



Cooperation and unregulated fishing: interactions between customary international law, and the European Union IUU fishing regulation



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ABSTRACT

The extent to which flag States are bound by the conservation rules of regional fishery management organisations is an important question in the quest to reduce unregulated fishing. The European Union implemented a trade suspension against Cambodia under Council Regulation 1005/2008, in response to unregulated fishing by Cambodian vessels in high seas areas managed by regional fishery management organisations. Limitations in the arguments underpinning the decision evidence the flaws of unregulated fishing as a legal concept, underlining the need for it to be appropriately interpreted and contextualised in the international legal framework. Clarity on the differences between conventional and customary sources of international legal obligation, and their implications for State consent, should guide the implementation of the Regulation to maximise the normative potential of resulting practices.

1. Introduction

The United Nations (UN) Convention on the Law of the Sea (LOSC) sets out the fundamental international legal obligations of States harvesting the high seas[1]. Amongst other provisions, the LOSC enshrines a general obligation to protect and preserve the marine environment [2], as well as concomitant cooperation duties[3]. The general obligation has been judicially interpreted to include the conservation of the living resources of the ocean[4]. The customary character of the obligation means that it is binding upon all States[5]. Competitive unregulated fishing for straddling or highly migratory fish stocks in high seas areas managed by Regional Fishery Management Organisations (RFMOs) has been a persistent problem[6], enduring beyond the adoption of the LOSC[7]. The resulting overfishing prompted the development of legal and voluntary instruments containing more specific cooperation obligations *vis-à-vis* RFMOs. Of particular relevance are the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement)[8] and the UN Fish Stocks Agreement (UNFSA)[9]. Whilst these agreements provide a detailed and comprehensive framework for cooperation, their conventional nature means they are not binding on States who do not consent to be bound by them. This outcome is underpinned by the general international law principle commonly known as *pacta tertiis*[10].

In 2001 a voluntary instrument, the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU)

Fishing (IPOA)[11], was adopted to complement the existing legal framework, and to assist States in implementing effective solutions against IUU fishing[12]. The European Union (EU) has integrated a number of provisions contained in the IPOA, including its controversial definition of unregulated fishing, into Council Regulation (EC) 1005/2008 (the IUU Regulation), which entered into force in January 2010[13]. The IUU Regulation was designed to enhance cooperation in the fight against IUU fishing, and applies to vessels harvesting marine living resources destined to EU markets, *via* product traceability and communication procedures with the vessels' flag States. Where significant IUU fishing activity is identified and verified, a process of flag State engagement is undertaken, which may lead to the identification of a country as non-cooperating, and to a trading suspension[14]. In 2012, the European Commission issued a decision under the IUU Regulation in respect of unregulated fishing activities by vessels flagged to Cambodia in RFMO managed areas of the high seas, which was reaffirmed in 2013 ('the Cambodia decisions')[15]. This article examines the arguments adduced by the Commission in respect of the customary international legal obligations of Cambodia, who was not a party to the LOSC, the Compliance Agreement, the UNFSA, or the constitutive agreements of the relevant RFMOs at the time. Seeking to identify the sources of legal obligation relevant to the case, this article investigates the customary dimension of the duty to cooperate in the conservation of high seas living resources for the purposes of addressing unregulated fishing. Further, it explores the general interest, and the role of conduct standards, concluding with a reflection upon how the implementation

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of the IUU Regulation may contribute to legal innovation.

Part one of the article identifies unregulated fishing, as described by paragraph 3.3.1 of the IPOA in respect of fishing that is ‘inconsistent’ with the rules of RFMOs, as problematic. Part two analyses the manner in which the Regulation interprets and reformulates this controversial aspect of the IPOA. Given the leadership of the EU as a global seafood market, the article outlines how considerations of power asymmetry call for sensitivity to international law in the implementation of the IUU Regulation. Evaluating the extent to which this need has been observed, part three examines the implementation of the IUU Regulation through the Cambodia decisions from the perspective of international legal sources. It frames and evaluates the arguments adduced by the Commission with regard to the international legal obligations of Cambodia, seeking to explore the difference between conventional commitments and customary sources of legal obligation, and the effect of the latter on the need for State consent. In particular, the article investigates whether the application of RFMO rules to non-cooperating States may transcend *pacta tertiis* concerns through considerations of general interest, or by reflecting widely shared conduct standards established through State practice. Recent jurisprudence of international tribunals that was not available to the Commission at the time of the Cambodia decisions is relied on for some of the analysis, given its relevance as a guide for future implementing action under the IUU Regulation. The conclusion calls for increased awareness of the role and normativity of customary international law, and the potential for its sensitive development and definition through State practice resulting from the implementation of the IUU Regulation.

2. Unregulated fishing and the IPOA

Paragraph 3 of the IPOA sets out the now ubiquitous, if much criticised, definition of IUU fishing[16]. Most of its categories appear relatively uncontroversial, if lacking in precision. In paragraphs 3.1 and 3.2, illegal and unreported fishing concern contraventions of domestic or international legal rules. Paragraph 3.3.2 describes unregulated fishing in the context of ocean areas where there are no applicable conservation and management measures, but where flag States still have obligations under international law. By contrast, paragraph 3.3.1 of the IPOA describes a particular type of unregulated fishing as follows:

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

Paragraph 3.3.1 suggests that certain unregulated fishing may be ‘inconsistent’ with RFMO rules, irrespective of whether an actual contravention of international law exists. Hence, ‘inconsistent’ unregulated fishing appears to operate outside the categorical absolutes implied in a binary ‘legal *versus* illegal’ analysis. From this perspective, the text of paragraph 3.3.1 of the IPOA could be interpreted to declare the RFMO conservation and management rules as conduct standards that flag States are expected to uphold, irrespective of their legal force. Yet, the extra-legal nature of the ‘inconsistent’ unregulated fishing category appears to be subsequently neutralised by a strict interpretation of paragraph 3.4 of the IPOA, whereby sanctions by States in respect of such unregulated activities should be preceded by international legal analysis to determine whether they are appropriate:

‘Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action’.

Nevertheless, the ambiguity of the word ‘may’ could be exploited to suggest that States could have discretion in determining what standards

of conduct could attract sanctions. Some cases, such as those involving fishing activities that are obviously destructive, may not be controversial. However, other cases may present difficulties, such as where a flag State has not agreed to uphold the conservation rules of an RFMO, permitting its vessels to operate in the RFMO management area, and potentially undermining any conservation efforts made by the RFMO member States. A reading of paragraph 3.4 of the IPOA that is coherent with the regular meaning of the words in the text, and with the international legal context in which that instrument operates, would imply a need for prior legal analysis to assess whether a breach exists[17]. The above-mentioned interpretation of paragraph 3.4 that is exploitative of the ambiguity in the text, by contrast, would appear to permit RFMO rules to be considered appropriate conduct standards for application to a flag State without prior consideration of their legal force.

The discrepancy between the possible interpretations of paragraph 3.4 in respect of ‘inconsistent’ unregulated fishing reflects uncertainty in the way in which differing international regimes interact[18]. Different regimes have generated conduct standards reflecting specific problem-solving approaches to IUU fishing control not explicitly rooted in general obligations of international law. In particular, a number of international actors have adopted measures of an economic character in order to address the financial drivers that motivate IUU fishing activity [19]. The overall objective of such measures is to de-motivate commercial actors who engage in IUU practices by removing market opportunities, and indirectly to incentivise better regulation by their flag States[20]. Insofar as measures of this nature can operate as barriers to trade, they require compliance with the rules of the World Trade Organization (WTO)[21]. However, literature on the market measures envisaged in the IPOA has conveyed concerns that ambiguities in the interaction between the different legal frameworks established by the WTO and LOSC could be exploited to the detriment of equity, and the coherence of international law[22]. The EU is one of several international actors who have responded to IUU fishing through the adoption of economic measures. The IUU Regulation, as the instrument through which those measures are applied, has been criticised for lacking clarity in its conduct standards, resulting in difficulty in the assessment of possible frictions with the rules contained in the LOSC and the WTO treaties[23]. The following paragraphs examine some of these claims from the perspective of the sources of international legal obligation, and the general interest, with a focus on the implementation of the IUU Regulation in respect of ‘inconsistent’ unregulated fishing.

3. Interactions of the IPOA, the IUU Regulation and international law

Given that the EU is a leader in the global fight against IUU fishing, its approach to the design and implementation of economic measures to combat IUU fishing calls for attention and analysis. The measures adopted by the EU are articulated under the framework of the IUU Regulation and related legislation, whereby processes for the identification of the IUU origin of seafood products destined to EU markets are established[24]. The IUU Regulation imports paragraph 3.3.1 of the IPOA describing ‘inconsistent’ unregulated fishing[25]. It, however, omits paragraph 3.4 of the IPOA, whereby prior assessment under international law is called for. Instead, the IUU Regulation indicates that sanctioning measures may be adopted in response to acts or omissions that ‘may diminish the effectiveness’ of international conservation and management measures[26]. Additionally, Regulation Article 31.3 indicates that the Commission ‘may’ take into account possible failures by the flag State to discharge international legal obligations for the purposes of declaring a country as non-cooperating under the IUU Regulation[27]. The standards of conduct that the IUU Regulation imposes on flag States differ from flag State obligations under the LOSC, largely reflecting those listed in UNFSA Article 21.11, and similarly establishing a presumption of wrongdoing by the flag State if certain

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