

# Illegal, Unreported and Unregulated Fishing: Responses in General and in West Africa

Tafsir Malick Ndiaye\*

## Abstract

West Africa enjoys exceptionally good climatic and ecological conditions. Its coastal and maritime areas are among the richest fishing grounds in the world. These maritime waters have a high biological productivity due to the rising of deep, nutrient-rich waters at the basis of the marine food chain. This phenomenon, known as “upwelling”, is caused by winds pushing the surface waters away from the land area, allowing waters from the deep ocean to rise to the surface. One of the major features of the region, from Mauritania to Cape Shilling, is the abundance of fisheries resources. The fishing industry in the sub-region has been going through a crisis since 1990 due to overfishing, overexploitation by fishermen, industrial fishing companies and especially the highly disturbing incidence of illegal, unreported and unregulated fishing. This paper looks into the applicable law through the treaty law and the case law prior to discussing States’ practice in the sub-region. The latter is reflected in the laws and regulations of these States that give effect to the United Nations Convention on the Law of the Sea and that govern fishing activities in areas under national jurisdiction. State practice is also reflected in bilateral agreements between States to establish the conditions for access of foreign vessels to living resources in the exclusive economic zones. Various inter-governmental arrangements have also been developed to ensure the management of resources in the maritime region of West Africa covered by the Sub-Regional Fisheries Commission.

\* Judge of the International Tribunal for the Law of the Sea (email: ndiaye@itlos.org). Opinions are personal. Completed on 21 November 2010. The websites referenced in this article were last accessed on the date that the article was completed.

## I. Introduction

1. West Africa enjoys exceptionally good climatic and ecological conditions. Its coastal and maritime areas are among the richest fishing grounds in the world. These maritime waters have a high biological productivity due to the rising of deep, nutrient-rich waters at the basis of the marine food chain. This phenomenon, known as “upwelling”, is caused by winds pushing the surface waters away from the land area, allowing waters from the deep ocean to rise to the surface. One of the major features of the region, from Mauritania to Cape Shilling,<sup>1</sup> is the abundance of fisheries resources.

2. The seven Member States of the Sub-Regional Fisheries Commission (SRFC) cover a total surface area of 1.6 million km<sup>2</sup> with a coastline that stretches over 3500 km. The total population of these countries is approximately 32 million inhabitants, of whom 70 per cent live near the coastal areas. Fishing is a highly important sector in these countries as it accounts for one quarter of their economic activities. It creates jobs and caters to the food and export needs of countries in the sub-region. The number of direct and indirect jobs generated by this sector is estimated at over one million with about 30 000 fishing boats and over 1000 industrial vessels, including 700 foreign vessels operating in the exclusive economic zones (EEZs) of these States as part of the fisheries agreements with the European Union, China and South Korea in particular. The estimated value of the annual catch is USD 1.5 billion while the projected volume of exports amounts to USD 350 million per year.

The fishing industry in the sub-region has been going through a crisis since 1990 due to overfishing, overexploitation by fishermen, industrial fishing companies and especially the highly disturbing incidence of illegal, unreported and unregulated fishing (IUU fishing).<sup>2</sup>

- 1 See D. Gréboval, *Bioeconomic analysis of the principal demersal fisheries in the northern zone of CEEAF*, Dakar, CEEAF Project, CEEAF/TECH/82/45 (1982).
- 2 Though the phenomenon is well known worldwide, the expression “illegal, unreported and unregulated fishing” (IUU fishing) was first used at the 1997 Session of the Commission for the Conservation of Antarctic Marine Living Resources during debates on unauthorized fishing activities (illegal and unreported) of members of the Commission and on the fishing activities (illegal and unregulated) of non-members within the area covered by the Convention on the creation of Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR). See D. Doulman, *Global overview of illegal, unreported and unregulated (IUU) fishing and its impact on national and regional efforts to manage fisheries sustainably: the rationale for the conclusions of the 2001 FAO International Plan of Action*, Appendix D, FAO Fisheries Report No. 722, Report of the Expert Consultation on Fishing Vessels Operating Open Registries and Their Impact on Illegal, Unreported and Unregulated Fishing, Miami, Florida, USA, 23–25 September 2003 (FAO, Rome 2004); see also W. Edeson, *Tools to Address IUU Fishing: The Current Legal Situation*, Document AUS:IUU/2000/8 (2000) ([www.fao.org/DOCREP/005/Y3274E/y3274e0a.htm](http://www.fao.org/DOCREP/005/Y3274E/y3274e0a.htm)).

3. In the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), the United Nations Food and Agriculture Organization (FAO) gives the following definition for IUU fishing:

3.1. Illegal fishing refers to activities:

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

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

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

3.2. Unreported fishing refers to fishing activities:

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

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

3.3. Unregulated fishing refers to fishing activities:

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

3.3.2. in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.<sup>3</sup>

4. It goes without saying that such a definition is necessarily subject to change given the type of activities in question, their prolific nature and, in particular, the ingenuity of those engaged in IUU fishing.

5. Especially as technology is highly advanced, more and more surprising innovations are being developed particularly for fish detection, such as the use of aircraft and sonar in purse seine fishing and trawling. The emerging use of mid-water trawls,

3 IPOA-IUU, adopted by consensus at the 24th Session of the FAO Committee on Fisheries (COFI) on 2 March 2001 and endorsed by the 120th Session of the FAO Council on 23 June 2001, Appendix 1, 109–110 ([www.fao.org/DOCREP/003/y1224E/Y1224E00.HTM](http://www.fao.org/DOCREP/003/y1224E/Y1224E00.HTM)).

new fish-netting techniques, fish pumps, the generalization of the use of synthetic fibres, new freezing and fish-processing techniques, parent vessels and factory ships accompanied by many fishing vessels of lesser tonnage that rely on an extensive network of ports of convenience or natural shelters where unloading as well as repairs and crew rotations can be done<sup>4</sup> complete the picture.

6. It is therefore understandable that losses in Sub-Saharan Africa should amount to USD 1 billion a year.<sup>5</sup> The international community noted that IUU fishing is profitable to those practising it, who come from a limited number of countries.

The worldwide value of IUU catches is estimated between USD 4 billion and USD 9 billion a year, with USD 1.25 billion of this coming from the high seas and the remainder from national jurisdictions.<sup>6</sup> The fishing effort in the world is 100 million tons per year, of which 27 per cent are IUU catches.<sup>7</sup>

7. In West Africa, the practice of IUU fishing is devastating and destructive to the marine economy and ecosystem of the region. One must see it to believe it. Vessels remain at sea for years and never call at ports in the sub-region. They conduct illegal trans shipments of their catches to other vessels, receive supplies and rotate their crews at sea.

8. IUU fishing is well organized and does not adhere to the laws or regulations of coastal States. Pirate ships develop their activities with impunity, convinced of always escaping control given that States cannot afford to establish appropriate fishery policing units and their territorial waters are not monitored.

9. The Environmental Justice Foundation (EJF) and Greenpeace conducted a survey in the region and produced an enlightening film.<sup>8</sup> It appears that trawling is a real disaster. Guinea is among the countries where IUU fishing is practised the most in the world. Its waters are not monitored due to a lack of means.

4 See FAO, *Cooperation among international institutions in relation to fisheries*, COFI/71/9(b), 5 March 1971, Appendix III, 15.

5 See High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas* (2006), 3.

6 *Ibid.*

7 As indicated in the FAO's IPOA-IUU, above n.3, IUU fishing undermines efforts to conserve and manage fish stocks in all captured fisheries. When confronted with IUU fishing, national and regional fisheries management organizations can fail to achieve management goals; this situation leads to the loss of both short- and long-term social and economic opportunities and to negative effects on food security and environmental protection. IUU fishing can lead to the collapse of a fishery or seriously impair efforts to rebuild stocks that have already been depleted. Existing international instruments addressing IUU fishing have not been effective, due to a lack of political will, priority, capacity and resources to ratify or accede to and implement them. See the first paragraph.

8 Greenpeace, *Pirate Fishing: The Scourge of West Africa* (2001) (available on the Internet Guide to International Fisheries Law, [www.oceanlaw.net](http://www.oceanlaw.net)); see [www.EJFoundation.org](http://www.EJFoundation.org).

10. Guinea has a 12-nautical-mile territorial sea reserved for local artisanal fishing. These territorial waters are invaded by foreign trawlers that travel back by night, as of 3 am. The stories of fishermen portrayed in the film are horrifying.

11. Trawlers catch all the fish available without consideration of protected species or safety standards. They destroy the nets of local fishermen and collide with their canoes, putting their lives at risk. They use heavy nets that sweep the ocean, destroying not only marine habitat but also nurseries for juveniles, which prevents the fish from reproducing.

12. Crew are trained to sort species and select those with the highest market value. Most of the catch (almost 90 per cent) is thrown back into the sea. It is a truly horrendous sight.

13. Fishing communities are suffering. Populations along the entire West African coast live on fish, which helps to meet their protein needs. Women who have been practising the art of preserving and smoking fish for over 1000 years now see their businesses ailing. They explain that the fishermen previously brought in fish within half a day, whereas nowadays they stay several weeks at sea for very small catches, if any.

14. Each year, Guinea loses USD 110 million due to the non-payment of licence fees, as well as thousands of jobs. Out of a hundred boats inspected in 2008, more than half were engaged in IUU fishing. These vessels transship their catches by night to reefers that shuttle between Guinea and the port of convenience of Las Palmas in the Canary Islands. The film shows a refrigerated cargo ship that had travelled seven times between the Guinean coast and Las Palmas. IUU catches are mixed with legally caught stocks, making them impossible to trace. Illegally caught fish are hence found in Europe in violation of prevailing laws and regulations. For 2009–2010, out of 1300 pirate ships in the region, only 58 were detained.

15. It is therefore easy to understand why owners do not hesitate to pay as soon as their vessels are detained. These unscrupulous owners falsify the technical specifications of their vessels, a practice known as marking. They also “clone” their vessels. Photocopies of a properly established fishing licence issued for one vessel can be found on other fishing vessels with the same name. These owners also engage in reflagging to escape the control of coastal States in areas within their territorial waters.

16. In the Nouakchott Declaration on IUU fishing, sub-regional States underscore the dangers of IUU fishing and affirm their full support of the FAO IPOA-IUU and their desire to protect the waters through strict control of the fishing activities of vessels operating in the sub-region. They solemnly called on the international community to lend its support and cooperation to Member States of the SRFC in their fight against IUU fishing.<sup>9</sup>

9 Nouakchott Declaration, adopted on 20 September 2001. The novel initiative of the Foreign and Commonwealth Office’s Polar Regions Unit, which organized, in Cape Town from 3 to 6 August 2010, a workshop in collaboration with Australia, South Africa, New Partnership for Africa’s Development (NEPAD) and CCAMLR, should be noted. “The workshop was funded by CCAMLR, using money donated by the UK, in 2001, obtained from the sale

17. We shall now examine the applicable law (Section II) prior to discussing States' practice in the sub-region (Section III). States operate within the international legal framework characterized by the freedom of the high seas, and are supposed to cooperate among themselves. This legal framework is reflected in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Articles 117–120 of the Convention underline the obligation of the flag States or States whose nationals fish in areas of the high seas to cooperate with each other and with other States that have an interest in conserving and managing the living resources of the high seas. Article 118 of the Convention refers to the manner in which States should cooperate with respect to fishing on the high seas, i.e. by establishing sub-regional or regional fisheries organizations. Other international instruments reiterate that States whose vessels fish on the high seas have a duty to cooperate and establish regional fisheries organizations. Such instruments include: the FAO Compliance Agreement of 1993, the 1995 Fish Stocks Agreement, the FAO Code for Responsible Fisheries of 1995 and the IPOA-IUU of 2001.

## II. Applicable law

18. In this section, we shall discuss treaty law (Section II.A) and case law (Section II.B).

### II.A. Treaty law

19. We shall review the UNCLOS (Section II.A.i), the Agreement on Straddling Fish Stocks (Section II.A.ii), the Compliance Agreement of 1993 (Section II.A.iii) and other instruments developed within the framework of FAO (Section II.A.iv).

#### *II.A.i. The UNCLOS of 10 December 1982*

20. The main provisions relating to fishing are found in the articles on EEZs.<sup>10</sup>

of fish confiscated from an illegal vessel operating in the waters of South Georgia and the South Sandwich Islands". See [www.illegal-fishing.info](http://www.illegal-fishing.info), African coastal states organize network to tackle illegal fishing (10 August 2010), 1–2. Twelve coastal African States attended the meeting.

10 Provisions of the Convention relating to the territorial sea hardly deal with fishing except to confirm the sovereignty of the coastal State. Para.2 of art. 19 indicates that the passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if, in the territorial sea, it engages in any of the 12 activities listed, including fishing. Similarly, the first paragraph of art. 21 provides that the coastal State may adopt laws and regulations relating to innocent passage through the territorial sea, in respect of the conservation of the living resources of the sea and the prevention of infringement of the fisheries laws and regulations of the coastal State, among other issues.

The establishment of EEZs or fishing zones<sup>11</sup> of 200 nautical miles would cover an area where almost 90 per cent of present-day commercial fishing occurs.<sup>12</sup> This means that the regime applicable to this area is a determining factor in the management of fisheries resources.

21. In the EEZ, the coastal State has sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural and living resources.<sup>13</sup> It thus has considerable authority, but must also perform a certain number of duties.

22. The coastal State shall ensure, through proper conservation and management measures, that the maintenance of the living resources in the EEZ is not endangered by overexploitation.<sup>14</sup> Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global.<sup>15</sup> In this regard, the coastal State shall determine the allowable catch of the living resources in its EEZ.<sup>16</sup> It shall then determine its capacity to harvest the living resources. Where it does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch, having particular regard for the situation of land-locked and geographically disadvantaged States.<sup>17</sup>

23. The Convention grants full discretion to the coastal State regarding the choice of third countries allowed access to the surplus of the allowable catch. It establishes the principle that the coastal State, in giving access to other States, shall take into account all relevant factors, including, *inter alia*, the significance of the living

11 R.J. Dupuy writes of new data on fisheries on which one point is certain: the generalization of economic zones with the same territorial scope is tantamount to absorbing the most significant capture areas. This includes all shelves extending to the 200-m isobath based on the now-outdated 1958 Convention, which currently account for 87 per cent of global marine fish stocks. Also covered by the economic zone are virtually all areas of high fertility resulting from the upwelling of intermediate waters under the influence of downdrafts reinforced by seasonal winds: California Current, Canary Current, upwelling in the Gulf of Guinea, Peru Current, Somali Current, etc. Rene Jean Dupuy, *L'Océan Partagé* (Pédone, Paris, 1979), 87.

12 In *Franco-Canadian Fisheries Arbitration*, Judgment of 17 July 1986, the Arbitral Tribunal held that the concept of an EEZ and fishing area is considered the same with regard to the rights of a coastal State on the living resources of the sea (§ 49). 90 RGDIP (1986), 713–786 (especially 745).

13 UNCLOS, art. 56, para.1(a).

14 UNCLOS, art. 61, para.2.

15 *Ibid.*, para.3.

16 *Ibid.*, para.1

17 UNCLOS, art. 62, para.2.

resources of the area to the economy of the coastal State concerned and its other national interests.

24. The Convention also refers to categories of countries whose requirements and needs will be taken into consideration by the coastal State: landlocked and coastal States in the region or sub-region showing certain geographic particularities, developing States in the region, States whose nationals have habitually fished in the zone or which have greatly contributed to research and identification of stocks so as to minimize economic dislocation in these countries<sup>18</sup> and States which have made substantial efforts in research and identification of stocks. Nationals of other States fishing in the EEZ shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State, which shall be consistent with the Convention.<sup>19</sup>

25. Regarding the enforcement of the laws and regulations of the coastal State, the first paragraph of Article 73 stipulates: “The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention”.

26. Article 73 gives wide discretionary powers to the coastal State. There are nonetheless a set of rights and duties it has to fulfil, including the duty to promptly release arrested vessels and their crews upon the posting of reasonable bond or other security. There is hence an intrinsic link with Article 292 of the Convention, relating to the prompt release of the vessel and an example of compulsory jurisdiction. Indeed, where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew, the vessel owner suspected of violating the legislation on fishing may ask the appropriate national tribunal for release on the basis of Article 73, paragraph 2. The matter may otherwise be brought before the International Tribunal for the Law of the Sea. However, the application for release may be made only by or on behalf of the flag State of the vessel.<sup>20</sup>

27. The issue of prompt release raises complex legal questions such as: the requirement for prompt release in the Convention and forfeiture as punishment for illegal fishing, the abuse of legal process, the relationship between the requirement for prompt release and the competence of the coastal State, the “summary” procedures of the coastal State with regard to illegal fishing crimes, release as an emergency procedure, pendency of a case and so on.

18 *Ibid.*, para.3.

19 UNCLOS, art. 62, para.4, gives a list of 11 areas where the said laws and regulations can apply.

20 UNCLOS, art. 292, para.2.



28. As a result of their mobility, living resources should be managed on the basis of arrangements between the States directly concerned. The Convention recognizes in this regard the need for cooperation and coordination. Article 63 refers to two cases. On the one hand, where the same stock or stocks of associated species occur within the EEZs of two or more coastal States, these States shall seek, either directly or through appropriate sub-regional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks.<sup>21</sup>

29. On the other hand, where the same stock or stocks of associated species occur both within the EEZ and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate sub-regional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.<sup>22</sup> The Convention also stresses the importance of conserving the living resources of the high seas.

30. As regards the right to fish on the high seas, Article 116 of the Convention stipulates that all States have the right to their nationals engaging in fishing on the high seas, subject to: (a) their treaty obligations; (b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in Article 63, paragraph 2, and Articles 64–67; and (c) the provisions of the Convention relating to the conservation and management of the living resources of the high seas.

31. The Convention focuses primarily on the duty of States to adopt, with respect to their nationals, measures for the conservation of the living resources of the high seas or to cooperate with other States in taking such measures.

32. Then, States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to take the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish sub-regional or regional fisheries organizations to this end.

33. Finally, in determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall rely on the best scientific evidence available, the relevant environmental and economic factors, fishing patterns, the interdependence of stocks and the special needs of developing States. States shall also exchange available scientific information as well as catch and fishing effort statistics, through competent regional or international organizations.

21 UNCLOS, art. 63, para.1.

22 *Ibid.*, para.2; see also UNCLOS, art. 61, para.2. As regards the specific provisions relating to certain species: highly migratory species (art. 64); marine mammals (art. 65); anadromous stocks (art. 66); catadromous species (art. 67); and sedentary species (art. 68). Refer to arts. 116–120 of the Convention for fishing on the high seas.

Furthermore, States shall ensure that conservation measures and their implementation do not discriminate against the fishermen of any State.

*II.A.ii The United Nations agreement on straddling fish stocks*

34. The status of straddling and highly migratory fish stocks was of great concern to the United Nations Conference on Environment and Development in 1992 (UNCED). In Chapter 17, Programme Area C of Agenda 21 adopted at this Conference, it was noted that the management of fish stocks was lacking and it was recommended to convene an inter-governmental conference under United Nations auspices with a view to promoting effective implementation of the provisions of the UNCLOS.

35. Following these recommendations, the United Nations Conference on Straddling Fish Stocks held six sessions from April 1993 to August 1995, which resulted in: “The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks”, adopted on 4 August 1995. The Agreement entered into force on 11 December 2001.

36. States parties to the agreement proclaim to be “seeking to address in particular the problems identified in chapter 17, programme area C, of Agenda 21 adopted by the United Nations Conference on Environment and Development, namely, that the management of high seas fisheries is inadequate in many areas and that some resources are over-utilized; noting that there are problems of: unregulated fishing, over-capitalization, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of adequate cooperation between States”.

The objective of the Agreement is to ensure the long-term conservation and sustainable use of stocks.<sup>23</sup> It applies beyond areas under national jurisdiction.<sup>24</sup> In this regard, States shall apply the precautionary approach widely in order to protect the living marine resources and preserve the marine environment.<sup>25</sup>

23 1995 Agreement, art. 2.

24 1995 Agreement, art. 3.

25 1995 Agreement, art. 6. On the precautionary approach, see L. Boisson de Chazournes, Precaution in International Law: Reflection on Its Composite Nature, in: Liber Amicorum Judge T.A. Mensah, T.M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff Publishers, Leiden/Boston, 2007), 21–34; L. Lucchini, Le principe de précaution en droit international de l’environnement: ombres plus que lumières, *AFDI* (1999), 710 et seq.; P.M. Dupuy, Le principe de précaution et le droit international de la mer, in: V. Coussirat-Coustere, Y. Daudet, P.-M. Dupuy and P.M. Eisemann (eds.), *La Mer et Son Droit, Mélanges offerts à Laurent Lucchini et Jean Pierre Quéneudec* (Paris, Pédone, 2003), 205–220. O. McIntyre and T. Mosedale, The Precautionary Principle as a Norm of Customary International Law, 9 *Journal of Environmental Law* (1997), 221–235; T.M. Ndiaye, La responsabilité internationale des Etats pour dommages au milieu marin, in: Liber Amicorum Bozidar Bakotic, B. Vukas and T.M. Sosic (eds.), *International Law, New Actors, New Concepts, Continuing Dilemmas* (Martinus Nijhoff Publishers, Leiden/Boston, 2010), 265–279 (especially pages 271–274).

37. The agreement contains elaborate provisions to ensure compliance and enforcement of measures. For example, State parties may, on account of sub-regional or regional cooperation, board and inspect fishing vessels flying the flag of another State and secure evidence of serious violation.<sup>26</sup> Moreover, a port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of sub-regional, regional and global conservation and management measures.<sup>27</sup>

38. Part V of the Agreement sets out the obligations of a State to ensure that vessels flying its flag comply with and enforce rules such that vessels do not engage in any activity that undermines the effectiveness of conservation and management measures in the high seas. A State shall authorize the use of vessels flying its flag for fishing on the high seas only where it is able to exercise effectively its responsibilities in respect of such vessels.<sup>28</sup>

#### *II.A.iii. FAO compliance agreement of 1993*

39. The original reason that prompted the drafting and negotiation of this agreement was to address the practice of reflagging of vessels in order to avoid the application of high seas conservation and management measures.<sup>29</sup> In the absence of

26 Art. 21, para.11 states: "For the purposes of this article, a serious violation means: a) fishing without a valid licence, authorization or permit issued by the flag State in accordance with article 18, paragraph 3(a); b) failing to maintain accurate records of catch and catch-related data, as required by the relevant sub-regional or regional fisheries management organization or arrangement, or serious misreporting of catch, contrary to the catch reporting requirements of such organization or arrangement; c) fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant sub-regional or regional fisheries management organization or arrangement; d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited; e) using prohibited fishing gear; f) falsifying or concealing the markings, identity or registration of a fishing vessel; g) concealing, tampering with or disposing of evidence relating to an investigation; h) multiple violations which together constitute a serious disregard of conservation and management measures; or i) such other violations as may be specified in procedures established by the relevant sub-regional or regional fisheries management organization or arrangement."

27 1995 Agreement, art. 23, para.1.

28 1995 Agreement, art. 18, para.3. Measures to be taken by a State in respect of vessels flying its flag shall include: "1) control of such vessels by means of fishing licences; 2) establishment of regulations concerning the terms and conditions for a licence; 3) establishment of a national record of fishing vessels authorized to fish on the high seas and provision of access to the information contained in that record on request by directly interested States; 4) requirements for marking of fishing vessels; 5) requirements for recording and timely reporting of vessel position, catch of target and non-target species; 6) requirements for verifying the catch of target and non-target species through such means as observer programmes and inspection schemes; 7) monitoring, control and surveillance of fishing operations and related activities."

29 See G. Moore, *The FAO Compliance Agreement*, in: M. Nordquist and J. More (eds.), *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations* (Martinus Nijhoff Publishers, The Hague, 2000), 78.

consensus on this issue, delegates focused on the concept of the flag States' responsibilities and the "systematic exchange of information on fishing operations on the high seas".<sup>30</sup>

40. Regarding the responsibility of the flag State, each party shall take such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.<sup>31</sup>

41. When granting a fishing licence, the Party shall ensure that it can effectively exercise its responsibilities under this agreement in respect of that fishing vessel. Furthermore, no Party shall authorize any fishing vessel previously registered in the territory of another Party that has undermined the effectiveness of international conservation and management measures to be used for fishing on the high seas, unless certain conditions have been met.<sup>32</sup> In addition, the agreement requires flag States to take enforcement action.<sup>33</sup> These measures may consist of making contravention of the provisions of this agreement an offence under national legislation.<sup>34</sup>

42. Other obligations of the flag State relate to the need to ensure "the free flow of information on fishing operations on the high seas". The flag State shall ensure that vessels are marked and provide the necessary information pertaining to their fishing operations, catches and landings.<sup>35</sup>

43. It shall maintain a record of fishing vessels entitled to fly its flag and authorized to be used for fishing on the high seas. Information collected by the flag State shall be transmitted to FAO in real time.<sup>36</sup> Finally, Parties have a duty to cooperate through the exchange of information and by notifying the flag State when it is believed that the fishing vessel has been used for an activity that undermines the effectiveness of international conservation and management measures, under Article 5.

30 Ibid. The official wording of the agreement is: "Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas", adopted in November 1993. It entered into force on 24 April 2003.

31 Compliance Agreement, art. 3, para.2.

32 Compliance Agreement, art. 3, paras.3–5.

33 See R. Rayfuse, *To Our Children's Children's Children: From Promoting to Achieving Compliance in High Seas Fisheries*, 20 *International Journal of Maritime and Coastal Law* (2005), 514.

34 Compliance Agreement, art. 3, para.8. The Agreement states that "Sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish on the high seas".

35 Ibid., paras.6, 7.

36 Compliance Agreement, art. 4.

*II.A.iv. Fisheries instruments developed under the auspices of FAO*

44. Non-binding instruments pertaining to fisheries have been developed under the auspices of FAO. These include the Code of Conduct for Responsible Fisheries and four voluntary instruments developed under this Code with regard to specific issues.

45. The Code, which is exhortatory or recommendatory, is to be interpreted and applied in conformity with the relevant rules of international law, as reflected in UNCLOS<sup>37</sup> and in accordance with the Agreement on Straddling Fish Stocks as well as other relevant regulations including those listed under Chapter 17 of Agenda 21.

46. The Code sets out the key elements of responsible fisheries: general principles, fisheries management, fishing operations, aquaculture, integration of fisheries into coastal area management, post-harvesting practices and trade, fisheries research.

47. Other instruments on specific issues have been designed as plans of action: the International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries; the International Plan of Action for the Conservation and Management of Sharks; the International Plan of Action for the Management of Fishing Capacity and the IPOA-IUU.<sup>38</sup> The latter was adopted by consensus at the 24th Session of the FAO Committee on Fisheries on 2 March 2001 and approved by the FAO Council at its 120th Session on 23 June 2001.

48. Since its adoption, the IPOA-IUU has been a reference tool for States that are preparing their national plan of action against IUU fishing.<sup>39</sup>

49. The International Plan of Action of the FAO that deals with action plans for regional fisheries management organizations greatly contributed to harmonizing the practices of these organizations in the fight against illegal fishing.<sup>40</sup>

37 Code of Conduct for Responsible Fisheries, art. 3.1.

38 The IPOA-IUU is available at [www.fao.org/DocREP/003/Y1224E/Y1224E00.HTM](http://www.fao.org/DocREP/003/Y1224E/Y1224E00.HTM). The first three international plans of action were adopted at the 23rd Session of the FAO Committee on Fisheries in February 1999. They were approved by the FAO Council in November 2000.

39 The following States have adopted a national plan of action against IUU fishing based on the Plan of Action of the FAO: Cambodia, Canada, Spain, United States, Kuwait, Latvia, Mexico, Norway, New Zealand and Venezuela. See also UN Doc A/63/128 (Sustainable Fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of the Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments), Report of the Secretary General, 14 July 2008.

The European Union adopted Council Regulation (EC) No. 1005/2008, establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing on 29 September 2008.

40 It shall be recalled that in the light of the international plan of action against IUU fishing and the FAO Model Scheme of 2005 on port State measures, the FAO organized in Rome a technical consultation to draft a legally binding instrument on port State measures. Three technical consultation sessions were held: from 23 to 27 June 2008; from 26 to 30 January 2009; and from 4 to 8 May 2009. This consultation resulted in the draft Agreement on port State

50. Though the coastal State has broad powers under Article 56 and a number of rights as stipulated in Article 62, the fact remains that several major fisheries-related issues, which could possibly be niches for IUU fishing, have not been foreseen by the Convention. One need only think of the activities of support vessels engaged in bunkering and transshipment, the transportation of frozen fish by reefers or processing activities on trawlers such as filleting.

51. When these activities are conducted within the EEZ, the Convention may fall short of State practices, which together with case law attempts to find solutions to problems that have not been addressed by the Convention.

## II.B. Case law

52. Case law is a means for clarifying the rights and obligations of the coastal State in the EEZ and the sovereign rights for exploration, exploitation, conservation and management of living resources as well as for enforcing these laws and regulations.

### *II.B.i The Franco-Canadian Fisheries Arbitration (1986)*

53. In the case relating to filleting within the Gulf of St Laurent by French trawlers, referred to in Article 4(b) of the Agreement on Mutual Relations between Canada and France on Fisheries signed in Ottawa on 27 March 1972, a dispute arose between the two countries pertaining to the interpretation of the said agreement.

54. The dispute emerged in January 1985 when the trawler *La Bretagne*, registered in St Pierre and Miquelon, which had been authorized to fish outside the Gulf of St Laurent in 1984, applied for a licence in 1985 to conduct fishing operations both within and outside the Gulf.

55. After having acceded to this request on 4 January 1985 in respect of fishing outside the Gulf, Canadian authorities accompanied this licence with an "Amendment No. 1" dated 24 January 1985, which stated that: "In accordance with the current Canadian prohibition against the filleting of traditional groundfish species

measures to prevent, deter and eliminate illegal, unreported and unregulated fishing, dated 18 May 2009 (<ftp://ftp.fao.org/FI/DOCUMENT/tc-psm/2009/PSMAgreementf.pdf>). The document comprises ten parts and four annexes: Preamble, Part 1: General Provisions (arts. 1–6), Part 2: Requirements Prior to Entry into Port (arts. 7 and 8), Part 3: Use of Ports (arts. 9 and 10), Part 4: Inspections and Follow-up Actions (arts. 11–19), Part 5: Role of Flag States (art. 21—note that there is no art. 20), Part 6: Requirements of Developing States (art. 22), Part 7: Dispute Settlement (art. 23), Part 8: Non-Parties (art. 24), Part 9: Monitoring and Review (art. 25) and Part 10: Final Provisions (arts. 26–37), Annex A (Information to be provided in advance by vessels requesting port entry), Annex B (Port State inspection procedures, Annex C (Report of the results of the inspection) and Annex D (Information systems on port State measures). The Agreement has been open for signature since November 2009. It has been signed by 15 States. The Agreement shall enter into force 30 days after the date of deposit with the Depositary (the FAO Director General) of the 25th instrument of ratification, acceptance, approval or accession (art. 30 of the draft document).

at sea, the ‘La Bretagne’ is permitted to process groundfish species in the Gulf of St Laurent to the headed, gutted form only”.<sup>41</sup>

56. Canadian authorities based their decision on the “equal footing” clause in Article 4(b) of the 1972 Agreement. When this agreement was reached, regulations were adopted under two laws of 1970 on fisheries and on the protection of coastal fisheries essentially targeting foreign fishing vessels.

57. The first law defines a “fishing vessel” as “any vessel used, fitted or designed for the catching, processing or transporting of fish”, while the word “fisheries” is understood as referring to “areas where and periods during which fishing and its related activities, particularly [...] packaging, transport and processing, take place”.<sup>42</sup>

58. Though most of the debate focused on the interpretation of the 1972 Agreement, the Tribunal stated that it was “obliged to also take into account any relevant rules of international law applicable between the Parties. In their oral submissions, both Parties indeed used provisions of UNCLOS as argument to support their respective views”.<sup>43</sup> On this basis, the Tribunal undertook a description of the evolution of international law of the sea since the conclusion of the 1972 Agreement.

59. On the question regarding the extent of the coastal State’s rights on fishing and related activities, the Tribunal explained that:

While it is true, as Canada has rightly observed that Article 56 of the Convention recognizes the sovereign rights of the coastal State, not only in the exploitation of natural resources but also as regards the management of these resources, it however does not seem that this management authority, that the Convention constantly associates with the idea of conservation, has precisely any other purpose than the conservation of resources; it is above all an administration function that the coastal State is considered better equipped to exercise, but which however remains a general interest function.<sup>44</sup>

60. Regarding the exploitation of living resources provided for in Article 62 of the 1982 Convention, the Tribunal considered that this article contains both the rights and obligations of the coastal State applicable to foreign nationals exploiting living resources in the area. Even if this list is not exhaustive, it does not appear that the regulatory power of the coastal State includes the authority to regulate matters of a different nature from those described therein. In the

41 Franco-Canadian Fisheries Arbitration, above n.12, para.14.

42 A new definition of the word “processing” was incorporated in the amendment to the regulation adopted under the 1970 Law on the Protection of Coastal Fisheries of 26 June 1985, to read as follows: “cleaning, filleting, tubing, icing, packing, canning, freezing, smoking, salting, cooking, pickling, drying, or preparing fish for market in any other manner” (art. 2).

43 Franco-Canadian Fisheries Arbitration, above n.12, para.49.

44 *Ibid.*, para.50.

opinion of the Tribunal, a possible regulation on filleting at sea cannot *a priori* find its justification in the powers vested on the coastal State by the new rules of the Law of the Sea.<sup>45</sup>

61. Under these circumstances, the Tribunal was of the opinion that Canada can only exercise its regulatory authority over French trawlers covered by Article 4(b) of the 1972 Agreement in a reasonable manner, i.e. without rendering impossible the exercise of the fishing rights of vessels stipulated in the Agreement.<sup>46</sup>

62. If this case was to be brought before the Tribunal today, it is likely that it would adopt a less restrictive approach, given the practices of coastal States observed over the past 20 years.

### *II.B.ii. The SAIGA cases*

63. In the *SAIGA* cases, the issue of the law applicable to bunkering at sea was put to the International Tribunal for the Law of the Sea.<sup>47</sup> The *SAIGA* was an oil tanker flying the flag of Saint Vincent and the Grenadines and was based in Dakar (Senegal). It was engaged in selling gas oil as bunker to fishing vessels off the coast of West Africa.

64. On the morning of 27 October 1997, the *SAIGA*, having crossed the northern maritime boundary between Guinea and Guinea Bissau, entered the EEZ of Guinea, approximately 32 nautical miles from Guinea's island of Alcatraz. It supplied gas oil to three fishing vessels on the same day: the *Giuseppe Primo*, the *Kritt* and the *Eleni S*.

65. On 28 October 1997, the *SAIGA* was arrested by Guinean Customs patrol boats in the southern limit of the EEZ of Guinea.<sup>48</sup> Guinea indicated that the *SAIGA* was engaged in smuggling activities, which constitutes an offence punishable

45 *Ibid.*, para.52. These views of the Tribunal have been criticized by various schools of thought. R.R. Churchill and A.V. Lowe, in *The Law of the Sea* (3rd edn., Manchester University Press, 1999), 291–292, write: “In the Franco-Canadian Fisheries arbitration (1986) the tribunal suggested that the coastal State’s competence to prescribe legislation for foreign fishing vessels in its EEZ was limited to conservation measures *stricto sensu* and therefore could not include measures to regulate fish processing. This seems an unjustifiably narrow reading of Article 62(4), which speaks of foreign vessels complying with the coastal State’s ‘conservation measures and the other terms and conditions established in [its] laws and regulations’, and many of the illustrative list of eleven permissible types of measures go beyond conservation. In any case the point was not central to the tribunal’s decision”. See also W.T. Burke, *The New International Law of Fisheries* (Oxford, Clarendon, 1994), 48; B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Dordrecht, Nijhoff, 1989), 67.

46 Franco-Canadian Fisheries arbitration, above n.12, para.54.

47 The *SAIGA* cases: Saint Vincent and the Grenadines v. Guinea, Judgment of 4 December 1997; *SAIGA* Case No. 2, Judgment of 1 July 1999.

48 An account of the circumstances of the arrest of the *SAIGA* was drawn up by Guinean authorities in a “Procès-Verbal” bearing the designation “PV 29”. This document also contains a statement of the Master obtained through interrogation by the Guinean authorities.



under the Customs Code of Guinea,<sup>49</sup> and that detention had taken place following the exercise by Guinea of its right of hot pursuit under Article 111 of the Convention.

66. The Tribunal considered the question of “bunkering of fishing vessels” as an activity, the regulation of which can be assimilated to the regulation of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage living resources in the EEZ.

67. It indicates: “It can be argued that refuelling is by nature an activity ancillary to that of the refuelled ship”. Some examples of State practice can be noted. Article 1 of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific of 23 November 1989 defines “driftnet fishing activities” as *inter alia* “transporting, transshipping and processing any driftnet catch, and co-operation in the provision of food, fuel and other supplies for vessels equipped for or engaged in driftnet fishing”.

68. As documented by Saint Vincent and the Grenadines, Guinea Bissau, in its decree-law No. 4/94 of 2 August 1994, requires authorization of the Ministry of Fishing for operations “connected” with fishing, and Sierra Leone and Morocco routinely authorize fishing vessels to be refuelled offshore.<sup>50</sup>

69. However, the Tribunal considered that it is not necessary to continue the reflection “for the purpose of the admissibility of the application for prompt release of the SAIGA”.<sup>51</sup>

70. Conversely, the question of bunkering was raised again when the Tribunal had to consider the merits. It explains that, in the EEZ, the coastal State has jurisdiction to apply its customs laws and regulations in respect of artificial islands, installations and structures (Article 60, paragraph 2). In the view of the Tribunal, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the EEZ not mentioned above.<sup>52</sup>

71. The Tribunal considered that it had reached a decision on the issue that needed to be decided, “without having to address the broader question of bunkering in the exclusive economic zone. Consequently, it does not make any findings on that question.”<sup>53</sup>

72. Not only is the Convention silent on this issue, it undoubtedly falls short of existing practice.

49 See art. I of the Guinean Law No. L 94/007/CTRN of 15 March 1994, published in the Official Gazette of the Republic of Guinea on 25 March 1994.

50 The SAIGA case No. 1, above n.47, para.57.

51 *Ibid.*, para.59. Indeed, in this emergency procedure, “. . . the Court shall deal only with the question of release . . . without prejudice to the merits of any case before the appropriate domestic forum” (art. 292, para.3, of the Convention).

52 *Ibid.*, para.127.

53 *Ibid.*, para.138.

*II.B.iii. The Monte Confurco case*

73. The *Monte Confurco*<sup>54</sup> is a fishing vessel, flying the flag of Seychelles. Seychelles provided the *Monte Confurco* with fishing licence No. 710 to engage in fishing in international waters. On 27 August 2000, it sailed from Port Louis (Mauritius) to engage in long-line fishing in the southern seas. On 8 November 2000, the *Monte Confurco* was boarded by the crew of the French surveillance frigate *Floréal* in the EEZ of the Kerguelen Islands in the French Southern and Antarctic Territories.

74. A process-verbal of violation No. 1/00 was drawn up on 8 November 2000 by the Captain of the *Floréal* against the Master of the *Monte Confurco* for having:

- failed to announce his presence and the quantity of fish carried aboard to the Head of the District of the Kerguelen Islands;
- fished without having obtained the prior authorization required by law;
- attempted to evade or for having evaded investigations by the agents responsible for policing fishing activities.

75. On 8 November 2000, the *Monte Confurco* was rerouted and escorted under the supervision of the French navy to Port-des-Galets, Réunion, where it arrived on 19 November 2000.

76. The principle of announcing entry into and departure from EEZs or fishing areas by foreign vessels appears crucial in preventing IUU fishing.

77. Unreported fishing refers to “fishing activities which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations”.<sup>55</sup>

78. Given that transit passage through the economic zone of a State, by a fishing or foreign vessel, constitutes the exercise of the freedom of navigation on high seas enjoyed by all States,<sup>56</sup> coastal States are very particular about this principle.

79. The applicant stated that, in order to take the shortest route and avoid crossing the Convention on the Conservation of Arctic Marine Living Resources (CCAMLR) fishing area, the Master of the vessel decided to traverse the EEZ of the Kerguelen Islands on a south-east bearing in order to reach Williams Bank as soon as possible.

80. The applicant further maintains that it was technically impossible for the Master to notify his entry into the EEZ or the tonnage of frozen fish carried on board, since the fax machine on board had broken down, which was duly mentioned in the logbook. The applicant finally states that the officers of *Floréal*,

54 The *Monte Confurco* case (Seychelles v. France), Application for Prompt Release, Judgment of 18 December 2000.

55 IPOA-IUU definition, above n.2.

56 Art. 90 of UNCLOS provides: “Every State, whether coastal or landlocked, has the right to sail ships flying its flag on the high seas”.

when they conducted their on-board inspection of the vessel, noted that the fax machine could only receive.

81. In its order of 22 November 2000, the court of first instance at Saint-Paul noted, among other things, that the vessel *Monte Confurco* entered into the EEZ of the Kerguelen Islands without prior authorization and without advising the head of a district of the nearest archipelago of its presence, or declaring the tonnage of fish carried on board,<sup>57</sup> and that the fact that the vessel was found in the EEZ of the Kerguelen Islands with a certain tonnage of toothfish on board without having given notice of its presence or declaring the quantity of fish carried raised the “presumption” that the whole of the catch was unlawfully fished in the EEZ of the Kerguelen Islands.

82. After noting that the vessel carried on board a large quantity of toothfish and that it was equipped with radio-telephone equipment and an INMARSAT station capable of sending and receiving telephone messages, the International Tribunal for the Law of the Sea accepted the argument of France. Paragraph 79 of the Judgment reads:

The respondent has pointed out that the general context of unlawful fishing in the region should also constitute one of the factors which should be taken into account in assessing the reasonableness of the bond. In its view, this illegal fishing is a threat to the future resources and the measures taken under CCAMLR for the conservation of toothfish. The respondent states that “among the circumstances constituting what one might call the ‘factual background’ of the present case, there is one whose importance is fundamental. That is the general context of unlawful fishing in the region concerned”. The Tribunal takes note of this argument.<sup>58</sup>

57 In violation of the provisions of art. 2 of the French Law No. 66-400 of 18 February 1966, as amended by the Law of 18 November 1997.

58 The Grand Prince case (*Belize v. France*), Application for Prompt Release, Judgment of 20 April 2001, is also a case concerning illegal fishing in the EEZ of the Kerguelen Islands. The Grand Prince is a fishing vessel. At the time of its arrest, it was flying the flag of Belize. According to the applicant, at the time of its detention, the vessel was going to be reflagged and registered in Brazil, where the vessel had been allocated a fishing licence. The Grand Prince was arrested for the same reasons as the *Monte Confurco* (see paras.35–41 of the Judgment). In contrast, the International Tribunal for the Law of the Sea declared that it had no jurisdiction to hear the application “on the basis of an overall assessment of the material placed before it. [It] concludes that the documentary evidence submitted by the applicant fails to establish that Belize was the flag State of the vessel when the application was made” (para.93 of the Judgment); See also B.H. Oxman and V.P. Bantz, *Un droit de confisquer? L’obligation de prompt mainlevée des navires*, in: V. Coussirat-Coustere, Y. Daudet, P.-M. Dupuy and P.M. Eisemann (eds.), *La mer et son droit, Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Pédone, Paris, 2003), 479–499.

*II.B.iv. The Juno Trader case*

83. The *Juno Trader* case<sup>59</sup> raises the issue of the jurisdiction of the coastal State regarding the transshipment and transport of catch in its EEZ.

84. The *Juno Trader* is a refrigerated cargo vessel flying the flag of Saint Vincent and the Grenadines. Its owner is Juno Reefers Limited—a company incorporated in the British Virgin Islands—a branch of the South African seafood company Irvin and Johnson Limited, based in Cape Town. The Master of the *Juno Trader* is Mr. Nikolay Potarykin, a Russian national.

85. By order of its owner/operator, the *Juno Trader* was, on 18 September 2004 at 2200 hours, off the coast of Nouadhibou, Mauritania, to receive a transshipment of fish caught within the EEZ of Mauritania by the fishing vessel, *Juno Warrior*. This vessel was in possession of a fishing licence issued by the Mauritanian authorities.

86. The transshipment process of the *Juno Warrior* cargo to the *Juno Trader* began on 19 September 2004 at 2240 hours—1183.83 tonnes of frozen fish were first transhipped. The fish were packaged in 39 461 cartons, each weighing 30 kg. This operation was completed on 22 September 2004 at 1800 hours. This was followed by a second transshipment of fish meal (2800 bags each weighing 40 kg). This operation, which commenced on 22 September 2004 at 1900 hours, was completed the next day, 23 September 2004 at 0330 hours.

87. Loaded with frozen fish and fish meal, and after refuelling by the vessel *Amursk* (operation completed on 24 September 2004, around 2000 hours), the *Juno Trader* left Mauritanian waters bound for Ghana, where it was to discharge its cargo, which had now been sold to the company Unique Concerns Limited as shown in several bills of lading prepared on 23 September 2004.

88. It was during the *Juno Trader's* transit through the EEZ of the Republic of Guinea-Bissau that the events giving rise to this case occurred. On 26 September 2004 at about 1700 hours, Guinea-Bissau's navy (performing routine control) apprehended the *Juno Trader* and escorted it to the port of Bissau, where it arrived on 27 September 2004 at approximately 1600 hours and was placed under the surveillance of the Guinea Bissau authorities. The Fisheries Control Technical Committee met to consider the notice of a serious fishing violation and the inspection reports concerning the arrest of the *Juno Trader* found as follows:

- (1) On 26 September 2004, inspectors from the Fisheries Inspection Service on board the vessel CACINE came across the vessel "JUNO TRADER"

59 The *Juno Trader* case (Saint Vincent and the Grenadines v. Guinea-Bissau), Request for Prompt Release, Judgment of 18 December 2004.

- anchored in the fishing zone of Guinea-Bissau at the position of 11° 42' and 017° 09', alongside the vessel FLIPPER 1.
- (2) As the vessel "Juno Trader" noticed the approach of the inspection vessel, it weighed anchor and fled and was arrested at the position of 11° 29' and 017° 13', after 2 hours and 30 minutes of hot pursuit.
  - (3) During the boarding, the captain of the vessel refused to present the logbook and the engine log, as requested by the inspectors, with a view to determining the reason for the vessel being stopped at the position where it had been found.
  - (4) No documentary or other evidence was found concerning the destination of the vessel and the fishing products on board.<sup>60</sup>

89. The *Juno Trader* was suspected of fishing or having been transhipped in the EEZ of Guinea-Bissau without due authorization, especially since according to the report on the inspection of the catch found on board, prepared by the CIPA technicians at the request of FISCAP, the species identified (sardinela, sareia, carapau, bonito, cavala and dentão) are similar to those existing in Guinea-Bissau's waters.<sup>61</sup>

90. Guinea-Bissau pointed out to the Tribunal that "illegal, unregulated and unreported fishing in the EEZ of Guinea-Bissau has resulted in a serious depletion of its fisheries resources". The Tribunal took note of this concern and the applicant expressed its understanding regarding the action taken by coastal States to fight illegal fishing but denied that the *Juno Trader*<sup>62</sup> had been engaged in any illegal activity, claiming that the vessel was only transiting through Guinea-Bissau's EEZ. An application for prompt release was made on behalf of the State flag on that basis.

91. The International Tribunal decided that Guinea-Bissau shall promptly release the *Juno Trader* and its cargo upon the posting of a bond of the amount of 308 770 euros.

92. The jurisdiction of the coastal State regarding fishing in its EEZ is recognized by the Convention. It even extends to related activities such as transshipment and transport within this zone.

93. However, transit through the economic zone is rather the exercise of freedom of navigation on the high seas. This aspect is not always easy to determine in practice because it often happens that there are support or transport vessels at anchor in fishing areas.

60 Act No. 12/CFM/04 of The Fisheries Control Technical Committee, dated 18 October 2004.

61 Ibid., above n.60, para.5.

62 *Juno Trader* case, above n.59, para.87.

*II.B.v. The Hoshinmaru case*

94. This case<sup>63</sup> deals with unreported fishing, i.e. fishing activities that have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations.

95. The *Hoshinmaru* is a fishing vessel flying the flag of Japan. On 14 May 2007, the Russian Federation provided the *Hoshinmaru* with a fishing licence for drift net salmon and trout fishing in three different areas of the EEZ of the Russian Federation.<sup>64</sup> On 1 June 2007, the *Hoshinmaru* was fishing in the EEZ of the Russian Federation off the eastern coast of the Kamchatka Peninsula when it was ordered to stop by a Russian patrol boat. It was boarded by an inspection team of the State Sea Inspection for examination. The protocol of inspection<sup>65</sup> recorded the following:

During the inspection of holds No. 10 and No. 11 the inspectors of the State Sea Inspection found out that under the upper layer of chum salmon, sockeye salmon is kept.

Therefore an offence is detected: substitution of output of one kind (chum salmon) with the other kind (sockeye salmon) and, thus, concealment of part of sockeye salmon catch in the Exploitation area No 1; misrepresentation of data in a fishing log and daily vessel report.

The Russian authorities indicated “the falsification of the species composition of the fish products. [...] consequently, about 14 tons of raw sockeye salmon were illegally captured.”<sup>66</sup>

96. The Tribunal noted that the present case is different from cases it had previously dealt with, since this case does not entail fishing without a licence. It further noted that Russia and Japan cooperate closely in respect of fishing activities in the area in question. They have even established an institutional framework for consultations concerning the management and conservation of fish stocks in the EEZ of the Russian Federation in the Pacific (promoting the conservation and reproduction of salmon and trout of Russian origin in the zone).

63 The *Hoshinmaru* case (Japan v. Russian Federation), Application for Prompt Release, Judgment of 6 August 2007.

64 Authorization to fish, from 15 May until 31 July 2007, the following: 101.8 tons of sockeye salmon; 161.8 tons of chum salmon; 7 tons of sakhalin trout; 1.7 tons of silver salmon; and 2.7 tons of spring salmon.

65 Protocol of Inspection No. 003483, drawn up on 1 June 2007 by a senior State coastguard inspector.

66 In a letter dated 2 June 2007, the Northeast Border Coast Guard Directorate of the Federal Security Service of the Russian Federation informed the Consul-General of Japan in Vladivostok of the inspection and detention of the *Hoshinmaru*. The letter also stated that the actions of the Master were in violation of the Federal Law of the Russian Federation on the EEZ and the regulation on the operation of the anadromous stocks approved by the Russian–Japanese Commission on Fisheries on 19 March 2007.

97. According to the Tribunal, monitoring of catches, which requires accurate reporting, is one of the most essential means of managing marine living resources. Not only is it the right of the Russian Federation to apply and implement such measures, but the provisions of Article 61, paragraph 2, of the Convention should also be taken into consideration to ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by overexploitation.<sup>67</sup> On this basis, the Tribunal decided that the Federation release the *Hoshinmaru* upon the posting of a bond of 10 million roubles.

98. Cases relating to IUU fishing have been repeatedly brought before the International Tribunal for the Law of the Sea, but only as an incidental part of the special procedure for prompt release. The Tribunal has therefore not had the opportunity as yet to address this issue in depth.

99. The particular nature of the procedure does not indeed permit the Tribunal to assess the actions of a coastal State in the exercise of its sovereign rights. Paragraph 3 of Article 292 of the Convention is quite explicit in this regard. The prompt release procedure is intended—very modestly—to ensure the prompt release of a vessel upon the posting of a bond and pending completion of domestic judicial proceedings.<sup>68</sup> Regional fisheries management organizations should consider requesting

67 The *Hoshinmaru*, above n.63, para.99.

68 In the *Tomimaru* case (Japan v. Russian Federation), Judgment of 6 August 2007, due to the completion of domestic judicial proceedings in the Russian Federation, “the Application of Japan no longer has any object and the Tribunal is therefore not called upon to give a decision thereon” (para. 82 of the Judgment). The *Tomimaru* is a fishing vessel flying the flag of Japan. It had a fishing licence to fish walleye Pollack and herring in an area of the western Bering Sea located in the EEZ of the Russian Federation, where it was boarded and inspected. Twenty tons of gutted walleye Pollack that were not listed in the logbook were found on board the vessel, as were some kinds of fish products that are forbidden to catch (various sorts of halibut, ray, cod as well as other kinds of bottom fish). According to Russian authorities, the quantity of fish illegally caught was established at 62186.9 kg and damages were estimated at 8 800 000 roubles (approximately US \$345 000). (See the letter dated 22 December 2006, from the Inter-district Prosecutor’s Office for Nature Protection in Kamchatka to the Consulate-General of Japan in Vladivostok, and para.25 of the Judgment of the International Tribunal for the Law of the Sea.) The City Court of Petropavlovsk-Kamtchatskii ordered the confiscation of the vessel. This decision was confirmed on 24 January 2007 by the Kamchatka District Court following an appeal filed by the owner. The latter then took action under the supervisory review procedure regarding the decision of the Kamchatka District Court. The procedure was pending before the Supreme Court of the Russian Federation at the time of filing of the application for prompt release before the International Tribunal for the Law of the Sea. The Supreme Court dismissed the complaint concerning the confiscation of the *Tomimaru* since “[...] there are no grounds for review of the Judgment on the basis of the arguments of the complaint” (para.46 of the ITLOS Judgment). The International Tribunal for the Law of the Sea noted that the decision of the Supreme Court of the Russian Federation brought to an end the procedures before the domestic courts. It considered the application to be without object (paras.79 and 81 of the Judgment of 6 August 2007). Note that all ITLOS judgments can be found on the Tribunal’s website: [www.itlos.org](http://www.itlos.org).

the advisory opinion of the Tribunal on such issues so that it can examine them more thoroughly.<sup>69</sup>

100. Meanwhile, States' practice will provide some solutions for addressing issues raised by IUU fishing. This is reflected in national legislation as well as in regional fisheries organizations. In addition to measures for conserving and managing marine-living resources, regional fisheries organizations have developed particular measures to combat IUU fishing activities that occur within their areas of competence. These measures are aimed at contracting parties of the convention that established the FSRC and non-contracting parties. These measures include control measures, enforcement, port State measures and trade-restrictive measures.

### III. State practices in the sub-region

101. State practices are reflected in their laws and regulations that give effect to the Convention on the Law of the Sea and that govern fishing activities in areas under national jurisdiction. They are also reflected in bilateral agreements between States to establish the conditions for access of foreign vessels to living resources in the EEZs. Various inter-governmental arrangements have also been developed to ensure the sound management of resources in the maritime region of West Africa covered by the SRFC.

#### III.A. National legislation

102. National legislation determines the regime applicable to fisheries as well as the terms and conditions for access to resources in areas under national jurisdiction.

103. Legislation defines the area under national jurisdiction<sup>70</sup> and includes the provisions of the Convention on the Rights of Coastal States. It sometimes goes further by establishing national fish stocks. Hence, under Senegalese law,<sup>71</sup> fisheries resources in domestic waters are part of a national heritage. The Senegalese State holds the right to fish in its waters and may extend this right to individuals or

69 See T.M. Ndiaye, *The Advisory Function of the International Tribunal for the Law of the Sea*, 9 *Chinese JIL* (2010), 565–587 (specifically §§ 58–89 and pages 580–587).

70 Senegalese Law No. 98-32 of 14 April 1998 stipulates in its art. 2 that “the maritime waters under Senegalese jurisdiction shall include the territorial sea, the contiguous zone, the exclusive economic zone, inland maritime waters as well as rivers and waterways up to the boundaries set by decree. The exclusive economic zone extends over 200 nautical miles from the baselines used to measure the territorial sea”. See also art. 2 of Law No. 2000-025 of 24 January 2000, constituting the Fisheries Code of the Islamic Republic of Mauritania.

71 *Marine Fisheries Code*, *ibid.*, § 3, art. 3; similarly, *Fisheries Code of Mauritania*, art. 3. The legislation of these two countries seem to be the most comprehensive. They are reviewed periodically to reflect the situation on the ground (a review process is currently underway in Senegal).



legal entities of Senegalese or foreign nationality. The management of fisheries resources is a prerogative of the State.

104. For this purpose, the State defines a policy to protect and maintain these resources and to ensure their sustainable exploitation in order to preserve the marine ecosystem. The State will implement a precautionary approach in fisheries management.

105. National legislation provides a more complete definition of fishing and related fishing operations than the Convention. Thus, fishing implies the act of capturing or trying to capture, retrieve or kill by any means whatsoever, biological species whose habitual or dominant living environment is water.<sup>72</sup>

106. Related fishing operations include: (a) transshipment of fish products in maritime waters under national jurisdiction; (b) storage, processing or transport of fish products in maritime waters under national jurisdiction aboard vessels prior to their first landing, and the collection of fish products at sea; (c) bunkering or supplying fishing vessels, or any other activity to provide logistical support to vessels at sea.<sup>73</sup>

107. West African States have annual or multi-annual plans for fisheries development and management. The purpose of these plans is to identify all major fisheries and their characteristics and to specify the objectives to be reached in terms of sustainable development and management.

108. They define, for each fishery, the total allowable catch or level of fishing effort as well as the total allowable bycatch, the various planning policies and the fishing licence programme. This is done in consultation with professional organizations and experts.<sup>74</sup> These tasks fall within the purview of ministers in charge of fisheries who rely on national advisory bodies on marine fisheries comprising representatives of the administration, the scientific research community and professional categories concerned.

109. Bearing in mind practices brought about by IUU fishing, national laws include very detailed provisions on conditions for granting access to foreign fishing vessels, landing, mandatory marking, catch reporting and stowage as well as reporting entry into and departure from areas under national jurisdiction.

110. Foreign fishing vessels may hence be allowed to fish in waters under national jurisdiction within the framework of international agreements or other arrangements between States and the foreign Party whose flag they fly or in whose ports they are registered.<sup>75</sup>

72 Senegalese Law, above n.70, art. 4; Mauritanian Law, above n.71, art. 4.

73 Senegalese Law, above n.70, art. 5; Mauritanian Law, above n.71, art. 4.

74 Senegalese Law, above n.70, art. 10; Mauritanian Law, above n.71, arts. 9, 10; see also the Gambian Fisheries Act of 1977.

75 See the discussion on bilateral agreements, in Section III.B.

111. Fishing vessels authorized to operate in waters under national jurisdiction are compelled to land their products and catch in the ports of these States. Landing implies the effective landing of all fish products for their storage, handling, processing and export. However, for technical reasons, national authorities may, under customs supervision, allow the transshipment of catches in mooring areas.

112. However, to ensure effective compliance with the obligation to land products or catches, the terms and conditions for monitoring and controlling catches and the refitting operations of fishing vessels are determined by order of the Minister of Fisheries.<sup>76</sup> This landing obligation is proving to be a formidable weapon in the fight against illegal fishing.

113. The marking of fishing vessels or the use of other identification systems is also of particular importance. Fishing vessels engaged in illegal fishing often practice reflagging to avoid control. One of their new inventions is to clone vessels that have been granted a fishing licence to operate in several EEZs. For this reason, fishing vessels are obliged to have an identification mark or other identification devices. They must constantly display names, letters and numbers to facilitate their identification. It is prohibited to remove, change beyond recognition, cover or hide in any way whatsoever the identification device.<sup>77</sup>

114. The practice of putting fish caught in West African waters in Asian country packages should also be noted. This is a convenient way to evade the new European Union regulation on the traceability of fish and fish products.<sup>78</sup>

115. Such practices show the importance of declaring catches. National laws stipulate that fishing vessels must submit to the competent authority statistical data and information on catches in the form required and within the deadline set by order of the minister in charge of fisheries. To this end, the master of a vessel is required to have a logbook on fishing operations.

116. National laws also include provisions for declarations to be made upon entering or leaving waters under national jurisdiction. Fishing vessels are thus required to transmit to the competent authority information on the time and place of their entry into and exit of waters under national jurisdiction, their position at regular intervals, their cargo and supporting documents or their catches, if any.<sup>79</sup>

76 Senegalese Law, above n.70, art. 44; Mauritanian Law, above n.71, arts. 17, 18, 19.

77 Mauritanian Law, above n.71, art. 33.

78 The EU Council adopted Regulation (EC) No. 1005 of 29 September 2008, establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999. The EU Regulation on illegal fishing, which is based on related FAO instruments, entered into force on 1 January 2010.

79 Mauritanian Law, above n.76, art. 37.

117. In general, national laws contain very detailed clauses on monitoring and surveillance of fishing activities. These range from investigating, identifying and imposing sanctions for offences to administrative and judicial proceedings.

118. Offences are classified under “very serious fishing violations” and “serious fishing violations”. The first include:

- (a) failure to comply with the requirement for landing of fish products in the country, illegal transshipment of catches under any circumstances whatsoever and using departures for refitting to conduct fishing activities;
- (b) the sale, purchase, transport and peddling of living species, that are to be reared, without the authorization of the Minister in charge of fisheries;
- (c) the import, export, construction, alteration or modification of any of the technical characteristics of the fishing vessel without prior authorization from the competent authority;
- (d) fishing during closed seasons, in areas closed to fishing or with prohibited gear or techniques;
- (e) the intentional destruction or damage to boats, fishing gear or nets belonging to others.<sup>80</sup>

119. “Serious violations” of the provisions of Senegalese law include: (a) non-compliance with the rules governing fishing related operations; (b) mesh size violations; (c) the capture, possession, landing, sale and marketing of species whose size or weight are below the minimum allowed; (d) the capture and retention of marine species in violation of the related provisions; (e) violation of standards for bycatch and their destination; (f) false statements on technical specifications of vessels; (g) failure to comply with the requirement to provide information on entry and exit points as well as on the various positions of the vessel and on captures; (h) violation of the provisions concerning the marking of vessels; (i) non-compliance with the requirement to include statistical data and information on catches in fishing logbooks and providing false or incomplete data or information; (j) the intentional destruction or damage to fishing boats, gear or nets belonging to others; (k) the destruction or concealing of evidence of an offence; (l) refusal of a fishing vessel to comply with an order to stop given by a surveillance ship; and (m) non-compliance with the rules on the catch limits of certain species.<sup>81</sup>

80 Mauritanian Law, above n.71, Section 3, Sub-section 1, art. 64; Senegalese Law, above n.70, Title 8, Chapter 4, art. 85. The Senegalese law adds two other very serious offenses: e) the use of explosives or toxic substances for fishing or their transport aboard fishing vessels without authorization, and d) the utilization of a fishing vessel for a different type of operation than that for which it has been granted a fishing licence.

81 Senegalese Law, Maritime Fishing Code, above n.86.

120. Though national legislation covers in great detail fishing activities in areas within the States' jurisdiction, it is supplemented by bilateral agreements concluded between the various States in West Africa.

### **III.B. Bilateral agreements**

121. States participate in the activities of sub-regional and regional fisheries cooperation agencies in order to negotiate and sign international agreements and other mechanisms on issues of common interest. These relate primarily to cooperation in the fisheries sector in general and the joint management of stocks in particular. They also cover the harmonization and coordination of resource management and development systems as well as the determination of conditions of access to fish resources in the States concerned and the adoption of coordinated measures for monitoring and controlling the activities of fishing vessels.

122. The joint management of stocks reflects the need for cooperation and coordination as indicated in the UNCLOS.<sup>82</sup> States concerned should seek, directly or through appropriate sub-regional or regional organizations, to agree on the measures necessary to coordinate and ensure the conservation and development of such stocks.

123. Agreements generally provide that consultations will be held among ministers in charge of fisheries during the design stage of development plans relating to shared stocks in the sub-region, with a view to harmonize and coordinate the respective national fisheries development and management plans. These plans are of vital importance to States in the sub-region. They identify the major fisheries, specify development and management objectives, determine the allowable catch or level of fishing effort and define the criteria or conditions for granting fishing licences.

124. An increasing number of bilateral agreements have been concluded pertaining to the determination of conditions of access to fish resources of States within the sub-region. States acknowledge reciprocal fishing rights for vessels of both parties in their respective territorial waters. They also define the conditions for fishing vessels of one party to operate in waters under the jurisdiction of the other.

125. Fishing vessels flying foreign flags are allowed to operate in these waters within the framework of a fisheries agreement between the West African State and the flag State or organization—the European Union—representing this State, or when chartered by nationals of the coastal State.

126. Agreements on access to fisheries resources of countries in the sub-region include comprehensive provisions whose effective implementation can be decisive in the fight against illegal fishing. These agreements specify the number and characteristics of fishing vessels allowed as well as the types of fishing. They set the amount

82 UNCLOS, art. 63, para.1.

for the granting of fishing licences and stress the obligation for authorized fishing vessels to be marked.

127. The agreements also provide for owners to regularly transmit data on catches to the relevant authorities. These agreements commit the responsibility of the flag State or the organization in charge of taking the appropriate measures to ensure compliance by vessels, with the terms and conditions of the agreements as well as with the relevant provisions of the laws and regulations of the State in the sub-region.<sup>83</sup>

### III.C. The Sub-Regional Fisheries Commission

128. Cooperation is also fostered within the SRFC.<sup>84</sup> It was created by the Convention of 29 March 1985 between the Governments of Cape Verde, The Gambia, Guinea, Guinea-Bissau, Mauritania and Senegal. Sierra Leone acceded to the

83 Bilateral agreements on fisheries are many in the sub-region: Cape Verde/Guinea, April 1989 (Reciprocal access); Cape Verde/Guinea-Bissau, June 1995 (reciprocal access); Cape Verde/Mauritania, 18 November 1995 (General Convention: resource conservation, sustainable level of exploitation, monitoring); Cape Verde/Mauritania, 25 April 2000 (Memorandum of Understanding on the coordination of surveillance and pursuit); Cape Verde/Senegal, 29 March 1985 (Reciprocal access and number of operational vessels); Cape Verde/Senegal, 17 November 1994 (Coordination of surveillance and pursuit); The Gambia/Senegal, 11 November 1992 (Reciprocal access); The Gambia/Senegal, 29 March 1993 (Cooperation on surveillance); The Gambia/Senegal, 25 January 1994 (Exchanges on gross registered tonnage per type of vessel); The Gambia/Senegal, 7 May 1999 (Procedures for the granting of licence); Guinea/Guinea-Bissau, 21 October 1995 (Conditions relating to the landing of catches in each State); Guinea/Guinea-Bissau, 7 June 1996 (Agreement and regulations for the coordination of surveillance and pursuit operations); Guinea-Bissau/Senegal, 22 December 1978 (Reciprocal access); Guinea-Bissau/Senegal, 2 May 1997 (Development and exploitation of fisheries resources in the common zone); Mauritania/Senegal, 14 January 2000 (Agreement on pursuit); Mauritania/Senegal, 14 January 2000 (Settlement of disputes relating to artisanal fisheries). See also the table on additional bilateral agreements listed by Mr. Kelleher in the Report of Mr. Daniel Owen, Legal and institutional aspects of management arrangements for shared stocks: with reference to small pelagics in Northwest Africa, FAO, the Nansen Programme, Fisheries Management and Marine Environment, GCP/INT/730/NOR, (October 2001), 53–54. On “Agreements relating to certain aspects of the demarcation of maritime borders”, the report states at page 66 that “the only remaining maritime boundary to be demarcated between the States concerned, is that between Mauritania and Senegal”. There is a grave error. Indeed, it was at the Senegalo-Mauritanian Ministerial Conference of 7–9 January 1971—following several others which began in 1969—that both parties agreed to retain the parallel of latitude 16°04' N as the maritime border. This line is strictly adhered to as regards oil concessions of the two States. The fact that this important decision was included in a report and not a formal treaty may have been misleading.

84 Convention of 29 March 1985 on the establishment of the SRFC, amended on 14 July 1993 in Praia, Cape Verde. See Ndiaye and Tavares de Pinho, *Une expérience africaine de coopération halieutique: la Commission Sous-Régionale des Pêches*, in: 8 *Espaces et Ressources Maritimes* (1994), 237–252.

Convention in 2004.<sup>85</sup> The organs of the Commission are the Conference of Ministers, the Coordinating Committee and the Permanent Secretariat.<sup>86</sup>

129. The Conference of Ministers in charge of Fisheries of Member States is the supreme authority of the Commission. Its mandate is to define objectives with regard to sub-regional cooperation and to render decisions on all issues relating to the preservation and exploitation of fisheries resources in the sub-region. However, its harmonization efforts in this area must take into account national fisheries policies of Member States.<sup>87</sup>

130. The Coordinating Committee comprises directors of fisheries or other experts designated by Member States. Its mandate is to collaborate with the Permanent Secretary, particularly with regard to the organization of meetings and the implementation of decisions of the Conference of Ministers. The Committee also makes recommendations to the Conference of Ministers on issues to be considered. It is the Commission's technical advisory body.<sup>88</sup>

131. The Permanent Secretariat is the executing body of the Commission. It is headed by a Permanent Secretary,<sup>89</sup> appointed by the Conference of Ministers for four years and renewable once. The duties of the Permanent Secretary are various. He implements the decisions of the Conference of Ministers and organizes planned meetings. He prepares the documents relating to development measures needed, seeks funding and represents the institution *vis-à-vis* third parties, among other duties.

132. The SRFC has extensive authority. It "aims to harmonise, in the long term, the policies of member states for the preservation, conservation and exploitation of their fisheries resources and to strengthen their cooperation for the well-being of their respective populations."<sup>90</sup> It is on this basis that the Commission "conducted significant standard-setting and operational activities".<sup>91</sup> An institutional re-organization was conducted at the SRFC in 2009, following which a department to harmonize policies and legislation was created to assist the Permanent Secretary in the areas that are strategic to the Commission as indicated in Article 2 of the 1985 Convention.

133. As part of its standard-setting activities, the Commission has produced legal instruments for the harmonization of certain aspects relating to the fisheries policies of States. These include the Convention on the determination of conditions of

85 On the establishment of the SRFC, see Ndiaye and Tavares de Pinho, above n.84, 238–239.

86 Convention of 29 March 1985, above n.84, art. 4.

87 *Ibid.*, art. 5. Arts. 6–8 focus on the Chairmanship of the Conference of Ministers, sessions and decisions.

88 *Ibid.*, art. 9.

89 See *ibid.*, arts. 12–15.

90 *Ibid.*, art. 2.

91 Ndiaye and Tavares de Pinho, above n.84, 242–247.

access and exploitation of the fisheries resources off the coasts of the SRFC Member States of 14 July 1993, commonly referred to as CMA, the Convention on sub-regional cooperation in the exercise of maritime hot pursuit of 1 September 1993 and the Protocol regarding the practical modalities for the co-ordination of surveillance activities in the Member States of the SRFC of 1 September 1993.

134. The CMA sets the minimum conditions of access for vessels operating in Member States of the SRFC. It includes all resources and provides that each State Party shall authorize vessels flying the flag of another State Party to access its territorial waters according to the availability of resources and on the basis of agreements or arrangements.

135. The maximum duration for international agreements is two years and the latter must include safeguards to protect the resource. A form for the registration of fishing vessels was adopted and attached to the CMA, of which it is an integral part.

136. The activities of factory, feeder or pickup vessels are regulated. Minimum mesh sizes are defined for certain types of fishing gear. The CMA sets forth the obligation of partial landing of catches, the declaration of catches and the positions of fishing vessels. Foreign vessels are required to have observers onboard and to employ registered sailors from the coastal State. Provisions have been made with regard to the monitoring of fishing activities and the punishment of offences, particularly in cases of recidivism. However, moving from the legal thought process to the implementation stage is not a smooth transition.<sup>92</sup>

137. The national management of fisheries resources has apparently shown its limits and the regional approach should be preferred. As a result, the idea to revise the CMA Convention has emerged in the light of the rapid evolution of the fisheries sector. Countries in the sub-region have realized that the law should not overlook the realities that it regulates lest it is reduced to pure fiction. What the legal expert calls “the facts”, i.e. the sociological, historical, political, economic and other realities must inform the law and cannot be overlooked when assessing a particular institution such as IUU fishing.

138. The SRFC organized a series of activities in 2009 and 2010 to advance the process of revising the CMA Convention.<sup>93</sup> Workshops on the revision of the CMA

92 See the report of Messrs Modou Thiam, Souleymane Nabi Bangoura and Chérif Ould Touellib, Communication IV: Fisheries Agreements and Capacity Management in the Member States of the Sub-Regional Fisheries Commission (SRFC), Archives and documents of the FAO Fisheries Department (28 September 2001) ([www.fao.org/DOCREP/005/Y4643F07.htm/](http://www.fao.org/DOCREP/005/Y4643F07.htm/)).

93 Sub-regional workshop on the “Revision of the Convention on Minimum Access Conditions” held in Dakar, on 22–24 April 2009, followed by several workshops organized under the aegis of the SRFC in each of the seven Member States. Finally, a meeting was held at the SRFC headquarters in Dakar on 5 and 6 October 2010 to discuss the reports produced by two consultants hired by the Organization in this regard. See the report prepared by Mrs. Dienaba Bèye Traoré, Head of the Policy and Harmonization of Laws Department (DHPL/PRSP), Dakar (6 October 2010).

adopted 42 recommendations forming the negotium of the draft revised CMA Convention to be submitted to the meeting of the SFRC's Conference of Ministers responsible for fisheries<sup>94</sup> in December 2010.

139. Regarding the adoption of coordinated measures for the surveillance and control of activities of fishing vessels, States in the sub-region, "conscious of the need to pool their efforts in order to effectively protect and monitor waters under their respective jurisdictions", adopted the Convention on sub-regional cooperation in the exercise of maritime hot pursuit.<sup>95</sup>

140. The Convention sets forth the rules and modalities for strengthening cooperation between the agencies responsible for fisheries surveillance in State Parties. It defines the general principles governing the right to hot pursuit of any State Party with regard to any vessel attempting to escape control operations by an aircraft or a surveillance vessel of that State. The Convention is directed primarily at vessels flying foreign flags and that do not have any licence to operate in the sub-region.<sup>96</sup>

141. As indicated by the FAO,<sup>97</sup> fishing has, for a very long time, been an important food source for mankind, providing employment and economic benefits to those who practise it. However, with increased knowledge and the dynamic development of the fisheries sector, people have begun to understand that aquatic resources, although renewable, are finite and must be properly managed if their contribution to the nutritional, economic and social well-being of the world's growing population is to be maintained.

94 These recommendations include: define the principles that should guide the registration and flagging of fishing vessels; establish a record of fishing vessels in each Member State of the SRFC; sub-regional fisheries register (mechanisms and conditions); condition the access of foreign fishing vessels to the existence of a surplus of fisheries resources; adopt the technical specifications for the marking and identification of fishing vessels; encourage foreign fishing vessels to land their catches in ports within the sub-region; introduce the principle of a mandatory logbook; maintain the principle of having an observer on-board any fishing vessel; maintain the principle of the declaration of entry into and exit from EEZs or fishing zones by foreign vessels; adopt the rule that the transshipment of catches should only be carried out at ports and harbours of States in the sub-region; subject all industrial fishing vessels, domestic or foreign, to the requirement to be equipped with a tracking device VMS; establish a list of IUU fishing vessels in the sub-region; introduce a penalty system for IUU fishing, etc.

95 Convention on sub-regional cooperation in the exercise of maritime hot pursuit of 1 September 1993 between Cape Verde, The Gambia, Guinea, Guinea-Bissau, Mauritania and Senegal.

96 On the circumstances that led to the drafting of the Convention, see Ndiaye and Tavares de Pinho, above n.84, 243–245. The issue of the "Sub-regional status of observers" and that of the "Marking of fishing vessels" must also be noted to complete the picture of standard-setting actions. The SRFC has, moreover, initiated significant actions: the sub-regional marine database, the sub-regional register of fishing vessels and joint research programmes.

97 IPOA-IUU, above n.3, XI.



142. Some experts predict that at the current pace, there will be no more fish in the world in 2048. Determined action must therefore be taken by States in the sub-region and by regional fisheries management organizations.

143. States must pool their resources and encourage joint surveillance operations in areas under their jurisdiction. They must coordinate their actions and set up very precise measures that they will be able to implement, to fight against IUU fishing. In this regard, they must demonstrate genuine political will which would be a strong signal to pirate vessels.

144. Today, the scope of the SRFC needs to be extended for it to properly perform its duties. It must be strengthened,<sup>98</sup> and should move on from being an inter-governmental organization on fisheries cooperation to a regional fisheries management organization equipped with the necessary resources and expertise, in other words, a shift from cooperation to integration.

98 See, for example, Elise Anne Clark, *Strengthening regional fisheries management: the application of the duty to cooperate under the Law of the Sea Convention*, Intern's Report, ITLOS, Hamburg (2010).

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