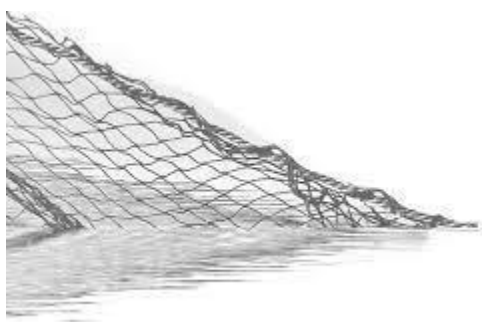




**Universitat Autònoma
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IUU fishing in the XXI Century



Anatol Vogdt

Supervised by Prof. Josep Ma. de Dios Marcer, PhD

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Abstract

The Dutch Jurist Hugo Grotius stated in his *De Mare Liberum* (The Freedom of the Seas, 1609), that the world's oceans had been gifted by God for the common use of mankind, for navigation, as well as for fishing. Four centuries later, the oceans have been completely overfished, risking the livelihood of millions and provoking irreversible damages to one of our most valuable resources.

Key words. IUU Fishing, Legislation, UN Sustainable Development Goals.

Glossary

AIS; Automated Identification Systems

CCAMLR; Convention on the Conservation of Antarctic Marine Living Resources

CCSBT; Commission for the Conservation of Southern Bluefin Tuna

CFP; Common Fisheries Policy

CMMs; Conservation and Management Measures

Driftnets; Fishing technique

EEZ; Exclusive Economic Zone

EIA; Environmental Impact Assessments

EJF; Environmental Justice Foundation

EPRS; European Parliamentary Research Service

FAO; Food and Agriculture Organization

H&M; Hull and Machinery Insurance.

IATTC; Inter-American Tropical Tuna Commission.

ICCAT; International Commission for the Conservation of Atlantic Tuna

ICFTU; International Confederation of Free Trade Unions

IMO; International Maritime Organization

IOTC; Indian Ocean Tuna Commission

IPOA-IUU; International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing

IUU; Illegal Unreported and Unregulated fishing

LDAC; Long-Distance Advisory Council

MARPOL; The International Convention for the Prevention of Pollution from Ships, 1973

MCS; Monitoring, Control and Surveillance

NGO; Non-Governmental Organization

NHH; Norwegian School of Economics

Nm; Nautical miles

OECD; The Organisation for Economic Co-operation and Development

P&I; Protection and Indemnity Clubs

PSMA; Agreement on Port State Measures
RFMO; Regional fisheries management
organisations SDG; Sustainable Development
Goals
SFPA; Sustainable fisheries partnership agreements
SMEFF; Sustainable Management of External Fishing
Fleets TFEU; Treaty on the Functioning of the
European Union
UNCLOS; United Nations Convention on the Law of
the Sea UVI; Unique Vessel Identifier
VGCDS; Voluntary Guidelines for Catch Documentation
Schemes VGFSP; Voluntary Guidelines for Flag State
Performance WCPFC; Western and Central Pacific
Fisheries Commission

Introduction

The own world that is the Sea and its affairs. Everything from commercial navigation to fishing, exploration, research, offshore drilling, and so on, providing all kind of resources for humanity, known for being a dark and obscure reality.

Legally, the Sea seems to be almost lawless besides of the existence of international regulations and consensus on most of the activities taking place within it. Monitoring, surveilling, monitoring 75% of the surface of the planet is an intangible task, for now.

The high seas are ruled by the so-called *mare liberum*, this is the principle in International law of the freedom of the seas. This principle as we will see in Part 1 is the essential core of navigation and International rules on sovereignty, but it comes with conflicts such as being unable to trace back what we consume and to be sure that the workers who collected our commodities do not fall within the so-called modern slavery.

This final degree paper focuses on one of the key industries that profits intensively from the lack of control and liability in the High Seas and EEZs of developing countries unable to ensure compliance, the so called Illegal, Unreported and Unregulated fishing Industry.

Divided in the following three parts; The first chapter provides the reader with the background, concept, impact and regulatory development of the IUU fishing Industry worldwide. The second part reflects the European Unions policy combating these activities, from an external perspective as in relationships with parties from third countries and from an internal perspective, this means, the activities conducted by EU nationals outside of the EUs territorial borders.

The last chapter of this paper, part three, provides us with a summarized overview of the challenges in the fight against IUU fishing and the adoption of

innovative methods that could be used to cut corners in the global efforts against this practice.

Choosing a topic like this for my final degree paper has not so much to do with the topic itself, but with what it expresses in the field of legal studies. IUU fishing is evidently one of the worst problems the world faces, and regulation cannot cope with its fast development.

After four years studying Law, writing this final degree paper gives me enough freedom to put on the table this example, which reflects my personal thought on the need to closely bond legal studies to the real world. If it's IUU fishing, corruption, corporate responsibility, political tampering, illegitimate private interests, or any other obscure topic, it seems to me that after all these years fully dedicating myself to these studies, that a profound challenge to rethink how we educate and prepare future legal professionals must be firmly taken in consideration, because this constant detachment of theoretical knowledge with what this fast developing globalized society requires is a burden to everyone that seeks for the correct implementation of law, order and Justice.

Adapting to a new century moved by technology, languages, multidisciplinary aptitudes, social skills, blurred cultural differences, is a necessary but unaccomplished requirement with the current philosophy in Law Faculties.

Our Legal studies must recycle themselves, adapt to the new circumstances and erase obstacles in order to close the gap by bridging its affairs with our Societies.

An important disclosure

This final degree paper compiles different studies, paper, tools, legislation, case-law I learned about, therefore, any statement found in this work without a reference will be directly inspired by experts in the field, and in no case do I appropriate them to myself.

1. Concept, impact, and regulatory development.

- I. The background and concept of IUU fishing.

In order to understand Illegal, Unreported and Unregulated (IUU) fishing, we have to date back in history and ask ourselves; Who owns the fish in the sea? The Right to Fish as a principle in the Western conception of the Law of the Sea was *traditionally open to anybody who had the wherewithal to venture out upon the ocean*, as espoused by the seventeenth century Dutch Jurist Hugo Grotius in his *De Mare Liberum (The Freedom of the Seas, 1609)*, stating that “the world’s oceans have been gifted by God for the common use of mankind, for navigation, as well as for fishing”. Boundless and the fish within inexhaustible, it could not become the property of any one person or state.¹

During the nineteenth century, the majority of Western States claimed territorial waters to a distance of three nautical miles (nm) seaward of their coastlines, based on the maximum a cannon could fire from the shore, known as the Cannon-shot rule. It therefore marked the reach of the State’s power. Beyond these 3 nm, the oceans remained the common property of the people.²

The Law of the Sea consolidated both principals, and facing the expansion of global fisheries in the second half of the twentieth century, facing the prospect of near o total collapse of fishing industries, a new Law of the Sea developed with the formalization of the United Nations Third Convention of the Law of the Sea (UNCLOS III) in 1982, establishing a 200nm Exclusive Economic Zone (EEZ) for the world’s Coastal Nations (Rothwell and Stephens 2010).³

¹ Illegal, Unreported and Unregulated Fishing in Historical Perspective. Joseph Christensen, Murdoch University. May 2016.

² The three-mile limit of territorial seas: a brief history. Navy Commander Swarztrauber, Sayre Archie, American University, 1970.

³ Donald R. Rothwell, ANU College of Law & Tim Stephens, The University of Sydney Law School.

Rögnvaldur Hannesson, former professor emeritus of fisheries economics at NHH stated in 2010 that by the end of the twentieth century, “most of the world’s major fishing nations had developed treaties for the management of migratory and High Seas fish populations not covered by EEZs and remaining vulnerable to over-exploitation by distant-water industrial fleets. The world’s oceans had been enclosed, creating the conditions where illegal and unregulated fishing could occur on an extensive global scale”.⁴

- Illegal, Unreported and Unregulated (IUU) fishing defines in broad terms any fishing activity that occurs in violation of fisheries laws or outside of existing laws and regulations in areas within the jurisdiction of a State or on the High Seas. Illegal Fishing includes activities of a national or foreign fishing vessel in the waters of a State or on the High Seas, that are in violation of requirements of a Coastal State, Flag State or a Regional Fisheries Management Organization (RFMO).⁵
- Unreported Fishing includes activities that are not reported at all or misreported in terms of the amount of catch to the relevant public authority or RFMO. Unreported fishing is a strong indicator of the willingness to circumvent quotas, and to avoid taxes and other relevant duties related to their catches.
- Unregulated Fishing includes fishing activities in areas or for fish stocks where there are no applicable conservation or management measures in place and that are inconsistent with state responsibilities for the conservation of marine resources under international law.

⁴ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. (2001). Food and Agriculture Organization of the United Nations. Retrieved from: <http://www.fao.org/publications/card/en/c/71be21c9-8406-5f66-ac68-1e74604464e7>. Archived at: <https://perma.cc/9EHZ-JGYF>.

⁵ Regional fisheries management organisations (RFMOs) are international organisations formed by countries with fishing interests in an area. Some of them manage all the fish stocks found in a specific area, while others focus on particular highly-migratory species, notably tuna, throughout vast geographical areas. The EU, represented by the European Commission, plays an active role in 6 tuna and 11 non-tuna RFMOs or RFBs.

It also includes operations by fishing vessel in areas governed by RFMOs that have no nationality or are flagged to a state that is not party to that organization.⁶

In relation to stateless vessels, several RFMOs such as the WCPFC (Western and Central Pacific Fisheries Commission) have expressed a deep concern regarding the operation of these vessels without governance and oversight.⁷

In broad terms, IUU fishing is without a doubt one of the main obstacles when it comes to achieving a sustainable, responsible and legal development of the world's fisheries, contributing to overexploitation of fish stocks and harming the recovery of fish populations and ecosystems.

Besides of severely damaging the Marine Environment, it also distorts competition by putting compliant fishers in a position of disadvantage, affecting therefore the socio-economic wellbeing of fishing communities.⁸

It occurs in all sorts of fisheries, from shallow coastal waters or inland waters to the deep and high seas.

The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) was the first in introducing the term in 1997, after it emerged abruptly as a major international problem in the 1990s and 2000s (Hannesson 2006). The *1997 Report of the Standing Committee on Observation and Inspection* noted that

⁶ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. (2001). Food and Agriculture Organization of the United Nations. Retrieved from: <http://www.fao.org/publications/card/en/c/71be21c9-8406-5f66-ac68-1e74604464e7>. Archived at: <https://perma.cc/9EHZ-JGYF>.

⁷ The competent authority of the WCPFC encouraged in 2009 the Commission Members and Cooperating Non-Members (CCM) to take all necessary measures to prevent vessels without nationality from undermining conservation legislation, to prevent vessels without nationality from undermining conservation and management measures adopted by the Commission.

⁸ The United Nations Convention on the Law of the Sea (UNCLOS) establishes in article 92 the Status of Ships, stating the following; (1) Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry. (2) A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

vessels flagged to CCAMLR members had been observed fishing illegally within CCAMLR waters and the EEZs adjacent to the Prince Edward Islands (South Africa), Crozet Islands and the Kerguelen Islands (France) and the Heard and McDonald Islands (Australia), while also noting the *increasing incidence* of fishing within the Contention Area by non- contracting states.

In 1999, given the rise of social pressure in order for competent actors to respond against Illegal fishing, a 2 years global strategy culminated in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2001, IPOA-IUU).

The activity of fishing under the radar, not documenting or reporting the catch and in areas not overseen of the capture of its species is one of the main causes for overfishing in our seas and oceans.

The FAO estimated in its annually report *State of the World Fisheries and Aquaculture (2002)* that up to 78 per cent (%) of marine capture fisheries were given that the global maritime catch increased from 18 million tonnes in 1950 to 92 million tonnes by 2001.⁹

In 2009, a team of scientists produced the first baseline estimate of the global scale of IUU fishing, finding that at the start of the twenty-first century, losses attributed to IUU fishing accounted for between US\$10 billion and US\$23.5 billion, representing an estimated 11 and 26 million tons of wild-caught fish.¹⁰

To have a broader understanding of the importance of IUU fishing, the illegal trade has been described as “probably more profitable than running drugs or smuggling people”.¹¹

By 2014, according to the Food and Agriculture Organization (FAO), IUU fishing ‘remains a major global threat to the long-term sustainable management of fisheries and the maintenance of productive and healthy ecosystems as well as to the stable socio-economic condition of many of the world’s small-scale and

⁹ Illegal, Unreported and Unregulated Fishing: An analysis of the legal, economic and historical factors relevant to its development and persistence, Rachel Braid, Deakin University, 2004.

¹⁰ Estimating the worldwide extension of IUU fishing, Agnew et al. 2009. <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0004570>

¹¹ Bruce Montgomery, “A Fishy Business”, *The Weekend Australian* (Sydney, Australia).

artisanal fishing communities'.¹²

The United Nations laid down life below water as the Sustainable Development Goal or SDG number 14, establishing guidelines to effectively regulate harvesting illegal, unreported and unregulated fishing, 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 characteristics. By 2020, prohibitions to certain forms of fisheries subsidies which contribute to overcapacity and overfishing have to be consolidated as well, eliminating subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiations.¹³

II. The impact of IUU fishing.

Fishing has been since ancient times one of the main resources for Humanity when it comes to food and economic development. First conceived as an unlimited gift of nature, it was not until the years after the Second World War that we came to the realization that the aquatic resources were in fact not indefinite, and the need of properly managing our activities was starting to be taken into account to ensure long-term sustainability.¹⁴

¹² The state of the world's fisheries FAO 2014, <http://www.fao.org/3/a-i3720e.pdf>

¹³ SDSN, Indicators and a Monitoring Framework. Launching a Data Revolution for the sustainable development goals. <https://indicators.report/targets/14-6/>

¹⁴ New York Times, The Outlaw Ocean, "Sea Slaves": The Human Misery That Feeds Pets and Livestock, by Ian Urbina, July 27, 2015. As for this article, Phil Robertson, deputy director of Human Rights Watch's Asia Division stated that "Life at Sea is cheap and conditions out there keep getting worse".

According to a United Nations Survey for a Report about 50 Cambodian men and boys sold to Thai fishing boats, stated that in the 2009 survey, 29 said they had witnessed their captain or other officers

With the consolidation in the mid-seventies of exclusive economic zones (EEZs) and the adoption in 1982 of the United Nations Convention on the Law of the Sea (UNCLOS), a more consolidated framework for the better management of marine resources was put in place.

Coastal States formally started now to have the obligation to control and preserve their resources within their EEZs, but many of them cannot cope with these international requirements as they face other serious challenges while lacking enough experience, financial and physical resources. These factors make them seriously vulnerable to the exploitation of their resources by external illegitimate third parties.¹⁵

The Food and Agriculture Organisation of the United Nations stated in the introductory comments of their Code of Conduct for Responsible Fisheries, that in the eighties it became clear that fisheries resources could no longer sustain such “rapid and often uncontrolled exploitation and development, and that new approaches to fisheries management embracing conservation and environmental considerations were urgently needed.”

A big increase in concern was coming as the result of unmonitored and uncontrolled fishing of migratory species in the High Seas.¹⁶

Fishing and fisheries are essential for food, employment, trade and economic sustainability and wellbeing for big parts of the global population, therefore Illegal fishing is considered as one of world’s biggest direct and indirect threats.

kill a worker. Many of these fisherman are lured across the border by traffickers only to become so-called “*Sea Slaves in floating labour camps*”. Often they are beaten for the smallest transgressions, like stitching a torn net too slowly or mistakenly placing a mackerel into a bucket of herring, and so many others examples to be said.

¹⁵ It was estimated in 2017 that the trade value of the fishing industry was around \$153 Billion, increasing by a compound annual rate (CAGR) of 4 percent in the five-year period other words, 24% of the global annually catch. Estimation conducted by Rabobank in 2017.

¹⁶ Evaluating the threat of IUU fishing to sea turtles in the Indian Ocean and Southeast Asia using expert elicitation. Kimberly A. Riska , Renae C. Tobin, Mariana M.P.B. Fuentes, Mark Harmann.

It affects all kinds of socio economic, political, and environmental factions of society. Illegal, unregulated and unreported fishing is, for example, a direct cause of unfair competition the fishing industry, due to illegal fishers fishing over the established quotas and not reporting it, leaving legitimate fishing trawlers without any real potential of catch.¹⁷

The World Economic Forum stated in its 2016 Agenda that vulnerable legitimate fishing activities were harmed in vast amounts within Africa's rich coastal waters.¹⁸

The WEF stated that "Illegal fishing is a theft from national revenues. (...) Africa's renewable fishery resources are a potential source of wealth and opportunity" if managed and controlled properly, of course.¹⁹

Estimations of losses due to foreign fishing vessels in West African Coastal waters can sum up to 1.3 Billion dollars per year.²⁰

Unfair competition does not only occur due to overfishing and other unreported activities, but as well when considering the techniques used by illegal fishers such as *driftnets*, an illegal practice that involves the use of nets that can reach 35m in height and can be up to 20km long.²¹

Consumers are also impacted by illegal, unregulated and unreported fishing Regarding. The notion of Seafood Fraud is as a Report by Oceana said, a widespread problem

¹⁷ Unfair competition as in dishonest or fraudulent rivalry in trade and commerce. Towards a European Unfair Competition Law, a clash between legal families. Rogier W. de Very. 2005.

¹⁸ <https://www.weforum.org/agenda/2016/06/illegal-fishing-is-robbing-africa-of-its-ocean-wealth/>

¹⁹ <https://www.worldwildlife.org/threats/illegal-fishing>

²⁰ These nets drift in open sea killing everything that encounters them, which mostly is considered as disposable bycatch. The economic loss should be considered in practical terms as a huge impact due to drainage of regional revenues, losses of fishing stocks, lower catches and severe damages to the marine environment. FAO.org

²¹ An International Moratorium was established in the 2002 United Nations General Assembly prohibiting the use of these nets. The European Union banned them in 2013.

across the world. Seafood Fraud as in mislabeling, consists in by replacing one species with a another cheaper one, leading to gaps in the supply chain, therefore, compromising the quality, security and sustainability of the products we consume.²²

The extend of the illegal act of defrauding consumers and buyers of seafood for economic gain is potentially unmeasurable due to its clandestine nature.²³

Countries efforts must be strongly focused to ensure adequate full-chain traceability and accountability.

The reason for ensuring traceability and accountability in the full-chain is a result of Seafood Fraud potentially happening in each step the supply chain, such as – in restaurants, - distributor, - processing and packaging phase, and so on. Consequences as a result of an effective Seafood Fraud are;²⁴

- Direct threats to Human Health. No control on the fish that gets swapped for another, opening a wide window for product consumption and related risks such as contaminants, toxins or allergens.
- The creation of a Market for IUU fishing in order to better launder illegally caught seafood throw-out the EU Market, undermining conservation efforts to prevent overfishing and the accidental capture of endangered species or species at risk.

²² Health concerns are of great relevance as illegal caught fish commonly bypasses any screening and may be tampered with environmental chemicals and aquaculture drugs, and other natural toxins such as *histamine* or *scombrototoxin poisoning, ciguatera, tetrodotoxin, gempylotoxin*. Oceana Report, Deceptive Dishes: Seafood swaps Found Worldwide. 2016.

²³ Substituting an inexpensive species for one of higher value can be relatively easy. The differences in the taste and texture of different fish species' flesh may be subtle, and therefore difficulty in identifying a species form, especially when targeted to consumers. The different practices vary depending on species, product form, region and others. Deception is a keyelement in these practices, such as in all the other clandestine or fraudulent activities. US Congressional Research Service, Seafood Fraud, Harold F. Upton. Analyst in Natural Resources Policy, April 7, 2015.

²⁴ The following relevant consequences are a direct extract from OCEANA'S efforts to make the public aware damages due to IUU fishing in the EU's efforts for the protection its consumers. For more information, please visit eu.oceana.org. Lobbying is a key element in establishing greater regulations to fight against harmful practices, benefiting a few private stakeholders while having immeasurable impacts for the General Public and its interests.

- Measures and the public's willingness to make eco-friendly choices is heavily undermined. "Market-driven conservation efforts depend on the consumer's ability to make an informed purchase of particular species."
- Fraud in labelling and misinformation is a serious cause for overconsumption of species that are actually in danger, without consumers being aware of the fact. Practices of this kind include Low Weights, Undercounting, Over-treating, altering colors, transshipment and mislabeling to avoid customs duties, giving place to hardships in Seafood traceability, associated losses.²⁵

Global and local efforts seeking to ensure sustainability and development fall as well under the threat of IUU fishing.²⁶

The FAO stated on behalf of the United Nations that "Illegal, unreported, and unregulated (IUU) fishing remains one of the greatest threats to marine ecosystems due to its potent ability to undermine national and regional efforts to manage fisheries sustainably as well as endeavors to conserve marine

²⁵ A study conducted in the US and referenced by the US Congressional Research Service showed that analysis based on mitochondrial DNA sequences revealed that 77% of the fish sold in the US marketplace as red snapper (*Lutjans Campechanus*) belonged to other species from the same family.

P.B. Marko et al., "Fisheries: Mislabeling of a Depleted Reef Fish," *Nature*, vol. 430 (July 2004), pp. 309-310. FDA policy states that labelling or sale of any fish other than *Lutjanus campechanus* as red snapper constitutes a misbranding in violation of the Federal Food Drug and Cosmetic Act of 1938 (FFDCA; 21 U.S.C. §§301 et seq.). As a personal comment to these studies and conclusions is that mislabelling must not necessarily be linked to bad faith of retailers. Negligent does not directly imply fraudulent, but there have been cases of convictions for knowingly mislabelling products such as in the following case in the year 2015. <https://thefishsite.com/articles/conviction-after-us-shrimp-mislabelling-case>.

Testing also took place in Europe in the year 2015 (conducted by Oceana). This testing procedure involved 280 fish samples collected from restaurants and EU Institutions canteens used by EU civil servants and politicians. The results from the Laboratory of Biodiversity and Evolutionary Genomics from the Katholieke Universiteit of Leuven showed that EU Institutions canteens where "fisheries management decision makers get their meals" 31.8% of clear cases of mislabelling based on information gathered from either the menu or from restaurant staff were discovered.

biodiversity. IUU fishing takes advantage of corrupt administrations and exploits weak management regimes, in particular those of developing countries lacking the capacity and resources for effective monitoring, control, and surveillance (MCS).” The FAO works closely with The World Bank and other organisations such as the International Maritime Organisation (IMO) in order to fight IUU fishing.²⁷

In the EU, five European Structural and Investment Funds support the economic development. the European Maritime and Fisheries Fund (EMFF), the European Social Fund (ESF), the Cohesion Fund (CF), the European Agricultural Fund for Rural Development (EAFRD) and the European Maritime and Fisheries Fund.²⁸

III. Regulatory Development.

The United Nations Convention on the Law of the Sea (UNCLOS) is the fundamental international legal instrument regulating activities in the Sea. Its preamble expresses in a very clear manner the reasons laying behind its creation, coming as a desire to settle, in a spirit of mutual understanding and cooperation, bringing this Convention to light as a contribution to the maintenance of peace, justice and progress for Humanity.

Conscious must be clear regarding problems derived from ocean space closely interrelated and considered as whole, therefore being the establishment of a legal order for the seas and oceans a must, taking always in consideration the respect to the nations sovereign rights, facilitating international communication, promoting peaceful uses of the sea and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and studies in protection and preservation of the marine environment.

Attaining to the principles embodied in resolution 2749 (XXV) of 17 December

²⁷ The International Maritime Organisation estimated that there are around 4.6 million identified vessels operating actively. Some 64.000 fishing vessels of 24 meter in length and over operate in marine waters.

²⁸ https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/european-structural-and-investment-funds_en

1970 in which the General Assembly of the United Nations solemnly declared inter alia that the area of the seabed and ocean floor and the subsoil thereof, are the common heritage of mankind, its exploration and exploitation must therefore be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States.

The United Nations Convention on the Law of the Sea was signed in Montego Bay, Jamaica by 157 countries, started the 10th December 1982 and was effective on the 16th November 1994. The Convention, with 320 articles plus 9 annexes regulates the whole spectrum of the Oceans, Seas and Nations conducting activities within them.

Signing Nations find their obligations regarding conservation and management of the living resources of the high seas in part VII, section 2; regarding the protection and preservation of the marine environment in part XII; monitoring and environmental assessment in section 4, enforcement in 5, obligations under other conventions on the protection and preservation of the marine environment in section 11; regarding Highly Migratory species in Annex I; without disregarding the entire prospect of obligations regarding vessels flying the States Flag and operating under its registries.²⁹

Several soft law instruments have been created to ensure international compliance within the Seas. One of them originated at the FAO Conference at its Twenty-seventh Session (November 1993), where, through Resolution 15/93, the FAO approved the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas for submission to Governments for acceptance.

The Agreement is open to acceptance by any Member or Associate Member of FAO, and to any non-member State that is a member of the United Nations, or any of the specialized agencies of the United Nations or of the International

²⁹ https://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm

Atomic Energy Agency, pursuant to its article X.1.

As per its Preamble, the Agreement reiterates the recognition that all States have the right for their nationals to engage In fishing on the High Seas, subject to the relevant rules of International Law, as reflected in the United Nations Convention on the Law of the Sea. All States have the duty to take, or to cooperate with other States in taking the necessary measures to protect and preserve the living resources of the High Seas.

Closely inspired in Agenda 21, the Agreement calls upon States which do not participate in global, regional or subregional fisheries organizations or arrangements to join or, as appropriate, to enter into understandings with such organizations or with parties to such organizations or arrangements with a view to achieving compliance with international conservation and management measures.

This *Soft Law* instrument seeks to ensure compliance by clearly reflecting 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.

Highly relevant is article III regarding Flag State Responsibility, by which the Agreement seeks to ensure that each party takes the necessary measures to ensure that fishing vessels entitled to fly its flag go not engage in any activity that undermines the effectiveness of international conservation and management measures

In particular, no Party shall allow any fishing vessels entitled to fly its flag to be used for fishing on the high seas unless it has been authorized to be so used by the appropriate authority or authorities of that Party. A fishing vessel so authorized shall fish in accordance with the conditions of the authorization.

Each Party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such provisions an offence under national legislation. Applicable sanctions must be qualitatively

sufficient to ensure compliance with the requirements of the Agreement by depriving offenders of the benefits accruing from their illegal activities.

Other articles of this Agreement aim at the ensure International Cooperation, information gathering, dispute resolution mechanisms and records of fishing vessels.

Keeping into account that Soft Law is a very useful instrument to secure guidance and good practices by consolidating the commitment of its signing parties, legally binding instruments bring an ever-greater effort against malpractices on paper. The 1995 United Nations Fish Stocks Agreement is an essential instrument that came as the result of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) efforts to establish a solid legal regime for the conservation and management of marine living resources within area under national jurisdiction and on the high seas.³⁰

The Agreement also contains specific provisions on straddling fish stocks and highly migratory fish stocks.

The Agreement entered into force on the 21st December 2001 and currently withholds 80 Nations to it, including the European Union and its Member States. It is therefore considered to be the most significant binding global instrument to be adopted for the UNCLOS.

By setting out the structured legal regime for the conservation and management of straddling and highly migratory fish stocks, with a view to ensuring their long-term conservation and sustainable use.³¹

The United Nations released a report on the effectiveness of the Agreement, and the results show that the Agreement brought a major leap in the development of a solid and well established legal regime for the long-term conservation and

³⁰ https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

³¹ Article 63 UNCLOS.

sustainable use of straddling and highly migratory fish stocks. The Agreement strengthens the role of regional fisheries management organizations and arrangements; it ensures effective mechanisms for compliance and enforcement of international conservation and management measures; it sets out the role and purpose of regional fisheries management organizations (RFMO) and arrangements, including their functions; it establishes general principles, such as the precautionary and ecosystem approaches for the conservation and management of straddling fish stocks and highly migratory fish stocks in all regions around the world; it requires the adoption of the best scientific evidence available as per Agenda 21; It strengthens the responsibility of Flag States over fishing vessels flying their flag on the high seas; it requires compatibility between conservation and management measures adopted for areas under national jurisdiction and those established in the adjacent high seas, so as to ensure conservation and management of stocks in their entirety.³²

Besides of the efforts to establish prevalent instruments to fight unsustainable conducts and ensure liability, several more tools and guidelines were created in order to counter the continuous increase of overfishing, pollution, damages due to the usage of harmful fishing techniques, and overall illegal, unreported and unregulated (IUU) fishing. One of these guidelines was established in the early 1990's by the Food and Agriculture Organization of the United Nations (FAO), the so-called Code of Conduct for Responsible Fisheries (the Code). Drafted by 170 nations, the Code was adopted by all FAO Member States on 31 October 1995, containing a large set of principles and articles promoting good practices and conducts for fishing and aquaculture activities, seeking for the best responsible and sustainable ways.³³

In other words, the Code sets out principles and international standards of behavior for responsible practices with a view to ensuring the effective conservation, management and development of all fisheries, while covering in the meantime activities such as capture, processing and trade of fish and fishery

³² The conservation and management of such stocks must be based on the precautionary approach and the best scientific evidence available.

³³ https://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm

products, fishing operations, aquaculture, fisheries research and the integration of fisheries into coastal area management.

Elaborated within the Framework of the Code of Conduct for Responsible Fisheries, a new Soft Law instrument was created under the nomenclatures IPOA-IUU, standing for – The International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing.

The IPOA-IUU is a voluntary instrument that applies to all States and entities and to all fisheries, and clearly addresses for the first time the extended nature and scope of IUU fishing. Its objective and principles come along with the implementation of measures to prevent, deter and eliminate IUU fishing, by focusing on all State responsibilities, flag State responsibilities, coastal State measures, port State measures, internationally agreed market-related measures, research and regional fisheries management organizations.

It was adopted by the FAO Committee on Fisheries (COFI) on 2 March 2001, after considering in 1999 that IUU fishing is a matter of high priority, recommending the elaboration of an International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).

The instrument oversees guidelines and instructions regarding national legislation, State control over nationals, vessels without nationality, sanctions, non-cooperating States, economic incentives, monitoring – control and surveillance (MCS), national plans of action, cooperation between States, publicity, technical capacity and resources.

It was time to set a legally binding instrument, which, resulted to be the United Nations Food and Agriculture Organization Agreement on Port State to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (PSMA). The International Agreement sees to prevent IUU fishing through the adoption and implementation of effective port State Measures as a means of ensuring the long-term conservation and sustainable use of living marine resources.³⁴

The PSMA, adopted in 2009 by the United Nations Food and Agriculture Organization requires parties to place tighter controls on foreign-flagged vessels

³⁴ Preamble of the PSMA Agreement. <http://www.fao.org/3/a-i5779e.pdf>

seeking to enter and use their ports to land or transship fish.³⁵

It established conservation and management measures such as the establishment of quotas or bycatch limits, via domestic laws of coastal nations and international agreements related to high seas and shared fish stocks. It aims to prevent vessels carrying illegally harvested fish from accessing ports around the world, denying port entry and access to port services and consequently preventing illegal seafood from entering trade, which leads to an increase in the costs associated with IUU fishing operations, while removing the financial incentives that initially encourage these activities.³⁶

The Agreement focuses as well on actions against vessel that provide logistic support to these operations, such as refueling or transshipment vessels.³⁷

“A collaborative approach by all stakeholders can help ports block illegal fishers from landing their catch and prevent illicitly caught seafood from entering the supply chain”.

Other complementary instruments such as the Voluntary Guidelines for Flag State Performance and the Voluntary Guidelines for Catch Documentation Schemes have been adopted. The Voluntary Guidelines for Flag State Performance (VGFSP) provide guidance to strengthen and monitor compliance by flag States with their international duties and obligations regarding the flagging and control of fishing vessels. Covering a vast amount of actions countries can take in order to ensure better practices and compliance, from

³⁵ Article 93 of the UNCLOS.

³⁶ Notice on the “special responsibility of Flag States to ensure that none of their vessels are fishing on the high seas unless authorized, and that they can effectively exercise their responsibilities to ensure that their vessels comply with international measures. The prevention of re-flagging of vessels fishing on the high seas is another key point of the Agreement. The Compliance Agreement was approved by the FAO Conference at its 27th session in November 1993 and entered into force on 24 April 2003, after the twenty-fifth instrument of acceptance was deposited with the FAO Director-General.

³⁷ Covering Flag, Port, Coastal and Market State Responsibilities, the IPOA-IUU pushes for participation, coordination among Member States, as well between the private sector of the Fishing Industry, fishing communities, NGO’s and other stakeholders in order to address the impacts of IUU fishing worldwide. Efforts for the adoption and effective implementation of National Plans of Action within Flag State, Coastal States and Port States responsibilities are key, taking in consideration the need of a joint coordination with RFMO’s. For more information, <http://www.fao.org/iuu-fishing/international-framework/ipoa-iuu/en/>

fisheries management, to registration, record of vessels, authorizations, monitoring, control and surveillance (MCS) and cooperation between Flag States and Coastal States. Cooperation among signing parties and guidelines to ensure good practices in an industry strained by unregulated and excessive activities.³⁸

The FAO Voluntary Guidelines for Catch Documentation Schemes (VGCDS) was the first international policy on Catch Documentation Schemes, adopted by the FAO Conference in July 2007, during its Fortieth Session.³⁹

Better implemented when working together with the PSMA and the Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels, the objective behind the catch documentation schemes is to establish a clear traceability of fishery products from the point of origin until it reaches the end consumers.⁴⁰

As previously mentioned, the 1995 United Nations Fish Stocks Agreement was one of the first mechanisms to set a framework for the nature and competences of the so-called Regional Fisheries Management Organizations (RFMO). These organizations are entities created by countries that “share a practical and/or financial interest in managing and conserving fish stocks in a particular region” as stated by PEW.⁴¹

In other words, RFMOs are international organisations formed by countries with fishing interests in an area. Some of them manage all the fish stocks found in a specific area, while others focus on particular highly migratory species, such as tuna.

Both open to countries in the region (“coastal states”) and countries with interests in the fisheries concerned. Contrary to regional fisheries bodies (RFBs), which have purely an advisory role, RFMOs have management to set

³⁸ The VGFSP was adopted at the 31st session of COFI in 2014.

³⁹ <http://www.fao.org/iuu-fishing/international-framework/voluntary-guidelines-for-catch-documentation-schemes/en/>

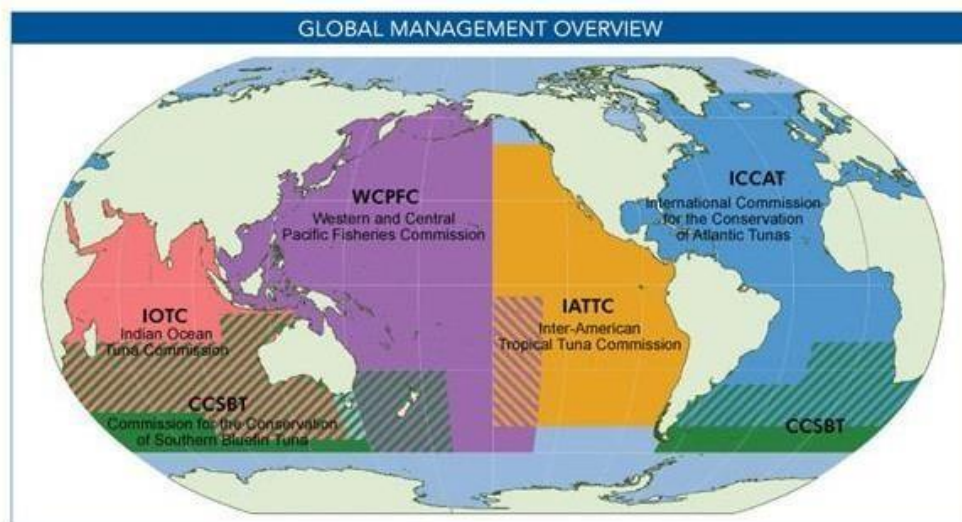
⁴⁰ The FAO identifies CDS as “market related measures that have been developed specially to combat IUU fishing.” “A system that tracks and traces fish from the point of capture through unloading and throughout the supply chain”.

⁴¹ <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2012/02/23/faq-what-is-a-regional-fishery-management-organization>

catch and fishing effort limits, technical measures, and control obligations, binding to their signing members.

Currently there are 17 RFMOs covering the globe, of which 5 are dedicated to Tuna, sharing around 91% of the world ocean's as seen in the picture below.⁴²

- CCSBT- Commission for the Conservation of Southern Bluefin Tuna
- IATTC- Inter-American Tropical Tuna Commission
- ICCAT- International Commission for the Conservation of Atlantic Tunas
- IOTC- Indian Ocean Tuna Commission
- WCPFC - Western and Central Pacific Fisheries Commission



⁴² International Commission for the Conservation of Atlantic Tunas (ICCAT), Indian Ocean Tuna Commission (IOTC), Western and Central Pacific Fisheries Commission (WCPFC), Inter-American Tropical Tuna Commission (IATTC), Agreement on the International Dolphin Conservation Programme (AIDCP) (sister organisation to IATTC), Commission for the Conservation of Southern Bluefin Tuna (CCSBT), Convention on Conservation of Antarctic Marine Living Resources (CCAMLR), Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (CCBSP), North-East Atlantic Fisheries Commission (NEAFC), Northwest Atlantic Fisheries Organization (NAFO), North Atlantic Salmon Conservation Organisation (NASCO), South-East Atlantic Fisheries Organisation (SEAFO), South Indian Ocean Fisheries Agreement (SIOFA), South Pacific Regional Fisheries Management Organisation (SPRFMO), General Fisheries Commission for the Mediterranean (GFCM), Western Central Atlantic Fisheries Commission (WECAFC), Fisheries Committee for the Eastern Central Atlantic (CECAF).
https://ec.europa.eu/fisheries/cfp/international/rfmo_en

Countries and even supranational bodies such as the European Union can be part of RFMO's, as long as they agree to certain provisions, such as sharing data, complying with established rules, contributing economically in order to support scientific research and better enforcement measures, but RFMO's have been long known to lack authority in limiting and reducing excessive practices due to heavy restraints and lack of tools to enforce its measures on contracting and non-contracting parties. RFMOs are key players in promoting awareness of International Instruments among its contracting parties, while ensuring Conservation and Management Measures (CMMs) support and complement international conservation and management measures.

2. The EU's Fishing Regulation.

The European Union is a Contracting Party to the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), and has ratified the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (the so-called UN Fish Stocks Agreement), while accepting in the same time the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing vessels on the High Seas of 24 November 1993 of the Food and Agricultural Organization of the United Nations (FAO Compliance Agreement).

The European Union is a key player in the fight against IUU fishing to an extent that it has created a vast framework that englobes different aspects of the industry and stakeholders involved in it, such as the Common Fisheries Policy (CFP), established institutional bodies such as the European Fisheries Control Agency, rules on worker protection (Seafarer's working time, working hours on board ships using EU ports, medical treatment on board vessels), on the preservation and management of fisheries stocks such as the International

Dolphin Conservation Program, the EU's fisheries control system, rules on the Conservation of certain stocks of migratory fish, on the Elimination of illegal, unreported and unregulated fishing, on the Fishing opportunities in EU and non-EU waters, on the Conservation of fish stocks in countries with unsustainable fishing and many others orientated as well to other sectors of the Fishing Industry, such as Aquaculture (Fish farming), Data collection (Assistance in the fisheries sector management) and on the Environmental protection.⁴³

This scheme of different regulations can only be imposed by strictly and effectively cooperation with the EU Member States and non-EU Member States. The relation between the European Commission and EU Member States basis itself in a division of competences. A clear reference to the division of competences was established in the European Community's Declaration made upon the signature of the United Nations Convention of the Law of the Sea and Treaty of Functioning of the European Union (TFEU).

- EU Member States retain control as Flag States by accepting vessels on their national registers, granting fishing authorisations and imposing sanctions when necessary.
- EU enjoys exclusive competence regarding the conservation of marine biological resources under the Common Fisheries Policy Framework. Therefore, responsible for entering SFPAs. The EU under international law is the ultimate element in ensuring a efficient Due-Diligence. It shall take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.

The European Union is the biggest market in the world, reaching over 500 million citizens willing to have quality goods. So, as a fact, it is safe to say that a large amount of the IUU catches end up in the EU's Internal Market.

Besides of being the biggest market in the World, the European Union has one

⁴³ Key initiatives in the fight against IUU fishing are the creation of lists for vessels engaging in IUU fishing.

of the largest distant water fishing fleets, with well over 15.000 vessels by 2010.⁴⁴

The most relevant regulations in the EU's framework in the fight against illegal, unreported and unregulated fishing are the Common Fisheries Policy, the Regulation on the sustainable management of external fleets and the EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing.

I. The EU's common fisheries policy.

First introduced in the early 1970's, the CFP sets rules for the management of European Fishing Fleets and for the conservation of fish stocks. Designed to manage a common resource, it gives all European Fishing Fleet equal access to EU waters and fishing grounds, allowing fair competitiveness among fishermen.⁴⁵

Contrary to the Seventeenth Century Dutch Jurist Hugo Grotius in his *De Mare Liberum (The Freedom of the Seas, 1609)*, time has shown us that fish within the Sea are in fact an exhaustible resource, and therefore EU countries have to take action to ensure a non-threatening sustainable industry.⁴⁶

It aims to ensure that fishing and aquaculture are environmentally and socially sustainable, providing a healthy source of food for EU citizens, while fostering a dynamic fishing industry withing a fair standard of living for fishing communities.⁴⁷

With such a rapid growth of the Industry and the lack of scientific certainty regarding human activity on all components of the ecosystem, the Union takes a cautious approach, seeking to make fishing fleets more selective, phasing out the practice of discarding unwanted fish, better managing the CFP, giving greater control to EU Member States on a national and regional level, and

⁴⁴ http://www.iuuwatch.eu/wp-content/uploads/2015/07/IUU_report_010216_web.pdf

⁴⁵ https://ec.europa.eu/fisheries/cfp_en

⁴⁶ https://scholar.harvard.edu/files/armitage/files/free_sea_ebook.pdf

⁴⁷ https://ec.europa.eu/fisheries/cfp_en

therefore making them subject of a greater liability scheme in case of non-compliance.

The Common Fisheries Policy or CFP has four main policy areas.

i) Fisheries Management.

The EU establishes a Fisheries Management system in order to – Safeguard stock reproduction for high long-term yield⁴⁸; lay the foundations for a profitable industry, share out fishing opportunities fairly, and to conserve marine resources.⁴⁸

The EU's Fisheries Management program under the CFP primarily aims to the ensure long-term fishing yields, reduce unwanted catches and wasteful practices to the minimum or avoiding them all together, introducing the so called landing obligation.⁴⁹

ii) International Policy.

The European Commission issued a report in 2015 stating that more than 20% of Union vessels catches are actually taken outside Union waters; 9.3% of EU catches between 2014 and 2018 were made in the EEZ of third countries engages with the EU in fishing agreements, 2.2% in other third countries, and 10% on the High Seas, mainly for Tropical Tunas in regions managed by tuna RFMO's.³⁴

Having the EU such a strong economic impact in the international spectrum, it must promote better governance, developing and implementing policy on fisheries management, and specially reinforcing compliance with the Law of the Sea.

External fishing activities conducted by EU operators that do not come under

⁴⁸ Annual Sustainable Yield (ASY) is defined as biomass that can be harvested from a fish population each year without resulting in a decline. ASY is dynamic and is adjusted based on population levels and performance of previous years fisheries. Wikipedia.

⁴⁹ Discarding and landing procedures. https://ec.europa.eu/fisheries/cfp/fishing_rules/discards_en

previous regulated regimes such as bilateral agreements, RFMO's and other must be specifically authorised by the Flag MS.

Authorisations are to be granted under predefined conditions under the SMEFF Regulation, while having to be in the same time continuously monitored to guarantee effective compliance.⁵⁰

iii) Market and Trade Policy.

One of the pillars of the Common Fisheries Policy is the Common Organisation of the Markets, the EU policy for managing the market in fishery and aquaculture products.⁵¹

Strengthening the role of actors on the ground, producers are responsible for ensuring sustainable exploitation of natural resources and equipped with instrument to better market their products.

iv) Funding of the policy.

Via the European Maritime and Fisheries Fund, the EU created a multiannual financial framework (2021-2027), with a budget that combines new instruments with modernized programs that seek to deliver efficiently on the EU's priorities.

Each year, the European Commission adopts a communication that seeks to gather sufficient information on the fishing opportunities for the following year and periodically evaluated the CFP's implementation, showing by those means the EU's fishing fleets performance, productivity and sustainability.

The CFP is regulated under the Regulation (EU) No. 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the common fisheries

⁵⁰ Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (Text with EEA relevance).

⁵¹ Market Organisation. https://ec.europa.eu/fisheries/cfp/market_en

policy, amending Council Regulations (EC) No. 1954/2003 and (EC) No. 1224/2009 and repealing Council Regulations (EC) No. 2371/2002 and (EC) No. 639/2004 and Council Decision 2004/585/EC. Successive amendments to Regulation (EU) No. 1380/2013 have been incorporated in the original text.⁵²

As previously said, the CFP was launched for the first time in 1970, and after several reforms, its last one took effect on the 1 January 2014.

With its legal basis laying on the articles 38 to 43 of the Treaty on the Functioning of the European Union (TFEU), the reform in the year 2013 was evidently the most important one. Its main objective was to ensure that the activities of the fishing and aquaculture sectors were sustainable in the long term and managed in way that is consistent with the objectives of achieving economic, social and employment benefits.

The approach is since then leaning to a Multiannual ecosystem-based management with multi-species and fisheries plans, in the regional framework of European geographical areas. From limitations to the Maximum Sustainable Yield (MSY), Discard bans, regulations on the fleet capacity, and others.

The rules governing the activities of EU fishing fleets in third countries and in international waters are determined within the EU's external relationships. The arrangements conducted fall within the Sustainable Fisheries Partnerships Agreements (SFPAs) and to the participation of the EU in regional management organizations (RFMOs).⁵³

⁵² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1380>

⁵³

[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/629202/IPOL_STU\(2019\)629202_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/629202/IPOL_STU(2019)629202_EN.pdf)

II. The EU System to prevent, deter and eliminate illegal, unreported and unregulated fishing (Regulation (EC) No 1005/2008).

On 29 September 2008, the Council of the European Union adopted Regulation No. 1005/2008, establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. Applicable from the 1 January 2010, the Regulation seeks to establish an effective system conditioning the entry of fishing products in the European Union.⁵⁴

The EU establishes a specific framework against IUU Fishing within its Member States Jurisdictions and activities conducted by MS operators, working alongside the EU fisheries control system for - checking, - inspection and the enforcement by national authorities of the rules of the Common Fisheries Policy.

i. Fishing vessels presumed to be engaged in IUU fishing.

A fishing vessel is presumed to be engaged in IUU fishing if it falls in one of several categories:⁵⁵

Does not hold a valid fishing license
Does not fulfil its obligations to record or report catch or catch-related data
Fishing in a closed area during a closed season without or having used up a quota, or beyond closed depth
Fishing unauthorised species
Using banned or non-compliant fishing gear
Falsifies or conceals evidence relating to an investigation
Obstructs the work of inspectors
Takes on board, transfers to another ship or lands undersized fish

⁵⁴ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R1005>

⁵⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ape0005>

Participates in activities with vessels included in the IUU vessel list
Carries out fishing activities in an area covered by a RFMO without complying with the conservation and management measures that organisation and is registered in a country not party to that organisation.
Is a stateless vessel

ii. Designated ports.

EU Member States must designate specifically port facilities that are open to vessels from non-EU countries. These designated ports must be used as well for transshipments between vessels from non-EU countries and EU vessels.⁵⁶

iii. Port Inspections.

Once a vessel arrives in EU waters, the port authority will be responsible for monitoring fishery products imported to the EU, checking that such products are legal and that the vessel complies with the regulations, holding the necessary licenses and authorisations. Quantity declared upon arrival must match with the real quantity landed or declared.⁵⁷

iv. Catch certificates.

The catch certificate scheme guarantees non IUU origin of fishery products from non-EU imports, accompanying them throughout the supply chain in order to maintain the possible to conduct continuous checks until it reaches the end

⁵⁶ Transshipment is the process of off-loading a container from one vessel and loading it onto another vessel. <https://shippingandfreightresource.com/will-the-port-of-loading-change-if-my-container-is-transhipped/>

⁵⁷ The actual illegal act of transshipment takes place when false information is provided regarding the country-of-origin to make it appear that the merchandise was made in the transited country.

consumer.⁵⁸

v. Presumed IUU Fishing.

The European Commission will identify vessels that are presumed to be involved in IUU Fishing, notifying Flag States (non-EU and EU countries) whose vessels have been effectively identified, and circulate the information to all EU Member States.

This identification involves the creation of a list of vessels engaged in IUU fishing, while safeguarding and appeal arrangements in order to provide a fair treatment of vessels and countries concerned.

vi. Non-cooperating non-EU countries.

Identifying non cooperating non-EU countries in the fight against IUU when these do not fulfil their duties as flag, port, coastal or market state to take actions to prevent, deter, and eliminate IUU fishing.⁵⁹

A non-cooperating country might eventually be denied having access to the EU market.

The European Union IUU regulation entered into force on 1 January 2010. It reflects the responsibility of every country to fulfil their international obligations as a flag, port, coastal or market State. Seeking to prevent, deter and eliminate the trade of fishery products deriving from IUU fishing into the EU, a number of tools have been introduced traceability, facilitate communication and

⁵⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ape0005>

⁵⁹ Since 2010, a vast amount of improvements in the fight against IUU have been shown via mechanisms such as the Catch Certificate. The 2015th Communication on IUU by the EU Commission reflected that effective risk analysis is essential given the sale of fisheries imports: between 2010 and 2013 Member States received more than 810.000 catch certificates, 108.000 processing statements, and sent more than 6.400 requests for verification.

Since 2010, more than 200 import consignments were refused, on reasons such as; false, non- valid erroneous or incomplete catch certificates; a breach of national or RFMO conservation and management measures (including quotas); illegal transshipment at sea; catch by a fishing vessel not included in the authorisation list to operate in an area regulated by an RFMO, or in case of a relevant lack of cooperation by the Flag State to certify the catch.

cooperation between EU Member States, Non-EU States or third countries, and RFMOs.

Based on a Communication from the Commission to the European Parliament and the Council in 2015 on the application of Council Regulation (EC) No 1005/2008, establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, the fight against IUU fishing has been a political priority for the EU in past years.⁶⁰

vii. Cooperation with EU Member States.

a. Member States and their flag State responsibilities.

The IUU regulation entered into force at the same time as the Control Regulation establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (Council Regulation (EC) No 1224/2009 of 20 November 2009) and the Fishing Authorisations Regulation (Council Regulation (EC) No 1006/2008 of 29 September 2008 concerning authorisations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters).

Reforming the EU control system, the main efforts are orientated in having Member States comply with all three regulations.

b. Member States and their port State responsibilities.

The EU framework on IUU fishing provides a strong framework to prevent and deter any IUU fishery products to enter the market. Via the establishment of specific ports to be used by third country or non-EU Member States, the EU creates a cone effect to be able to control with more certainty the input of uncomplying operators.⁶¹

⁶⁰ <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52015DC0480>

⁶¹ An important element in the International Law is article 93 of the United Nations Convention on the

The Commission's communication on the effectiveness of the IUU regulation reflected that “between 2012 and 2013 EU Member States inspected almost 1500 fishing vessels in their ports”. In these inspections, several irregularities were spotlighted, such as the identification of infringements linked to errors in landing declarations, misreporting information in the vessel logbook.⁶²

viii. Cooperation with third countries.

International Law (UNCLOS) strengthens the concept of Flag State responsibility, establishing a solid liability framework for actions and activities conducted by vessel under their jurisdiction. States responsible must adopt the necessary administrative measures and enforcement procedures.⁶³

Compliance by third states in adopting and enforcing measures to tackle IUU fishing will be key in order to establish and maintain relationships with the EU and its market.

The IUU regulation goes beyond reassuring international law via the implementation of a methodology to “ensure all countries fulfil these obligations with regards to IUU fishing and fishing management”.

Key elements in the cooperation with third countries are;

- Improving traceability of marine imports.

Via the establishment of the Catch Certificate Scheme, up to 91 third countries notified to the European Commission their competent authorities in order to comply with the IUU regulation and be eligible to apply for the Catch Certificate Scheme in order to be able to export to the EU.

Law of the Sea, stating a necessary real link between a vessel's flag and its relationship towards the country of registry. *Spanish: Vinculo real.*

⁶² Council Regulation (EC) 1006/2008 of 29 September 2008 was repealed by Regulation (EU) 2017/2403 of the European Parliament and of the Council of 12 December 2017 on the sustainable management of external fishing fleets.

⁶³ The European Fisheries Control Agency is responsible for overseeing the procedure and analyse samples of catch certificates from third countries in order to identify weakness and shortcomings in their validation systems. Modern IT Systems are in demand to cross check the data needed to validate catch certificates.

- Strengthening fisheries governance through dialogue.

Dialogue, as a softer procedure than establishing direct enforcement measures or conditions is essential for less developed third countries to concentrate their efforts in specific areas in order to be eligible to export to the EU market, creating a win-win situation for both parties. The Communication issued by the EU Commission shows us that the European Union fostered dialogues with almost 50 countries by 2015. These dialogues include assessments of compliance records of third country flag states, coastal states, port or market states, and the States global commitment in tackling IUU fishing.

- Identification scheme,
 - Pre-identification (“Yellow-card”).

Regulation 1005/2008, or the so-called IUU regulation establishes in article 32 the “Yellow-card”. 18 scenarios that will put a country on a pre-identification status in the EU as a non-cooperating third country in the fight against IUU fishing. Different aspects of the country’s relation towards IUU fishing will be analysed, such as market activities, port activities, assessment of compliance with international agreements and soft law, compliance with RFMOs, and reaction in case of evidence of IUU activities.

The pre-identification will be considered the first warning before implementing economic and commercial restrictions against the country matter of subject. A deadline is established in order for the country to reconduct a new strategy in the fight against IUU fishing and showing effective results. The European Union establishes cooperation mechanisms to enhance achievements in the field.⁶⁴

- Identification (“Red-card”)

If the country fails to act accordingly to the requirements put in place, article 31 of the IUU regulation will be applied, giving place to a “Red-card” as a formal

⁶⁴ Following FAO IPOA-IUU recommendations, Nation Plans of Action (NPOA) are put in place with better Monitoring, Control and Surveillance (MCS), Vessel Monitoring Systems (VMS) as requirements for both national and distant water fleets, reinforcing sanctions, better cooperation, commitment of politicians, policy makers, public authorities, in hand with stronger controls and inspections.

identification of a already pre-identified country as non-compliant in the fight against this global problem.

Giving a “Red-card” to a country implies the prohibition of imports of fishery products, and the prohibition of EU vessels from operating in the waters of non-cooperating countries.

Article 38 lays down several consequences of the identification, such as: as prohibition of imports; non-acceptance of catch certificates; prohibition to purchase fishing vessels; prohibition to flag EU fishing vessels; no chartering agreements; prohibition to export EU fishing vessels; prohibition of private trade agreements with EU nationals; prohibition of joint fishing operations with EU; possible denunciation of standing bilateral fisheries agreements or partnerships; and/or no further negotiations to conclude bilateral fisheries agreements or partnerships.⁶⁵

- Lifting the pre-identification and delisting (“Green-card”)

Once a country has been pre-identified or listed as non-cooperating, immediate and extensive measures will have to be conducted. If global efforts succeed, the same country that was once subject to a possible ban will now be eligible to receive a “Green-card”. Two examples are Korea and the Philippines, who after getting pre- identified conducted fundamental structural reforms in fisheries management with solid guarantees for an effective implementation of these reforms, that led the EU Commission to lift the pre-identification in April 2015.

• Supporting third countries.

The European Union is on the forefront in the fight against IUU fishing, but it does not only adopt conditional requirements for third countries to consider.

Dialogue is a fundamental process to provide support such training, capacity building, education, investments which will enable a more consolidated reform

⁶⁵ Identification procedures were initiated in November 2013 for Belize, Cambodia and Guinea and in October 2014 for Sri Lanka.

to achieve long-lasting change.

Capacity building from the one hand by the EU Commission and the European Fishery Control Agency; sectoral support under Sustainable Fisheries Partnership Agreements (SFPA) between the EU and third countries with the objective of enforcing Monitoring, Control and Surveillance (MCS) and reinforcing the fisheries governance of the SFPA third country partner.

From a strictly legal perspective, the European Union's IUU fishing Regulation applies to IUU fishing and linked or necessary associated activities that fall under the jurisdiction of the Union.

Fishing vessels subject to the Regulation as per article 1.3 include any vessel of any size used for or intended for use for the purposes of commercial exploitation of fishery resources, including support ships, fish processing vessels, and vessels engaged in transshipment and carrier vessels equipped for the transportation of fishery products, except container vessels.

Chapter II of the Regulation surrounds the inspections of third country fishing vessels in Member States Ports, by establishing conditions for the access to ports by third country fishing vessels, designating specific ports and requiring prior notifications upon arrival, with the need to release the corresponding authorizations and making sure that landings and transshipment operations are successfully recorded, without disregard to the strong efforts in providing selected and experience based inspections.

Chapter III involves the Catch Certification Scheme for Importation and Exportation of Fishery Products as previously detailed. This Scheme provides the regulatory guidelines and protocols for acceptances, submissions and checks of catch certificates, verifications, refusal of importations, transits and transshipments, Flag State notifications and cooperation with third countries and other complementary procedures.

Chapter IV established the Community Alert System, created to have a cross-border direct information system to communicate to other Member States and the Commission as soon as possible about the conclusions of their verifications and requests for verification, plus actions that were found to be non-compliant

with the applicable laws, regulations or international conservation and management established measures.

Chapter V regulates the identification of fishing vessels engaged in IUU fishing, with guidelines for the assessment of valid presumptions and the creation of Community IUU vessel lists.

The following chapter regulates the relationship with non-cooperating third countries, measures in respect of fishing vessels and states involved in IUU fishing, nationals supporting or engaged in IUU fishing, immediate enforcement measures, sanctions, and the implementation of measures adopted by the regional fisheries management organizations (RFMOs).

III. Regulation (EU) 2017/2403, on the sustainable management of external fleets.

In 2014, all members of the FAO, including the European Union, and its developing country partners, unanimously adopted the Voluntary Guidelines on Securing Sustainable small-scale Fisheries in the Context of Food Security and Poverty Eradication.⁶⁶

These Guidelines call for the adoption of measures for the long-term conservation and sustainable use of fisheries resources, as well as for securing the ecological foundation for food production, underlining the importance of environmental standards for fishing activities outside Union waters that include an ecosystem-based approach to fisheries management together with the precautionary approach.

The sustainable management of external fishing fleets regulation (SMEFF)

⁶⁶ The Union committed itself at the United Nations Summit on Sustainable Development on 25 September 2015 to implementing the resolution containing the outcome document “Transforming the World”: the 2030 Agenda for Sustainable Development”, including Sustainable Development Goal 14 which is “to conserve and sustainably use the oceans, seas and marine resources for sustainable development”, as well as the SDG 12, which is to “ensure sustainable consumption and production patterns” and their targets. (Whereas 7 of the SMEFF Regulation”.

focuses on the external dimension of the Common Fisheries Policy (CFP) by aiming at strengthening the control on fishing activities, mainly via an authorisation scheme for EU vessels fishing outside EU waters, while reinforcing the objectives of the common fisheries policy with regard to sustainability, control, and the European Union's rules on tackling illegal, unreported and unregulated fishing (IUU).

In other words, the core principle of this Regulation, as per the whereas 14 of the SMEFF Regulation, is that any Union vessel fishing outside Union waters should be authorized by its Flag Member State and monitored accordingly, irrespective of where it operates and the framework under which it does so.⁶⁷

This relatively new piece of regulation is in theory the solution against the practice of IUU fishing via private agreements between EU companies and third countries, chartering agreements and abusive reflagging operations; but as we will further analyse in this paper, serious doubts raise about the effectiveness of our current regulations.⁶⁸

This Regulation sets out rules for issuing and managing fishing authorisations for Union fishing vessels conducting fishing operations in waters under the sovereignty or jurisdiction of a third country, under the auspices of an RFMO to which the Union is a contracting party, in or outside Union waters, or on the high seas, and third-country fishing vessels conducting fishing operations in Union waters. The Regulation applies without prejudice to the provisions in sustainable fisheries partnership agreements (SFPAs) and other fisheries agreements concluded between the Union and third countries, provisions adopted by RFMOs to which the Union is a contracting party, and provisions in Union law implementing or transposing provisions previously referred to

⁶⁷ Consisting of 48 Articles and an Annex listing the Data to be sent to the European Commission, the SMEFF Regulation sets out the conditions for EU Member States, as flag States, to issue authorisations to their vessels. It also lists the conditions under which the Commission may issue fishing authorisations to the vessels of third countries wanting to fish in EU waters. It establishes certain institutional processes to control Member States decision-making. *The EU's Regulation on the Sustainable Management of External Fishing Fleets: International and European Law Perspectives.* Solène Guggisberg.

⁶⁸ The information gathered by the Member States and provided to the Commission should allow the Commission to Intervene in the Monitoring of the fishing operations of all Union fishing vessels in any given area outside Union waters at any time.

(Relationship to international and Union law, article 2 of the SMEFF Regulation). The procedure is established in the following way;

i. Fishing authorisations.

In order for a EU Member State flagged vessel operator to fish outside of EU waters, an authorisation is required by the EU country in which it is registered, having this authorisation to be based on general or common criteria's such as;

- Administrative information on the vessel, owner and master.
- International Maritime Organization (IMO) vessel identification number when require by EU Law.
- Valid fishing license.
- Proof that the vessel is not included in a IUU fishing vessel list under a RFMO or by the EU.

All these fishing operations must be supervised and regularly monitored by the flag states, besides of operations needing to meet requirements similar to Environmental Impact Assessments (EIA) to understand the impact of their activities in the ecosystem and coastal communities.

The EU Flag State must ensure that activities carried out in the waters of a foreign Coastal State are within authorisation of the Coastal State. These EU vessels should fish on the surplus determined by the foreign Coastal State, or in case of migratory species, under the rules set for these species at a regional level.⁶⁹

ii. Reflagging operations.

In case of reflagging, several measures have been adopted to avoid an analogy of Forum Shopping when it comes to vessels changing their registration. A very common practice in IUU fishing, hopping form one flag state to another in order

⁶⁹ Regulation 2017/2403 replaces the Fishing Authorisation Regulation (FAR) 1006/2008, which provided the legal framework for issuing and managing fishing authorisations. It was part of the control system of the Common Fisheries Policy (CFP), along with the Control Regulation (1224/2009) and the IUU regulation 1005/2008.

to leave less trace behind and to narrow chances of detection is one of the things the EU pretends to avoid.

Any vessel that has registered itself passing from being an EU vessel to a third countries register, consequently returning to a EU Register in order to have access to the market during a 5 year time prior of applying for an authorisation will be automatically subject to a screening procedure in order to know if its engaged in IUU fishing, nor operated in a non-cooperating country or third country identified as not tackling unstainable fishing practices.⁷⁰

iii. Public register.

The EU “Post-Aarhus Convention Era” is guaranteed in terms of providing public information to citizens via an EU electronic fishing authorisation register containing information on the name of the vessel, IMO number, target species and fishing zones.

iv. Requirements for EU operators.

Under the regulation, it is clear that Member States are in fact in charge of monitoring fishing authorisations. In case the Member State fails to comply, the Commission could decide to withdraw any authorisation.

This comes as an effect of the application of the common eligibility criteria. Fishing activities in water under the jurisdiction of a third country may take place;

Via a previous framework established by an SFPA (Sustainable Fisheries Partnership Agreement between the third state and the EU).⁷¹

- Via a direct authorisation issued by the third country through a private agreement.
- Via a direct authorisation issued by the third country through a private agreement.

⁷⁰ Any EU vessel must have a fishing authorisation from their flag state in addition to the one of the third country.

⁷¹ Under SFPAs, the Coastal State receives payment and some support specifically directed at improving fisheries governance, and the EU is therefore granted access rights to certain fishing grounds. Long-lasting framework treaties, supplemented by short-term protocols. For an overview of existing fisheries agreements involving the EU, see European Commission.

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3. Challenges in the Fight against IUU Fishing.

I. Public Access to Information, Beneficial Ownership and Chartering Agreements.

The current existence of a partial public access to the fishing authorisations database in the European Union’s fishing efforts conducted by its nationals is a major step towards making information available on which fishing vessels are active, in which areas, and, on the conditions under which they are fishing, as stated by Solène Gubbisberg. The reason for pushbacks against greater transparency regarding information about ownership have as main arguments,

data protection and commercial interests. Different from the Anti-Money Laundering Directive, which does provide the necessary tools to obtain information about the Beneficial Ownership behind legal entities, the SMEFF regulation distinguishes clearly between publicly accessible information and confidential data.⁷²

The importance of transparency as a mechanism to stop corruption for effective operators and other stakeholders to act visibly and report on their activities is a key element for the general public to hold them accountable is key, together with the consolidation of a stable democratic rule of law, increasing trust in institutions and politicians responsible for the correct implementation of these instruments.

Better management of natural resources is a direct consequence of public knowledge regarding the issues involved in it. This pattern has maintained itself on the same line regarding IUU fishing, but unfortunately, the lack of transparency in the fishing sector creates opportunities for corruption.

Studies such as Agnew DJ, Pearce J, Pramod G, Peatman T, Watson R, Beddington JR estimating the Worldwide Extent of Illegal Fishing, have shown that there is a significant relationship between the concentration of IUU fishing and countries poor performance in global scales conducted by the World Bank such as,- Government effectiveness, Regulatory Quality, Rule of Law and Control Corruption. Countries ranking in the lower end of the parameters are most vulnerable to illegal activities such as IUU fishing.⁷³

When referring to the access of public information as an essential instrument to gain control over illegitimate activities, the key element behind is holding the

⁷² Coning E., and Witbooi, E. (2015, October). Towards a new 'fisheries crime' paradigm: South Africa as an illustrative example. *Marine Policy* 60: 208-215. Retrieved from: <https://www.sciencedirect.com/science/article/pii/S0308597X1500189X#bib6>. Archived at: <https://perma.cc/93QY-C3MQ>.

⁷³ The first and second most lucrative natural resource crime are timber and mining, (Agnew et. Al (2009, February 25). "Estimating the Worldwide Extent of Illegal Fishing." & May, C. (2017, May). *Transnational Crime and the Developing World*. Global Financial Integrity. Retrieved from: http://www.gfintegrity.org/wp_content/uploads/2017/03/Transnational_Crime-final.pdf. Archived at: <https://perma.cc/UF9H-8HER>.

ultimate owners of the vessels and their managers accountable for their actions. It is not the fisher who need to be chased, but the person behind him who profits by abusing the socio-economic needs of these workers and that ultimately profits while staying protected by some sort of a spider web of different shell companies hiding the real natural or legal person's identity. The commonly used term to designate this end-beneficiary is known as Beneficial Ownership. This terminology is currently being applied by the International Maritime Organization, fixing therefore a solution to the large variety of definitions under domestic law.

When referring to the access of public information as an essential instrument to gain control over illegitimate activities, the key element behind is holding the ultimate owners of the vessels and their managers accountable for their actions. It is not the fisher who need to be chased, but the person behind him who profits by abusing the socio-economic needs of these workers and that ultimately profits while staying protected by some sort of a spider web of different shell companies hiding the real natural or legal person's identity. The commonly used term to designate this end-beneficiary is known as Beneficial Ownership. This terminology is currently being applied by the International Maritime Organization, fixing therefore a solution to the large variety of definitions under domestic law.⁷⁴

The 2001 OECD Report, Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes allows us to understand the multiple ownership structures behind it.⁷⁵

A commonly accepted definition as per Unions for seafarers integrated in efforts with the International Maritime Organization is that beneficial owners are those legal or natural persons who exercises true control over the asset.

⁷⁴[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/FI\(2017\)16/FIN/AL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/FI(2017)16/FIN/AL&docLanguage=En)

⁷⁵ The Spanish firm Sea Group SL was named in a new report tying them to illegal, unreported, and unregulated (IUU) fishing practices. <https://www.seafoodsource.com/news/environment-sustainability/c4ads-report-names-companies-involved-in-global-iuu-fishing-trade>. Sea Group SL incorporated in the Canary Islands, beneficially owns a fleet of at least seven vessels. Four of these vessels were implicated in an illegal transshipment in the EEZ of Guinea Bissau in 2017. At sea transshipment has been banned in Guinea Bissau since 2015.

A technique applied to surpass these webs of shell companies is called unveiling. Under English Law, where the concept of a limited liability company is well established, courts are reluctant to lift the “veil of incorporation”. In the same time, the burden of proof to provide enough evidence that the company is acting in an unfaithful manner falls on the maritime claimant.

The report issued by the ICFTU reflects a known reality of the maritime culture which is that “publicly available information regarding the ownership of vessels is extremely limited”. “A typical structure would be that a vessel is registered in a particular jurisdiction; the registered owner is also incorporated in that State; no information is available regarding nominee directors or directors of the vessel’s managers and shareholders who are themselves registered companies in another jurisdiction”. This would be considered just part of the chain of a complex corporate structure whose goal is to obtain a tight anonymity. An anonymity legitimized by jurisdictions of its registry, making Ship-owners able to work in a “virtually invisible manner”. One of the studies that reflected the relevance of the opaque and the little understood global business structures behind the IUU fishing industry is the one conducted by the nonprofit organization C4ADS (www.c4ads.org) dedicated to data-driven analysis and evidence-based reporting of conflict and security issues worldwide.⁷⁶

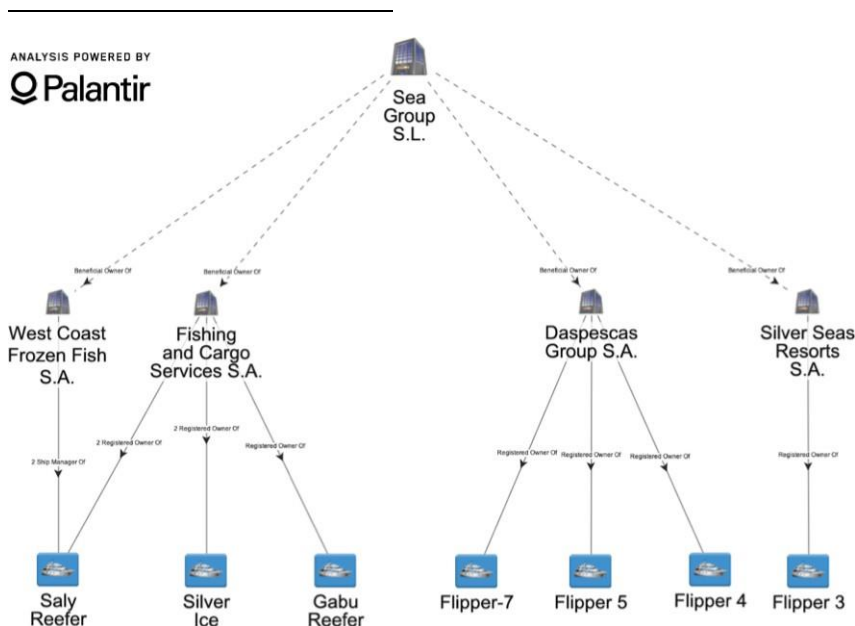
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It is estimated that IUU (Illegal, Unreported, and Unregulated Fishing) generates between ~\$10 Billion and ~\$36 Billion annually, coming in third position of crimes related to natural resources.

While the current prioritized approach lays on the at-sea activity of fishing vessels, it comes under a consensus that a stronger enforcement must be put in place. Currently, the prioritized approach in the fight against IUU fishing lays on the at-sea activities of fishing vessels, but an ever bigger growing consensus is taking place about the need to better regulate and enforce the links between these operations and the inland stakeholders involved that enable this activity and its criminals to be unaccountable for.

Over the span of 15 months, C4ADS identified and studied 29 business networks engaging in IUU fishing, including the analysis 150 vessels alongside with 2000 legal and natural persons, and support vessels (such as supply vessels aimed for transshipments on the high seas, providing the factory ships equipment, goods and fuel to the skippers conducting the activities).

While gathering information about the beneficial ownership is not required in legally binding international law, it is reflected in some Soft Law instruments such as in IPOA- IUU. The IPOA-IUU calls for States to include details and information on beneficial ownership in their records of fishing vessels, and to “cooperate to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing.”



In the EU, Beneficial Ownership was mentioned but not regulated under the Common Fisheries Policy (CFP) or the EU-IUU regulation. Even in the original proposal of the SMEFF regulation, no mention on the question of Beneficial Ownership was made, but, due to efforts in compromising positions between the Parliament and the Council recognition was taken in consideration, but only for its inclusion in the Authorizations Database, without it being included as a requirement in the Annex, which would mean that incompliance in providing information about the beneficial ownership would result in the denegation of a fishing authorization. The European Union established in article 30 of the SMEFF Regulation the need to include information about the beneficial ownership in article 39. a); record all information submitted in accordance with the Annex and other information submitted to the Commission for the purpose of issuing fishing authorisations under Titles II and III, including the name, city, country of residence of the owner and of up to five main beneficial owners, and display the status of each authorisation as soon as possible.

While part of the information provided by the fishing authorizations is available to the public, information to be provided according to the Annex is considered as part of the secure database, only accessible to the relevant administration and its services regarding the management of fishing fleets.

Another matter of concern related to the transparency in the available information are the so-called Chartering Agreements in the Fishing Industry. The lack of transparency is especially relevant when the fishing efforts are not directly conducted by the contracting members of the owners of the vessels itself but lend to another party via a chartering agreement.

A chartering agreement in commercial shipping consists in lending a vessel for a period of time or for a specific voyage in order to have ensure availability during an agreed time or to transport a large amount of cargo that requires the entire loading capacity.

In fishing, chartering consists in lending one vessel to a third party, providing the external party with usage of the vessel itself and its allowances or fishing authorizations, bringing this a handover that could lead to problems regarding accountability. Who Fishes Far, a leading NGO in the fight against IUU fishing stated in their report *Transparency, Accountability and Sustainability* that many chartering activities go unreported, creating gaps in the information available and limiting the control of a flag state over its fleet, looking as if these arrangements are at times “used to circumvent regulations”.

As the fishing industry becomes more sophisticated due to globalization, subsidies, technology, demand and so on, so do IUU fishing vessels in their planning and execution of fishing expeditions, giving birth to actions such as sharing intelligence, reflagging to non-members of RFMOs, changing the vessels name and IMO call sign, creating elaborate corporate webs to conceal ownership that indicate an emerging corporate element in IUU fishing.

The technical and compliance committee of the Western Pacific Fisheries Commission (WPFC) expressed in 2009 deep concerns on vessel chartering, stating that arrangements must be in accordance with international law, and that Flag States have to maintain responsibility for their vessels on the high seas, due to the potential links between vessel chartering and IUU fishing.⁷⁷

The reason behind private chartering agreements is closely connected to the willingness of avoiding legal restrictions on the amounts to catch for a certain party.⁷⁸

⁷⁷ The technical and compliance committee of the Western Pacific Fisheries Commission (WPFC) established by the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC Convention) which entered into force on 19 June 2004, has as cooperating members nations such as China, Japan, France, Canada, the United States of America and bodies such as the EU.

⁷⁸ One of the most important reports regarding beneficial ownership is a paper released by C4ADS (www.c4ads.org), a nonprofit organization dedicated to data-driven analysis and evidence-based reporting of conflict and security issues worldwide. The paper, “Strings attached, exploring the onshore networks behind Illegal, Unreported & Unregulated Fishing” is key to understand the corporate structure behind IUU fishing and 2000 corporations worldwide as owners of these networks.

While on the one hand it is accepted as a fact that charter vessels can present economically efficient means for developing States to develop their fisheries as it allows joint venture operations and benefit from extending their fisheries to the high seas; on the other hand, there are legitimate concerns regarding IUU fishing as;

- a. It can be very difficult to establish the genuine identity of whom is ultimately controlling the chartered vessel (beneficial owner).
- b. Confusion can arise over responsibility for control of the chartered vessel on the high seas, and,
- c. Boat owners may exploit the transfer of responsibility for vessels from their flag State to another State in order to avoid compliance with conservation and management measures.

Chartering Agreements are generally concluded when a Coastal State lacks the means to exploit fishing rights or wish to secure supplies. When contracting with EU Vessels, Coastal States “may authorise its national operators to enter into agreements with EU companies for the leasing (chartering) of EU-flagged vessels.”⁷⁹

- i) The EU on Chartering Agreements.

Chartering Agreements was and is not covered in the EU – IUU Fishing Regulation. In today’s EU fisheries Law, chartering has been addressed for the first time in the SMEFF Regulation.

The Regulation (EU) 2017/2403 of the European Parliament and of the Council

⁷⁹<http://www.iuuwatch.eu/wpcontent/uploads/2016/10/Private.Agreements.ENG..1DEC.high.1.pdf>
Lack of transparency has been a major concern in the chartering industry, forcing such as Spain to take measures establishing systems that require the release of licences strictly under diplomatic channels, with payments to be made directly to the public treasury and other no circumstance private third parties.

of 12 December 2017 on the sustainable management of external fishing fleets takes a first step in measuring and controlling a practice that could actually have a great implication in IUU fishing all around the world.

Chartering within the fishing industry is a poorly monitored practice defined as “an arrangement by which a fishing vessel flying the flag of a Member State is contracted for a defined period by an operator in either another Member State or a third country without a change of flag”.

The European Parliamentary Research Service (EPRS) issued a statement in 2016 that “the number of vessels in this situation is limited, but that the lack of scrutiny maintained a certain ambiguity, in particular on the fishing opportunities that these vessels use and on monitoring of catch and effort data associated with their activities.”

The previous authorisation system did not cover the chartering of EU fishing vessels by a third country.

Chartering agreements of EU vessels are now regulated in Chapter V, Chartering of Union fishing vessels, article 26 (principles) and article 27 (management of fishing authorisations under a chartering arrangement).⁸⁰

⁸⁰ Article 26. Principles.

1. A Union fishing vessel shall not carry out fishing operations under chartering arrangements in waters in which an SFPA is in force or is provisionally applied.
2. A Union fishing vessel shall not carry out fishing operations under more than one chartering arrangement at the same time or engage in sub-chartering.
3. Union fishing vessels shall operate under chartering agreements in waters under the auspices of an RFMO only if the State to which the vessel is chartered is a contracting party to that organisation.
4. A chartered Union fishing vessel shall not use the fishing opportunities of its flag Member State during the period of application of the charter. The catches of a chartered Union fishing vessel shall be counted against the fishing opportunities of the chartering State.
5. Nothing in this Regulation shall diminish the responsibilities of the flag Member State with respect to its obligations under international law, the Control Regulation, the IUU Regulation or other provisions of the CFP, including reporting requirements.
6. The holder of the fishing licence of a Union fishing vessel that is to be chartered shall inform the flag Member State of the chartering arrangement before its start. That Member State shall inform the Commission thereof without delay.

Article 27. Management of fishing authorisations under a chartering arrangement.

When issuing a fishing authorisation to a vessel in accordance with Article 17, 21 or 24, and when the relevant fishing operations are carried out under a chartering arrangement, the flag Member State shall verify that:

- (a) the chartering State’s competent authority has officially confirmed that the arrangement

Articles 26 and 27 establish limitations on the chartering of vessels. Being the practice allowed in case of fishing activities under direct authorisations, they are not in case of the existence of an SFPA with the Coastal State and the EU due to the exclusivity clause applicable under SFPA's. EU fishing vessels must be active only under the framework of an existing SFPA.

Under the SMEFF Regulation, Member States must check the legality of these private agreements under domestic law, with required information about fishing opportunities, timeframes, and applicable areas. Member States shall inform the EU Commission about these private arrangements.

Article 26. 4 of the SMEFF Regulation clearly states that “Union fishing vessel shall not use the fishing opportunities of its flag Member State during the period of application of the charter. The catches of a chartered Union fishing vessel shall be counted against the fishing opportunities of the chartering State.”

It is evident that the European Union is conscious about the threats these private agreements might suppose. Well establishing the beginning of a new regulatory structure for chartering agreements, but many more efforts must come in order to consolidate a comprehensive framework for chartering agreements.

ii. International Treaties on Chartering Agreements.

International chartering is a relatively poor regulated practice, especially in International Law, where we can find it in only a few instruments. However, it is mentioned in a leading soft-law instruments such as the Plan of Action to prevent, deter, and eliminate illegal, unreported and unregulated (IUU) fishing. Another soft law international instruments that mention chartering agreements is the 2014 FAO Voluntary Guidelines for Flag State Performance.

is in line with its national law; and

(b) the details of the chartering arrangement are specified in the fishing authorisation including time period, fishing opportunities and fishing area.

iii. RFMOs on Chartering Agreements

The FAO Guidelines for Responsible Fisheries on Implementation of the IPOA-IUU further note that RFMOs may have a role to play in ensuring that chartering arrangements for stocks under their purview do not lead to IUU fishing. Among other things, agreed rules for chartering arrangements can ensure that vessels do not engage in “flag hopping” to gain access to more than one member’s quota. Chartering rules can also provide for the orderly development of fisheries by developing States, while also allowing the RFMO to allocate access to fishery resources in a fair and transparent manner.

RFMOs such as the International Commission for the Conservation of Atlantic Tunas (ICCAT) provides models to establish procedural requirement when establishing private chartering agreements, giving recommendations such as counter-counting the catches of chartered vessels against national quotas of the chartering State, while not allowing more than one charter per time.

The ICCAT establishes also other requirements such as allowing only its members to charter vessels to other member nations. These chartered fishing vessels need to be registered to responsible members and cooperating non-members, or to non- members which have agreed to apply the conservation and management measures of the organization and enforce them on their vessels. Under no circumstances can these fishing vessels be included in an IUU fishing list and must be in possession of a valid fishing license.

Efforts to hold accountability for activities conducted within the RFMOs territory of application are focused on holding Flag States accountable without necessarily taking into consideration internal relationships with third parties via private or chartering agreements, in order to comply with article 91 of the United Nations Convention on the Law of the Sea (UNCLOS).

Other RFMOs such as the Western and Central Pacific Fisheries Commission (WCPFC) took on developments of their own chartering agreements regulations like the WCPFC Charter Notification Scheme.

II. IMO number, Monitoring, Control and Surveillance (MCS).

The International Maritime Organisation (IMO) number is the most widely used Unique Vessel Identifier (UVI) for fishing fleets across the world.⁸¹

The IMO number is required when vessels fulfill certain conditions. In the case of European Union, it is mandate for vessels of 24 meters and above/or 100GT and above fishing in EU waters, and for all EU vessels of 15 meters fishing outside of EU waters. Non-EU vessels fishing within the EU waters must all carry an IMO number.⁸²

Some Coastal States and 11 RFMO's have as well requirements for IMO numbers for vessels to be allowed to fish in their waters.⁸³

NGO's and environmental lobbyist are pushing for a general consensus in the global implementation of IMO number requirements, and for vessels not falling in the parameters, alternative Unique Vessel Identifiers (UVI) should be taken in consideration in order for Flag States and Registry States to have an actual real control on their fleets. Currently, there isn't and won't be in the near future a universal record of fishing vessels.

The FAO initiative on a Global Record will be the first Global Data system on vessels regarding their UVI, with diverse information regarding IMO number, registration, AIS, ownership, previous names and others. This information is highly relevant in the fight against IUU fishing as it would allow to trace and control de whole procedural chain.

IUU fishing takes place all over the world, wherever it is in the high seas, in EEZ, contiguous waters, and even territorial waters. Difficulties to track every single vessel and its behavior via the analysis of their Automatic Identification

⁸¹ U4 Expert Answer, Illegal, unreported and unregulated fishing and corruption, Anti-Corruption Resource Centre.

⁸² Out of the shadows. Improving transparency in global fisheries to stop illegal, unreported and unregulated fishing. The Environmental Justice Foundation, 2019.

⁸³ EJF, Oceana, The Pew Charitable Trusts, WWF (2017), The need for mandatory IMO number for vessels catching seafood for the European market, <http://www.iuuwatch.eu/wp-content/uploads/2017/05/IMO-Numbers-FINAL-1-High-Singles.pdf>. The FAO is trying to take the initiative by creating the Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels, all based on IMO numbers. After years of development, the Global Record was made available for the public in 2018.

Systems (AIS) would be highly only possible with the release of sufficient funding and having qualified human capital to do so.

As for 2020, International Law does not require fishing vessels to be fitted with and AIS device as per International Law.⁹¹ Despite of it not being mandatory according to the MARPOL Convention, several countries are mandating the implementation of AIS devices on Fishing Vessels. On the other hand, taking in consideration that technology moves on an ever-faster pace, monitoring, controlling, and surveilling (MCS) can be achieved with a better implementation of Satellite-based Vessel Monitoring Systems (VMS).⁸⁴

Satellite-based monitoring VMS for developed nations are not yet cost efficient enough for a good part of vulnerable countries affected by IUU fishing due to installation, maintenance, and work costs.

The Environmental Justice Foundation, in the 2019 Fishing Transparency Report argued that the main solution to this issue would be shifting to Complete Transparency through public access to vessel information. “Restricting access to information about their activity is counterproductive to establishing transparency and traceability in the Seafood Sector”. Greater efforts must be conduct by the global community and stakeholders involved in order to establish greater transparency and overall information systems to have a real picture of the worlds fishing efforts. This concern was also expressed in the FAO Code of Conduct for Responsible Fisheries.

Clear information on vessels, authorisations, holders of rights of access and efforts in exploitation of fisheries resources, public access, participation and others would allow countries and interested parties to crosscheck Data in order to know exactly the activities taking place and the conditions in which fishing efforts are conducted.⁸⁵

⁸⁴ Satellite-based VMS are highly cost efficient, put initial investment are still not a fully reachable to developing countries. Apart from initial installation costs, this type of VMS require constant and qualified monitoring

⁸⁵ Article 7.3.4 of the Code of Conduct.

Creating IUU fishing vessel lists is a key element in the fight against IUU fishing, therefore RFMO's such as the Convention of Antarctic Marine Living Resources (CCAMLR). Western & Central Pacific Fisheries Commission (WCPFC) and the International Commission for the Conservation of Atlantic Tunas (ICCAT) have well established lists of vessels authorised to fish within their convention areas. Countries such as Thailand and Ghana have as well created such lists.⁸⁶

The European Union, since the creation of the SMEFF regulation has taken the commitment to maintain a public registry of its vessel authorised to fish outside EU-waters.

RFMO's have also created lists of vessels banned to fish under areas of their competence, and these have been gathered in citizen initiatives such as the Combined IUU Vessel List⁹⁷ which provides available and up to date information on all vessels that appear on the lists of IUU fishing vessels published by Regional Fisheries Management Organisations (RFMOs) and fishing vessels that have been subject to an INTERPOL Purple Notice.

The European Union has since the year 2013 adopted an IUU vessel updated list that are not allowed to land or sell their fish in the EU. Commission implementing Regulation (EU) No 672/2013 of 15 July 2013 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing.

Countries such as Thailand and Ghana have as well created such lists. The European Union, since the creation of the SMEFF regulation has taken the commitment to maintain a public registry of its vessel authorised to fish outside EU-waters.⁸⁷

RFMO's have also created lists of vessels banned to fish under areas of their competence, and these have been gathered in citizen initiatives such as the

⁸⁶ Marine Department of Thailand, Published whitelist of fishing vessels permitted to fish in Thai waters, accessed 25.09.2018, https://analytics.md.go.th/fisheries_whitelist 40. Ministry of Fisheries and Aquaculture Development of Ghana, Vessel Registry, accessed on 30 May 2019, <https://www.mofad.gov.gh/publications/statistics-and-reports/vessel-registry/>

⁸⁷ Article 39 of Council Regulation (EC) No. 2017/2403 on the sustainable management of external fishing fleets. This includes Private Agreements.

Combined IUU Vessel List which provides available and up to date information on all vessels that appear on the lists of IUU fishing vessels published by Regional Fisheries Management Organisations (RFMOs) and fishing vessels that have been subject to an INTERPOL Purple Notice.⁸⁸

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III. Insuring IUU fishing.

The fight against IUU fishing will be a lost cause if measures to combat it are not diversified. Due to its high incentives, this form of crime is one of the most lucrative business models in the world. Therefore, efforts cannot only be taken in the Public Sector and on the material activities of these operators at Sea. Every stakeholder matters, therefore, the Private Sector plays a key role, if not the most important one after all, because the root cause of this problem is not the willingness to harm the environment, but to profit out of global resources in an unreported, unregulated and illegal way in order to avoid costs and maximize profits.

Altering the balance between risk, costs and benefits should be one of the main goals in the fight against IUU fishing. Insurances are historically the private institution that makes Maritime Transport and Commerce work. The great risks the seafarers face can result in total losses when sailing in worlds seas and oceans, and without means to outbalance these external factors, the costs for end consumers and other commercial operator would be unbearable as a

⁸⁸ The Combined IUU Fishing Vessel List is maintained by Trygg Mat Tracking (TMT), a Norwegian not-for-profit organisation that provides expert fisheries intelligence analysis to national authorities and relevant international institutions. <https://www.iuu-vessels.org/>. Purple Notice: To seek or provide information on modus operandi, objects, devices and concealment methods used by criminals. INTERPOL–United Nations Security Council Special Notice: Issued for groups and individuals who are the targets of UN Security Council Sanctions Committees <https://www.interpol.int/How-we-work/Notices/About-Notices>.

consequence of seafarers rolling the dice each time they adventure the unknown.

Restricting insurance to operators involved in IUU fishing might just be one of the milestones to overpass we might need to start gaining terrain on one of the worlds must resource consuming activities. Currently there are extensive studies such as “Cutting a lifeline to maritime crime: marine insurance and IUU fishing” that reflected a global request to restrict access to insurance for IUU vessel operators, which could lead to a heavy increase in costs for them to conduct their activities.

Insurance coverage is legally required by International and national laws, depending on the size of the vessel, type of activities and other matters.

These obligations are mainly related to third party liability (Protection via Protection and Indemnity or P&I Insurance Clubs) and other common forms of insurance such as for Hull and Machinery (H&M Insurance), or as well cargo insurance.⁸⁹

The Maritime Insurance Industry is concentrated in only a handful on Insurers, which could, as stated in *van Anrooy et. al. 2009* to the establishment of a “real embargo” within the maritime insurance sector, when having into account the increase of an ever-bigger awareness by stakeholders about this issue. (OECD 2005, Le Gallic 2008).

“In 2017, UN Environment, Oceana and leading insurers joined forces to forge a first-ever insurance industry commitment to tackle pirate fishing—one of the most unsustainable practices damaging the health of our ocean. That industry commitment has now led to greater sustainability ambition, which is necessary to achieve UN Sustainable Development Goal 14 on healthy oceans, including the target to end pirate fishing by 2020. With these pioneering industry guidelines, insurers are demonstrating that leading by example, ambition and collaboration are key to achieving a sustainable ocean economy and to protecting our Blue Planet,” said Butch Bacani, who leads UN Environment’s Principles for Sustainable Insurance Initiative (PSI), “the largest collaborative initiative between the UN and the insurance industry.”⁹⁰

⁸⁹ Front Ecol Environ 2016; 14(7): 357–362, doi:10.1002/fee.1293; Dana D Miller^{1*}, U Rashid

⁹⁰ Efforts have been shown in International Conferences such as the one organized by UN Environment’s Principles for Sustainable Insurance Initiative (PSI) and the global insurer Allianz,

Conclusions

From the freedom of the Seas as per the *mare liberum* until the United Nations Convention on the Law of the Sea, fishing was an essential activity that fell out of the control such as the ones other industries might have faced after the Second World War.

Once we realized that the oceans and seas resources were not unlimited, efforts started to be initiated to seek for their long-term sustainability. Nowadays strong commitments by International Organisations, RFMO's, States and others are prevalent in the efforts to ensure that flag and costal state responsibilities are maintained, but monitoring, controlling and surveillance to ensure compliance must be a fought globally and unitarily to deter and downgrade any benefit derived from illegal activities such as the one analyzed in this paper, which would ultimately lead to their end.

Illegal, unreported and unregulated fishing has been, is, and will continue to be a major threat to humanity and the planet's sustainability, but this paper wishes to reflect further than that.

I hope that you, the reader, learned about the concept, impact, the international regulatory development and more precisely the EU's framework as the leader in the fight against illegal, unreported and unregulated fishing, and other challenges we might face in the upcoming decades, but most importantly, I wish that you realized the following problem in our current legal studies.

Law is an essential tool in society as it regulates our conducts and limits our behaviors on the one hand, while seeking the protection of our personal and society's general interests on the other in order to allow us to live in peace with the limited resources we have. Its complexity comes as a result of a multifaceted correlation with every aspect ruling our interpersonal relationships. There is not

launching risk assessment guidelines to help the insurance industry to better detect and the insurance to vessels and companies caught or suspected of pirate Fishing.

<https://www.unepfi.org/news/industries/insurance/leading-insurers-ocean-conservationists-oceana-and-unep-fi-issue-first-ever-guidelines-to-combat-pirate-fishing/>

a single thing that comes up in my mind that has not or will not eventually be regulated in one moment or in another.

The issue lies in the rapidness and effectiveness of its consolidation when the rule of law is most needed, such as in issues like the one reflected in this final degree paper, but for now, effectiveness is long from being accomplished because once again, *law* is not yet being used collectively with all the necessary resources.

We must deeply reconsider what use we are making of law degrees, and challenge teaching methods that detach themselves from reality by ignoring that law is the bridge between Society and Justice, otherwise, we will always be one step behind.

The end

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