the Appellate Body reversed the Panel's findings that the United States' unilateral trade measure complied with Art. 2, para. 1, but violated Art. 2, para. 2³⁷⁸.

Following this report, in 2013 and 2016 the United States amended certain dolphin-safe labelling requirements, by reducing the different treatment reserved to tuna harvested in the Eastern Tropical Pacific Ocean and in all other maritime areas to that justified by the mortality rate of certain fishing methods in different ocean areas³⁷⁹. A series of proceedings followed, including the establishment of an arbitration pursuant to Art. 22, para. 6. of the Dispute Settlement Understanding, and of two compliance Panels, whose reports were appealed. As an epilogue to this intricate saga, on 14 December 2018, the Appellate Body finally found that the 2016 Tuna Measure was consistent with GATT and TBT³⁸⁰. It held that the detrimental impact caused by the 2016 Tuna Measure on Mexican tuna products stemmed exclusively from a legitimate regulatory distinction and therefore is consistent with Art. 2, para. 1, of the TBT³⁸¹. Furthermore, the Appellate Body found that the revised labelling scheme did not constitute arbitrary or unjustifiable discrimination and meets the requirements of the *chapeau* of Art. XX³⁸².

6.A.ii The *Shrimp/Turtle* Case

More open to the consideration of environmental concerns were the landmark *Shrimp/Turtle* reports, deciding a dispute raising very similar issues to the *Tuna/Dolphin* saga. The case concerned

³⁷⁶ Paras. from 4.189 to 4194 and from 7.369 to 7370.

³⁷⁷ WTO Appellate Body Report, U.S.-Tuna II (Mexico). A much less environmentally friendly conclusion of the Panel is that – independently from their process and production methods – the panel qualifies U.S. and Mexican tunas as “like products”, regardless of their safety for dolphins.

³⁷⁸ WTO Appellate Body Report, US-Tuna II (Mexico), paras. from 297 to 303.

³⁷⁹ United States Code of Federal Regulations, Title 50, Part 216, Subpart H (Dolphin Safe Tuna Labeling), as amended by the Enhanced Document Requirements and Captain Training Requirements to Support Use of the Dolphin Safe Label on Tuna Products, *United States Federal Register*, vol. 81, No. 56, 2016.

³⁸⁰ WTO, Appellate Body Report, US-Tuna II (Mexico) (*Article 21.5 – US*) / *US-Tuna II (Mexico) (Article 21.5 – Mexico II)*, WT/DS381/AB/RW/USA WT/DS381/AB/RW2, 14 December 2018, on which see BARONCINI & BRUNEL, *A WTO Safe Harbour for the Dolphins: The Second Compliance Proceedings in the US – Tuna II (Mexico) Case*, in *World Trade Review*, 2020, p. 196.

³⁸¹ WTO Appellate Body Report, U.S.-Tuna II (Mexico) (*Article 21.5 – U.S.*) / *U.S.-Tuna II (Mexico) (Article 21.5 – Mexico II)*, paras. from 7.2 to 7.11.

³⁸² Paras. from 7-12 to 7.14.

the United States embargo on shrimps caught by trawlers without the use of turtle excluder devices designed to allow trapped sea turtles to escape from shrimp nets. According to sect. 609 of Public Law 101-162³⁸³, some countries had not obtained from the United States authorities the certification of having an endangered seas turtle protection programme comparable to that of the United States, which is necessary in order to import shrimp into the United States.

In *Shrimp I (India, Malaysia, Pakistan and Thailand v. United States)*, the Panel and then the Appellate Body were called upon to establish whether the import restriction, prohibited *per se* under Art. XI of the GATT, was justified under Art. XX (g). Both finally found against the United States, ruling that conditions for invoking Art. XX were not met³⁸⁴. However, the 1998 Appellate Body report represented a step forward from previous case law. It is generally considered as an implementation of the mutual supportiveness principle, in the part where it interprets the notion of “exhaustible resources” under Art. XX “in light of contemporary concerns of the community of nations about the protection and conservation of the environment,” referring also to the Convention on International Trade in Endangered Species³⁸⁵ and the UNCLOS³⁸⁶.

Some passages of the report merit special attention. The Appellate Body held:

“[i]t is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply”³⁸⁷.

As concerns the finding in the *Tuna/Dolphin I* report on the unlawfulness of “extraterritorial” market State jurisdiction, the Appellate Body very cautiously found that it was unnecessary to

³⁸³ 16 U.S.C. § 1537.

³⁸⁴ WTO Panel Report, U.S.-Shrimps I, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15 May 1998; WTO AB Report, U.S.-Shrimps I, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1999. On this case see QURESHI, *Extraterritorial Shrimps, NGOs and the WTO Appellate Body*, in *International and Comparative Law Quarterly*, 1999, p. 199; JACKSON, *Comments on Shrimp/Turtle and the Product/Process Distinction*, in *European Journal of International Law*, 2000, p. 303; BERGER, *Unilateral Trade Measures to Conserve the World’s Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case*, in *Columbia Journal of Environmental Law*, 1999, p. 355; CONE, *The Appellate Body, the Protection of Sea Turtles and the Technique of ‘Completing the Analysis’*, in *Journal of World Trade*, 1999, p. 51.

³⁸⁵ Hereinafter: CITES.

³⁸⁶ WTO Appellate Body Report, U.S.-Shrimps I, paras. from 129 to 131. It should be noted however that, even before the creation of WTO, two GATT Panel reports had already qualified fish as an exhaustible natural resource (GATT Panel Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198 - 29S/91, 22 February 1982, para. 4.9; GATT Panel Report, *Canada – Herring and Salmon, Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268 - 35S/98, 22 March 1988, para. 4.4).

³⁸⁷ Appellate Body Report, US-Shrimps I, para. 121.

examine “the question of whether there is an implied jurisdictional limitation in Article XX (g), and if so, the nature or extent of that limitation”³⁸⁸. It stated:

“The sea turtle species here at stake, i. e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction. Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat - the oceans. (...) We note only that in the specific circumstances of the case before us, there is a *sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX (g)*”³⁸⁹.

Although admitting the possibility of adopting unilateral trade measures having extraterritorial effects, the Appellate Body found that the United States measure did not satisfy the standards set in the *chapeaux* of Art. XX, since it was unjustifiably discriminatory and threatened the multilateral trading system. This was because the measure aimed at inducing other countries to adopt essentially the same policies as the United States, and not just comparable measures³⁹⁰. Furthermore, the procedure for certifying foreign States as using acceptable fishing technology was not transparent³⁹¹. The report added that the United States had failed to seriously seek international negotiations aimed at finding a multilateral solution³⁹².

Malaysia followed this up by requiring the creation of a Panel pursuant to Art. 21, para. 5, of the WTO Dispute Settlement Understanding to assess whether the United States, in revising the certification process, had complied with the Appellate Body report³⁹³. The report issued by this Panel was appealed, and the Appellate Body ultimately found that the amendments made by the United States to sect. 609 were WTO-consistent³⁹⁴.

³⁸⁸ Para. 133.

³⁸⁹ *Ibidem*, italics added.

³⁹⁰ Paras. from 161 to 165.

³⁹¹ For further analysis see HANSEN, *Transparency, Standards of Review, And the use of Trade Measures to Protect the Global Environment*, in *Virginia Journal of International Law*, 1999, p. 1017.

³⁹² Appellate Body Report, US-Shrimps I, paras. from 166 to 167: “failure (...) to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members”.

³⁹³ WTO Panel Report (compliance), *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/RW, 15 June 2001.

³⁹⁴ WTO AB Report (compliance), *United States – Shrimp, United States – Import Prohibition of Certain Shrimp and Shrimp Products*, - Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, 22 October 2011, paras. from 123 to 124.

6.A.iii. The *Seal Products* Case

The last case worthy of mention is the *Seal Products* case³⁹⁵, brought against the European Union by Canada and Norway, contesting the legitimacy under WTO of the European Union Seal regime. This latter case revolved around Regulation No. 1007/2009, which prohibited importing seal-containing products and placing them on the market, with the exception of seal products derived from hunts conducted by Inuit or indigenous communities, or for marine resource management purposes, or products brought by European travellers for personal use³⁹⁶. Both the Panel and the Appellate Body found that the European Union measure was WTO inconsistent, mainly because it granted market advantages to seal products originating from Greenland, while not extending them to seal products from Canada and Norway. The defence under Art. XX also failed, because both reports found that the European Union measure did not comply with the good faith requirement set by the *chapeau*³⁹⁷. What is remarkable, however, is that the Panel, upheld by the Appellate Body, recognized that the European Union Seal Regime could be characterized as a necessary measure to protect public morals within the meaning of Art. XX (a) of the GATT³⁹⁸.

In this case, the public moral concern addressed by the European Union measure was the inhumane killing of seals – a concern recognized as prevailing in European society, also taking into account that “the content of public morals can be characterized by a degree of variation, and that, for this reason, Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values”³⁹⁹. The same concern may be invoked to justify prohibiting the import of products originating from other “charismatic” marine

³⁹⁵ WTO Panel Report, EC- Seal Products, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R, 25 November 2013; WTO AB Report, EC - Seal Products, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 22 May 2014.

³⁹⁶ Regulation No. 1007/2009 of 16 September 2009 on trade in seal products (Basic Regulation), in *Official Journal of the European Communities* No. L 286 of 31 October 2009, p. 36, and Commission Regulation No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, *ibidem* No. L 216 of 17 August 2010, p. 1. On the sensitive issues posed by this Regulation – trying to balance the protection of welfare of animals and the socio-economic and cultural identity of the Inuit people, based for centuries on seal hunting – see VEZZANI, *The Inuit Tapiriit Kanatami I Case and the Protection of Indigenous Peoples’ Rights: A Missed Opportunity?* in *European Papers*, 2016, p. 307.

³⁹⁷ WTO Panel Report, EC-Seal Products, para. 7.650; WTO Appellate Body Report, EC Seal Products, para. 5339.

³⁹⁸ WTO Appellate Body Report, EC-Seal Products, para. 5290. On this dispute see PERIŠIN, *Is the EU Seal Products Regulation a Sealed Deal? EU and WTO Challenges*, in *International and Comparative Law Quarterly*, 2013, p. 373; HOWSE, LANGILLE & SYKES, *Sealing the Deal: The WTO’s Appellate Body Report in EC – Seal Products*, in *ASIL Insights*, 2014; MARCEAU, *A Comment of the Appellate Body Report in ‘EC-Seal Products’ in the Context of the Trade and Environment Debate*, in *Review of European, Comparative and International Environmental Law*, 2014, p. 318; DESIERTO, *The Right to Regulate for Public Morals Upheld (Somewhat): The WTO Panel Report in EC-Seal Products*, in *EJIL: Talk!*, 2014.

³⁹⁹ WTO Appellate Body Report, EC-Seal Products, para. 5.199.

species with widespread popular appeal, such as whales, orcas or sea turtles⁴⁰⁰. On the other hand, the thesis that the mere “illegality of timber or fish trade and the connection with organized crime could outrage a sense of public morals”⁴⁰¹ seems less convincing.

From a “jurisdictional” point of view, Canada did not succeed in convincing the panel that the protection of public morals “requires the prevention of some type of harm to a public moral within the territory of the Member whose measure is at issue”⁴⁰². The argument was not addressed in the submissions before the Appellate Body, which decided not to examine the matter “while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX (a), and, if so, the nature or extent of that limitation”⁴⁰³. This clarification by the Appellate Body should be explained as a zealous application of the *non ultra petita* rule rather than as an example of self-restraint. As Cooremans has put it, “[a] strictly territorial interpretation of Article XX (a) seems to be unwarranted and illogical”⁴⁰⁴. If a product is made in a way that clashes with ethical values prevailing in a certain society, the place where the production and processing phases has taken place arguably has little if any influence on the perception by citizens and consumers. It is therefore arguable that the morality exception, once interpreted as including an environmental concern such as animal welfare, is inherently independent of any territorial link with the State invoking the exception⁴⁰⁵.

6.B. Substantive and Procedural Limitations on the Adoption of Trade-restrictive Measures

WTO case law shows both procedural and substantial limitations that States face in the adoption of trade-related environmental measures. As concerns the content of such measures, it is settled case law that the market State cannot require, as import conditions, production processes to have been accomplished in strict respect of all their own environmental standards. Import should be allowed for products produced according to the methods prescribed by the foreign State, if they offer an equivalent protection for the environment. Rather than necessitated by the respect of other States’

⁴⁰⁰ See on the point SYKES, *WTO Law, the Environment and Animal Welfare*, in SCHOLTZ (ed.), *International Environmental Law from Conservation to Compassion*, Cheltenham, 2019, p. 269.

⁴⁰¹ YOUNG, *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing*, in *E15 Initiative*, 2015, p. 11.

⁴⁰² WTO Panel Report, EC-Seal Products, para. 7.628.

⁴⁰³ WTO Appellate Body Report, EC-Seal Products, para. 5.173.

⁴⁰⁴ COOREMANS, *Addressing Environmental Concerns Through Trade: A Case for Extraterritoriality?*, in *International and Comparative Law Quarterly*, 2016, p. 235.

⁴⁰⁵ However, one might argue that the jurisdictional link is constituted by the fact that contrariety to public morals is perceived by the persons under the jurisdiction of the State adopting the trade-restrictive measure.

sovereignty⁴⁰⁶, this limitation seems to be a manifestation of the *bona fide* principle. As the Appellate Body has put it, market States should condition market access on the adoption of measures providing a protection “comparable in effectiveness, allow[ing] for sufficient flexibility in the application of the measure so as to avoid ‘arbitrary or unjustifiable discrimination’”⁴⁰⁷.

A sophisticated model to frame and rationalize WTO case law concerning substantive limitations has been elaborated by Cooreman. In this author’s view, two elements should be taken into consideration to establish whether a market State may lawfully adopt trade-related environmental measures that take into account conduct beyond its borders: the inward- or outward-looking purpose of the measure and the international recognition and support enjoyed by the concern invoked by the regulating State⁴⁰⁸. The first step in the proposed decision tree refers to the location of the concern and classifies market measures on a scale ranging from purely inward to purely outward. Inward measures aimed at protecting the domestic environment, due to the existence of a strong territorial connection, may be lawfully adopted even if the market State intends to promote its particularistic environmental values. Conversely, outward-looking measures require additional international support to be justified. The less the regulating State is physically affected by the environmental impact (and the weaker the territorial connection is), the more the environmental objective requires some international support, ranging from soft law to customary and treaty law⁴⁰⁹.

Turning to procedural limitations, these were built upon the *chapeaux* of Art. XX. The WTO has espoused the theory whereby the exercise of unilateral jurisdiction to protect the environment is a second-best solution in comparison with multilateral solutions: market States – as bystanders – should “take the law into their hands”, only after having made all reasonable efforts to negotiate in good faith. Should international negotiations fail, the Appellate Body also believes that unilateral jurisdiction should be exercised by duly taking into account the interests of affected foreign States and involving them in the decision-making processes. This approach fits well with Bogdandy’s theory of “simulated multilateralism”⁴¹⁰.

⁴⁰⁶ RYNGAERT, *Whither Territoriality? The European Union’s Use of Territoriality to Set Norms with Universal Effects*, in RYNGAERT, MOLENAAR & NOUWEN (eds.), *What’s Wrong with International Law? - Liber Amicorum A. H. A. Soons*, Leiden - Boston, 2015, p. 434; DOBSON & RYNGAERT, *Provocative Climate Protection: EU ‘Extraterritorial’ Regulation of Maritime Emissions*, in *International and Comparative Law Quarterly*, 2017, p. 327.

⁴⁰⁷ WTO Appellate Body Report (compliance), United States-Shrimp, para. 144.

⁴⁰⁸ COOREMAN, *Addressing cit.*, p. 233.

⁴⁰⁹ *Ibidem*.

⁴¹⁰ VON BOGDANDY, *Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization*, in GRILLER (ed.), *International Economic Governance and Non-Economic Concerns – New Challenges for the International Legal Order*, Wien - New York, 2003, p. 103. See also FERRI, *Conflicts cit.*, p. 218.

From a different perspective, the need to provide foreign States with an opportunity to be heard, according to a due process approach, has been underlined by the exponents of the so called “Global Administrative Law” school⁴¹¹.

6.C. Varying Degrees of Unilateralism in Trade Measures to Combat IUU Fishing

Some authors⁴¹² and even the European Parliament⁴¹³ have advocated the adoption of a new multilateral fisheries treaty on market-related measures. Such a treaty might better specify the content of substantive and procedural obligations States have to respect in adopting trade-restrictive measures to combat IUU fishing, while at the same time enhancing cooperation in a perspective of “simulated multilateralism”. As noted above, a varying degree of unilateralism in trade-restrictive measures adopted to combat IUU fishing may be identified⁴¹⁴. By way of example, Bodansky emphasizes that in the *Dolphin/Tuna* case, the United States was pursuing a high degree of unilateralism, by trying to induce other countries to transpose exactly the same standards it had adopted unilaterally⁴¹⁵, while in the *Shrimp* case it was advancing an internationally agreed policy objective⁴¹⁶. The same author underlines that there is a lesser degree of unilateralism in the case of restriction on trade as a reaction to violation of multilateral regimes, like CITES⁴¹⁷.

As concerns unilateral measures that do not implement decisions or recommendations of competent international organizations, a distinction may be made between those measures that protect global environmental concerns, and those relating to a mainly domestic concern. This last category includes legislative acts such as Regulation (EU) No. 1026/2012, providing for sanctions against third States that allow non-sustainable fishing of a fish stock of common interest. The predominant interest here is the preservation of fishery resources in areas subject to the European Union’s fishery jurisdiction and therefore directly affecting the European marine environment and fish industry.

In a globalized economy, it is more and more frequent for States (and the European Union) to seek to influence conduct abroad by adopting laws regulating conduct abroad or, at any rate, attaching consequences to such conduct. Many are the examples of assertion of market power to affect

⁴¹¹ CASSESE, *Shrimps, Turtles and Procedure: Global Standards for National Administrations*, in *Law and Contemporary Problems*, 2005, p. 109.

⁴¹² SERDY, *The Shaky Foundations of the FAO Port State Measures Agreement: How Watertight Is the Legal Seal against Access for Foreign Fishing?*, in *International Journal of Marine and Coastal Law*, 2016, p. 441.

⁴¹³ European Parliament Resolution of 17 November 2011 on combating illegal fishing at the global level - the role of the European Union, in Official Journal of the European Union No. L 153 of 31 May 2013.

⁴¹⁴ BODANSKY, *What’s So Bad about Unilateral Action to Protect the Environment?*, in *European Journal of International Law*, 2000, p. 339.

⁴¹⁵ *Ibidem*, p. 342.

⁴¹⁶ *Ibidem*, p. 342.

⁴¹⁷ *Ibidem*, p. 343.

behaviour in other jurisdictions in the environmental field⁴¹⁸. Noteworthy among these is the European Union legislation that takes into account, for taxation purposes, airplane carbon dioxide emissions occurring under the jurisdiction of third States⁴¹⁹. It has been argued that “[t]o some extent, extraterritorial application of national environmental laws can be viewed as an extension of the Stockholm Declaration’s Principle 21”⁴²⁰, whereby States have the “responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”. Nevertheless, it remains debated whether States may, and should be encouraged to, act unilaterally to protect the global environment. Pursuant to Principle 12 of the United Nations Declaration on the Environment (Rio, 1992), “[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided”. As is known, this principle was introduced to address the concerns of the Third World countries that environmental protection may penalize their exports and be used to disguise the protectionist aims of industrialized countries using more environmentally friendly technologies⁴²¹.

While they are justified by market States as based on altruistic motivations and pursuing community interests, market State’s measures are often criticized as promoting the enacting State’s idiosyncratic social and environmental values, if not stigmatized as “arrogant” and “imperialistic”⁴²². At least the Lacey Amendment Act⁴²³ and similar non-United States statutes are immune to these criticisms, since they make it unlawful to deal in products obtained in breach of foreign laws, without pressuring foreign States and projecting the State’s policy preferences to other States wishing to maintain trade relations.

In conclusion, the exercise of market State jurisdiction to combat IUU fishing may be considered as having what Ryngaert has called a “hybrid” nature⁴²⁴. This merely confirms that in the

⁴¹⁸ ABATE, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, in *Columbia Journal of Environmental Law*, 2006, p. 87; HUNTER, SALZMAN & ZAELKE, *International Environmental Law and Policy*, New York, 2007, p. 1509.

⁴¹⁹ See the so-called “EU Aviation Directive”, on which see RINGBOM, *Global Problem—Regional Solution? International Law Reflections on an EU CO₂ Emissions Trading Scheme for Ships*, in *International Journal of Marine and Coastal Law*, 2011, p. 613; SCOTT & RAJAMANI, *EU Climate Change Unilateralism*, in *European Journal of International Law*, 2012, p. 469 ; HARTMANN, *Unilateralism in International Law: Implications of the Inclusion of Emissions from Aviation in the EU ETS*, in *Questions of International Law*, 2015.

⁴²⁰ HUNTER, SALZMAN & ZAELKE, *International Environmental Law* cit., p. 1511.

⁴²¹ See WEINSTEIN & CHARNOVITZ, *The Greening of the WTO*, in *Foreign Affairs*, 2001, p. 148.

⁴²² LAWRENCE, *The Extraterritorial Reach of EU Animal Welfare Rules (Again): Case C-592/14 European Federation for Cosmetic Ingredients*, in *European Law Blog*, 2016.

⁴²³ Currently title 16, chapter 53, of the U.S. Code. Named after its proponent, this act was passed by the United States Congress in 1900 as one of the first pieces of legislation in the world for the protection of wildlife and has been amended on various occasions (1930, 1948, 1935, 1969, 1981 and 2008), with a view to enlarging its scope of application. On the Lacey Amendment Act see more in detail VEZZANI, *Jurisdiction* cit., p. 345.

⁴²⁴ RYNGAERT, *Unilateral Jurisdiction and Global Values*, The Hague, 2015, p. 105.

whole body of international fisheries law, domestic and global community interests co-exist and variously interact among to influence State conduct.

On the one hand, there is no doubt that trade-restrictive measures aim to protect the global environment and even third coastal States (and small fishing communities living there), which are particularly affected by the illegal trafficking in marine resources. For instance, regulation (EC) No. 1005/2008 provides for the inclusion in the European Union blacklist of vessels and countries involved in IUU fishing, regardless of the place of harvesting, and therefore even with no appreciable connection between fishery resources and the European territory. As Hosch has emphasized, the concrete implementation of the regulation reveals that almost half of the States against which the procedure has been activated were not trading seafood to the European Union: this

“suggests that the identification process fulfils a different objective from the CDS [= catch documentation scheme] in targeting countries with perceived IUU problems, rather than protecting the EU [= European Union] market from the products of IUU fishing”⁴²⁵.

On the other hand, trade-restrictive measures in most cases aim to protect (more or less directly) the domestic fishing industry from the concurrence of foreign operators fishing in the high seas or in waters under the *ratione loci* jurisdiction of another State⁴²⁶. Indeed, market States are incentivized to exercise jurisdiction that “level the international playing field so as to ensure that domestic operators are not put at a competitive disadvantage as a result of strict domestic environmental regulation”⁴²⁷.

6.D. Freedom of Transit under Art. V of the GATT

It is a debated question whether the denial of entry into ports, or prohibition of landings, infringes upon the freedom of transit of goods principle, which is enshrined in a number of bilateral and multilateral treaties, mostly adopted to the benefit of landlocked Countries⁴²⁸, including the GATT⁴²⁹.

Pursuant to Art. V, para. 2, of the GATT,

⁴²⁵ HOSCH, *Trade* cit., p. 35.

⁴²⁶ *Ibidem*, p. 6.

⁴²⁷ RYNGAERT, *Subsidiarity and the Law of Jurisdiction*, Working papers series, Utrecht University School of Law, p. 16.

⁴²⁸ See in particular the Convention on Transit Trade of Land-Locked States (New York, 1965).

⁴²⁹ MOLENAAR, *Port and Coastal States*, in *The Oxford Handbook of the Law of the Sea*, Oxford, 2015, p. 285; DE LA FAYETTE, *Access to Ports in International Law*, in *International Journal of Marine and Coastal Law*, 1996, p. 20.

“[t]here shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport”.

This provision was expressly invoked over the course of two international disputes involving the landing of fish/fishery products. The first is the “swordfish war” that arose in 2000 between the (then) European Community and Chile, concerning the conservation and sustainable exploitation of swordfish stocks in the Southeastern Pacific Ocean. The European Community asserted that Community fishing vessels operating in the South East Pacific were not allowed under Chilean legislation to land their swordfish in Chilean ports or to transship it onto other vessels, which constituted in its view a violation of the GATT principle of freedom of transit⁴³⁰. The dispute was settled by the Parties, with no decision being issued by a WTO Panel⁴³¹.

Arguments similar to those of the (then) European Community were made by Denmark (with respect to the Faroe Islands) against the European Union, in a dispute concerning the exploitation of the Atlanto-Scandian stock of herring, a highly migratory species⁴³². During a dispute concerning the allocation of herring catch, the Faroe Islands set a unilateral catch limit and was therefore identified as one of the countries allowing non-sustainable fishing, pursuant to Regulation (EU) No. 1026/2012⁴³³. Accordingly, the European Union adopted a trade ban against herring and mackerel from the Faroe Islands and – in a literal reversal of roles from the *Swordfish* case – closed European ports to Faroese fishing vessels harvesting these species⁴³⁴. Denmark instituted two sets of

⁴³⁰ *Chile–Measures Affecting the Transit and Importation of Swordfish*, EC Request for consultations, WT/DS193, 19 April 2000. Chilean port State measures had been adopted on the basis of Art. 165 of the Chilean general fishery law, as consolidated by Presidential supreme decree 430 of 28 September 1991 and measures of conservation and management adopted pursuant thereto, as extended to swordfish harvested in the high seas by decree 598 of 15 October 1999. In its turn, Chile had countersued the EC under the UNCLOS. However, the procedure was terminated without the issuance of any judicial decision (International Tribunal for the Law of the Sea, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Communities)* Order of 16 December 2009, *ITLOS Reports 2008-2010*, p. 13. For more details, see ORELLANA, *The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO*, in *Nordic Journal of International Law*, 2002, p. 55; SERDY, *See You in Port: Australia and New Zealand as Third Parties in the Dispute between Chile and the European Community over Chile’s Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas*, in *Melbourne Journal of International Law*, 2002, p. 79.

⁴³¹ See WTO Doc. WT/DS193/4 (3 June 2010).

⁴³² *European Union – Measures on Atlanto-Scandian Herring, Denmark Request for consultations*, WT/DS469 (4 November 2013) / WT/DS469/2 (10 January 2014); significantly enough, almost twenty States reserved their third-Parties rights.

⁴³³ Regulation No. 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing in Official Journal of the European Union, No. L 316 of 14 November 2012.

⁴³⁴ See ISHIKAWA, *The EU-Faroe Islands Herring Stock Dispute at the WTO: the Environmental Justification*, in *ASIL Insights*, 2014.

proceedings, under the UNCLOS and the WTO, by alleging *inter alia* a breach of Art. V of the GATT. Once again, in 2014 the dispute was amicably settled before an international decision was rendered by a WTO Panel⁴³⁵.

Even in the absence of significant clarification provided by WTO adjudicatory bodies⁴³⁶, it may be safely assumed that Art. V, para. 2, contains no general prohibition for port States to deny access to vessels intending to land or transship their cargoes. It is significant to note that the first sentence of this article, affirming the freedom of transit principle, is followed by a prohibition of discrimination based on the flag of the vessels or the ownership of goods or vessels. The prohibition of discrimination is established by several provisions of the UNCLOS and, concerning port State measures, by both the Fish Stocks Agreement⁴³⁷ and the Port State Agreement⁴³⁸.

As convincingly held by Rose and Tsamenyi, discrimination should be understood in this context as “arbitrary discrimination,” *i. e.* “withholding privileges available to other countries participating in a regime for reasons that are unrelated to the agreed objectives for which the regime was instituted”⁴³⁹. It follows that neither international maritime law, nor Art. V of the GATT, precludes the establishment by port States of *non-discriminatory* access criteria, to distinguish among vessels based on their specific characteristics or conducts⁴⁴⁰. This interpretation is consonant with the widespread and consistent practice of States, whose legislation generally denies entry into port to foreign vessels having the nationality of other States on ground that they have been involved in IUU fishing or fishing-related activities⁴⁴¹, or even prohibit all foreign-flagged vessels from landing fish harvested on the high seas⁴⁴². Even assuming that denial of entry into or use of port decided without the consent of the flag State and exclusively on the basis of the vessel’s nationality is not allowed under Art. V, para. 2, such denial may be justified if required or permitted under an international agreement to which both the interested port and the flag States are parties, pursuant to the *lex specialis* or the *lex posterior* principles⁴⁴³. As noted, after the adoption of the GATT, a number of RFMOs addressed IUU fishing through a IUU vessel listing mechanism, pursuant to which member States are

⁴³⁵ *European Union – Measures on Atlanto-Scandian Herring*, Joint Communication from Denmark in respect of the Faroe Islands and the European Union, 25 August 2014, WT/DS469/3.

⁴³⁶ Thus far, Art. V of the GATT has been interpreted by a WTO panel in just one case involving restrictions on port entry: WTO, *Colombia-Indicative Prices and Restrictions on Port Entry*, WT/DS366/R, Panel Report of 29 April 2009.

⁴³⁷ Fish Stocks Agreement, Art. 23, para. 1.

⁴³⁸ Port State Agreement, Art. 3, para. 4.

⁴³⁹ ROSE & TSAMENYI, *Universalising* cit., p. 76.

⁴⁴⁰ See, among others, SERDY, *See You* cit., p. 112.

⁴⁴¹ For some examples of denial of entry into port, see PALMA, TSAMENYI & EDESON, *Promoting* cit., p. 167.

⁴⁴² RAYFUSE, *Non-Flag State Enforcement in High Seas Fisheries*, Leiden, 2004, p. 335.

⁴⁴³ SERDY, *The Shaky* cit., p. 428.

bound to deny port facilities to blacklisted vessels. So long as the lists include vessels flying the flag of Parties – which is rarely the case – the *lex specialis / lex posterior* argument should operate *inter partes* to exclude the application of the GATT provision⁴⁴⁴. The same consideration should be extended to other international treaties providing for the adoption of port State measures, such as the Fish Stocks Agreement⁴⁴⁵ or the Port State Agreement⁴⁴⁶.

It should be added that, under certain circumstances, the denial of port entry or prohibition of landings may be justified as a proportionate countermeasure⁴⁴⁷. This may be precisely the case with restrictive measures aimed at preventing the transit of products that are the result of illegal activities, carried out as a consequence of the failure of the flag State to meet its obligations under international law⁴⁴⁸.

6.E. WTO Consistency of Trade Measures Decided by RFMOs

From the developments reviewed in the previous paragraphs it emerges that the compatibility of trade restrictive measures with WTO law has been questioned only in cases where a State was enforcing unilaterally adopted measures, considered by the targeted State as a disguised form of protectionism.

However, also when trade measures are agreed by a competent RFMO, their WTO consistency might be questioned by non-Parties invoking the principle of *pacta tertiis*. It is not even possible to

⁴⁴⁴ From the perspective of WTO law, it still remains highly debated to what extent WTO adjudicating bodies may take into account non-WTO law in solving commercial disputes. As known, in the *Biotech* case a WTO panel adopted a very restricted interpretation of Art. 31, para. 3 (c), of the Vienna Convention on the Law of Treaties, by holding that the phrase “applicable in the relations between the parties” should be interpreted as referring to all WTO Members (Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291-293, 29 September 2006: for a comment, see YOUNG, *The WTO’s Use of Relevant Rules of International Law: An Analysis of the Biotech Case*, in *International and Comparative Law Quarterly*, 2007, p. 907). This position was rightly criticized by a large part of the doctrine and in the Report of the International Law Commission’s Study Group on Fragmentation of International Law, finalized by Koskenniemi (UN Doc. A/CN.4/L.682, 2006, para. 471). A more nuanced (but far from clear) position has been taken more recently by the Appellate Body (see, in particular, *EC and Certain Member States – Large Civil Aircraft*, WT/DS316/AB/R, AB Report of 18 May 2011, paras. 844 and 845).

⁴⁴⁵ Fish Stocks Agreement, Art. 23.

⁴⁴⁶ Port State Measures Agreement, Art. 4, para. 1 (b).

⁴⁴⁷ On the permissibility of suspending WTO obligations as a form of countermeasure see PAUWELYN, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, in *European Journal of International Law*, 2003, p. 945. Indeed, in the *Soft Drinks* case, the WTO Appellate Body did not accept the submission that the challenged Mexican measures, inconsistent with the provisions of the GATT, were justified as international countermeasures adopted “to secure compliance with laws or regulations”, within the meaning of Art. XX (d), of the GATT (Appellate Body Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006). As one can clearly evince from the report, the Appellate Body reached this conclusion based on the consideration that the WTO dispute settlement system cannot be used to determine rights and obligations outside the covered agreements (para. 78). This is not to say that, under international law, a WTO member is never allowed to adopt WTO-inconsistent measures as legitimate countermeasures, as an answer to the breach of international obligations outside the WTO system.

⁴⁴⁸ See, in this sense, RAYFUSE, *Non-Flag* cit. p. 351, arguing that the blanket closure of ports to all the vessels flagging the flag of another State is “more consistent with the law of the sea and the rules on state responsibility”.

exclude that, after having approved the act authorizing the organization to decide trade sanctions, a Party might challenge under the dispute settlement system a specific trade sanction implemented by the other Parties, by arguing that it is not in conformity with certain obligations under the WTO system.

In any case, it is argued that, if properly structured, trade measures decided by RFMOs (to the detriment of both Parties and non-Parties, being the latter cooperating or not) can be justified under the GATT and the TBT. The reasons justifying such a conclusion are put forward hereunder.

6.E.i. Trade Sanction against IUU Fishing

All the instruments on trade-related measures adopted by RFMOs acknowledge the existence of obligations under the WTO and the need to take non-discriminatory trade restrictive measures consistent with international law. The consistency of trade sanctions with the GATT was carefully considered by ICCAT, when it was the first RFMO to adopt a sanctioning scheme at the beginning of the 1990s. Already in 2000 the WTO Secretariat indicated ICCAT as a best practice of multilateral environmental agreements providing for WTO consistent trade-related measures⁴⁴⁹ and, indeed, this organization still remains a point of reference for all other RFMOs⁴⁵⁰. More recently, it has reviewed the procedure for the imposition and removal of trade measures to enhance its fairness and transparency, in line with the IUU Fishing Plan of Action and the findings of the Appellate Body in the *Shrimp-Turtle* case⁴⁵¹.

Of course, trade-related measures decided by RFMOs to ban the import of products from blacklisted countries or vessels fall within the remit of Art. XX (g) of the GATT, as they aim at protecting “exhaustible natural resources”. As compared to unilateral trade measures, those decided by RFMOs are immune from the criticism lying at the hearth of the trade disputes analysed above, that they constitute a way for States (in the quality as market States) to extend their regulatory power to activities occurring in waters beyond their jurisdiction, compelling flag States to transpose unilaterally adopted standards⁴⁵². It is however necessary to appraise those measures under the

⁴⁴⁹ WTO Document WT/CTE/W/167, p. 9.

⁴⁵⁰ For a detailed analysis see FERRI, *Conflicts* cit., p. 212, also describing the exchange of information between ICCAT and the WTO Secretariat and the attendance by ICCAT of meetings of the Committee on Trade and the Environment and in meetings of WTO working groups.

⁴⁵¹ FERRI, *Conflicts* cit., p. 226. As noted *supra* (para. 5.B.iv), Recommendation 06-13 provides for the possibility of sanctions against both Parties, cooperating non-Parties and non-Parties.

⁴⁵² “Practice shows that bans that implement international instruments are far less likely to be challenged in judicial proceedings under the WTO’s dispute settlement procedures than purely unilateral measures” (CHURCHILL. *International Trade Law Aspects of Measures to combat IUU and Unsustainable Fishing*, in CADDELL & MOLENAAR (eds.), *Strengthening International Fisheries Law in an Era of Changing Oceans*, Oxford – Portland, 2019, p. 349).

chapeau of Art. XX.

First, in order to meet the requirements of Art. XX, the sanctioning scheme should not be discriminatory, *i. e.*, as a reaction to the same conducts undermining conservation and management measures, it should envisage the adoption of the same sanctions against the responsible States (or international organization, in the case of the European Union), be they Parties, cooperating non-Parties, or non-Parties. For instance, providing as a follow-up measure the reduction of quotas for Parties or cooperating non-Parties, while at the same time providing for trade-restrictive measures against non-Parties, would be unlawful under the WTO system, as it would discriminate against the latter.

As far as procedural requirements are concerned, the procedure governing trade sanctions must be fair and transparent and offer an opportunity for due process to the negatively affected State, in line with the findings of the Appellate Body in the *Shrimp-Turtle* case. Accordingly, the instruments on trade-restrictive measures must guarantee that the targeted State is contacted and provided with all the relevant information about the contested breaches of conservation and management measures. An adequate period of time must be granted to the targeted State to reply and rectify its behaviour and a periodical review of the action taken must follow, in order to guarantee delisting.

The conclusions reached above, concerning the WTO consistency of the blacklisting procedures by RFMOs, are indirectly supported by the adoption of the Subsidies Agreement. As noted above⁴⁵³, this Agreement sets new rules to curb harmful subsidies and protect global fish stocks. Most notably, it prohibits support for IUU fishing⁴⁵⁴ and bans support for fishing overfished stocks⁴⁵⁵. For the present purposes, what is relevant to emphasize is that the Agreement reveals the confidence of member States in the fairness of IUU listing procedures of RFMOs. In fact, the Agreement pays deference to the decisions taken by RFMOs, in order to identify those vessels or operators to which member States are prohibited from granting subsidies. Pursuant to Art. 4, para. 2, a fish stock is considered overfished if it is recognized as overfished “by the a relevant RFMO/A in areas and for species under its competence, based on best scientific evidence available to it”. Furthermore, the Agreement provides that a vessel or operator shall be automatically considered to be engaged in IUU fishing if it is included by a competent RFMO in its IUU vessels list⁴⁵⁶. This automatism marks a

⁴⁵³ *Supra*, para. 2.B.vi.

⁴⁵⁴ Art. 3.

⁴⁵⁵ Art. 4.

⁴⁵⁶ Arts 3, para. 2 (c), and 3, para. 2 (a).

significant difference from cases where the determination of IUU fishing is made by a coastal State. Indeed, Art. 3, para. 3 (b) conditions the prohibition of subsidies to the circumstance that the flag State has been provided an opportunity for due process before the final determination, notably that it has been timely notified, has had an opportunity to exchange relevant information and has been properly notified of the sanctions applied.

Several RFMOs also include in their IUU vessels list, those vessels under the control of the owner of an IUU vessel⁴⁵⁷. The said measures might legitimately be adopted by Parties against vessels flying the flag of other Parties. However, from an international law standpoint, the legitimacy of the measures is doubtful when they are taken against third States. It should be emphasized that vessels under the control of the same owner may fly the flag of States extraneous to the IUU fishing activity at the origin of the inclusion in the blacklist. In these cases, the countermeasure justification may not operate, unless the flag State has failed to discharge its duties.

6.E.ii. Catch Documentation Schemes

Catch documentation schemes represent the only effective way for States to verify the legal provenance of fish, and therefore to ensure that fish or fish products originating from blacklisted vessels or countries are not introduced into the market. So long as they result in import bans, their legitimacy is to be appreciated under the GATT: in this perspective, the discussion about consistency with WTO law of catch documentation schemes adopted by RFMOs is to a large extent absorbed into the above analysis on the legitimacy of import bans of fish products resulting from IUU or unsustainable fishing activities.

However, catch documentation schemes are not only ancillary to import bans. Being applicable indistinctly to all fish imports, they *per se* represent an obstacle to trade, not differently than eco-labelling requirements⁴⁵⁸.

As it has been convincingly argued by He, it appears correct to qualify catch documentation scheme as “technical regulations” under the meaning of TBT Annex 1.1⁴⁵⁹, independently from the

⁴⁵⁷ PALMA, TSAMENYI & EDESON, *Promoting* cit., p. 213.

⁴⁵⁸ As noted above, the *Tuna II* case clearly reveals that eco-labelling requirements (including those concerning fishing methods) are “technical regulations” falling under the TBT Agreement.

⁴⁵⁹ “Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method”.

fact that they are not accompanied by labelling obligations⁴⁶⁰. This view is also supported by the fact that analogous traceability systems (established for forest products to fight illegal logging) have been notified to the TBT Committee⁴⁶¹.

The TBT expressly acknowledges that States Parties are allowed to pursue the legitimate objective of “the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate”⁴⁶². However, in order to be TBT-compliant, technical regulations should not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade⁴⁶³.

Most notably, while recognizing that the protection of the environment can justify trade-restrictive measures, Art. 2, para. 2, prohibits

“more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create (...). In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products”.

As noted by a WTO Panel, “while the tests under Article 2, para 1, of the TBT Agreement and Art. XX of the GATT 1994 should not be conflated, there are nevertheless important similarities and overlaps between them”⁴⁶⁴.

Pursuant to Art. 2, para. 5. of the TBT,

“Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade”.

In *Tuna II*, unlike the panel, the Appellate Body held that international standards for the purposes of the TBT Agreement could not be set under the Agreement on the International Dolphin Conservation Program, due to the fact that this Organization is not open to any WTO Member State⁴⁶⁵.

⁴⁶⁰ HE, *Imported Seafood Traceability Regulations: A Mishap for the WTO's Disregard for Non-Product Related Processes and Production Methods?*, in *Asian Journal of WTO & International Health Law and Policy*, 2020, p. 189: “It would be absurd for the TBT to only examine conventional means of product identification at the border such as labelling and packaging, while inadvertently leaving a growing variety of digital carriers, e.g. e-catch certification schemes (...) out of its regulatory restraint”.

⁴⁶¹ See for instance, the notification of Australia’s Illegal Logging Prohibition Act 2021 and Amendment Regulation 2013.

⁴⁶² TBT Agreement, Preamble; see also Art. 2, para. 2.

⁴⁶³ Art. 2, para. 1.

⁴⁶⁴ WTO, *Tuna II*, WT/DS381/RW, Panel Report of 14 April 2015, para. 7.90.

⁴⁶⁵ WTO Appellate Body Report, US-Tuna II (Mexico), para. 399.

From this point of view, the circumstance that a catch documentation scheme has been adopted by a RFMO would not be sufficient to establish the presumption of conformity *ex Art. 2, para. 5*, even if constituting a relevant element of the factual context to be considered for the purposes of the necessity test under Art. 2, para. 2, taking also into account the expertise of RFMOs in their respective field.

However, one should note that in 2017 the FAO Conference adopted the already mentioned set of Voluntary Guidelines on Catch Documentation Schemes⁴⁶⁶, which represent a guideline for both RFMOs and domestic legislators willing to establish catch documentation schemes in order to prevent fish derived from IUU fishing from entering trade and market. It can be safely argued that, although they do not aim at creating a centralized system, the Guidelines may be relied on as an internationally agreed standard *ex Art. 2, para. 5*.

7. Answers to the Questions

In light of all the considerations developed in the preceding paragraphs, the consultants give the following answers to the questions asked to them:

1) The GFCM has the power to impose non-compliance follow-up measures, including trade-restrictive measures. This conclusion is based on:

- the post-UNCLOS evolution of international fisheries law, which, through the Compliance Agreement, the Code of Conduct for Responsible Fisheries, the Fish Stocks Agreement, the IUU Fishing Plan of Action, the Port State Agreement and the Subsidies Agreement goes in the precise direction of strengthening the obligation to cooperate for the conservation and sustainable management of living marine resources. Consequently, in order not to undermine the effectiveness of conservation and management measures adopted by RFMOs, IUU fishing can be prevented and deterred by appropriate follow-up measures, including trade-related sanctions;

- the practice of some RFMOs, which shows that they have adopted follow-up schemes including a broad range of measures and that, at least in one case (ICCAT), the sanctions scheme specifically includes trade-restrictive measures that have been effectively implemented; nobody has put into question the legality of ICCAT measures, even if they are not explicitly mentioned in the ICCAT Agreement;

⁴⁶⁶ *Supra*, para. 4.B..

- a number of specific provisions within the GFCM system, such as Art. 8 (b), and Art. 14 of the GFCM Agreement, Art. XIX of the Rules of Procedure (although this provision has a discriminatory character whose WTO legality is dubious) and several GFCM instruments, most notably Recommendation 38/2014/2, Resolution 43/2019/5 and Resolution 44/2021/13.

It is understood that non-compliance follow-up measures must be implemented consistently with other international law obligations, in particular those arising from WTO instruments. Consequently, trade-restrictive measures shall not discriminate between Parties, cooperating non-Parties and non-Parties (see answer to question 5).

Given that the GFCM has the power to impose non-compliance follow-up measures, including trade-restrictive measures, the actual adoption of such measures, which is currently pending within this organization, is more a political than a legal question.

2) A broad range of follow-up measures are permitted by the GFCM Agreement and can be implemented consistently with other international law obligations. They have a different nature. Some of them are addressed to vessels and are intended to sanction owners, including, if possible, beneficial owners (e. g., IUU vessels list; prohibition of subsidies); others are addressed to States, be they Parties, cooperating non-Parties or non-Parties (e. g., trade restrictions). Some follow-up measures prohibit IUU vessels from fishing; others prohibit trade in seafood products. Some follow-up measures aim at preventing further non-compliance (e. g., catch documentation schemes; technical assistance and capacity building); others aim at sanctioning those responsible for wrongful acts.

Trade-restrictive measures should be adopted as a last resort, where other kinds of measures have proven to be insufficient. In order to effectively implement trade-related measures, the GFCM should establish, as a first step, a more comprehensive catch documentation scheme, modelled upon the 2017 FAO Voluntary Guidelines.

3) Under general international law, any State or international organization that breaches an obligation is responsible for its wrongful conduct and must comply with consequent obligations of re-establishing the situation that existed before the breach and compensating for damages. In addition, treaties can provide for special regimes of responsibility. It is a matter of fact that several treaties relating to fisheries provide for special responsibility regimes, which establish particular mechanisms for ensuring compliance and include follow-up measures, such as trade-restrictive measures.

If a GFCM Party puts in question the legality of follow-up measures imposed by the GFCM it can resort to the means of settlement of disputes provided for by international law (it is questionable

whether Art. 19 of the GFCM Agreement can be applied by analogy, as it specifically relates to disputes between two or more GFCM Parties).

4) As remarked in the answer to question 1), the UNCLOS and post-UNCLOS evolution of international fisheries law goes in the direction of not undermining the effectiveness of conservation and management measures adopted by RFMOs and aims at preventing and deterring IUU fishing through appropriate measures, including trade-related sanctions. No provision in the UNCLOS can be found against this assumption.

Equally, the FAO determination in combating IUU fishing has been widely demonstrated by the Compliance Agreement, the Code of Conduct, the IUU Fishing Plan of Action and the Port State Agreement, which have been sponsored by this organization. All the GFCM instruments must be interpreted in the light of the consistent FAO practice in promoting measures to prevent and deter IUU fishing.

As regards WTO, Art. XX (g), of the GATT Agreement allows the adoption of trade-restrictive measures whose purpose is the conservation of exhaustible natural resources, which clearly also include fisheries resources. A number of WTO adjudicatory bodies decisions have been taken on unilateral measures adopted for this purpose. To be consistent with the GATT and the TBT Agreements, trade restrictive measures need to be proportionate and non-discriminatory. For instance, providing as a follow-up measure the reduction of quotas for Parties or cooperating non-Parties, while at the same time providing for trade-restrictive measures against non-Parties, would be unlawful under the WTO system.

As far as procedural requirements are concerned, the procedure governing trade sanctions must be fair and transparent. It must also offer an opportunity for due process to the negatively affected State, in line with the findings of the Appellate Body in the *Shrimp-Turtle* case. Accordingly, an adequate period of time must be granted to targeted State to reply and rectify its behaviour and periodical review of the action taken must follow, in order to guarantee timely de-listing.

Other conflicts that can be envisaged, taking into account general human rights principles, relate to respect for due process requirements in case of sanctions affecting persons and to the timely de-listing if conditions for listing do not exist anymore. Non-compliance proceedings should be reviewed accordingly.

5) As stated under question 4), trade-restrictive measures can determine conflicts of obligations only with respect to WTO instruments. In the GFCM system, the very adoption of trade-

restrictive measures can already be avoided if the GFCM is able to resolve the situation of non-compliance either by providing technical assistance and capacity building programmes or by identifying derogations to the implementation of given recommendations subject to the adoption of a multi-annual process to correct non-compliance. If this is not possible and trade-restrictive measures are adopted as a last resort option, the affected States can resort to WTO dispute settlement means against GFCM Parties and cooperating non-Parties that have implemented the said measures.