

**UNIVERSITY OF CAPETOWN
FACULTY OF LAW
SCHOOL FOR ADVANCED LEGAL STUDIES
MASTERS OF LAW (LLM): SHIPPING LAW**

TITLE:

**‘THE USE OF PORT STATE MEASURES AS A TOOL OF COMBATING ILLEGAL
UNREPORTED UNREGULATED FISHING:**

Is there a need for expansion of coastal state jurisdiction?’

Submitted by: Peris B. Ogega

Student No: OGGPER001

Supervisor: Associate Professor Graham Bradfield

Word Count:20783

Date: 8th February 2020.

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in approved courses and a research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation paper conforms to those regulations.

Signature: **P.B.O.**

Date: **8.02.2020.**

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or noncommercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

ACKNOWLEDGEMENTS

I extend my deepest gratitude to my supervisor, Associate Professor Graham Bradfield, for being generous enough to share his wealth of knowledge without any reservations, for his invaluable support, patience and encouragement. May God bless the work of his hands.

I am completely indebted to my parents for their unconditional love and support. Thank you for always believing in me and making my dreams come true. I am who I am because of your hard work and prayers.

I would like to express my great appreciation to my family and friends for their unwavering support and words of encouragement throughout this programme.

Lastly, I would like to thank the Lord Almighty to whom I owe him my very existence. He has been the source of my strength throughout this research. He is indeed faithful. 'With man it is impossible, but not with God. For all things are possible with God' (Mark 10:27).

ABSTRACT

This dissertation examines the scope and limitations of port state jurisdiction with respect to the enforcement of international conservation and management measures established under international and national instruments. The current fisheries regulatory regimes rely primarily on flag states to enforce these measures against foreign vessels. The aim of this dissertation is to recommend an expansion of port state enforcement jurisdiction over foreign vessels when fishing in the high seas. The expansion of port state jurisdiction supplements the role of flag states in enforcing the provisions of international conventions and agreements applicable in the high seas and also fills in where flag of convenience fishing vessels have failed to do so. To support this view, the dissertation will compare the issue of illegal unreported unregulated fishing with the issue of marine pollution. The significance of this comparison is to show how provisions in regard to marine pollution, have legitimized the expansion of port state jurisdiction to the extent that port states have enforcement jurisdiction over foreign flagged vessels which violate the provisions of LOSC relating to marine pollution in the high seas.

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION	6
I Aim of Dissertation.....	6
II Background of the dissertation	7
III The structure.....	10
CHAPTER 2 SCOPE OF PORT STATE JURISDICTION	11
I INTRODUCTION	11
II TERRITORIAL JURISDICTION OF PORT STATES	13
III EXTRATERRITORIAL JURISDICTION OF PORT STATES	15
(a) Extra territorial port state jurisdiction in the EEZ	17
(b) Extra Territorial Port State Jurisdiction in the High Seas.....	19
(c) Regional Fisheries Management Organizations	23
(d) The European Council regulation on IUU Fishing.....	24
IV CONCLUSION	27
CHAPTER 3 EXCLUSIVE FLAG STATE JURISDICTION AS A LIMITATION OF PORT STATE JURISDICTION.	29
I INTRODUCTION	29
II EXCLUSIVE FLAG STATE JURISDICTION PRINCIPLE.....	29
(a) Freedom of the high seas	29
(b) Obligation of flag states in regard to fishing.....	31
(c) Flags of convenience.....	32
III CONCLUSION	36
CHAPTER 4 PORT STATE JURISDICTION IN MARINE POLLUTION CASES	39
I INTRODUCTION	39
II HISTORICAL DEVELOPMENT OF THE MARINE POLLUTION REGIME	39
III PORT STATES MEASURES IN RELATION TO MARINE POLLUTION	43
IV ANALYSIS OF ARTICLE 218 OF LOSC.....	45
CHAPTER 5 CONCLUSION.....	48

CHAPTER 1 INTRODUCTION

I Aim of Dissertation

Illegal, unreported, unregulated fishing (IUU fishing) refers to activities conducted by nationals or foreign vessels in waters under the jurisdiction of a state or relevant regional fisheries management organizations (RFMOs) in contravention of its laws or such fishing activities that have not been reported or have been misreported or fishing activities carried out in a manner that contravenes the conservation and management measures of the relevant RFMO.¹ IUU fishing is a great danger to the sustainability of the global commons as it has negative effects on food security, environmental protection and the economy of the states involved. It is due to these reasons that the United Nations General Assembly (UNGA), several RFMOs and other organizations have called on states to take measures individually or jointly to combat IUU fishing.²

The rise of IUU fishing in the recent years can be attributed to the unregulated access to flags of convenience and open registries, little regulation of transshipment, the existence of ports of convenience and an active business in offshore shell companies and tax havens.³ The failure or unwillingness of flag states to exercise their jurisdiction over their vessels and to take appropriate action in cases of IUU fishing has led to port states taking extraterritorial measures in order to fill in for the flag states. The preamble of the United Nations Convention on the Law of the Sea (LOSC) explicitly recognizes its aim of promoting the conservation of living resources and the study, protection and preservation of the marine environment. It is in this spirit that the LOSC has specific provisions for conservation of fisheries both in the Exclusive Economic Zones (EEZ) and the high seas as will be discussed herein below.

It is against this backdrop that this dissertation will critically analyze the role played by port states in regard to IUU fishing as provided by conventions, treaties and the general international law principles. The use of port state control is not controversial however the extent of port states' jurisdiction over foreign vessels voluntarily visiting ports within their territory is debatable. This dissertation further examines the limitation of port state jurisdiction primarily focusing on the

¹ International Plan of Action to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing 2001 Article 3.

² Martin Tsamenyi, Mary Ann Palma & Others 'The European Council Regulation on Illegal Unreported and Unregulated Fishing: An International Fisheries Law Perspective' (2010) 25 *The International Journal of Marine and Coastal Law* 1 at 6.

³ Anastasia Telesetky 'Laundering Fish in the Global Undercurrents: Illegal, Unreported and Unregulated Fishing and Transnational Organized Crime' (2014) 41 *Ecology Law Quarterly* 939.

exclusive flag state jurisdiction principle. It seeks to elaborate on how reliance primarily on flag state jurisdiction has not been effective in fighting IUU fishing due to the increase of flags of convenience (FoC) fishing vessels and that given the irreparable damage caused to both marine living resources and the economies of states that rely on fishing, there is need for the expansion of port state jurisdiction to supplement flag states.

To support this view, the dissertation will compare IUU fishing with the issue of marine pollution, what laws are currently in place and the role played by port states and their efficacy in fighting marine pollution. The significance of this comparison is to show how these provisions have introduced the expansion of port state jurisdiction to the extent that port states have enforcement jurisdiction over foreign flagged vessels which violate the provisions of LOSC relating to marine pollution in the high seas. The LOSC recognizes that all the problems of the ocean space are closely interrelated and need to be considered as a whole.⁴ Hence the same laws that have been used to fight marine pollution, if proven to be very effective, can be used to fight any crimes that are committed at sea including IUU fishing, drug trafficking, human trafficking, illegal trade among others.

The main argument of this dissertation is that the most effective way of fighting IUU fishing in the high seas is by giving port states enforcement jurisdiction over foreign vessels which are parties to the same convention as the port states or are members of other international treaties that confer such an enforcement jurisdiction. This expansion of port state jurisdiction is necessary for the protection of the global commons.

II Background of the dissertation

IUU fishing has serious consequences for the sustainability of fisheries resources as it undermines conservation and management measures established by national fisheries authorities within their EEZs and those of RFMOs.⁵ It can affect the food and work security of vulnerable human populations and has deleterious consequences for economic development, as well as a devastating effect on ocean wildlife.⁶ Almost 30% of the world's fisheries are overexploited and over 60% are

⁴ United Nations Convention on the Law of the sea 1982 Preamble.

⁵ Dikdik Mohamad Sodik 'Non-legally International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing' (2008) 15 *Australian International Law Journal* 129 at 139.

⁶ IUUWATCH 'What is IUU Fishing' available at <http://www.IUUwatch.eu/what-is-IUU-fishing/>, accessed on 24 January 2020.

already fully exploited.⁷ Most States and international organizations have agreed there is an urgent need to control or eliminate IUU fishing. This is because 75% of the world's fisheries resources are being harvested at or beyond sustainable levels. IUU fishing represents a major loss of revenue particularly to some of the poorest countries in the world where the dependency on fisheries for food, livelihood and revenue is high e.g. it is estimated to cost West Africa \$1.3. billion a year.⁸ Global losses from IUU fishing are estimated to be between \$10 and \$23.5 billion per year this means that between 11 and 26 million tonnes of fish are caught illegally per annum.⁹ Unreported fishing activities undermines the ability of coastal states to determine the status of fish stocks in their EEZs and to set the appropriate total allowable catch as it makes it difficult to compile accurate data on fish stocks.¹⁰

Indeed, the emergence and increase in IUU fishing globally has been caused by various factors including the increase in the demand for fisheries products globally, the lack of flag state control over fishing vessels and ineffective fisheries monitoring, control and surveillance.¹¹ The LOSC provides for the exclusive flag state jurisdiction and states that ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in the international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.¹² Exclusive flag state jurisdiction can only be effective if one assumes that all states will take responsibility for enforcing international standards on their vessels and punishing violations of the law.¹³ Unfortunately, many states are not willing or are unable to exercise effective control over vessels flying their flags leading to violation of international legal rules on the high seas. The most common vessels that are found to be engaging in IUU fishing are those registered with Flags of convenience (FoC). This is due to the fact that the vessels are either associated to flag states with poor records

⁷ IUUWATCH 'IUU Fishing Facts and Figures' available at <http://www.IUUwatch.eu/IUU-fishing-facts-and-figures/> accessed on 24 January 2020.

⁸ IUUWATCH 'IUU Fishing Facts and Figures' available at <http://www.IUUwatch.eu/IUU-fishing-facts-and-figures/> accessed on 24 January 2020.

⁹ Ibid.

¹⁰ Dikdik Mohamad Sodik 'Non-legally International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing' (2008) 15 *Australian International Law Journal* 129 at 141.

¹¹ Dikdik Mohamad Sodik 'Non-legally International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing' (2008) 15 *Australian International Law Journal* 129 at 134.

¹² United Nations Convention on the Law of the sea 1982 Article 92.

¹³ Joanna Mossop 'Can we make the oceans greener? The success and failures of LOSC as an Environmental Treaty' (2018) 49 *Victoria Wellington University Law Review* 573 at 581.

of compliance or cooperation or are loosely linked to the states that are obligated to exercise jurisdiction over them.¹⁴

One of the essential tools of global governance and that has proven to be effective in the fight against IUU fishing is the exercise of port state control. Indeed, the role of port states in certain fields has been increasingly highlighted and strengthened by the international community, to the extent that it considers not only port states' rights, but a general duty, and push for legally binding minimum standards in the exercise of jurisdiction by 'responsible' port states.¹⁵ Ports provide an opportunity for verifying if visiting foreign ships comply with certain types of national or international technical standards or if they have engaged in certain illegal behavior in the port state's maritime zones, in the maritime zones of other states, or on the high seas.¹⁶ Port state jurisdiction furthers the interests of the international community in relation to maritime safety and security, marine environmental protection, sustainable use and conservation of marine living resources and food security.¹⁷ Port states can complement the flag state's responsibility over its ships and thus make an important contribution to ensuring compliance with national and international regulatory efforts.

This has resulted in the port states exercising extraterritorial jurisdiction as a means of circumventing the inadequacies of enforcement on the high seas, flag states' ineffectiveness and also the absence of international rules due to lack of consensus at the international level.¹⁸ Port state jurisdiction does not just serve the national interests of the port state, but can also further the interests of the international community by, among other things, ensuring safety at sea (maritime safety), marine environmental protection, sustainable utilization of marine living resources; safeguarding marine biodiversity; and combating international terrorism.¹⁹

In view of the above, this dissertation will focus mainly on the scope of the port state jurisdiction over foreign vessels under the different conventions and treaties that govern the sea

¹⁴ Dana D. Miller & U. Rashid Sumalia 'Flag use behavior and IUU activity within the international fishing fleet: Refining definitions and identifying areas of concern' 2013 *Elsevier* 207.

¹⁵ Arron N. Honniball 'The exclusive jurisdiction of flag states: A limitation of pro-active port states?' (2016) 31 *The International Journal of Marine and Coastal Law* 499-530.

¹⁶ Erik Jaap Molenaar 'Port states jurisdiction: Towards comprehensive, mandatory and global coverage' (2007) 38 *Ocean Development and International Law* 225.

¹⁷ Donald Rothwell Alex Oude ELferink, Karen Scott et AL *The Oxford Handbook of the Law of the Sea* (2015) 283.

¹⁸ Dr. Sophia Kopela 'Port-state jurisdiction, extraterritoriality and the protection of global commons' (2016) 47 *Ocean Development and International Law* 89.

¹⁹ Erik Jaap Molenaar 'Port states jurisdiction: Towards comprehensive, mandatory and global coverage' (2007) 38 *Ocean Development and International Law* 225.

and the general principles of international law. It shall demonstrate how port states have exercised both prescriptive and enforcement jurisdiction in different maritime zones in regard to IUU fishing and compare it with marine pollution. It shall also discuss the limitations of the port state jurisdiction focusing mainly on flag state exclusivity. The dissertation will seek to establish the need for the expansion of port state enforcement jurisdiction over foreign vessels engaging in IUU fishing in the high seas by comparing this issue to marine pollution and elaborating how port states have played a key role in enforcing international and regional laws and regulations.

III The structure

The dissertation is composed of five chapters outlined as follows:

Following the introduction in Chapter 1 is Chapter 2, which critically looks at the scope of port state jurisdiction in the different maritime zones as provided by the Conventions and customary principles of international law. The main area of focus however is the territorial jurisdiction and extra territorial jurisdiction of port states. It shall critically analyze the prescriptive and enforcement jurisdiction of the port states over their maritime zones. The aim of this chapter is to enable the reader to appreciate the role that port states play in the fight of IUU fishing.

Chapter 3 will seek elaborate how the exclusive flag state jurisdiction principle limits port states which are able and willing to effect port state measures in order to combat IUU fishing. This chapter seeks to show the weaknesses of flag state jurisdiction which is the use of flags of convenience and open registries by IUU fishing vessels and how port states assist in resolving this issue.

Chapter 4 draws a comparison between the issue of IUU fishing and marine pollution. The significance of this comparison is to legitimize the expansion of port state jurisdiction in IUU fishing.

Lastly, Chapter 5 contains the conclusions reached with respect to main issues that has been discussed in this dissertation.

CHAPTER 2 SCOPE OF PORT STATE JURISDICTION

I INTRODUCTION

The primary responsibility for controlling fishing vessels activities shifts from the flag state to the coastal state when the vessel enters the waters of a coastal state.²⁰ Coastal states set up monitoring control and surveillance system to govern fisheries within their waters.²¹ The effectiveness of this system varies greatly from one country to another depending on the availability of capacity and resources.²² Port states on the other hand act as gatekeepers with the main aim of ensuring that illegally caught fish is not landed hence restricting its entry to the market.²³ They establish a series of requirements, referred to as port state measures, with which a foreign vessel must comply, as a condition for access to ports within the port state.²⁴ Typically, these requirements include prior notification of port entry, use of designated ports, restrictions on port entry and on landing or transshipment of fish, restrictions on supply and services, documentation requirements and port inspections.²⁵

The concept of port state jurisdiction has been derived from general international law rather than LOSC. Port state jurisdiction concerns the port state's powers to prosecute ships and to impose fines on them for violations of international rules and standards.²⁶ The LOSC defines ports as including the outermost permanent harbor works which form an integral part of the harbor system.²⁷ However, the location of a port is believed to be inconsequential given that in voluntarily stopping at a port a vessel waives the right of innocent passage and comes under the full and unlimited jurisdiction of the coastal state.²⁸ The scope of port state jurisdiction has been summed up as follows:

‘Once a ship voluntarily enters port it becomes fully subject to the laws and regulations prescribed by the officials of that territory...and are in common expectation obliged to

²⁰ Irina Popescu ‘Illegal, Unreported and Unregulated (IUU) Fishing Briefing’ 2017 *European Parliamentary Research Service* 1 at 4.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ho Sam Bang ‘Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea’ (2009) 40 *Journal of Maritime Law* 290 at 292.

²⁷ United Nations Convention on the Law of the Sea 1982 Article 11.

²⁸ Henry Curtis ‘Is there any other way? Port state jurisdiction as an alternative to the mandatory reflagging of deep water fishing vessels in New Zealand’s EEZ’ 2014 Victoria University of Wellington 18.

comply with the coastal regulations about proper procedures to be employed and permissible activities within internal waters.’²⁹

The notion of a ‘responsible port state’ namely, a port that uses to the fullest its own jurisdiction as provided by international law to safeguard not only its interest but the interest of the international community, has been widely accepted as playing a vital role in optimizing the use of port state jurisdiction.³⁰ The concept of state jurisdiction is composed of three distinct forms which are prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction.³¹ Prescriptive jurisdiction gives a state authority to make law, while adjudicative jurisdiction subjects a person or things to the process of the state’s courts or administrative tribunals. On the other hand, enforcement jurisdiction compels compliance with laws or regulations of a state.³²

International law provides that enforcement is only lawful if based on legislation that has been enacted in accordance with it and it presumes that there must be sufficient jurisdictional link.³³ In this dissertation, port state jurisdiction will refer to the prescriptive and enforcement powers of port states. The authority that a state has in exercising prescriptive and enforcement jurisdiction is primarily derived from its sovereignty over a specific territory as recognized by international law.³⁴ This is what is known as the territoriality principle.³⁵ Territorial jurisdiction applies with respect to activities which take place wholly or partly within the territory of a state while extra territorial principle has been developed to justify the exercise of jurisdiction in respect to activities which take place wholly outside a state’s territory.³⁶ In order to establish territorial or extra territorial jurisdiction, it is important to analyze how the national law has determined the location of violation

²⁹ Ibid.

³⁰ Erik Jaap Molenaar ‘Port states jurisdiction: Towards comprehensive, mandatory and global coverage’ (2007) 38 *Ocean Development and International Law* 246.

³¹ Aaron N. Honniball ‘The Exclusive Jurisdiction of Flag States: A limitation on Pro-active Port States?’ (2016) 31 *The International Journal of Marine and Coastal Law* 501.

³² Aaron N. Honniball ‘The Exclusive Jurisdiction of Flag States: A limitation on Pro-active Port States?’ (2016) 31 *The International Journal of Marine and Coastal Law* 501.

³³ Erik Jaap Molenaar ‘Port states jurisdiction: Towards comprehensive, mandatory and global coverage’ (2007) 38 *Ocean Development and International Law* 230.

³⁴ Daniele Fabris ‘Crimes Committed at Sea and Criminal Jurisdiction: Current Issue of International Law of the Sea awaiting The ‘Enrica Lexie’ Decision’ (2017) 9:2 *Amsterdam Law Forum* 1 at 8.

³⁵ Daniele Fabris ‘Crimes Committed at Sea and Criminal Jurisdiction: Current Issue of International Law of the Sea awaiting The ‘Enrica Lexie’ Decision’ (2017) 9:2 *Amsterdam Law Forum* 1 at 8.

³⁶ Dr. Sophia Kopela ‘Port-state jurisdiction, extraterritoriality and the protection of global commons’ (2016) 47 *Ocean Development and International Law* 89 at 92.

and the nature of the crime.³⁷ This is because the mere presence of a vessel in a port does not give the port state unlimited territorial jurisdiction.

In this chapter, the scope of port state jurisdiction over foreign flagged vessels in relation to fishing activities will be discussed.

II TERRITORIAL JURISDICTION OF PORT STATES

Article 2(1) of the LOSC grants jurisdiction to sovereign states beyond their land territory and internal waters to the territorial sea. Since a state exercises territorial sovereignty over its ports, port states have residual territorial jurisdiction under customary international law.³⁸ It is well established in state practice that ships not engaged in innocent passage, either because they are not passing, or are passing but are not innocent, are subject to all coastal state laws.³⁹ Coastal states have prescriptive jurisdiction in certain matters relating to the innocent passage of foreign vessels through their territorial sea and they are required to give due publicity to all such laws and regulations.⁴⁰ Such matters include safety of navigation, conservation of living resources, protection of cables and pipelines, fisheries, pollution, marine scientific research and customs, fiscal, immigration and sanitary regulations.⁴¹

Article 21(2) of the LOSC however provides that such laws shall not apply to the construction, design, equipment or manning standards (CDEM standards) of foreign ships unless they are giving effect to generally accepted international rules or standards. It is worth noting that these standards aim at making the ship seaworthy and ensure that the vessels are operating safely with minimum risk to those on board and to other ships. The CDEM standards are laid down in several conventions including the International Convention for the Safety of Life at Sea, 1974 (the SOLAS Convention). This significant limitation is meant to balance coastal and flag state interests by allowing the coastal state to legislate but removing the risk of divergent standards to which vessels cannot adjust during voyage.⁴²

³⁷ Dr. Sophia Kopela 'Port-state jurisdiction, extraterritoriality and the protection of global commons' (2016) 47 *Ocean Development and International Law* 89 at 94.

³⁸ Cedric Ryngaert & Henrik Ringbom 'Introduction: Port State Jurisdiction: Challenges and Potential' (2016) 31 *The International Journal of Marine and Coastal Law* 382.

³⁹ R.R. Churchill & A.V. Lowe *The Law of the Sea* 3 ed (1999) 95.

⁴⁰ United Nations Convention on the Law of the Sea 1982 Article 21(3).

⁴¹ United Nations Convention on the Law of the Sea 1982 Article 21(1).

⁴² R.R. Churchill & A.V. Lowe *The Law of the Sea* 3 ed (1999) 94.

Another way in which a port state exercises its territorial jurisdiction over foreign flagged vessels is by regulating access to its ports. Indeed, it was clearly stated in the *Nicaragua* case that the coastal state may regulate access to its port by virtue of its sovereignty.⁴³ Article 25(2) of the LOSC gives the coastal state the right to take necessary steps to prevent any breach of conditions to which admission of ships proceeding to internal waters or a call or at a port facility is subject. However, states do not have an unlimited power to prohibit access to ports as recognized in the 1958 *Saudi Arabia v Aramco* arbitration, where the arbitrator observed that:

‘According to a great principle of public international law, the ports of every state must be open to foreign merchant vessels and can only be closed when the vital interests of the states so require.’⁴⁴

Article 24(1) of the LOSC operates to prevent unreasonable interference with innocent passage by providing that a coastal state shall not impose requirements on foreign ships which have the practical effect of denying the right of innocent passage and that a coastal state shall not discriminate in form or in fact against the ships of any state. Since access to ports is very vital for international trade, many bilateral and multilateral treaties have been formed in order to confer rights of entry to ports for foreign merchant ships, for instance, the 1923 Geneva Convention and Statute On the International Regime of Maritime Ports.⁴⁵

The effectiveness of port states measures in denial of access to ports to IUU fishing vessels has been witnessed in several cases including the case of two vessels namely the *FV Premier* and the *FV Solevant*.⁴⁶ The vessels were South Korean owned by Dongwon industries and were identified fishing on various occasions between November 2011 and May 2012 and between February and September 2012 in the Liberian EEZ. The Liberian government investigated both the

⁴³ *Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)* 1986 ICJ Reports p. 111 par. 213.

⁴⁴ *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)* 1963 27 ILR 117.

⁴⁵ Article 2 of the 1923 Geneva convention and Statute on the International Regime of Maritime Ports provides that: ‘subject to the principle of reciprocity and to its reservation set out in the first paragraph of article 8, every contracting state undertakes to grant the vessels of every other contracting state equality of treatment with its own vessels, or those of any other states whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.’

⁴⁶ Stop Illegal Fishing Coordination Team ‘Case study series’ available at <http://www.imcsnet.org/wp-content/uploads/2012/03/SIF-Case-Study-7-FV-Premier.pdf>, accessed on 6 February 2020.

vessels and brought charges against them for violations of the Liberian Fisheries Regulations including fishing without a license in February 2013. During the investigation, the Mauritian ministry of fisheries, upon a request by the Liberian government, inspected the *FV Premier* and provided copies of the fishing catch log and a forged Liberian fishing licence to Liberia. While the investigation was still open, Kenya and Mozambique denied the *FV Premier* a fishing license to operate in the waters under their national jurisdiction and Seychelles denied the *FV Premier* permission to offload its catch in port Victoria based on the Indian Ocean Tuna Commission (IOTC) port state measures resolutions.

On 22 April 2013, the owners of the vessels paid the Liberian government two million US dollars in settlement of the charges against the *FV Premier* and the *FV Solevant*. The Mauritian government did not allow the *FV Premier* to offload in its port as it did not want potentially illegal fish to enter its market. The main challenges experienced was limited human capacity in terms of enforcement officers with adequate knowledge experience and understanding of IUU fishing regulations, unclear legal framework with regard to dealing with vessels with an IUU fishing history and communication and exchange of information between the states involved due to lack of adequate equipment.⁴⁷

In regard to crimes committed on board foreign vessels such as homicide, bodily harm, piracy, armed robbery, acts of terrorism and facilitation of proliferation of weapons of mass destruction, port states are prohibited from exercising criminal jurisdiction to arrest any person or conduct any investigation during its passage save only in the cases stated under the LOSC.⁴⁸ Most notably, port states may exercise criminal jurisdiction in cases where the consequence of the crime extends to the coastal state and if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

III EXTRATERRITORIAL JURISDICTION OF PORT STATES

Extraterritorial jurisdiction of a port state is based on the presumption that despite the jurisdictional link, the regulated activity has taken place outside a state's territory.⁴⁹ International law permits a

⁴⁷ Ibid.

⁴⁸ Article 27 of the LOSC allows port states to carry on arrests or criminal investigations where the crime extends to the coastal state, it disturbs the peace of the country, if the assistance of the local authorities has been requested by the master of the ship or if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

⁴⁹ Dr. Sophia Kopela 'Port-state jurisdiction, extraterritoriality and the protection of global commons' (2016) 47 *Ocean Development and International Law* 89 at 92.

state to exercise extra territorial jurisdiction in certain circumstances. The legality of extraterritorial port state jurisdiction depends on two aspects, the first being, a sufficient jurisdictional basis, for instance provided by a treaty or justifiable reliance on a jurisdictional principle, such as the universality principle. The second aspect is the type of enforcement measures taken such as denial of landing, transshipment or processing of cargo, denial of use of other port services such as refueling, denial of access to ports, boarding and inspection, detention until standards are complied with and monetary or other forms of penalties including confiscation of ship or cargo.⁵⁰

Indeed, in the *SS Lotus* case⁵¹, the court held that apart from certain special cases which are defined by international law, vessels on the high seas are subject to no authority except that of the state whose flag they fly. It went on to state that:

‘if a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different states were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the state to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting , accordingly, the delinquent.’

This is what is called the passive personality principle and it gives a state jurisdiction where the victim of the offence is a national of the state. The passive personality principle has been widely used by many states especially the USA in prosecuting criminal offences by foreign nationals. An example is the case of the *de facto* leader of Panama, Manuel Noriega who was convicted by an American court of cocaine trafficking, racketeering and money laundering.⁵² The court held that the acts done outside a jurisdiction, but intended to produce or producing effects within it, justify a state in punishing the person causing the effect, as if he had been present at the effect, if the state should succeed in getting him within its power.

The other international law principles that give states extra territorial jurisdiction include where the commission of an act begun extra-territorially but completed in that states territory (objective territorial jurisdiction), where an act is committed by a citizen of that state (nationality principle), where an act threatens the security of the State (the protective principle) , where an act

⁵⁰ Erik Jaap Molenaar ‘Port states jurisdiction: Towards comprehensive, mandatory and global coverage’ (2007) 38 *Ocean Development and International Law* 237.

⁵¹ *S.S. ‘Lotus’, France v Turkey* 1927 PCIJ.

⁵² *United States v Noriega* 1990 S.D. Fla.

is acknowledged as a universal crime e.g. piracy, slavery and crimes against humanity or where extra territorial legislative jurisdiction is permitted by a treaty.⁵³ The view of the Permanent Court of International Justice (PCIJ) in the *SS Lotus* case has been widely criticized as states on one hand have accepted that jurisdiction is to be exercised in accordance with international law while on the other hand it has been suggested that the general principles of international law such as equality of states, non-intervention and principles of territorial integrity, determine the scope of jurisdiction.⁵⁴

The LOSC is the main treaty that sets out provisions in the different maritime zones outside a state's territory, namely, the contiguous zone, EEZ and the high seas. Coastal states may only exercise enforcement jurisdiction in the contiguous zone by punishing vessels where it is necessary to prevent infringement of customs, fiscal immigration or sanitary laws and regulations within its territory or territorial sea.⁵⁵ It must be noted that the enforcement jurisdiction only applies to vessels leaving the territorial sea of the coastal state. The legal status of the contiguous zone has been a contentious issue as some states claim both legislative and enforcement jurisdiction especially in security issues. This is because under the LOSC, the contiguous zone falls under the EEZ and not the high seas. China for example, has sought to confer jurisdiction within the contiguous zone with respect to security laws and regulations.⁵⁶

(a) Extra territorial port state jurisdiction in the EEZ

Coastal states have both prescriptive and enforcement jurisdictions in the EEZ for the purpose of exploring and exploiting, conserving and managing the fish stock found therein. Article 62(4) of the LOSC requires other states fishing in the EEZ to comply with the conservation measures and with other terms and conditions established in the laws and regulations of the coastal state. Hence certain conditions may be placed on them for example, foreign fishermen may be required to have licenses, to observe the coastal state's conservation measures, to carry out research programs, to land part or all of their catches in the coastal states, to train coastal personnel and transfer of

⁵³ Robin Churchill 'Port State Jurisdiction Relating to The Safety of Shipping and Pollution from Ships- What degree of Extra-territoriality?' (2016) 31 *The International Journal of Marine and Coastal Law* 442 at 462.

⁵⁴ Dr. Sophia Kopela 'Port-state jurisdiction, extraterritoriality and the protection of global commons' (2016) 47 *Ocean Development and International Law* 89 at 91.

⁵⁵ United Nations Convention on the Law of the Sea 1982 Article 33(1).

⁵⁶ Law of The People's Republic of China On the Territorial Sea and The Contiguous Zone 1992 Article 13.

fisheries technology and enforcement procedures among other requirements.⁵⁷ The coastal State must however give due notice of conservation and management laws and regulations.⁵⁸

In exercising their enforcement jurisdiction in the EEZ, coastal states may board, inspect, arrest and institute judicial proceedings as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the LOSC.⁵⁹ The LOSC has sought to provide a balance between powers of the coastal states to arrest the vessels and crews and those of flag states by providing the assurance of prompt release of their vessels and crews when there has been an arrest by a coastal state.⁶⁰ Furthermore, Article 73(3) of the LOSC has limited the enforcement powers of the coastal state by providing that the penalties for violations of fisheries laws may not include imprisonment in the absence of agreements to the contrary by the states concerned or any other form of corporal punishment. The disputes relating to prompt release including where the detaining state has not complied with the provisions of the LOSC of prompt release upon posting of a reasonable bond are exclusively dealt with by the International Tribunal for the Law of the Sea, herein after referred to as ITLOS.⁶¹

Many coastal states use their prescriptive jurisdiction as provided under Article 73(3) of the LOSC to provide for confiscation of fishing vessels as a penalty for illegal fishing within their EEZ. Indeed, in the *Tomimaru* Case, ITLOS recognized that many states have provided for measures of confiscation of fishing vessels in their legislation with respect to the management and conservation of marine living resources.⁶² In this case, the *Tomimaru* was a fishing vessel registered in Japan and had a fishing license issued by the Russian Authorities. It was confiscated by the Russian authorities after it was found guilty of illegal fishing in the EEZ of the Russian Federation. The ITLOS upheld this decision of the Supreme Court of the Russian court but noted that the confiscation of a fishing vessel may not be used in such a manner as to upset the balance of the interests of the flag state and of the coastal state established in the convention.

In addition to the above mentioned enforcement powers, the coastal state may exercise its right of hot pursuit where there are violations of its laws and regulations applicable to the EEZ and

⁵⁷ United Nations Convention on the Law of the Sea 1982 Article 62(4).

⁵⁸ United Nations Convention on the Law of the Sea 1982 Article 62(5).

⁵⁹ United Nations Convention on the Law of the Sea 1982 Article 73(1).

⁶⁰ Article 73(2) of the LOSC provides that the arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

⁶¹ United Nations Convention on the Law of the Sea 1982 Article 292.

⁶² *The Tominmaru Case (Japan v Russian Federation)*, Case No. 15 of 2007 ITLOS p 96.

the Continental shelf by a foreign ship.⁶³ The right of hot pursuit may involve a right of the coastal state to exercise legislative and enforcement jurisdiction over foreign ships in the high seas where the pursuit has rightfully commenced in the internal, territorial sea, EEZ or the continental shelf and has not been interrupted.⁶⁴ The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state.⁶⁵

The LOSC has also endeavored to deal with the issue of shared stock by providing that where the same stock occurs within the EEZ of two or more coastal states, these states shall agree upon the measures necessary to ensure conservation and development of such stocks either directly or through appropriate sub regional or regional organizations.⁶⁶ States have achieved this mainly by adopting legally binding conservation and management measures through the RFMOs. The RFMOs provides a forum for states to fulfill their duty to cooperate regarding fisheries in the high seas, as set out in the LOSC and described further in the 1995 UN Fish Stocks Agreement (the Fish Stock Agreement).⁶⁷ However, port states with a sizeable EEZ face a considerable challenge in the proper enforcement of fisheries regulations in terms of technology (use of satellites to track vessels) and resources such as vessels, aircraft and qualified personnel.⁶⁸

(b) Extra Territorial Port State Jurisdiction in the High Seas

Although the EEZ fisheries are the most commercially important, many fisheries on the high seas are being increasingly exploited as various fishing grounds closer to shore are depleted.⁶⁹ Port state measures relating to fishing activities have been recognized in international agreements such as the LOSC, 1993 Agreement to Promote Compliance With International Conservation and Management Measures By Fishing Vessels On The High Seas (Compliance Agreement), 1995 U.N. Fish Stocks Agreement, 2001 International Plan of Action to prevent, deter and eliminate Illegal Unreported and Unregulated Fishing (IPOA-IUU) and 2009 Agreement on Port State Measures to Prevent Deter and Eliminate illegal , unreported and unregulated fishing (PSMA).

⁶³ United Nations Convention on the Law of the Sea 1982 Article 111.

⁶⁴ United Nations Convention on the Law of the Sea 1982 Article 111(1).

⁶⁵ United Nations Convention on the Law of the Sea 1982 Article 111(3).

⁶⁶ United Nations Convention on the Law of the Sea 1982 Article 63(1).

⁶⁷ Stefan Asmundsson 'Regional Fisheries Management Organizations (RFMOs): Who are they, what is their geographical coverage on the high seas and which ones should be considered as General RFMOs, Tuna RFMOs and Specialized RFMOs?' 2016.

⁶⁸ R.R. Churchill & A.V. Lowe *The Law of the Sea* 3 ed (1999) 293.

⁶⁹ Donald R Rothwell & Tim Stephens *The International law of the Sea* 2 ed (2016) 328.

Article 116 of the LOSC gives all states the right to engage in fishing on the high seas, subject to their treaty obligation and their duty to cooperate with other states in conserving highly migratory species as provided under Articles 63 and 64 of the LOSC. This right has been reinforced by Article 89, which provides that no state may validly purport to subject any part of the high seas to its sovereignty and Article 92 which provides for the exclusive flag state jurisdiction in the high seas. The Compliance Agreement was drafted with the aim of enhancing the role of flag states in ensuring compliance of their vessels with international conservation and management measures when fishing in the high seas. This Agreement came into force on 24th April 2003. It placed upon flag states several responsibilities including establishment of a genuine link between the state and the fishing vessel⁷⁰ and ensuring that none of their vessels are fishing on the high seas unless authorized.⁷¹ It further provided for cancellation of the authorization to fish where the fishing vessel ceases to fly the state party's flag.⁷²

The Compliance Agreement only provided for flag state jurisdiction and failed to confer rights to port states to take measures in combating IUU fishing. In fact, Article V(2) of the Compliance Agreement provides that a port state must promptly notify the flag state where it has reasonable grounds for believing that a fishing vessel has been used for an activity that undermines the effectiveness of international conservation measures when the vessel is in its port. This meant that a port state cannot investigate a foreign flagged vessel or take any other measures without the permission of the flag state.

The Fish Stock Agreement significantly strengthened the use of port state measures as a fisheries management tool.⁷³ Article 8(1) of the Fish Stock Agreement seeks to create a balance between the rights of the states to fish in the high seas by providing for cooperation between states in relation to straddling fish stocks and highly migratory fish stocks either directly or through appropriate sub regional management organizations or RFMOs. State parties fishing in the high seas are obliged to become members of such organizations or agree to apply the conservation

⁷⁰ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels On the High Seas 1993 Article 3(3).

⁷¹ Ibid at 3(2).

⁷² Ibid.

⁷³ Judith Swan 'Port State Measures-from Residual Port State Jurisdiction to Global Standards' (2016) 31 *The International Journal of Marine and Coastal Law* 395 at 421.

measures established by such organizations.⁷⁴ Article 18(1) requires compliance with sub regional and regional conservation and management measures.

The Fish Stock Agreement is notably the first global instrument to spell out circumstances, other than those specified by an international agreement or treaty, where a non-flag state may take action against a vessel undermining the effectiveness of international fisheries conservation and management measures.⁷⁵ Article 21(1) allows state parties to the Fish Stock Agreement and also members of a RFMO to board and inspect fishing vessels of any other state party to the Fish Stock Agreement, whether or not that state is a member of the regional body in question. Article 20(7) further allows state parties to this Agreement and members of regional bodies or arrangements to take action, in accordance with international law, to deter vessels which have engaged in activities which undermine the effectiveness of or otherwise violate the conservation and management measures established by that organization or arrangement from fishing on the high seas until such time as appropriate action is taken by the flag state.

Port states have been given extra territorial jurisdiction in regard to fishing by virtue of Article 23(1) of the Fish Stock Agreement. It gives port states the right and duty to take measures in accordance with international law, to promote the effectiveness of sub regional, regional and global conservation and management measures. Ports states may prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of such measures on the high seas.⁷⁶ In addition, port states have the powers to inspect documents, fishing gear and catch on board fishing vessels when such vessels are voluntarily in its ports or offshore terminals.⁷⁷ It should be noted however that port states are not legally bound to take such enforcement measures as the provisions of article 23(2) and (3) of the Fish Stock Agreement use the words ‘may’ instead of ‘shall’ hence some port states may be unable or unwilling to take such measures as required.⁷⁸

The Fish Stock Agreement encouraged further deliberation on port state measures which led to the drafting of the IPOA-IUU. The IPOA-IUU is a voluntary document which focuses on the

⁷⁴ Fish Stock Agreement 1995 Article 8(3).

⁷⁵ Deirdre Warner-Kramer ‘Control begins at home: Tackling flags of convenience and IUU Fishing’ (2004) 34 *Golden Gate University Law Review* 497 at 506.

⁷⁶ Fish Stock Agreement 1995 Article 23(3).

⁷⁷ *Ibid* at Article 21(2).

⁷⁸ Dawn A. Russell & David L. VanderZwang *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles* 2010 at 373.

implementation of measures of all states including the flag states, port states and coastal states and their respective responsibilities in preventing, deterring and eliminating IUU fishing.⁷⁹ It provides for a range of measures that can be used by flag states, port states, coastal states and market states to combat IUU fishing within their jurisdiction and on the high seas. These measures include implementing of a fishing vessel registration and licensing system, maintenance of records of fishing vessels, implementation of monitoring, control and surveillance(MCS) measures, port enforcement actions, catch documentation schemes and trade restrictions. It also sets out a number of general responsibilities of such measures that relate to implementation of international instruments, cooperation among states, application of sanctions and adoption of measures against IUU fishing by vessels without nationality and vessels flying the flags of non-cooperating members of RFMOs.

Another international law instrument that is intended to provide the legal framework and management of RFMOs is the Agreement on port state measures (PSMA) that was adopted by the Food and Agriculture Organization of the United States (FAO) in 2009. The rationale behind the PSMA is the absence of a global legally binding obligation for port states to take specific measures to combat IUU fishing. PSMA empowers port states to deny entry where there is sufficient proof that a vessel seeking entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing.⁸⁰

In addition to this, where a vessel is already in port, the port state has the power of denying such a vessel the use of its ports for landing, transshipping, packaging and processing of fish and other port services.⁸¹ The main aim is to reduce the incentive of such vessels to continue to operate and also blocking fishery products derived from IUU fishing from reaching national and international markets.⁸² The adoption of the PSMA is the culmination of growing recognition during more than a decade of the need for, and high potential of port state measures to combat IUU fishing.⁸³ The PSMA came into force on the 5th June 2016 and currently it has 62 member states

⁷⁹ International Plan of Action to prevent, deter and eliminate Illegal Unreported and Unregulated Fishing 2001 Abstract.

⁸⁰ Agreement on Port State Measures to Prevent Deter and Eliminate illegal, unreported and unregulated fishing, 2009 Article 9(3).

⁸¹ Ibid at 9(6).

⁸² FAO 'Agreement on Port State Measures(PSMA)' available at <http://www.fao.org/port-state-measures/en/>, accessed on 20th November 2019.

⁸³ Dawn A. Russell & David L. VanderZwang *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles* 2010 at 386.

including Kenya, South Africa and United States of America.⁸⁴ It is evident the member states must demonstrate their commitment in enforcing the PSMA and also more states must ratify this convention for it to be effective.

(c) Regional Fisheries Management Organizations

RFMOs provide a powerful tool of regional governance in implementing port state measures.⁸⁵ The international instruments such as the Fish Stock agreement⁸⁶ and the PSMA⁸⁷ encourage coastal states and states fishing on the high seas to cooperate in cases where there is straddling fish stocks and highly migratory fish stocks either directly or through appropriate sub regional or RFMOs as discussed above. The PSMA has defined RFMOs as intergovernmental fisheries organization or arrangement, as appropriate, that has the competence to establish conservation and management measures.⁸⁸ Examples of RFMOs are the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the International Commission for the Conservation of Atlantic Tuna (ICCAT) and the Indian Ocean Tuna Commission (IOTC) .

Members of RFMOs agree to be bound by conservation and management measures (including those relating to port state measures) adopted in accordance with agreed procedures and cooperating non-parties may also be required to apply the measures.⁸⁹ However, they are not obliged to give effect to measures or decisions of a RFMO if those measures or decisions have not been adopted in conformity with international law.⁹⁰

The roles of RFMOs have been provided under the PSMA and they include sharing the measures adopted in the conservation and management of marine resources with the state parties to the PSMA, FAO, other international organizations and RFMOs.⁹¹ Although many RFMOs are

⁸⁴FAO ‘Agreement on Port State Measures(PSMA)’ available at <http://www.fao.org/port-state-measures/background/parties-psma/en/>, accessed on 20th November 2019.

⁸⁵ Judith Swan ‘Port State Measures-from Residual Port State Jurisdiction to Global Standards’ (2016) 31 *The International Journal of Marine and Coastal Law* 395 at 412.

⁸⁶ Fish Stock Agreement 1995 Article 8.

⁸⁷ Agreement on Port State Measures to Prevent Deter and Eliminate illegal, unreported and unregulated fishing, 2009 Article 6.

⁸⁸ Ibid at Article 1.

⁸⁹ Judith Swan ‘Port State Measures-from Residual Port State Jurisdiction to Global Standards’ (2016) 31 *The International Journal of Marine and Coastal Law* 395 at 412.

⁹⁰ Agreement on Port State Measures to Prevent Deter and Eliminate illegal, unreported and unregulated fishing, 2009 Article 4(3).

⁹¹ Agreement on Port State Measures to Prevent Deter and Eliminate illegal, unreported and unregulated fishing, 2009 Article 6.

attempting to adopt the minimum standards provided in the PSMA, the types of measures taken vary among the various RFMOs.⁹² Hence they are struggling to fulfil their mandates despite concerted efforts to improve their performance as a result of frameworks within which they operate and partly from an apparent lack of political will by members to implement decisions in a timely manner.⁹³ Steps are being taken to establish new RFMOs where none existed previously in order to increase the effectiveness of RFMOs as nearly all of the world's major fish stocks will be covered by RFMOs.

(d) The European Council regulation on IUU Fishing

The European Union(EU) is a valuable destination market for IUU operators due to the fact that it imports many high value products and also its member states lend their flags to a significant number of vessels active in distant waters that catch a large share of the fish consumed within the EU market.⁹⁴ Hence the EU considers itself as having a major responsibility in promoting the sustainability of fisheries resources and in taking a lead in preventing, deterring and eliminating IUU fishing. The management of fisheries in the EU is primarily governed by the Common Fisheries Policy whose main objective is to ensure that there is a sustainable exploitation of living aquatic resources based on sound scientific advice and precautionary approach to fisheries. A number of regulations which establish obligations for EU members to ensure proper enforcement of all relevant fisheries conservation and management measures have been adopted by the EU council in order to implement the Common Fisheries Policy.

Perhaps the most significant regulation is the European Commission Regulation (EC) No. 1005/2008 (the IUU Regulation) which was adopted by the EU on 29th September 2008 and entered into force on January 1, 2010, with the aim of preventing deterring and eliminating trade in fisheries products deriving from IUU fishing into the EU. It is a transparent and nondiscriminatory instrument which applies to all vessels engaged in the commercial exploitation of fishery resources in the territory of each member state of the EU, within community waters, within maritime waters

⁹² Judith Swan 'Port State Measures-from Residual Port State Jurisdiction to Global Standards' (2016) 31 *The International Journal of Marine and Coastal Law* 395 at 412.

⁹³ FAO 'The state of world fisheries and aquaculture 2008' available at <http://www.fao.org/3/a-i0250e.pdf> at p9, accessed on 20 January 2020.

⁹⁴ The Environmental Justice Foundation & Others 'Building on Success: EU progress in the Global Fight Against IUU Fishing' available at http://www.iuuwatch.eu/wp-content/uploads/2015/07/IUU_report_010216_web.pdf, accessed on 20 January 2020.

under the jurisdiction of third countries and on the high seas.⁹⁵ The regulation marks the first attempt to link trade in fish and fishery products with efforts made by these countries in the area of fisheries resources conservation and management in the waters under their jurisdiction.⁹⁶ The IUU Regulation, as the instrument through which those measures are applied, has been criticized for lacking clarity in its conduct standards, resulting in difficulty in the assessment of possible frictions with the rules contained in the LOSC.⁹⁷

The IUU regulation has expanded the port state extra territorial jurisdiction by giving certain enforcement powers to member states when vessels are visiting their ports. First, it prohibits access to ports of member states, provision of port services and the conduct of landing or transshipment operations for third country fishing vessels unless they meet the requirements laid down in the regulations.⁹⁸ Member states are obliged to carry out inspections in their designated ports of at least 5% of landing and transshipment operations by third country fishing vessels.⁹⁹ Masters of third country fishing vessels are required to give at least three working days' notice before arriving to the member states port and to furnish them with adequate information that would assist with inspection.¹⁰⁰ Where there is evidence to show that a fishing vessel has engaged in IUU fishing, the official shall record the suspected infringement in the inspection report, and forward the report to the competent authority.¹⁰¹ In cases where the infringement has taken place in the high seas, the port member state shall cooperate with the flag state and apply sanctions provided for by the legislation of that port member state under the condition that the flag state has expressly agreed to transfer its jurisdiction.¹⁰²

⁹⁵ Council Regulation (EC) No. 1005/2008 Article 1.

⁹⁶ K M Shajahan 'The European Union Regulation on IUU Fishing: Impact on Developing Countries' (2012) 47 economic and political weekly 81.

⁹⁷ Mercedes Rosello 'Cooperation and Unregulated Fishing: Interactions Between Customary International Law, And The European Union IUU Fishing Regulation (2017) 84 Marine Policy 306 at 307.

⁹⁸ Council Regulation (EC) No. 1005/2008 Article 4(2).

⁹⁹ Council Regulation (EC) No. 1005/2008 Article 9(1).

¹⁰⁰ Council Regulation (EC) No. 1005/2008 Article 6(1).

such information that's required by the ports include vessel identification, name of the designated port of destination and the purpose of the call, landing, transshipment or access to services, fishing authorization, dates of fishing trip, estimated date and time of arrival at port, the quantities of each species retained on board, the zone or zones where the catch was made or where transshipment took place, whether in community waters, in zones under the jurisdiction or sovereignty of a third country or on the high seas and the quantities for each species to be landed or transshipped.

¹⁰¹ Council Regulation (EC) No. 1005/2008 Article 11.

¹⁰² Ibid at Article 11(4).

Secondly, the IUU Regulation requires a catch certificate when importing into the EU, fishery products and also during the exportation of catches made by fishing vessels flying the flag of a member state.¹⁰³ The catch certificate contains information such as the name of the fishing vessel, home port and registration number, fishing license number, description of the product, the catch areas among other details¹⁰⁴ and will be validated by the flag state of the fishing vessels. The competent authorities of the member states are obliged to carry out verifications of the certificates and release of the products into the market can only be done after the verification process has been completed.¹⁰⁵ The main aim of the catch certificates is to certify that catches coming into and leaving the member states have been made in accordance with applicable laws, regulations and international conservation and management measures. The competent authority may refuse the importation of the fishery products into the member state on the various grounds including that the importer has not been able to submit a catch certificate for the products concerned, the products intended for importation are not the same as mentioned in the catch certificate, the fishing vessel has been included in the IUU vessel list among other reasons.¹⁰⁶

Perhaps the most notable feature of the IUU Regulation is the creation of a community IUU vessel list which shall include fishing vessels that are engaged in IUU fishing and whose flag states have not complied with the official requests by competent authorities in response to such IUU fishing.¹⁰⁷ The measures that may be taken against fishing vessels included in the community IUU vessel list include denial of requests for fishing authorizations by flag member states, withdrawal of fishing permits, vessels flying the flag of a third country shall not be authorized to fish in community waters, importation and exportation of fishery products by the listed vessels will be prohibited among others.¹⁰⁸ The IUU regulation has also dealt with the issue of sanctions as a measure of preventing IUU fishing by providing that member states shall impose a maximum sanction of at least five times the value of the fishery products obtained by IUU fishing. Lastly the IUU regulation has provided for measures that should be taken by member states in the event of non-cooperating third countries.

¹⁰³ Council Regulation (EC) No. 1005/2008 Article 12.

¹⁰⁴ Ibid at Annex ii.

¹⁰⁵ Ibid at Article 17.

¹⁰⁶ Ibid at Article 18.

¹⁰⁷ Ibid at Article 27.

¹⁰⁸ Ibid at Article 37.

The EU has attempted to combat IUU fishing by dealing with the economic aspect of it. This means that the effect of the application of these regulations where a violation has occurred is either to increase the cost of IUU fishing by imposing adequate sanctions or reducing the benefit by prohibiting importation or exportation of fishery products within the EU member states hence reducing the market for such products. Analysis has proven that the IUU regulation is a powerful tool in preventing illegally caught fish from entering the EU and its implementation has driven positive change in fisheries management in third countries where more than 60 percent of the fish products consumed in the EU originate.¹⁰⁹ However for this regulation to be more effective, the EU members must be more consistent and effective in checks of catch certificates to ensure that fish have been caught legally¹¹⁰ and more major fish exporting countries such as the United States, Japan, China among others would have to institute similar regulations as it is still possible for states that engage in IUU fishing to redirect the fish they sell to the EU to other states not signatories to the IUU regulation. It has however not been able to circumvent the exclusive flag state principle as it still requires the port states to cooperate with the flag states where the violation has occurred in the high seas.

IV CONCLUSION

From the foregoing, it is clear that IUU fishing is a global concern and the international community has made a considerable effort in expanding port state jurisdiction in order to effectively combat it. Despite the enactment of the mentioned conventions which are aimed at conserving the marine resources and combating IUU fishing, states are still faced with several challenges. Some of the challenges that have reduced the effectiveness of the systems put in place to fight IUU fishing are mentioned below.

First, Article 61 of the LOSC allows the coastal states to determine the allowable catch of the living resources in their EEZ. However, in as much as the coastal states enjoy a wide discretion in determining the allowable catch they are obliged to ensure proper conservation and management

¹⁰⁹ Mena Report ‘Tough Illegal Fishing Legislation Needs Stronger Implementation to Reach Full Potential’ 2016 SyndiGate media Inc.

¹¹⁰ Ibid.

of the living resources so as to prevent over exploitation.¹¹¹ The risk that this provision brings about is that a coastal state may manipulate the allowable catch for its own economic and social interest and there is no review process by a third party capable of examining the validity of conservation measures of the coastal state in its EEZ.¹¹²

Secondly, the inspection of vessels of non-contracting parties at the high seas is mostly carried out by regional fisheries organs.¹¹³ Organs such as the IOTC, ICCAT and CCAMLR have provisions for presumption of undermining conservation and enforcement measures of the organs when a non-contracting vessel has been found engaging in fishing activities on the high seas.¹¹⁴ The expectation of the vessels of non-contracting states to be bound by the regulatory measures adopted by RFMOs may be unreasonable as these measures have not been accepted at the global level.¹¹⁵

Thirdly port state jurisdiction may be limited by insufficient information and lack of compliance among port states.¹¹⁶ Illegal fishers are increasingly becoming sophisticated, well-funded and able to work around the port state conservation and management measures.¹¹⁷ It has been reported that some RFMO secretariats receive threats when implementing measures to combat IUU fishing while some vessels take advantage of FoC and open registers in order to fly the flag of another country other than the country of ownership.¹¹⁸ The fundamental right of flag state jurisdiction combined with lax flag state enforcement creates a challenge for coastal states in implementing fisheries conservation and management measures.¹¹⁹

¹¹¹ United Nations Convention on the Law of the Sea 1982 Article 61(2).

¹¹² Yoshifumi Tanaka *The International Law of the Sea* 2 ed (2015) 367.

¹¹³ Yoshifumi Tanaka *The International Law of the Sea* 2 ed (2015) 367.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Laurence Blakely 'The End of the *Viarsa Saga* and The Legality of Australia's Vessel Forfeiture Penalty for Illegal Fishing in Its Exclusive Economic Zone' (2008) 17 *Pacific Rim Law Policy Journal* 677 at 681.

¹¹⁸ Laurence Blakely 'The End of the *Viarsa Saga* and The Legality of Australia's Vessel Forfeiture Penalty for Illegal Fishing in Its Exclusive Economic Zone' (2008) 17 *Pacific Rim Law Policy Journal* 677 at 682.

¹¹⁹ Ibid.

CHAPTER 3 EXCLUSIVE FLAG STATE JURISDICTION AS A LIMITATION OF PORT STATE JURISDICTION.

I INTRODUCTION

In this Chapter, the principle of exclusive flag state jurisdiction as being the main limitation to the exercise of port state jurisdiction in combating IUU fishing shall be discussed. As discussed in the previous chapter, port states can only exercise limited residual extraterritorial jurisdiction over foreign vessels that have engaged in IUU fishing in the high seas. This is because port states can only exercise their enforcement jurisdiction that is, carry out inspections and deny entry to their ports in some cases only when the vessel is voluntarily in their territory. Hence when there is a violation of any of the conventions and regulations in regard to fishing in the high seas, only the flag state has the power to enforce any of the applicable international laws. In addition, port states can only exercise their jurisdiction over foreign vessels in the high seas with the permission of the flag states.

II EXCLUSIVE FLAG STATE JURISDICTION PRINCIPLE

(a) Freedom of the high seas

The usage of the world's oceans has operated on the basic but unwritten principle of freedom of the seas since as early as the Roman Empire.¹²⁰ Indeed, in 1609, Hugo Grotius, a Dutch scholar published *Mare Liberum* (The freedom of the seas) in which he codified the generally accepted principle of freedom of the seas, giving states equal and unrestricted access to the oceans and the resources contained.¹²¹ Despite this freedom, he maintained that the coastal states should enjoy a limited right to exercise authority on the adjoining waters that could be controlled from the state's mainland.¹²²

Freedom of the seas remained the dominant guiding force for the development of international trade among states until the beginning of the twentieth century when there was need for harmonization of safety standards in commercial activities such as carriage of goods by sea. This led to the enactment of the Geneva Convention on the High Seas in 1958, which established new international norms including confirming that no state may validly subject the high seas to its

¹²⁰ Tina Shaughnessy & Ellen Tobin 'Flags of Inconvenience: Freedom and Insecurity On the High Seas' (2006) 5 *Journal of International Law Policy* 1 at 3.

¹²¹ *Ibid.*

¹²² Daniele Fabris 'Crimes Committed at Sea and Criminal Jurisdiction: Current Issue of International Law of the Sea awaiting The 'Enrica Lexie' Decision' (2017) 9:2 *Amsterdam Law Forum* 1 at 10.

sovereignty.¹²³ It defined the high seas as all parts of the sea not included in the territorial sea or in the internal waters of a state. However, this definition has since been revised with the emergence of the specific regimes of the contiguous zone and the EEZ. Indeed, Article 86 of the current LOSC 1982, provides that the provisions of the high seas will only apply to all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a state or in the archipelagic waters of an archipelagic state.

All states whether coastal or landlocked have the right to exercise high seas freedoms.¹²⁴ These freedoms include the freedom of navigation, overflight, laying submarine cables and pipelines and freedom to construct artificial islands and other installations permitted under international law subject to Part VI, freedom of fishing and freedom of scientific research.¹²⁵ They are subject to a ‘due regard’ obligation which is aimed at protecting the interests of other states in their exercise of the freedom of the high seas.¹²⁶ The exercise of freedom of the high seas is also subject to the general rules of international law such as those governing the use of force under Article 88¹²⁷ and Article 301¹²⁸ of the LOSC. The PCIJ confirmed this position in the case of the *SS Lotus*, by stating as follows:

‘It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the sea, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.’

Freedom of fishing in the high seas, in particular, is subject to various constraints. First, states may be bound by other treaty obligations such as bilateral, regional or global multilateral treaties which are put in place to regulate fishing in the high seas.¹²⁹ Secondly, Article 63 and 64 of the LOSC obliges states to take measures necessary to coordinate and ensure conservation and development of stocks of associated species that occur within the EEZ of two or more coastal states

¹²³ Convention On the High Seas 1958 Article 2.

¹²⁴ United Nations Convention on the Law of the Sea 1982 Article 87.

¹²⁵ Ibid at Article 87 (1).

¹²⁶ Ibid at Article 87(2).

¹²⁷ R.R. Churchill & A.V. Lowe *The Law of the Sea* 3 ed (1999) 208.

¹²⁸ Article 301 provides that states parties shall refrain from any threat or use of force against the territorial integrity or political independence of any state in the exercise of their rights and duties under the Convention.

¹²⁹ United Nations Convention on the Law of the Sea 1982 Article 116.

or where there are highly migratory species. Lastly, the right to fish on the high seas is subject to the provisions of Section 2, Part VII of the LOSC which encompasses Articles 117 to 120. These provisions oblige state parties to cooperate and take measures that may be necessary for the conservation of the living resources of the high seas.

(b) Obligation of flag states in regard to fishing.

Since sovereign states may not extend their jurisdiction over the high seas, the principle of the exclusive flag state jurisdiction was agreed upon by states to allow states to exercise control over the vessels and persons sailing on the high seas under their flag.¹³⁰ This principle has been recognized as a rule of customary international law and has since been embodied in Article 92 of the LOSC. It provides that ships shall sail under the flag of one state and shall be subject to its exclusive jurisdiction (both legislative and enforcement jurisdiction) on the high seas.¹³¹

The principle of exclusive flag state jurisdiction plays two roles. First, it prevents any interference by other states with vessels flying its flag on the high seas hence ensuring that there's freedom of activity of vessels on the high seas. Secondly, the flag state has responsibility to ensure compliance with national and international laws concerning activities of ships flying its flag on the high seas.¹³² Indeed, Article 192 of the LOSC imposes on all state parties an obligation to protect and preserve the marine environment. The obligations of the flag states are specified in article 94 of the LOSC in particular every state has the duty to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.¹³³ Hence in fulfilment of its responsibilities to exercise effective jurisdiction, a flag state must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag states responsibilities under the LOSC in respect of the conservation and management of marine living resources.¹³⁴ Such measures are determined by each flag state in accordance with its legal system however flag states are obliged to include sufficient enforcement mechanism such as applying sufficient sanctions that will be able to deter violations and deprive

¹³⁰ Daniele Fabris 'Crimes Committed at Sea and Criminal Jurisdiction: Current Issue of International Law of the Sea awaiting The 'Enrica Lexie' Decision' (2017) 9:2 *Amsterdam Law Forum* 1 at 18.

¹³¹ United Nations Convention on the Law of the Sea 1982 Article 92(1).

¹³² Yoshifumi Tanaka *The International Law of the Sea* 2 ed (2015) 158.

¹³³ United Nations Convention on the Law of the Sea 1982 Article 94(1).

¹³⁴ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission(SRFC) to the International Tribunal for the Law of the Sea*, Case No. 21 of 2015 p 37.

the offenders of the benefits accruing from their IUU fishing activities.¹³⁵ A state which has clear grounds to believe that proper jurisdiction and control with respect to a ship has not been exercised may report the facts to its flag state and the flag state is obliged to investigate the matter and take appropriate action necessary to remedy the situation.¹³⁶

On 27th March 2013, the Sub-Regional Fisheries Commission (the SRFC) requested the ITLOS to give its advisory opinion on matters relating to the obligations of the flag states in cases where vessels flying their flag are engaged in IUU fishing within the EEZ of the SRFC, the extent to which the flag state should be held liable for IUU fishing activities conducted by vessels sailing under its flag and the rights and obligations of the coastal state in ensuring the sustainable management of shared stocks and stocks of common interest. ITLOS in issuing an advisory opinion on the obligations of flag states stated that the flag state is under the ‘due diligence obligation’ to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.¹³⁷ It defined the term due diligence according to the findings of the seabed disputes chamber in the *pulp mills on the river Uruguay* case as follows:

‘It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction.’¹³⁸

(c) Flags of convenience

FoC or open registry states refer to states that permit foreign ship-owners having very little or no connection with those states, to register their ships under the flags of those states.¹³⁹ In 1958 the Maritime Transport Committee Of The Organization For European Economic Co-Operation defined them as :

¹³⁵ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission(SRFC) to the International Tribunal for the Law of the Sea*, Case No. 21 of 2015 p 42-43.

¹³⁶ United Nations Convention on the Law of the Sea 1982 Article 94(6).

¹³⁷ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission(SRFC) to the International Tribunal for the Law of the Sea*, Case No. 21 of 2015 p41.

¹³⁸ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, (Judgment) 2010 ICJ Reports, p14.

¹³⁹ Yoshifumi Tanaka *The International Law of the Sea* 2 ed (2015) 162.

‘The flags of such countries as Panama, Liberia, Honduras and Costa Rica whose laws allow and, indeed, make it easy for ships owned by foreign nationals or companies to fly these flags. This is in contrast to the practice in the maritime countries (and in many others) where the right to fly the national flag is subject to stringent conditions and involves far-reaching obligations.’¹⁴⁰

According to the *Rochdale Report*¹⁴¹ some of the features common to flags of convenience include:

- i. The country of registry allows ownership and/or control of its merchant vessels by non-citizens and access to the registry is easy;
- ii. Taxes on the income from the ships are not levied locally or are low;
- iii. The country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered;
- iv. Manning of ships by non-nationals is freely permitted; and
- v. The country of registry has neither the power nor the administrative machinery to effectively impose any government or international regulations nor has the country the wish or the power to control the companies themselves.

FoC undermine the provisions of Article 91 of the LOSC which provides for the nationality of ships. It directs as follows:

‘Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship’

Ship nationality is important as it entitles the vessel to certain privileges and protections by her registering state in the high seas other than the recognition of basic human rights.¹⁴² Article 92(2) of the LOSC provides that a ship may not claim any nationality when it sails under the flag of two or more states using them according to convenience. The LOSC has endeavored to discourage ships from operating under FoC by providing that there must be a genuine link between the state and the ship as mentioned above.

¹⁴⁰Maritime Transport Committee of the Organization for European Economic Co-Operation, *Rochdale Report* (1958) 51 at par 183.

¹⁴¹ *Ibid.*

¹⁴² John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 128.

The 1958 Geneva Convention on the High Seas attempted to limit the discretion enjoyed by states when registering vessels by providing that;

‘There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.’¹⁴³

This provision was influenced by the findings of the International Court Of Justice in the *Nottebohm case* where the court found on the facts that there was insufficient connection between *Nottebohm* and Liechtenstein for the latter to be able to exercise diplomatic protection on *Nottebohm’s* behalf.¹⁴⁴ In this case, the court did not provide a clear meaning of the phrase ‘genuine link’ but it gave significant terms of the nationality of ships. The court noted that while under international law it was up to each state to lay down rules governing the grant of its nationality, a state could not claim that:

‘ the rules it has thus laid down are entitled to recognition by another state unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State which assumes the defense of its citizens by means of protection as against other States.’¹⁴⁵

The court went on to add:

‘nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis à vis another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him his national.’¹⁴⁶

It should be noted however that the two conventions have neither established the definition and scope of the genuine link requirement nor do they stipulate what consequences if any follows

¹⁴³ Convention on the High Seas 1958 Article 5.

¹⁴⁴ *Nottebohm case (Liechtenstein v. Guatemala)* Case No. 6 of 1955 ICJ Reports.

¹⁴⁵ *Ibid* at p23.

¹⁴⁶ *Ibid* at p23.

where there is none. This issue has been dealt with by the ITLOS though not in finality in a number of cases most notably the *M/V Saiga (No.2)* case.¹⁴⁷ The facts of this case are Guinea arrested an oil tanker used for supplying gas oil to fishing vessels off West Africa named *M/V Saiga*. The *M/V Saiga* was owned by a Cypriot Company, registered in St. Vincent and the Grenadines, managed by a Scottish company, chartered to a Swiss company and its officers and crews were Ukraine. Guinea claimed that the vessel was in violation of its customs laws however St. Vincent and the Grenadines argued that the arrest was contrary to international law. To this, Guinea replied by stating there was no genuine link between *M/V Saiga* and St. Vincent and the Grenadines and hence Guinea is not bound to recognize the Vincentian nationality of the *M/V Saiga*.

The Tribunal recognized the exclusive right of a flag state by stating:

‘Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. These matters are regulated by a State in its domestic law. Pursuant to article 91, paragraph 2, Saint Vincent and the Grenadines is under an obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law.’¹⁴⁸

ITLOS further acknowledged the need for the existence of a genuine link and stated as follows:

‘The purpose of the provisions of the convention on the need for a genuine link between a ship and its flag state is to secure more effective implementation of the duties of the flag state and not to establish criteria by reference to which the validity of the registration of ships in a flag state may be challenged by other States.’¹⁴⁹

It rejected Guinea’s claim noting that in the drafting of article 5(1) of the 1958 Geneva Convention on the High Seas, the International Law Commission maintained the obligation regarding a genuine link but did not adopt the proposal that the existence of a genuine link should be a basis for the recognition of nationality of a ship.

¹⁴⁷ *M/V Saiga (No.2) Case, (Saint Vincent and the Grenadines v Guinea)*, Case No. 2 of 1998 ITLOS.

¹⁴⁸ *M/V Saiga (No.2) Case, (Saint Vincent and the Grenadines v Guinea)*, Case No. 2 of 1998 ITLOS p63.

¹⁴⁹ *Ibid* at p 83.

The issue of genuine link was also addressed in the *M/V Virginia G* case which involved Panama and Guinea-Bissau.¹⁵⁰ The tribunal reaffirmed the dictum in the *M/V Saiga* by holding that the convention requiring a genuine link between the flag state and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag state to grant its nationality to ships.¹⁵¹

The concept of a genuine link is still quite vague and since third states cannot refuse to recognize the nationality of a ship on the basis of the absence of a genuine link between the flag state and a ship, many vessels opt to register themselves under FoC or open registries. As a result, meaningful flag state control has proven to be very difficult to achieve where the vessels operate far from the flag state and they may never have contact with the territory or officials of the flag state.¹⁵² There are at least two motivations for foreign fishing vessels to register in FoC states.¹⁵³ First, open register states do not have the desire and capability to exercise effective jurisdiction over fishing hence such fishing vessels tend to exploit low fees, tax exemptions, lower crew costs and financial savings by avoiding compliance with international safety standards.¹⁵⁴ Secondly, Vessels sailing under FoC enjoy the freedom of fishing due to lack of effective control of the flag states.¹⁵⁵ This in turn undermines the efforts put in place of conserving and managing marine resources and ending IUU fishing.

III CONCLUSION

By definition, FoC fishing vessels have little or no connection to the territory of their state of registry hence more often than not the vessels do not fish in the EEZ of their flag state.¹⁵⁶ It has proven to be very difficult for a willing state to exercise its jurisdiction over the owner of the vessel or the vessel itself as FoC vessels have circumvented the requirement of having a genuine link.¹⁵⁷

¹⁵⁰ *M/V Virginia G Case, (Panama v Guinea-Bissau, Case No. 19 of 2014 ITLOS.*

¹⁵¹ *M/V Virginia G Case, (Panama v Guinea-Bissau, Case No. 19 of 2014 ITLOS at 110.*

¹⁵² Deirdre Warner-Kramer 'Control begins at home: Tackling flags of convenience and IUU Fishing' (2004) 34 *Golden Gate University Law Review* 497 at 510.

¹⁵³ Dikdik Mohamad Sodik 'Non-legally International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing' (2008) 15 *Australian International Law Journal* 129 at 136.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ Deirdre Warner-Kramer 'Control begins at home: Tackling flags of convenience and IUU Fishing' (2004) 34 *Golden Gate University Law Review* 497 at 500.

¹⁵⁷ Kelly Rigg, Remi Parmentier & Others 'Halting IUU Fishing: Enforcing International Fisheries Agreements' 2003 *Oceana* 7.

The FoC vessels do this by incorporating a shell company in the flag state often with bearer shares hence the real beneficial owner always remains hidden.¹⁵⁸

It is worth noting that the definition for the term ‘FoC’ has evolved over time and has been replaced by or used interchangeably with the term ‘flag of non-compliance’. This trend has occurred in response to the recognition that some flag states consistently fail to comply with their international obligations, irrespective of whether they operate an open register.¹⁵⁹ For instance, vessels of Panamanian flag would be regarded as FoC in Antarctic waters, because Panama is a non-party to CCAMLR hence this RFMO would not be able to exert effective control on its vessels navigating those waters.¹⁶⁰ However, Panamanian flagged vessels are not FoC vessels in waters administered by ICCAT, since it has become a Member of ICCAT.¹⁶¹ For these reasons CCAMLR has moved away from the term ‘Flags of Convenience’ and now uses the term ‘Flags of Non Compliance’. The CCAMLR adopted a resolution in 2002 that introduced this term in relation to vessels fishing within CCAMLR Convention area and defined them as:

‘Flag states particularly non-contracting parties which do not comply with their obligations regarding jurisdiction and control according to international law in respect of fishing vessels entitled to fly their flag that carry out their activities in the Convention Area, and that as a result these vessels are not under the effective control of such flag states.’¹⁶²

IUU vessels often fly FoC or employ reflagging as a means of deliberately avoiding fisheries conservation and management measures on the high seas.¹⁶³ The vessels may reflag several times in a fishing season to confuse management and surveillance authorities this is because reflagging is relatively easy.¹⁶⁴ The vessels also exploit the ease of changing names and registries to avoid both effective control of flag state and compliance with RFMO rules.¹⁶⁵ An example would be the *Camouco*, a Panamanian flagged vessel which was arrested by the French authorities in 1999 for fishing Patagonian tooth fish near the Crozet Islands. Panama successfully petitioned ITLOS for

¹⁵⁸ Ibid.

¹⁵⁹ Dana D. Miller & U. Rashid Sumalia ‘Flag use behavior and IUU activity within the international fishing fleet: Refining definitions and identifying areas of concern’ 2013 *Elsevier* 205.

¹⁶⁰ David J. Agnew & Colin T. Barnes ‘Economic Aspects and Drivers of IUU fishing: Building a Framework’ 2004 *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* 8.

¹⁶¹ Ibid.

¹⁶² CCAMLR Resolution 19/XXI of 2002.

¹⁶³ David J. Agnew & Colin T. Barnes ‘Economic Aspects and Drivers of IUU fishing: Building a Framework’ 2004 *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* 8.

¹⁶⁴ Ibid.

¹⁶⁵ Deirdre Warner-Kramer ‘Control begins at home: Tackling flags of convenience and IUU Fishing’ (2004) 34 *Golden Gate University Law Review* 497 at 498.

its release. After its release the vessel was renamed the *Arvisa I* and flagged to Uruguay. In January 2002, it was spotted fishing near Prydz Bay in eastern Antarctica by an Australian research vessel. It then claimed to be the Mauritanian flagged *Kambott*. She was arrested again in July 2002 for illegally harvesting Patagonian tooth fish in the French EEZ off Kerguelen Island. At the time the vessel was reflagged to the Netherlands Antilles and had changed its name to *Eternal*.

FoC states are generally not members of RFMOs and other agreements and their flag vessels are not bound by the management regulations enforced by these organizations. While normally they would be bound by the provisions of the compliance or straddling stocks agreements, they usually do not accede to these agreements either hence may be beyond the reach of international law. They also undermine fishing conservation and management regimes by taking fish outside quotas, not reporting catches and poaching fish in the EEZs which are difficult to police due to isolation or lack of capacity by developing coastal states.¹⁶⁶

In most cases, vessels flying FoC often carry concealed or no markings in order to mask their identities at sea hence making detection by the VMS Systems very hard or impossible.¹⁶⁷ These vessels are able to remain at sea for months at a time, rarely or never entering the ports of countries which maintain efficient port control measures and offload more than half of their annual catch of illegally caught fish to reefer ships which then take them to the port for sale.¹⁶⁸ Transshipment of the catch in this way allows a 'whitewashing' of illegal fish by the time it arrives on the market.¹⁶⁹

The practice of FoC or open registries has proven to be one of the most persistent challenges in fighting IUU fishing in the high seas. This is because the law as it is now, only providing for the exclusive flag state jurisdiction in regard to fishing in the high seas and does not recognize the enforcement powers of the port states. The only provision in the LOSC that recognizes the extra territorial jurisdiction of the port states is Article 218 which deals with the port state enforcement measures in regard to marine pollution. The history behind it and the impact it has on the international community will be discussed in the following chapter in order to draw comparison with the fishing regulations and appreciate the role of port states.

¹⁶⁶ Kelly Rigg, Remi Parmentier & Others 'Halting IUU Fishing: Enforcing International Fisheries Agreements' 2003 *Oceana* 7.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

CHAPTER 4 PORT STATE JURISDICTION IN MARINE POLLUTION CASES

I INTRODUCTION

The legality of extra-territorial port state jurisdiction can be illustrated by comparing the scenario of illegal discharges on the high seas with that of IUU fishing. In this chapter, the response of the international community to the problem of vessel source pollution is examined. The LOSC provides an explicit duty of cooperation among all states parties for the protection and preservation of the marine environment. Article 198 of the LOSC obliges state parties to notify other states deemed likely to be of any cases in which the marine environment is in imminent danger of being damaged by pollution. Historically, a flag state had exclusive power to prescribe and enforce vessel-source pollution standards against any vessels of its registry in the high seas as international agreements have largely preserved the exclusivity of flag state jurisdiction. For example, Article X of the 1954 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL Convention) gives the flag state jurisdiction over any violations done by its ships and directs that contracting parties may notify the flag state of a violation and the flag state was obligated to conduct an investigation and if the evidence is deemed sufficient, to prosecute the owner or master of the vessel.

However due to the gravity of the effects of marine pollution, as shall be discussed below, the international community responded by enacting Article 218 of the LOSC. It grants port states the right to institute proceedings and impose monetary penalties for illegal discharges that have occurred beyond its own maritime zones. This scenario contrasts sharply with the scenario of IUU fishing in the high seas as no global treaty provides a similar right.¹⁷⁰ The aim of this chapter is to discuss how Article 218 of the LOSC has achieved in expanding the extra territorial jurisdiction of port states and what measures have been put in place to prevent abuse of such jurisdiction by port states.

II HISTORICAL DEVELOPMENT OF THE MARINE POLLUTION REGIME

There are currently two types of regulatory measures used to prevent pollution from ships. The first is designed to regulate and minimize operational pollution, for instance, prohibiting the discharge of certain pollutants and the second type is CDEM measures such as requiring oil tankers to have

¹⁷⁰ Donald Rothwell Alex Oude ELferink, Karen Scott et AL *The Oxford Handbook of the Law of the Sea* (2015) 290.

double hulls and carry oily water separators.¹⁷¹ Pollution measures at the international level are laid down in a number of IMO Conventions.

The development of international law with the aim of regulating vessel source pollution beyond a state's territorial zone occurred in the early 20th century as a result of significant political pressure from both the United Kingdom and the United States. Both states acknowledged the need for immediate action as there was a growing concern with regard to oil discharges from ships and the impact it had on the marine environment.¹⁷² The United States was the first country to issue an international response to marine pollution by enacting national legislation in 1924 and by holding an international shipping conference in Washington DC in 1926.¹⁷³ The main aim of the conference was to impose limitation on the deliberate discharges of oil into the sea. The draft convention failed as most countries had not yet experienced any pollution problems and were not receptive to proposed regulations that would add substantial costs as the regulations required the on-board retention of oil residues, additional holding tanks among others.¹⁷⁴

This failed attempt at enacting sound marine pollution regulations was followed by the London Conference which produced the OILPOL Convention. The only regulation that was adopted was a fifty-mile coastal discharge prohibition zone which had the effect of making the oil transportation industry spend extra time going outside the prohibition zones to discharge dirty ballast and tank cleaning residues. It was evident that some of the convention participants did not accept the existence of the pollution problem hence the convention did not adopt effective regulations in preventing marine pollution.

Further attempts at strengthening the international legal control of pollution of the sea were taken in 1962 and 1969 when the OILPOL Convention was amended.¹⁷⁵ The 1962 amendment saw the number of prohibited zones widened and also provided that the penalty of pollution in the high seas must be adequate in severity to discourage any unlawful discharge. On the other hand, the 1969 amendment recognized that the territorial authorities may discover that a breach of the

¹⁷¹ Robin Churchill 'Port State Jurisdiction Relating to The Safety of Shipping and Pollution from Ships- What degree of Extra-territoriality?' (2016) 31 *The International Journal of Marine and Coastal Law* 442 at 443.

¹⁷² Mark Szepes 'MARPOL 73/78: The Challenges of Regulating Vessel-Source Oil Pollution' 2013 *Manchester Student Law Review* 73 at 76.

¹⁷³ Jeff B. Curtis 'Vessel-Source Oil Pollution and MARPOL 73/78: An International Success Story?' (1985) 15 *Environmental Law* 679 at 683.

¹⁷⁴ *Ibid.*

¹⁷⁵ L.C. Green 'International Law and Canada's Anti-Pollution Legislation' (1971) 50 *Oregon Law Review* 461 at 468.

convention has occurred while the ship is within their territory. In such circumstances, the convention provided that the territorial authority shall inform the country of registration of the violation and the government receiving such information is required to take proceedings against the owner or master of the ship.

Pollution prevention achieved parity with maritime safety after the *Torrey Canyon* incident in 1967 off the Cornwall coast in the English Channel. She was flagged in Liberia and was on charter to British Petroleum.¹⁷⁶ It was the world's first major supertanker disaster as it had carried 120,000 tonnes of Kuwait crude oil. The vessel suffered damage to her keel and almost immediately released about 30,000 tons of crude oil into the sea. The spill coated beaches in southern England, the Channel Islands and northwestern France and ended up killing more than 25,000 seabirds and numerous other marine organisms.¹⁷⁷ The affected parties including the British and French governments sought to make claims for compensation against the owners of the *Torrey Canyon* which case faced a myriad of legal hurdles due to the absence of an international compensation regime.¹⁷⁸ This major disaster led to the International Maritime Organization(IMO) addressing the issue of pollution prevention from ships by enacting several conventions including the 1969 International Convention On Civil Liability For Oil Pollution Damage(CLC), the 1969 International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties (Intervention Convention) and the 1971 International Convention on the Establishment of an International Fund Compensation for Oil Pollution Damage(Fund Convention).¹⁷⁹

In 1973, the international conference on marine pollution was held in London and 71 states representing both the developed and developing world were in attendance.¹⁸⁰ The result of this conference was the development and adoption of one of the most significant convention that has been very effective in fighting pollution, that is, the Convention for the Prevention of Pollution from Ships (MARPOL 73).¹⁸¹ The convention was modified by the protocol 1978 since it had not

¹⁷⁶ The Hon. Justice Steven Rares *Ships That Changed the Law-The Torrey Canyon Disaster* (Unpublished, a paper presented at the Maritime Law Association of Australia and New Zealand 44th National Conference in Melbourne on 5 October 2017).

¹⁷⁷ Peter G. Wells 'The Iconic Torrey Canyon Oil Spill of 1967- Marking its Legacy' (2017) 115 *Marine Pollution Bulletin* 1-2.

¹⁷⁸ *Ibid.*

¹⁷⁹ Donald Rothwell Alex Oude ELferink, Karen Scott et AL *The Oxford Handbook of the Law of the Sea* (2015) 519.

¹⁸⁰ Mark Szepes 'MARPOL 73/78: The Challenges of Regulating Vessel-Source Oil Pollution' 2013 *Manchester Student Law Review* 73 at 80.

¹⁸¹ *Ibid* at p81.

been able to meet the double ratification requirements several years after it had been negotiated.¹⁸² The result of this modification was the creation of the regulation known as MARPOL 73/78 which came into effect in October 1983 with the mandate of eliminating international pollution of the marine environment.¹⁸³ Additional measures for tanker safety were incorporated into the 1978 Protocol to the International Convention for The Safety of Life at Sea (SOLAS), 1974. It is important to note that the jurisdiction of port states over foreign vessels in cases of pollution has improved since the introduction of MARPOL 73/78 and was significantly improved further with the adoption of LOSC.

There have been significant amendments to MARPOL 73/78 which have been brought about as a reaction to vessels causing pollution while at sea. One of the significant amendments was prompted by the 1989 grounding of the single hulled *Exxon Valdez* which was loaded with 1,264,155 barrels of crude oil and ran aground in the north eastern portion of Prince William Sound, spilling about one fifth of its cargo. It was estimated that about 250,000 birds, 2,800 sea otters, 300 harbor seals, 250 bald eagles, 22 killer whales, billions of salmon and herring eggs were killed.¹⁸⁴ As a reaction to this accident, the United States called upon the IMO to make double hulls a mandatory requirement of MARPOL 73/78.¹⁸⁵ The amendment was adopted in March 1992 and entered into force in July 1993 by introduction of two new regulations, 13F and 13G relating to standards for design and construction of new and existing oil tankers.¹⁸⁶

MARPOL 73/78 also required the International Safety Management(ISM) Code, which was adopted in 1993 and the 1995 amendments to the Convention on Standards of Training, Certification and Watch keeping Seafarers(STCW) which set higher standards for deck officers on the bridge of a vessel.¹⁸⁷ Other significant amendments to the MARPOL were brought about by the accidents involving the *Erika* and *Prestige* which caused oil spills of 10,000 and 63,000 tonnes

¹⁸²Mark Szepes 'MARPOL 73/78: The Challenges of Regulating Vessel-Source Oil Pollution' 2013 *Manchester Student Law Review* 73 at 81.

¹⁸³ *Ibid.*

¹⁸⁴ The Maritime Executive 'Lessons Learned: Exxon Valdez 26 years later' available at <https://www.maritime-executive.com/article/lessons-learned-exxon-valdez-26-years-later>, accessed on 7 February 2020.

¹⁸⁵International Maritime Organization 'Background' available at <http://www.imo.org/en/OurWork/Environment/PollutionPrevention/OilPollution/Pages/Background.aspx>, accessed on 7 February 2020.

¹⁸⁶ Caroline Stenman *The Development of the MARPOL and EU Regulations to Phase out Single Hulled Oil Tankers* (unpublished LLM thesis, Goteborg University,2005) 21.

¹⁸⁷The Maritime Executive 'Lessons Learned: Exxon Valdez 26 years later' available at <https://www.maritime-executive.com/article/lessons-learned-exxon-valdez-26-years-later>, accessed on 7 February 2020.

respectively. This led to IMO adopting an amendment to regulation 13G of MARPOL 73/78 Annex I that accelerated the phasing out of single hulled tankers as it was believed that they were the main cause of pollution.¹⁸⁸

III PORT STATES MEASURES IN RELATION TO MARINE POLLUTION

The main global instruments that regulate vessel-source marine pollution are the MARPOL 73/78 and the LOSC. The main aim of the MARPOL 73/78 is to completely eliminate intentional pollution of the marine environment by oil and other harmful substances and to minimize accidental discharge of such substances.¹⁸⁹ Under Article 4(1) of the MARPOL 73/78, any violation of the requirements of the convention shall be prohibited and sanctions shall be established under the administration of the ship concerned wherever the violation occurs. This means that the flag states have enforcement jurisdiction over their own vessels. However, Article 4(2) gives port states some enforcement jurisdiction by providing that a party to the convention may cause proceedings to be taken in accordance with its law or furnish to the flag state such information and evidence as may be in its possession that a violation has occurred when the violation has occurred within the jurisdiction of the party state.

Party states are also obliged to carry out inspections on foreign vessels which are in their ports or offshore terminals for the purpose of verifying that there is on board a valid certificate showing the condition of the vessel.¹⁹⁰ Where the vessel does not possess a valid certificate, proceedings may be brought in respect to the alleged violation and the vessel may be detained where the situation warrants, until it can be proved that the ship can sail without presenting unreasonable threat or harm to the marine environment.¹⁹¹ The port state is obliged to inform the flag state immediately after taking such action against the foreign vessel.¹⁹² Similar powers of port state control are laid down in the SOLAS Convention, notably Regulation 19. It provides that a port state is to verify that ships in its ports carry the certificates required by the SOLAS Convention.

The above mentioned legal framework proved to be dissatisfactory in combating marine pollution due to the fact that the enforcement powers beyond the territorial sea were only given to

¹⁸⁸ Caroline Stenman *The Development of the MARPOL and EU Regulations to Phase out Single Hulled Oil Tankers* (unpublished LLM thesis, Goteborg University, 2005) 22.

¹⁸⁹ International Convention for the Prevention of Pollution from Ships (MARPOL) 1973 Preamble.

¹⁹⁰ *Ibid* Article 5(2).

¹⁹¹ *Ibid*.

¹⁹² *Ibid* Article 5(3).

the flag states.¹⁹³ The flag states demonstrated serious shortcomings in implementing the laws against marine pollution because of the inability or unwillingness of some flag states to inspect ships adequately and take action when the offence is detected. In addition, flag state jurisdiction was weakened by the fact that states permitted vessels to operate under FoC. Another reason why the traditional framework proved to be ineffective was that even if port states and coastal states could exercise some enforcement powers over within their territory, there was no clear limits on the type of pollution regulations they could prescribe.¹⁹⁴ As a result, there was a chance that there would be differing and conflicting regulations which particularly related to design and construction standard and this would have made it impossible for a vessel to comply with all the laws to which it might become subject during the course of its voyage.¹⁹⁵

As a result of the persistence of marine pollution and the catastrophic effects it had on the marine environment, the international community responded by introducing a number of significant provisions to the LOSC that would make it more effective. First, the convention tries to limit the legislative discretion of coastal states in order that there should be a degree of uniformity in coastal states regulations.¹⁹⁶ Article 21(2) of the LOSC allows coastal states to prescribe pollution regulations in regard to foreign vessels within their territorial sea in innocent passage. Such regulations must be published and must not be non-discriminatory or unduly hamper transit passage. This position has been firmly established by Article 211(4) of the LOSC. A state is permitted to prevent a vessel from exiting its port or off-shore terminal in the event that it has ascertained that indeed a vessel within one of their ports or one of their off-shore terminals threatens damage to the marine environment and as a result is in violation of applicable international rules and standards relating to seaworthiness of vessels.¹⁹⁷ The port state is however obliged to promptly release the vessel subject to reasonable procedures such as bonding and to notify the flag state of the detainment.¹⁹⁸

The scope of port state powers in regard to the above stated provisions of the LOSC was discussed by the court of appeal of New Zealand in the *Sellers v Maritime Safety Inspector* case.¹⁹⁹

¹⁹³ R.R. Churchill & A.V. Lowe *The Law of the Sea* 3 ed (1999) 346.

¹⁹⁴ R.R. Churchill & A.V. Lowe *The Law of the Sea* 3 ed (1999) 346.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ United Nations Convention on the Law of the Sea 1982 Article 219.

¹⁹⁸ *Ibid* Article 226.

¹⁹⁹ *Sellers v Maritime Safety Inspector* (1999) 2 NZLR 44.

In this case, William Rodman Sellers was the owner and master of a vessel named *Nimbus* registered in the port of Valletta. He permitted the vessel to leave for an overseas port without obtaining the clearances which the Maritime Safety Authority required of him. He was prosecuted upon his return for the breach of the act and was convicted by the District Court. His conviction was overturned by the court of appeal which held that a port state has no general power to unilaterally impose its own requirements on foreign ships relating to their construction, their safety and other equipment and their crewing if the requirements are to have effect on the high seas. The court in allowing his appeal found that the vessel was not in a dangerous state according to international standards.

Secondly, the LOSC has increased the geographical scope of the legislative competence of coastal states by giving them certain powers to legislate for marine pollution from foreign vessels in their EEZ. Under Article 211(5) of the LOSC, coastal states may adopt laws and regulations which conform and give effect to generally accepted international rules and standards in respect of their EEZ, for the prevention, reduction and control of pollution from vessels. Thirdly, the LOSC makes it a mandatory obligation for flag states to ensure compliance by vessels with applicable international rules and standards adopted in accordance with the convention in regard to marine pollution.²⁰⁰ Flag states are further obliged to investigate and where appropriate institute proceedings and provide adequate penalties where a vessel commits a violation of the rules and standards established.²⁰¹ The fourth provision that was added to the LOSC in response to marine pollution and perhaps the most radical innovation made to the enforcement standards is Article 218. This Article extends the powers of port states by giving them extra territorial enforcement jurisdiction over foreign vessels. The scope of Article 218 of the LOSC shall be critically examined in the next section.

IV ANALYSIS OF ARTICLE 218 OF LOSC

Article 218 was introduced to remedy what was considered to be the failure and reluctance of flag states to prosecute their vessels for pollution offences in spite of being obliged under Article 4(1).²⁰² It deals with port state enforcement jurisdiction and provides as follows:

²⁰⁰ United Nations Convention on the Law of the Sea 1982 Article 217.

²⁰¹ Ibid Article 217(4) and (7).

²⁰² Robin Churchill 'Port State Jurisdiction Relating to The Safety of Shipping and Pollution from Ships- What degree of Extra-territoriality?' (2016) 31 *The International Journal of Marine and Coastal Law* 442 at 463.

‘When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.’²⁰³

This provision creates a potential conflict of jurisdiction between port states and flag states due to Article 92 of the LOSC which recognizes the exclusive flag state jurisdiction principle. Concurrent jurisdiction is only recognized under Article 97 of the LOSC which provides that in the event of a collision or any other incidence of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, either the flag state or the state of which such person is a national may institute disciplinary proceedings. Indeed, the participants at the 1982 Convention On Law of the Sea were not convinced about giving port states complete jurisdiction due to the problems of concurrent jurisdiction, jurisdiction over what types of violations, priority of jurisdiction, evidentiary requirements in order to prosecute and lack of interest from developing countries.

Article 228 of the LOSC solves the potential conflict of jurisdiction between flag states and port states that may be brought by Article 218 of the LOSC. It provides that flag states may take over from states, proceedings to impose penalties in respect of violations of applicable international laws relating to marine pollution within six months of the date on which proceedings were first instituted unless those proceedings relate to a case of major damage to the coastal state or the flag state in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards. Hence legal proceedings against an alleged polluter can be initiated by the port state but the conclusion of the proceedings largely depends on whether or not the flag state seeks to exercise the right to pre-empt.²⁰⁴ As much as the port states have extraterritorial jurisdiction over foreign vessels, the flag state jurisdiction supersedes it. The port states powers to institute proceedings where the discharge violation has occurred in the internal waters, territorial sea or EEZ of another state are limited because the port states may only do so with a request by the state, the flag state or a state damaged or threatened by the discharge

²⁰³ United Nations Convention on the Law of the Sea 1982 Article 218(1).

²⁰⁴ Ho Sam Bang ‘Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea’ (2009) 40 *Journal of Maritime Law* 290 at 296.

violation.²⁰⁵ This is in line with the requirement of jurisdictional link in international law where a party intends to assert their jurisdiction.

One of the main fears of expansion of port state jurisdiction is that port state prosecutions may be politically motivated. The LOSC has sought to put safeguards in order to ensure that Article 218 is properly applied by state parties. First, the power of enforcement against foreign vessels under Article 218 may only be exercised by officials or by warships, military aircraft or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.²⁰⁶ Secondly, states have a responsibility of not endangering the safety of navigation or otherwise create any hazard to a vessel or bring it to an unsafe port or anchorage or expose the marine environment to an unreasonable risk when exercising their enforcement powers.²⁰⁷

Thirdly the inspection of a foreign vessel has been limited to an examination of such certificates, records or other documents as the vessel is required to carry by generally accepted international rules and standards.²⁰⁸ Hence port states may not apply their own standards to foreign vessels. Fourthly, the law provides for prompt release subject to reasonable procedures such as bonding or other appropriate financial security where investigations by a state confirms that a violation of applicable laws has been committed by a foreign vessel.²⁰⁹ Lastly, Article 227 of the LOSC provides that states shall not discriminate in form or fact against vessels of any other state when exercising their jurisdiction under Article 218.

Article 218 of the LOS Convention is designed to provide the port state with greater powers to enforce applicable international law against visiting foreign vessels for pollution offences that have taken place on the high seas or in other states' waters. It appears that, to date, there have been no court cases where port states have prosecuted foreign vessels for unlawful discharges committed outside their national waters or EEZ under Article 218 of the LOSC. This may be due to the lack of interest of port states in involving themselves in pollution incidents occurring outside their national waters, given that port state enforcement is optional. It also may be due to lack of economic incentive in prosecuting such cases as port states incur the expenditure of time, effort and money that would be required to secure convictions.

²⁰⁵ United Nations Convention on the Law of the Sea 1982 Article 218(2).

²⁰⁶ *Ibid* Article 224.

²⁰⁷ *Ibid* Article 225.

²⁰⁸ *Ibid* Article 226(1)(a).

²⁰⁹ *Ibid* Article 226(1)(b)

CHAPTER 5 CONCLUSION

This dissertation has endeavored to show the need for expansion of port state jurisdiction in preventing, reducing and eradicating IUU fishing in cases where flag states fall short. While the use of port state jurisdiction under the current regimes is not controversial, the question that this dissertation seeks to answer is if the current regime is sufficient in fighting IUU fishing, if not, then how far should the port state jurisdiction be expanded in order for it to be effective. The answer to this question is that the current regime is not sufficient to fight IUU fishing and the port state jurisdiction should be expanded to the extent that port states are given prescriptive and enforcement jurisdiction over foreign vessels that violate laws and regulations in regard to fishing in the high seas.

As discussed, the main challenges that undermine the efforts of the international, regional and sub-regional organizations in conserving living resources and preserving the marine environment are the FoC, open registries, unwilling states which weaken the efforts of states that are willing to tighten their registries and fight IUU fishing, insufficient monitoring, control and surveillance of the high seas and within the EEZ of many developing countries and transshipping at sea. Port state jurisdiction can be used to solve most of these issues if given the jurisdiction to do so. Currently, the most relevant legally binding instrument that has attempted to expand the port state jurisdiction in regard to IUU fishing is the PSMA. It has given port states powers of denying IUU fishing vessels the use of their ports for services such as landing, transshipping, packaging and processing of fish and other port services. RFMOs and EU have responded by adopting such measures in their own laws and regulations. However, some states have chosen not to ratify these instruments and become bound by them hence weakening the effect of the port state measures.

Additional port state measures were proposed by the Report of the Expert Consultation to Review Port state measures to combat IUU fishing held at the FAO headquarters from 4th to 6th November 2002 and they include an MOU to apply to vessels engaging in fishing activities which is meant to target vessels flying a FONC. An MOU could, as the FAO has suggested, improve the current permissive approach and make port state controls mandatory, and in addition could help harmonize the various port state controls. The consultation also proposed prior notice by foreign vessels engaging in fishing activities of the intention to use their ports, landing or transshipment facilities and sanctions by port states with the exception of detention, arrest or other measures against the vessel or its crew.

If port states are given the same enforcement powers in cases of IUU fishing as they have in matters relating to marine pollution, they will be able to arrest vessels, undertake investigations, institute proceedings against vessels engaging in IUU fishing and if found guilty, may impose appropriate penalties. This will supplement the efforts of flag states and greatly assist in implementing the laws and regulations in place where FoC and open registries have failed to do so. The international community has expressed its reluctance to support the expansion of port state jurisdiction due to the fear that the port states may abuse their powers.

However, if the same safeguards elaborated in chapter 4 in regard to Article 218 of the LOSC are put in place then the fear of political pressures from port states may be reduced. These measures include port states being obliged to exercise their duties without discriminating in form or in fact against vessels of any other state. Another proposed measure for protecting states from port states that may abuse their extra territorial jurisdiction by enacting discriminatory regulations or regulations that are too strict is the use of a ‘substantial connection’ test.²¹⁰ The test involves states arguing that a port states regulation was not insufficiently connected to the state and its interests to be justifiable under international law.²¹¹ Bevan Marten proposes that the single test of a substantial connection between port state and the regulated matter could be employed for assessing the lawfulness of port states’ jurisdictional claims hence curbing excessive claims.²¹²

In conclusion, there is a clear indication that states are becoming more open to the idea of port state measures being used as an enforcement mechanism of the laws and regulations that relate to IUU fishing in the high seas. This is the next appropriate step to take especially in cases where the flag states are unwilling or unable to shoulder their responsibilities. As has been proven by the effects of Article 218 of the LOSC in regard to vessel sourced pollution at sea, giving port state enforcements powers when vessels are within their ports is not only necessary but very effective in the fight against IUU fishing.

²¹⁰ Ringbom, Henrik *Jurisdiction over ships: Post-UNCLOS Developments in the Law of the Sea* (2014) 137

²¹¹ *Ibid.*

²¹² *Ibid* at p6.

BIBLIOGRAPHY

Primary Sources

Conventions

Agreement on Port State Measures to Prevent Deter and Eliminate illegal, unreported and unregulated fishing, 2009.

Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels On the High Seas 1993.

CCAMLR Resolution 19/XXI of 2002.

Convention On the High Seas 1958.

Council Regulation (EC) No. 1005/2008.

Fish Stock Agreement 1995.

Geneva convention and Statute on the International Regime of Maritime Ports 1923.

International Convention for the Prevention of Pollution from Ships (MARPOL73/78).

International Plan of Action to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing 2001.

Law of The People's Republic of China On the Territorial Sea and The Contiguous Zone 1992.

United Nations Convention on the Law of the sea 1982.

Reports

Maritime Transport Committee of the Organization for European Economic Co-Operation, *Rochdale Report* (1958).

Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission(SRFC) to the International Tribunal for the Law of the Sea, Case No. 21 of 2015.

Cases

Case concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) 1986 ICJ Reports.

Japan v Russian Federation, The Tominmaru Case 2007 ITLOS Case No. 15.

M/V Saiga (No.2) Case, (Saint Vincent and the Grenadines v Guinea), Case No. 2 of 1998 ITLOS.

M/V Virginia G Case, (Panama v Guinea-Bissau), Case No. 19 of 2014 ITLOS.

Nottebohm case (Liechtenstein v. Guatemala) Case No. 6 of 1955 ICJ Reports.

Pulp Mills on the River Uruguay (Argentina v Uruguay), 2010 ICJ Reports.

Saudi Arabia v. Arabian American Oil Co. (ARAMCO) 1963 27 ILR 117.

S.S. 'Lotus', France v Turkey 1927 PCIJ.

Sellers v Maritime Safety Inspector (1999) 2 NZLR 44.

The Tomimaru Case (Japan v Russian Federation), Case No. 15 of 2007 ITLOS.

United States v Noriega 1990 S.D. Fla.

Secondary Sources

Books

Dawn A. Russell & David L. VanderZwang *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles* 2010.

Donald R Rothwell & Tim Stephens *the International law of the Sea* 2 ed (2016).

John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 128.

Ringbom, Henrik *Jurisdiction over ships: Post-UNCLOS Developments in the Law of the Sea* (2014) 137.

R.R. Churchill & A.V. Lowe *The Law of the Sea* 3 ed (1998).

Yoshifumi Tanaka *The International Law of the Sea* 2 ed (2015).

Articles

Anastasia Telesetky 'Laundering Fish in the Global Undercurrents: Illegal, Unreported and Unregulated Fishing and Transnational Organized Crime' (2014) 41 *Ecology Law Quarterly* 939.

Arron N. Honniball 'The exclusive jurisdiction of flag states: A limitation of pro-active port states?' (2016) 31 *The International Journal of Marine and Coastal Law* 499.

Caroline Stenman *The Development of the MARPOL and EU Regulations to Phase out Single Hulled Oil Tankers* (unpublished LLM thesis, Goteborg University, 2005).

Cedric Ryngaert & Henrik Ringbom 'Introduction: Port State Jurisdiction: Challenges and Potential' (2016) 31 *The International Journal of Marine and Coastal Law* 382.

Dana D. Miller & U. Rashid Sumalia 'Flag use behavior and IUU activity within the international fishing fleet: Refining definitions and identifying areas of concern' 2013 *Elsevier* 207.

Daniele Fabris 'Crimes Committed at Sea and Criminal Jurisdiction: Current Issue of International Law of the Sea awaiting The 'Enrica Lexie' Decision' (2017) 9:2 *Amsterdam Law Forum* 1.

David J. Agnew & Colin T. Barnes 'Economic Aspects and Drivers of IUU fishing: Building a Framework' 2004 *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing*.

Deirdre Warner-Kramer 'Control begins at home: Tackling flags of convenience and IUU Fishing' (2004) 34 *Golden Gate University Law Review* 497.

Dikdik Mohamad Sodik 'Non-legally International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing' (2008) 15 *Australian International Law Journal* 129.

Donald Rothwell Alex Oude ELferink, Karen Scott et AL *The Oxford Handbook of the Law of the Sea* (2015) 283.

Dr. Sophia Kopela 'Port-state jurisdiction, extraterritoriality and the protection of global commons' (2016) 47 *Ocean Development and International Law* 89.

Environmental Treaty' (2018) 49 *Victoria Wellington University Law Review* 573 at 581.

Erik Jaap Molenaar 'Port states jurisdiction: Towards comprehensive, mandatory and global coverage' (2007) 38 *Ocean Development and International Law* 225-227.

Jeff B. Curtis 'Vessel-Source Oil Pollution and MARPOL 73/78: An International Success Story?' (1985) 15 *Environmental Law* 679.

Joanna Mossop 'Can we make the oceans greener? The success and failures of LOSC as an Environmental Treaty' (2018) 49 *Victoria Wellington University Law Review* 573.

Henry Curtis 'Is there any other way? Port state jurisdiction as an alternative to the mandatory reflagging of deep water fishing vessels in New Zealand's EEZ' 2014 *Victoria University of Wellington*.

Ho Sam Bang 'Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea' (2009) 40 *Journal of Maritime Law* 290.

Irina Popescu 'Illegal, Unreported and Unregulated (IUU) Fishing Briefing' 2017 *European Parliamentary Research Service* 1.

Judith Swan 'Port State Measures-from Residual Port State Jurisdiction to Global Standards' (2016) 31 *The International Journal of Marine and Coastal Law* 395.

Kelly Rigg, Remi Parmentier & Others 'Halting IUU Fishing: Enforcing International Fisheries Agreements' 2003 *Oceana*.

K M Shajahan 'The European Union Regulation on IUU Fishing: Impact on Developing Countries' (2012) 47 *economic and political weekly* 81.

L.C. Green 'International Law and Canada's Anti-Pollution Legislation' (1971) 50 *Oregon Law Review* 461.

Mark Szepes 'MARPOL 73/78: The Challenges of Regulating Vessel-Source Oil Pollution' 2013 *Manchester Student Law Review* 73.

Martin Tsamenyi, Mary Ann Palma & Others 'The European Council Regulation on Illegal Unreported and Unregulated Fishing: An International Fisheries Law Perspective' (2010) 25 *The International Journal of Marine and Coastal Law* 1.

Mercedes Rosello 'Cooperation and Unregulated Fishing: Interactions Between Customary International Law, And The European Union IUU Fishing Regulation (2017) 84 *Marine Policy* 306.

Peter G. Wells 'The Iconic Torrey Canyon Oil Spill of 1967- Marking its Legacy' (2017) 115 *Marine Pollution Bulletin*.

Robin Churchill 'Port State Jurisdiction Relating to The Safety of Shipping and Pollution from Ships- What degree of Extra-territoriality?' (2016) 31 *The International Journal of Marine and Coastal Law* 442.

Stefan Asmundsson 'Regional Fisheries Management Organizations (RFMOS): Who are they, what is their geographical coverage on the high seas and which ones should be considered as General RFMOs, Tuna RFMOs and Specialized RFMOs?' 2016.

The Hon. Justice Steven Rares *Ships That Changed the Law-The Torrey Canyon Disaster* (Unpublished, a paper presented at the Maritime Law Association of Australia and New Zealand 44th National Conference in Melbourne on 5 October 2017).

Tina Shaughnessy & Ellen Tobin 'Flags of Inconvenience: Freedom and Insecurity On the High Seas' 2006 *Journal of International Law Policy* 3.

Internet References

FAO 'Agreement on Port State Measures(PSMA)' available at <http://www.fao.org/port-state-measures/en/>.

FAO 'Agreement on Port State Measures(PSMA)' available at <http://www.fao.org/port-state-measures/background/parties-psma/en/>.

FAO 'The state of world fisheries and aquaculture 2008' available at <http://www.fao.org/3/a-i0250e.pdf>.

IUUWATCH 'What is IUU Fishing' available at <http://www.IUUwatch.eu/what-is-IUU-fishing/>.

IUUWATCH 'IUU Fishing Facts and Figures' available at <http://www.IUUwatch.eu/IUU-fishing-facts-and-figures/>.

The Maritime Executive 'Lessons Learned: Exxon Valdez 26 years later' available at <https://www.maritime-executive.com/article/lessons-learned-exxon-valdez-26-years-later>.