

**THIRD WORLD APPROACH TO INTERNATIONAL
LAW ANALYSIS ON LAW ENFORCEMENT AGAINST
ILLEGAL, UNREPORTED AND UNREGULATED
FISHING IN INDONESIA**

by

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*Thesis
Submitted to Flinders University
for the degree of*

Master of Laws

College of Business, Government, and Law

16 January 2019

CONTENTS

ABSTRACT.....	VI
DECLARATION.....	VIII
ACKNOWLEDGEMENTS.....	IX
LIST OF TABLES AND FIGURES	X
1 TABLES.....	X
2 FIGURES.....	X
LIST OF ACRONYMS	XI
CHAPTER I: INTRODUCTION.....	1
1 RESEARCH PROBLEM	1
2 RESEARCH OBJECTIVE	8
3 THEORETICAL FRAMEWORK	9
4 RESEARCH QUESTIONS	13
5 THESIS ARGUMENT.....	14
6 SCOPE AND LIMITATION	14
7 RESEARCH METHOD	15
8 SIGNIFICANCE OF THE RESEARCH	16
9 THESIS STRUCTURE	16
CHAPTER II: ILLEGAL, UNREPORTED AND UNREGULATED FISHING IN INDONESIA.....	19
1 INTRODUCTION	19
2 ILLEGAL, UNREPORTED AND UNREGULATED FISHING IN INDONESIA.....	23
A <i>IUU Fishing in Indonesia According to Scholars</i>	25
B <i>Criminalisation Against Indonesian Small-Scale Fishers</i>	29
3 THE UNIQUENESS OF INDONESIA AS A DEVELOPING STATE AND ITS CONTRIBUTION TO ILLEGAL UNREPORTED AND UNREGULATED FISHING IN INDONESIA.....	32

7	THE FREEDOM OF NAVIGATION IMPACTS TO LAW ENFORCEMENT ARRANGEMENTS IN THE SEA UNDER NATIONAL JURISDICTION	92
	A <i>The Problem of Enforcement in the Territorial Sea and Archipelagic Waters</i>	92
	B <i>The Problem of Enforcement in EEZs</i>	99
8	CONCLUSION	101
	CHAPTER IV: THE AMBIGUITY OF THE IUU FISHING DEFINITION AND ITS IMPACTS ON INDONESIA	104
1	INTRODUCTION	104
2	THE AMBIGUITIES OF THE IUU FISHING DEFINITION: THE TOOLS OF HEGEMONY.....	107
	A <i>The Definition of Illegal, Unreported and Unregulated Fishing</i>	107
	B <i>The Ambiguity of the IUU Fishing Definition</i>	109
	C <i>The Broad Scope of the IUU Fishing Definition: An Ahistorical Approach to Finding a Solution for Overfishing and Its Impacts on Indonesia</i>	113
	D <i>Ahistorical Approach to Solving the Overfishing Problem</i>	116
	E <i>The Hegemonic Nature of the Fisheries Conservation Regime According to the International Fisheries Legal Framework</i>	118
	F <i>The Best Scientific Evidence as the Authoritative Requirement in Fisheries Conservation and Management</i>	120
	G <i>Species/Stocks Based Fisheries Conservation and Management Measures</i>	123
3	THE AMBIGUITY OF THE IUU FISHING DEFINITION AND ITS IMPACTS ON INDONESIA'S EFFORTS TO COMBAT IUU FISHING	134
	A <i>Small-Scale Fisheries Crime</i>	136
	B <i>IUU Fishing as Organised Crime or Transnational Organised Crime</i>	138
	C <i>State-Corporate Crime and IUU Fishing</i>	143
4	CONCLUSION.....	149

CHAPTER V: CONCLUSION AND RECOMMENDATIONS	152
1 THE AMBIGUITIES OF THE INTERNATIONAL FISHERIES LEGAL FRAMEWORK AND THE IUU FISHING DEFINITION: TOOLS OF HEGEMONY	152
2 THE IMPACTS OF THE AMBIGUITY OF THE IUU FISHING DEFINITION ON INDONESIA’S LAW ENFORCEMENT MEASURES AGAINST IUU FISHING	164
3 RECOMMENDATIONS.....	168
4 THESIS LIMITATION	175
5 FUTURE STUDY.....	176
BIBLIOGRAPHY	178

ABSTRACT

The ambiguities of the international fisheries legal framework and the illegal, unreported, and unregulated fishing (IUU fishing) definition leads Indonesia to be portrayed as reluctant to implement and comply with international fisheries management and conservation. This is because Indonesia allows its small-scale fishers to conduct mass unreported and unregulated fishing in Indonesia's waters and in the exclusive economic zone (EEZ). Some scholars also question whether Indonesia's recent blow-up and sink IUU fishing vessels policy complies with international law. On the other hand, Indonesia suffers great loss because of IUU fishing due to its geographic situation and limited capacity to guard its waters and EEZ. Additionally, limitations inherent in the international fisheries legal framework hamper Indonesia's efforts to combat IUU fishing. Indonesia's experience demonstrates the adverse impacts of the ambiguities in international fisheries legal framework on developing states. However, study on this issue is scarce. Indeed, research in this area predominately focuses on supporting the implementation of the existing international fisheries management and conservation measures, even though history has revealed these measures were developed and proposed by the United States to be adopted in the international fisheries legal framework largely to support the United States' own fisheries interests.

Employing TWAIL theory to recognise the practice of hegemony in international law, this thesis analyses the ambiguities in the international fisheries legal framework and the IUU fishing definition, which facilitates the hegemony of developed states in international fisheries management and conservation, and challenges Indonesia's efforts to combat IUU fishing. To do so, it analyses the historical context of the development of the international fisheries legal framework, using key law and policy texts, including those related to the international fisheries

legal framework, as well as Indonesia's regulations and policies to combat IUU fishing. It also examines Indonesia's enforcement measures directed at combating IUU fishing in order to explore the gap between the international fisheries legal framework and Indonesia's fisheries law enforcement framework.

This study finds that both the ambiguity of provisions in the international fisheries legal framework and the ambiguity of IUU fishing definition facilitate the hegemony of the developed states against developing states in accessing and managing fisheries. This study provides a valuable contribution towards the improvement of Indonesia's policy and measures to combat IUU fishing, and fills the gap in the international academic discussion pertaining to the inequality between developed and developing states in fisheries conservation and management.

DECLARATION

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.



Arip Hidayatulloh

ACKNOWLEDGEMENTS

Firstly, I offer my sincerest gratitude to my supervisor Dr. Nerida Chazal and Dr. Maria Giannacopoulos, who patiently guided me through the steep and winding road of my study. I am thankful for their continuous support, guidance, and time.

I remain indebted to Catherine Schubert for her patient, kindness, and priceless help to do peer review and immeasurable support throughout the final years of my study.

Secondly, thank you to the Australia Awards Scholarship who provided fund for my study at Flinders University and also a big thank you to Directorate General of Surveillance for Marine Resources and Fisheries, Ministry of Marine Affairs and Fisheries of Indonesia who permit me to do the study.

To my family, thank you for your understanding, support and prayers. My mother, wife, sons, daughter and all of my brothers and sister you are indeed the greatest supporter of me. Especially to Donna Mutiara Muchtar, my best friend, thank you for all of your lovely support and prayers for the success of my study.

Finally, I must express my profound gratitude to all people that I cannot mention them one by one. Indeed, this thesis could not have been done without help and assistance from all of kind people around me. Thank you.

LIST OF TABLES AND FIGURES

1 Tables

Table 1. Illegal Fishing Vessels Apprehended by Fisheries Patrol	35
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2 Figures

Figure 1. Fisheries Violations Hotspots Maps	24
--	----

Figure 2. Origin and Routes of Foreign Illegal Fishing to Indonesia's EEZ and Territorial Seas.....	41
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Figure 3. The Location of Fisheries Courts in Indonesia.....	50
--	----

Figure 4. The Maritime Zones According to the <i>LOSC</i>	72
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Figure 5. Indonesia's archipelagic waters.....	73
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LIST OF ACRONYMS

AIS	Automatic Identification System
ASEAN	Association of Southeast Asian Nations
AUD	Australian Dollar
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCRF	Code of Conduct for Responsible Fisheries
CCSBT	Commission for the Conservation of the Southern Bluefin Tuna
CDS	Catch Documentation Scheme
CFP	Common Fisheries Policy
DG-SMRF	Directorate General of Surveillance for Marine Resources and Fisheries
EEZ	Exclusive Economic Zone
EJF	Environmental Justice Foundation
EU	European Union
FAO	Food and Agriculture Organisation
FFVs	Foreign Fishing Vessels
GIS	Geographic Information System
GPS	Global Positioning System
GT	Gross Tonnage
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
IFVs	Indonesian Fishing Vessels
INTERPOL	International Police
IOM	International Organisation for Migration
IOTC	Indian Ocean Tuna Commission
IPOA	International Plan of Action
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, Unreported, and Unregulated
LOSC	Law of the Sea Convention
MCS	Monitoring, Control, and Surveillance

MMAF	Ministry of Marine Affairs and Fisheries of Republic of Indonesia
MSC	Marine Stewardship Council
MSY	Maximum Sustainable Yield
NPOA	National Plan of Action
OECD	Organisation for Economic Cooperation and Development
PSM	Port State Measures
RPOA-IUU	Regional Plan of Action to Promote Responsible Fishing Practices Including Combating Illegal, Unreported and Unregulated Fishing in the region of ASEAN plus Australia
RFMO	Regional Fisheries Management Organisation
Rp	Rupiah
SBT	Southern Bluefin Tuna
TAC	Total Allowable Catch
TWAIL	Third World Approach to International Law
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNODC	United Nations Office on Drugs and Crime
USA	United States of America
USD	United States Dollar
VMS	Vessels Monitoring System
WCPFC	Western and Central Pacific Fisheries Commission
WWF	World Wildlife Fund

CHAPTER I:

INTRODUCTION

1 Research Problem

Indonesia suffers a great loss caused by illegal, unreported and unregulated (IUU) fishing. According to the Indonesian Ministry of Marine Affairs and Fisheries, Indonesia loses more than USD 20 billion every year from IUU fishing by foreign fishing fleets.¹ To curb this crime, Indonesia has continuously developed its fisheries legal framework and law enforcement methods. Among the major actions taken by Indonesia are: a moratorium on fishing licenses for Indonesian ex-foreign fishing vessels, compliance audits against Indonesian ex-foreign fishing vessels, a ban on all transshipment activities in Indonesia's waters and EEZ, the establishment of the Indonesian special task force to combat IUU fishing (TASK FORCE 115), and the policy to destroy and sink IUU fishing vessels.²

The recent developments of Indonesian law enforcement against IUU fishing raises concern among its neighbouring countries such as China, Vietnam and Malaysia.³ Some experts consider that Indonesia has inappropriately applied law enforcement actions

¹ See *"Indonesia Fisheries: 2015 Review": A Report on Trends in Coastal Marine Resources and Fisheries Management Indonesia*. (California Environmental Associates, 2016) 16; Ministry of Marine Affairs and Fisheries Republic of Indonesia, *Indonesian government establish the illegal fishing taskforce (Pemerintah bentuk satgas pemberantasan illegal fishing)* (2014) <<http://kkp.go.id/index.php/pers/pemerintah-bentuk-satgas-pemberantasan-illegal-fishing/>>.

² Susi Pudjiastuti, 'Fisheries Crime as Transnational Organized Crime' (Presentation delivered at the 2nd INTERPOL Environmental Compliance and Enforcement Events, Singapore, 16-18 November 2015).

³ See Zhang Hongzhou, *Indonesia's War on Illegal Fishing Sinks China's Catch* (2015) The Establishment Post <<http://www.establishmentpost.com/indonesias-war-illegal-fishing-impact-china/>>; Ahmad Almaududy Amri, *Is Indonesia's 'Sink the Vessels' Policy Legal?* (2015) The Diplomat <<http://thediplomat.com/2015/01/is-indonesias-sink-the-vessels-policy-legal/>>; Prashanth Parameswaran, *Vietnam 'Deeply Concerned' by Indonesia's War on Illegal Fishing* (2015) The Diplomat <<http://thediplomat.com/2015/08/vietnam-deeply-concerned-by-indonesias-war-on-illegal-fishing/>>.

inconsistent with the international law of the sea.⁴ The main reason for this concern is that Indonesia applies the “blow up and sink” policy for IUU fishing vessels that are apprehended in Indonesia’s Exclusive Economic Zone (EEZ).⁵ However, according to the international *Law of the Sea Convention (LOSC)*,⁶ to which Indonesia is party, in EEZs, the traditional principle of freedom of the sea (*mare liberum*) is applicable.⁷ This principle gives every country freedom to sail across, fly over, and lay submarine cables and pipes through the bottom of another country’s EEZ.⁸ Consequently, Article 73 of the *LOSC* does not clearly define what punishment can be applied to foreign IUU fishing perpetrators in EEZs. The Article only prohibits imprisonment sanction, appearing to solely endorse fines as penalty.⁹ This demonstrates the discrepancy between the international fisheries legal framework that binds Indonesia and Indonesia’s law enforcement policies against IUU fishing because Indonesia has given its consent to abide by the international framework.

IUU fishing is a global problem.¹⁰ However, reports from relevant international bodies such as the United Nations Food and Agriculture Organization (FAO), and the Organisation for Economic Co-operation and Development (OECD) highlight that most IUU fishing occurs

⁴ Hongzhou, above n 3; Amri, above n 3; Parameswaran, above n 3.

⁵ An Exclusive Economic Zone is the area of sea beyond the territorial sea and adjacent to the high seas. It expands up to 200 nautical miles towards the high seas when measured from the baseline. *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, UNTS 1833 (entered into force 16 November 1994) (*‘LOSC’*) art 57.

⁶ *LOSC*, above. The *LOSC* is considered to be the umbrella convention for international fisheries laws because all of the agreements constituted under the international fisheries legal framework refer to the *LOSC* and declare themselves in accordance with it. See Barbara Kwiatkowska et al, *International Organizations and the Law of the Sea: Documentary Yearbook* (Springer Netherlands, 1999) vol 1, [12]; See also Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (Cambridge University Press, 2006) 146.

⁷ Robert Beckman and Tara Davenport, 'The EEZ Regime: Reflections After 30 years' (Paper presented at the 2012 LOSI-KIOST Conference on Securing the Ocean for the Next Generation, Seoul, 2012).

⁸ *LOSC*, above n 5, art 58(1).

⁹ See Shigeru Oda, 'Fisheries under the United Nations Convention on the Law of the Sea' (1983) *American Journal of International Law* 747.

¹⁰ This conclusion has become common knowledge among scholars in the fisheries field. See, eg, David J Agnew et al, 'Estimating the Worldwide Extent of Illegal Fishing' [2009] 4(2) *PLOS One*.

in developing coastal states' jurisdictions, particularly in their EEZs.¹¹ Furthermore, almost half of this is happening in Indonesia.¹² The rampant IUU fishing in developing coastal states' waters is understood to be a result of three factors: the ignorance of the developing coastal states who try to obtain benefit from the IUU fishing activities; the lack of developing coastal states' capacity to protect their waters from IUU fishing; and the lack of developing coastal states' commitment to enforce their fisheries regulations.¹³

The discrepancy between Indonesia's recent policies for enforcing its fisheries law against IUU fishing and the international fisheries legal framework are at odds with the view that developing coastal states lack enforcement commitment. In fact, Indonesia's measures to combat IUU fishing are now being challenged with the allegation that they do not comply with international fisheries law, in particular Article 73 of the *LOSC*. This Article creates a contradiction. On the one hand, IUU fishing is a serious threat to the world's living marine resources, food security, and coastal people's livelihood.¹⁴ Furthermore, the international fisheries legal framework gives primary responsibility for combating IUU fishing in EEZs to coastal states.¹⁵ However, on the other hand, the *LOSC* is ambiguous regarding law enforcement in EEZs, as it expects the coastal states to not enforce harsh punishment on IUU fishing perpetrators in EEZs.¹⁶ This demonstrates the ambiguity of the *LOSC* provisions.

¹¹ See, eg, Frank Meere, *The Challenge of Combating Illegal, Unreported and Unregulated (IUU) Fishing, Fishing for Development: Background Paper for Session 4, TAD/FI (2014) 9 (20 March 2014)*.

¹² Ella Syafputri, *Almost Half of Illegal Fishing in the World Occur in Indonesia (19 July 2014)* Tempo.co <<http://en.tempo.co/read/news/2014/07/19/056594269/Almost-Half-of-Illegal-Fishing-in-the-World-Occur-in-Indonesia>>.

¹³ Literature confirming this is exhaustive. See, eg, Diane Erceg, 'Deterring IUU Fishing Through State Control Over Nationals' (2006) 30(2) *Marine Policy* 173; Murray Johns, 'Enhancing Responsible Fishing Practices in South East Asia to combat Illegal, Unreported and Unregulated (IUU) Fishing' (2013) 5(3) *Australian Journal of Maritime and Ocean Affairs* 112.

¹⁴ Food and Agriculture Organization, *Stopping illegal, unreported and unregulated fishing* (2002) FAO Corporate Document Repository <<http://www.fao.org/docrep/005/Y3554E/y3554e01.htm>>. See also *Case 21 (Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC))* [2015] ITLOS, [106].

¹⁵ *Ibid.*

¹⁶ Beckman and Davenport, above n 7.

The establishment of the *Fish Stock Agreement*,¹⁷ the *Compliance Agreement*,¹⁸ and its non-binding instrument: the *Code of Conduct for Responsible Fisheries (CCRF)*¹⁹ is intended to address the ambiguities of the *LOSC*'s provisions regarding fisheries issues.²⁰ However, this did not solve all the problems.²¹ Indeed, the agreements and the *CCRF* did not address the ambiguity regarding sanctions for IUU fishing in EEZs, or freedom of navigation for foreign fishing vessels through coastal states' EEZs, territorial seas, archipelagic waters and straits used for international navigation. Furthermore, the ambiguity of the IUU fishing definition in the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)*²² presents additional challenges for Indonesia. For example, the ambiguity of the IUU fishing definition allows Indonesian traditional small-scale/artisanal fishing activities to be categorised as unreported fishing activities. This is because such fishers catch tuna in Indonesian waters and often do not report – or misreport – their catches to Indonesian authorities.²³ Such categorisation then challenges Indonesian fisheries regulations that grant freedom to Indonesian small-scale/artisanal fishers to catch fish anywhere in Indonesian waters with no reporting or permit holding obligation.²⁴ This example and others will be explored further later in this thesis.

¹⁷ *United Nations Agreement for the Implementation of the Provision 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*, concluded on 4 August 1995, 2167 UNTS 88 (entered into force 11 December 2001) ('*Fish Stock Agreement*').

¹⁸ *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, signed 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003) ('*Compliance Agreement*').

¹⁹ Food and Agriculture Organization, *Code of Conduct for Responsible Fisheries* (1995) ('*CCRF*') <<http://www.fao.org/docrep/005/v9878e/v9878e00.htm>>.

²⁰ See Mary Ann Palma, Martin Tsamenyi and William R Edeson, in David Freestone (ed.) *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill, 2010) 56-92.

²¹ *Ibid.*

²² Food and Agriculture Organization, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001) ('*IPOA-IUU*').

²³ See, eg, A Hamilton, A Lewis, MA McCoy, E Havice, and L Campling L, *Impact of Industry and Market Drivers on the Global Tuna Supply Chain* (Report for the Pacific Islands Forum Fisheries Agency, 2011) 172.

²⁴ See Indonesian Act Number 31 of 2004 art 61(1); Indonesian Act Number 45 of 2009 art 27(5).

The discourses about the definition and scope of IUU fishing generally focus on the sufficiency of the IUU fishing definition in the *IPOA-IUU* as a legal definition;²⁵ whether IUU fishing should be considered a crime;²⁶ and the criminalisation of each specific category – illegal, unreported, and unregulated fishing.²⁷ Indeed, as will be explored later in this thesis, the definitional ambiguity has transformed IUU fishing from a concept that was initially developed to address irresponsible fishing activities in high seas and some (willing) states' EEZs, into a global fisheries problem which mostly occurs within developing countries' jurisdictions, fisheries organisations' management areas, and high seas. This problem is undermining the conservation and management of 'many international fish stocks'.²⁸

The IUU fishing concept was first developed by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) – a fisheries organisation – to address fishing activities that were illegal and/or did not comply with its conservation and management

²⁵ See, eg, Seokwoo Lee, Anastasia Telesetsky and Clive H Schofield, 'Slipping the Net: Why is it so Difficult to Crack Down on IUU Fishing?' in Myron H. Nordquist et al (eds), *Freedom of Navigation and Globalization: Center for Oceans Law and Policy* (Martinus Nijhoff Publishers, 2014) 96; Andrew Serdy, 'Simplistic or Surreptitious? Beyond the Flawed Concept(s) of IUU Fishing' in Abigail J Lynch, Michael G Schechter and William W Taylor (eds), *Sustainable Fisheries: Multi-Level Approaches to a Global Problem* (American Fisheries Society, 2011) 253.

²⁶ See, eg, Mary Ann Palma, 'Fisheries Crime: Bridging the Conceptual Gap and Practical Response' (30 July 2014) *Center for International Maritime Security* <<http://cimsec.org/fisheries-crime-bridging-conceptual-gap-practical-response/12338>>; Don Liddick, 'The Dimensions of a Transnational Crime Problem: the Case of IUU Fishing' (2014) 17(4) *Trends in Organized Crime* 290; Rachel Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence' (2004) 5 *Melbourne Journal of International Law* 299.

²⁷ Some scholars consider unregulated and/or unreported fishing to not always be illegal. For example, see Matthew Gianni and Walt Simpson, *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing* (Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers' Federation, and WWF International, 2005) 3; Other scholars consider unreported fishing to be a subcategory of illegal fishing. For example, see Mary Ann Palma, Martin Tsamenyi and William R Edeson, 'History and Scope of IUU Fishing' in David Freestone (ed), *Promoting sustainable fisheries: the international legal and policy framework to combat illegal, unreported and unregulated fishing* (Brill, 2010) vol 6, 45; Still others consider illegal, unreported and unregulated fishing to all be illegal. For example, see Jens T Theilen, 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' (2013) 28(3) *The International Journal of Marine and Coastal Law* 536.

²⁸ Kevin Bray, *A Global Review of Illegal, Unreported and Unregulated (IUU) Fishing*, FAO Fisheries Report, no 88 (2001) Executive Summary [1].

measures in high seas and its members' EEZs.²⁹ This led to the adoption of the *IPOA-IUU*³⁰ and the *PSM Agreement*.³¹ Under the international fisheries legal framework (namely the *LOSC*, the *Fish Stock Agreement*, the *Compliance Agreement*, the *CCRF*, the *IPOA-IUU* and the *PSM Agreement*) states are required to cooperate in terms of management and conservation of fisheries resources in high seas and their EEZs to combat IUU fishing. Regional and sub-regional fisheries organisations are central in this cooperation.³² However, as time has progressed, the jurisdiction of regional fisheries organisations regarding fisheries management has been expected to broaden, reaching into developing states' sovereign waters (territorial sea and archipelagic waters) in order to anticipate the inability of those states to undertake responsible fisheries management and conservation.³³

This development is contrary to the interests of developing states expressed during the negotiation of the *LOSC*. Indeed, one of the major reasons the developing states urged for the extension of territorial sea breadth from three to twelve nautical miles and exclusive jurisdiction on fisheries in EEZs was to protect their coastal people's interests regarding fish, which had previously been jeopardised by the aggressive and advanced distant water fishers

²⁹ For elaboration on the history and scope of IUU fishing see Palma, Tsamenyi and Edeson, above n 19, 25. See also David J. Doullman, *Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action*, FAO Fisheries Report, no 666 (2001).

³⁰ Ibid.

³¹ *Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing*, concluded 22 November 2009, ATNIF 41 (entered into force 5 June 2016).

³² See Michael W Lodge et al, *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations* (Chatham House, 2007); Henrik Österblom and Örjan Bodin, 'Global Cooperation Among Diverse Organizations to Reduce Illegal Fishing in the Southern Ocean' (2012) 26(4) *Conservation Biology* 638; Are K Sydnes, 'Regional Fishery Organizations: How and Why Organizational Diversity Matters' (2001) 32(4) *Ocean Development and International Law* 349.

³³ For discussion on this issue see M Johanne Picard, 'International Law of Fisheries and Small Developing States: A Call for the Recognition of Regional Hegemony' (1996) 31 *Texas International Law Journal* 317; Martin Tsamenyi and Quentin Hanich, 'Fisheries Jurisdiction Under the Law of the Sea Convention: Rights and Obligations in Maritime Zones Under the Sovereignty of Coastal States' (2012) 27(4) *The International Journal of Marine and Coastal Law* 783.

from developed countries.³⁴ Instead, as this thesis will demonstrate, the ambiguities in the international fisheries legal framework preserve the hegemony of developed states in maximising their benefits from the use of the ocean's fisheries in the name of protecting the international fish stocks.

The Third World Approaches to International Law (TWAIL) theory can be used to analyse this problem well. Indeed, TWAIL has been recognised for its critique on unfairness towards developing states regarding both the implementation and formulation of international law.³⁵ Scholars employing TWAIL theory acknowledge the hegemony of powerful states over developing states in international law implementation.³⁶ TWAIL scholars explore the abuse of power by powerful states and highlight how such abuses are contradictory to international human rights law, international humanitarian law, the laws of war, and/or international criminal law.³⁷ Some TWAIL scholars address environmental issues.³⁸ However, few – if any – TWAIL scholars discuss fisheries issues. This thesis will now fill this gap.

³⁴ See Ram Prakash Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Brill, 1983) vol 7; Luke T Lee, 'The Law of the Sea Convention and Third States' (1983) 77(3) *The American Journal of International Law* 541.

³⁵ James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade Law and Development* 26.

³⁶ See David P Fidler, 'Revolt Against or from Within the West-TWAIL, the Developing World, and the Future Direction of International Law' (2003) 2 *Chinese Journal of International Law* 29; Makau Mutua, 'What is TWAIL?' (2000) 94 *American Society of International Law* 31; Ibid; Ibiroke T Odumosu, 'Challenges for the (Present/) Future of the Third World Approaches to International Law' (2008) 10(4) *International Community Law Review* 467; Usha Natarajan et al, *Introduction: TWAIL-on praxis and the intellectual* (Taylor & Francis, 2016); Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall Law Journal* 171.

³⁷ For example, Martti Koskeniemi, *From apology to utopia: the structure of international legal argument* (Cambridge University Press, 2006); Antony Anghie, *Imperialism, sovereignty and the making of international law* (Cambridge University Press, 2007) vol 37; Nerida Chazal, 'Beyond Borders? The International Criminal Court and the Geopolitics of International Criminal Justice' (2013) 22(3) *Griffith Law Review* 707; Nerida Chazal, *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity* (Routledge, 2015); Maria Giannacopoulos, 'Sovereign debts: Global colonialism, austerity and neo-liberal assimilation' (2015) 19 *Law Text Culture* 166; Maria Giannacopoulos, 'Offshore hospitality: Law, asylum and colonisation' (2013) 17 *Law Text Culture* 163.

³⁸ For example, Karin Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers' (2000) 11 *Yearbook of International Environmental Law* 52; Usha Natarajan, 'TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring' (2012) 14 *Oregon Review of International Law* 177.

2 Research Objective

Drawing on TWAIL theory, this thesis will analyse the impacts of the ambiguity of the IUU fishing definition and the *LOSC*'s provisions regarding sanctions pertaining to IUU fishing in EEZs, as well as freedom of navigation implementation in Indonesia's fisheries management areas (EEZ, territorial sea and archipelagic waters). In doing so it will explore how the existing ambiguities in the international fisheries legal framework hamper Indonesia's efforts to eliminate IUU fishing, and discuss why Indonesia applies the existing measures to combat IUU fishing that it does. Use of TWAIL theory will also reveal the manifestation of 'legalised hegemony'³⁹ in the international fisheries legal framework which degrades equality and justice for developing coastal states.

As one of TWAIL's objectives is to counter powerful states' hegemony over developing states,⁴⁰ this thesis will often employ the legalised hegemony theory in its analysis. In particular, it will use the legalised hegemony theory as a framework to analyse the development of the international fisheries legal framework and the IUU fishing definition which favours developed states over developing coastal states in dealing with the IUU fishing issue. It will also use TWAIL theory pertaining to environmental issues to examine how the ambiguities in the international fisheries legal framework unfairly characterises Indonesia – a developing state – as a 'grudging'⁴¹ and irresponsible party in the global war against IUU fishing.

³⁹ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004), 62.

⁴⁰ See, eg, Natarajan et al, above n 36; Mutua, above n 36; Fidler, above n 36.

⁴¹ Mickelson, above n 38, 54.

The thesis does not discard the notion that management, conservation, and international cooperation is important to achieve the sustainability of fisheries resources. It argues, however, the unique nature and character of both fisheries and developing coastal states are not addressed appropriately or fairly in the current international legal framework. In fact, this thesis will examine the question posed by the president of the third United Nations Conference on the Law of the Sea, Mr. Tommy T.B. Koh: '[Has the *LOSC*] narrowed the gap between developed and developing countries?'.⁴² This thesis will demonstrate that it has not.

3 Theoretical Framework

As previously discussed, TWAIL theory is a particularly useful tool to critique international law developments that maintain the inequality between developed and developing states.⁴³ More specifically, however, the theories that will be used in this thesis focus on the importance of balancing the *concreteness* and *normativity* in developing a rule in international law.⁴⁴ Koskenniemi, for example, states that the balance of these two principles means international law should exist to eliminate unjust situations created by a differentiation of power, and to avoid the domination of the stronger states' interest and political agenda.⁴⁵ A failure to balance the two principles will preserve hegemony of developed states against developing states.⁴⁶

⁴² Tommy T B Koh, 'The Third United Nations Conference on the Law of the Sea: What Was Accomplished' (1983) 46 *Law and Contemporary Problems* 5, 9.

⁴³ Fidler, above n 36; Mutua, above n 36; Gathii, above n 36; Odumosu, above n 36; Natarajan et al, above n 36; Okafor, above n 36.

⁴⁴ Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 36.

⁴⁵ Ibid. Koskenniemi extensively discusses this issue in many of his masterpieces, including Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001).

⁴⁶ Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, above n 44, 36.

Utilising Gramsci's new definition of hegemony, Simpson argues that sovereign equality, which is a major principle in international law and international relations, has been jeopardised by the legalised hegemony in the 'international legal order'.⁴⁷ In the case of fisheries, legalised hegemony occurred when some of the developing states consented to be bound by the *LOSC*, the *Fish Stock Agreement*, the *Compliance Agreement*, the *CCRF*, the *IPOA-IUU* and the *PSM Agreement*, by signing and ratifying them. These are the instruments that make up the international fisheries legal framework.

Gramsci's theory of hegemony is considered to be an alternative to the traditional Marxist base and superstructure paradigm.⁴⁸ Indeed, Gramsci's theory emerged as criticism to previous approaches and theories of social change dominated by the traditional Marxist focuses of class and economic determinism.⁴⁹ That which distinguishes Gramsci's theory from previous (and similar) uses of the term hegemony is as follows. First, Gramsci applies the concept more broadly to include the supremacy of one group (or more) over another in every social relationship and is not confined only to relationships between the proletariat and the aristocrat. Second, Gramsci characterises hegemony in terms of "cultural influence", rather than only "political leadership in an alliance system" as understood by generations of Marxist theorists.⁵⁰ Moreover, Gramsci argues that legalised hegemony effectively applies if the members of groups or communities consent to their subordination to the ruling power.⁵¹ Gerry Simpson, whose theory is used in my thesis, applies Gramsci's legalised hegemony term to describe the naturalisation of the ideas of the developed states (referred to as the Powers) into international

⁴⁷ Simpson, above n 39, 9.

⁴⁸ Chantal Mouffe, *Gramsci and Marxist Theory (RLE: Gramsci)* (Routledge, 2014), 48; Valeriano Ramos, Jr: 'The Concepts of Ideology, Hegemony, and Organic Intellectuals in Gramsci's Marxism' (Theoretical Review, 1982), 2.

⁴⁹ Ramos above, 48.

⁵⁰ Mouffe above n 48, 97; Joseph V. Femia: 'Gramsci's Patrimony' (British Journal of Political Science, 1983), 13(3), 327-364.

⁵¹ Sugiono, *Metode Penelitian Bisnis / Business Research Method* (CV. Alfa Beta, 1999) 68.

law. The purpose of this naturalisation is to accommodate the Powers' domination over developing (or less powerful) states. As Simpson explains that:

At least two uses of hegemony, both of which are relevant to this book, should be distinguished. The first refers simply to a form of frontal domination. The second is adapted from Gramsci's reformulation of hegemony to mean a structure of ideas that accompanies this domination and 'naturalises' it. Though it is worth keeping the distinction in mind, it is in fact quite difficult to tease out the separate elements since hegemons usually attempt to legitimise themselves at the level of ideology.⁵²

Simpson's theory of hegemony is applied in my thesis because it provides a more proficient lens than Gramsci's theory to investigate the purpose of the naturalisation of the Freedom of Navigation doctrine and two of the US's fishery policies, namely that of highly migratory fish management and the best scientific evidence based fishery management system to the Law of the Sea Convention (*LOSC*) and other conventions that make up international fisheries law. The developing states signed and ratified the *LOSC* in order to attain the developed states' acknowledgement of the developing states' right to have wider territorial sea up to 12 nautical miles, exclusive economic zones up to 200 nautical miles, and adoption of the archipelagic states regime. As a consequence, legalised hegemony occurred in international fisheries management. The developed states, mainly the US, became the ruler because the existing international fisheries management system had been made more suitable for them. As Simpson argues that:

They [the great power] make and remake (but rarely break) international law. In this tradition, the Great Powers are loath simply to step outside the law and use brute force.

⁵² Simpson, above n 39, 25.

Instead, there has been a practice of willing into existence new legal regimes in moments of constitutional crisis in the international system. These new regimes are characterised by the presence of a phenomenon I want to call legalised hegemony: the realization through legal forms of Great Power prerogatives.⁵³

In contrast, Indonesia, as one of the parties of the *LOSC*, must still obey the *LOSC*'s provisions regarding fisheries and its derivation even though the provisions are not well suited to Indonesia. For example, according to the international fisheries law, Indonesia has an obligation to adopt fishing reporting requirements in its domestic law. However, considering that Indonesian small-scale fishers are mostly illiterate, Indonesia has freed their small scale fishers from fishing reporting obligations. As a result, Indonesia has been accused by the developed states of facilitating unreported fishing practices. This is an example of how legalised hegemony has jeopardised sovereign equality. As further Simpson argues that:

Sovereign equality as a background principle of international law contains three separate ideas. I call these formal equality, legislative equality and existential equality. I suggest that while states are formally equal within the system, their legislative and existential equality has traditionally been compromised by the presence of, respectively, legalised hegemony and anti-pluralism.⁵⁴

Indeed, the uniqueness of the developing states' character makes them 'vulnerable and dependent by international law'.⁵⁵ However, the legalised hegemony of developed states in

⁵³ Ibid, x.

⁵⁴ Ibid, 6.

⁵⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007), 6.

international law endangers the ‘*existential equality* (right to organise their community on any basis they wish)’⁵⁶ of the developing states.⁵⁷

TWAIL scholars focusing on environmental issues, have revealed that the hegemony of developed states regarding environmental issues is preserved by a campaign alleging that developing states are incapable or unwilling to protect and conserve their environment.⁵⁸ The developed states usually claim that developing states’ are only interested in exploiting their resources as much as possible for their economic agenda.⁵⁹ As Mickelson observes, for example:

[the developing state] is portrayed as a grudging participant in environmental regimes rather than as an active partner in an ongoing discussion regarding what the fundamental nature of environmental problems is and what the appropriate responses should be.⁶⁰

This thesis will use these theories to rigorously explore the research questions that will now be outlined.

4 Research Questions

The main question that will be answered by this study is: how do the ambiguities in the international fisheries legal framework and the IUU fishing definition facilitate the practice of hegemony of developed states against developing states in accessing and managing the world’s fisheries resources and challenge Indonesia’s efforts to combat IUU fishing?

⁵⁶ Simpson above n 39, 29. Italics as featured in the original.

⁵⁷ Simpson above n 39, 6-7.

⁵⁸ See Mickelson, above n 38; See also Natarajan, above n 38.

⁵⁹ Natarajan, above n 38, 35.

⁶⁰ Mickelson, above n 38, 60.

To achieve that goal, this thesis will explore the following research questions:

1. How does Indonesia respond to IUU fishing?
2. How is *legalised hegemony* facilitated by the ambiguities in the international fisheries legal framework and the IUU fishing definition?
3. How does this *legalised hegemony* pose Indonesia as a ‘grudging participant’⁶¹ in IUU fishing issue?
4. How can Indonesia’s fisheries law enforcement framework better respond to these ambiguities?

5 Thesis Argument

International law does not always assist Indonesia’s efforts at combatting IUU fishing, but instead presents challenges. The ambiguity of the international fisheries legal framework informed by the ambiguity of the IUU fishing definition, the ambiguity of the *LOSC* provisions regarding sanctions for IUU fishing in EEZs, and the freedom of navigation implementation in Indonesia’s fisheries management areas (EEZ, territorial sea and archipelagic waters) hampers Indonesia’s efforts to secure its waters from IUU fishing. This also facilitates the hegemony of developed states upon their benefit from the ocean fisheries through regional/sub-regional fisheries organisations.

6 Scope and Limitation

This thesis will conduct a comprehensive study on the international fisheries legal framework, as well as Indonesia’s fisheries legal framework and fisheries law enforcement procedure, to

⁶¹ Ibid.

discover the practice of legalised hegemony in the international fisheries legal framework and its impacts on Indonesia. In particular, the history of the implementation of the freedom of navigation and the development of the international fisheries conservation and management measures will be rigorously analysed as the primary focus of this thesis.

7 Research Method

This thesis will analyse key texts pertaining to the international fisheries legal framework, including Indonesian fisheries laws, regulations and policies, as well as official reports and records from the Indonesian Government and other relevant international bodies and organisations. The international fisheries instruments regulating law enforcement against IUU fishing upon which this thesis will draw are: the *LOSC*, the *Compliance Agreement*, the *Fish Stock Agreement*, the *PSM Agreement*, the *CCRF*, and the *IPOA-IUU*. These are the sources that make up the international fisheries legal framework. This study will also analyse Indonesian laws and regulations, as well as data about IUU fishing in Indonesia and law enforcement actions that have been taken by the Indonesian Government. This data will be sourced from the Indonesian Government's official reports, as well as websites, magazines and online news articles. All of this data is publicly available

Chapters II, III and IV of this thesis adopt the framework provided by TWAIL theory. Therefore, this thesis will draw from books and journal articles pertinent to this. Other secondary sources it will draw on include *travaux préparatoires* of the *LOSC* and other relevant conventions, resolutions, commentaries, the jurisprudence of international and national courts, as well as additional materials from the United Nations and other relevant international bodies.

8 Significance of the Research

While some existing literature discusses IUU fishing as a result of disobedience or disconformity of states or fishers to the international fisheries legal framework, this thesis's analysis of the IUU fishing issue in Indonesia, through the lens of TWAIL theory, will provide a rigorous and different academic perspective on the issue. Indeed, this study will provide an important contribution to balance academic literature that views IUU fishing as a problem in developing coastal states. This balance will support the finding of a more accurate solution to solve the IUU fishing problem in Indonesia and developing coastal states in general. This thesis is also important as it will assist Indonesia in improving its legal framework and actions to combat IUU fishing. From a broader perspective, this thesis will be useful for other developing coastal states which are also currently developing their regulations and law enforcement mechanisms against IUU fishing.

It is expected that this study will play a significant role in the development of Indonesian fisheries' legal framework and law enforcement; contribute to this area of governance and legislation in other developing countries; and provide an academic contribution to the enhancement of efforts in combating IUU fishing. Ultimately, this thesis is expected to contribute to the development of international fisheries legal framework and global efforts to combat IUU fishing.

9 Thesis Structure

This thesis consists of five chapters. This introductory chapter has presented the research problems, research objectives, theoretical framework, and research questions. It has also

explained this thesis's argument, scope and limitation, research methods, and the significance of the research.

Chapter II will explore the difficulties Indonesia faces in combating IUU fishing. To do this, it will examine how IUU fishing impacts Indonesia and how Indonesia responds to IUU fishing. More specifically it will focus on the uniqueness of Indonesia as an archipelagic developing state, which makes Indonesia vulnerable to the ambiguities in the international fisheries legal framework and the IUU fishing definition. This means it will elaborate on many of the problems that have been outlined in the introductory chapter. The discussion in Chapter II will additionally focus on how the difficulties experienced by Indonesia in combating IUU fishing degrades Indonesia's credibility in global efforts to fight IUU fishing. Consequently, this chapter will investigate Indonesia's efforts to cope with this problem by implementing the recent Indonesian fisheries law enforcement policy of blowing up and sinking IUU fishing vessels, as well as other measures such as trawl banning and a moratorium on fishing licence for ex-foreigner fishing vessels.

Chapter III will utilise TWAIL theory – specifically focussing on the history of the *LOSC* – to investigate how the hegemony of powerful states is structured in the formulation of the international fisheries legal framework, which is a prominent factor behind the difficulties faced by Indonesia as a developing coastal state in dealing with the IUU fishing problem. This chapter will analyse how the *legalised hegemony* is facilitated by the ambiguity of the freedom of navigation vis-a-vis law enforcement arrangements in EEZs and territorial seas.

Chapter IV examines the impacts of the ambiguity of IUU fishing definition which pose Indonesia as a ‘grudging participant’ in the IUU fishing issue.⁶² To do this, it will examine more closely the definition of IUU fishing and its ambiguities which advantage developed states. Analysis in this chapter too will be based on TWAIL theory, especially in the field of international environmental law, due to its relevance to fisheries issue. This analysis will demonstrate the contribution of *legalised hegemony* in the posing of Indonesia as a non-compliant party incapable of dealing with IUU fishing, which facilitates the developed states’ control over the utilisation of fisheries resources in Indonesian fisheries management areas through regional fisheries organisations.

Finally, Chapter V will conclude by summarising this thesis’ findings. This will include reflective discussion on the rationale of Indonesia’s policy and measures to combat IUU fishing, and its conformity to international law, as well as how Indonesia’s fisheries law enforcement framework can better respond to the ambiguities of the international fisheries legal framework and the IUU fishing definition. This chapter will also provide recommendations on the importance of TWAIL scholars’ attention to the issue of equality in international fisheries conservation and management measures, and on the necessary improvement of Indonesia’s measures to address the vulnerability of Indonesian waters to IUU fishing.

⁶² Mickelson, above n 38, 54.

CHAPTER II:

ILLEGAL, UNREPORTED AND UNREGULATED FISHING IN INDONESIA

1 Introduction

Indonesia is composed of 17,504 islands and is surrounded by 9.29 million square kilometres of waters, consisting of 6.32 million square kilometres of territorial water and 2.97 million square kilometres of Exclusive Economic Zone (EEZ). Its coastline spans 99,093 kilometres.¹ As it is situated in the centre of the world's coral reef diversity, it also has approximately 75,000 square kilometres of coral; at least one-eighth of the world's coral reefs.² These geographical conditions mean that Indonesian waters have an abundance of fisheries resources and diversity.³

The abundance of fisheries resources in Indonesian waters attracts unscrupulous fishers who undertake illegal, unreported, and unregulated fishing – otherwise known as IUU fishing – in this area. As fish stocks in neighbouring countries' waters are already severely depleted, fish in Indonesian waters and EEZ have become a target for theft.⁴ According to Indonesian fisheries authorities, Indonesia suffers a loss of more than USD 20 billion every year from IUU

¹ Ministry of Marine Affairs and Fisheries Indonesia, *Kelautan dan Perikanan Dalam Angka 2015 / Marine and Fisheries in Figures 2015* (December 2015) The Center for Data, Statistic and Information, 139 <<http://statistik.kkp.go.id/sidatik-dev/Publikasi/src/kpda2015.pdf>>.

² Herman Cesar, *Economic analysis of Indonesian coral reefs*, (Environment Department Work in Progress, 1996); D Hopley and H Suharsono, *The Status of Coral Reefs in Eastern Indonesia* (2000) (Australian Institute of Marine Science, 2000).

³ Brian W. Bowen et al, 'The Origins of Tropical Marine Biodiversity' (2013) 28(6) *Trends in Ecology & Evolution* 359.

⁴ Michael Heazle and John G. Butcher, 'Fisheries Depletion and the State in Indonesia: Towards a Regional Regulatory Regime' (2007) 31(3) *Marine Policy* 276.

fishing by foreign fishing fleets.⁵ Furthermore, the Indonesian president states that among the 5,400 vessels fishing in Indonesia waters and EEZ, 4,860 of them are foreign IUU fishing vessels.⁶ Besides the direct economic loss, IUU fishing also plunders the main livelihood of the majority of Indonesian people living on the coastline. Since IUU fishing occurrences have escalated, the number of fish stocks have decreased, increasing the poverty of coastal communities in Indonesia.⁷ The Indonesian Bureau of Statistics reports that numbers of Indonesian fishers decreased almost 50 per cent from 1.6 million to 864 thousand people, between 2003 and 2013.⁸ As this reflects, Indonesian fishers desperately changed their means of livelihood because they were hardly able to catch any fish in Indonesia's waters.⁹ In addition to the fish stocks being diminished by IUU fishing, Indonesian small-scale fishers were often mocked and expelled from the fertile fishing area by foreign IUU fishers.¹⁰ At the same time, 115 Indonesian fish exporter companies shut down due to the lack of fish supplies.¹¹ This decreased the value of Indonesian fishery exports in 2014 to only USD 4.6 million, making it third in ASEAN, far below Vietnam (USD 8.03 million) as the highest and Thailand (USD 6.57 million) as the second highest.¹² The irony there is that Indonesia's sea areas are more

⁵ Zhang Hongzhou, *Indonesia's War on Illegal Fishing Sinks China's Catch* (2015) The Establishment Post <<http://www.establishmentpost.com/indonesias-war-illegal-fishing-impact-china/>>; Ministry of Marine Affairs and Fisheries Indonesia, *Pemerintah Bentuk Satgas Pemberantasan Illegal Fishing / Indonesian Government Established Illegal Fishing Task Force* (2014) <<http://kkp.go.id/index.php/pers/pemerintah-bentuk-satgas-pemberantasan-illegal-fishing/>>.

⁶ World Wildlife Fund, *Blowing Up the Bad Guys: Will Indonesia's New Fisheries Laws Deliver?* (25 February 2015) WWF <http://wwf.panda.org/wwf_news/?240152/Blowing-up-the-bad-guys-Will-Indonesias-new-fisheries-laws-deliver>.

⁷ Victor P H Nikijuluw, *Blue Water Crime: Dimensi Sosial Ekonomi Perikanan Ilegal / Economy and Social Aspects of Illegal Fishing* (PT Pustaka Cidesindo, 2008); G A Wagey et al, *A study of Illegal, Unreported and Unregulated (IUU) Fishing in the Arafura Sea, Indonesia* (Research Center for Capture Fisheries, Agency for Marine and Fisheries Research, Ministry of Marine Affairs and Fisheries, 2009).

⁸ BPS, *Angka Nasional Hasil Pencacahan Lengkap Sensus Pertanian 2013/National Figures the Results of Complete Enumeration Census of Agriculture 2013* (Statistic Indonesia, 2013), 21.

⁹ Susi Pudjiastuti in Tempo.co.id, *Minister Susi: Indonesia is 3rd largest fish exporter in SE Asia* (22 May 2017) <<https://en.tempo.co/read/877454/minister-susi-indonesia-is-3rd-largest-fish-exporter-in-se-asia>>

¹⁰ Nikijuluw, above n 7.

¹¹ Maizura Ismail, *Protecting Indonesia's marine resources*, the asean post (11 November 2018) <<https://theaseanpost.com/article/protecting-indonesias-marine-resources>>

¹² FAO, *The State of World Fisheries and Aquaculture 2014: Opportunities and challenges* <<http://www.fao.org/3/a-i3720e.pdf>>

than a thousand times larger than those of Vietnam and Thailand.¹³ This demonstrates the terrible impact of IUU fishing on Indonesia.

To tackle IUU fishing, Indonesia has developed measures in accordance with the international fisheries legal framework.¹⁴ These measures include joining all relevant Fisheries Management Organisations around Indonesia; cooperating with neighbouring countries; actively participating in regional and international forums on combating IUU fishing; establishing a National Plan of Action (NPOA) to Prevent and Combat Illegal, Unreported, and Unregulated Fishing; and improving Indonesia's Fisheries Act and related policies and regulations. Among the recent policies enacted by Indonesia is the blow up and sink IUU fishing vessels policy. Indonesia's government claims that this policy is essential to increase the deterrence effect of Indonesian law enforcement measures against IUU fishing.¹⁵ This policy demonstrates that not all of the measures that Indonesia has taken have been helpful in solving the problems that Indonesia faces in combating IUU fishing. There is a loop-hole in the definition of IUU fishing and the international fisheries legal framework that degrades the deterrence effect of enforcement against IUU fishing and hampers Indonesia's efforts to combat it. Analysis in this chapter will also discuss the controversy around the blow up and

¹³ FAO, *Fishery and Aquaculture Country Profiles* <<http://www.fao.org/fishery/countryprofiles/search/en>>

¹⁴ The international fisheries legal framework is made up of the *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, UNTS 1833 (entered into force 16 November 1994) ('LOSC'); *United Nations Agreement for the Implementation of the Provision 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*, concluded on 4 August 1995, 2167 UNTS 88 (entered into force 11 December 2001); the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, signed 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003); the *Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing*, concluded 22 November 2009, ATNIF 41 (entered into force 5 June 2016); the Food and Agriculture Organization's *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001) ('IPOA-IUU'), which is a non-binding agreement; and the Food and Agriculture Organization, *Code of Conduct for Responsible Fisheries* (1995) <<http://www.fao.org/docrep/005/v9878e/v9878e00.htm>>.

¹⁵ Lindsey Bever, *Indonesia's Harsh Response to Illegal Fishing: Blowing Up Ships* (15 March 2016) *The Washington Post* <https://www.washingtonpost.com/news/speaking-of-science/wp/2016/03/15/indonesias-harsh-response-to-illegal-fishing-blowing-up-ships/?utm_term=.16f535eca12b>

sink IUU fishing vessels policy, which has attracted protest from Indonesia's neighbouring countries, especially Vietnam which is the origin of the most IUU fishing perpetrators in Indonesia. Even though this discussion will not directly analyse conflict between developed and developing states, TWAIL analysis is still applicable because TWAIL does not confine itself to discussion regarding the relationship between the North (developed states) and the South (developing states). It can also be used to discuss disputes and competition among developing states, as one of the impacts of the inequality and hegemony in international law. For example, Chimni states that 'the implementation of neo-liberal policies is at least one significant cause of growing internal conflicts in the third world'.¹⁶ Therefore, TWAIL analysis regarding the dispute between Indonesia and its neighbouring states will reveal that the conflict among developing states is the result of inequality and hegemony in international fisheries management.

This chapter will examine IUU fishing in Indonesia and explore the problems that Indonesia has experienced in combating IUU fishing. It will conclude that scholars tend to accuse Indonesian small-scale fishers of being perpetrators of IUU fishing in Indonesia. This demonstrates – in general – the impacts of the ambiguity of the IUU fishing definition and the limitations of the international fisheries legal framework on Indonesia's efforts to eradicate IUU fishing. This chapter will also elaborate on the difficulties experienced by Indonesia in combating IUU fishing, and how this degrades Indonesia's credibility in global efforts to fight IUU fishing. TWAIL theory concludes that the special character of developing states makes them susceptible to the limitations of international law such as its preference to European

¹⁶ A. Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 *Harvard International Law Journal* 443- 485 (1997), OAU Report of the International Panel of Eminent Personalities asked to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (2000), online: <<http://www.oau-oua.org/Document/ipep/ipep.htm>> in Bhupinder S. Chimni, *Third World Approaches to International Law: A Manifesto*, (8 *Int'l Comm. L. Rev.* 3, 28, 2006) 11.

values.¹⁷ Therefore, this chapter will also analyse Indonesia's special character in the form of its geographical situation; the social character of its coastal people (small-scale fishers); and its limited capacity to guard its waters and EEZ, which makes it vulnerable to IUU fishing.

This chapter will now be divided into four sections. Section B will review scholars' views on IUU fishing in Indonesia. Section C will review TWAIL theory to analyse the uniqueness of Indonesia as a developing state and the contribution of this uniqueness to illegal, unreported and unregulated fishing in Indonesia. Section D will elaborate on Indonesia's efforts to combat IUU fishing. Finally, Section E will summarise the key arguments made in the chapter.

2 Illegal, Unreported and Unregulated Fishing in Indonesia

The Indonesian government identifies three locations where illegal fishing occurs in much greater numbers than other locations in Indonesia. These hot spots are: the territorial sea and EEZ around the Natuna Islands, the Sulawesi Sea; and the Arafura Sea.¹⁸ These locations are shown in Figure 1 below.

¹⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007) 6.

¹⁸ Directorate General of Surveillance for Marine Resources and Fisheries, *Reflection 2014 and Outlook 2015 / Refleksi 2014 dan Outlook 2015* (Directorate General of Surveillance for Marine Resources and Fisheries, 2015).

FISHERIES VIOLATIONS HOTSPOTS IN INDONESIA FISHERIES MANAGEMENT AREAS

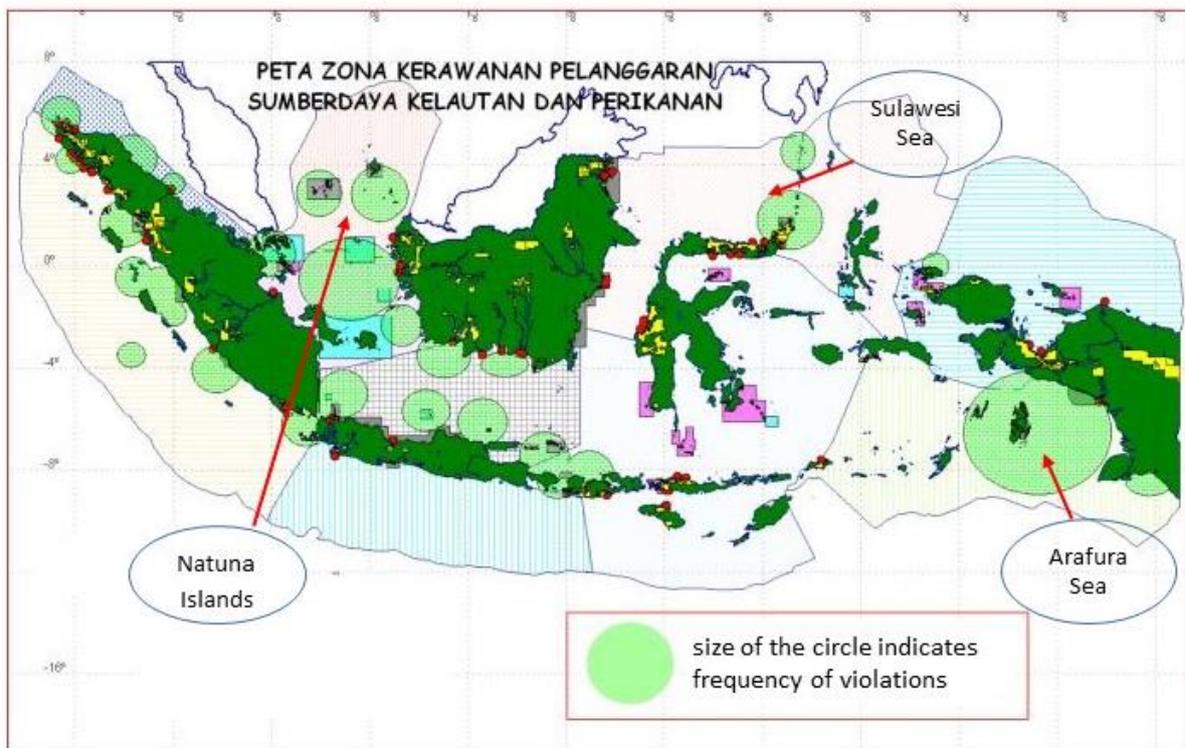


Figure 1. Fisheries Violations Hotspots Maps.¹⁹

In defining the IUU fishing phenomenon in Indonesia, some scholars try to emphasise the three prongs of IUU fishing in Indonesia's internal waters, territorial seas (including archipelagic waters) and EEZ: illegal, unreported and unregulated. However, this chapter finds that overwhelmingly the categorisation of unreported and unregulated fishing made by scholars in regards to fishing activities by Indonesian small-scale fishers, has blurred the real problems that Indonesia faces in combating IUU fishing in its jurisdiction. The problems are related to the uniqueness of Indonesia's geographical situation, the characteristic of Indonesian small-scale fishers, and Indonesia's capacity to conduct surveillance over its waters.

¹⁹ Ibid.

A *IUU Fishing in Indonesia According to Scholars*

To comprehensively understand scholars' views on IUU fishing in Indonesia, this section will examine different studies regarding IUU fishing in eastern and central parts of Indonesia which are considered to be the areas most vulnerable to IUU fishing.²⁰ In the eastern parts of Indonesia, Resosudarmo concludes that there are four forms of illegal fishing in the Arafura Sea: fishing without a permit (poaching); the utilisation of fake documents (a fake permit or fake documents required to apply for a permit); the violation of permit conditions regarding the size of the vessel, the type of fishing gear, the fishing location consisting of the fishing area or the permitted distance from land (fishing zone); and misreporting or underreporting the catch.²¹ Furthermore, Resosudarmo states that the offenders of illegal fishing are foreigners (from Thailand, the Philippines, Taiwan, China, South Korea, and Japan) as well as Indonesians who works for foreigners (as intermediaries or as part of a cover-company).²²

Wagey et al. conclude that although there is a declining trend in IUU fishing activities in the Arafura Sea, a staggering amount of IUU fishing still occurs.²³ Moreover, they emphasise the very high number of misreported or underreported catches that occur in the Arafura Sea. Wagey et al. estimate these misreported or underreported catches equate to around 2 million tons every year, or in other words, the recorded catch is only around 0.9% - 19.4% of the reality.²⁴ It is estimated that from the total of unreported fishing in the Arafura Sea, only

²⁰ Daniel Pauly and V Budimartono, *Marine Fisheries Catches of Western, Central and Eastern Indonesia, 1950-2010*, Fisheries Centre Working Paper #2015-61 (2015), 7.

²¹ Budy Resosudarmo, Lydia Napitupulu and David Campbell, 'Illegal Fishing in the Arafura Sea' in Budy P Resosudarmo and Frank Jotzo (eds), *Working with Nature Against Poverty: Development, Resources and the Environment in Eastern Indonesia* (Institute of Southeast Asian Studies, 2009) 178.

²² Ibid 186.

²³ Wagey et al, above n 7.

²⁴ Ibid 43.

ten per cent was taken by Indonesian trawlers.²⁵ The remaining 90 per cent was taken via illegal fishing practices.²⁶ Estimations such as these are made by scholars who include unreported catches in the illegal fishing category – and vice versa – demonstrating the mixed perception of the illegal and unreported fishing.

Palma and Tsamenyi focus their research on one of the most active fisheries areas in central Indonesia: the Sulawesi Sea.²⁷ The Sulawesi Sea is shared between Indonesia, Malaysia, and the Philippines.²⁸ In their research, Palma and Tsamenyi conclude that IUU fishing in the Indonesian part of the Sulawesi Sea comprises of fishing without a permit; using fake documents; carrying more than one flag; using explosives or poison; landing a catch not at the required port; and not reporting, misreporting, or under-reporting a catch.²⁹ Furthermore, they argue that there is common knowledge regarding the unreported fishing practices that occur widely in Indonesia.³⁰ Palma and Tsamenyi estimate there is a significant gap between the real number of tuna caught and data officially provided by Indonesia.³¹ The real number of tuna caught is believed to be 125,000 metric-tons greater than was reported.³² To support this, Palma and Tsamenyi used tuna trading data between Indonesia and Japan as an example.³³ The data from Japan says Japan tuna imports from Indonesia were 45 per cent higher than the data from the Indonesian government regarding tuna exports to Japan.³⁴ A similar case also occurred regarding shrimp. Indeed, Indonesia's data on shrimp exports to Japan was found to be 11 per

²⁵ Pauly and Budimartono, above n 20.

²⁶ Ibid.

²⁷ Mary Ann Palma and Martin Tsamenyi, *Case Study on the Impacts of Illegal, Unreported and Unregulated (IUU) Fishing in the Sulawesi Sea* (Asia-Pacific Economic Cooperation, 2008).

²⁸ Ibid 13.

²⁹ Ibid 26.

³⁰ Ibid 27.

³¹ Ibid.

³² Etty Agoes, 'Indonesia's Fisheries Legislation: Conditions of Access' (Presentation at the Bilateral Indonesian-Philippines IUU Fishing Workshop, Singapore, 21-23 May 2001) cited in Palma and Tsamenyi, above n 20, 27.

³³ Palma and Tsamenyi above n 27, 27.

³⁴ Ibid.

cent less than that shown by Japan's data regarding imported shrimp from Indonesia.³⁵ Consequently, Palma and Tsamenyi conclude that the real number of fish caught, and vessels operating, in the Sulawesi Sea is not represented in the existing data on fish landing.³⁶

In their report, Pramod et al. observe that unreported tuna from Indonesia has become a main source for Vietnam's export to the USA.³⁷ Unreported shrimp from Indonesia is also an important source for the China and Thailand fisheries industries.³⁸ The unreported fishing in Indonesia is a form of collaboration between unlicensed and licensed foreign fishing fleets.³⁹ They do transactions and transfer fish at sea (transshipment).⁴⁰ Moreover, Pramod et al.'s report also mentions that the unreported fishing practice in Indonesia also has been used to benefit its local tuna canneries industry, especially business in joint-venture with foreign owned fishing vessels.⁴¹ Hamilton et al. report highlights that the massive unreported tuna fishing practice in Indonesia is conducted by Indonesian small-scale/artisanal fishers.⁴²

The above reports indicate that unreported fishing poses a significant threat to Indonesia's economy that is sourced from its fisheries and also endangers the sustainability of its fisheries. The benefits from Indonesia's abundant tuna and shrimp are enjoyed by other states in unlawful ways instead of ways that develop Indonesia's economy and its people's wealth. Furthermore, this practice hides data regarding the real number of fish caught and leads

³⁵ Ibid.

³⁶ 'Fisheries Management Issues in Indonesia' (Presentation at the Bilateral Indonesian-Philippines IUU Fishing Workshop, Singapore, 21-23 May 2001).

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Sustainable Fisheries Partnership, *Scoping Out: Indonesian Tuna Fisheries* (Sustainable Fisheries Partnership, 2009) cited in Ganapathiraju Pramod et al. 'Estimates of illegal and unreported fish in seafood imports to the USA' (2014) 48 *Marine Policy* 102, 110.

⁴² Amanda Hamilton et al, *Impact of Industry and Market Drivers on the Global Tuna Supply Chain*, Report for the Pacific Islands Forum Fisheries Agency (2011), 172.

to ineffectiveness in conservation practices and fisheries protection efforts by Indonesia. These reports show that unreported fishing practices are one aspect, or at least means, of illegal fishing. This unlawful fishing activity brings severe economic harm to a nation and its poor coastal people as well as jeopardising fisheries conservation efforts just like illegal fishing does.

According to the United Nations Environmental Programme (UNEP), in 2010, one-third of global fish stocks were already depleted, and there is strong possibility that by 2050, fish stocks in the ocean will be completely exhausted if the current exploitative behaviour is not improved.⁴³ For that reason, IUU fishing is considered a potential threat to international food security, especially to developing coastal states where their people mostly depend on fish as a cheap protein source.⁴⁴ Besides the direct economic loss, IUU fishing also plunders the main livelihood of the majority of the Indonesian people living on the coastline. Since IUU fishing occurrences have escalated, the number of fish stocks has decreased, increasing the poverty of coastal communities in Indonesia.⁴⁵ Indeed, IUU fishing inevitably leads to poverty and conflicts among small-scale coastal communities.⁴⁶ Therefore, it is not appropriate to differentiate unreported fishing in a nation's jurisdiction with illegal fishing, whether this is by nature or degree of violation.

The findings elaborated above reiterate the problems resulting from the overuse of the unreported fishing term; a term that overlaps with illegal fishing in a state's jurisdiction.

⁴³ U Rashia Sumaila et al, 'Fisheries: Investing in Natural Capital' in *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (United Nations Environment Programme, 2011) 77.

⁴⁴ See *FAO/UNEP Expert Meeting on Impacts of Destructive Fishing Practices, Unsustainable Fishing, and Illegal, Unreported and Unregulated (IUU) Fishing on Marine Biodiversity and Habitats, Rome, 23-25 September 2009* FAO Fisheries and Aquaculture Report, no 932 (2009), 2.

⁴⁵ Nikijuluw, above n 7.

⁴⁶ *Ibid* 64.

Naturally, illegal fishers will not report their catches.⁴⁷ Therefore, it is very hard to know exactly the number of fish poached by illegal fishing activity. In fact, the gap between Japan's data regarding tuna imported from Indonesia and Indonesia's data regarding tuna exported to Japan shows the ability of a developed state to buy illegally sourced fish, which promotes illegal fishing practices in Indonesia. This fact should have encouraged a rigorous study regarding how developed states take advantage of IUU fishing in developing states's jurisdictions. Serdy argues that developed states use the IUU fishing issue to maintain their interests in fisheries.⁴⁸ Moreover, there is recrimination between Japan and Australia regarding who caught tuna excessively over their quota.⁴⁹ An anomaly in the tuna import-export data could be related to this issue. Nevertheless, the overwhelming use of the unreported fishing term in Indonesia only exacerbates accusations of mismanaged or poorly managed fisheries in Indonesia.⁵⁰

B *Criminalisation Against Indonesian Small-Scale Fishers*

Findings that indicate unreported fishing in Indonesia is overwhelmingly conducted by Indonesian small-scale/artisanal fishers need to be questioned. This includes, for example, Palma and Tsamenyi's comment that the massive unreported fishing in Indonesia has become common knowledge, and Hamilton et al.'s position is that Indonesian small-scale/artisanal fishers conduct unreported tuna fishing widely in Indonesia. Views like these need to be

⁴⁷ Rachel Baird, 'Illegal, unreported and unregulated fishing: an analysis of the legal, economic and historical factors relevant to its development and persistence' (2004) 5 *Melbourne Journal of International Law* 299, 302.

⁴⁸ Andrew Serdy, 'Postmodern International Fisheries Law, or We Are All Coastal States Now' (2011) 60(2) *International & Comparative Law Quarterly* 387.

⁴⁹ Kate Barclay, 'Following the Proceeds of Illegal Fishing in the Asia-Pacific' in Gregory Rose (ed), *Following the Proceeds of Environmental Crime: Fish, Forests and Filthy Lucre* (Routledge, 2014) 89.

⁵⁰ See, eg, Ian M Dutton, 'If Only Fish Could Vote: The Enduring Challenges of Coastal and Marine Resources Management in Post-Reformasi Indonesia' in Budy P Resosudarmo (ed), *The Politics and Economics of Indonesia's Natural Resources* (ISEAS, 2005) 162.

questioned because they can lead to an erroneous understanding of unreported fishing. According to the *IPOA-IUU*, the key phrase to identify an unreported fishing activity in a nation's jurisdiction is if the activity violates the respective nation's laws and regulations. Indeed, subsection 3.2.1 of Chapter II of the *IPOA-IUU* categorises unreported fishing as fishing activities 'which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations'.⁵¹ This is not the case regarding Indonesian small-scale/artisanal fishers.

Indonesian small-scale fishers are free to fish in all parts of Indonesian fisheries management areas.⁵² Indonesian laws and regulations do not require them to have a permit to do so.⁵³ Therefore, the catch reporting obligation is not applicable to Indonesian small-scale fishers because the obligation to report catches is attached to the licensing system.⁵⁴ This demonstrates the accusation that Indonesian small-scale fishers conducts unreported fishing is not legitimate.

Some scholars such as Metzals et al. even categorise Indonesia's practice to liberate their small-scale fishers from licensing and reporting obligation as unregulated fishing.⁵⁵ This opinion is problematic because it has equated Indonesia's policy to dismiss Indonesian small-scale fishers from licensing and reporting obligation with a *laissez faire* situation. This is misleading when it comes to understanding the unregulated fishing criterion set out in the

⁵¹ *IPOA-IUU*, above n 14, para 3.2.1.

⁵² Indonesian Act Number 31 of 2004 arts 61(1), (3)-(4). Minister is a reference to the Ministry of Marine Affairs and Fisheries of Republic of Indonesia.

⁵³ Please see Indonesian Act Number 31 of 2004 art 26(2); Indonesian Act Number 45 of 2009 arts 27(5), 28(4).

⁵⁴ See Indonesian Ministry of Marine Affairs and Fisheries Regulation Number 48/PERMEN-KP/2014 art 2.a.

⁵⁵ Kaija Metzals et al, 'One Fish, Two Fish, IUU, and No Fish: Unreported Fishing Worldwide' (2010) *Handbook of Marine Fisheries Conservation and Management* (Oxford University Press, 2010) 166, [12.3.3].

IPOA-IUU. Here, subsection 3.3, Chapter II, of the *IPOA-IUU* describes unregulated fishing as fishing activities in a regional fisheries management organisation's (RFMO) area conducted by unregistered vessels, or vessels of non-member state;⁵⁶ or fishing activities in areas without management authority – or for fish species that do not have any applicable conservation regulation upon it – where these fishing activities breach state responsibilities under international law.⁵⁷ Consequently, fishing activities conducted by Indonesian small-scale fishers under a policy that allows them to not report to Indonesian authorities do not qualify as unregulated fishing. This is because there are management measures (policy) in place. Moreover, although Indonesian small-scale fishers are free from licencing and reporting obligations, they are still subject to conservation and other management policies established by the Indonesian Minister of Marine Affairs and Fisheries.⁵⁸ Understanding the limitations and social-economy of the Indonesian small-scale fishers, the Indonesian government applies a persuasive approach to develop catch reporting responsibility among small-scale fishers.⁵⁹ Furthermore, the Indonesian government maintains statistical data on small-scale fishers' catches based on estimation. However, some scholars believe that the statistical data is inaccurate.⁶⁰

Obtaining a precise number of fish catches in states' jurisdictions is a big problem. This problem also occurs in developed states, such as Canada, Australia and the USA.⁶¹ Recognising the limitations and marginality of the small-scale/artisanal fishers in Indonesia, it is important to develop an effective method to estimate the real number of their catches; the more accurate

⁵⁶ *IPOA-IUU*, above n 14, para 3.3.1.

⁵⁷ *IPOA-IUU*, above n 14, ch II, ss 3.3.2.

⁵⁸ See Indonesian Minister of Marine Affairs and Fisheries Regulation Number PER.30/MEN/2012 art 29(1).

⁵⁹ See Indonesian Ministry of Marine Affairs and Fisheries Letter Number 0600/MEN-KP/XI/2014 dated 7 November 2014.

⁶⁰ See, eg, Metzals et al, above n 55, 167.

⁶¹ *Ibid.*

the estimation, the more sufficient the data available to support national and global fisheries management and conservation policy making. However, to not recognise data from the government in order to support the contention that small-scale/artisanal fishers in Indonesia are conducting mass unreported fishing or unregulated fishing is definitely misleading.⁶²

This criminalisation against Indonesian small-scale fishers – without taking into account the special condition of the local small-scale fishers or the Indonesian government’s policy to protect them – highlights an example of the impact of the legalised hegemony in the international fisheries legal order on Indonesia. As noted in Chapter I, TWAIL framework identifies that legalised hegemony threatens a developing state’s sovereign equality.⁶³ One subcategory of sovereign equality is *existential equality* which refers to the right of a state to manage its own people according to its own systems and values.⁶⁴ Of this, Indonesia’s policy to protect and manage its small-scale fishers with their own special characteristics being pressured by international fisheries communities in the name of efforts to combat IUU fishing is a prime example.

3 The Uniqueness of Indonesia as a Developing State and Its Contribution to Illegal Unreported and Unregulated Fishing in Indonesia

As briefly outlined earlier in this chapter, Anghie argues that the unique character of a developing state makes the developing state’s sovereignty dependent on and vulnerable to the hegemony of international law.⁶⁵ Discussion in this section will further demonstrate the impact

⁶² See, eg, *ibid* 168.

⁶³ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004) 6.

⁶⁴ *Ibid*, 29. Italics as featured in the original.

⁶⁵ Anghie, above n 17, 6.

of legalised hegemony in the international fisheries legal framework – including the ambiguity of the IUU fishing definition – on Indonesia. Indeed, Indonesia struggles to develop its small-scale fishers on the one hand, while dealing with IUU fishing by foreigners on the other. However, Indonesia’s special characteristics pertaining to its small-scale fishers, its geography, and its lack of capacity to guard its waters and EEZ, become factors that degraded Indonesia’s credibility in international efforts to combat IUU fishing. This happened because the Indonesia’s special characteristics prevented it from complying with the obligations set out in the international fisheries law, by which Indonesia consented to abide. Some scholars argue that exposing the developing states limitations as the major factor behind the failure of them to address their problems while paying heed to the inequality in international law, is a form of neo-colonialism, which is preserved by international law. For example, as Anghie explains:

[a neo-colonialist] view held that the lack of development was attributable to the backward cultural, political and economic systems in the Third World. Of course, it was recognized that colonial excesses might have hindered progress; but once these were negated -- and this was achieved, it was asserted, by granting independence to colonial states -- then indigenous conditions and incapacity were to blame.⁶⁶

Indonesia is vulnerable to IUU fishing because of its geographical situation and the implementation of freedom of navigation that allows foreign fishing vessels to traverse Indonesian waters. However, a hegemonic view considers Indonesia’s limited capacity to guard its waters and Indonesian small-scale fishing practice, as the prominent factors in the problem of IUU fishing in Indonesia.

⁶⁶ Ibid 207.

The uniqueness of Indonesia's geography, its limited surveillance capacity, and the characteristics of Indonesian small-scale fishers, as well as how the current international fisheries framework preserves hegemony towards Indonesia, will now be discussed.

A *The Characteristics of Indonesian Small-Scale Fishers*

Indonesian fishers usually inherit the ways of their livelihood from their ancestors generation to generation.⁶⁷ This group of Indonesian coastal people are considered by Indonesian constitution to have *de facto property rights* over Indonesia's sea.⁶⁸ This is demonstrated by the existence of various *hukum adat* (traditional laws) in most coastal areas of Indonesia, such as: *awig-awig* and *sawen* in North Lombok; *petuanan* and *sasi* in Maluku;⁶⁹ *panglima laot* in Aceh;⁷⁰ *Ponggawa Sawi* in South Sulawesi;⁷¹ and *ondoafi* in Papua.⁷² The existence of *hukum adat* helps the sustainability of the fisheries resource. For example, *sawen* demands individuals respect traditional catch season management to preserve the fisheries resources in North Lombok.⁷³ However, the *hukum adat* also gives rise to questions regarding the values that need to be respected in developing and implementing national laws, regulations and policies in regards to fisheries management, especially when considering local fishers as having *tenure*

⁶⁷ Arif Satria, *Fishermen Ecology and Politic / Ekologi Politik Nelayan* (PT LKiS Pelangi Aksara, 2009) 351.

⁶⁸ Ibid 351.

⁶⁹ Arif Satria and Dedi S Adhuri, 'Pre-Existing Fisheries Management Systems in Indonesia, Focusing on Lombok and Maluku' in Kenneth Ruddle and Arif Satria (eds), *Managing Coastal and Inland Waters* (Springer, 2010) 31.

⁷⁰ Tjetjep Nurasa, Nurzali Naamin and Riyanto Basuki, 'The Role of Panglima Laot "Sea Commander" System in Coastal Fisheries Management in Aceh, Indonesia' (1994) *Rapa Nui Journal* 395.

⁷¹ Muhammad Yusran, *Ponggawa-sawi Relationship in Co-Management: An Interdisciplinary Analysis of Coastal Resource Management in South Sulawesi, Indonesia* (PhD Thesis, Dalhousie University, 2002).

⁷² Victor PH Nikijuluw, *Review on Community-Based Fisheries Management in Eastern Indonesia*, WP No 21 (1997).

⁷³ Satria and Adhuri, above n 69, 36.

over fisheries resources.⁷⁴ Indeed, it is the rampancy of illegal fishing by foreigners who poach the local fishers' livelihood, which pushes local fishers to compete with the foreigners.⁷⁵

Data regarding illegal fishing vessels apprehended by Indonesian fisheries patrol vessels – as shown in Table 1 – suggests that most illegal fishing is conducted by foreign fishing vessels (FFVs).

Year	FFVs		IFVs	
	Inspected	Apprehended	Inspected	Apprehended
2010	166	159	2,089	24
2011	79	76	3,269	30
2012	74	70	4,252	42
2013	47	44	3,824	24
2014	16	16	2,017	23
2015	85	84	6,720	73
2016	149	140	3,726	23

Table 1. Illegal Fishing Vessels Apprehended by Fisheries Patrol.⁷⁶

Table 1 permits the ratio of inspected and apprehended FFVs to be compared with that of Indonesian Fishing Vessels (IFVs). For example, in 2015, 84 out of 85 inspected FFVs (99 per cent) were apprehended by Indonesian fisheries patrols for committing IUU fishing. On the other hand, only 73 out of 6,720 inspected IFVs (0.0001 per cent) were apprehended by the same authorities. The number of FFVs inspected and apprehended do not represent the actual number of FFVs, which have traversed and committed IUU fishing in Indonesia's waters and

⁷⁴ Satria, above n 67, 351.

⁷⁵ Cathy Haenlein, *Below the Surface: How Illegal, Unreported and Unregulated Fishing Threatens our Security* (the Royal United Services Institute for Defence and Security Studies (RUSI), 2017)

⁷⁶ Directorate General of Surveillance for Marine Resources and Fisheries, *Reflection 2016 and Outlook 2017 / Refleksi 2016 dan Outlook 2017* (Directorate General of Surveillance for Marine Resources and Fisheries, 2015), 42.

EEZ. Indeed, easy access to Indonesia's waters and EEZ, and Indonesia's limited surveillance capacity makes it difficult to identify the real number of FFVs conducting IUU fishing in Indonesia's waters and EEZ. However, the Indonesian government believes that the number is much greater than those inspected and apprehended.⁷⁷ This validates the argument that IUU fishing in Indonesia's waters and EEZ is largely committed by FFVs rather than IFVs.

In 2014, there were around 2.74 million Indonesian fishers and around 222,557 Indonesian fishing vessels.⁷⁸ Indonesian fishers are recognised as the poorest of the poor in Indonesian society.⁷⁹ Illegal fishing, over fishing, fuel scarcity, climate change, severe weather, and high tide all play a part in reducing Indonesian fishers' income.⁸⁰ Fishers who use fishing vessels sized 30 gross-tonnage (GT) or smaller are those most vulnerable to these threats.⁸¹ This group comprises 98 per cent (218,746 vessels sized 0-30 GT) of the total number of Indonesian fishers.⁸² However, Indonesian fisheries laws define small-scale fishers are those who use boats no bigger than five GT.⁸³ When it comes to the total number of Indonesian fishing vessels, around 69 per cent (153,493 vessels) are small-scale fishers with boats no bigger than five GT.⁸⁴ Most of them cannot afford education, thus they are illiterate.⁸⁵ Indonesia's policy to liberate small-scale fishers from fishing permit obligations, and any retribution regarding this, is an effort to help the Indonesian small-scale fishers. It is also a

⁷⁷ "Indonesia Fisheries: 2015 Review": A Report on Trends in Coastal Marine Resources and Fisheries Management Indonesia. (California Environmental Associates, 2016).

⁷⁸ Ministry of Marine Affairs and Fisheries Indonesia, above n 1, 40.

⁷⁹ Melda Kamil Ariadno and Fitri Amelina, 'An Evaluation of the Indonesian Law and Policy on Small-Scale Fisheries' (2016) 7(2) *Journal of Sustainable Development Law and Policy* 51; Endang Retnowati, 'Indonesian Fishers in the Circle of Structured Poverty: Social, Economy and Legal perspective / Nelayan Indonesia Dalam Pusaran Kemiskinan Struktural: Perspektif Sosial, Ekonomi dan Hukum' (2011) 16(3) *Perspektif* 149.

⁸⁰ Indonesian Act Number 7 of 2017.

⁸¹ Retnowati, above n 79.

⁸² Ministry of Marine Affairs and Fisheries Indonesia, above n 1.

⁸³ Satria above n.67, 351.

⁸⁴ Ibid 41.

⁸⁵ Ariadno and Amelia, above n 79; Retnowati, above n 79.

manifestation of the Indonesian government's acknowledgement of their ownership of fisheries resources in Indonesia's jurisdiction.⁸⁶

The definition of small-scale fishers according to the Indonesia's Fisheries Act is much tighter than the internationally accepted size for a small-scale vessel, namely 12 metres in long.⁸⁷ It is challenging to compare these two different vessel size regimes; the one that is used in international literature and the one that has been adopted by Indonesia. Indeed, most of the literature uses the length of the boat (in metres) to define its size, while Indonesia uses capacity (in gross-tonnage).⁸⁸ The reasons for the Indonesian government adopting GT instead of meters to classify their fisheries vessels can be traced to the characteristics of the majority of Indonesian traditional small-scale fishing boats. These are usually long but not necessarily high in capacity.⁸⁹ This means the implementation of length measurement would have the potential to be inaccurate and disadvantageous when it comes to categorising Indonesian small-scale fishing vessels. However, Indonesian regulations utilise an equation, stating that the capacity of a fishing vessel that is 15 meters in length, is commonly equal to 30 GT.⁹⁰ Therefore, the size of a small-scale fishing boat according to the literature, if converted to GT, would be around 24 GT.⁹¹ The stricter requirements made by Indonesia's Fisheries Law, which – limit the freedom from fishing permit obligations to Indonesian small-scale fishers with boat no

⁸⁶ Satria, above n 67.

⁸⁷ See, eg, Lore M Ruttan, F C Gayanilo, Ussif Rashid Sumaila and Daniel Pauly, *Small Versus Large-Scale Fisheries: A Multi-Species, Multi-Fleet Model for Evaluating Their Interactions and Potential Benefits*, Working Paper for the Fisheries Centre, Vancouver (2001).

⁸⁸ See for example an article discusses the measurement of the capacity of fishing vessels in one province in Indonesia, David Lymer, Funge-Smith S., and Greboval D., *The fishing fleet in Aceh Province, Indonesia*. FAO Regional Office for Asia and the Pacific, Bangkok, Thailand. RAP Publication 2009/09, (2009) 39 pp.

⁸⁹ See Adrian Horridge, *The Prahau: Traditional Sailing Boat of Indonesia* (Oxford University Press, 1985).

⁹⁰ See Indonesian Ministry of Marine Affairs and Fisheries Regulation Number PER.12/MEN/2012 on Fishing Business in the High Seas, art 3(3).

⁹¹ An estimation can be done using a simple math calculation: if 15 meters = 30 GT, 12 meters = 30 GT/15 meters x 12 meters = 24 GT.

bigger than 5 GT, – demonstrates Indonesia’s efforts to manage its fishers as much as possible, while still promoting responsible fishing practices for Indonesian local fishers.

Regardless of these efforts, Indonesia’s policy to liberate its small-scale fishers from licensing and reporting obligation continues to receive criticism. For example, a report from the USA National Intelligence Council regarding global implications of IUU fishing in 2016, argues Indonesia’s policy of not requiring fishing permits for its traditional fishing fleets has facilitated unreported fishing by small-scale fishers that ‘accounts for a large proportion of all fishing activities’.⁹² Most of these continuing pressures on the Indonesian government come from the international tuna management measures. A report from Banks⁹³ – a fisheries consultant working for the *Marine Stewardship Council*,⁹⁴ which is an international non-profit organisation that has the primary goal of addressing unsustainable fishing practice, provides prime example. This acknowledges some improvement has been made by Indonesia in managing its tuna fisheries, including Indonesia’s implementation of a tuna fishing *logbook* required for all Indonesian fishers with boats sized above 5 GT (>5 GT).⁹⁵ However, the report still urges Indonesia to apply the tuna fishing *logbook* obligation to its small-scale fishers with boats sized below 5 GT (< 5 GT).⁹⁶ This means to be categorised as implementing sustainable fishing practice, Indonesia must implement reporting procedure regarding tuna caught by all

⁹² *Global Implications of Illegal, Unreported, and Unregulated (IUU) Fishing*, Memorandum prepared for the National Intelligence Council (19 September 2016), 9 <<https://fas.org/irp/nic/fishing.pdf>>.

⁹³ Richard Banks, 'Review of the Fishery Improvement Plan for Indonesian Tuna Fisheries and Revisions to the MSC Scoring' (Poseidon Aquatic Resource Management Ltd, 2015) 10 <<http://ipnlf.org/perch/resources/poseidon-indonesian-fip-review-final.pdf>>.

⁹⁴ The Marine Stewardship Council is a non-governmental organization established by the World Wildlife Fund and Unilever, focusing on addressing unsustainable fishing practices and seafood supplies. Please see The Press Association, *Sustainable Seafood: The First 20 Years: A History of the Marine Stewardship Council* (25 April 2017) <<http://20-years.msc.org/>>.

⁹⁵ Banks, above n 93, 10.

⁹⁶ *Ibid.*

Indonesian fishers, no matter their scale.⁹⁷ This is definitely an interference with the Indonesian Fisheries Act and disrespects Indonesian small-scale fisheries condition.

International tuna management is mandated by the *LOSC*. This is especially evident in Article 64, which urges states to cooperate in fulfilling their obligation to manage and conserve highly migratory species – namely, fish, such as tuna, which have their life cycle in wide and trans-boundary areas of the seas – within their EEZs and beyond.⁹⁸ Further arrangements for tuna conservation and management measures are then elaborated in the *Fish Stock Agreement* and the *CCRF*.⁹⁹ These arrangements provide ‘a global reference for standards for fisheries management’.¹⁰⁰ These standards consist of a precautionary approach which demands adequate, certain and reliable data regarding the status of tuna stocks, including catch data.¹⁰¹ Furthermore, the international fisheries legal framework then facilitates the establishment of RFMOs.¹⁰²

Pressures on Indonesia pertaining to its catch reporting policy regarding small-scale fishers, comes from the RFMOs with jurisdiction around Indonesia’s EEZ, such as the *Indian Ocean Tuna Commission (IOTC)*, the *Commission for the Conservation of Southern Bluefin Tuna (CCSBT)*, and the *Western and Central Pacific Fisheries Commission (WCPFC)*, with help from some NGOs such as *WWF* and *Marine Stewardship Council*. The RFMOs set universal standards for managing and conserving tuna, which bind Indonesia as a party of the RFMOs. For example, the IOTC Resolution No. 15/01 on *the Recording of Catch and Effort*

⁹⁷ Ibid.

⁹⁸ The *LOSC*, art 64; Robin Allen, *International Management of Tuna Fisheries: Arrangements, Challenges and a Way Forward*, FAO Fisheries and Aquaculture Technical Paper, no 536 (2010), 3 <<http://www.fao.org/docrep/012/i1453e/i1453e00.pdf>>.

⁹⁹ Allen, above.

¹⁰⁰ Ibid 3.

¹⁰¹ Ibid.

¹⁰² Ibid.

Data by Fishing Vessels in the IOTC Area of Competence, obliges all tuna catches to be recorded in a *logbook* for each fishing operation.¹⁰³ Additionally, the *Marine Stewardship Council* also establishes standards – called the *MSC Standard* – to assess whether a state is implementing sustainable fishing practices.¹⁰⁴ These universalised standards facilitate hegemony against Indonesia, as they dictate and subordinate the Indonesian Fisheries Act and Indonesian small-scale fishers. Indeed, the role these universalised standards plays is summed up well by Anghie:

[t]he principle of universality creates, even as it encompasses, the difference that must be sanctioned; universality is created to disempower the party to which it applies. Indeed, the construction of the universal and the international is not by any means an innocent act for here, it would seem, the ‘international’ is formulated precisely in order to subordinate the Third World.¹⁰⁵

The universal standard to record tuna catches in a *logbook*, derogates Indonesia’s policy and Fisheries Law which frees its small-scale fishers from reporting obligations. Indeed, the Indonesian government’s respect for the *hukum adat* (traditional law) adopted by its small-scale fishers is ruled out by international interests regarding tuna. Consequently, as long as Indonesian small-scale fishers continue to be illiterate, Indonesia will continue to be blamed for not implementing sustainable fishing practices. Further analysis pertaining to the process

¹⁰³ See Indian Ocean Tuna Commission, *Resolution 15/01 on the Recording of Catch and Effort Data by Fishing Vessels in the IOTC Area of Competence* (2015), [3] <http://www.iotc.org/sites/default/files/documents/compliance/cmm/iotc_cmm_15-01_en.pdf>.

¹⁰⁴ See Banks, above n 93. Currently the *Marine Stewardship Council* implements three standards: the *MSC Standard Verse 1: Principles and Criteria for Sustainable Fishing*; the *MSC Standard Verse 2: Fisheries Certification Requirements*; and the *MSC Standard Verse 3: Chain of Custody Standard*.

¹⁰⁵ Anghie, above n 10, 238.

and operation of this hegemony and its impact on Indonesia will be rigorously discussed in Chapter IV.

B *Indonesia's Geography*

As the biggest archipelagic state, Indonesia's islands are scattered between the Pacific and Indian oceans.¹⁰⁶ This provides many channels to sail through Indonesian waters.¹⁰⁷ Accompanied with the freedom of navigation right for all foreign fishing vessels, Indonesian waters are very vulnerable to IUU fishing.¹⁰⁸ Below, Figure 2 illustrates the origins and routes used by the FFV poachers who enter Indonesia's waters and EEZ.



Figure 2. Origin and Routes of Foreign Illegal Fishing to Indonesia's EEZ and Territorial Seas.¹⁰⁹

¹⁰⁶ Kresno Buntoro, 'Perspectives on Enhancing Safety and Security in Indonesian Waters' (2010) 8 *Indonesian Journal of International Law* 640.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ DG-SMRF, *Reflection 2014 and Outlook 2015 / Refleksi 2014 dan Outlook 2015* (Directorate General of Surveillance for Marine Resources and Fisheries, 2015).

From Figure 2 it can be observed that the foreign illegal fishers sail through Indonesia's EEZ and territorial seas (archipelagic waters) to access the targeted location. The foreign fish poachers mostly come from Vietnam, Thailand, Malaysia, the Philippines, China, Taiwan and Cambodia.¹¹⁰

Returning to Table 1 in the previous section, this further shows that almost all of the FFVs found in Indonesia's EEZ and territorial seas were committing illegal fishing. Nevertheless, some of the FFVs that sail Indonesia's EEZ and territorial seas are found to possess no evidence of illegal fishing activity. For example, in 2010 seven FFVs out of the 169 inspected were released due to there being no evidence of illegal fishing. Between 2011 and 2016, on average, only two FFVs were found to be innocent.¹¹¹ This means 96 per cent of FFVs conducting freedom of navigation through Indonesia's EEZ and territorial seas were committing illegal fishing.

This is allowed by Indonesia's geographical situation and the freedom of navigation principle adopted by the LOSC. Freedom of navigation and freedom to fish in the high seas, accompanied by irresponsible or incapable flag state control of fishing fleets, has been believed to be a major factor in the rampancy of IUU fishing in the high seas.¹¹² However, there is a lack of attention regarding the impacts of freedom of navigation on IUU fishing in the coastal states' jurisdictional waters. Some studies agree that the freedom of navigation limits the jurisdiction of the coastal states against foreign vessels.¹¹³

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Matthew Gianni and Walt Simpson, *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing* (Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers' Federation, and World Wildlife Fund International, 2005).

¹¹³ See, eg, Anne Bardin, 'Coastal State's Jurisdiction over Foreign Vessels' (2002) 14 *Pace International Law Review* 27.

The *LOSC* divides the jurisdiction of coastal states in the sea into two areas which have distinct legal status. The first is the waters under the state's sovereignty, which consist of the internal waters, archipelagic waters, and the territorial sea.¹¹⁴ The second is the waters under the state's sovereign right called its EEZ. EEZs are part of the high seas,¹¹⁵ but coastal states hold exclusive rights to explore, exploit, conserve and manage, as well as have jurisdiction to protect and preserve the natural resources in this area.¹¹⁶ However, this jurisdiction is limited when it comes to the implementation of the freedom of navigation principle. The coastal states' jurisdiction implementation shall not hamper or in practice result in denying or impairing the implementation of freedom of navigation which consists of the innocent passage, transit passage, and archipelagic sea-lanes passage rights.¹¹⁷ Moreover, on the topic of IUU fishing in Indonesia, the jurisdiction of some international bodies even tries to overlap with Indonesia's. For example, the international standard, which obliges Indonesian small-scale fishers to record their catch in a *logbook*, as discussed in the previous section.¹¹⁸

C *Indonesia's Limitation in Monitoring, Control, and Surveillance Capacity*

Monitoring, control and surveillance (MCS) systems are a fisheries management tool, which has been developed to increase the effectiveness of fisheries management, the compliance of domestic fishers, and security against foreign unlicensed fishers.¹¹⁹ MCS systems are believed to deliver comprehensive and more effective fisheries enforcement when compared with

¹¹⁴ The *LOSC*, art 2 (1).

¹¹⁵ The *LOSC*, art 58 (1).

¹¹⁶ The *LOSC*, art 56 (1).

¹¹⁷ The *LOSC*, arts 24(1), 42(2), 54.

¹¹⁸ Banks above n 93.

¹¹⁹ Mary Ann Palma-Robles, 'Fisheries Enforcement and the Concepts of Compliance and Monitoring, Control and Surveillance' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge, 2016), 153.

‘traditional fisheries enforcement in which patrol vessels mainly conduct surveillance operations and arrest of fishing vessels for alleged violations’.¹²⁰ However, analysis in this section shows that the existence of patrol vessels remains essential in protecting Indonesia, as an archipelagic country, from IUU fishing.

The MCS concept has officially been discussed since 1981.¹²¹ This began even before the *LOSC* was established in 1982. Initial discussions regarding MCS were held in April 1981, during the FAO expert meeting in Rome, Italy.¹²² This meeting was held in preparation for the enactment of the *LOSC*’s provisions regarding fisheries conservation and management in EEZs.¹²³ The meeting also adopted the definition of MCS, which is as follows:

Monitoring - the continuous requirement for the measurement of fishing effort characteristics and resource yields.

Control - the regulatory conditions under which the exploitation of the resource may be conducted.

Surveillance - the degree and types of observations required to maintain compliance with the regulatory controls imposed on fishing activities.¹²⁴

In 1999, the United Nations Food and Agriculture Organization (FAO) published Technical Paper no. 338 titled *An Introduction to Monitoring, Control and Surveillance Systems for*

¹²⁰ Ibid 153.

¹²¹ David J Doulman, 'Technical Assistance in Fisheries Monitoring Control and Surveillance: A Historical Perspective of FAO's Role' (Food and Agriculture Organization, 1994) 3.

¹²² The meeting was attended by 12 States, namely Australia, Argentina, Canada, Chile, Fiji, Iceland, Indonesia, New Zealand, Norway, Sierra Leone, United Kingdom, and the United States of America. See *ibid* 3.

¹²³ Doulman, above n 121.

¹²⁴ *Ibid*.

Capture Fisheries.¹²⁵ This elaborates on that implementation of MCS systems, stating that monitoring constitutes activities to collect data regarding fisheries resources' capacity and threats; control is an overfishing prevention effort through the enactment of proper and enforceable regulations; and surveillance is an effort to patrol, and to enforce laws and regulations, in the fishing area.¹²⁶ In addition, the technical paper states that MCS systems' aim is to combine prevention measures, such as 'voluntary compliance' and enforcement.¹²⁷ Furthermore, the MCS technical paper emphasises that instead of only targeting foreign fishing vessels, MCS systems' operation is projected to increase the compliance of domestic fishers.¹²⁸

The FAO explains that MCS systems consist of land, sea and air components.¹²⁹ The land divisions of MCS systems are central to coordinating and organising all MCS operations. In its role, the land division is responsible for fisheries MCS system operations in coastline, inland, and freshwater areas. In addition, the land division also conducts vessel inspections at port, including monitoring transshipment activity at port and fish product trading.¹³⁰ The sea divisions utilise extensive resources including: radar, vessel platforms (including patrol vessel and its crew), and observers on fishing vessels and fisheries management policies (such as quota systems, fishing gear size restrictions, and the stipulation of maximum and minimum sized fish to catch).¹³¹ While this occurs, the air division is conducting air surveillance using satellites and airplanes.¹³²

¹²⁵ Peter Flewelling, *An Introduction to Monitoring, Control and Surveillance Systems for capture fisheries* (Food and Agriculture Organization, 1994).

¹²⁶ Ibid 19-20.

¹²⁷ Ibid 9.

¹²⁸ Ibid 4.

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

There are important variables in each part of MCS system implementation. When it comes to monitoring, fishing license, vessel registration, and catch-effort data are essential. Meanwhile, an integrated and well-planned coastal, offshore and air patrol operation is crucial for effective surveillance.¹³³ On the other hand, legislation is core regarding the control aspect. Subsequently, good coordination between the fisheries manager, MCS system operator, and legal drafter is needed to develop the proper regulations to achieve the fisheries management plan. The regulations should be effectively enforceable to promote compliance.¹³⁴

FAO Technical Paper No. 338 discourages the utilisation of military assets in MCS systems.¹³⁵ This suggestion is based on the consideration that operational military vessels require extra cost and are more politically sensitive than civilian law enforcement vessels.¹³⁶ Moreover, military deployment in MCS systems is considered to be less appropriate in terms of the scope of activity since MCS systems are not intended solely for enforcement measure. However, beyond this, MCS systems are expected to provide important data that is very useful for the fisheries management as a whole.¹³⁷ Addressing the trend of multi-agency approach regarding MCS systems, the MCS guidelines also emphasise the necessity for the fisheries department to lead the fisheries MCS system implementation. This will increase the effectiveness of the MCS system operation, and reduce the risk of fisheries mismanagement.¹³⁸

In 2002, the FAO updated the MCS guidelines by publishing FAO Technical Paper No.415 titled, *Recent Trends in Monitoring, Control and Surveillance Systems for Capture*

¹³³ Ibid 56.

¹³⁴ Ibid 20.

¹³⁵ Ibid 4.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid 11.

Fisheries.¹³⁹ These new guidelines elaborate on the important role of new technology in MCS systems, such as the Vessel Monitoring System (VMS), Satellite Imagery, and the Geographical Information System (GIS).¹⁴⁰ In particular, regarding VMS, the technical paper emphasises the crucial support satellite-based VMS plays in the success of MCS systems.¹⁴¹ VMS works on the same platform with GPS. It is used as a tool for MCS systems operators to observe the real-time position of fishing vessels.¹⁴² Only the licenced fishing vessels will install the VMS device.¹⁴³ As a major part of MCS systems, the VMS implementation goal is to increase the state's responsibility over its licenced fishing vessels.¹⁴⁴

Indonesia began to implement VMS in 2003, formalised by the Ministry Decree Number.29/MEN/2003 on the *Implementation of Fishing Vessel Monitoring Systems*.¹⁴⁵ The implementation of VMS in Indonesia continues to develop, including the adoption of the obligation to install and activate VMS in fishing vessels by the Indonesia's Fisheries Act in 2004.¹⁴⁶ Furthermore, to demonstrate Indonesia's commitment to actively participate in global fisheries management and the war against IUU fishing, Indonesia was the first state to make its real-time VMS data accessible to the world through the global-fishing-watch application.¹⁴⁷ However, as has been mentioned earlier, VMS is only a means to monitor Indonesia's licenced vessels. Therefore, VMS cannot help Indonesia protect its fisheries from foreign vessels.

¹³⁹ Peter Flewelling et al, *Recent Trends in Monitoring Control and Surveillance Systems for Capture Fisheries* (Food and Agriculture Organization, 2002)

¹⁴⁰ Ibid 78.

¹⁴¹ Ibid 24.

¹⁴² Ibid 79.

¹⁴³ Ibid.

¹⁴⁴ For more information regarding VMS implementation and its relation to the responsibility of the flag state please see Food and Agriculture Organization, 'Fishing Operations: Vessel Monitoring' (1998) 1 *FAO Technical Guidelines for Responsible Fisheries*.

¹⁴⁵ Toni Ruhimat et al, *Indonesia National Report to the Scientific Committee of the Indian Ocean Tuna Commission, 2017*, IOTC-2017-SC20-NR09 (03 November 2017), 16.

¹⁴⁶ See Indonesian Fisheries Act Law Number 31 of 2004 art 7(2)e.

¹⁴⁷ Kimbra Cutlip, *Indonesia Makes Its Fishing Fleet Visible to the World Through Global Fishing Watch* (7 June 2017) Global Fishing Watch <<http://blog.globalfishingwatch.org/2017/06/indonesia-shares-vms-with-global-fishing-watch/>>.

The *International Tribunal for Law of the Sea (ITLOS)* decision in the *M/V Saiga Case*¹⁴⁸ underlines the necessity of visual evidence that must be clearly observed by the coastal state's authority before implementing law enforcement measures against foreign vessels who abuse the right of freedom of navigation.¹⁴⁹ Considering the limited number and capacity of Indonesia's fisheries patrol vessels, this requirement is a significant obstacle for Indonesia to secure its waters from the misuse of the freedom of navigation provisions by foreign fishing vessels. Furthermore, this requirement makes radar, VMS, and other means of monitoring and surveillance in MCS systems insufficient to support the lack of patrol vessels in both number and capacity. Currently, Indonesia only has 35 fisheries patrol vessels out of the minimum 90 vessels needed.¹⁵⁰ Furthermore, out of these 35 patrol vessels, only 15 are considered safe to sail the open seas.¹⁵¹

4 Indonesia's Efforts to Combat Illegal, Unreported and Unregulated Fishing

To combat IUU fishing, Indonesia consistently develops its measures in accordance with the international fisheries legal framework. Such measures however, do not effectively help Indonesia to protect its waters from IUU fishing conducted by foreign vessels, and this has pushed Indonesia into implementing a controversial policy to blow up and sink IUU fishing vessels. Indonesia's measures consist of developing its national laws and regulations, establishing a National Plan of Actions to Prevent and to Combat IUU Fishing (NPOA-IUU), joining all regional fisheries management organisations (RFMO) around Indonesia, and bilateral, regional and international cooperation. As the most relevant measures to this

¹⁴⁸ *M/V "Saiga" (No. 2) Case (St Vincent and the Grenadines v Guinea) (Judgment)* [1999] ITLOS, [147].

¹⁴⁹ *Ibid.*

¹⁵⁰ Directorate General of Surveillance for Marine Resources and Fisheries, above n 76, 14.

¹⁵¹ *Ibid.*

chapter's analysis pertain to the development and enforcement of Indonesian fisheries laws and regulations, and the blow up and sink policy, these will now be discussed.

A *Development and Enforcement of Indonesian Fisheries Laws and Regulations*

The development of Indonesian fisheries laws is marked by the creation of Law Number 31 of 2004 on Fisheries¹⁵² and its amendment, Law Number 45 of 2009.¹⁵³ Hereafter both laws will be referred to as the Fisheries Law. Advancement of the Fisheries Law is demonstrated by the categorisation of IUU fishing as a crime.¹⁵⁴ This supports stringent measures to combat IUU fishing as opposed to the notion of fisheries offences as administrative violations.¹⁵⁵

The Fisheries Law states that it is important to provide special criminal procedures to prosecute offenders of fisheries crimes due to the unique nature and significant impact of these offences.¹⁵⁶ One of the factors unique to fisheries crimes is the location of its occurrence, namely in vast areas of the sea. This means it requires cooperation and coordination among various institutions.¹⁵⁷ Therefore, the Fisheries Act established special fisheries crimes investigators from the Indonesian Ministry of Marine Affairs and Fisheries (MMAF), Navy, and Police.¹⁵⁸

¹⁵² Indonesian Fisheries Law Number 31 of 2004.

¹⁵³ Indonesian Fisheries Law Number 45 of 2009.

¹⁵⁴ Mary Ann Palma, 'Integrating Monitoring, Control and Surveillance and Anti-Money Laundering Tools to Address Illegal Fishing in the Philippines and Indonesia' in Gregory Rose (ed), *Following the Proceeds of Environmental Crime: Fish, Forests and Filthy Lucre* (Routledge, 2014) 100

¹⁵⁵ Rob McLaughlin, 'Coastal state use of force in the EEZ under the Law of the Sea Convention 1982' (1999) 18 *University of Tasmania Law Review* 11, 16.

¹⁵⁶ Elucidation of Fisheries Law Number 31 of 2004 (Indonesia) ch I [6].

¹⁵⁷ *Ibid.*

¹⁵⁸ Indonesian Fisheries Law Number 45 of 2009 art 73.

The Fisheries Law also established special prosecutors and courts, as well as special criminal procedures for fisheries crimes. Here, the fisheries prosecutor must be a special attorney appointed by the Indonesian Attorney General with a minimum experience of two years in prosecuting crime. This prosecutor must also hold a certificate of completion regarding fisheries crimes prosecution training.¹⁵⁹

Special fisheries courts are established in the area of port locations which become the most frequent place to process fisheries crime offenders. Currently, there are ten fisheries courts. These have been established in Jakarta, Medan – North Sumatera, Pontianak – West Kalimantan, Ambon – Maluku, Bitung – North Sulawesi, Tual – Maluku, Tanjung Pinang – Riau Islands, Ranai – Natuna (Riau Islands), Merauke – Papua, and Sorong – Papua.¹⁶⁰ Figure 3 shows the locations of these special fisheries courts in Indonesia.



Figure 3 the Location of Fisheries Courts in Indonesia.¹⁶¹

¹⁵⁹ Indonesian Fisheries Law Number 45 of 2009 art 75.

¹⁶⁰ Directorate General of Surveillance for Marine Resources and Fisheries, above n 69, 12.

¹⁶¹ Ibid.

The Fisheries Law also impose severe sanctions on various types of fisheries crimes. For example, unlicensed fishing can be charged with a maximum of eight years imprisonment, as well as a maximum fine of Rp. 1.5 billion (approximately AUD 150,000).¹⁶² However, because the *LOSC* prohibits imprisonment for IUU fishing by foreign vessels in EEZs,¹⁶³ the Fisheries Law must ultimately conform to the *LOSC*. As a consequence, the Fisheries Law in practice only charges IUU fishing offenders in Indonesia's EEZ with a fine of up to Rp. 20 billion (approximately AUD 2 million).¹⁶⁴ Limitation on sanctions for the foreign IUU fishing perpetrators in EEZs was proposed by the developed states in the discussions during the *LOSC*'s preparation.¹⁶⁵ This proposal came from the developed states' practice to protect their fishers from harsh punishment as a consequence of fishing in other states' waters.¹⁶⁶ Nevertheless, when it comes to being implemented by Indonesia, the limitations imposed by the *LOSC* on the sanctions for IUU fishing by foreign vessels in EEZs significantly hamper the effectiveness of enforcement measures against this crime.¹⁶⁷

With limited capacity to patrol its waters, Indonesia has apprehended only a relatively small sized foreign fishing vessels.¹⁶⁸ Furthermore, the beneficial owners of foreign IUU fishing vessels usually remain unknown. This means the fines, which are imposed on the foreign perpetrators of IUU fishing in Indonesia's EEZ, are never paid.¹⁶⁹ This situation dramatically degrades the effectiveness of these enforcement measures against foreign

¹⁶² Indonesian Fisheries Law Number 31 of 2004 arts 26(1), 92.

¹⁶³ See The *LOSC*, art 73.

¹⁶⁴ Indonesian Fisheries Law Number 45 of 2009 art 93(2).

¹⁶⁵ M Nordquist et al, *UNCLOS 1982 Commentary Vol. IV* (Martinus Nijhoff, 1991).

¹⁶⁶ Paul N McCloskey Jr, and Ronald K Losch, 'The UN Law of the Sea Conference and the US Congress: Will Pending US Unilateral Action on Deep Seabed Mining Destroy Hope for a Treaty' (1979) 1 *Northwestern Journal of International Law and Business* 245.

¹⁶⁷ Example of discussion on the impact of the *LOSC* limitation of sanction on the deterrence effect against IUU fishing perpetrators in EEZ please see Gail Lugten, 'Big fish to fry-international law and deterrence of the toothfish pirates' (2004) 16 *Current Issues in Criminal Justice* 307.

¹⁶⁸ *Fish War* (Produced by InfocusAsia (IFA) and National Geographic Channel, 2010).

¹⁶⁹ *Ibid*.

perpetrators of IUU fishing in Indonesia's EEZ. In fact, 90 per cent of IUU fishing by foreigners occurs in Indonesia's EEZ.¹⁷⁰ Unfortunately, many Indonesian fishing vessels also transferred their catches illegally to foreign vessels in Indonesia's EEZ adjacent to high seas or neighbouring countries' waters, which exacerbated the problem of IUU fishing in Indonesia.¹⁷¹ This type of IUU fishing made Indonesia's efforts to combat IUU fishing increasingly difficult.¹⁷² Therefore, besides developing its fisheries law and enforcement, Indonesia enacted: a moratorium on fishing licenses and compliance audits against Indonesian ex-foreign fishing vessels, it also banned all transshipment activities in Indonesia's waters and EEZ, and established the Indonesian special task force to combat IUU fishing (TASK FORCE 115).

Moratorium on fishing licenses and compliance audits against Indonesian ex-foreign fishing vessels

These measures were imposed by the Indonesian government to confirm the suspicion that many Indonesian fishing vessels were transferring their catches to foreign fishing vessels in Indonesia's EEZ adjacent to the high seas or neighbouring states' waters.¹⁷³ By means of moratorium, Indonesia halted the operation of all Indonesian fishing vessels that were built overseas (known as the ex-foreign fishing vessels) for one year, from 2014 to 2015.¹⁷⁴ This moratorium allowed the ministry to review closely all of the operational data of the 1,132 Indonesian ex-foreign fishing vessels.¹⁷⁵ The review concluded that all of the Indonesian ex-foreign fishing vessels had been involved in various types/degrees of IUU fishing activities in

¹⁷⁰ OECD, 'Fishing for Development - Background Paper for Session 4: The Challenge of Combatting Illegal, Unreported and Unregulated (IUU) Fishing' (Paper presented at the Fishing for Development a joint meeting of the OECD Fisheries and Development Assistance Committees, with the Food and Agriculture Organization of the United Nations and the World Bank Paris, France, 10 and 11 April 2014), 3.

¹⁷¹ IOM, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry* (International Organization for Migration, 2016) 28.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid, 36.

¹⁷⁵ Ibid, 38.

Indonesia's waters and EEZ.¹⁷⁶ Moreover, most of the Indonesian ex-foreign vessels were proven to still be owned by foreigners.¹⁷⁷ This was revealed after as many as 573 of the under inspected ex-foreign vessels fled overseas.¹⁷⁸ Therefore, all of the ex-foreign fishing vessels were deregistered as Indonesian fishing vessels after administrative sanctions had been imposed on them.¹⁷⁹ This review discovered the practice of organised crime / transnational organised crime in the Indonesian fishing industry, requiring urgent action.

Ban on transshipment at sea

Transshipment is the practice of transferring catches (fish) in the middle of the sea from a fishing boat to a transport vessel for delivery.¹⁸⁰ This practice has been blamed as the cause of widespread IUU fishing in the high seas because it is through transshipment that transport vessels are able to take their catch and ship it directly overseas without having to go through the proper processes in Indonesia.¹⁸¹ Therefore, since 2014, Indonesia has imposed a total restriction on transshipment activities in Indonesia's waters and EEZ.¹⁸² This measure effectively reduced IUU fishing in Indonesia since it minimised this hard to monitor activity, especially as Indonesia has a limited number of patrol vessels.¹⁸³ Unfortunately, the prohibition on transshipment also cost Indonesia significantly. The ban has made catch deliveries inefficient because fishing boats need to return to port in order to deliver their catches.¹⁸⁴ The fishing boats

¹⁷⁶ Ibid, 39.

¹⁷⁷ Ibid, 38.

¹⁷⁸ Elisa Valenta Sari, Tim Anev: 887 Kapal Ikan Asing Langgar Sejumlah Aturan / Anev Team: 887 Foreign Fishing Vessels Violated Multiple Regulations, CNN Indonesia (8 April 2015) <<https://www.cnnindonesia.com/ekonomi/20150408122554-92-45022/tim-anev-887-kapal-ikan-asing-langgar-sejumlah-aturan>>

¹⁷⁹ IOM, above n 171, 45.

¹⁸⁰ Ibid, 17.

¹⁸¹ Ibid.

¹⁸² Ibid, 37.

¹⁸³ Ibid, 17.

¹⁸⁴ See Rendi A. Witular, 'Special Reports: Collateral damage in war against poachers' (2016) <<https://www.thejakartapost.com/longform/2016/10/04/collateral-damage-in-war-against-poachers.html>>;

are then unable to maximise their fishing days because they must deliver their catches right away before quality degrades.¹⁸⁵ As a result, quantities of fish have declined and local fish processing companies are facing great hardship due to the lack or disruption of raw materials for their industry.¹⁸⁶

It is important to understand that curbing IUU fishing in Indonesia needs an extraordinary effort because of its complexity, as well as the high risk and price to bear. Consequently, Indonesia tries to increase the deterrence effect of its enforcement measures by implementing the blow up and sink IUU fishing vessels policy. Indonesia considers this policy immensely important because previously, the vessels of foreign IUU fishing perpetrators were auctioned after they were convicted.¹⁸⁷ However, the owner – using an intermediary – typically bought the vessel back for a tiny price and then re-used it to repeatedly conduct IUU fishing in Indonesia’s waters and EEZ.¹⁸⁸

The Establishment of the Task Force 115

To increase the effectiveness of measures against IUU fishing, Indonesia established the Indonesian Task Force on Prevention and Eradication of IUU Fishing (Task Force 115) in 2015.¹⁸⁹ The Task Force was established through a presidential decree, and reports directly to Indonesian President Joko Widodo.¹⁹⁰ This Task Force has authority to take action on illegal

FAO, *Global Study on Transshipment: Regulations, Practices, Monitoring and Control*, (2018) <<http://www.fao.org/3/CA0464EN/ca0464en.pdf>>.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Susi Pudjiastuti in News Desk The Jakarta Post, *Minister Susi Rejects Idea to Auction Off Confiscated Fishing Boats*, The Jakarta Post <<http://www.Thejakartapost.Com/News/2017/07/24/minister-susi-reject-idea-to-auction-off-confiscated-fishing-boats.html>>, 1.

¹⁸⁸ Ibid.

¹⁸⁹ Alfurkon Setiawan, ‘President Jokowi Sets Up Task Force to Fight Illegal Fishing’ (27 October 2015), Secretariat of the Cabinet of the Republic of Indonesia, <<http://setkab.go.id/en/president-jokowi-sets-up-task-force-to-fight-illegal-fishing/>>; see also Presidential Regulation Number 115 of 2015 on Illegal Fishing Eradication Task Force.

¹⁹⁰ Ibid.

poachers and other perpetrators of related crimes in Indonesian waters.¹⁹¹ This Task Force conducts regular patrols to detect IUU fishing activities, and leads joint enforcement efforts between MMAF, Navy, Police, Coastguards, and Prosecutors.¹⁹² This Task Force's main responsibilities are to coordinate the crime investigations against IUU fishing and the implementation of the blow up and sink IUU fishing vessels policy.¹⁹³ While criticised by some scholars and activists, the Indonesian IUU fishing Task Force on Prevention and Eradication of IUU Fishing is considered successful in reducing IUU fishing.¹⁹⁴ Criticisms against this Task Force are based on inefficiency within the Task Force's operation. For example, Halim, the Secretary General of the People's Coalition for Fisheries Justice (KIARA), argues that the Task Force overlaps with the duty of the Indonesian Maritime Security Board (BAKAMLA) and the Task Force's operational costs, which are around one trillion rupiahs (AUD 100 Million) a year, wastes the national budget.¹⁹⁵ On the other hand, the Indonesian government believes that the Task Force is successful because the Task Force significantly contributes to the effectiveness of the criminal investigations against IUU fishing and the implementation of the blow up and sink IUU fishing vessels policy. As a result, not only fisheries crimes have been solved by the Task Force, but slavery practices, smuggling and other crimes associated with IUU fishing in Indonesia's waters have also been prosecuted.¹⁹⁶

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Please see for example, Mohd. Agoes Afiya, 'Indonesia's Global Maritime Fulcrum: Contribution in the Indo-Pacific Region' (2017) 6(2) *Andalas Journal of International Studies*, 152; See also Nusantara Maritime News, 'Susi's Authority to Eradicate Illegal Fishing Exceeds the Limit' (29 October 2015), <<https://maritimeneeds.id/susi-authority-to-eradicate-illegal-fishing-exceeds-the-limit/>>

¹⁹⁵ Nusantara Maritime News, above.

¹⁹⁶ IOM, above n 171

B *The Blow Up and Sink IUU Fishing Vessels Policy*

To create a deterrent effect, the Indonesian government sank more than 488 IUU fishing vessels between 2014 and 2018, and still continues to sink such vessels today.¹⁹⁷ Out of these 488 vessels, twenty six were Indonesian and the remaining 462 were foreign owned, with the majority coming from Vietnam (276 vessels).¹⁹⁸ The practice of sinking ships itself is not new for Indonesia. Indeed, this is permitted by the Fisheries Laws. Here, Article 69(4) of Fisheries Law Number 45/2009 states that:

[the] investigator and fisheries inspector vessel may conduct specific action such as burning down and/or sinking foreign-flagged fisheries vessels based on sufficient initial evidence.” Article 76A then states that: “any object and/or tool used for and/or resulting from fisheries crime may be confiscated for the state or destroyed subsequent to the approval of the chief of a district court.¹⁹⁹

After the sinking policy was first enacted in 2009, however, its implementation was soon postponed by the Indonesian government due to protests from neighbouring countries.²⁰⁰ This demonstrates the controversy of the policy in the context of international law. As will be further discussed in Chapter III, the ambiguity of the IUU fishing definition poses IUU fishing as an

¹⁹⁷ Vincent Bevins, ‘I’m nasty.’ How an Indonesian government official won admirers by blowing up boats’, *the Washington Post* (online), 5 September 2018, <https://www.washingtonpost.com/world/2018/09/05/im-nasty-how-an-indonesian-government-official-won-admirers-by-blowing-up-boats/?noredirect=on&utm_term=.869405103af6>.

¹⁹⁸ *Ibid.*

¹⁹⁹ Indonesian Fisheries Law Number 45 of 2009 arts 69(4), 76A.

²⁰⁰ Tempo.co, *SBY Pernah Tegur Pembakaran Kapal Asing Ilegal/ SBY Rebuked the Burning of Foreign Illegal Fishing Vessels* (5 October 2017) Tempo.co <<https://nasional.tempo.co/read/626629/sby-pernah-tegur-pembakaran-kapal-asing-ilegal>>

administrative offence.²⁰¹ Therefore, the sinking policy is considered by some scholars to be excessive and not conform with international law.

To address the problem, the Indonesian government made improvements to the implementation of its policy to sink IUU fishing vessels. Consequently, the implementation of this policy by Indonesia can now be separated into two periods: 2009-2010 and 2014-present.²⁰² In the 2009-2010 period, Indonesian authorities mostly burned and sunk the foreign IUU fishing right away in the middle of the sea after apprehending the crews and securing them on board the Indonesian patrol vessels.²⁰³ This implementation did not conform with Articles 73(1),(3) and 225 of the *LOSC*, which limits the law enforcement measures against foreign fishing vessels to boarding, inspecting, arresting, and following with judicial proceedings;²⁰⁴ obliges Indonesia to notify any arrests to the country of origin as soon as possible;²⁰⁵ and prohibits the use of power in enforcement that risks the safety of navigation, causes hazard to the vessel, or poses an unnecessary threat to the marine environment.²⁰⁶ When it comes to implementation today, however, Indonesia has made significant improvement by establishing the technical guidelines that restrict the immediate burning and sinking of IUU fishing vessels, making this measure only applicable if the poachers' vessels are in a very unseaworthy condition and will risk the safety of the foreign vessels' crews as well as the officers, if the vessels continue to be escorted to the nearest port for further investigation.²⁰⁷ Therefore, all of

²⁰¹ Warwick Gullett, 'Prompt Release Procedures and the Challenge for Fisheries Law Enforcement: The Judgement of the International Tribunal for the Law of the Sea in the Volga Case (Russian Federation v. Australia)' (2003) 31 *Federal Law Review* 405.

²⁰² Between the end of 2004 and early 2014 the sinking IUU fishing vessels policy ceased by Indonesian government.

²⁰³ InfocusAsia (IFA) and National Geographic Channel, above n 168.

²⁰⁴ The *LOSC*, art. 73(1).

²⁰⁵ The *LOSC*, art. 73(3).

²⁰⁶ The *LOSC*, art. 225.

²⁰⁷ See the Director General of Surveillance for Marine Resources and Fisheries Regulation Number 11/per-djpsdkp/2014 on Technical Guidelines on the Implementation of Distinctive Measure towards Foreign Fishing Vessels, art 7(3).

the vessels that have been sunk by the Indonesian authorities in the present implementation period were those vessels whose cases had already been filed in the courts regardless of whether the hearing was finished or not.²⁰⁸ This means the investigation procedures regarding the vessels have been accomplished and the notification obligation met. Furthermore, the execution of the measures to sink the IUU fishing vessels was well prepared, including determination of the sinking location, time, and method, and taking into account the safety of navigation and people, as well as the marine environment.²⁰⁹

Today, implementation of this policy in such a high-profile manner shows that the country's war on IUU fishing is not mere rhetoric. Indonesia expects this policy to be successful in creating the intended deterrent effect. Moreover, Kamil argues that the current implementation of the IUU fishing vessel sinking policy is not in breach of international law.²¹⁰ In particular the *LOSC* only restricts imprisonment as a punishment but does not prohibit the implementation of domestic policies such as the sinking of foreign vessels as a penalty for illegal fishing in EEZs.²¹¹ Therefore, this thesis argues that the current protest from neighbouring countries and academics are mostly derived from the ambiguity of the IUU fishing definition, which causes IUU fishing to be considered an administrative offence.²¹² Therefore, the blowing-up and sinking of IUU fishing vessels is regarded as excessive only according to this notion. Further discussion on the impact of the ambiguity of the IUU fishing

²⁰⁸ Fabian Januarius Kuwado, *81 More Fish Poachers' Vessels Will be Sunk Around Indonesia / Lagi, 81 Kapal Pencuri Ikan Ditenggelamkan di Penjuru Indonesia* kompas.com (1 April 2017) <<http://nasional.kompas.com/read/2017/04/01/12003881/lagi.81.kapal.pencuri.ikan.ditenggelamkan.di.penjuru.indonesia>>,1.

²⁰⁹ Parameswaran, Prashanth, *Indonesia Blows Up 81 Ships in War on Illegal Fishing* The Diplomat.com <<https://thediplomat.com/2017/04/indonesia-blows-up-81-ships-in-war-on-illegal-fishing/>>

²¹⁰ Melda Kamil, (Speech delivered at the Focus Group Discussion on Law Enforcement against Illegal Fishing by Foreign Vessels in Indonesian EEZ University of Indonesia, Depok, 24 October 2017)

²¹¹ Ibid.

²¹² See Gullet, above n 202.

definition on Indonesia's efforts to combat IUU fishing will be discussed further in Chapter IV.

5 Conclusion

Discussion in this chapter has revealed that IUU fishing is a complex problem in Indonesia. The very openness of Indonesia's EEZ and territorial seas (including archipelagic waters), as is its geographic nature, makes Indonesia prone to IUU fishing, which abuses the freedom of navigation practice through Indonesia's EEZ and territorial sea. IUU fishing causes a great loss to Indonesia both in terms of national economy and Indonesian coastal people's livelihoods in general. Here, Indonesian small-scale fishers are hit most severely, and they are the greatest proportion of Indonesia's fishers. However, the ambiguity of the IUU fishing definition poses Indonesia's small-scale fishers as offenders instead of victims of IUU fishing. Indonesia has implemented various measures in accordance with the international fisheries legal framework. Yet, there are several remaining problems that need to be addressed to provide equal opportunity to protect Indonesian fisheries resources. They are: the ambiguity of the IUU fishing definition; the implementation of freedom of navigation for foreign fishing vessels; and the diminished deterrence effect of sanctions for IUU fishing in Indonesia's EEZ according to the *LOSC*, which is the source of the international fisheries legal framework. This demonstrates that the existing international fisheries legal framework is not favourable to Indonesia because of its special character.

The first special characteristic of Indonesia is that its small-scale fishers are dominant in number, have strong dependency on the fisheries resources, and have traditionally had strong legitimate ownership over the fisheries resources in Indonesia. Their freedom to not report their

catches cannot be said to be unlawful. However, this makes estimations for fisheries resources sustainability challenging. The best approach here is to increase the Indonesian small-scale fishers' cooperation regarding catch recording in particular, and compliance with fisheries management measures in general, by eliminating IUU fishing by foreign fishers and industrial scale fishers, which is in fact, the biggest threat to the small-scale fishers' livelihood. The second is the geographical nature of Indonesia's EEZ and territorial seas, as Indonesia is the biggest archipelagic state. Indonesia's geographical nature needs special protection against misuse of the freedom of navigation practices. The third uniqueness of Indonesia is its limitation in patrolling capacity.

The uniqueness of Indonesia, as a third world state, demands special protection from the international fisheries legal framework. Otherwise, the existing international legal framework will only work for, and benefit, developed states. This will eventually constitute a practice of hegemony by developed states over developing states facilitated by the international fisheries legal framework. Hegemony as a result of the ambiguity of the IUU fishing definition and hegemony as the result of the ambiguity of the international fisheries legal framework will be analysed in Chapters III and IV.

CHAPTER III:

THE HISTORY OF THE LAW OF THE SEA CONVENTION: THE INTRINSIC HEGEMONY OF FREEDOM OF NAVIGATION

1 Introduction

Chapter II revealed that Indonesia's efforts to curb IUU fishing in its waters and EEZ face serious problems because of the implementation of freedom of navigation for foreign fishing vessels, as well as the ambiguities of the law enforcement arrangement in the international fisheries legal framework and the IUU fishing definition. This chapter will now analyse how hegemony – which eventually hampers Indonesia's efforts to combat IUU fishing and at the same time limits Indonesia's access to fisheries – has shaped and maintained the inequality in the *Law of the Sea Convention (LOSC)*,¹ which is the umbrella convention of the international fisheries legal framework.² To do this, it will employ TWAIL theory to identify hegemony in the international law.

Mickelson argues that historical analysis is the most important technique TWAIL scholars can use to understand how developments in international law 'serve the interests of some States rather than others'.³ As Okafor points out, historical analysis via TWAIL is conducted by:

¹ *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, UNTS 1833 (entered into force 16 November 1994) ('*LOSC*').

² James Harrison, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (OUP Oxford, 2017) 22.

³ Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1997) 16 *Wisconsin International Law Journal* 353, 408.

mapping the techniques and devices used by the global powers in the past [such as international legal norms, structures, claims, or rules] ...reveal how those techniques continue to work today to sustain or create global injustice.⁴

This approach will be used by this chapter to: observe the history of the *LOSC* to recognise the interests of both developing and developed states; and identify how hegemony disadvantages developing states. Analysis will focus on the impact of the implementation of freedom of navigation by foreign fishing vessels on the developing states.

The argument, which will be developed throughout this chapter, is that the ambiguities of the international fisheries legal framework and the IUU fishing definition results from the developed maritime states' strategies to obtain political and commercial interests over the sea. More specifically, this chapter will argue these ambiguities are intended to protect the fisheries interests of developed states; that they facilitate the tools of hegemony, namely freedom of navigation, and fisheries conservation. Therefore, analysis in this chapter will stretch from the history of the early establishment of the freedom of navigation doctrine to the establishment of the *LOSC* as the umbrella convention for the modern international fisheries legal framework.

This chapter will develop its analysis in four sections. Section B will discuss the international law of the sea's development prior to the establishment of the *LOSC*. Section C will then analyse the history of the *LOSC*, and Section D will elaborate on the impacts of the freedom of navigation for fishing vessels on the developing states. To conclude, Section E will summarise the main arguments made in the chapter.

⁴ Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall Law Journal* 171, 178.

2 The International Law of the Sea's Development Prior to the LOSC's Establishment: The Origin of the Freedom of Navigation Doctrine

Freedom of navigation originated from the *freedom of the sea (mare liberum)* doctrine.⁵ Indeed, today's international law of the sea has been greatly influenced by the traditional law of the sea principles of the *freedom of the sea (mare liberum)* and the *closed sea (mare clausum)*.⁶ In his book titled: *Origin and Development of the Law of the Sea: History of International Law Revisited*, Anand explains that the *freedom of the sea* principle was implemented by the ancient Rhodes.⁷ At this time, the principle granted freedom to any ship to conduct navigation and trade in the Mediterranean Sea.⁸ Subsequently, the *freedom of the sea* principle was preserved by the Byzantine and old Roman Empire.⁹ However, after the fall of the Roman Empire, the *freedom of the sea* principle was no longer implemented by European kingdoms.¹⁰ These kingdoms were involved in competition to possess and dominate seas and new land since the 13th Century.¹¹ This competition eventually turned into a quarrel between the new *freedom of the sea (mare liberum)* and the *closed sea (mare clausum)* doctrines in the 17th Century.¹²

⁵ See Stuart Kaye, 'Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral' (2005) 24 *Aust. YBIL* 93

⁶ Shigeru Oda, 'Fisheries Under the United Nations Convention on the Law of the Sea' (1983) *The American Journal of International Law* 77(4) 739. See also Y Tanaka, *The International Law of the Sea* (Cambridge University Press, 2015) 16-17.

⁷ Ram Prakash Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Brill, 1983) vol 7, 11.

⁸ Oda, above n 6, 10-11.

⁹ Anand, above n 7, 10.

¹⁰ *Ibid* 11.

¹¹ *Ibid* 84, 112.

¹² *Ibid*, 72. See also Hugo Grotius, Ralph Van Deman Magoffin and James Brown Scott, *The Freedom of the Seas, or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (The Lawbook Exchange, 2001) v.

The *freedom of the sea (mare liberum)* doctrine was revitalised in the 17th Century and considered new because it was given a different purpose from the old *freedom of the sea* doctrine. While the old *freedom of the sea* doctrine facilitated peaceful trade and cultural relations, the new *freedom of the sea (mare liberum)* doctrine was simply intended to facilitate Europe's interest in exploiting and colonialising Asia and Africa.¹³ The *closed sea (mare clausum)* doctrine is the antithesis of the new *freedom of the sea (mare liberum)* doctrine. The *closed sea (mare clausum)* doctrine is 'the principle that the sea may be exclusively controlled by a sovereign authority, in the same manner as the land'.¹⁴

The new *freedom of the sea (mare liberum)* doctrine was resurrected by a Dutch lawyer, Hugo Grotius, in 1608. This was done to support Holland's interest in taking over the domination of East Indies' spices from Spain and Portugal, and to support the operation of its fishing fleets in all parts of the ocean.¹⁵ In his dissertation titled *the Law of Prize and Booty (De Iure Praedae)*, Grotius defended arguments that the Law of Nation (*Ius Gentium*) granted free navigation and commerce through the sea for all people.¹⁶ Thus, he argued that the Portuguese had no right to prevent the Dutch from navigating and trading in the East Indies.¹⁷ Furthermore, Grotius added that the Portuguese were unable to dominate trading by means such as title of discovery, title of war, occupation, custom, or Papal authorisation.¹⁸ This argument was used by Grotius to reject Spain and Portugal's claims over the world based on

¹³ Anand, above n 7, 229.

¹⁴ D Loades, *The Tudor Navy: An Administrative, Political and Military History* (Taylor & Francis, 2016), 286.

¹⁵ Anand, above n 7, 79-81; Grotius, Magoffin and Scott, above n 12, v.

¹⁶ Hugo Grotius, Ralph Van Deman Magoffin and James Brown Scott, *The Freedom of the Seas, or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (The Lawbook Exchange, 2001) vii; Ileana M Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius De Iure Praedae – The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"* (2006) 31(3) Brooklyn Journal of International Law 741.

¹⁷ Ibid.

¹⁸ Ibid.

the Alcáçovas and the Tordesillas treaties as well as the Inter Caetera Papal Bull of Pope Alexander VI.¹⁹

The *closed sea (mare clausum)* doctrine was written in 1619, and published in 1635 by the English lawyer, John Selden, to support England's desire to be the 'Lord of the Sea',²⁰ and to protect its fisheries domination over the North Seas and expanses around England.²¹ England's desire to oppose Holland was also fuelled by its competition with Holland to monopolise the spices trade from the East Indies.²² The *closed sea (mare clausum)* principle provided legal justification for England to possess vast areas of sea as part of its territory.²³ Any non-English ship could only sail and fish under the King of England's permission.²⁴ If foreign ships encountered the King of England's ships, they were obliged 'to lower their top-sails and strike their flag' as a form of salute, otherwise they were considered enemy ships giving England the right to confiscate them along with their cargo.²⁵ The implementation of *the closed sea (mare clausum)* doctrine by England posed a great hurdle to the Dutch fishing fleets and spices cargos.²⁶ It was this that brought the Dutch and the English to war between 1652-1674.²⁷

¹⁹ The 1479 *Tordesillas* treaty was revised by the 1494 *Alcáçovas* treaty, as proposed by King Ferdinand and Queen Isabella of Spain to King John II of the Portuguese Kingdom, with support from the *Inter Caetera papal bull of Pope Alexander VI*. The treaties and papal bull legalised Spain and the east part to Portugal's ownership of the west part of the globe. See Jan Hendrik Willem Verzijl, *International Law in Historical Perspective* (Brill Archive, 1970). See also Tanaka, above n 6, 17.

²⁰ Thomas Wemyss Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute* (The Lawbook Exchange, 1911) 210; *G W Johnson Memoirs of John Seiden* cited in Rachel Baird, 'Political and Commercial Interests as Influences in the Development of the Doctrine of the Freedom of the High Seas' (1996) 12 *Queensland University of Technology Law Journal* 274, 281.

²¹ Baird, above 20, 284.

²² Anand, above n 7.

²³ Fulton, above n 20, 11.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Fulton, above n 20, 11.

²⁷ Anand, above n 7, 108.

The *freedom of the sea (mare liberum)* and the *closed sea (mare clausum)* principles were established to facilitate the political and commercial interests of Holland and England.²⁸ However, the maritime powers were inconsistent between the proposed doctrines.²⁹ For example, despite championing *freedom of the sea (mare liberum)*, the Dutch also implemented a *closed sea (mare clausum)* like policy to support their monopoly and domination over the East Indies.³⁰ The Dutch also decisively, and often coercively made treaties with traditional leaders in the East Indies.³¹ These treaties allowed only the Dutch to trade for spices with the East Indies.³² Any spice trade with other parties was considered illegal.³³ The Dutch then attacked every ship which tried to trade with the East Indies without Dutch permission, arguing they were protecting the local people.³⁴ This practice ensured the Dutch dominated the spice trade and fishing in the East Indies and Indian Ocean.³⁵ This all occurred against their own championed *freedom of the sea (mare liberum)* principle.³⁶

Furthermore, in 1623, Hugo Grotius supported England's claim for territorial sea according to *the closed sea (mare clausum)* principle.³⁷ In his new book titled *On the Law of War and Peace (De Jure Belli ac Pacis)*, Grotius demanded that the sea adjacent to shores should be owned by a state within reasonable width, and additionally determined by the state's capacity to manage it.³⁸ Another Dutch lawyer, Cornelius Bynkershoek, wrote *Dissertation on the Dominion of the Sea (De Dominio Maris Dissertatio)* in 1702.³⁹ In this dissertation,

²⁸ Baird, above n 20.

²⁹ Anand, above n 7, 97.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid. See also Fulton, above n 20, 340.

³⁶ Anand, above n 7.

³⁷ Hugo Grotius, *The Rights of War and Peace* (M W Dune, 1901).

³⁸ Ibid 104.

³⁹ See Kinji Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law* (Martinus Nijhoff Publishers, 1998).

Bynkershoek supported Grotius's suggestion that a state could assert a claim of territory over a particular area of sea adjacent to its shore within a reasonable width if it was manageable by the state. Furthermore, by his expression 'terrae dominium finitur, ubi finitur armorum vis',⁴⁰ Bynkershoek declared that the manageable width of this territorial sea was equal to the maximum reach of a cannon shot.⁴¹ The majority of scholars at that time believed a cannon shot would hit an object up to three nautical miles (5.6 km) away.⁴² Subsequently, *De Dominio Maris* is regarded as the fundamental doctrine for the establishment of the traditional customary law of the three-nautical miles-territorial sea regime.⁴³

England applied a similar attitude. In fact, England opposed the domination of trade and fishing in the west by Spain, and the east part by Portugal, under the 1479 Alcáçovas Treaty and the 1494 Treaty of Tordesillas.⁴⁴ England also challenged Denmark's claim to possess some parts of the Baltic Sea.⁴⁵ This demonstrates that England was claiming *freedom of the sea* long before Holland did.⁴⁶ England advanced the *closed sea (mare clausum)* doctrine only after the Dutch fishing fleets grew significantly and put England's fishing business under great pressures.⁴⁷ The advance development of the Dutch fishing fleet led to the Dutch achieving domination over the spice trade in the East Indies.⁴⁸ This increased England's determination to challenge the Dutch's *freedom of the sea (mare liberum)* doctrine.⁴⁹ However, after England eventually managed to overtake the Dutch naval power, England decided to support the

⁴⁰ Ibid 167.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ The *Tordesillas* treaty revised the *Alcáçovas* treaty as proposed by King Ferdinand and Queen Isabella of Spain to King John II of Portuguese Kingdom, with support from the *Inter Caetera* papal bull of Pope Alexander V. See Fulton, above n 20, 109.

⁴⁵ Fulton, above n 20, 16.

⁴⁶ Ibid 105.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid 555.

freedom of the sea (mare liberum) principle as it supported England's general welfare, while continuing to defend England's possession of the sea around its land and the Baltic Sea.⁵⁰ Utilising the *freedom of the sea (mare liberum)* doctrine, England then built imperialism in Asia and Africa and maintained 'colonial commercial monopolies until the early quarter of the nineteenth century'.⁵¹

The attitude of the Dutch and English led to Europe continuing ambiguous implementation of both the *freedom of the sea* and *the closed sea* doctrines as a means to maintain its interests.⁵² As Fulton argues:

'By leaving them [the *freedom of the sea* and *the closed sea* doctrines] vague and ambiguous the pretension to maritime sovereignty could be put forward and used as a political instrument when the navy was strong and occasion offered, and when the navy was weak the pretension might fall into the background without the national honour being unduly tarnished'.⁵³

This ambiguity, specifically the implementation of the *freedom of the sea (mare liberum)* doctrine, was used by the Europeans to support their imperialist practices, particularly in Asia and Africa.⁵⁴ The establishment of the England East Indies Company and the France East Indies Company in 18th Century were intended to compete with the Dutch East Indies Company to exploit materials from Asia such as spices, cotton cloth, and rugs, as well as raw materials to support the industrial revolution in Europe, which boomed in the 19th Century.⁵⁵ In this era,

⁵⁰ Ibid.

⁵¹ Anand, above n 7, 131.

⁵² Fulton, above n 20, 20.

⁵³ Ibid.

⁵⁴ Anand, above n 7, 124.

⁵⁵ Ibid 124-28.

Europeans collected materials from Asia and used slaves from Africa to work for them.⁵⁶ Indeed, '[t]he needs and demands of the industrial revolution were largely responsible for the creation of huge European colonial empires in Asia and Africa'.⁵⁷ Consequently, the implementation of the *freedom of the sea (mare liberum)* doctrine in the late 18th Century to the end of the Second World War in 1945, is considered to be the tool of European imperialism.⁵⁸

In case of fisheries, the *freedom of the sea (mare liberum)* doctrine has legalised fisheries exploitation by maritime powers.⁵⁹ This particularly started after those powers invented steam-powered fishing vessels and the very effective yet destructive fishing gear called trawl in the 19th Century.⁶⁰ The *freedom of the sea (mare liberum)* principle advantaged the developed states' fishing fleets by allowing them to easily move from one fishing area to another in the sea around the shore of a coastal state, leaving it depleted for the small coastal fishers who have less capacity to compete and are desperately reliant on the fish in the area.⁶¹ This practice has created a critical fisheries shortage for the smaller states as they are incapable to compete with the maritime powers.⁶² As Anand argues, '[f]reedom of the seas has always meant unequal freedom or only freedom for the few. It came to be used...with advancing technology and continued misuse of the absolute freedom by the big Powers'.⁶³

⁵⁶ Ibid 127.

⁵⁷ Ibid 128.

⁵⁸ Ibid 152-53.

⁵⁹ Ibid 153.

⁶⁰ Ibid.

⁶¹ P B Payoyo, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity* (Springer Netherlands, 1997); See also Ramon Bonfil et al. 'The footprint of distant water fleets on world fisheries' (1998).

⁶² Payoyo, above n 61; Bonfil et al. above n 61.

⁶³ Anand, above n 7, 153.

To this end, it is clear that before the establishment of the *LOSC* and its implementation of agreements regarding fisheries, the over-exploitation of the world's fisheries was caused by the developed states' implementation of the *freedom of the sea (mare liberum)* principle. However, after the establishment of the *LOSC*, the overfishing that today is being closely associated with IUU fishing, mostly occurs in the developing states' waters and jurisdictions.⁶⁴ Many scholars believe this is because of the unwillingness, or at least the incompetence of the developing states in protecting their waters and jurisdictions.⁶⁵ However, the discussion in the subsequent section will demonstrate that the intrinsic hegemony of the developed states in the freedom of navigation is in fact responsible for this phenomenon.

3 The History of the Law of the Sea Convention: Hegemony in the Freedom of Navigation and the Fisheries Conservation

Modern international law of the sea was developed after the Second World War.⁶⁶ This development resulted in the adoption of the *LOSC* and its implementation of agreements on fisheries that make up the international fisheries legal framework.⁶⁷ One of the impetus for the development was the independence of many new states soon after the Second World War ended.⁶⁸ These new states, also known as the developing states, urged for the reformation of the international law of the sea on the ground that the law was no longer relevant in the post-colonial era.⁶⁹ The main concern of the developing coastal states was that the implementation

⁶⁴ David J Agnew et al, 'Estimating the worldwide extent of illegal fishing' [2009] 4(2) *PLOS One*.

⁶⁵ *Ibid*.

⁶⁶ D R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing 2016), 1-29.

⁶⁷ Mary Ann Palma, Martin Tsamenyi and William R Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill, 2010) 55.

⁶⁸ Anand, above n 7, 161.

⁶⁹ *Ibid* 177.

of *freedom of the sea* according to the colonial era's law only benefited maritime power, and jeopardised the livelihood of the coastal people as well as the security and the integrity of the territory of the developing states.⁷⁰ Therefore, the developing states demanded an extension of the width of the territorial sea and an exclusive fishing right in the high seas adjacent to their territories in order to limit the adverse impact of *freedom of the sea* to them.⁷¹

The *LOSC* was considered the most significant achievement in the codification of the existing customary international law of the sea as well as its modification to accommodate the global interests regarding the sea.⁷² The *LOSC*'s 320 articles, divided into seventeen parts and complemented by nine annexes, are considered a masterpiece of the United Nations. As of 23 September 2016, 168 countries are bound by the convention.⁷³ The enormous numbers of parties to the *LOSC* entitles the *LOSC* to be called the ocean's constitution.⁷⁴ Some of the provisions of the *LOSC* most relevant to this thesis are the establishment of the various maritime zones, namely the territorial sea that extended from three to 12 nautical miles; and the contiguous zone that extended from 12 to 24 nautical miles; the new regimes of the exclusive economic zone to 200 nautical miles; and the continental shelf to 350 nautical miles.⁷⁵ Figure 4 illustrates the maritime zones according to the *LOSC*.

⁷⁰ Indonesia and the Philippines are examples of the developing coastal states that challenged the *freedom of the sea* principle on the ground that this principle jeopardised their territorial integrity as archipelagic states. See *ibid* 168-177.

⁷¹ Tommy TB Koh, 'The Third United Nations Conference on the Law of the Sea: What Was Accomplished' (1983) 46 *Law and Contemporary Problems* 5.

⁷² *Ibid*.

⁷³ United Nations, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements* (23 September 2016) Oceans & Law of the Sea <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>.

⁷⁴ See Tommy T B Koh, *A Constitution for the Oceans: Remarks Made by Tommy T.B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea* (1982) <http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>.

⁷⁵ Rothwell and Stephen, above n 66, 15.

Maritime Zones

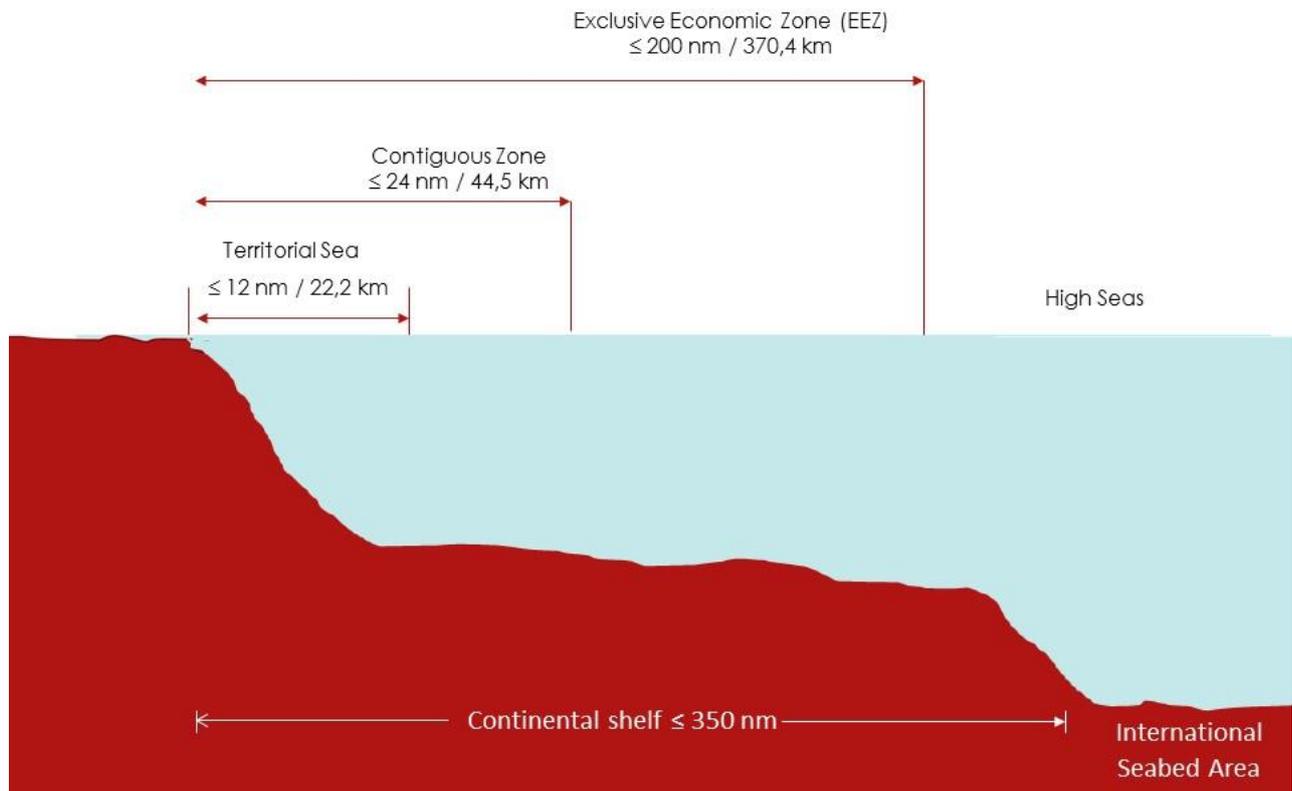


Figure 4 The Maritime Zones According to the *LOSC*.⁷⁶

Moreover, the *LOSC* also acknowledges the sovereignty of the archipelagic states in their archipelagic waters,⁷⁷ and lays down some fundamental rules in fisheries management and conservation. Figure 5 shows Indonesia's archipelagic waters for illustrative purpose.

⁷⁶ Prepared by the author based on the *LOSC*.

⁷⁷ Rothwell and Stephen, above n 66, 15.



Figure 5 Indonesia's Archipelagic Waters.⁷⁸

Tommy T.B. Koh, the president of *The Third United Nations Conference on the Law of the Sea* (UNCLOS III), argues that one of the reasons the *LOSC* is worthy of praise is its success in fulfilling the developing coastal states' demand for better equity in accessing the ocean's fisheries against developed states who benefit from the *freedom of the sea* principle and advanced technology.⁷⁹ This was embodied in the *LOSC* provisions that grant the wider territorial sea, and the new regime of the Exclusive Economic Zones (EEZs).⁸⁰ However, the *LOSC* also preserves the hegemony of developed states by the ambiguity of the *LOSC* provisions regarding the freedom of navigation and law enforcement, as well as the ambiguity of the *LOSC* provisions on fisheries management and conservation. Indeed, the history of the *LOSC* reveals that the extension of the territorial sea and the establishment of EEZs was not to fulfil the interests of the developing coastal states alone. In fact, the developed states were

⁷⁸ Source of picture in I Made Andi Arsana, *Strategic Role of Maritime Boundaries in Marine Resources Management / Peran Strategis Batas Maritim dalam Pengelolaan Sumberdaya Kelautan* www.ugm.ac.id <<http://mgb.ugm.ac.id/materi-KM-2/I%20Made%20Andi%20Arsana%20PhD.pdf>>, 4. With modification by the author.

⁷⁹ Rothwell & Stephen, above n 66, 15.

⁸⁰ Ibid.

successful in manoeuvring to grab the interests of the extension of the territorial seas and establishment of the EEZs on one hand, and the freedom of navigation on the other. This left the developing coastal states with the expectation that they would have a firm control over the utilisation of fisheries in the sea around their territory hampered.

The development of the *LOSC* can be separated into four stages: the *1930 Hague Conference on the Law of the Sea*; the *First United Nations Convention on the Law of the Sea*; the *Second United Nations Convention on the Law of the Sea*; and the *Third United Nations Convention on the Law of the Sea*. These will now be explored.

A *The 1930 Hague Conference*

The extension of the territorial sea and the establishment of EEZs were claimed by some scholars to be a manifestation of the interest of developing states.⁸¹ However, this is not the case. In fact, the aspiration of small coastal states to have international legal protection over fisheries and security in the sea around their shore, was always refused by the developed states in order to uphold the developed states' navigation and fishing interests.⁸² This was demonstrated at the *1930 Hague Conference*; the very first time international efforts were made to codify the international law of the sea.⁸³ Here, the developed states led by the United States and Great Britain, refused the idea of the smaller states to codify the international law of the sea and justify the right of the coastal states over their territorial sea.⁸⁴

⁸¹ Koh, above n 71, 6.

⁸² B D Lepard, *Reexamining Customary International Law* (Cambridge University Press, 2016).

⁸³ *Ibid.*

⁸⁴ *Ibid.*

It was the United States who then modified its determination on 28 September 1945. The United States urged for international recognition of the United States' rights and jurisdiction to explore and exploit mining resources on the seabed and subsoil of the continental shelf, as well as to conserve fisheries in the high seas adjacent to the United States' territorial sea.⁸⁵ These claims by the United States were elaborated in two documents: 1) the *Proclamation 2667—Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*; and 2) the *Proclamation 2668—Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas*. These two documents are known as the Truman Proclamations.⁸⁶

After the power of Holland had faded in the 19th Century, the development of the international law of the sea was significantly influenced by the emergence of the United States as one of the most important players at sea.⁸⁷ Truman Proclamations were prepared to protect the United States' interests regarding offshore mining and fishing.⁸⁸ The first document of Truman proclamation was dedicated to supporting the United States' desire to monopolise the oil, gas and minerals mining in the northern part of the Gulf of Mexico.⁸⁹ During preparation of the policy in 1943, the United States' President, Theodore Roosevelt said:

⁸⁵ See Harry S. Truman, *Proclamation 2667—Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf* (28 September 1945) The American Presidency Project <<http://www.presidency.ucsb.edu/ws/?pid=12332>>. See also Harry S. Truman, *Proclamation 2668—Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas* (28 September 1945) The American Presidency Project <<http://www.presidency.ucsb.edu/ws/?pid=58816>>.

⁸⁶ Truman, *Proclamation 2667*, above; Truman, *Proclamation 2668*, above.

⁸⁷ C Espósito et al, *Ocean Law and Policy: Twenty Years of Development under the UNCLOS Regime* (Brill, 2016) 108.

⁸⁸ Donald Cameron Watt, 'First steps in the enclosure of the oceans: The origins of Truman's proclamation on the resources of the continental shelf, 28 September 1945' (1979) 3(3) *Marine Policy* 211.

⁸⁹ *Ibid* 213.

For many years I have felt that the old three-mile limit . . . should be superseded by a rule of common sense. For instance the Gulf of Mexico is bounded on the South by Mexico and on the North by the United States. In parts of the Gulf, shallow water extends very many miles offshore. It seems to me that the Mexican Government should be entitled to drill for oil in the Southern half of the Gulf and we in the Northern half of the Gulf. That would be far more sensible than allowing some European nation, for example, to come in there and drill.⁹⁰

In contrast, the second proclamation was made to restrict Japan from fishing in Alaska.⁹¹ Between 1937 and 1945, the United States' government was very anxious to compete with Japan in Salmon fishing in Alaska.⁹² At this time, the United States' fisheries industry was considered the biggest in the world.⁹³ The aggressiveness of Japanese fishing fleets in Alaska was believed to be a serious threat to the United States' food security at that time.⁹⁴ Therefore, the proclamation regarding fisheries conservation was a formalisation of the United States' claim of:

exclusive US rights to the Alaskan salmon fisheries based on the nation's role in 'developing' them to their present state by conservation measures, the construction of hatcheries, regulation of licensing, etc.⁹⁵

Here, it became clear that the fisheries conservation was being used by the developed states as a means for their monopoly over fisheries. This can be seen further in 1946, when Mexico

⁹⁰ *Roosevelt to Hull, 9 June 1943*, FRUS 7945, vol II, 1482 cited in Watt, above n 87, 213.

⁹¹ Watt, above n 88, 216-218.

⁹² *Ibid.*

⁹³ Paul N McCloskey Jr. and Ronald K Losch, 'UN Law of the Sea Conference and the US Congress: Will Pending US Unilateral Action on Deep Seabed Mining Destroy Hope for a Treaty?' (1979) 1 *Northwestern Journal of International Law and Business* 245.

⁹⁴ *Ibid* 218.

⁹⁵ *Ibid* 217.

followed the United States' strategy by claiming its special rights regarding fisheries conservation to protect its fishing interests from the United States' advanced fishing fleets.⁹⁶ The United States, however, rejected Mexico's claim on the grounds that it was not based on 'scientific investigation'.⁹⁷ This was another device used by the United States to win the fishing competition; that claims for the fisheries conservation rights must be supported by advanced science and technology. This provided the United States with an advantageous position as the United States was leading in science and technology at that time.

The Truman Proclamations also encouraged other developing coastal states to declare their claim regarding exclusive rights upon fishery resources in the high seas adjacent to their territorial seas. Some countries such as Argentina, Chile, Peru, Costa Rica and El Salvador asserted a special right to manage fishery resources beyond their territorial seas up to 200 nautical miles.⁹⁸ On the other hand, some archipelagic states such as Indonesia and the Philippines made their claim for special character as archipelagic states and refused the categorisation of the sea between their islands as high seas.⁹⁹ This assertion was claimed in order to recover the fish stock in those coastal states' territorial water that had been depleted by the excessive fishing activities of foreign anglers in the high seas adjacent to their territorial seas.¹⁰⁰ The United States, however, rejected all of these claims as they hampered its fisheries

⁹⁶ Ibid 221.

⁹⁷ Ibid.

⁹⁸ Ibid 222.

⁹⁹ Indonesia articulated itself as an archipelagic country on 13 December 1957. By the *Djuanda Declaration*, it proclaimed that all of the sea areas between its islands should be considered as archipelagic water no matter its width. The Philippines declared that it was an archipelagic state in 1955 by posting the *Note-Verbale* to the Secretary General of the United Nations. Please see Muhammad Munawwar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (Martinus Nijhoff Publishers, 1995). See also Lowell B. Bautista, 'The Philippine Treaty Limits and Territorial Water Claim in International Law' (2009) *Social Science Diliman* 113.

¹⁰⁰ United Nations, *The United Nations Convention on the Law of the Sea: A Historical Perspective* (1998) The United Nations Division for Ocean Affairs and the Law of the Sea
<http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm>.

interest which had long been preserved by the *freedom of the seas* doctrine.¹⁰¹ Indeed, after the Truman Proclamations, the operation of the United States' fisheries fleets faced great hurdles from coastal states in the Pacific, the Caribbean, Europe and Far East.¹⁰²

In 1950, to protect its fisheries interest, the United States implemented a strategy of ambiguity. The United States declared that the Truman Proclamations were not intended to modify the existing concept of international law;¹⁰³ that the *freedom of the sea* principle should not be hampered by any claim.¹⁰⁴ The United States argued that their national policies in the Truman Proclamations could only be implemented if they were accompanied with the necessary agreements from the affected states.¹⁰⁵ Thus, other states which made a Truman Proclamation-like claim should consider their claim as the United States would.¹⁰⁶ Furthermore, the United States implemented the *Fishermen's Protective Act* in 1954.¹⁰⁷ This Act's purpose was to encourage the United States' fishers to continue fishing in locations that were claimed by other states.¹⁰⁸ However, at the same time, the United States also continued to dominate fishing in Alaska in the name of conservation.¹⁰⁹ Indeed, the Act ordered the United States government to facilitate the release of the vessel and its crew as well as pay any associated fees if a United States' vessel was caught by the authorities of a coastal state.¹¹⁰ This practice was the precedent for the adoption of the prompt release mechanism, financial penalty

¹⁰¹ Watt, above n 88, 222.

¹⁰² Ibid.

¹⁰³ Ibid 223.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Richard T. Whiteleather, *Fishermen's Protective Fund* Aquatic Commons < http://aquaticcommons.org/11936/1/gcfi_23-10.pdf >.

¹⁰⁸ McCloskey Jr. and Losch, above n 93, 245.

¹⁰⁹ Watt, above n 88.

¹¹⁰ Whiteleather, above n 107, 68.

and the restriction of any corporal punishment for fish poachers in EEZs, according to Article 73 of the *LOSC*.¹¹¹

B *The First United Nations Convention on the Law of the Sea*

The first *United Nations Conference on the Law of the Sea* (UNCLOS I) was held in Geneva in 1958.¹¹² This conference created four conventions: *The Convention on the Continental Shelf*;¹¹³ *The Convention on Fishing and Conservation of the Living Resources of the High Seas*;¹¹⁴ *The Convention on the High Seas*;¹¹⁵ and *The Convention on the Territorial Sea and the Contiguous Zone*.¹¹⁶ These conventions are known as the 1958 *Geneva Conventions on the Law of the Sea*.¹¹⁷ The 1958 *Geneva Conventions on the Law of the Sea* merely reflected the mining and fishing interests of the developed states. They failed to appreciate the concerns of the developing coastal states regarding having an unambiguous international law that grants wider territorial seas and areas of exclusive fishing rights to protect their coastal anglers.¹¹⁸

The 1958 Convention on Continental Shelf specifically legitimated the claim for the exclusive rights on the continental shelf.¹¹⁹ In this convention, the continental shelf was described as the seabed or subsoil beyond territorial sea that ‘admits of the exploitation of the

¹¹¹ Oda, above n 6, 747.

¹¹² Robert H Manley, 'Developing Nation Imperatives for a New Law of the Sea: UNCLOS I and III as Stages in the International Policy Process' (1979) 7(1-2) *Ocean Development & International Law* 10.

¹¹³ *Convention on the Continental Shelf*, signed 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

¹¹⁴ *Convention on Fishing and Conservation of Living Resources of the High Seas*, signed 29 April 1958, 559 UNTS 258 (entered into force 20 March 1966) 285.

¹¹⁵ *Convention on the High Seas*, signed 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962).

¹¹⁶ *Convention on Territorial Sea and Contiguous Zone*, signed 29 April 1958, 516 UNTS 205 (entered into force 22 November 1964).

¹¹⁷ Tullio Treves, *Geneva Conventions on the Law of the Sea*, United Nations Office of Legal Affairs, 1 <<http://legal.un.org/avl/pdf/ha/gclos/gclose.pdf>>.

¹¹⁸ Stuart Kaye, 'Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral' (2005) 24 *Australian Yearbook of International Law* 93

¹¹⁹ *Convention on the Continental Shelf*, art 2(4).

natural resources of the said areas'.¹²⁰ There was no clear limitation of the outer limit of the continental shelf from the coast.¹²¹ In contrast, *The Convention on Fishing and Conservation of the Living Resources of the High Seas* simply accommodated the developed states interest to protect their claim over fisheries in the high seas adjacent to their territorial seas.¹²² *The Convention on the Territorial Sea and the Contiguous Zone* left the breadth of the territorial seas unclear instead of formulating a clear limit.¹²³ This convention asserted that the *freedom of the sea* principle was applicable in the territorial seas in the form of innocent passage.¹²⁴ Furthermore, while leaving the territorial sea's breadth remain, the convention established a new regime at sea namely the contiguous zone. The contiguous zone is part of the high seas adjacent to territorial sea which can be claimed by a coastal state in the distance no further than 'twelve nautical miles from the baseline from which the territorial sea measured' to prevent the infringement of 'fiscal, immigration or sanitary regulations within its territory or territorial sea'.¹²⁵ The contiguous zone will not, however, be discussed further as it is beyond the scope of this thesis.

Finally, *The Convention on the High Seas*, was, to put simply, a codification of the international customary law that preserved the *freedom of the sea* doctrine. This convention emphasized the liberty of all states to navigate, to conduct fishing, to place both underwater cables and pipelines, and to fly above the high seas.¹²⁶ Such freedoms historically benefited maritime powers and were seriously defended by the United States and other big maritime

¹²⁰ *Convention on the Continental Shelf*, art 1.

¹²¹ *Ibid.*

¹²² See *Convention on Fishing and Conservation of Living Resources of the High Seas* arts 2, 6(1).

¹²³ See *Convention on Territorial Sea and Contiguous Zone*, signed 29 April 1958, 516 UNTS 205 (entered into force 22 November 1964) arts 1-13.

¹²⁴ *Ibid* arts 5, 14-23.

¹²⁵ *Ibid* arts 5, 24.

¹²⁶ *Convention on the High Seas*, signed 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962) art 2.

states.¹²⁷ Consequently, the 1958 conventions were considered to only facilitate the developed states.¹²⁸ Therefore, the conventions were only ratified by some states.¹²⁹

C *The Second United Nations Convention on the Law of the Sea*

To solve the issue of ‘the breadth of the territorial sea and fishery limit’¹³⁰ the *Second United Nations Conference on the Law of the Sea* (UNCLOS II) was held on 17 March to 27 April 1960 in Geneva, Switzerland.¹³¹ However, the UNCLOS II failed to solve the problem as the maritime powers insisted on refusing a rule that would allow coastal states to claim territorial sea to the maximum width of twelve nautical miles and exclusive fishing rights in the high seas adjacent to territorial seas to the maximum outer limit of 200 nautical miles.¹³²

This was an effort by developed states to maintain the ambiguity between the freedom of the high seas under the *freedom of the sea (mare liberum)* doctrine vis-a-vis the territorial seas under the *closed sea (mare clausum)* doctrine in the international law of the sea.¹³³ In fact, the maritime powers have implemented the twelve nautical miles claim regarding the territorial seas and exclusive fishing rights in the high seas. For example, the United States declared it

¹²⁷ Great Britain, Holland, Belgium, France, Japan, West Germany and Greece all strove with the USA regarding the *freedom of the sea* doctrine at the Geneva Convention. See Arthur H Dean, 'The Geneva Conference on the Law of the Sea: What Was Accomplished' (1958) 52(4) *The American Journal of International Law* 607.

¹²⁸ Glenn M. Sulmasy and Chris Tribolet, 'The United Nations Convention on the Law of the Sea' in Paul Rosenzweig, Timothy J McNulty and Ellen Shearer (eds), *National Security Law in the News: A Guide for Journalists, Scholars and Policymakers, the American Bar Association* (American Bar Association, 2012).

¹²⁹ While eighty-six countries presented at UNCLOS I, only 37 nations signed the convention. Among them, only seven countries, namely the US, UK, Senegal, Nigeria, Cambodia, Malaysia and Haiti, ratified the convention before 1963. See William W Bishop, 'The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas' (1962) 62(7) *Columbia Law Review* 1220.

¹³⁰ 'United Nations Resolution No. A/RES/1307(XIII) (1958)' [1958] *Yearbook of the United Nations* 381.

¹³¹ *Ibid.*

¹³² Luke T Lee, 'The Law of the Sea Convention and Third States' (1983) 77(3) *The American Journal of International Law* 551.

¹³³ Sulmasy and Tribolet, above n 128, 3.

adopted a three nautical miles territorial sea according to the traditional cannon shot rule.¹³⁴ However, in 1969 when Russia tried to sail to the high seas near the United States' territorial seas, the United States coerced the Russian vessel to sail only on the sea outside of the distance of twelve nautical miles from the United States' shore.¹³⁵ This demonstrate that in practice the United States implemented the claim of twelve – rather than three – nautical miles of territorial seas.

When it comes to the right regarding 200 nautical miles of exclusive fishing, the United States has implemented this at least formally since 1953 under the tripartite agreement between the United States, Japan, and Canada.¹³⁶ This agreement was intended to exclude Japan, which was at its weakest after being defeated in World War II, from fishing in the Northeast Pacific.¹³⁷ Despite a long process since 1936, to push Japan into refraining from fishing in the mentioned area, this exclusion was made voluntary and known as the abstention doctrine.¹³⁸ The tripartite treaty also acknowledged the United States' policy that tuna fisheries should be excluded from the exclusive fishing rights agreement as 'few tuna ever come within 200 miles of the United States but often most easily caught within the 200-mile limits of other countries'.¹³⁹

¹³⁴ A L Hollick, *U.S. Foreign Policy and the Law of the Sea* (Princeton University Press, 2017).

¹³⁵ Bowen L Florsheim, 'Territorial Seas – 3000 Year Old Question' (1970) 36 *Journal of Air Law and Commerce* 73.

¹³⁶ William C Herrington, 'In the Realm of Diplomacy and Fish: Some Reflections on the International Convention on High Seas Fisheries in the North Pacific Ocean and the Law of the Sea Negotiations' (1989) 16(1) *Ecology Law Quarterly* 111.

¹³⁷ Harry N Scheiber, 'Origins of the Abstention Doctrine in Ocean Law: Japanese-US Relations and the Pacific Fisheries, 1937-1958' (1989) 16 *Ecology Law Quarterly* 25.

¹³⁸ The abstention doctrine said that in the particular condition of fish stocks that do not allow the excessive exploitation, states which do not contribute significantly to the conservation and management of that stock should voluntarily refrain from fishing in the area. This principle was popularised by the United States. See *ibid* 25.

¹³⁹ McCloskey Jr. and Losch, *above n* 93, 245, 255. See also M E Caprio and Y Sugita, *Democracy in Occupied Japan: The U.S. Occupation and Japanese Politics and Society* (Taylor & Francis, 2007) 63.

D *The Third United Nations Convention on the Law of the Sea*

The hegemonic approach of the developed states through the ambiguity of the high seas versus territorial seas regime faced great challenge in the *Third United Nations Convention on the Law of the Sea* (UNCLOS III), which occurred between 3 December 1973 and 10 December 1982.¹⁴⁰ After a nine-year negotiation, the UNCLOS III finally agreed on the *LOSC*. However, the main issue that successfully brought the developed states and the developing states to renegotiate the international law of the sea was the formation of the International Seabed Authority (ISA) rather than the chronic problem of the territorial sea and EEZ issue.¹⁴¹ Indeed, the formation of a single international authority to manage and distribute the benefit from the international seabed resources was the main debate in the UNCLOS III.¹⁴² This was based on the developing states' concern regarding the unfair practice of the high seas seabed mining by the developed states.¹⁴³ The developing states requested the international seabed area be recognised as the 'common heritage of the mankind'.¹⁴⁴ This would mean the utilisation of resources in the international seabed area would have to be managed by the ISA, and the states with less access to seabed mining technology could also enjoy benefit from the Area.¹⁴⁵ The United States together with Great Britain, however, insisted that the international seabed could be occupied by a state.¹⁴⁶

During discussions in the UNCLOS III, the developed states slightly modified their stand by proposing that the Area should remain free and open to all states under the freedom

¹⁴⁰ Rothwell and Stephens, above n 66, 14.

¹⁴¹ United Nations, above n 100.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Rothwell and Stephens, above n 66, 127.

¹⁴⁵ The *LOSC* stipulates that the international seabed area as the Area. See the *LOSC*, part XI.

¹⁴⁶ Rothwell and Stephens, above n 66 133.

of the high seas principle.¹⁴⁷ Nevertheless, as the developing states were firm with their aspiration, on 9 July 1982 (two months before the *LOSC* was concluded as a final Act in September 1982) the United States announced it would not sign the *LOSC*.¹⁴⁸ However, it would continue to join the technical meeting in UNCLOS III that specifically discussed some issues pertinent to the United States' interests such as freedom of navigation and the fisheries management and conservation.¹⁴⁹ This highlights how the powerful states dominated the legal construction of the *LOSC*. In fact, one of the most important impetus for the acceptance of the twelve nautical miles territorial sea regime in the *LOSC* was the United States' proposal in 1970.¹⁵⁰ The proposal was made by the United States as a bargain for the acceptance of the United States' interest regarding the right to exploit non-living resources from the international seabed, and the more unimpeded freedom of navigation implementation called transit passage.¹⁵¹ One of the difference between transit passage and innocent passage is that transit passage should not be impeded by the coastal state in any way, while it is possible to suspend innocent passage.¹⁵²

The acknowledgment of the EEZ regime in the *LOSC* has a similar background to the territorial sea. After previously refusing to acknowledge the regime of 200 nautical miles of the exclusive fishing right but applying it in practice, the United States made a unilateral claim of its 200 nautical miles of EEZ in 1975.¹⁵³ This claim was then adopted in the United States' 1976 *Fisheries Conservation and Management Act*.¹⁵⁴ However, the United States argued that

¹⁴⁷ Ibid 135.

¹⁴⁸ James L Malone, 'The United States and the Law of the Sea after UNCLOS III' (1983) 46(2) *Law and Contemporary Problems* 30.

¹⁴⁹ Ibid.

¹⁵⁰ Shigeru Oda, *Fifty Years of the Law of the Sea: With a Special Section on the International Court of Justice: Selected Writings of Shigeru Oda* (Kluwer Law International, 2003) 662.

¹⁵¹ Ibid.

¹⁵² Rothwell and Stephens, above n 66, 255.

¹⁵³ McCloskey Jr and Losch, above n 93, 245.

¹⁵⁴ Ibid.

the EEZ regime did not include tuna fisheries, which still needed to be managed through a treaty.¹⁵⁵ The United States' acknowledgement of the EEZ regime was part of its effort to pass its fisheries management and conservation approach during the UNCLOS III.¹⁵⁶ The main ideas in the United States' proposal for fisheries management and conservation were that coastal states have an obligation to manage their fisheries in the EEZ and the high seas through cooperation with other 'states concerned'.¹⁵⁷ Especially regarding tuna, which is categorised as a highly migratory fish, the United States insisted that it must be managed distinctively through cooperation with the concerned states regardless of EEZs or territorial sea.¹⁵⁸

The United States' proposal regarding freedom of navigation and fisheries management and conservation in the EEZs and high seas, as well as the special treatment of highly migratory and straddling fish stocks, were subsequently regulated in the *LOSC*.¹⁵⁹ However, the United States refused to sign and ratify the *LOSC* as this convention also established the International Seabed Authority (ISA).¹⁶⁰ Here, the United States has demonstrated the hegemony of powerful states in international law. After successfully shifting the *LOSC* provisions regarding the freedom of navigation and fisheries conservation to accord with its interest, the United States still refused to be a party to the *LOSC*.

¹⁵⁵ Ibid.

¹⁵⁶ Oda, above n 7, 743.

¹⁵⁷ Ibid 752.

¹⁵⁸ Christopher R Kelly, 'Law of the Sea: The Jurisdictional Dispute Over Highly Migratory Species of Tuna' (1987) 26 *Columbia Journal of Transnational Law* 475.

¹⁵⁹ Oda, above n 7.

¹⁶⁰ Rothwell and Stephens, above n 66, 14.

E *The Fisheries Management and Conservation Provisions in the LOSC*

The *LOSC* has solved the ambiguity regarding the breadth of the territorial sea and exclusive fishing right in the EEZs.¹⁶¹ However, the *LOSC* maintains the hegemony of the developed states by preserving the freedom of navigation through territorial sea, archipelagic waters, strait and EEZs, as well as applying ambiguous provisions regarding law enforcement and the obligation of the coastal states to manage and conserve fisheries resources.¹⁶² The excessive fishing competition by the developed states since the earlier implementation of the *freedom of the sea (mare liberum)* principle highlights the need for global fisheries conservation and management efforts. This is essential to prevent the ‘tragedy of the common’ that was expressed by Hardin to signify the damage of fisheries resources as a result of freedom of the sea implementation.¹⁶³ However, it is unfortunate that the need for conservation has been used to fulfil hegemonic interests.

All the tools of hegemony that have used by the United States to win the fishing competition as discussed earlier, have been adopted in the international fisheries management and conservation measures with the developing states’ consent. This occurs After the *LOSC* finally agreed and ratified by Indonesia and other developing states. The measures are consist of an obligation to cooperate on fishing in EEZs and in particular in relation to highly migratory species (such as tuna), anadromous stocks (such as salmon) and catadromous stocks (such as the American eel).¹⁶⁴ Fisheries are also required to be managed based on the best scientific evidence.¹⁶⁵ The paradigm of scientific based fisheries management is the backdrop for the

¹⁶¹ Koh, above n 71, 6.

¹⁶² Please see the *LOSC*, arts 17-55, 61-73.

¹⁶³ Garrett Hardin, ‘The tragedy of the commons’ (1968) 162(3859) *Science* 1243, 1245.

¹⁶⁴ The *LOSC*, arts 61, 64, 66, 117, 118.

¹⁶⁵ The *LOSC*, arts 61 (2), 119(1).

contention that the Indonesian small-scale fishers conduct extensive unreported fishing as discussed in Chapter II.

The *UNCLOS* provisions related to fisheries management then implemented by the 1994 *United Nations Fish Stock Agreement*.¹⁶⁶ The United States was among the first to be party to the agreement.¹⁶⁷ Furthermore, based on the fisheries legal framework, Regional Fisheries Management Organisations (RFMOs) were established and the term of IUU fishing was founded.¹⁶⁸ Therefore, it is not a surprise that the issue of IUU fishing is used as a tool of hegemony. Serdy argues that the IUU fishing definition has been developed as a tool to exclude competitors in the fishing competition among developed states rather than to solve the fisheries conservation problem.¹⁶⁹ Further discussion on the ambiguity of the fisheries conservation and IUU fishing definition will be provided in Chapter IV. This chapter will now continue to discuss the ambiguity of the *LOSC* provisions regarding the freedom of navigation and law enforcement.

4 The Impacts of Freedom of Navigation for Fishing Vessels on Developing States

Freedom of navigation is claimed as one of the important pillars of globalisation and has been acting as ‘the lifeblood of the shipping industry’.¹⁷⁰ Therefore, it brings prosperity to Asian

¹⁶⁶ *United Nations Agreement for the Implementation of the Provision 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*, concluded on 4 August 1995, 2167 UNTS 88 (entered into force 11 December 2001).

¹⁶⁷ United Nations, above n 73.

¹⁶⁸ Palma, Tsamenyi and Edeson, above n 67, 58.

¹⁶⁹ Andrew Serdy, 'Pacta Tertius and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal' (2017) *Ocean Development and International Law* 1.

¹⁷⁰ Tommy Koh, 'Setting the Context: A Globalized World' in Myron H Nordquist et al (eds), *Freedom of Navigation and Globalization* (Martinus Nijhoff Publishers, 2014) 5.

countries, which are heavily reliant on trade.¹⁷¹ The benefits that are enjoyed by all states as the result of freedom of navigation implementation should not be disregarded. However, when it comes to fisheries conservation and management, the freedom of navigation presents a great challenge to developing states in guarding their waters from foreign fish poachers.¹⁷²

Articles 8(2), 24, and 52(1) of the *LOSC* rule that in its internal water, territorial sea, and archipelagic water, a coastal state has an obligation to allow and to not obstruct any innocent passage through these waters. Furthermore, specific to the territorial sea that covers the strait used for international navigation between other states' EEZs or between high seas, the coastal state shall allow any foreign ship to enjoy the transit passage.¹⁷³ Exclusively applying to the archipelagic state, this state must not impede the archipelagic sea-lane passage through its archipelagic water used for international navigation from, and to, other states' EEZs or between high seas¹⁷⁴. This provision provides significant limitation to developing coastal states in protecting their waters from IUU fishing. However, before continuing the discussion, it is important to acknowledge the differences between innocent passage, transit passage and archipelagic sea-lanes passage. These will now be explored.

¹⁷¹ Ibid.

¹⁷² Ousman KL Drammeh, 'Illegal, unreported and unregulated fishing in small-scale marine and inland capture fisheries' (Paper presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia, 15-19 May 2000).

¹⁷³ The *LOSC*, art 38 (1).

¹⁷⁴ The *LOSC*, art 53.

5 The Differences Between Innocent Passage, Transit Passage, and Archipelagic Sea Lanes Passage

The first difference is regarding the location of implementation. Innocent passage is generally applicable in the territorial sea,¹⁷⁵ the strait that is used for international navigation,¹⁷⁶ and archipelagic water.¹⁷⁷ In contrast, the term transit passage only applies in the strait that is used for the international navigation,¹⁷⁸ and the archipelagic sea-lanes passage only applies in the designated sea-lanes of the archipelagic water.¹⁷⁹ The second difference is that aside from on the strait for international navigation, the coastal state can indiscriminately suspend the implementation of innocent passage in certain areas of its territorial water and its archipelagic water for security reasons.¹⁸⁰ The implementation of transit passage and archipelagic sea lane passage cannot be suspended.¹⁸¹

The third difference is that the innocent passage regime does not include freedom of flight over the respected water. In contrast, transit passage and archipelagic sea-lanes passage both grant the right of free flight over the designated sea-lanes.¹⁸² The fourth and final difference is that to enjoy innocent passage, the foreign submarine or other underwater vessel needs to be sailing in surface mode and show its flag.¹⁸³ In contrast, underwater crafts can

¹⁷⁵ The *LOSC*, art 17.

¹⁷⁶ The *LOSC*, art 45.

¹⁷⁷ The *LOSC*, art 52.

¹⁷⁸ The *LOSC*, art 37.

¹⁷⁹ If the archipelagic state has not determined the archipelagic sea-lanes, the archipelagic sea-lanes passage may be implemented according to the common international navigation through that archipelagic water. See The *LOSC*, art 53(12).

¹⁸⁰ The *LOSC*, arts 25(3), 45(2), 52(2).

¹⁸¹ The *LOSC*, art 54. According to this Article the prohibition to suspend transit passage also applies *mutatis mutandis* to the archipelagic sea-lanes passage.

¹⁸² The *LOSC*, arts 38, 53.

¹⁸³ The *LOSC*, art 20.

navigate in normal mode while enjoying transit passage or archipelagic sea-lanes passage.¹⁸⁴ The *LOSC* does not explain the meaning of normal mode. However, scholars consider normal mode to mean that the submarine can be submerged while enjoying passage.¹⁸⁵

These differences show that transit passage and archipelagic sea-lanes passage provide more “freedom” for foreign vessels than innocent passage. Indeed, the sovereignty of a coastal state to control navigation through its strait and archipelagic water is weaker than for its territorial water. As discussed in Chapter II, the geographic situation of Indonesia positions it as the biggest archipelagic state. It has two straits – namely the Malacca Strait and Lombok Strait – that fall into the category of straits for international navigation. This means all three types of freedom of navigation are applicable to, and pose great trouble for, Indonesia.¹⁸⁶

6 Freedom of Navigation for Fishing Vessels

The freedom of navigation for foreign fishing vessels has concerned developing coastal states since discussion regarding the implementation of the innocent passage in the *Conference on United States-Ecuadoran Fishery Relation* in 1953.¹⁸⁷ Ecuador, as a developing coastal state, argued that the innocent passage regime should only be applicable to merchant ships.¹⁸⁸ However, the United States insisted innocent passage should apply to all ships, including warships and fishing vessels.¹⁸⁹ Furthermore, Ecuador argued that the implementation of

¹⁸⁴ The *LOSC*, arts 39(1)(c), 53(3).

¹⁸⁵ For example see J Ashley Roach, 'Legal Aspects of Modern Submarine Warfare' (2002) 6(1) *Max Planck Yearbook of United Nations Law Online* 367, 372.

¹⁸⁶ Melda Kamil, 'Freedom of Navigation and Archipelagic State: Indonesian Case' (2017) 25(5) *Jurnal Hukum & Pembangunan* 435.

¹⁸⁷ Charles B Selak, 'Fishing Vessels and the Principle of Innocent Passage' (1954) 48(4) *The American Journal of International Law* 627.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

innocent passage by foreign fishing vessels would potentially be misused because by their very nature, fishing vessels are determine to fish. They are not used for expedition or other business transactions in accordance with the purpose of the innocent passage regime's establishment.¹⁹⁰

Ecuador's concern was based on past experience where many of the United States' tuna fishing vessels had abused innocent passage implementation on Ecuador's waters.¹⁹¹ These misuses resulted in the apprehension of several of the United States' tuna fishing vessels by Ecuadorian authorities. Furthermore, Ecuador released its national law that prohibited any foreign fishing vessels from conducting innocent passage through its territorial water.¹⁹² This was strongly refused by the United States.¹⁹³

The fact that the innocent passage regime is potentially misused by the foreign fishing vessels was recently highlighted in a press release issued by the South African Department of Agriculture, Forestry and Fisheries on 14 May 2016.¹⁹⁴ In fact, innocent passage is a common *modus operandi* for IUU fishing in South African waters.¹⁹⁵ The misuse of innocent passage in South African territorial water demonstrates that the implementation of the *LOSC* articles regarding the rights of coastal states in the implementation of innocent passage, transit passage and archipelagic sea-lanes passage is definitely problematic for developing coastal states.¹⁹⁶

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Department of Agriculture, Forestry and Fisheries Republic of South Africa, *Speaking Notes For The Honourable Senzeni Zokwana, Minister of Agriculture, Forestry and Fisheries. Press Conference on Foreign Fishing Vessels* (Pt Department of Agriculture, Forestry and Fisheries Republic of South Africa, 2016).

¹⁹⁵ Martin Purves, 'Illegal, Unregulated and Unreported Fishing and Maritime Security in South Africa' in Thean Potgieter and Reiner Pommerin (eds), *Maritime Security in Southern African Waters* (Sun Media, 2009) 127.

¹⁹⁶ Article 21(1)(e) of the *LOSC* states that a coastal state may adopt laws and regulations to prevent the infringement of the coastal state's fisheries laws and regulations in the implementation of innocent passage by foreign vessels. Article 42(1)(c) of the *LOSC* allows a coastal state to adopt laws and regulations that obligate foreign fishing vessels to stow their fishing gear in order to prevent them fishing while enjoying

This is because the *LOSC* does not provide adequate rules to facilitate the compliance of foreign fishing vessels in conducting innocent passage, and it does not help the developing coastal state to extend their enforcement mechanisms against the abuse.

7 The Freedom of Navigation Impacts to Law Enforcement Arrangements in the Sea Under National Jurisdiction

The limited fisheries enforcement rules in the *LOSC* give the impression of “liberty” and autonomy for coastal states to design and manage their own law enforcement mechanisms in their jurisdictional waters. In contrast, the absent of the *LOSC* in supporting coastal states’ law enforcement mechanisms potentially put them in a vulnerable position regarding IUU fishing. This is especially because the *LOSC* provides some limitations on law enforcement mechanisms.

To facilitate the freedom of navigation regime, the *LOSC* places some limitations on the coastal states’ enforcement jurisdiction in its territorial sea and archipelagic waters, and even tighter restrictions regarding the enforcement jurisdiction of coastal states in their EEZs.

A *The Problem of Enforcement in the Territorial Sea and Archipelagic Waters*

Article 2 of the *LOSC* stipulates that the internal waters, archipelagic waters and territorial sea constitute the waters under a coastal state’s sovereignty. The following are the fisheries related rights of the coastal state in those waters according to the *LOSC*:

transit passage. Article 54 of the *LOSC* asserts that the same rights are applicable to the archipelagic sea-lanes passage.

1. The right to adopt laws and regulation to conserve the sea's living resources and to prevent fisheries infringement during the implementation of innocent passage.¹⁹⁷
2. The right to adopt laws and regulations to prevent foreign fishing vessels from fishing during transit passage and archipelagic sea-lanes passage. Such prevention includes an order to keep fishing gear inside stowage.¹⁹⁸
3. The right 'to take the necessary steps' to prevent non-innocent passage in its territorial sea.¹⁹⁹
4. The right of hot pursuit. The coastal state's military ship or aircraft or any government ship or aircraft that is 'clearly marked and identifiable as being on government service and authorized to that effect', has the right to chase foreign fishing vessels, which commit IUU fishing in the coastal state's territorial sea, archipelagic waters and EEZs.²⁰⁰

Aside from the right of hot pursuit, the *LOSC* does not elaborate further regarding the enforcement of the above laws and regulations. This is a crucial point because the *LOSC* does provide some restrictions for the implementation of the coastal state's laws and regulations as follows:

¹⁹⁷ The *LOSC*, arts 21(1)(d), (e).

¹⁹⁸ The *LOSC*, arts 42(1)(c), 54.

¹⁹⁹ The *LOSC*, art 25(1).

²⁰⁰ The *LOSC*, art 111(1)(5).

1. The implementation of the aforementioned rights must comply with the provisions in the *LOSC* and other international law.²⁰¹
2. The laws and regulations shall not hamper or in practice result in denying or impairing innocent passage, transit passage, or archipelagic sea-lanes passage rights.²⁰²
3. The coastal state shall not hamper or suspend transit passage.²⁰³
4. The laws and regulations of the coastal state shall not include ‘the design, construction, manning or equipment’ of foreign vessels.²⁰⁴
5. Except for the violation of laws and regulations with respect to pollution and the right of the coastal state to utilise, explore and conserve the marine resources in its EEZ, ‘the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea’.²⁰⁵

The *LOSC*’s restrictions on hot pursuit are:

1. The right of hot pursuit can only be initiated if the coastal state has ‘good reason to believe that the ship has violated the laws and regulations’ of the coastal state.²⁰⁶

²⁰¹ The *LOSC*, art 21(1).

²⁰² The *LOSC*, arts 24(1), 42(2), 54.

²⁰³ The *LOSC*, art 44.

²⁰⁴ The *LOSC*, art 21(2).

²⁰⁵ The *LOSC*, art 27(5).

²⁰⁶ The *LOSC*, art 111(1).

2. The hot pursuit must not start unless the pursuant vessel has given the signal to stop either by visual or auditory means. Such signal must be given at an appropriate distance to ensure it can be seen or heard by the foreign fishing vessel.²⁰⁷
3. The hot pursuit must be continuous and ‘not been interrupted’.²⁰⁸
4. The hot pursuit must be stopped if the foreign vessel enters its own state’s territorial waters or a third coastal state’s territorial waters.²⁰⁹
5. The coastal state is liable for any damage or loss caused by the hot pursuit if the foreign vessel is successfully stopped or arrested outside the territorial waters of the coastal state but the coastal state is unable to find sufficient proof that the hot pursuit was necessary.²¹⁰

The tight restrictions above provide a significant obstacle for the efforts of developing coastal states in combating IUU fishing by foreign ships in the waters under their jurisdiction. Firstly, while foreign vessels are obliged by the *LOSC* to comply with the coastal states’ laws and regulations,²¹¹ the *LOSC* is silent in regulating the ambit of coastal states’ law enforcement. The *LOSC* does, however, repeatedly emphasise that the coastal states have no right to hamper, deny or impair freedom of navigation practices through their territorial sea, archipelagic waters and EEZs. From this, a number of questions arise. How can developing coastal states ensure foreign vessels will not commit IUU fishing during the practice of freedom of navigation?

²⁰⁷ The *LOSC*, art 111(5).

²⁰⁸ The *LOSC*, art 111(1).

²⁰⁹ The *LOSC*, art 111(3).

²¹⁰ The *LOSC*, art 111(8).

²¹¹ The *LOSC*, arts 21(4), 42(4), 54.

Would it be considered as hampering innocent passage, transit passage or archipelagic sea-lanes passage if the developing coastal state's patrol vessel tried to stop foreign vessels for inspection? Can foreign vessels refuse to stop citing the reason of conducting freedom of navigation?

The refusal of two Taiwanese fishing vessels to stop for inspection by an Indonesian fisheries patrol boat on the 24 March 2016 is an example of the problem.²¹² The order to stop was based on the suspicion of the Indonesian officer that the Taiwanese fishing vessels had conducted IUU fishing during their transit passage through the Malacca strait. As the fishing vessels continued to escape with high speed, the Indonesian patrol vessel fired a three warning shot and then directed a gunshot towards the hull the one of the vessels. There were no people injured in the incident and the Taiwanese fishing vessels managed to escape as their speeds were higher than that of the Indonesian patrol vessel. One day later the Taiwanese government expressed its protest over the incident and asked the Indonesian authority to evidence its reasons for using excessive power.²¹³

This incident shows how the domination of the freedom of navigation interest in the *LOSC* provisions is a significant problem for developing coastal states whose patrol vessels generally have less capacity and technology when compared to modern long distant fishing vessels.²¹⁴ In addition to the speed of these vessels, long distant fishing fleets are usually

²¹² To see reports about the incident please visit:

<<http://www.thejakartapost.com/news/2016/03/24/taiwan-queries-indonesia-allegation-fishing-boats-shot.html>> and <<http://www.dailymail.co.uk/wires/ap/article-3507316/Taiwan-queries-Indonesia-allegation-fishing-boat-shot-at.html>>.

²¹³ To see reports about the incident please visit:

<<http://www.thejakartapost.com/news/2016/03/24/taiwan-queries-indonesia-allegation-fishing-boats-shot.html>> and <<http://www.dailymail.co.uk/wires/ap/article-3507316/Taiwan-queries-Indonesia-allegation-fishing-boat-shot-at.html>>.

²¹⁴ Denzil GM Miller, 'Occupying the High Ground: Technology and the War on IUU Fishing' in Davor Vidas (ed), *Law, Technology and Science for Oceans in Globalisation* (Brill, 2010) 75.

equipped with more proficient radar that allows the unscrupulous fishing vessels to detect the location of the patrol vessels before the patrol vessels can detect them.²¹⁵ This condition means the IUU fishing vessels can stop their unlawful action, pack back their fishing gear, and pretend they are only conducting a freedom of navigation practice all before patrol boats arrive.

The problem is exacerbated by the absence of rules in the *LOSC* obliging foreign fishing vessels to notify the coastal state prior to conducting innocent passage, transit passage or archipelagic sea-lanes passage. The maritime power insists that the notification is unnecessary. The developing coastal states, however, consider the notification mechanism very important in order to secure their fisheries resources.²¹⁶ As a result, some coastal states have established domestic regulations that require foreign vessels to notify them before enjoying freedom of navigation through their territorial sea, archipelagic waters or EEZs.²¹⁷ Yet, despite this being considered an obligation by developed states, such regulations are merely considered a suggestion by them. This is based on the argument that such obligation is not recognised by the *LOSC*.²¹⁸ Furthermore, the International Court of Justice (ICJ) on the *Corfu Channel* case between the United Kingdom and Albania in 1949 decided that the implementation of the freedom of navigation does not require prior authorisation from the coastal state.²¹⁹ These circumstances suggest that the right of coastal states to adopt laws and regulations and take necessary steps to prevent IUU fishing by foreign fishing vessels during the implementation of the freedom of navigation regime as discussed above, is too vague to be implemented by a developing coastal state.

²¹⁵ Ibid 96.

²¹⁶ William T Burke, 'Exclusive fisheries zones and freedom of navigation' (1982) 20 *San Diego L. Rev.* 595

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Judgment)* [1949] 35 ICJ Rep 7.

Another problem previously discussed by this chapter is the limitations on the right of hot pursuit. Here, the most problematic limitations for developing coastal states is the need to have a ‘good reason to believe’²²⁰ the foreign fishing vessel committed IUU fishing when enjoying the freedom of navigation, and that the hot pursuit shall stop if the foreign fishing vessel has entered its own or a third state’s territorial sea.²²¹ The *LOSC* does not provide any explanation regarding the meaning of “good reason”. However, the decision of the International Tribunal on Law of the Sea (ITLOS) in the *Saiga Case* established that a hot pursuit cannot be commenced on the ground of suspicion.²²² Furthermore, the ITLOS emphasized that the requirements stipulated in Article 111 of the *LOSC* must all be cumulatively fulfilled in order to constitute a legitimate hot pursuit.²²³ Moreover, ITLOS also underlined the essentiality that evidence regarding the appropriate signal to order the foreign vessels to stop must be managed prior to the hot pursuit.²²⁴

The ITLOS’s decision indicates enforcement against foreign fishing vessels that abuse the right of freedom of navigation can only be conducted on the basis of visual evidence, which is clearly observed by the coastal state’s authority.²²⁵ Considering the limited number and capacity of developing coastal states’ patrol vessels, this requirement is a significant obstacle for them to secure their waters from misuse of freedom of navigation by foreign fishing vessels. Furthermore, as discussed in Chapter II, this requirement makes radar, vessel monitoring systems (VMS) and other means of monitoring and surveillance in the Monitoring, Control, and Surveillance (MCS) System insufficient to compensate the lack of numbers and capacity of patrol vessels.

²²⁰ The *LOSC*, art 111(1).

²²¹ The *LOSC*, art 111(3).

²²² *M/V “Saiga” (No. 2) Case (St Vincent and the Grenadines v Guinea) (Judgment)* [1999] ITLOS, [147].

²²³ *Ibid* [146].

²²⁴ *Ibid*.

²²⁵ *Ibid*.

Restriction on continuing a hot pursuit if foreign fishing vessels entering their own or a third state's territorial sea makes innocent passage, transit passage and archipelagic sea-lanes passage potentially able to be misused by foreign fishing vessels trying to escape from a hot pursuit by a neighbouring state's authority. This practice has been observed by the Australian authority on the arrest of the *South Tomi* fishing vessel in 2001 and the *Lena* in 2002.²²⁶ In both cases the Australian authority revealed the owner of the vessels ordered the skippers of both vessels to enter France's territorial sea in order to escape the Australian enforcement authority.²²⁷ Fortunately, there is a treaty between the Australian government and France, which allows the Australian authority to continue a hot pursuit into France's territorial sea. Otherwise, both vessels would have escaped because the freedom of navigation regime would have prevented the Australian authority from apprehending the vessels.²²⁸

B *The Problem of Enforcement in EEZs*

Greater limitations on IUU fishing prevention and deterrence occurs in coastal states' EEZs. According to Article 56 of the *LOSC*, a coastal state has a sovereign right to conduct research on and utilize the natural resources in its EEZ (including the seabed and subsoil underneath).²²⁹ Furthermore, the Article states that the jurisdiction of the coastal state in its EEZ is limited to the establishment and utilization of the artificial islands, structures and installations as well as the protection and conservation of the marine environment.²³⁰ Article 58 of the *LOSC* then grants the freedom of ships operation, freedom of overflight, and freedom to lay submarine

²²⁶ Rachel Baird, 'Arrests in a Cold Climate (Part 2) – Shaping Hot Pursuit Through State Practice' (2009) 13 *Antarctic and Southern Ocean Law and Policy Occasional Papers* 1, 13.

²²⁷ *Ibid.*

²²⁸ *Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and McDonald Islands* [2007] ATNIF 20 cited in Baird, above n 225, 13.

²²⁹ The *LOSC*, art 56(1)(a).

²³⁰ The *LOSC*, art 56(1)(b).

cables and pipelines in a coastal state's EEZ. Therefore, the pressure of these navigation practices on a developing coastal state's fisheries enforcement is more severe in its EEZ. Article 58 of the *LOSC* guarantees foreign vessels freedom of navigation in all part of an EEZ.²³¹ Article 73(2)-(3) then provides additional limitation, namely the requirement of prompt release, and restriction on imprisonment and other corporal punishment.²³²

The prompt release obligation significantly diminishes the deterrent effect of enforcement in EEZs.²³³ After all, the prompt release regime orders a coastal state's enforcement agency to release a vessel and its crews as soon as possible after the owner of the fishing vessel pays a reasonable amount of bail.²³⁴ This reasonable amount is determined by calculating the value of the vessel including the value of its cargo (the caught fish).²³⁵ The prompt release mechanism allows IUU fishing vessels to be released after they are caught, permitting them to then be re-named, re-flagged and re-crewed to seek another fortune through additional IUU fishing activity.²³⁶ Nevertheless, most IUU fishing occurs via unseaworthy and low value vessels,²³⁷ and the owners of the vessels remain unknown.²³⁸ Therefore, with the freedom of navigation that is applicable in EEZs combined with the restrictions on imprisonment penalty for IUU fishing offenders in EEZs, the enforcement in this area is toothless. This is especially true for the developing coastal states with their limited capacity

²³¹ The *LOSC*, art 58.

²³² The *LOSC*, arts 73(2), 73(3).

²³³ See Gail Lugten, 'Big Fish to Fry-International Law and Deterrence of the Toothfish Pirates' (2004) 16 *Current Issues in Criminal Justice*. 307.

²³⁴ The *LOSC*, art 73(2).

²³⁵ Tullio Treves, 'The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea' (1996) 11(2) *The International Journal of Marine and Coastal Law* 179.

²³⁶ See Ella Lawton, 'Flags of Convenience: Legal Issues in Relation to Fishing the Southern Ocean' (2006) *University of Canterbury*, 5
<<https://ir.canterbury.ac.nz/bitstream/handle/10092/13953/Ella%20Lawton%20Review.pdf?sequence=1&isAllowed=y>>.

²³⁷ Phelps Bondaroff, Teale N., Tuesday Reitano and Wietse van der Werf, *The illegal fishing and organized crime nexus: Illegal fishing as transnational organized crime* (The Global Initiative Against Transnational Organized Crime, 2015), 56.

²³⁸ *Ibid.*

and funds to support regular patrols. Indeed, the restrictions provided by Article 73 of the *LOSC* make the developing coastal states' EEZs extremely vulnerable to IUU fishing.

8 Conclusion

History has revealed that the *freedom of the sea (mare liberum)* doctrine, as the origin of the freedom of navigation principle, was used by developed states to acquire their interests unfairly. Supported by their advanced power and technology, the developed states used the *freedom of the sea (mare liberum)* doctrine to endorse colonialisation and the practice of excessive fishing. Fishing competition under the auspices of the *freedom of the sea (mare liberum)* doctrine finally resulted in the fisheries depletion that is famously illustrated by the expression the 'tragedy of the commons'.²³⁹

The *LOSC* was expected to bring equity to the utilisation of marine resources between the developed and developing states closer to reality. Unfortunately, however, the formation of the *LOSC* could not escape the hegemonic power that has dominantly driven its content. Indeed, analysis in this chapter has identified two hegemony tools that are adopted in the *LOSC*. The first is the freedom of navigation, which consists of innocent passage, transit passage, and archipelagic sea-lanes passage. The second is fisheries conservation, which is based on scientific evidence, and a stocks approach, namely the highly migratory species, anadromous stocks, and catadromous stocks.

This chapter has highlighted the importance of fisheries conservation. However, analysis in this chapter has also found that the construction of the fisheries conservation in the

²³⁹ Hardin, above n 163, 1244.

LOSC was based on the efforts of developed states to eliminate their competitors. Subsequently, the fisheries conservation provisions in the *LOSC* and its implementation agreements, which make up the international fisheries legal framework and are supplemented by the IUU fishing definition, facilitate the hegemony of developed states in accessing fisheries resources. One of the problems that arise from this hegemony in practice is the accusation that the Indonesian small-scale fishers conduct mass unreported fishing activity. Further discussion on this notion will occur in Chapter IV.

The major finding of this chapter is that the implementation of freedom of navigation by fishing vessels is problematic for developing states that have limited capacity to patrol their territorial sea, archipelagic waters, and EEZs. Analysis of the *LOSC* provisions regarding the implementation of freedom of navigation reveal that the coastal state's authority must have visual evidence that a foreign fishing vessel has abused the freedom of navigation before conducting any enforcement measures such as an order to stop for inspection. This means a sufficient number of patrol vessels that regularly patrol the sea is essential to prevent illegal fishing by foreign fishing vessels; a requirement that is problematic for developing states. This problem is exaggerated by the absence of obligation to give notification to the concerned coastal states prior to the implementation of freedom of navigation.

EEZs are considered to be the areas most vulnerable to the abuse of freedom of navigation implementation. In EEZs, the movement of foreign fishing vessels is freer because here the freedom of navigation for foreign vessels does not fall under innocent passage, transit passage, or archipelagic sea-lanes passage. It instead falls under freedom of navigation in the high seas. Furthermore, sanctions applied to foreign fish poachers in EEZs are limited to financial sanction (fine) only. This limitation exacerbates the problem by significantly

diminishing the deterrence effect of the law enforcement measures enacted by developing states.

This chapter's findings demand a reconsideration of the implementation of freedom of navigation by fishing vessels. The benefit of the freedom of navigation for trade and shipping purpose is not disputed. However, as its implementation has been demonstrated to be misused by fishing vessels to fish illegally, it is important to improve the arrangement regarding freedom of navigation for these vessels. Recommendations to this effect will be discussed in Chapter V.

CHAPTER IV:

THE AMBIGUITY OF THE IUU FISHING DEFINITION AND ITS IMPACTS ON INDONESIA

1 Introduction

Historical analysis in Chapter III demonstrated that before the *LOSC*¹ was established, ‘the tragedy of the commons’² in the world’s fisheries was a result of the fishing race between maritime powers under the auspices of the *freedom of the sea (mare liberum)* principle. This fishing race created devastating impacts on the smaller-states and colonies.³ Today, it is evident that overfishing continues to occur.⁴ However, the international community believes that IUU fishing is the major factor that causes overfishing now.⁵ Furthermore, some analysis and reports conclude that IUU fishing mostly occurs in the developing states’ waters and EEZs.⁶ Indonesia, as discussed in the Chapter II, is being accused of facilitating, or being incapable of responding to IUU fishing in its waters and EEZs. In particular, this pertains to the mass unreported fishing by Indonesian small-scale fishers. Indeed, the developing states, which previously were the victims of a power contest at sea, have become the malevolent actors of IUU fishing after they gave their consent to abide by the *LOSC*. This is a dramatic shift that requires critical attention.

¹ *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, UNTS 1833 (entered into force 16 November 1994) (*‘LOSC’*).

² Garrett Hardin, ‘The tragedy of the commons’ (1968) 162(3859) *Science* 1243, 1244.

³ Ram Prakash Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Brill, 1983) vol 7, 147.

⁴ See Organisation for Economic Co-operation and Development, ‘Fishing for Development - Background Paper for Session 4: The Challenge of Combatting Illegal, Unreported and Unregulated (IUU) Fishing’ (Paper presented at the Fishing for Development 2014 – Joint Session, Paris, 10-11 April 2014).

⁵ *Ibid.*

⁶ *Ibid.*

This chapter will argue that the tendency to blame developing states for the IUU fishing issue results from hegemony in the international fisheries management. This hegemony is facilitated by the ambiguities in the IUU fishing definition and the existing international fisheries legal framework. In fact, the maritime powers continue to dominate access to, and gain the biggest share of, revenue from the world's capture fisheries. Therefore, this chapter also considers the urgency for improvement in the implementation of the IUU fishing definition. This improvement is essential to remedy the effectiveness of law enforcement measures of the developing states against IUU fishing and to improve the equity between developing and developed states in protecting and accessing the fisheries.

To achieve this goal, this chapter will be framed around the TWAIL analysis that Mickelson adopted in her article titled *South, North, International Environmental Law, and International Environmental Lawyers*.⁷ Here, Mickelson argues that the discourses in international environmental law are dominated by a general perspective that actually disregards the 'power imbalance' between the developed and developing states.⁸ As Mickelson writes '[d]ifferentiated responsibilities, technology transfer provisions, and financial assistance mechanisms' become common features in international environmental law and diplomacy.⁹ However:

international environmental law *as a discipline* has failed to respond to Third World concerns in a meaningful fashion. Indeed, it has accommodated these concerns at the

⁷ Karin Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers' (2000) 11 *Yearbook of International Environmental Law* 52.

⁸ Ibid 80.

⁹ Ibid 54.

margins, as opposed to integrating them into the core of the discipline and its self-understanding.¹⁰

This manifests in the tendency to refer to ahistorical international environmental law when discussing solutions for environmental problems, and to portray developing states as the problem rather than as ‘an active partner in an ongoing effort to identify the fundamental nature of environmental problems and the appropriate responses thereto’.¹¹ Ultimately, Mickelson argues that an attempt to solve dilemmatic environmental problems between the interests of the developed states and the concerns of the developing states can only be successfully achieved if insightful consideration to environmental improvement is given together with a comprehensive understanding and acknowledgment of the history of international environmental law and the concern of the developing states.¹² This is essential in the case of fisheries. As will be elaborated on in this chapter, since the very beginning, international fisheries conservation and management measures were promoted by developed states to advance their desire to dominate and control the exploitation of fisheries resources for their benefit. Therefore, this chapter will identify the tools of hegemony used by the developed states in the context of international fisheries conservation and management measures, as well as their impact on Indonesia, to present insights for the improvement of fisheries conservation and management.

Additionally, it is important to consider the TWAIL framework on environmental issues in this chapter because there is a strong and interrelated connection between the

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid 79-81.

environment and fisheries.¹³ In fact, IUU fishing is categorised as an environmental crime by various international bodies such as Interpol, the United Nations Environment Program (UNEP), Europe Union, G8, and the United Nations Interregional Crime and Justice Research Institute.¹⁴ Therefore, TWAIL literature provides analysis on environmental issues that can be regarded as a mirror to reflect the problem of fisheries and IUU fishing, specifically regarding the notion that fisheries issues cannot be isolated from environmental issues and vice versa. Furthermore, the attention of TWAIL scholars regarding fisheries and the IUU fishing issue remains scarce. Therefore, incorporating the TWAIL perspective on environmental law in this chapter is expected to encourage TWAIL scholars' attention to fisheries and the IUU fishing issue.

2 The Ambiguities of the IUU Fishing Definition: The Tools of Hegemony

A *The Definition of Illegal, Unreported and Unregulated Fishing*

Illegal, unreported and unregulated fishing – or IUU fishing – is a term formulated by the United Nations Food and Agriculture Organization (FAO) to describe fishing activities, which infringe on existing laws and regulations and do not comply with international standards and obligations.¹⁵ The original description of IUU fishing can be found in section 3, chapter II of

¹³ Mikael Hildén et al, *The Relationship Between Environment and Fisheries Information: Project Report for the Nordic Strategy for the Environment and Fisheries* (Nordic Council of Ministers, 2000); Ernesto Penas Lado, *The Common Fisheries Policy: The Quest for Sustainability* (Wiley, 2016) 234.

¹⁴ Debbie Banks et al, *Environmental Crime: A threat to our future* (Environmental Investigation Agency, 2008) 1.

¹⁵ Food and Agriculture Organization, 'Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2002) 9 *Technical Guideline for Responsible Fisheries*, 6.

the *International Plan of Actions to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing* (the *IPOA-IUU*),¹⁶ and is as follows:

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 misreported, 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 misreported, 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.

¹⁶ Food and Agriculture Organization, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001) ('*IPOA-IUU*').

3.4 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 (IPOA).¹⁷

B *The Ambiguity of the IUU Fishing Definition*

There is continuing discourse on the ambiguity of the *IPOA-IUU* definition of IUU fishing. These debates are dominated by conflicting perceptions on the degree of illegality of each specific category – illegal, unreported, and unregulated –¹⁸ as well as the adequacy of the IUU fishing definition as a legal term,¹⁹ and whether IUU fishing qualifies to be considered as a crime or even trans-national organised crime.²⁰ However, unfortunately, the existing debates on the ambiguity of the IUU fishing definition have not yet recognised the hegemonic purpose of the background of the ambiguous definition of IUU fishing. For example, Palma, concludes that the *IPOA-IUU* definition only gives a description of ‘what may constitute “illegal fishing”’,

¹⁷ Ibid s 3 para II.

¹⁸ As mentioned in Chapter 1, some scholars consider unregulated and/or unreported fishing to not always be illegal. For example see Matthew Gianni and Walt Simpson, *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing* (Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers’ Federation, and WWF International, 2005) 3; Other scholars consider unreported fishing to be a subcategory of illegal fishing. See, eg, Mary Ann Palma, Martin Tsamenyi and William R Edeson 'History and Scope of IUU Fishing' in David Freestone (ed), *Promoting sustainable fisheries: the international legal and policy framework to combat illegal, unreported and unregulated fishing* (Brill, 2010) vol 6, 45; Still others consider illegal, unreported and unregulated fishing to all be illegal. See, eg, Jens T Theilen, 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' (2013) 28(3) *The International Journal of Marine and Coastal Law* 536.

¹⁹ See, eg, Seokwoo Lee, Anastasia Telesetsky and Clive H Schofield, 'Slipping the Net: Why is it so Difficult to Crack Down on IUU Fishing?' in Myron H. Nordquist et al (eds), *Freedom of Navigation and Globalization: Center for Oceans Law and Policy* (Martinus Nijhoff Publishers, 2014) 96; Andrew Serdy, 'Simplistic or surreptitious? Beyond the flawed concept (s) of IUU fishing' in Abigail J Lynch and Michael G Schechter William W Taylor (eds), *Sustainable Fisheries: Multi-Level Approaches to a Global Problem* (American Fisheries Society, 2011) 253.

²⁰ See, eg, Mary Ann Palma, *Fisheries Crime: Bridging the Conceptual Gap and Practical Response* (2014) Center for International Maritime Security <<http://cimsec.org/fisheries-crime-bridging-conceptual-gap-practical-response/12338>>; Don Liddick, 'The Dimensions of a Transnational Crime Problem: the Case of IUU Fishing' (2014) 17(4) *Trends in Organized Crime* 290; Rachel Baird, 'Illegal, unreported and unregulated fishing: an analysis of the legal, economic and historical factors relevant to its development and persistence' (2004) 5 *Melbourne Journal of International Law* 299.

“unreported fishing” or “unregulated fishing”, and does not strictly define these terms’.²¹ Furthermore, Palma points out that the *IPOA-IUU* tends to combine the different actions (illegal fishing, unreported fishing, and unregulated fishing) into one general term: IUU fishing.²² Indeed, this can be observed in chapter IV of the *IPOA-IUU* as it makes no specific distinction when recommending measures to combat IUU fishing. There is no clear information on what action is targeting illegal fishing, unreported fishing and unregulated fishing respectively.²³

In addition, Palma believes that the international fisheries legal framework does not provide an appropriate definition of IUU fishing as a crime.²⁴ Indeed, she concludes that the scope and nature of IUU fishing as set out in the *IPOA-IUU*, does not cover fisheries crime. Moreover, she argues that currently ‘there is no legal definition of fisheries crime, fisheries-related transnational crime, or transnational crime in fisheries’.²⁵ This hampers efforts to categorise IUU fishing as a serious or transnational organised crime. Indeed, today international discussions regarding the need to categorise of IUU fishing as a transnational organised crime have stalled due to the issue of defining the scope of fisheries crime.²⁶

²¹ Mary Ann Palma, *Analysis of the Adequacy of the Philippine Legal, Policy, and Institutional Framework to Combat Illegal, Unreported, and Unregulated Fishing* (PhD Thesis, University of Wollongong, 2006) 33.

²² Mary Ann Palma, 'Combating IUU fishing: international legal developments' in Q. Hanich and M. Tsamenyi (eds), *Navigating Pacific Fisheries: Legal and Policy Trends in the Implementation of International Fisheries Instruments in the Western and Central Pacific Region* (Australian National Centre for Ocean Resources and Security, 2009) 71.

²³ Ibid 73.

²⁴ Mary Ann Palma, 'Integrating Monitoring, Control and Surveillance and Anti-Money Laundering Tools to Address Illegal Fishing in the Philippines and Indonesia' in Gregory Rose (ed), *Following the Proceeds of Environmental Crime: Fish, Forests and Filthy Lucre* (Routledge, 2014) 100.

²⁵ Mary Ann Palma, *Fisheries Crime: Bridging the Conceptual Gap and Practical Response* (2014) Center for International Maritime Security, 2 <<http://cimsec.org/fisheries-crime-bridging-conceptual-gap-practical-response/12338>>.

²⁶ United Nations Office on Drugs and Crime, 'Transnational organized crime in the fishing industry' (2011) <http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf>., 102.

Daley reports that during the FAO Committee on Fisheries (COFI) technical consultation to draft the *PSM Agreement* in 2009,²⁷ there was a common concern from some delegates regarding the ambiguity of the IUU fishing definition in the *IPOA-IUU*. This was especially regarding the definition of unregulated fishing as something unable to support legal certainty in the context of a legally binding agreement.²⁸ However, this forum failed to reformulate the IUU fishing definition arguing that the flexibility of the IUU fishing definition will allow any country to improve their individual strategy to discourage IUU fishing, ‘particularly when it came to vessels engaged in fishing in high seas areas not regulated by a RFMO’.²⁹ This is a clear reference to the practice of developed states dominating the high seas fisheries by reason of conservation. Daley, however, does not provide further comment on the reluctance of the international forum to improve the IUU fishing definition. Instead, he argues that the *PSM Agreement* will effectively combat IUU fishing and save the fish stocks and environment.³⁰

Baird, highlights the changes in the application of the term of IUU fishing from its initial purpose.³¹ The term IUU fishing was initially introduced in 1996 by the Commission for the Conservation of Antarctic Marine Living Resources (the CCAMLR),³² a regional fisheries management organisation (RFMO) whose area of management encompasses ‘all waters

²⁷ *Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing*, concluded 22 November 2009, ATNIF 41 (entered into force 5 June 2016) (‘*PSM Agreement*’).

²⁸ Robert Daley, ‘New Agreement Establishing Global Port State Measures to Combat IUU Fishing’ (2010) 2(1) *Australian Journal of Maritime & Ocean Affairs* 32.

²⁹ Food and Agriculture Organization, *Report of the Technical Consultation to Draft a Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2009) [22] cited in *ibid* 30.

³⁰ Daley, above n 27, 31.

³¹ Rachel Baird, ‘Illegal, unreported and unregulated fishing: an analysis of the legal, economic and historical factors relevant to its development and persistence’ (2004) 5 *Melbourne Journal of International Law* 302.

³² This commission was established under Article VII of the *Convention on the Conservation of Antarctic Marine Living Resources*. See Commission for the Conservation of Antarctic Marine Living Resources, *About CCAMLR: Commission* (23 April 2015) CCAMLR <<https://www.ccamlr.org/en/organisation/commission>>.

bounded by the Antarctic Continent to the south, and to the north'.³³ This term was introduced to describe the non-compliant fishing activities in its management area.³⁴ Illegal fishing was used by the CCAMLR when the non-compliant fishing activities were conducted by its members,³⁵ while the unreported and unregulated fishing labels were applied to non-compliant fishing activities conducted by others.³⁶ The distinction made by the CCAMLR is logical. Under the principle of *pacta tertiis nec nocent nec prosunt*, any international agreement cannot bind (create an obligation or right for) any state without the state's consent.³⁷ Therefore, because non-parties of the CCAMLR are not bound by conservation measures under the *CAMLR Convention*, fishing activities by them cannot be categorised as illegal fishing. Unreported and unregulated fishing are more appropriate labels.

While in the beginning there was a clear differentiation in the application of the terms illegal, unreported, and unregulated fishing, today scholars and international institutions tend to merge the use of these terms into 'a generic description of fishing activity which undermines efforts to conserve and manage fish stocks in all capture fisheries'.³⁸ Baird admits that there are overlaps in the IUU fishing definition.³⁹ This especially occurs between illegal and unreported fishing because by its very nature, illegal fishing is also usually unreported.⁴⁰ Baird argues that the term illegal fishing is more accurate to describe fishing activities in a coastal state's waters without a permit from the coastal state, and fishing activities by a RFMO's

³³ See Commission for the Conservation of Antarctic Marine Living Resources, *About CCAMLR: Convention Area* (23 April 2015) CCAMLR, 1 <<https://www.ccamlr.org/en/organisation/convention-area>>.

³⁴ David J. Doullman, *Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action*, FAO Fisheries Report, No 666 (2001) [37].

³⁵ Baird, above n 31, 302.

³⁶ *Ibid.*

³⁷ See *Vienna Convention on the law of treaties*, opened for signature 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980), art 34; The implication of the *pacta tertiis* principle on the implementation of CCAMLR conservation measures please see Baird, above n 30, 317-18.

³⁸ Baird, above n 31, 302.

³⁹ Baird, above n 31, 302.

⁴⁰ *Ibid.*

members, which contravene the conservation measures of the RFMO.⁴¹ Furthermore, Baird infers that unreported and unregulated fishing only occurs in the high seas or areas under the management of the RFMOs that are outside a coastal state's jurisdiction.⁴²

C *The Broad Scope of the IUU Fishing Definition: An Ahistorical Approach to Finding a Solution for Overfishing and Its Impacts on Indonesia*

A clear differentiation, as originally intended, between the areas of implementation for each term – illegal, unreported, and unregulated fishing – weakens the argument that the Indonesian small-scale fishers have been conducting mass unreported or unregulated fishing in Indonesia's waters. This is because these terms would clearly not apply to their activities, as discussed in the previous paragraph. Unfortunately, however, such differentiation no longer occurs in practice. As the IUU fishing term is intended to cover fishing activities and areas as broadly as possible,⁴³ the 2015 Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally concluded that any discussion and attempt to modify the IUU fishing definition in the *IPOA-IUU* needs to be prevented.⁴⁴ It is important to avoid possible obstructions against 'the existing international instruments and the intentions and momentum of States to act on the three descriptions of illegal, unreported and unregulated fishing together'.⁴⁵ The forum instead encouraged the development and implementation of guidelines regarding the scope of the IUU fishing term beyond the IUU fishing definition in the *IPOA-IUU*.⁴⁶ For example, the forum proposed the scope of unreported fishing should include

⁴¹ Ibid.

⁴² Ibid.

⁴³ Food and Agriculture Organization, 'Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally' (FAO Fisheries and Aquaculture Report, No 1106, 2015) <<http://www.fao.org/3/a-i5028e.pdf>>.

⁴⁴ Ibid 3.

⁴⁵ Ibid 3[15].

⁴⁶ Ibid 52.

‘reporting that is not required by a law (not illegal under national law) or regional/international conservation and management measure but is recognized as essential that it be regulated’.⁴⁷ It also proposed that unregulated fishing should cover ‘activities (other than reporting) that are not regulated...but is recognized by fisheries management experts or competent international organizations as essential that it be regulated’.⁴⁸ These efforts to widen the IUU fishing definition reflects a trend in international perspectives towards IUU fishing, and provides more support for laying blaming against Indonesian small-scale fishers because the widened definition encompasses their activities.

The trend to expand the scope of the implementation of the unreported fishing and unregulated fishing term in the name of fisheries conservation, has greatly worsened the legal uncertainty and widened the gap of equity between developed and developing states. For example, paragraph 3.2 *IPOA-IUU* rules that to be categorised as unreported fishing, the reporting procedure must be obliged by national law (for fishing in a national jurisdiction: internal waters, archipelagic waters, territorial seas and EEZs) or by the RFMO for fishing in the areas under an RFMO’s management (for fishing in high seas).⁴⁹ The limitation of unreported fishing in the *IPOA-IUU* arguably provides better legal certainty than the proposed categorisation of unreported fishing without necessarily breaching nationals’ law or RFMOs’ conservation measures. The definition in the *IPOA-IUU* clearly differentiates and respects the jurisdictions of coastal states and RFMOs. Indeed, clarity is only hampered by the definition of unregulated fishing in paragraph 3.3.3 of the *IPOA-IUU*, which states:

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ *IPOA-IUU*, above n 16, [3.2].

[Unregulated fishing refers to fishing activities] 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.⁵⁰

Its reference to unspecified area (whether in a national jurisdiction or high seas) makes this paragraph able to be used as a pressure tool against coastal states that are regarded as not complying with the international conservation measures. For example, Indonesia's policy to free its small-scale fishers from reporting obligations is also sometimes categorised as unregulated fishing.⁵¹ The expansion of the implementation of the unreported and unregulated fishing term would make this uncertainty even worse.

On the other hand, the categorisation of unreported fishing in a coastal state's jurisdiction without necessarily breaching the coastal state's regulation simply undermines the sovereignty and sovereign right of the coastal state. The sovereignty of a coastal state in its internal waters, archipelagic waters, and territorial seas, is preserved by Article 2 of the *LOSC*, and the sovereign right of a coastal state in its EEZ is defended by Article 56. One of the manifestations of the sovereignty and sovereign right of a coastal state is the right to determine laws and regulations concerning fisheries management and conservation in its jurisdiction.⁵² However, the trend to expand the scope of the implementation of the IUU fishing term in a coastal state's jurisdiction without considering the coastal state's laws and regulations obstructs the sovereignty and sovereign right of the coastal state.

⁵⁰ *IPOA-IUU*, above n 16, [3.3.3].

⁵¹ See Kaija Metuzals et al, 'One Fish, Two Fish, IUU, and No Fish: Unreported Fishing Worldwide' in R Q Grafton (ed), *Handbook of marine fisheries conservation and management* (Oxford University Press, 2010) 166, [12.3.3].

⁵² The right of coastal states to establish their own laws and regulations on fisheries management and conservation in their jurisdiction can be observed in Articles 21[1](e), 42[1](c), 54, 58[3], 62[4][5], 73[1] of the *LOSC*.

Furthermore, an expansion of the implementation of the IUU fishing term would forcibly transfer the authority to categorise unreported and unregulated fishing in a coastal state's jurisdiction from the coastal state to other experts or fisheries management organisations whose opinions will likely accord with the powerful developed states' interests to dominate access and control over fisheries. As Chimni highlights:

the 'erosion' of sovereignty is empowering for powerful states as their loss is more apparent than real: it is the very exercise of their sovereign power that continuously shapes the objectives of [international institutions] and the rules they enforce. In contrast, the erosion of sovereignty is real in the case of third world states and peoples as they are subjected to rules in the formulation of which they have often been excluded, rules which are codified to realize the interests of the powerful states.⁵³

As this demonstrates, broadening the ambit of the IUU fishing term will only extend the gap of equity between developed and developing states. This idea reflects the tendency to ignore the differentiation of power between developed and developing states, and approach issues from an ahistorical perspective.

D *Ahistorical Approach to Solving the Overfishing Problem*

The tendency to expand the implementation of the scope of the IUU fishing term in a way that encroaches on the sovereignty and sovereign rights of the coastal states in regards to their territorial seas and EEZs is arguably negating the historical facts. As discussed in Chapter III,

⁵³ Bhupinder S Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15(1) *European Journal of International Law* 1, 25.

the developing states' demands to extend territorial seas and establish EEZs was intended to protect their fishers' livelihoods, and their nations' economic potential, from the aggressiveness of the developed states' fishing fleets, which had already overfished the waters near the developing states' shores.⁵⁴ Indeed, the establishment of EEZs reduced overfishing simply because it limited the open access regime of the high seas.⁵⁵ In contrast, an expansion of the implementation of the scope of the IUU fishing term departs from the belief that the major factors behind the rampancy of IUU fishing, which causes overfishing, is the extension of territorial seas and the establishment of EEZs.⁵⁶ This has forced distant water fishing fleets to compete in a reduced area in the high seas.⁵⁷ While the international community through RFMOs under the auspices of the international fisheries legal framework, try hard to conserve fisheries by combating IUU fishing in the high seas, some of the coastal states are reluctant or incompetent when it comes to conserving fisheries in their jurisdiction.⁵⁸ Therefore, some scholars argue that it is important to extend the jurisdiction of the RFMOs into the coastal states' EEZs and even territorial seas.⁵⁹ This demonstrates an ahistorical perspective behind the expansion of the implementation of the scope of the IUU fishing term. Indeed, the idea is the very antithesis of the developing states' expectation to have firm control over fisheries in their own territorial seas and EEZs.

⁵⁴ Anand, above n 3.

⁵⁵ Crow White and Christopher Costello, 'Close the high seas to fishing?' [2014] 12(3) *PLOS Biology*

⁵⁶ Discussion on this is extensive. For example see Baird, above n 30; Jennifer L Bailey, 'States, Stocks, and Sovereignty: High Seas Fishing and the Expansion of State Sovereignty' in N P Gleditsch (ed), *Conflict and the Environment* (Springer, 1997) 215; Martin Tsamenyi, and Quentin Hanich, 'Fisheries Jurisdiction Under the Law of the Sea Convention: Rights and Obligations in Maritime Zones Under the Sovereignty of Coastal States' (2012) 27(4) *The International Journal of Marine and Coastal Law* 783.

⁵⁷ Bailey, above n 56, 219-22; Baird, above n 31, 306.

⁵⁸ See David J Agnew et al, 'Estimating the worldwide extent of illegal fishing' [2009] 4(2) *PLOS One*, 4.

⁵⁹ See, eg, M Johanne Picard, 'International Law of Fisheries and Small Developing States: A Call for the Recognition of Regional Hegemony' (1996) 31 *Texas International Law Journal* 317; Tsamenyi, and Hanich, above n 56.

Instead of remedying the impact of past unfair fishing practices on the developing states, an expansion of the IUU fishing term's implementation would arguably continue to serve the interests of the developed states to control and dominate fisheries utilisation. Some scholars notice the hegemonic purpose behind the ambiguity of IUU fishing. For example, Serdy concludes that the ambiguity of the IUU fishing definition:

is being used by fishing states, deliberately or not, as a cloak to conceal consolidation of their oligopoly. In this way such states are succeeding both in avoiding being held to account by other states for their past overexploitation, and in keeping off the agenda any prospect of compensation for those states affected by the loss of freedom of fishing.⁶⁰

This intrinsic hegemonic purpose in the IUU fishing definition embodies the hegemonic nature of the fisheries conservation regime in the international fisheries legal framework.

E *The Hegemonic Nature of the Fisheries Conservation Regime According to the International Fisheries Legal Framework*

There are four legally binding international agreements that make up the international fisheries legal framework: the *LOSC*, the *UN Fish Stock Agreement*,⁶¹ the *FAO Compliance Agreement*,⁶² and the *PSM Agreement*.⁶³ The *LOSC* is an 'umbrella convention' for managing

⁶⁰ Andrew Serdy, 'Pacta Tertius and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal' (2017) *Ocean Development & International Law* 1, 13.

⁶¹ *United Nations Agreement for the Implementation of the Provision 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*, concluded on 4 August 1995, 2167 UNTS 88 (entered into force 11 December 2001) ('*UN Fish Stock Agreement*').

⁶² *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, signed 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003).

⁶³ *PSM Agreement*, above n 27.

the world's ocean and its resources.⁶⁴ When it comes to the management of the world's fisheries specifically, the *LOSC* provides basic principles for the international fisheries legal framework.⁶⁵ The *UN Fish Stock Agreement* was then initiated to address the *LOSC*'s insufficient provisions regarding the conservation and management of the straddling fish stocks and highly migratory fish stocks.⁶⁶ This agreement elaborates on the responsibilities of the coastal state, flag state, and port state for improving highly migratory and straddling fish stock conservation and sustainability.⁶⁷ Since the *LOSC* and the *Fish Stock Agreement* construct hegemony in international fisheries management and conservation, these two treaties will be frequently discussed in this section. In contrast, the *FAO Compliance Agreement* and the *PSM Agreement* were established to address specific problems relating to IUU fishing. The *FAO Compliance Agreement* was established to address the flag of convenience (FOC) problem resulting from the lack of flag states' responsibility to control their fishing fleets.⁶⁸ The *PSM Agreement* was initiated to address the port of convenience practice that facilitates the 'landing, transshipping, packaging and processing'⁶⁹ of fish from IUU fishing activities.⁷⁰ These two agreements will not be discussed further because they are beyond the scope of this section.

⁶⁴ Barbara Kwiatkowska et al, *International Organizations and the Law of the Sea: Documentary Yearbook. (1985)* (Springer Netherlands, 1999) vol 1, [12]. See also Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (Cambridge University Press, 2006) 146.

⁶⁵ Mary Ann Palma, Martin Tsamenyi and William R Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill, 2010) vol 6, 58.

⁶⁶ See Gordon R Munro, 'The United Nations Fish Stocks Agreement of 1995: History and Problems of Implementation' (2000) 15(4) *Marine Resource Economics* 266, 270; See also Ben M Tsamenyi, Lara Manarangi- Trott and Shilpa Rajkumar, *The International Legal Regime for Fisheries Management* The United Nations Environmental Program, 10 <www.unep.ch/etu/fisheries%2520meeting/submittedPapers/MartinTsamenyiLaraManarangiTrottShilpaRajkumar.pdf> 10.

⁶⁷ *UN Fish Stock Agreement*, art 2.

⁶⁸ The Flag of convenience is a practice that allows easy registering procedures for IUU vessels. It permits the IUU vessels to effortlessly change their nationality in order to escape from strict conservation measures. See Matthew Gianni and Walt Simpson, *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing* (Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers' Federation, and World Wildlife Fund International, 2005).

⁶⁹ *PSM Agreement*, above n 27, art 9.6.

⁷⁰ Port of convenience is a term that is given to a loose standard of controls in a port that gives delinquent fishers the opportunity to unload and sell their IUU fishing sourced fish. See Robert Daley, 'New Agreement

Having identified the international fisheries legal framework, this thesis argues there are two main features in the international fisheries legal framework that essentially make fisheries conservation measures favour the domination of developed states against developing states in accessing and managing fisheries. The first feature is the requirement that fisheries management and conservation measures be implemented based on the best scientific evidence. The second is the fisheries species/stocks based fisheries conservation and management measures. These will now be discussed.

F *The Best Scientific Evidence as the Authoritative Requirement in Fisheries Conservation and Management*

According to Article 61.2 of the *LOSC*, a coastal state has a duty in its EEZ to prevent overfishing by implementing the best scientific based conservation and management measures, and by cooperating with other states through fisheries management organisations to achieve the maximum sustainable yield (MSY).⁷¹ Furthermore, a coastal state has the obligation to exchange scientific data, including statistics pertaining to catch and fishing efforts, with the relevant fisheries management organisations on a regular basis.⁷² In the high seas, however, freedom of fishing is still acknowledged by Article 87.1(e) of the *LOSC* although this freedom is strictly limited by treaty obligations, and by the rights, duties, and interests of the adjacent coastal states.⁷³ States fishing in the high seas have the responsibility to cooperate with other relevant states through fisheries management organisations.⁷⁴ Moreover, states have a duty to

Establishing Global Port State Measures to Combat IUU Fishing' (2010) 2(1) *Australian Journal of Maritime & Ocean Affairs* 29.

⁷¹ The *LOSC*, art 61(2)(3).

⁷² The *LOSC*, art 61(5).

⁷³ The *LOSC*, art 116.

⁷⁴ The *LOSC*, arts 117, 118.

implement conservation measures based on the best scientific evidence to maintain MSY in the high seas.⁷⁵ The obligation to maintain MSY is implemented more extensively in the *Fish Stock Agreement* Article 5(b), 6(7), 10(f), and 16.1.

The requirement to use the best scientific evidence to maintain MSY advantages the developed states because they are more advanced in technology and science. This permits developed states to dictate international fisheries conservation measures, dominate access to high seas fisheries, and control fisheries in the developing states' jurisdiction. Indeed, as discussed in Chapter III, this requirement originated from the United States' strategy to achieve a monopoly on fishing in Alaska and the Pacific.⁷⁶ Furthermore, during the drafting of the *LOSC* this feature, together with the fish stocks/species based fisheries management and conservation measures was proposed as a compromise to allow the establishment of EEZs.⁷⁷ Despite the fact that the initial idea for MSY, as proposed by the United States, lacked scientific support,⁷⁸ this measure continues to be adopted and developed today in fisheries management and conservation programs and in academia. As Findley and Oreskes conclude:

MSY is an example of the proverbial three-legged stool. It began as policy, it was declared to be science, and then it was enshrined in law. The three partial theories could not be successfully unified into a comprehensive "scientific" theory because MSY was a policy camouflaged as science.⁷⁹

⁷⁵ The *LOSC*, art 119.

⁷⁶ See Carmel Finley, *All the Fish in the Sea: Maximum Sustainable Yield and the Failure of Fisheries Management* (University of Chicago Press, 2011); Donald Cameron Watt, 'First Steps in the Enclosure of the Oceans: The Origins of Truman's Proclamation on the Resources of the Continental Shelf, 28 September 1945' (1979) 3(3) *Marine Policy* 211; Carmel Finley and Naomi Oreskes, 'Maximum Sustained Yield: A Policy Disguised as Science' (2013) 70(2) *ICES Journal of Marine Science* 245.

⁷⁷ Shigeru Oda, 'Fisheries under the United Nations Convention on the Law of the Sea' (1983) 77(4) *American Journal of International Law* 743.

⁷⁸ Finley and Oreskes, above n 76. See also James Acheson, Spencer Apollonio and James Wilson, 'Individual Transferable Quotas and Conservation: A Critical Assessment' (2015) 20(4) *Ecology and Society* 7.

⁷⁹ Finley and Oreskes, above n 76, 248.

The implementation of the MSY theory in international fisheries management and conservation measures and academia demonstrates how developed states' interests have shaped the world's fisheries management and conservation.

The adoption of MSY legalised the hegemony of developed states, allowing them to dominate access to high seas fisheries. The idea of MSY is to predict the fisheries population that remain safe for exploitation.⁸⁰ If MSY analysis demonstrates the sustainable limit has been exceeded, then this analysis is used as justification for the closure or limitation of fishing in an area, or regarding a particular fish species, in order to prevent overfishing.⁸¹ Article 119 of the *LOSC* and Article 10 of the *Fish Stock Agreement* requires MSY analysis to be adopted as the basis for determining an allowable catch in the high seas.⁸² Subsequently, the allowable catch (popularly known as the fishing quota system) is adopted by various RFMOs in the high seas to conserve high seas fisheries.⁸³ However, the fishing quota distributed to the members of the RFMOs is based on catch history.⁸⁴ Consequently, this scheme automatically grants the developed states greater access to high seas fisheries than developing states because historically the developed states have caught more fish, starting from before the developing states were even formed. Again, this demonstrates an ahistorical perspective in addressing the overfishing problem. Indeed, the developed states, which have historically overfished the ocean, are authorised to dominate fishing in the name of the conservation (quota) scheme. Instead of considering a plea from conservationists and developing states for quota cutting to prevent overfishing, developed states have refused to cut their quota.⁸⁵ On the contrary, this quota has

⁸⁰ Ibid 247.

⁸¹ Ibid 248.

⁸² The *LOSC*, art 119(1).

⁸³ Anthony Cox, *Quota Allocation in International Fisheries* (OECD Food, Agriculture and Fisheries Working Papers No 22, 2009).

⁸⁴ Ibid 15.

⁸⁵ Oliver Milman, *Large Fishing Nations Fail to Agree to Deep Cuts in Pacific Tuna Quotas* (6 December 2013) theguardian <<https://www.theguardian.com/world/2013/dec/06/fishing-nations-fail-cut-tuna->

continued to increase. For example, the *International Commission for the Conservation of Atlantic Tuna* (the ICCAT), of which the United States, Japan, Europe Union, Canada, Russia, and China are among members, will raise its quota from 24,000 tons to 28,000 tons in 2018, and plans to continue rising it by 4,000 tons in 2019 and 2020.⁸⁶ In a press conference to announce this resolution, the European Union delegation argued that the decision to increase the quota accords with ‘scientific advice’.⁸⁷ This demonstrates the work of science to support the developed states’ interest. As concluded by Anghie: ‘[t]he invocation of ‘science’ and the involvement of the [international institutions] provide a new justification and guise for colonial practices’.⁸⁸

G *Species/Stocks Based Fisheries Conservation and Management Measures*

The species/stocks based fisheries conservation and management measures adopt the MSY concept. Therefore, as previously discussed, the work of the developed states hegemony, via science and the quota system also occurs here. However, this section will now emphasise the extraterritoriality of the species/stocks based fisheries conservation and management measures, which ultimately portrays the Indonesian government’s policy to exempt its small-scale fishers from reporting their catches while fishing in Indonesia’s waters and EEZ, as an invalid policy.⁸⁹

quotas>; Jim Hendricks, *Big Nations Refuse to Curb Commercial Overfishing of Pacific Tuna Species* (7 December 2012) sportfishingmag.com <<https://www.sportfishingmag.com/news/big-nations-refuse-curb-commercial-overfishing-pacific-tuna>>.

⁸⁶ Raf Casert and Nadine Achoui-Lesage, *Nations decide to increase quota for Atlantic Bluefin tuna*, 2017, abc news <<http://abcnews.go.com/International/wireStory/nations-decide-increase-quota-atlantic-bluefin-tuna-51297573>>.

⁸⁷ Ibid 1.

⁸⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007) vol 37, 185.

⁸⁹ Recent discussion on this issue can be found in Laurie Elizabeth Starr, *Blowing It Out of the Water: How Breaking Down Illegal, Unreported, and Unregulated (IUU) Fishing Can Contribute to its Effective Management in Indonesia Using an Area Based Approach* (Master’s Thesis, Dalhousie University, 2016); Deirdre E Duggan and Momo Kochen, ‘Small in Scale But Big in Potential: Opportunities and Challenges for Fisheries Certification of Indonesian Small-Scale Tuna Fisheries’ (2016) 67 *Marine Policy* 30.

Articles 63-64, and 66-67 of the *LOSC* provide the legal basis for special conservation and management measures for straddling stocks⁹⁰ (such as cod), highly migratory species⁹¹ (such as tuna), anadromous stocks⁹² (such as salmon), and catadromous species⁹³ (such as American eel) respectively. Nevertheless, only measures regarding straddling stocks and highly migratory species are implemented globally, spurred by the establishment of the *Fish Stocks Agreement*, which is dedicated to implementing the *LOSC*'s provisions for conservation and management in these two areas.⁹⁴ This section will primarily limit its discussion to highly migratory species, as this is most relevant to Indonesia, although mention will be made regarding straddling fish stocks as the *Fish Stocks Agreement* encompass both species.

As discussed earlier, species/stocks based fisheries conservation and management – together with the MSY measures – was proposed by the developed states during the preparation of the *LOSC*. Indeed, Chapter III of this thesis revealed that to secure its interests regarding tuna, the United States insisted that from 1953, tuna (which was later categorised as a highly migratory species in Annex I of the *LOSC*) was to be excluded from the regime of fisheries conservation and management in EEZs.⁹⁵ At that time, the United States' tuna industry had developed significantly even though tuna was scarce in the United States' EEZ.⁹⁶ This made

⁹⁰ Straddling stocks are stocks that can be found in two or more coastal states' EEZs and high seas. See The *LOSC*, art 63.

⁹¹ The *LOSC* does not provide a definition for highly migratory fish, but includes a list of fish in this category in Annex I. Tuna, marlin, and dolphin are among the listed species. Some scholars, however, define highly migratory fish as fish whose lifecycle occurs in more than one jurisdiction. See for example Christopher R Kelly, 'Law of the Sea: The Jurisdictional Dispute Over Highly Migratory Species of Tuna' (1987) 26 *Columbia Journal of Transnational Law* 476.

⁹² Anadromous stocks pertain to fish that spend most of their lifecycle at sea but spawn in rivers. See Ian C. Potter et al, 'The Ways in Which Fish Use Estuaries: A Refinement and Expansion of the Guild Approach' (2015) 16 *Fish and Fisheries* 232.

⁹³ Catadromous stocks pertain to fish that spend most of their lifecycle in rivers but spawn at sea. *Ibid* 233.

⁹⁴ Division for Ocean Affairs and the Law of the Sea, *Background Paper on UNFSA* (2013) <http://www.un.org/Depts/los/convention_agreements/Background%20paper%20on%20UNFSA.pdf>.

⁹⁵ Paul N. McCloskey Jr, and Ronald K Losch, 'UN Law of the Sea Conference and the US Congress: Will Pending US Unilateral Action on Deep Seabed Mining Destroy Hope for a Treaty, The' (1979) 1 *Nw. J. Int'l L. & Bus.* 240, 245, 255. See also M.E. Caprio, and Y. Sugita, *Democracy in Occupied Japan: The U.S. Occupation and Japanese Politics and Society* (Taylor & Francis, 2007) 63.

⁹⁶ *Ibid*.

the United States' tuna industry dependant on tuna sources from other states' EEZs.⁹⁷ Therefore, in discussions regarding the *LOSC*, the United States argued that tuna should be categorised as a highly migratory stock, and should be excluded from the EEZ's fisheries management and conservation regime.⁹⁸ Moreover, the United States argued that this species should be managed distinctively through cooperation between states that have similar tuna interests.⁹⁹ However, some scholars argue that the categorisation of tuna as a highly migratory species by the United States was merely a political reason rather than a biological consideration.¹⁰⁰ This is because tuna is both commercially and highly valued.¹⁰¹ Therefore, it can be argued that the motivation behind species/stocks based management and conservation measures is to secure the developed states interest in particular high value fisheries.

The *LOSC* expresses the need for special treatment for highly migratory species, albeit ambiguously. Indeed, the provision regarding highly migratory species management and conservation is located in the *LOSC* under Part V *EXCLUSIVE ECONOMIC ZONE*.¹⁰² This positioning implies that the management and conservation of highly migratory species falls under the EEZ regime that preserves coastal states' sovereignty over the species.¹⁰³ However, as Article 64 of the *LOSC* reads:

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate

⁹⁷ Ibid.

⁹⁸ Finley, above n 76.

⁹⁹ Patrick A Nickler, 'A Tragedy of the Commons in Coastal Fisheries: Contending Prescriptions for Conservation, and the Case of the Atlantic Bluefin Tuna' (1998) 26 *Boston College Environmental Affairs Law Review* 553.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² The *LOSC*, part V.

¹⁰³ Jennifer L. Bailey, 'States, Stocks, and Sovereignty: High Seas Fishing and the Expansion of State Sovereignty', *Conflict and the Environment* (Springer, 1997) 218.

international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.¹⁰⁴

The positioning of this article under Part V of the *LOSC* is a compromise to accommodate some of the coastal states' concerns regarding the developed states' proposal to create a special regime for the management and conservation of highly migratory species.¹⁰⁵ Indeed, according to Nordquist, paragraph 2 of the Article is meant to exclude the highly migratory species from management and conservation measures under the EEZ regime.¹⁰⁶

The ambiguity of Article 64 of the *LOSC* is addressed by the *Fish Stock Agreement*. Indeed, the *Fish Stocks Agreement* was intended to address the failure of fisheries management and conservation based on the imaginary boundary approach under the EEZ regime for protecting highly migratory fisheries.¹⁰⁷ However, the argument behind this conclusion is at odds with the accusation that mass unreported fishing is conducted by Indonesian small-scale fishers in Indonesia's jurisdiction. For example, intertwined with the reason behind the trend to broaden the implementation of the IUU fishing term, Bailey argues that the EEZ regime fails to protect highly migratory species because the increasing protection by coastal states in their

¹⁰⁴ The *LOSC*, art 64.

¹⁰⁵ Myron H Nordquist, *United Nations Convention on the Law of the Sea: A Commentary, Volume II* (Martinus Nijhoff Publishers, 1993) 650.

¹⁰⁶ *Ibid.*

¹⁰⁷ Bailey, above n 103.

EEZs has pushed the distant water fishing fleets to compete in the more confined high seas.¹⁰⁸ Meanwhile, the highly migratory fish themselves do not respect such boundaries. They ‘move or coexist beyond the confines of a single EEZ, often in international waters’.¹⁰⁹ This made the highly migratory species targets for IUU fishing in the high seas irrespective of the coastal states’ efforts to protect the species in the coastal states’ EEZs.¹¹⁰ To increase the effectiveness of the coastal states’ protection regarding highly migratory fish, the *Fish Stocks Agreement* mandates that states protect highly migratory species beyond their own EEZs.¹¹¹ For example, Article 21 of the *Fish Stocks Agreement* authorises state parties to inspect and even seize fishing vessels belonging to other parties in order to enforce the straddling and highly migratory fisheries management and conservation measures adopted by the relevant RFMOs in the high seas.¹¹²

This rationale is contrary to the accusations that Indonesian small-scale fishers catch tuna either intentionally or as a bycatch in Indonesia’s waters and EEZ. For example, Serdy contends ‘Indonesia was doing nothing to prevent the taking of large quantities of southern bluefin tuna on its spawning ground [Indonesia’s EEZ] as a bycatch from its fishery for other tuna species’.¹¹³ Furthermore, Duggan argues that ‘Indonesia represents one of the single largest sources of uncertainty in current regional stock assessments’.¹¹⁴ This is in contrast to the purpose of the *Fish Stocks Agreement* as elaborated above. Indeed, here the tuna conservation and management measures, under the auspices of the *Fish Stocks Agreement*, are

¹⁰⁸ Ibid, 219.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid, 229.

¹¹² The *LOSC*, art 21.

¹¹³ Serdy, above n 60, 4.

¹¹⁴ Western and Central Pacific Fisheries Commission, *West Pacific, East Asia Oceanic Fisheries Management*, UNDP Proj. Doc 1, 2009, cited in Duggan, above n 87, 34.

being used to discredit Indonesia for its measures in utilising, managing, and conserving fish in its own EEZ and territorial sea.

This accusation is allowed by the extraterritorial nature of the highly migratory species conservation and management measures adopted by Article 7 of the *Fish Stocks Agreement*. This article obliges states who engage in the fishing of highly migratory species to cooperate through RFMOs in order to maintain the ‘optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction’.¹¹⁵ Some scholars argue that the optimum referred to in this article falls under the maximum catch number that allowed by the MSY analysis.¹¹⁶ Furthermore, the states have a duty to maintain MSY,¹¹⁷ and to implement a precautionary approach, which involves using the best scientific information and data in the decision making process.¹¹⁸ Subsequently, Article 7 requires states to align their conservation and management measures in their jurisdiction with those adopted by the RFMOs.¹¹⁹ This universalisation of conservation and management measures allows the parties of RFMOs to contend that Indonesia’s policy to liberate their small-scale fishers from reporting obligations while fishing in Indonesia’s jurisdiction is a serious problem in the world’s tuna conservation and management measures.¹²⁰ This is based on the argument that according to Article 5(j) of the *Fish Stocks Agreement*, each state has an obligation ‘to collect and share, in a timely manner, complete and accurate data concerning fishing activities’ in high seas, or in its jurisdiction by its nationals when tuna is caught either intentionally or as a bycatch.¹²¹

¹¹⁵ *UN Fish Stocks Agreement*, above n 61, art 7(b).

¹¹⁶ See, eg, Robert May and Angela R. McLean, *Theoretical Ecology: Principles and Applications* (OUP Oxford, 2007) 152.

¹¹⁷ *UN Fish Stocks Agreement*, above n 61, art 5(b).

¹¹⁸ *UN Fish Stocks Agreement*, above n 61, art 6.3(a).

¹¹⁹ *UN Fish Stocks Agreement*, above n 61, art 7.2.

¹²⁰ See the National Intelligence Council, *Global Implications of Illegal, Unreported, and Unregulated (IUU) Fishing*, Memorandum, NIC WP 2016-02, (2016), 9 <<https://fas.org/irp/nic/fishing.pdf>>; Deirdre E Duggan, and Momo Kochen, 'Small in Scale but Big in Potential: Opportunities and Challenges for Fisheries Certification of Indonesian Small-Scale Tuna Fisheries' (2016) 67 *Marine Policy* 30.

¹²¹ *UN Fish Stocks Agreement*, above n 61, art 5(j), Annex I, art 1.1.

Ultimately, as discussed in Chapter II, the term unreported fishing or unregulated fishing is used to portray Indonesia's failure in complying with this obligation. The use of the ambiguous IUU fishing term additionally supports the developed states' domination over fisheries. As Serdy argues, the RFMOs' 'concern about existing IUU fishing...was mere statements of intent to limit fishing capacity'.¹²² Serdy also alerts that the phrase 'fight against IUU fishing' is being used by RFMO members to secure their 'exclusive access rights' to fisheries by eliminating the new entrants.¹²³

This situation demonstrates that the extraterritoriality of the tuna management and conservation measures under the auspices of the *Fish Stocks Agreement* allows developed states to control the exploitation of tuna in the high seas and in Indonesia's jurisdiction. The act of portraying Indonesia as a grudging, incapable, or at least less capable party when it comes to tuna conservation and management measures, has a significant impact on Indonesia's access to tuna fishing even in Indonesia's waters and EEZ. For example, Indonesia's quota regarding *Southern Bluefin Tuna* (SBT) has been limited to 750 tons since it became a member of the *Commission for the Conservation of the Southern Bluefin Tuna* (the *CCSBT*) in 2008.¹²⁴ This is because Indonesia was accused by Australian scientists of excessively catching up to 2,500 tons of SBT every year and not reporting it.¹²⁵ On the other hand, developed states such as Japan and Australia continue to enjoy huge quotas of 4,737 and 5,665 tons respectively in both 2016 and 2017.¹²⁶ Negative stereotyping against one party of RFMOs by others is used to win

¹²² Serdy, above n 60, 11.

¹²³ Ibid 12.

¹²⁴ Tom Polacheck, 'Assessment of IUU Fishing for Southern Bluefin Tuna' (2012) 36(5) *Marine Policy* 1151.

¹²⁵ Andrew Serdy, *The New Entrants Problem in International Fisheries Law* (Cambridge University Press, 2016) 240.

¹²⁶ See Commission for the Conservation of the Southern Bluefin Tuna, *Total Allowable Catch* <<https://www.ccsbt.org/en/content/total-allowable-catch>>.

this quota competition. For example, Sato argues that Australia and New Zealand campaigned together against Japan, using negative stereotyping, to win the SBT quota competition.¹²⁷

Indonesia's SBT quota is projected to be increased to 1,002 tons in 2018-2020, while Japan's and Australia's will increase to 6,165 tons.¹²⁸ This decision was made by the *CCSBT* after Indonesia had continuously struggled since 2013 to convince the commission that it had implemented a quota management system,¹²⁹ ensured there was no traditional or recreational catching of SBT, and confirmed that all of the SBT caught had been recorded and tagged in accordance with the *CCSBT*'s Catch Documentation Scheme (CDS).¹³⁰ This decision was reached even though Indonesia provided supporting data that demonstrates its SBT catch in 2015 was actually only 593 tons, which is below its 750 ton quota.¹³¹ Indeed, there are spreading complaints from Indonesian fishers arguing that the Indonesian government has been imposing an unfair policy to restrict Indonesian fishers from fishing for SBT in Indonesia's waters and EEZ, deteriorating the fishers' livelihood.¹³² This demonstrates how the international species/stocks based conservation and management measures have pushed the Indonesian government to sacrifice its traditional small-scale fishers' rights of access to SBT. Indeed, the universalisation of the stocks/species based fisheries conservation and management measures undermine Indonesian small-scale fishers' *property rights* regarding fisheries in Indonesia's waters and EEZ.

¹²⁷ Yoichiro Sato, 'Fishy Business: A Political-Economic Analysis of the Southern Bluefin Tuna Dispute' (2002) 28(4) *Asian Affairs: An American Review* 217. For an overview of the contestation between Japan and Australia regarding SBT quotas please see Sidney Adams, 'The International Management of Southern Bluefin Tuna: Consensus, Conflict and Communication Over a Common Pool Resource' in S. Sargeon (ed), *Collective Goods: Collective Futures in East and Southeast Asia* (Taylor & Francis, 2012) 41.

¹²⁸ Commission for the Conservation of the Southern Bluefin Tuna, *Report of the Twenty Third Annual Meeting of the Commission* (2016), [58].

¹²⁹ *Ibid*, [56].

¹³⁰ *Ibid*, [42].

¹³¹ *Ibid* attachment 4-4, Opening Statement by Indonesia.

¹³² These complaints of Indonesian fishers are

The existence of *hukum adat* (traditional law) in Indonesia is acknowledged by some scholars as a potential tool to manage and protect fisheries resources in Indonesia.¹³³ However, this is jeopardised by the implementation of the international best scientific evidence and stocks/species based fisheries conservation and management measures. As discussed in Chapter II, Indonesia's coastal people developed the *hukum adat* which includes *awig-awig*, *sawen*, *petuanan*, *sasi*, *panglima laot*, *pongawa sawi*, and *ondoafi* in order to protect the fisheries resources on which they are highly dependent for living.¹³⁴ The *hukum adat* basically implements a license system, opens and closes fishing season, and prohibits destructive and unsustainable fishing methods.¹³⁵ However, Harkes argues that the *hukum adat* also contains weaknesses such as generally adopting a patriarchal system that ignores the role of women in fisheries management.¹³⁶ Furthermore, the limited implementation of the *hukum adat* means it is confined to 'only [a] few species [in] specific local inshore waters' due to limited support from government.¹³⁷ The difference between the *hukum adat* and the current international fisheries conservation and management measures is that the decision to implement a particular measure in *hukum adat* is made based on the coastal people's traditional understanding of the ethics, and philosophical value of fisheries and sea utilisation, and their 'respect to

¹³³ For discussion on the potential role of *hukum adat* in fisheries management and conservation please see John Kurien, 'The Blessing of the Commons: Small-Scale Fisheries, Community Property Rights, and Coastal Natural Assets' (2007) 1 *Reclaiming Nature: Environmental Justice and Ecological Restoration* 23. See also Duggan, above n 88, 33.

¹³⁴ The existence of variations of the *hukum adat* name in Indonesia indicates that tribes developed the traditional law differently, and demonstrates that each major island in Indonesia has its own *hukum adat*. For more information please see Arif Satria and Dedi S Adhuri, 'Pre-Existing Fisheries Management Systems in Indonesia, Focusing on Lombok and Maluku', in Kenneth Ruddle and Arif Satria (eds), *Managing Coastal and Inland Waters* (Springer, 2010) 31; Tjetjep Nurasa, Nurzali Naamin and Riyanto Basuki, 'The Role of Panglima Laot "Sea Commander" System in Coastal Fisheries Management in Aceh, Indonesia' (1994) *Rapa Nui Journal* 395; Yusran Muhammad, *Pongawa-sawi Relationship in Co-Management: An Interdisciplinary Analysis of Coastal Resource Management in South Sulawesi, Indonesia* (UMI, 2003); Victor PH Nikijuluw, *Review on Community-Based Fisheries Management in Eastern Indonesia*, WP No 21 (1997).

¹³⁵ See for example Ingvild Harkes and Irene Novaczek, 'Institutional Resilience of Sasi Laut, a Fisheries Management System in Indonesia' (Paper presented at the The Eighth Conference of the International Association for the Study of Common Property, Bloomington, IN, 31 May-4 June 2000).

¹³⁶ Ibid.

¹³⁷ Ibid 5.

ancestors'.¹³⁸ In contrast, the international fisheries conservation and management measures, as discussed previously, lays down its measures via MSY calculation. This United States policy relies on the false belief that technology can accurately predict the population of fish in the sea.¹³⁹ As Finley and Oreskes highlight, this assumption 'was not supported by a strong empirical base, and...[has] subsequently [been] shown to be incorrect'.¹⁴⁰ Despite the fact that the principles of both *hukum adat* and MSY need to be continuously developed in order to achieve the best result for the sustainability of fisheries, Indonesia's small-scale/traditional fishing practice is still considered to be unreported and unregulated fishing because it does not comply with the existing international fisheries conservation and management measures. This reflects the dispute between the subjectivity of the coastal people in developing states and the developed states in deciding the best way to conserve and manage fisheries. Nevertheless, as Al-Attar concludes:

transnational law continues to expand in a world characterized by wide inequities in power, wealth, and technology. While political and economic development are highly particular exercises, heavily dependent on local cultural and normative preferences as well as available natural resources, the universalizing mission of international institutions and transnational legal projects dismisses, if not denies, subjectivity by imposing global compliance with transnational lawmaking processes, consistently at the behest of interests far removed from the subject states.¹⁴¹

This is in contrast to the "common but differentiated responsibility" principle that is claimed by some scholars, adopted by the *LOSC*. For example, Van der Burgt argues that the *LOSC*

¹³⁸ Ibid.

¹³⁹ Finley and Oreskes, above n 76, 247.

¹⁴⁰ D Pauly, *On the Sex of Fish and the Gender of Scientists* (Springer Netherlands, 1994) 49.

¹⁴¹ Mohsen Al Attar, 'Reframing the "Universality" of International Law in a Globalizing World' (2013) 59(1) *McGill Law Journal* 95, 115.

upholds equity value by adopting the common but differentiated responsibility principle.¹⁴² This principle is manifested in the requirements to take account of the interest and need of developing countries, and the requirement to provide assistance to developing countries.¹⁴³ This principle [the common but differentiated responsibility principle] underscores the importance of international fisheries law to acknowledge *hukum adat* as a legitimate tool to substitute the reporting obligations for Indonesian small-scale fishers. This will improve Indonesia's responsibility in managing and protecting its fisheries. As discussed previously, some scholars highlight the prospect of *hukum adat* to improve the sustainability of fisheries resources. For example, Kurien argues that the traditional rules which "included the design of equipment for harvest, taboos on its use, controls over times of access, and cultural norms of distribution of the harvest" support protection and management of the fisheries resources in the area.¹⁴⁴ Furthermore, Duggan and Kochen assert that *hukum Adat* is a very helpful system to increase Indonesian small-scale fishers participation in developing sustainable fishing practice in Indonesia.¹⁴⁵ On the contrary, in fact, the universalisation of the best scientific evidence and the stocks/species based fisheries conservation and management measures undermine Indonesian small-scale fishers' special need for protection of fishing rights derived from their poverty and illiteracy. On the other hand, the ambiguity of IUU fishing definition allows foreign fishers to plunder fish in Indonesia's waters and EEZ because this ambiguity hinders Indonesia's effort to combat IUU fishing as an organised or transnational crime. Further discussion on the possibility of *hukum Adat* to be acknowledged and accepted by the international fisheries law will be elaborated on the recommendation section. This chapter will

¹⁴² Nienke Van Der Burgt, *The Contribution of International Fisheries Law to Human Development: An Analysis of Multilateral and ACP-EU Fisheries Instruments* (Martinus Nijhoff Publishers, 2012) 175.

¹⁴³ Ibid.

¹⁴⁴ John Kurien, 'The Blessing of the Commons: Small-Scale Fisheries, Community Property Rights, and Coastal Natural Assets' (2007) 1 *Reclaiming Nature: Environmental Justice and Ecological Restoration* 23, 2.

¹⁴⁵ Deirdre E. Duggan, and Momo Kochen, 'Small in scale but big in potential: opportunities and challenges for fisheries certification of Indonesian small-scale tuna fisheries.' (2016) 67 *Marine Policy* 30.

now continue to discuss the impacts of the ambiguity of the IUU fishing definition on Indonesia.

3 The Ambiguity of the IUU Fishing Definition and its Impacts on Indonesia's Efforts to Combat IUU Fishing

The ambiguity of the IUU fishing definition communicates that fisheries offences are not serious violations. This can be seen in discussion regarding the desirable degree of force that should be used against fisheries offenders to enforce legal provisions. Indeed, the notion of fisheries offences as administrative violations is often used by scholars who argue that a disproportionate use of force should not be applied in fisheries matters. For example, McLaughlin argues that IUU fishing is a regulatory offence. Therefore, the proportionality of procedure used in enforcing fisheries law should be carefully considered.¹⁴⁶ This view can also be observed in the *UN Fish Stock Agreement* Article 22.1(f) which orders fisheries enforcement officers to:

avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.¹⁴⁷

Furthermore, paragraph 21 of the *IPOA-IUU* clearly recommends the 'administrative penalty scheme' as the applicable sanction for IUU fishing.¹⁴⁸ These all demonstrate the international fisheries legal framework's consideration of IUU fishing as an administrative offence. Some

¹⁴⁶ Rob McLaughlin, 'Coastal State Use of Force in the EEZ under the Law of the Sea Convention 1982' (1999) 18 *University of Tasmania Law Review* 11, 16.

¹⁴⁷ *UN Fish Stock Agreement*, above n 61, art 22(1)(f).

¹⁴⁸ *IPOA-IUU*, above n 16, [21].

scholars argue that the *International Tribunal of Law of the Sea* (ITLOS) also considers that IUU fishing is not a crime or at least not a serious one.¹⁴⁹ Their conclusion came after studying the ITLOS decisions, most of which did not support strong enforcement measures and penalties against IUU fishing.¹⁵⁰ This consideration significantly undermines Indonesia's law enforcement measures to combat IUU fishing.

As discussed in Chapter II, Indonesia's Fisheries Law¹⁵¹ adopts measures that are directed to address IUU fishing as a serious crime. This is demonstrated, inter alia, by the severe sanction adopted by the Fisheries Law. For example, Article 86 of the Fisheries Law imposed 6 years imprisonment and fines of up to Rp. 20 billion (AUD 2 Million) on unlicensed fishing.¹⁵² The establishment of special criminal justice systems on fisheries crime includes the establishment of special courts to hear fisheries crime cases, and the implementation of policy to blow-up and sink the IUU fishing vessels. However, the notion of IUU fishing as an administrative offence makes the blow-up and sink policy seem excessive and as if it is not complying with the international fisheries legal framework. For example, Prameswaran argues that Indonesia's policy to blow-up and sink its neighbouring countries' boats, in particular the Vietnamese fishing vessels apprehended by Indonesian authorities while conducting IUU fishing in Indonesia waters, is against the 'legal rights' of those neighbouring countries.¹⁵³

¹⁴⁹ See, eg, Warwick Gullett, 'Prompt Release Procedures and the Challenge for Fisheries Law Enforcement: The Judgement of the International Tribunal for the Law of the Sea in the Volga Case (Russian Federation v. Australia)' (2003) 31 *Federal Law Review* 405.

¹⁵⁰ Ibid.

¹⁵¹ Indonesian Fisheries Law Number 31 of 2004 as amended by Law Number 45 of 2009.

¹⁵² Indonesian Fisheries Law Number 45 of 2009 arts 27, 93.

¹⁵³ P Parameswaran 2015, *Vietnam 'Deeply Concerned' by Indonesia's War on Illegal Fishing* (2015) thediplomat.com, 1 <<http://thedi diplomat.com/2015/08/vietnam-deeply-concerned-by-indonesias-war-on-illegal-fishing/>>.

This point of view contradicts the findings of some scholars that IUU fishing can be qualified as a small-scale fisheries crime, an organised crime or even a trans-national organised crime, and a state-corporate organised crime.

A *Small-Scale Fisheries Crime*

There is a common perception that small-scale fishers are seaside people who have tiny capital and barely use any modern technology to catch fish for their livelihood.¹⁵⁴ Some others identify small-scale fishers as ‘artisanal’ to clearly differentiate between them from big ‘industrial’ fishery businesses.¹⁵⁵ Drammeh concludes that small-scale fishers usually fish illegally in their national, inland or archipelagic waters in order to survive from the unfair competition with industrial and foreign fishers.¹⁵⁶ Small-scale unlawful fishing tends to occur using simple methods. The activities usually take one of – or include all forms of – the following routines: being unlicensed; being unreported; and using destructive fishing gears or methods such as diminished mesh-size net, electric shock, cyanide and explosive.¹⁵⁷ However, some of them often cross borders into neighbouring jurisdictions. Their actions result from a lack of understanding of the international law of the sea’s development. Their fishing activities follow

¹⁵⁴ See Fikret Berkes et al, *Managing Small-Scale Fisheries: Alternative Directions and Methods* (International Development Research Centre, 2001). See also Anthony T. Charles, *Sustainable fishery systems* (John Wiley & Sons, 2008); Daniel Pauly, 'Major Trends in Small-Scale Marine Fisheries, With Emphasis on Developing Countries, and Some Implications for the Social Sciences' (2006) 4(2) *Maritime Studies* 7.

¹⁵⁵ Sarah Schumann and Seth Macinko, 'Subsistence in Coastal Fisheries Policy: What's in a Word?' (2007) 31(6) *Marine Policy* 706; Merle Sowman, 'Subsistence and Small-Scale Fisheries in South Africa: A Ten-Year Review' (2006) 30(1) *Marine Policy* 60.

¹⁵⁶ Ousman KL Drammeh, 'Illegal, Unreported and Unregulated Fishing in Small-Scale Marine and Inland Capture Fisheries' (Paper presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia, 15-19 May 2000).

¹⁵⁷ Ibid. See also Charles V. Barber and Vaughan R Pratt, 'Policy Reform and Community-Based Programmes to Combat Cyanide Fishing in Philippines' (1997) 8 *Live Reef Fish Information Bulletin* 26; Maria Hauck, 'Non-Compliance in Small-Scale Fisheries: A Threat to Security' (2007) *Issues in Green Criminology* 270; C Pet-Soede, H S J Cesar and J S Pet, (1999) 'An Economic Analysis of Blast Fishing on Indonesian Coral Reefs' 26(2) *Environmental Conservation* 83; United Nations Environment Programme, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP, 2011) <<http://www.unep.org/greeneconomy>>.

and continue their ancestors' traditions.¹⁵⁸ However, there is a small percentage of small-scale fishers that trespass the boundaries and use unscrupulous measures to gain larger catches.¹⁵⁹

Small-scale fishers are commonly the most impoverished group of people in a developing states' coastal community.¹⁶⁰ They mostly live in isolated areas where it is hard to get an alternative job.¹⁶¹ These conditions are exacerbated by the aggressive legal and illegal industrial fishing which is depleting the fish stocks.¹⁶² As a consequence, despite the fact that small-scale fishers are the true victims of IUU fishing, they are also involved in IUU fishing because of indigence and marginalisation.¹⁶³ For example, as discussed in Chapter II, IUU fishing by foreign fishers in Indonesia's waters and EEZ increases the poverty and conflicts among Indonesian small-scale fishers. In order to survive, Indonesian small-scale fishers use the prohibited means and methods to catch fish such as explosive, poison, or modified trawl such as *cantrang* (a bagged net with a diminished mesh size that is dragged by a small boat).¹⁶⁴

¹⁵⁸ Natasha, Stacey, *Boats To Burn: Bajo Fishing Activity In The Australian Fishing Zone* (The Australian National University, 2007).

¹⁵⁹ Judy Putt and Katherine M Anderson, 'A National Study of Crime in the Australian Fishing Industry' *Research and Public Policy Series* (Australian Institute of Criminology, 2007) vol 21.

¹⁶⁰ Berkes et al, above n 151; See also Christophe Béné, 'When Fishery Rhymes with Poverty: A First Step Beyond the Old Paradigm on Poverty in Small-Scale Fisheries' (2003) 31(6) *World Development* 949; John W McManus, 'Tropical Marine Fisheries and the Future of Coral Reefs: A Brief Review with Emphasis on Southeast Asia' (1997) 16(1) *Coral Reefs* S121.

¹⁶¹ McManus, above n 157. See also Edward H Allison and Frank Ellis, 'The Livelihoods Approach and Management of Small-Scale Fisheries' (2001) 25(5) *Marine Policy* 377; Daniel Pauly, 'Putting Fisheries Management Back in Places' (1997) 7(1) *Reviews in Fish Biology and Fisheries* 125.

¹⁶² Drammeh, above n 153. See also Estelle Victoria Jones, Timothy Stuart Gray and Chanin Umponstira, 'Small-Scale Fishing: Perceptions and Threats to Conserving a Livelihood in the Province of Phang-Nga, Thailand' (2010) 3(1) *Environment Asia* 1; United Nations Office on Drugs and Crime, above n 26.

¹⁶³ Drammeh, above n 153; McManus above n 157. See also Stop Illegal Fishing, *Stop Illegal Fishing in Southern Africa* (Stop Illegal Fishing Programme, 2008).

¹⁶⁴ The use of explosives, poison, and trawling to catch fish in Indonesia's waters and EEZ are prohibited by Indonesian Fisheries Law Number 45 of 2009 and Ministry Regulations Number 2/PERMEN-KP/2015 on Trawl and Seine Nets Banning. For discussion regarding this issue please see Sri Suro Adhawati et al, 'Comparative Study of Economic Value Post Cantrang Moratorium in the Waters of the Gulf of Bone and Makassar Straits, South Sulawesi Province' (2017) 11(2) *International Journal of Oceans and Oceanography* 201; Akhmad Fauzi, and Zuzy Anna, 'Social resilience and uncertainties: the case of small-scale fishing households in the north coast of Central Java' (2010) 9(2) *Maritime Studies* 55.

Unlucky small-scale fishers are often recruited by organised criminal groups on the basis of their skill and local knowledge of the sea. Some of them are victims of trafficking for the purpose of forced labour on board fishing vessels,¹⁶⁵ while others are recruited as intermediaries by organised IUU fishing groups.¹⁶⁶ Additionally, Pedroza points out that these intermediaries commence an informal trade to cover the IUU fishing practice,¹⁶⁷ and they also have the job of recruiting fishers to work on fisheries fleets for a very low salary or even without payment in a slavery-like practice.¹⁶⁸ These facts show how small-scale fishers are easily being used and exploited by organised IUU fishing groups to secure their illegal fisheries business. The intermediaries practice – or brokerage – means the real beneficial owner remains unknown. It is not desirable that regulation and enforcement to combat IUU fishing is only capable of targeting the small-scale fishers who are not actually doing IUU fishing based on their own will, and is powerless to reveal and punish the beneficial owner behind this crime.

B *IUU Fishing as Organised Crime or Transnational Organised Crime*

Perceiving organised criminal groups as the decisive actors behind IUU fishing, many researchers point out the importance of studying IUU fishing in industrial and international fishing enterprises.¹⁶⁹ As a result, discussion between today's experts revolves around the

¹⁶⁵ United Nations Office on Drugs and Crime, above n 26; See also Environmental Justice Foundation, *Slavery at Sea: The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry* (The Environmental Justice Foundation, 2014).

¹⁶⁶ Carmen Pedroza, 'Middlemen, Informal Trading and its Linkages with IUU Fishing Activities in the Port of Progreso, Mexico' (2013) 39 *Marine Policy* 135.

¹⁶⁷ *Ibid.*

¹⁶⁸ For further explanation on how slavery happens in the fishing industry please see Environmental Justice Foundation, *Pirates and Slaves: How Overfishing in Thailand Fuels Human Trafficking and the Plundering of Our Oceans* (The Environmental Justice Foundation, 2015).

¹⁶⁹ See, Steve Trent, Juliette Williams and Louis Buckley, *Pirates and profiteers: how pirate fishing fleets are robbing people and oceans* (Environmental Justice Foundation, 2005). See also Marine Resources Assessment Group, *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries* (Marine Resources Assessment Group Ltd, 2005); Kelly Rigg, Rémi Parmentier and Duncan Currie, "Halting IUU fishing: enforcing international fisheries agreements." *Fish piracy: combating illegal, unreported and unregulated fishing*. Paris: OECD (2004): 369-99.

involvement of organised groups behind IUU fishing. This tendency was first highlighted in a forum held by the United Nations Office on Drugs and Crime (UNODC) in early 2011.¹⁷⁰ As a response to the concern of many delegates at the conference, UNODC then arranged further study on the existence of transnational organised crime within IUU fishing.¹⁷¹ In 2012, the United Nations General Assembly announced their affirmation of the possibility of organised crime group interference in IUU fishing.¹⁷² Subsequently, in 2013, INTERPOL made its first contribution to the IUU fishing investigation process by issuing the purple notice¹⁷³ for an IUU fishing vessel named *Snake*.¹⁷⁴ INTERPOL then released a report regarding the *Snake's modus operandi* and latest position, which then allowed INTERPOL's member states to anticipate if the ship would enter and conduct IUU fishing in their waters.¹⁷⁵

One of the key findings of the research conducted by UNODC is the number of transnational fishing industries involved in 'marine living resource crime'.¹⁷⁶ They commonly exist as well-organised and legitimate transnational business groups, but are much more complicated as they use a fake company and management as a shield to protect the real owners. These groups combine the illegal fishing activity with other kinds of transnational organised crimes such as money laundering, human trafficking, slavery, drug smuggling, gun trading,

¹⁷⁰ United Nations Office on Drugs and Crime, above n 30.

¹⁷¹ Ibid 129.

¹⁷² General Assembly of the United Nations, *Resolution Adopted by the General Assembly on 6 December 2011: Sustainable Fisheries, Including Through the 1995 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, and Related Instruments*, UN Doc A/RES/66/68, 66th sess.

¹⁷³ These notices are issued by INTERPOL as a means of information sharing regarding crimes and criminals, and their threat to the INTERPOL's members. There are nine types of Notices: Red Notice, Blue Notice, Green Notice, Yellow Notice, Black Notice, Orange Notice, Interpol-UN Special Notice, Diffusion, and Purple Notice. According to page two of the International Notices System Fact Sheet, the Purple Notice provides 'information on modus operandi, procedures, objects, devices or hiding places used by criminals'. See International Criminal Police Organization, *International Notices System*, Fact Sheet, COM/FS/2017-02/GI-02 (2017).

¹⁷⁴ Gabriela Raffaele, *INTERPOL Requested for the First Time to Detect Illegal Fishing Activities* Fish Information and Service <<http://fis.com/fis/worldnews/worldnews.asp?l=e&ndb=1&id=63402>>.

¹⁷⁵ Ibid.

¹⁷⁶ United Nations Office on Drugs and Crime, above n 27, 12.

piracy, and – in some cases – terrorism.¹⁷⁷ Moreover, this report also highlights that some countries either lack the capacity or are reluctant to enforce their jurisdiction on fisheries management.¹⁷⁸ These states usually become targets of transnational organised crime groups to register their fishing vessels.¹⁷⁹ In fact, as discussed in Chapter II, the result of Indonesia's measure to suspend and audit the fishing permits of 1,132 Indonesian ex-foreign fishing vessels in 2014 and 2015 revealed that these organised groups cunningly registered their large fishing vessels sized 100-600 GT as Indonesian fishing vessels.¹⁸⁰ This to facilitate their IUU fishing practice in Indonesia's waters and EEZ, as well as to exploit Indonesia's tuna quota.¹⁸¹ However, as the real beneficial owners of the vessels were unknown, Indonesia only could impose permit revocation as the sanction to the vessels that was actually still registered in other states.¹⁸² This highlights the importance of IUU fishing to be categorised as transnational organised crime in order to facilitate Indonesia's efforts to impose criminal as well as financial sanction on the beneficial owners of the vessels, which that needs transnational enforcement cooperation with relevant states.¹⁸³

Following the report from UNODC, the 66th meeting of the United Nations General Assembly on 28 March 2012 emphasised the importance of further study on ways and means of transnational organised crime in fishing businesses as well as understanding the differences regarding applicable law and treatment between transnational organised crime and IUU

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ IOM, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry* (International Organization for Migration, 2016) 36.

¹⁸¹ Susi Pudjiastuti, 'Fisheries Crime as Transnational Organized Crime' (Presentation delivered at the 2nd INTERPOL Environmental Compliance and Enforcement Events, Singapore, 16-18 November 2015).

¹⁸² Ibid.

¹⁸³ Ibid.

fishing.¹⁸⁴ Furthermore, research on IUU fishing as a crime¹⁸⁵ found that besides IUU fishing activities being linked to drug smuggling, human trafficking, and marine piracy,¹⁸⁶ there are also strong links between IUU fishing and transnational organised criminal groups. This suggests that IUU fishing should be categorised as transnational organised crime as opposed to ordinary crime.

There are some “mafia” groups controlling transnational illicit fisheries businesses.¹⁸⁷ They are able to equip their fish poacher fleets with high speed vessels and high technology navigation equipment such as on-board radar and communication devices. The incident involving two Taiwanese fishing vessels which managed to escape from inspection by Indonesian patrol vessel as discussed in Chapter III makes this evident. This means the organised groups have the capacity to support the poachers to overcome enforcement measures.¹⁸⁸ Furthermore, as is the culture in these kinds of organisations, they apply forgery, intimidation, violence and bribery in the fishery business.¹⁸⁹ These practices persuade some law enforcement officers to become involved in the illegal fisheries business activities. Here, their decision would be based on risk and benefit consideration. On the one side there is a

¹⁸⁴ General Assembly of the United Nations, *Resolution adopted by the General Assembly on 6 December 2011: sustainable fisheries, including through the 1995 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, and related instruments*, New York, the United States, 66 sess, UN Doc A/RES/66/68, [60].

¹⁸⁵ See Judy Putt, and Diana Nelson, ‘Crime in the Australian Fishing Industry’ (2008) 336 *Trends and Issues in Crime & Criminal Justice*; Eve de Coning and Emma Witbooi, ‘Towards a New “Fisheries Crime” Paradigm: South Africa as an Illustrative Example’ (2015) 60 *Marine Policy* 208; Phelps Bondaroff, Teale N., Tuesday Reitano and Wietse van der Werf, *The illegal fishing and organized crime nexus: Illegal fishing as transnational organized crime* (The Global Initiative Against Transnational Organized Crime, 2015); Henrik Osterblom, Andrew Constable and Sayaka Fukumi, ‘Illegal Fishing and the Organized Crime Analogy’ (2011) 26 *Trends in Ecology and Evolution* 7; Gregory L Rose and Ben Tsamenyi, *Universalising Jurisdiction Over Marine Living Resources Crime* (University of Wollongong, 2013); Mary Ann Palma, above n 23.

¹⁸⁶ Bondaroff, Reitano and van Der Werf, above n 182; United Nations Office on Drugs and Crime, above n 26.

¹⁸⁷ Yuliya G Zabyelina, ‘The “Fishy” Business: A Qualitative Analysis of the Illicit Market in Black Caviar’ (2014) 17(3) *Trends in Organized Crime* 187.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

serious risk of death if the officer stands up to the mafia.¹⁹⁰ On the other side there is money from the bribery practice if the officer cooperates with them.¹⁹¹

It is very hard to reveal the involvement of organised groups behind IUU fishing. They implement sophisticated strategies to cover their business.¹⁹² As discussed above, creating fake companies is one of the common means to veil the beneficial owner of these unlawful organised fisheries businesses,¹⁹³ as well as employing small-scale fishers as intermediaries or brokers. Indeed, these organised IUU fishing groups create a multilayered shield to protect the real owner.¹⁹⁴

The sophisticated strategy of organised IUU fishing groups to hide their activities potentially makes law enforcement measures only effective on the small-scale fishers. This highlights the need to define IUU fishing as an organised/transnational crime. If it is seen and defined as such then more appropriate methods can be developed to combat it, rather than simply enforcing laws against small-scale fishers. As previously discussed, this is not desirable. Unfortunately, the existing international fisheries legal framework means IUU fishing is unlikely to be categorised as an organised crime or transnational organised crime. This was concluded at the ASEAN Regional Forum Workshop on IUU Fishing, held in Bali 16-21 April

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² See Lynden Griggs and Gail Lugten, 'Veil Over the Nets (Unravelling Corporate Liability for IUU Fishing Offences)' (2007) 31(2) *Marine Policy* 159; Matthew Gianni and Walt Simpson, *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing* (Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers' Federation, and WWF International, 2005).

¹⁹³ Organisation for Economic Co-operation and Development, *Fish Piracy: Combatting Illegal, Unreported and Unregulated Fishing* (Organisation for Economic Co-operation and Development, 2004) 222.

¹⁹⁴ Liddick above n 21.

2016.¹⁹⁵ Further discussion on this problem and on how Indonesian regulations and enforcement practices can address this will occur in Chapter V.

C *State-Corporate Crime and IUU Fishing*

There are indications that politicians and officers participate in IUU fishing businesses.¹⁹⁶ This involvement has occurred in the form of compromise in regulation making. Here, instead of providing rules to promote responsible fishing activity, the regulation's wording permits relaxation in 'licensing process; access agreements; monitoring and inspection'¹⁹⁷. Another form of involvement by politicians and officers in IUU fishing is by establishing an action or policy to help or to acquit the IUU fishing criminal group upon prosecution. In return, the organised IUU fishing group then provides political support and financial revenue to those unscrupulous politicians and officers.¹⁹⁸ These forms of politician and officer involvement in IUU fishing indicates the state-corporate crime aspect in IUU fishing. This will now be elaborated.

Standing has investigated IUU fishing as state-corporate organised crime and concludes that there are direct facilitations or omissions of state(s) in IUU fishing.¹⁹⁹ In his case study, Standing found that corruption, economic gain and political interest are the reasons for a state becoming involved in IUU fishing. The states' contributions in promoting IUU fishing are in

¹⁹⁵ 'Co-Chairs' Summary Report ASEAN Regional Forum Workshop on Illegal, Unregulated and Unreported (IUU) Fishing' (ASEAN Regional Forum, Bali, 19-21 April 2016) [12].

¹⁹⁶ Ben M Tsamenyi and Quentin A Hanich, *Addressing Corruption in Pacific Islands Fisheries: A Report/Prepared for IUCN PROFISH Law Enforcement, Corruption and Fisheries Project* (2008); Zabyelina, above n 184.

¹⁹⁷ Tsamenyi and Hanich, above n 194, 9.

¹⁹⁸ Ibid.

¹⁹⁹ André Standing, *Corruption and State-Corporate Crime in Fisheries*, U4 Issue Paper, No 15 (2015).

the form of omission to exercise their control and law enforcement jurisdiction; handicapped regulations and abuse of bilateral agreements or joint venture agreements.²⁰⁰

Numerous findings highlight the involvement of state officers and politicians in organised IUU fishing crime as well as in small-scale IUU fishing.²⁰¹ Some even directly conclude that there is involvements of states in IUU fishing.²⁰² For example, the Environmental Justice Foundation (EJF) has revealed the negligence of the Thailand government over IUU fishing and slavery practice in their fisheries industry.²⁰³ In its findings, the EJF reports that Thailand's government has not improved its outdated fisheries regulation since 1947, and tolerates destructive fishing gears as well as allows unlicensed fishing fleets to operate.²⁰⁴ Furthermore, after slavery practices in the Thailand fishing industry were revealed, Thailand's government failed to eliminate the unregulated industry of labour brokers.²⁰⁵ More specifically it failed to: identify victims of trafficking, forced and bonded labour aboard fishing vessels;

²⁰⁰ Ibid 11.

²⁰¹ See, eg, Justin Gosling and Tuesday Reitano, *The Global Response to Transnational Organized Environmental Crime*, Global Initiative Against Transnational Organized Crime Research Report (2014); Aksel Sundström, 'Corruption and Regulatory Compliance: Experimental Findings From South African Small-Scale Fishers' (2012) 36(6) *Marine Policy* 1255; Aksel Sundström, 'Corruption in the Commons: Why Bribery Hampers Enforcement of Environmental Regulations in South African Fisheries' (2013) 7(2) *International Journal of the Commons* 454.

²⁰² See, eg, José-María Da Rocha, Santiago Cervino and Sebastian Villasante, 'The Common Fisheries Policy: An Enforcement Problem' (2012) 36(6) *Marine Policy* 1309; Rainer Froese, 'Fishery Reform Slips Through the Net' (2011) 475 *Nature* 7; Judith Swan, *Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities: Information and Options* (Food and Agriculture Organization of the United Nations, 2002); Seokwoo Lee, Anastasia Telesetsky and Clive H Schofield, 'Slipping the Net: Why is it so Difficult to Crack Down on IUU Fishing?' in Myron H. Nordquist et al (eds), *Freedom of Navigation and Globalization: Center for Oceans Law and Policy* (Martinus Nijhoff Publishers, 2014) 88; Environmental Justice Foundation, *Slavery at Sea: The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry* (The Environmental Justice Foundation, 2014); Environmental Justice Foundation, *Broken Promises: Why Thailand Should Stay on Tier 3 in the 2015 US Trafficking in Persons Report* (The Environmental Justice Foundation, 2015); Environmental Justice Foundation, *Pirates and Slaves: How Overfishing in Thailand Fuels Human Trafficking and the Plundering of Our Oceans* (The Environmental Justice Foundation, 2015).

²⁰³ Environmental Justice Foundation, *Slavery at Sea*, above n 202; Environmental Justice Foundation, *Broken Promises*, above n 202; Environmental Justice Foundation, *Pirates and Slaves*, above n 202.

²⁰⁴ Environmental Justice Foundation, *Pirates and Slaves*, above n 202.

²⁰⁵ Environmental Justice Foundation, *Broken Promises*, above n 202.

enforce the law against state officials who engaged in human trafficking; and protect the slavery victims.²⁰⁶

Slavery practices in Thailand's fishing industry shows the partiality of the trade-related measures and diplomatic pressure that was implemented by the United States and the Europe Union. Some scholars consider these measures as effective tools to combat IUU fishing.²⁰⁷ However, despite numerous reports highlighting the negligence of Thailand's government regarding the slavery practice in its fishing industry, the EU and USA continue to allow Thailand to be the main fish supplier to the EU and USA .²⁰⁸ This demonstrates that the developed states' decision to impose sanctions against the state/s that support IUU fishing is not based on efforts to suppress IUU fishing but to support the interests of the developed states instead.

Swan points out that IUU fishing may offer economic or other incentives to a state to avoid the implementation of controls.²⁰⁹ DaRocha, Cervino, and Villasante highlight that there is a regular lack of enforcement at national fisheries authority level which affects most of the stocks analysed.²¹⁰ Froese concludes that the lack of success of the Common Fisheries Policy (CFP) is mainly due to the collusion between fisheries advisers and industry.²¹¹ Lee, Telesetsky, and Schofield further argue there are states that are intentionally irresponsible over

²⁰⁶ Ibid.

²⁰⁷ For example, see United Nations Conference on Trade and Development and Food and Agriculture Organization, *Trade-related Fisheries Targets: Sustainable Development Goal 14*, UN Doc UNCTAD/DITC/TED/2017/3; Margaret Young, *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing*. (E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015).

²⁰⁸ R McDowell and M Mason, *The World's Third-Largest Seafood Exporter has a Slavery Problem* (26 February 2015) Associated Press <<http://www.businessinsider.com/the-worlds-third-largest-seafood-exporter-has-a-slavery-problem-2015-2?IR=T>>.

²⁰⁹ Swan, above n 202.

²¹⁰ Da Rocha and Villasante, above n 202.

²¹¹ Froese, above n 202.

their flagged vessels' behaviour, and support IUU fishing by disregarding an accountable licensing procedure. Lee, Telesetsky and Schofield conclude that those states do not 'exercise their jurisdiction and control in administrative, technical and social matter over their flagged ships'²¹². All of these findings can be compared with the definition of State-corporate crime.

Aulette and Michalowski define state-corporate crime as an illegal or social-injurious action that results from cooperation between government and entrepreneurs in producing illegitimate policy and/or conducting illicit actions with the intention to attain a political and economic agenda of one or both sides.²¹³ There are two forms of state-corporate crime: State-initiated and State-facilitated. Kramer, Michalowski and Kauzlarich explain both forms of state-corporate crime as follows:

State-initiated corporate crime occurs when corporations employed by the government engage in organizational deviance at the direction of, or with the tacit approval of, the government'.²¹⁴ 'State-facilitated corporate crime, occurs when government regulatory institutions fail to restrain deviant business activities, either caused by direct collusion between business and government or because they adhere to shared goals whose attainment would be hampered by aggressive regulation.²¹⁵

The final key feature of state-corporate crime is that of denial; that the act or problem never occurred, that it was not a criminal violation, or that the state did not have a responsibility or

²¹² Lee, Telesetsky and Schofield, above n 202, 115.

²¹³ Judy Root Aulette and Raymond Michalowski, *Fire in Hamlet: A case study of a state-corporate crime* (Garland Publishing, 1993).

²¹⁴ Ronald C Kramer, Raymond J Michalowski and David Kauzlarich, 'The Origins and Development of the Concept and Theory of State-Corporate Crime' (2002) 48(2) *Crime & Delinquency* 271.

²¹⁵ *Ibid*, 272.

duty to respond or to prevent the specific act.²¹⁶ Often the state silences or dismisses experts, or shifts responsibility or blame to other parties.²¹⁷ State-corporate crime furthers the goals of the state or the elites who compose it.²¹⁸

Based on the above description, there are three findings that indicate IUU fishing should be categorised as a state-corporate crime. The first is there is evidence that direct facilitation from the state is happening through weak regulation and the misuse of bilateral and investment agreements.²¹⁹ The second is there is state negligence regarding IUU fishing and slavery practice,²²⁰ and the third is there is collusion in policy creation that contributes to the growth of IUU fishing.²²¹ However, there is another state action which should arguably be considered as part of the state-corporate IUU fishing scope, namely wrongful acts of a flag state. For example, some reports reveal that China employed its coastguard vessels to intervene when an Indonesian fisheries patrol vessel tried to apprehend Chinese fishing ships that were conducting IUU fishing in Indonesia's EEZ in Natuna. The report says the Chinese coastguard vessels exercised dangerous manoeuvres against Indonesian fisheries patrol vessels to prevent Chinese IUU fishing fleets from being caught by Indonesian authorities.²²² This dangerous action, which provides a means of protection to IUU fishing fleets, is a clear example of a state-corporate IUU fishing crime.

²¹⁶ Rob White, 'Depleted Uranium, State Crime and the Politics of Knowing' (2008) 12(1) *Theoretical Criminology* 31.

²¹⁷ Ibid.

²¹⁸ See Penny Green and Tony Ward, *State Crime: Governments, Violence and Corruption* (Pluto Press, 2004); Ronald C Kramer, 'State Violence and Violent Crime' (1994) 6(2) *Peace Review* 171; Jeffrey Ian Ross, *Controlling State Crime* (Transaction Publishers, 2000); Jeffrey Ian Ross and Gregg Barak, *Varieties of State Crime and its Control* (Criminal Justice Press Monsey, 2000).

²¹⁹ Standing, above n 199.

²²⁰ Environmental Justice Foundation, *Slavery at Sea*, above n 202; Environmental Justice Foundation, *Broken Promises*, above n 202; Environmental Justice Foundation, *Pirates and Slaves*, above n 202.

²²¹ Froese, above n 202.

²²² Katie Hunt, *South China Sea: Indonesia Issues Protest to China* (22 March 2016) [cnn.com <http://edition.cnn.com/2016/03/21/asia/indonesia-china-south-china-sea/>](http://edition.cnn.com/2016/03/21/asia/indonesia-china-south-china-sea/).

The inconsistency between international fisheries law's perception towards IUU fishing as an administrative offence and the findings of some studies that IUU fishing is a serious crime encompassing organised/transnational organised crime or even state-corporate crime – as has been elaborated on previously – suggests the partial nature of IUU fishing according to the international fisheries law. TWAIL scholars argue that the partiality of this internationally described crime was established by developed states to support their ideas and interests.²²³ For example, Reynolds and Xavier argue that the establishment and implementation of the International Criminal Law (ICL) and the International Criminal Court (ICC) were driven by the interests of the winners of the World War II to protect their past act of aggression and to continue their conquest against non-western states.²²⁴ While the partial nature of the ICL and ICC results in only non-western states being able to be prosecuted for so called international crimes,²²⁵ the partiality of the categorisation of IUU fishing as an administrative offence exaggerates the inequality between developed and developing states. As has been mentioned elsewhere in this thesis, the developing states with their limited number of patrol vessels and funding to support patrol operations, require great effort and face many restrictions (e.g. they cannot use excessive power or apply corporal punishment) in combating IUU fishing in their waters and EEZs. On the other hand, the developed states with their advanced means of surveillance and patrol, easily guard their waters, while at the same time complain and dictate to the developing states regarding the developing states failure to addressing IUU fishing and comply with their obligation to manage and protect fisheries in their waters and EEZs.

²²³ For example, see John Reynolds, and Sujith Xavier, "'The Dark Corners of the World" TWAIL and International Criminal Justice.' (2016) 14(4), *Journal of International Criminal Justice*, 959.

²²⁴ Ibid.

²²⁵ Ibid.

4 Conclusion

Drawing on TWAIL analysis regarding international environmental lawyers' perceptions towards developing states' roles in international environmental law, this chapter discovered that there is a similar trend among experts in international environmental law and in the field of fisheries to use an ahistorical approach in addressing environmental and overfishing problems. Both end up exposing developing states as unwilling or non-compliant participants in the international measures addressing the environmental and overfishing problems. Moreover, due to the lack of TWAIL studies on the international fisheries management and the IUU fishing issue, this chapter demonstrated the valuable context of TWAIL analysis in the field of international environmental law when used to analyse the hegemony of developed states in international fisheries conservation and management measures and the IUU fishing issue.

This chapter also revealed that the ambiguity of the IUU fishing definition has been used by developed states to support their practice of hegemony in accessing and managing fisheries. Indeed, the IUU fishing term is often used by developed states as a tool to discredit and exclude their rivals in accessing valuable fisheries resources. This hegemonic practice permits developed states to enjoy a much bigger share of the fishing quota for highly valuable fisheries, such as tuna, than developing states such as Indonesia. To maintain this hegemony, there is a growing trend to refuse any efforts to improve the definition of IUU fishing in the *IPOA-IUU*, or to expand the outreach of the ambiguous definition and scope of IUU fishing instead. This expansion is intended to overcome the limitation of the international measures for combating the IUU fishing issue when it comes to fishing activities in a coastal state's jurisdiction (territorial sea, archipelagic waters and EEZ). The expansion of the IUU fishing

term's implementation, in particular regarding the categorisation of unreported and unregulated fishing activities in a coastal state's jurisdiction without necessarily breach the coastal state's laws and regulation, is arguably undermining the coastal state's sovereignty and sovereign rights.

The categorisation of unreported or unregulated fishing for fishing activities by Indonesian small-scale fishers who are free from reporting obligations in accordance with Indonesian fisheries laws and regulations is an example of an act to portray Indonesia as an unwilling and not-compliant party regarding international fisheries conservation and management measures. This has caused Indonesia to suffer an unfairly small SBT quota disregarding the fact that Indonesia's waters and EEZ are the spawning ground for the species. This is the result of the universalisation of the best scientific evidence and stocks/species based fisheries conservation and management measures in the international fisheries legal framework, originating from the United States' policy to dominate fisheries resources. Indonesian small-scale fishers, however, who generally identify as poor and illiterate, are being exploited by the universal fisheries conservation and management measures, which demand fishers write the numbers of their catches in a *logbook*. This universal fisheries conservation and management measure derogates the *hukum adat* which otherwise has the potential to protect fisheries resources and is more compatible with the characteristics of the Indonesian small-scale fishers.

The ambiguity of the IUU fishing definition also results in IUU fishing being categorised as an administrative offence as opposed to a crime. This significantly hampers Indonesia's efforts to combat IUU fishing as a serious and transnational organised crime. Scholarship on IUU fishing as a crime concludes that IUU fishing should be categorised as a

small-scale fisheries crime, organised and transnational organised crime, or state-corporate organised crime. However, the ambiguity of the IUU fishing definition, and the hegemonic purpose behind the ambiguity do not allow the categorisation of IUU fishing as organised and transnational organised crime to be realised. This is demonstrated by the failure of numerous international forums to conclude that IUU fishing is an organised and transnational organised crime.

Ultimately, findings in this chapter demand improvement regarding the implementation of the IUU fishing term in order to improve the inequality between the developed and developing states that has been preserved by the current ambiguity of the IUU fishing definition. Moreover, the existence and implementation of the *hukum adat* should be preserved and improved as a partner to the existing international fisheries conservation and management measures. This is important to improve the protection of fisheries resources, particularly in areas where fishing is dominated by small-scale fishers, such as in Indonesia's jurisdiction. It is needed to restore the fairness in international fisheries conservation and management measures. However, considering that the ambiguity of the IUU fishing definition and the universalisation of the existing international fisheries conservation and management measures has been developed to support the hegemony of developed states, it will be challenging to reverse the established condition. Therefore, this chapter invites further TWAIL studies on the inequality that is preserved by the international fisheries conservation and management measures and the IUU fishing issue.

CHAPTER V: CONCLUSION AND RECOMMENDATIONS

1 The Ambiguities of the International Fisheries Legal Framework and the IUU Fishing Definition: Tools of Hegemony

This thesis has demonstrated that the ambiguities of the *LOSC*'s provisions regarding freedom of navigation for fishing vessels and law enforcement contribute to Indonesia's vulnerability to IUU fishing.¹ As Kamil highlights:

The conflict of interest between the freedom of navigation which is held by big maritime states on the one hand and the archipelagic states on the other hand, indeed has [created] ... various problems regarding the implementation of the right enjoy[ed] by foreign vessel[s to travel] through the water territories of archipelagic state[s].²

This thesis has revealed that the implementation of freedom of navigation hinders Indonesia's efforts to combat IUU fishing in its waters.

The abundance of fish in Indonesia's waters and its openness attracts unscrupulous foreign fishers who abuse the implementation of freedom of navigation as a means to poach fish in this area. Indonesia, as the biggest developing archipelagic state, has its area dominated by water.³ Its territorial sea, archipelagic waters and EEZ connect with the Indian and Pacific

¹ The *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, UNTS 1833 (entered into force 16 November 1994) (*LOSC*).

² Melda Kamil, 'Freedom of Navigation and Archipelagic State: Indonesian Case' (1995) 25(5) *Jurnal Hukum & Pembangunan* 1971-2017 435, 441.

³ Melda Kamil Ariadno and Fitri Amelina, 'An evaluation of the Indonesian law and policy on small-scale fisheries' (2016) 7(2) *The Journal of Sustainable Development Law and Policy* 49.

Oceans as well as the South China Sea.⁴ As a result, besides being rich with fish and becoming a spawning ground for various tuna species,⁵ Indonesia's territorial sea, archipelagic waters and EEZ are very open and frequently used for international navigation.⁶ The *LOSC* obliges Indonesia to allow any foreign vessels – including foreign fishing vessels – to sail its EEZ, territorial sea, and archipelagic waters under the auspices of the freedom of navigation regime.⁷ However, the *LOSC* also limits Indonesia's measures to prevent the abuse of freedom of navigation. These limitations include there being no obligation for foreign fishing vessels to notify Indonesian authorities prior to implementing the freedom of navigation.⁸ Furthermore, inspection by Indonesian authorities can only be initiated if there is visual evidence that a foreign fishing vessels has conducted IUU fishing during freedom of navigation.⁹ These are serious challenges for Indonesia, which is limited in its patrol and surveillance capacity. These realities demonstrate the impact of the ambiguities of the *LOSC* provisions regarding the implementation of freedom of navigation on Indonesia.

The *LOSC* also restricts the penalty that can be imposed on foreign fishers who illegally fish in Indonesia's EEZ, confining this to a monetary penalty (a fine) and prohibiting any physical punishment such as imprisonment.¹⁰ This limitation on punishment does not help Indonesia to combat IUU fishing as most of the foreign IUU fishing offenders that are caught by Indonesian authorities are fishing workers rather than the beneficial owners of the IUU

⁴ Arif Havas Oegroseno, 'Archipelagic States: From Concept to Law' in D.J. Attard et al (eds), *The IMLI Manual on International Maritime Law: The law of the sea* (Oxford University Press, 2014), 134.

⁵ Andrew Serdy, *The New Entrants Problem in International Fisheries Law* (Cambridge University Press, 2016), 108.

⁶ Senia Febrica, *Maritime Security and Indonesia: Cooperation, Interests and Strategies* (Taylor & Francis, 2017), 33; Sebastian, Leonard C, Ristian Atriandi Supriyanto and I Made Andi Arsana, 'Indonesia and the Law of the Sea: Beyond the archipelagic outlook' (2014) *National Security College Issue Brief No 9 May 2014*, 71.

⁷ Ibid.

⁸ Ibid.

⁹ *M/V Saiga Case* (St Vincent and the Grenadines v Guinea) ITLOS Case No.2. 1 July 1999, [146].

¹⁰ The *LOSC*, art. 73.

fishing vessels.¹¹ These workers cannot afford to pay fines. Furthermore, as is the nature of organised crime, the beneficial owners of the IUU fishing vessels are unknown.¹² As a result, most of the fines imposed by judges on foreign fishers involved in IUU fishing in Indonesia's waters were rarely paid.¹³

This thesis reveals that the inequality between developed and developing states in the capacity to guard their waters from IUU fishing, is being exploited by the ambiguity of the *LOSC*'s provisions regarding the implementation of freedom of navigation and law enforcement measures. This ambiguity assists the developed states in attaining benefit from the implementation of freedom of navigation including being able to facilitate their distant water fishing fleets' activities in developing states' waters and EEZs.¹⁴ This ambiguity also causes a significant burden on the developing states when protecting their fisheries from looting by foreign fishers due to shortcomings in the developing states' ability to patrol and secure the vast areas of their seas and EEZs.¹⁵ Subsequently, the ambiguity of the *LOSC*'s provisions regarding freedom of navigation implementation and law enforcement arrangements preserve the inequality between the developed and developing states.

This thesis has acknowledged the benefits of freedom of navigation regarding its support for international transportation and commerce activities. However, it has also argued

¹¹ Basten Gokkon, *Indonesia Seeks to Slap Money-Laundering Label on Illegal Fishing* Mongabay.com, 1 <<https://news.mongabay.com/2017/12/indonesia-seeks-to-slap-money-laundering-label-on-illegal-fishing/>>.

¹² Ibid.

¹³ Agung Tri Radityo, 'Criminal Responsibility Of Corporate Crime Towards The Criminal Act Of Illegal Fishing (Study of Verdict No. 31/Pid. Sus/2013/PTR)' (2017) 1(1) *Legal Standing: Jurnal Ilmu Hukum* 16, 21.

¹⁴ Ram Prakash Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Brill, 1983) vol 7, 153.

¹⁵ David J Agnew et al, 'Estimating the worldwide extent of illegal fishing' (2009) 4(2) *PloS one* e4570; Ousman KL Drammeh, 'Illegal, unreported and unregulated fishing in small-scale marine and inland capture fisheries' (Paper presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, 15-19 May 2000, Sydney, Australia).

that the ambiguity of the *LOSC* provisions regarding the freedom of navigation by fishing vessels, accompanied with the limitations of law enforcement arrangements, were championed by the developed states to facilitate their domination of fisheries. As Anghie accurately argues:

[while the developed states] asserted that colonialism was a thing of the past, it nevertheless relied precisely on those relationships of power and inequality that had been created by that colonial past to maintain its economic and political superiority which it then attempted to entrench through an ostensibly neutral international law.¹⁶

Chapter III especially, has further demonstrated that the ambiguities of the *LOSC*'s provisions pertaining to the implementation of freedom of navigation and law enforcement arrangements were created to maintain the hegemony of developed states in the utilisation of the sea and its resources. Indeed, the hegemony of developed states through the ambiguities of provisions regarding freedom of navigation and law enforcement arrangements jeopardise the developing states' ability to have steady control over fisheries resources in the waters around their territories for the wealth of their fisherfolk.¹⁷ These ambiguities facilitate the proliferation of IUU fishing by foreign fishers in Indonesia's waters and EEZs. Furthermore, this situation demands careful consideration regarding the need to improve the implementation of the *LOSC*'s arrangements for freedom of navigation by fishing vessels. In particular, this thesis has argued that notification prior to the implementation of freedom of navigation for fishing vessels is important to prevent IUU fishing by foreign fishing vessels. Such notification would make it easier for developing states to monitor the implementation of freedom of navigation

¹⁶ Antony Anghie, *Imperialism, sovereignty and the making of international law* (Cambridge University Press, 2007) vol 37, 215.

¹⁷ Tommy TB Koh, 'the Third United Nations Conference on the Law of the Sea: What Was Accomplished' (1983) 46 *Law & Contemp. Probs* 5, 6.

through their waters and EEZs. It would also give them the right to inspect any fishing vessels that do not comply with the notification requirement.

IUU fishing by foreign fishers plunders the livelihood of Indonesian fishers and Indonesia's economic potential.¹⁸ This contributes to making Indonesian small-scale fishers the poorest of the poor in Indonesian coastal communities.¹⁹ Furthermore, the rampant IUU fishing by foreign fishers encourages the Indonesian fishers – who are the dominant small-scale fishers in Indonesia – to conduct IUU fishing in Indonesia's waters and EEZs. Conflicts among Indonesian fishers and between Indonesian and foreign fishers also frequently ensues from this competition.²⁰ As discussed in Chapter II, some of the existing studies on IUU fishing in Indonesia describe Indonesian small-scale fishers as unreported or unregulated fishing offenders, alleging Indonesia's mismanagement of these individuals.²¹ This is an example of the overuse of the IUU fishing term that has resulted from the ambiguity of the IUU fishing definition. It is undeniable that IUU fishing in Indonesia's waters and EEZs is conducted by both foreign and local fishers.²² However, this thesis has argued that the categorisation of unreported or unregulated fishing in Indonesian waters and EEZs should not include the local small-scale fishers. As discussed in Chapter IV, paragraph 3.2.1 of the *IPOA-IUU* states that in order to be categorised as unreported fishing in a state's waters or EEZs, a reporting procedure must first be obliged by the state's laws and regulations. Indeed, a failure to report

¹⁸ Victor P.H. Nikijuluw, *Blue Water Crime: Dimensi Sosial Ekonomi Perikanan Ilegal/ Economy and Social Aspects of Illegal Fishing* (PT Pustaka Cidesindo, 2008)

¹⁹ Ibid.

²⁰ Ibid.

²¹ See for example Mary Ann Palma and Martin Tsamenyi, 'Case study on the impacts of illegal, unreported and unregulated (IUU) fishing in the Sulawesi Sea' (2008); Amanda Hamilton et al, *Impact of Industry and Market Drivers on the Global Tuna Supply Chain*, Report for the Pacific Islands Forum Fisheries Agency (2011)

²² Directorate General of Surveillance for Marine Resources and Fisheries, *Reflection 2015 and Outlook 2016 / Refleksi 2015 dan Outlook 2016* (Directorate General of Surveillance for Marine Resources and Fisheries, 2015), 7.

or misreport a fishing catch must be ‘in contravention of national laws and regulations’.²³ This is not the case regarding Indonesian small-scale fishers, as the Indonesian government has liberated them from licensing and reporting obligations in an effort to support and bolster their livelihood.²⁴ Therefore, it is inappropriate to categorise the Indonesian small-scale fishers’ freedom from licensing and reporting obligations as a form of unreported fishing.

When it comes to unregulated fishing, paragraph 3.3.2 of the *IPOA-IUU* in particular, provides ambiguity. Indeed, this paragraph does not clearly mention the area of occurrence for unregulated fishing. Although this thesis has argued that unregulated fishing is intended to only occur in the high seas, as the unregulated term was coined by the CCAMLR to describe fishing activities by non-members of this RFMO.²⁵ Therefore, the implementation of paragraph 3.3.2 of the *IPOA-IUU* in a national jurisdiction – in particular regarding Indonesia’s policy to liberate its small-scale fishers from reporting obligations due to the characteristics of this group of fishers who are mostly marginalised and illiterate – is breaching the sovereignty of Indonesia. As Simpson argues, sovereign equality is ‘the backbone principle of international law’.²⁶ This consists of existential equality, which ‘is the norm of non-intervention[,] and the right to choose one’s own form of government free from external interference’.²⁷ Therefore, it is also inappropriate to categorise the Indonesian small-scale fishers’ freedom from licensing and reporting obligations as a form of unregulated fishing.

²³ Food and Agriculture Organization, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001), [3.2.1].

²⁴ Please see Indonesian Fisheries Law Number 31 of 2004, art 61(1); Law Number 45 of 2009, art 7(3), 27(5), 28(4), and Elucidation (I).

²⁵ Rachel Baird, ‘Illegal, unreported and unregulated fishing: an analysis of the legal, economic and historical factors relevant to its development and persistence’ (2004) 5 *Melbourne Journal of International Law* 299, 302.

²⁶ Gerry Simpson, *Great powers and outlaw states: unequal sovereigns in the international legal order* (Cambridge University Press, 2004) vol 32, 6.

²⁷ *Ibid*, 54.

As discussed in Chapter III, there is a trend to maintain the ambiguity of the IUU fishing definition in order to support the implementation of the current international fisheries legal framework. There is also a trend to expand the scope of the implementation of the unreported and unregulated fishing terms into the jurisdictions of coastal states even though reporting is not required by the coastal states' laws and regulations.²⁸ This supports the expansion of the jurisdictions of Regional Fisheries Management Organisations (RFMOs) – whose decision making is commonly dominated by developed states – into coastal states' waters and EEZs.²⁹ As Chimni argues:

[such strategies] are used to ensure that third world states cannot opt out of legal obligations that are inimical to interest of their people. Finally, overt and covert political pressures are used to get third world states on board.³⁰

The contention against Indonesian small-scale fishers as the perpetrators of unreported fishing, as well as efforts to expand the scope of the ambiguous unreported and unregulated fishing and to extend the RFMOs' jurisdiction into coastal states' waters and EEZs, are all prime examples of developed states' strategies to maintain their hegemony over fisheries conservation and management through international organisations.

²⁸ For example, see Food and Agriculture Organization, 'Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally' (FAO Fisheries and Aquaculture Report, No 1106, 2015) <<http://www.fao.org/3/a-i5028e.pdf>>, 3[15], 52.

²⁹ For example of this idea please see M Johanne Picard, 'International Law of Fisheries and Small Developing States: A Call for the Recognition of Regional Hegemony' (1996) 31 *Tex. Int'l LJ* 317; Martin Tsamenyi and Quentin Hanich, 'Fisheries jurisdiction under the Law of the Sea Convention: rights and obligations in maritime zones under the sovereignty of Coastal States' (2012) 27(4) *The International Journal of Marine and Coastal Law*, 783;

³⁰ Bhupinder S Chimni, 'International institutions today: an imperial global state in the making' (2004) 15(1) *European Journal of International Law* 1, 25.

By turning its attention to the practice of hegemony by the developed states in international fisheries conservation and management systems, and using Third World Approach to International Law (TWAAIL) theory, this thesis has also found that there is a strong relation between the continuing accusation that Indonesian small-scale fishers have been conducting extensive unreported fishing and the developed states' interest in dominance over the benefits from fisheries resources. Indeed, despite the scarcity of TWAAIL studies on fisheries issues, this thesis has successfully applied TWAAIL theory to fisheries issues in an international environmental context.

In addition to the ambiguity of freedom of navigation for fishing vessel arrangements vis-a-vis the limitations in law enforcement arrangements, this thesis found that some principles in tuna conservation and management which are adopted by the *LOSC* and *UN Fish Stock Agreement* also facilitate the hegemony of developed states in the international fisheries conservation and management. These principles consist of the best scientific evidence, and stocks/species based fisheries conservation and management measures.³¹ Both of these principles were introduced and developed by the United States to support its interest in dominating fishing in Alaska and the Pacific.³² This domination included the desire to catch tuna in the waters near smaller states such as Mexico, Ecuador, Chile, and Peru, and to prevent Japan a notable competitor of the United States from fishing in Alaska and the Pacific Ocean.³³

³¹ See The *LOSC*, arts 61(2), 64, 65, 66, 67, 68, 77(4), 119(1)a; *United Nations Agreement for the Implementation of the Provision 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*, concluded on 4 August 1995, UNTS 2167(88) (entered into force 11 December 2001) ('*UN Fish Stock Agreement*'), arts 5(b), 6.7, 9.1(d).

³² Carmel Finley, *All the fish in the sea: maximum sustainable yield and the failure of fisheries management* (University of Chicago Press, 2011).

³³ Carmel Finley and Naomi Oreskes, 'Maximum sustained yield: a policy disguised as science' (2013) 70(2) *ICES Journal of Marine Science* 245.

The role of the best scientific evidence based fisheries conservation and management measures in upholding the hegemony of the developed states is demonstrated by its success in facilitating the United States' fishing activities in the waters near the shores of some small Latin American states; activities which were strongly opposed by these states in the 1950s.³⁴ The United States, through the FAO, argued that the Latin American states should provide scientific reasons to legitimate their desire to limit the United States' fishing activities in the areas near the Latin American states' shores. As Finley and Oreskes state:

Since only the USA and Europe had the necessary scientific capability, this policy effectively excluded most nations – particularly the Latin American ones – from challenging the US position or US dominance. In effect, it allowed the USA to impose its own preferred policy – limited management through bilateral or multi-lateral commissions – on the whole world. It was a political, if not an actual physical, enclosure of the world's oceans, but enclosure not to limit fishing but to permit it to proceed on US terms.³⁵

As discussed in Chapter III, the adoption of this principle was a result of the developed states' bargain to allow developing states to have their territorial waters expanded from three to twelve nautical miles, and to have sovereign right over fisheries in their EEZs. This thesis has argued that the best scientific evidence principle, which is manifested in the maximum sustainable yield (MSY) theory, limits developing states' access to fisheries both in the high seas, and their waters and EEZs. The MSY's main purpose is to decide the maximum number of fish that are allowed to be caught in order to maintain the sustainability of the fisheries.³⁶ Some scholars argue that the MSY theory contains significant flaws due to its overconfidence in predicting

³⁴ Ibid.

³⁵ Ibid 248.

³⁶ Finley and Oreskes, above n 42.

the number of fish in the ocean, while at the same time there is no strong empirical evidence to support the accuracy of these predictions.³⁷ Nonetheless, MSY has been adopted as the requirement in determining the total allowable catch (TAC), which is distributed by RFMOs as fishing quota to its members.³⁸ Here, the limitations against developing states' access to fisheries becomes particularly evident as the fishing quota is distributed between RFMO members based on their catch history. This secures the developed states' domination over fisheries quotas because, as discussed extensively throughout this thesis, history shows that the developed states have dominated the exploitation of fisheries since the colonial era.

Another variable to determine the quota share is the compliance of the RFMO members regarding the conservation and management measures adopted by the RFMOs, including the obligation to share reliable catch data.³⁹ Therefore, issues of compliance pertaining to one RFMO member is likely to be politicised by other members as a means to win the largest quota share. This thesis found some support for this argument. For example, Sato argues that the issue surrounding the compliance of Japan's experimental tuna fishing program 'was closely tied to the quota dispute among Australia, Japan, and New Zealand, but the simple explanation provided by western media – that Japan cheated the quota agreement by disguising some of its catch as research – is false'.⁴⁰ This observation supports the notion that there is a strong relation between the continuing accusation of unreported fishing by Indonesian small-scale fishers and the very small quota share afforded to Indonesia for *Southern Bluefin Tuna* (SBT) since it became a member of the *Commission for the Conservation of Southern Bluefin Tuna* (CCSBT) in 2008 until present. Indeed, this is only 750 tons compared with Australia's 5,665 tons, even

³⁷ For example see Finley and Oreskes, above n 44.

³⁸ The *LOSC*, art 119(1); Anthony Cox, *Quota Allocation in International Fisheries* (OECD Food, Agriculture and Fisheries Working Papers No 22, 2009).

³⁹ Anthony Cox, above n 46

⁴⁰ See Yoichiro Sato, 'Fishy business: A political-economic analysis of the southern bluefin tuna dispute' (2002) 28(4) *Asian Affairs: An American Review* 217, 218.

though Indonesia's EEZ is the only one featuring an SBT spawning ground.⁴¹ This underlines the need to evaluate the implementation of the quota system adopted by CCSBT. While most RFMOs set 'the distribution and biological characteristics of the stock(s), including the occurrence of the stock(s) in areas under national jurisdiction and on the high seas' as one of criterion for determining the share of quota of their members,⁴² the CCSBT does not adopt such criteria, disrespecting the importance of Indonesian EEZs as the spawning ground of SBT instead. This demonstrates the unfairness of the SBT quota allocation to Indonesia.

Chapter II discovered that the rights of Indonesian small-scale fishers, as the holder of *de facto property rights* of fisheries in Indonesia's waters,⁴³ are instead occupied by developed states in the name of tuna conservation and management measures. This is made possible by the adoption of the species/stocks based fisheries conservation and management measures. The species/stocks based fisheries conservation and management measures – particularly as they pertain to tuna – under the auspices of the *LOSC* and the *UN Fish Stocks Agreement* mandate the conservation and management of tuna fisheries in RFMOs irrespective of whether tuna fishing occurs in high seas or in coastal states' waters and EEZs.⁴⁴ This theory was developed based on the United States policy to protect its tuna industries from the emergence of developing states' claims on EEZs.⁴⁵ As Kirsch argues:

⁴¹ The CCSBT, *Total Allowable Catch* The Commission for the Conservation of Southern Bluefin Tuna (CCSBT) <<https://www.ccsbt.org/en/content/total-allowable-catch>>; The CCSBT, 'Report on Biology, Stock Status and Management of Southern Bluefin Tuna: 2017' (2017) <https://www.ccsbt.org/sites/default/files/userfiles/file/docs_english/meetings/meeting_reports/ccsbt_24/Attachment11_from_report_of_SC22.pdf>.

⁴² Anthony Cox, above n 46, 5. For example, the International Commission for the Conservation of Atlantic Tunas (ICCAT) applies this criteria to determine its members' quota, See Anthony Cox, above n 46, 5.

⁴³ Arif Satria, *Fishermen Ecology and Politic / Ekologi politik nelayan* (PT LKiS Pelangi Aksara, 2009), 351.

⁴⁴ *UN Fish Stock Agreement*, above n 40.

⁴⁵ See McCloskey Jr. and Losch, above n 92, 245, 255. See also M E Caprio and Y Sugita, *Democracy in Occupied Japan: The U.S. Occupation and Japanese Politics and Society* (Taylor & Francis, 2007) 63.

the power differential translates very differently into different areas of the law. In the process, the sovereign equality of states is increasingly challenged: not only because its formality contrasts so starkly with the facts of international life, but also because even in formal terms, sovereign equality is more and more eroded, as the hegemon comes to occupy a position above the law, not under it.⁴⁶

Indeed, chapters III and IV of this thesis revealed that the developed states – by exploiting the ambiguity in the international fisheries legal framework – have constructed their hegemony by limiting the sovereignty of developing states in implementing the territorial sea and EEZ regime. Furthermore, in addition to the preserved and expanded ambiguous IUU fishing definition, the developed states maintain their legalised hegemony in international fisheries conservation and management, worsening the inequity between them and the developing states.

This thesis has not discarded the importance of fisheries conservation and management measures in preventing unsustainable fishing practices. However, as it has revealed, the current international fisheries conservation and management measures, according to the international fisheries legal framework, contains gaps that hamper the developing states' efforts to combat IUU fishing in their waters and EEZs, and their attempts to protect their small-scale fishers. This thesis has argued that the current expansion of the international fisheries conservation and management measures, and the ambiguity of the IUU fishing definition significantly injures the developing states' sovereignty over utilising fisheries in their waters to improve the economic positions of their coastal peoples. As Al Attar argues:

⁴⁶ Nico Krisch, 'International law in times of hegemony: unequal power and the shaping of the international legal order' (2005) 16(3) *European Journal of International Law* 369, 407.

Among Third World peoples, [expansion of international legal regimes] is cause for unease, as the uploading of their nation's sovereignty translates into a downloading of disenfranchisement. Today's marginalisation is arguably more insidious: it calls upon the freshly-emancipated to surrender their recently-won sovereignty to a network of authorities not far removed from former colonial conquerors. Following hard on the heels of the decolonisation movement, it would be both insensitive and arrogant to underestimate the significant impact such a capitulation has upon the dignity of Third World states.⁴⁷

Consequently, this thesis urges for insightful consideration in discussing the problem of IUU fishing in developing states' waters and EEZs. As has been repeatedly demonstrated, improvement needs to be made in order to fix the ambiguity of the IUU fishing definition, the implementation of freedom of navigation for fishing vessels, and the equality in accessing fisheries under the auspices of the international fisheries conservation and management measures.

2 The Impacts of the Ambiguity of the IUU Fishing Definition on Indonesia's Law Enforcement Measures Against IUU Fishing

Chapter II of this thesis has discussed Indonesia's development and implementation of its domestic legal framework and its measures to combat IUU fishing as a serious crime. Indeed, through its Fisheries Act Number 31/2004 and 45/2009,⁴⁸ Indonesia endeavours to cope with problems in combating IUU fishing in its waters and EEZ. Indonesia has also consistently been

⁴⁷ Mohsen Al Attar and Rebekah Thompson, 'How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination' (2011) 3 *Trade Law & Development* 65, 68.

⁴⁸ Indonesian Fisheries Laws Number 31 of 2004 and Number 45 of 2009.

calling for international recognition of IUU fishing as a transnational organised crime since 2005. This thesis has further observed that Indonesia strives to balance its measures in targeting IUU fishing conducted by both foreign and local fisheries, as well as protect its small-scale fishers. However, Indonesia's efforts to combat IUU fishing as a serious or transnational organised crime facing great obstacles from the ambiguity of the IUU fishing definition. This thesis found there are two conditions that demonstrate the impacts of the ambiguity of the IUU fishing definition on Indonesia's law enforcement measures to combat IUU fishing: criticism of Indonesia's policy to blow-up and sink IUU fishing vessels both from its neighbouring countries and domestic figures, and the inappropriate adoption of IUU fishing categories in the Indonesian National Plan of Action to combat IUU fishing (NPOA-IUU). On the other hand, Indonesian small-scale fishers continue to be criminalised.

The Indonesian government tries to comprehensively address IUU fishing problems by applying the blow-up and sinking IUU fishing policy, the moratorium on the Indonesian ex-foreign fishing vessels, trawl banning, and transshipment banning.⁴⁹ However, unfortunately these policies and measures are not appropriately represented in the Indonesian NPOA-IUU.⁵⁰ This thesis has argued that the ambiguity of the IUU fishing definition in the IPOA-IUU has impacts on the failure of the Indonesian NPOA-IUU in adopting these important measures. As Palma argues, the ambiguity of the IUU fishing definition stipulated in the IPOA-IUU made:

⁴⁹ See Ministry Regulation Number 56/PERMEN-KP/2014 as amended by Ministry Regulation Number 10/PERMEN-KP/2015 on the Moratorium of Licenses in Fishing Business Activities in Republic of Indonesia Fishing Management Area; Ministry Regulation Number 2/PERMEN-KP/2015 on the Banning of Trawls and Seine Nets in Indonesian Fisheries Management Areas; Ministry Instruction Number 630/2014 on the Implementation of Moratorium of Licenses in Fishing Business, Transshipment, and Employment of Foreign Crews;

⁵⁰ Indonesian NPOA-IUU was established in 2012 endorsed by the Minister of Marine Affairs and Fisheries Decision Number KEP.50/MEN/2012.

a number of states have incorporated specific measures against IUU fishing in their NPOAs, but simply adopted the IUU fishing definition under paragraph 3 of the IPOA-IUU without indicating how the definition relates to the specific nature of fishing activities occurring within their jurisdiction or to vessels flying their flags and conducting fishing operations on the high seas and RFMO areas.⁵¹

The Indonesian NPOA-IUU's failure to incorporate the aforementioned measures to combat IUU fishing in Indonesia's waters and EEZs is a prime example of this. Indeed, it seems that the ambiguity of the IUU fishing definition in the IPOA-IUU has caused Indonesia confusion when it comes to being implemented in Indonesia's waters and EEZ. For example, chapter III paragraph C of the Indonesian NPOA-IUU mentions that the only form of unregulated fishing in Indonesian waters is sport fishing.⁵² However, the mention of sport fishing here is merely a statement without further elaboration on what specific action needs to be done to solve the problem.

Even though all of the measures to combat IUU fishing applied by Indonesia are regulated by its fisheries laws and regulations, there are significant problems that occur within the implementation of the measures because they are not set out as a national plan in the NPOA-IUU. For example, Indonesian Fisheries Laws Number 31/2004 and Number 45/2009 adopt four potential measures against IUU fishing vessels. The first is burning and sinking foreign IUU fishing vessels immediately – wherever they are located in the sea – if the vessels are considered so unseaworthy that it would be dangerous for crew members and Indonesian

⁵¹ Mary Ann Palma, 'Combating IUU fishing: international legal developments' in Q. Hanich and M. Tsamenyi (eds), *Navigating Pacific fisheries: legal and policy trends in the implementation of international fisheries instruments in the Western and Central Pacific Region* (ANCORS, 2009) 71, 74.

⁵² Indonesian NPOA-IUU, Ch III para C

officers if the vessels were seized and taken to the nearest port.⁵³ The second is blowing-up and sinking the vessels after a court order or court permission has been obtained.⁵⁴ The third is selling the vessels through an auction with the proceeds going to the states' income,⁵⁵ and the fourth is giving the vessels to government and academic institutions, or to Indonesian fishers' organisations as a grant.⁵⁶ These alternatives provide opportunities for the Indonesian government to choose any of those measures that are most suitable for an effective law enforcement measure against IUU fishing. However, the absence of a specific preference made in Indonesia's NPOA-IUU regarding the implementation of these alternatives of measures against IUU fishing vessels, means the implementation of the blow-up and sink IUU fishing vessels policy continues to receive criticism from Indonesian academics and even from high ranked executive officials.⁵⁷ This demonstrates that the debates regarding the appropriate degree of enforcement measures against IUU fishing as an impact of the ambiguity of IUU fishing definition, are not only occurring internationally but also among the decision makers inside Indonesia's government itself. This highlights the need for amendment to the Indonesian NPOA-IUU.

This thesis has analysed the problems that are faced by Indonesia in combating IUU fishing in its waters and EEZ with particular attention to the practice of hegemony by developed states in international fisheries management and conservation measures. The contribution of this thesis to the existing body of knowledge pertaining law enforcement against IUU fishing, is that there are three significant problems that hamper Indonesia's efforts to combat IUU

⁵³ Indonesian Fisheries Law Number 45 of 2009, arts 66(1)k, 69(4); See also Zaki Mubarok Busro, 'Burning and/or Sinking Foreign Fishing Vessels Conducting Illegal Fishing in Indonesia' (2017) 2(1) *Asia-Pacific Journal of Ocean Law and Policy* 174.

⁵⁴ Indonesian Fisheries Law Number 45 of 2009, art 76A.

⁵⁵ Indonesian Fisheries Law Number 45 of 2009, art 76C(1)(3).

⁵⁶ Indonesian Fisheries Law Number 45 of 2009, art 76C(5).

⁵⁷ Fadhly Fauzi Rachman, *Agree with Luhut, Entrepreneur Want Susi Setop Sink Ship* <<http://www.indonesia-news.tk/2018/01/agree-with-luhut-entrepreneur-want-susi.html>>

fishing in its waters and EEZ. These are the ambiguous provisions of the international fisheries legal framework regarding the implementation of freedom of navigation by foreign fishing vessels, the limitation on law enforcement measures and penalties, and the ambiguity of the IUU fishing definition. Furthermore, this thesis has argued that these problems were created and developed to maintain the domination of the developed states over fisheries resources. The findings of this thesis emphasise the fact that the objective of the international fisheries legal framework, as stipulated in the preamble of the *LOSC*, to improve the equality between developed and developing states in accessing benefit from the sea, is still far from reality.

3 Recommendations

It is always challenging when it comes to proposing improvement of equity between developed and developing states in international law. Indeed, international law will always be dealing with hegemony. As Koskenniemi argues, international law is ‘a process of articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made’.⁵⁸ In other words, Koskenniemi contends that international law is inevitably ‘a hegemonic technique’.⁵⁹ Nevertheless, efforts to enhance fairness within the international fisheries legal framework must be continuously championed in order to improve quality of life for the coastal communities in developing states who rely heavily on access to fisheries resources. As Koskenniemi further argues:

⁵⁸ Martti Koskenniemi, 'International law and hegemony: a reconfiguration' (2004) 17(2) *Cambridge Review of International Affairs* 197, 198.

⁵⁹ *Ibid.*

the main problems of world order are not those the hegemon is obsessed with – use of force and national security – but economic problems, poverty as the most striking example, that is, problems the hegemon usually casts as outside regulation by public international law.⁶⁰

With this in mind, this thesis firstly calls for more TWAIL studies to be conducted on the issue of equality regarding the international fisheries conservation and management measures under the auspices of the international fisheries legal framework. More specifically, these studies should focus on the implementation of freedom of navigation for fishing vessels vis-a-vis law enforcement arrangements, the best scientific evidence and stocks/species based fisheries conservation and management principles, and the ambiguity of the IUU fishing definition; areas on which this thesis has now initiated – albeit general – discussion. More extensive TWAIL scholarship in these areas will significantly improve the balance of academic consideration on the best efforts to combat IUU fishing, as well as fisheries conservation and management measures to eliminate poverty in the developing states' coastal communities. Currently, the situation is arguably being distorted because so far most scholars have looked at the problem in fisheries conservation and management from the point of view of the developed states' fisheries conservation and management theories.

The stark inequality in the share of SBT quota for Indonesia also need further study. As a preliminary recommendation, this thesis urges that the criteria to determine SBT quota shares according to catch history be complemented by the consideration that Indonesia's EEZ is the only SBT spawning ground. Recognising Indonesia as an active partner in managing SBT fisheries, would then further improve the equality between Indonesia and other CCSBT parties

⁶⁰ Ibid, 218.

rather than continuously portraying Indonesia as a grudging partner in SBT conservation and management measures.

This thesis recommends improvement regarding the consideration of local wisdoms (*hukum adat*) as a partner to the international tuna conservation and management. While this needs to be followed up with further study on the most effective way to combine *hukum adat* with the international measures, this thesis has observed the *hukum adat* as a set of rules that have been recognised and respected by Indonesian small-scale fishers and their ancestor. These rules will arguably have more legitimate power in the eyes of the small-scale fishers, increasing their participation in maintaining the sustainability of tuna fisheries, rather than the new obligations – based on the current international tuna conservation and management measures – that attempt to coerce them to do so. Moreover, the basic principles of fisheries conservation and management according to *hukum adat* and the international measures are relatively similar, namely the same: opening and closing of fishing seasons and in different areas; prohibition on destructive fishing gear and methods; protection for endangered species; and licensing system. Furthermore, the common but differentiated responsibility principle adopted by the international fisheries legal framework requires developed states to support developing states in fulfilling the developing states' common responsibility in different ways according to their special conditions and capabilities.⁶¹ Therefore, this thesis endorses that *hukum adat* be revitalised and recognised by the international fisheries law as one of the tools to improve the sustainability of tuna fisheries in Indonesia.

⁶¹ Nienke Van Der Burgt, *The Contribution of International Fisheries Law to Human Development: An Analysis of Multilateral and ACP-EU Fisheries Instruments* (Martinus Nijhoff Publishers, 2012)

Another recommendation proposed by this thesis is a preventative measure against the misuse of the implementation of freedom of navigation by fishing vessels. As has been underlined, notification by foreign fishing vessels prior to implementing freedom of navigation through Indonesia's EEZs, territorial sea, and archipelagic waters is very important to prevent the abuse of freedom of navigation implementation by IUU fishers. However, considering the importance of Indonesia's waters for international navigation, measures requiring such notification will probably face great resistance from its neighbouring countries and states, which have a strong interest in navigation through Indonesia, such as the United States and Australia. Nevertheless, Indonesia can initiate these measures by implementing a specific program to monitor and record the movement of foreign fishing vessels through Indonesia's waters and EEZs. Furthermore, Indonesia needs to take the initiative to discuss the fishing vessels movements in the region of South East Asia and Australia. These initiatives would raise awareness of the significant impacts of the freedom of navigation implementation by fishing vessels by promoting IUU fishing in the region.

Special cooperation should also be implemented by ASEAN Countries to address IUU fishing in Indonesia's waters and EEZ, which is mostly conducted by its neighbouring states' fishers. The existing cooperation under the auspices of the Regional Plan of Action to Promote Responsible Fishing Practices Including Combating Illegal, Unreported and Unregulated Fishing in the region of ASEAN plus Australia – called as RPOA-IUU – can be useful to enhance the responsibility of its members to ensure their fishers do not conduct IUU fishing in neighbouring states' waters and EEZs. RPOA-IUU was established in 2007, with its primary objective being to 'enhance and strengthen the overall level of fisheries management in the region, in order to sustain fisheries resources and the marine environment, also to optimize the

benefit of adopting responsible fishing practices'.⁶² Nevertheless, some scholars have identified limitations of the RPOA-IUU. For example, Septaria argues that the main obstacle within the RPOA-IUU is the lack of concrete procedures and sanctions against a violation of its arrangements/requirements,⁶³ while Williams underlines the contestation of fishing interests among its members.⁶⁴ However, the RPOA-IUU has two strengths that are valuable for solving the problem of IUU fishing conducted by the RPOA-IUU's members. Firstly, there is a strong cooperation framework in the areas of capacity building and data exchanges.⁶⁵ Strong cooperation in these fields is demonstrated by the continuation of the Monitoring, Control, and Surveillance (MCS) training, as well as courses for the law enforcement officers, and the successful exchange of IUU fishing vessel lists among RPOA-IUU members.⁶⁶ These strengths are promising for further cooperation in the exchange of data regarding RPOA-IUU members' fisheries vessels implementation of freedom of navigation through Indonesia's EEZ, archipelagic waters and territorial seas. Moreover, it is important for the RPOA-IUU to formulate and adopt effective mechanisms to disincentive RPOA-IUU members whose nationals frequently conduct IUU fishing in other RPOA-IUU members' waters and EEZs. Such mechanisms will increase the implementation of Article 61 Paragraph 2 and Article 62 Paragraph 2 of the *LOSC*, which requires coastal states to cooperate in managing, conserving and utilising the living resources in exclusive economic zones.

This thesis also encourages Indonesia to revise its NPOA-IUU as a matter of urgency. Improvements to the NPOA-IUU should include the existing policy and measures adopted by

⁶² Secretariat of RPOA-IUU, *Who we are* (18 November 2018) RPOA-IUU.org <<http://www.rpoaiuu.org/>>

⁶³ Ema Septaria, *IUU Fishing In Indonesia, Are Asean Member States Responsible For?*, International Journal of Business, Economics and Law, Vol. 11, Issue 4 (Dec.) 2016, 81 <<http://ijbel.com/wp-content/uploads/2017/01/LAW-146.pdf>>

⁶⁴ Williams, Meryl, *Will New Multilateral Arrangements Help Southeast Asian States Solve Illegal Fishing?*, 262, Contemporary Southeast Asia. 35. 258-283. 10.1355/cs35-2f, 2013.

⁶⁵ Ibid.

⁶⁶ Secretariat of RPOA-IUU, above n 62.

Indonesia in combating IUU fishing, such as the policy to blow-up and sink IUU fishing vessels, trawl banning, transshipment banning and the moratorium on ex-foreign fishing vessels. The adoption of these measures in Indonesia's NPOA-IUU is very important to ensure the continuity of their implementation.

Finally, this thesis urges the parties of the *LOSC* to discuss an opportunity to amend Paragraph 3 of Article 73 of the *LOSC* or at least re-interpret the Article, which plays a significant role in IUU fishing being considered an administrative offence. As has been explored in Chapter III, Paragraph 3 of Article 73 of the *LOSC* restricts prison and any corporal punishment against IUU fishing in EEZs. This restriction has commonly been interpreted as grounds for considering IUU fishing to not be a serious crime.⁶⁷ The article also provides obstacles for the categorisation of IUU fishing as a transnational organised crime. Transnational organised crime is defined by the *United Nations Convention against Transnational Organized Crime (TOC Convention)*⁶⁸ as a serious crime that is 'transnational in nature and involves an organized criminal group'.⁶⁹ On the other hand, Article 2(b) of the *TOC Convention* rules that a "serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'.⁷⁰ Here, the difficulty of categorising IUU fishing as a transnational organised crime, as presented by Paragraph 3 of Article 73 of the *LOSC*, becomes obvious. The restriction of prison and any corporal punishment made by Paragraph 3 of Article 73 of the *LOSC* means IUU fishing does not qualify to be categorised as a serious crime according to the *TOC*

⁶⁷ Valentin J. Schatz, 'The battle against Transnational Fisheries Crime: Jurisdictional Challenges.', *Völkerrechtsblog*, 3 March 2017, <http://voelkerrechtsblog.org/the-battle-against-transnational-fisheries-crime/>, 2.

⁶⁸ *United Nations Convention against Transnational Organized Crime*, adopted 15 November 2000 (entered into force 29 September 2003) ('*TOC Convention*').

⁶⁹ *TOC Convention*, art 3[1].

⁷⁰ *TOC Convention*, art 2(b).

Convention. Therefore, this thesis urges for the amendment of Paragraph 3 of Article 73 of the *LOSC* to make such categorisation possible.

Amendment to the *LOSC* is possible according to Paragraph 1 of Article 312 of the *LOSC*. This article states that amendment is possible after the *LOSC* has been in force for ten years.⁷¹ The *LOSC* came into force in 1994. Therefore, since 2004, the *LOSC* has been amendable. Furthermore, Articles 312 and 313 of the *LOSC* provide the option for the proposer of an amendment to discuss their proposal at a conference or proceed with a simplified amendment procedure. A conference to discuss an amendment proposal is held if the request for a conference is supported by at least half of the parties of the *LOSC*.⁷² The simplified procedure takes place if the proposer requests it in writing to the Secretary General of the UN.⁷³ The Secretary General will then circulate the proposal to all *LOSC* parties.⁷⁴ Amendment proposals are considered refused if there is a rejection expressed by one of the *LOSC* parties.⁷⁵ Any proposal to amend Article 73 of the *LOSC* will face considerable challenge from some of the *LOSC* parties. Therefore, this thesis argues that amendment via the conference procedure will provide more opportunity to persuade *LOSC* parties to give their support to the amendment proposal.

Another way to tackle the difficulty in categorising IUU fishing as a transnational organised crime is by re-interpreting Paragraph 3 of Article 73 of the *LOSC*. This thesis argues that the prohibition of prison or any corporal punishment as a sanction for IUU fishing in EEZs

⁷¹ the *LOSC*, art 312(1)

⁷² *Ibid.*

⁷³ the *LOSC*, art 313(1)

⁷⁴ *Ibid.*

⁷⁵ the *LOSC*, art 313(2)

expressed by this Article, should be interpreted as a conditional restriction due to the nature of EEZs. As Article 55 of the *LOSC* stipulates:

‘The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention’.⁷⁶

Hence, the restriction of prison and any corporal punishment only applies in EEZs because these areas are subject to a special legal regime where the coastal states do not have full sovereignty, but rather sovereign right over the natural resources.⁷⁷ Therefore, the restriction should not be interpreted as impacting on the nature of IUU fishing as a serious crime. Re-interpretation can be initiated by Indonesia as a party to both the *LOSC* and the *TOC Convention*. Here, Indonesia can negotiate with the other parties of the *TOC Convention* to discuss and formulate a protocol to acknowledge and emphasise the nature of IUU fishing as a transnational organised crime, and to confirm that the restriction of prison and any corporal punishment made by Paragraph 3 of Article 73 of the *LOSC* should not be interpreted as impacting on the nature of IUU fishing as a serious crime.

4 Thesis Limitation

Despite its achievement in discovering the inequality present in the international fisheries legal framework, which eventually causes complex problems for Indonesia’s efforts to combat IUU fishing in its waters and EEZ, this thesis acknowledges its limitations,

⁷⁶ the *LOSC*, art 55.

⁷⁷ Robert Beckman and Tara Davenport, 'The EEZ Regime: Reflections After 30 years' (Paper presented at the 2012 LOSI-KIOST Conference on Securing the Ocean for the Next Generation, Seoul, 2012).

especially pertaining to the concreteness of solutions offered by it to solve the intrinsic inequality problems in the international fisheries legal framework. As Hippolyte has asserted:

the theoretical arguments offered by [TWAIL] jurist fail to offer constructive solutions for improving developing countries' positions in the system. This critique fails to make proper use of any forceful methodological instruments, offering constructive proposals for improving the system.⁷⁸

This thesis realises the difficulty in offering a concrete solution to remedy the inequality and legalised hegemony adopted in the international fisheries legal framework. For example, it is unrealistic to propose an amendment to Article 73(3) of the *LOSC* pertaining to the prohibition of imprisonment as a sanction for IUU fishing in EEZs even though this article plays a fundamental role in the categorisation of IUU fishing as an administrative offence. This is because the *LOSC* is an extraordinary product of international deals, which was developed through long and significant efforts by both developed and developing states. It would definitely need a very strong and holistic academic approach before moves towards revision could be made. Consequently, by setting out other recommendations in Section D of this chapter, this thesis endeavours to counter this limitation by offering some more realistic solutions.

5 Future Study

To develop a more accurate and comprehensive solution for the problem of IUU fishing in Indonesia, and the regions of South East Asia and Australia, this study needs to be followed up

⁷⁸ Antonius R Hippolyte, 'Correcting TWAIL's Blind Spots' (2016) 18(1) *International Community Law Review* 34, 49.

by a comprehensive study on the patterns of fishing vessel navigation in the South East Asian and Australian regions, and their impact on IUU fishing here. Scholarly work must also be done on the role and operation of *hukum adat* in maintaining the sustainability of fisheries, and its inter-connection with the current international fisheries conservation and management measures. It is expected that future studies can use this thesis as a springboard to develop a comprehensive and accurate solution for the IUU fishing problem in developing states.

BIBLIOGRAPHY

I Articles/Books/Reports

Acheson, James, Spencer Apollonio and James Wilson, 'Individual Transferable Quotas and Conservation: A Critical Assessment' (2015) 20(4) *Ecology and Society* 7

Adams, Sidney, 'The International Management of Southern Bluefin Tuna: Consensus, Conflict and Communication Over a Common Pool Resource' in S. Sargeson (ed), *Collective Goods: Collective Futures in East and Southeast Asia* (Taylor & Francis, 2012) 41

Adhawati, Sri Suro, et al, 'Comparative Study of Economic Value Post Cantrang Moratorium in the Waters of the Gulf of Bone and Makassar Straits, South Sulawesi Province' (2017) 11(2) *International Journal of Oceans and Oceanography* 201

Agnew, David J et al, 'Estimating the Worldwide Extent of Illegal Fishing' [2009] 4(2) *PLOS One*

Akashi, Kinji, *Cornelius van Bynkershoek: His Role in the History of International Law* (Martinus Nijhoff Publishers, 1998).

Allen, Robin, *International Management of Tuna Fisheries: Arrangements, Challenges and a Way Forward*, FAO Fisheries and Aquaculture Technical Paper, no 536 (2010), 3 <<http://www.fao.org/docrep/012/i1453e/i1453e00.pdf>>

Allison, Edward H, and Frank Ellis, 'The Livelihoods Approach and Management of Small-Scale Fisheries' (2001) 25(5) *Marine Policy* 377

Amri, Ahmad Almaududy, *Is Indonesia's 'Sink the Vessels' Policy Legal?* (2015) *The Diplomat* <<http://thediplomat.com/2015/01/is-indonesias-sink-the-vessels-policy-legal/>>

Anand, Ram Prakash, *Origin and Development of the Law of the Sea: History of International Law Revisited* (Brill, 1983) vol 7

Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2007)

Ariadno, Melda Kamil, and Fitri Amelina, 'An Evaluation of the Indonesian Law and Policy on Small-Scale Fisheries' (2016) 7(2) *Journal of Sustainable Development Law and Policy* 51

Attar, Mohsen Al, 'Reframing the "Universality" of International Law in a Globalizing World' (2013) 59(1) *McGill Law Journal* 115

Associated Press, *Indonesia says Taiwanese Vessels Ignored Repeated Warnings* (24 March 2016) Daily Mail <<http://www.dailymail.co.uk/wires/ap/article-3507316/Taiwan-queries-Indonesia-allegation-fishing-boat-shot-at.html>>.

Aufiya, Mohd. Agoes, 'Indonesia's Global Maritime Fulcrum: Contribution in the Indo-Pacific Region' (2017) 6(2) *Andalas Journal of International Studies*

Aulette, Judy Root, and Raymond Michalowski, *Fire in Hamlet: A case study of a state-corporate crime* (Garland Publishing, 1993)

Bailey, Jennifer L, 'States, Stocks, and Sovereignty: High Seas Fishing and the Expansion of State Sovereignty' in N P Gleditsch (ed), *Conflict and the Environment* (Springer, 1997) 215

Baird, Rachel, 'Arrests in a Cold Climate (Part 2) – Shaping Hot Pursuit Through State Practice' (2009) 13 *Antarctic and Southern Ocean Law and Policy Occasional Papers* 1

Baird, Rachel, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence' (2004) 5 *Melbourne Journal of International Law* 299

Baird, Rachel, 'Political and Commercial Interests as Influences in the Development of the Doctrine of the Freedom of the High Seas' (1996) 12 *Queensland University of Technology Law Journal* 274

Banks, Debbie, et al, *Environmental Crime: A threat to our future* (Environmental Investigation Agency, 2008)

Banks, Richard, 'Review of the Fishery Improvement Plan for Indonesian Tuna Fisheries and Revisions to the MSC Scoring' (Poseidon Aquatic Resource Management Ltd, 2015) 10 <<http://ipnlf.org/perch/resources/poseidon-indonesian-fip-review-final.pdf>>

Barber, Charles V, and Vaughan R Pratt, 'Policy Reform and Community-Based Programmes to Combat Cyanide Fishing in Philippines' (1997) 8 *Live Reef Fish Information Bulletin* 26

Barclay, Kate, 'Following the Proceeds of Illegal Fishing in the Asia-Pacific' in Gregory Rose (ed), *Following the Proceeds of Environmental Crime: Fish, Forests and Filthy Lucre* (Routledge, 2014) 89

Bardin, Anne, 'Coastal State's Jurisdiction over Foreign Vessels' (2002) 14 *Pace International Law Review* 27

Bautista, Lowell B, 'The Philippine Treaty Limits and Territorial Water Claim in International Law' (2009) *Social Science Diliman* 113

Beckman, Robert and Tara Davenport, 'The EEZ Regime: Reflections After 30 years' (Paper presented at the 2012 LOSI-KIOST Conference on Securing the Ocean for the Next Generation, Seoul, 2012)

Béné, Christophe, 'When Fishery Rhymes with Poverty: A First Step Beyond the Old Paradigm on Poverty in Small-Scale Fisheries' (2003) 31(6) *World Development* 949

Berkes, Fikret, et al, *Managing Small-Scale Fisheries: Alternative Directions and Methods* (International Development Research Centre, 2001)

Bever, Lindsey, *Indonesia's Harsh Response to Illegal Fishing: Blowing Up Ships* (15 March 2016) *The Washington Post* <https://www.washingtonpost.com/news/science/wp/2016/03/15/indonesias-harsh-response-to-illegal-fishing-blowing-upships/?utm_term=.16f535eca12b>

Bevins, Vincent, '‘I'm nasty.’ How an Indonesian government official won admirers by blowing up boats', *the Washington Post* (online), 5 September 2018, <https://www.washingtonpost.com/world/2018/09/05/im-nasty-how-an-indonesian-government-official-won-admirers-by-blowing-up-boats/?noredirect=on&utm_term=.869405103af6>.

Bishop, William W, 'The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas' (1962) 62(7) *Columbia Law Review* 1220

Bowen, Brian W, et al, 'The Origins of Tropical Marine Biodiversity' (2013) 28(6) *Trends in Ecology & Evolution* 359

BPS, *Angka Nasional Hasil Pencacahan Lengkap Sensus Pertanian 2013/National Figures the Results of Complete Enumeration Census of Agriculture 2013* (Statistic Indonesia, 2013)

Bray, Kevin, *A Global Review of Illegal, Unreported and Unregulated (IUU) Fishing*, FAO Fisheries Report, no 88 (2001)

Buntoro, Kresno, *An Analysis of Legal Issues Relating to Navigational Rights and Freedoms Through and Over Indonesian Waters* (PhD Thesis, University of Wollongong, 2010)

Buntoro, Kresno, 'Perspectives on Enhancing Safety and Security in Indonesian Waters' (2010) 8 *Indonesian Journal of International Law* 640

Burke, William T, 'Exclusive fisheries zones and freedom of navigation' (1982) 20 *San Diego Law Review* 595

Busro, Zaki Mubarak, 'Burning and/or Sinking Foreign Fishing Vessels Conducting Illegal Fishing in Indonesia' (2017) 2(1) *Asia-Pacific Journal of Ocean Law and Policy* 174

Caprio, M E, and Y Sugita, *Democracy in Occupied Japan: The U.S. Occupation and Japanese Politics and Society* (Taylor & Francis, 2007) 63

Casert, Raf, and Nadine Achoui-Lesage, Associated Press, *Nations decide to increase quota for Atlantic Bluefin tuna*, 2017, abc news
<<http://abcnews.go.com/International/wireStory/nations-decide-increase-quota-atlantic-bluefin-tuna-51297573>>

Cesar, Herman, *Economic Analysis of Indonesian Coral Reefs* (Environment Department Work in Progress, 1996)

Charles, Anthony T, *Sustainable Fishery Systems: Fish and Aquatic Resources* (The Blackwell Science, 2001)

Chazal, Nerida, 'Beyond Borders? The International Criminal Court and the Geopolitics of International Criminal Justice' (2013) 22(3) *Griffith Law Review* 707

Chazal, Nerida, *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity* (Routledge, 2015)

Chazal, Nerida, 'The Rationale of International Criminal Justice' (2014) *Criminal Justice in International Society* 19

Chimni, Bhupinder S, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15(1) *European Journal of International Law* 1

Chimni, Bhupinder S, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *Int'l Comm. L. Rev.* 3, 28, 2006

'Co-Chairs' Summary Report ASEAN Regional Forum Workshop on Illegal, Unregulated and Unreported (IUU) Fishing' (ASEAN Regional Forum, Bali, 19-21 April 2016)

Commission for the Conservation of Antarctic Marine Living Resources, *About CCAMLR: Commission* (23 April 2015) CCAMLR
<<https://www.ccamlr.org/en/organisation/commission>>

Commission for the Conservation of Antarctic Marine Living Resources, *About CCAMLR: Convention Area* (23 April 2015) CCAMLR
<<https://www.ccamlr.org/en/organisation/convention-area>>

Commission for the Conservation of the Southern Bluefin Tuna, *Report of the Twenty Third Annual Meeting of the Commission* (2016)

Commission for the Conservation of the Southern Bluefin Tuna, *Total Allowable Catch*
<<https://www.ccsbt.org/en/content/total-allowable-catch>>

Cox, Anthony, *Quota Allocation in International Fisheries* (OECD Food, Agriculture and Fisheries Working Papers No 22, 2009)

Cutlip, Kimbra, *Indonesia Makes Its Fishing Fleet Visible to the World Trough Global Fishing Watch* (7 June 2017) Global Fishing Watch

<<http://blog.globalfishingwatch.org/2017/06/indonesia-shares-vms-with-global-fishing-watch/>>

Da Rocha, José-María, Santiago Cervino and Sebastian Villasante, 'The Common Fisheries Policy: An Enforcement Problem' (2012) 36(6) *Marine Policy* 1309

Daley, Robert, 'New Agreement Establishing Global Port State Measures to Combat IUU Fishing' (2010) 2(1) *Australian Journal of Maritime & Ocean Affairs* 32

De Coning, Eve, and Emma Witbooi, 'Towards a New “Fisheries Crime” Paradigm: South Africa as an Illustrative Example' (2015) 60 *Marine Policy* 208

Dean, Arthur H, 'The Geneva Conference on the Law of the Sea: What Was Accomplished' (1958) 52(4) *The American Journal of International Law* 607

Department of Agriculture, Forestry and Fisheries Republic of South Africa, Speaking Notes For The Honourable Senzeni Zokwana, Minister of Agriculture, Forestry and Fisheries. Press Conference on Foreign Fishing Vessels (Pt Department of Agriculture, Forestry and Fisheries Republic of South Africa, 2016)

DG Surveillance, *The Reflection of 2016 and the Outlook of 2017 / Refleksi 2016 dan Outlook 2017* (DG Surveillance for Marine Resources and Fisheries, 2017)

Doulman, David J, 'Technical Assistance in Fisheries Monitoring Control and Surveillance: A Historical Perspective of FAO's Role' (Food and Agriculture Organization, 1994)

Doulman, David J, *Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action*, FAO Fisheries Report, no 666 (2001)

Directorate General of Surveillance for Marine Resources and Fisheries, *Reflection 2013 and Outlook 2014 / Refleksi 2013 dan Outlook 2014* (Directorate General of Surveillance for Marine Resources and Fisheries, 2015)

Directorate General of Surveillance for Marine Resources and Fisheries, *Reflection 2014 and Outlook 2015 / Refleksi 2014 dan Outlook 2015* (Directorate General of Surveillance for Marine Resources and Fisheries, 2015)

Directorate General of Surveillance for Marine Resources and Fisheries, *Reflection 2015 and Outlook 2016 / Refleksi 2015 dan Outlook 2016* (Directorate General of Surveillance for Marine Resources and Fisheries, 2015)

Directorate General of Surveillance for Marine Resources and Fisheries, *Reflection 2016 and Outlook 2017 / Refleksi 2016 dan Outlook 2017* (Directorate General of Surveillance for Marine Resources and Fisheries, 2015)

Directorate General of Surveillance for Marine Resources and Fisheries Regulation Number 11/per-djpsdkp/2014 on Technical Guidelines on the Implementation of Distinctive Measure towards Foreign Fishing Vessels

Division for Ocean Affairs and the Law of the Sea, *Background Paper on UNFSA* (2013) <http://www.un.org/Depts/los/convention_agreements/Background%20paper%20on%20UNFSA.pdf>

Drammeh, Ousman KL, 'Illegal, unreported and unregulated fishing in small-scale marine and inland capture fisheries' (Paper presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, Sydney, Australia, 15-19 May 2000)

Duggan, Deirdre E, and Momo Kochen, 'Small in Scale But Big in Potential: Opportunities and Challenges for Fisheries Certification of Indonesian Small-Scale Tuna Fisheries' (2016) 67 *Marine Policy* 30

Dutton, Ian M, 'If Only Fish Could Vote: The Enduring Challenges of Coastal and Marine Resources Management in Post-Reformasi Indonesia' in Budy P Resosudarmo (ed), *The Politics and Economics of Indonesia's Natural Resources* (ISEAS, 2005) 162

E. Duggan, Deirdre, and Momo Kochen, 'Small in scale but big in potential: opportunities and challenges for fisheries certification of Indonesian small-scale tuna fisheries.' (2016) 67 *Marine Policy* 30

Environmental Justice Foundation, *Broken Promises: Why Thailand Should Stay on Tier 3 in the 2015 US Trafficking in Persons Report* (The Environmental Justice Foundation, 2015)

Environmental Justice Foundation, *Pirates and Slaves: How Overfishing in Thailand Fuels Human Trafficking and the Plundering of Our Oceans* (The Environmental Justice Foundation, 2015)

Environmental Justice Foundation, *Slavery at Sea: The Continued Plight of Trafficked Migrants in Thailand's Fishing Industry* (The Environmental Justice Foundation, 2014)

Erceg, Diane, 'Deterring IUU Fishing Through State Control Over Nationals' (2006) 30(2) *Marine Policy* 173

Espósito, C, et al, *Ocean Law and Policy: Twenty Years of Development under the UNCLOS Regime* (Brill, 2016) 108

Fauzi, Akhmad, and Zuzy Anna, 'Social resilience and uncertainties: the case of small-scale fishing households in the north coast of Central Java' (2010) 9(2) *Maritime Studies* 55

Febrica, S, *Maritime Security and Indonesia: Cooperation, Interests and Strategies* (Taylor & Francis, 2017)

Fidler, David P, 'Revolt Against or From Within the West-TWAIL, the Developing World, and the Future Direction of International Law' (2003) 2 *Chinese Journal of International Law* 29

Finley, Carmel, *All the Fish in the Sea: Maximum Sustainable Yield and the Failure of Fisheries Management* (University of Chicago Press, 2011)

Finley, Carmel, and Naomi Oreskes, 'Maximum Sustained Yield: A Policy Disguised as Science' (2013) 70(2) *ICES Journal of Marine Science* 245

'Fisheries Management Issues in Indonesia' (Presentation at the Bilateral Indonesian-Philippines IUU Fishing Workshop, Singapore, 21-23 May 2001)

Flewelling, Peter, *An Introduction to Monitoring, Control and Surveillance Systems for capture fisheries* (Food and Agriculture Organization, 1994)

Flewelling, Peter, et al, *Recent Trends in Monitoring Control and Surveillance Systems for Capture Fisheries* (Food and Agriculture Organization, 2002)

Florsheim, Bowen L, 'Territorial Seas – 3000 Year Old Question' (1970) 36 *Journal of Air Law and Commerce* 73.

FAO/UNEP Expert Meeting on Impacts of Destructive Fishing Practices, Unsustainable Fishing, and Illegal, Unreported and Unregulated (IUU) Fishing on Marine Biodiversity and Habitats, Rome, 23-25 September 2009 FAO Fisheries and Aquaculture Report, no 932 (2009)

Food and Agriculture Organization, 'Fishing Operations: Vessel Monitoring' (1998) 1 *FAO Technical Guidelines for Responsible Fisheries*

Food and Agriculture Organization, *Fishery and Aquaculture Country Profiles* <<http://www.fao.org/fishery/countryprofiles/search/en>>

Food and Agriculture Organization, *Global Study on Transshipment: Regulations, Practices, Monitoring and Control*, (2018) <<http://www.fao.org/3/CA0464EN/ca0464en.pdf>>

Food and Agriculture Organization, 'Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (2002) 9 *Technical Guideline for Responsible Fisheries*.

Food and Agriculture Organization, 'Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally' (FAO Fisheries and Aquaculture Report, No 1106, 2015) <<http://www.fao.org/3/a-i5028e.pdf>>

Food and Agriculture Organization, *Stopping illegal, unreported and unregulated fishing* (2002) FAO Corporate Document Repository <<http://www.fao.org/docrep/005/Y3554E/y3554e01.htm>>

Froese, Rainer, 'Fishery Reform Slips Through the Net' (2011) 475 *Nature* 7

Fulton, Thomas Wemyss, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute* (The Lawbook Exchange, 1911)

Gathii, James Thuo, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade Law and Development* 26

Giannacopoulos, Maria, 'Offshore Hospitality: Law, Asylum and Colonisation' (2013) 17 *Law Text Culture* 163

Giannacopoulos, Maria, 'Sovereign Debt Crises, Referendums and the Changing Face of Colonial Power' (2017) 31(1) *Continuum* 33

Giannacopoulos, Maria, 'Sovereign Debts: Global Colonialism, Austerity and Neo-Liberal Assimilation' (2015) 19 *Law Text Culture* 166

Gianni, Matthew and Walt Simpson, *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing* (Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers' Federation, and WWF International, 2005)

Global Implications of Illegal, Unreported, and Unregulated (IUU) Fishing, Memorandum prepared for the National Intelligence Council (19 September 2016) <<https://fas.org/irp/nic/fishing.pdf>>

Giannacopoulos, Maria, 'Alien Conscription, Australian Sovereignty and the Vietnam War' in J Pugliese (ed), *Transmediterranean: Diasporas, Histories, Geopolitical Spaces* (Peter Lang Publishing, 2010) 21

Gokkon, Basten, *Indonesia Seeks to Slap Money-Laundering Label on Illegal Fishing* Mongabay.com, 1 <<https://news.mongabay.com/2017/12/indonesia-seeks-to-slap-money-laundering-label-on-illegal-fishing/>>

Gosling, Justin, and Tuesday Reitano, *The Global Response to Transnational Organized Environmental Crime*, Global Initiative Against Transnational Organized Crime Research Report (2014)

Green, Penny, and Tony Ward, *State Crime: Governments, Violence and Corruption* (Pluto Press, 2004)

Griggs, Lynden, and Gail Lugten, 'Veil Over the Nets (Unravelling Corporate Liability for IUU Fishing Offences)' (2007) 31(2) *Marine Policy* 159

Grotius, Hugo, *The Rights of War and Peace* (M W Dune, 1901)

Grotius, Hugo, Ralph Van Deman Magoffin and James Brown Scott, *The Freedom of the Seas, or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (The Lawbook Exchange, 2001)

Gullett, Warwick, 'Prompt Release Procedures and the Challenge for Fisheries Law Enforcement: The Judgement of the International Tribunal for the Law of the Sea in the Volga Case (Russian Federation v. Australia)' (2003) 31 *Federal Law Review* 405

Haenlein, Cathy, *Below the Surface: How Illegal, Unreported and Unregulated Fishing Threatens our Security* (The Royal United Services Institute for Defence and Security Studies, 2017)

Hamilton, A, A Lewis, MA McCoy, E Havice, and L Campling L, *Impact of Industry and Market Drivers on the Global Tuna Supply Chain* (Report for the Pacific Islands Forum Fisheries Agency, 2011)

Hamilton, Amanda, et al, *Impact of Industry and Market Drivers on the Global Tuna Supply Chain*, Report for the Pacific Islands Forum Fisheries Agency (2011), 172.

Hardin, Garrett, 'The tragedy of the commons' (1968) 162(3859) *Science* 1243

Harkes, Ingvild, and Irene Novaczek, 'Institutional Resilience of Sasi Laut, a Fisheries Management System in Indonesia' (Paper presented at the The Eighth Conference of the International Association for the Study of Common Property, Bloomington, IN, 31 May-4 June 2000)

Harrison, James, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (OUP Oxford, 2017)

Hauck, Maria, 'Non-Compliance in Small-Scale Fisheries: A Threat to Security' (2007) *Issues in Green Criminology* 270

Heazle, Michael, and John G. Butcher, 'Fisheries Depletion and the State in Indonesia: Towards a Regional Regulatory Regime' (2007) 31(3) *Marine Policy* 276

Hendricks, Jim, *Big Nations Refuse to Curb Commercial Overfishing of Pacific Tuna Species* (7 December 2012) sportfishingmag.com <<https://www.sportfishingmag.com/news/big-nations-refuse-curb-commercial-overfishing-pacific-tuna>>

Herrington, William C, 'In the Realm of Diplomacy and Fish: Some Reflections on the International Convention on High Seas Fisheries in the North Pacific Ocean and the Law of the Sea Negotiations' (1989) 16(1) *Ecology Law Quarterly* 111

Hildén, Mikael, et al, *The Relationship Between Environment and Fisheries Information: Project Report for the Nordic Strategy for the Environment and Fisheries* (Nordic Council of Ministers, 2000)

Hollick, A L, *U.S. Foreign Policy and the Law of the Sea* (Princeton University Press, 2017)

Hongzhou, Zhang, *Indonesia's War on Illegal Fishing Sinks China's Catch* (2015) The Establishment Post<<http://www.establishmentpost.com/indonesias-war-illegal-fishing-impact-china/>>

Hopley, D. and H Suharsono, *The Status of Coral Reefs in Eastern Indonesia* (2000) (Australian Institute of Marine Science, 2000)

Horridge, Adrian, *The Prahua: Traditional Sailing Boat of Indonesia* (Oxford University Press, 1985)

Hunt, Katie, *South China Sea: Indonesia Issues Protest to China* (22 March 2016) cnn.com <<http://edition.cnn.com/2016/03/21/asia/indonesia-china-south-china-sea/>>

"Indonesia Fisheries: 2015 Review": A Report on Trends in Coastal Marine Resources and Fisheries Management Indonesia. (California Environmental Associates, 2016)

Indian Ocean Tuna Commission, *Resolution 15/01 on the Recording of Catch and Effort Data by Fishing Vessels in the IOTC Area of Competence* (2015) <http://www.iotc.org/sites/default/files/documents/compliance/cmm/iotc_cmm_15-01_en.pdf>

International Criminal Police Organization, *International Notices System, Fact Sheet, COM/FS/2017-02/GI-02* (2017).

IOM, *Report on Human Trafficking, Forced Labour and Fisheries Crime in the Indonesian Fishing Industry* (International Organization for Migration, 2016) 36

Ismail, Maizura, *Protecting Indonesia's marine resources*, the asean post (11 November 2018) <<https://theaseanpost.com/article/protecting-indonesias-marine-resources>>

J. Schatz, Valentin, 'The battle against Transnational Fisheries Crime: Jurisdictional Challenges.', *Völkerrechtsblog*, 3 March 2017, <http://voelkerrechtsblog.org/the-battle-against-transnational-fisheries-crime/>

Johns, Murray, 'Enhancing Responsible Fishing Practices in South East Asia to combat Illegal, Unreported and Unregulated (IUU) Fishing' (2013) 5(3) *Australian Journal of Maritime and Ocean Affairs* 112

Jones, Estelle Victoria, Timothy Stuart Gray and Chanin Umponstira, 'Small-Scale Fishing: Perceptions and Threats to Conserving a Livelihood in the Province of Phang-Nga, Thailand' (2010) 3(1) *Environment Asia* 1

Kamil, Melda, 'Freedom of Navigation and Archipelagic State: Indonesian Case' (2017) 25(5) *Jurnal Hukum & Pembangunan* 435

Kamil, Melda, 'Legal Aspects of Indonesian Maritime Security' (Speech delivered at the Focus Group Discussion on Law Enforcement against Illegal Fishing by Foreign Vessels in Indonesian EEZ University of Indonesia, Depok, 24 October 2017)

Kaye, Melati, *From Boom to Glug Glug: Indonesia's New Anti-Poacher Policy* (2016) mongabay.com <<https://news.mongabay.com/2016/08/from-boom-to-glug-glug-indonesias-new-anti-poacher-policy/>>

Kaye, Stuart, 'Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral' (2005) 24 *Australian Yearbook of International Law* 93

Kelly, Christopher R, 'Law of the Sea: The Jurisdictional Dispute Over Highly Migratory Species of Tuna' (1987) 26 *Columbia Journal of Transnational Law* 475

Koh, Tommy, 'Setting the Context: A Globalized World' in Myron H Nordquist et al (eds), *Freedom of Navigation and Globalization* (Martinus Nijhoff Publishers, 2014) 5

Koh, Tommy T B, *A Constitution for the Oceans: Remarks Made by Tommy T.B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea* (1982) <http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf >

Koh, Tommy T B, 'The Third United Nations Conference on the Law of the Sea: What Was Accomplished' (1983) 46 *Law and Contemporary Problems* 5

Koskenniemi, Martti, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006)

Koskenniemi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001)

Koskenniemi, Martti, *The Politics of International Law* (Hart Publishing, 2011)

Kramer, Ronald C, 'State Violence and Violent Crime' (1994) 6(2) *Peace Review* 171; Jeffrey Ian Ross, *Controlling State Crime* (Transaction Publishers, 2000)

Kramer, Ronald C, Raymond J Michalowski and David Kauzlarich, 'The Origins and Development of the Concept and Theory of State-Corporate Crime' (2002) 48(2) *Crime & Delinquency* 271

Kurien, John, 'The Blessing of the Commons: Small-Scale Fisheries, Community Property Rights, and Coastal Natural Assets' (2007) 1 *Reclaiming Nature: Environmental Justice and Ecological Restoration* 23

Kuwado, Fabian Januarius, *81 More Fish Poachers' Vessels Will be Sunk Around Indonesia / Lagi, 81 Kapal Pencuri Ikan Ditenggelamkan di Penjuru Indonesia* (1 April 2017) [kompas.com
<http://nasional.kompas.com/read/2017/04/01/12003881/lagi.81.kapal.pencuri.ikan.ditenggelamkan.di.penjuru.indonesia>](http://nasional.kompas.com/read/2017/04/01/12003881/lagi.81.kapal.pencuri.ikan.ditenggelamkan.di.penjuru.indonesia)

Kwiatkowska, Barbara et al, *International Organizations and the Law of the Sea: Documentary Yearbook* (Springer Netherlands, 1999) vol 1

Lado, Ernesto Penas, *The Common Fisheries Policy: The Quest for Sustainability* (Wiley, 2016)

Lampe, Munsu et al, 'Main Drivers and Alternative Solutions for Destructive Fishing in South Sulawesi-Indonesia: Lessons Learned From Spermonde Archipelago, Taka Bonerate, and Sembilan Island' (2017) 29(1) *Science International (Lahore)* 159

Lawton, Ella, 'Flags of Convenience: Legal Issues in Relation to Fishing the Southern Ocean' (2006) *University of Canterbury*
<<https://ir.canterbury.ac.nz/bitstream/handle/10092/13953/Ella%20Lawton%20Review.pdf?squence=1&isAllowed=y>>

Lee, Luke T, 'The Law of the Sea Convention and Third States' (1983) 77(3) *The American Journal of International Law* 541.

Lee, Seokwoo, Anastasia Telesetsky and Clive H Schofield, 'Slipping the Net: Why is it so Difficult to Crack Down on IUU Fishing?' in Myron H. Nordquist et al (eds), *Freedom of Navigation and Globalization: Center for Oceans Law and Policy* (Martinus Nijhoff Publishers, 2014)

Lepard, B D, *Reexamining Customary International Law* (Cambridge University Press, 2016)

Liddick, Don, 'The Dimensions of a Transnational Crime Problem: The Case of IUU Fishing' (2014) 17(4) *Trends in Organized Crime* 290;

Lodge, Michael W, et al, *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for Improved Governance by Regional Fisheries Management Organizations* (Chatham House, 2007)

Loades, D, *The Tudor Navy: An Administrative, Political and Military History* (Taylor & Francis, 2016)

Louka, Elli. *International Environmental Law: Fairness, Effectiveness, and World Order* (Cambridge University Press, 2006)

Lugten, Gail, 'Big Fish to Fry-International Law and Deterrence of the Toothfish Pirates' (2004) 16 *Current Issues in Criminal Justice* 307

Lymer, D, S Funge-Smith, and D Greboval, *The Fishing Fleet in Aceh Province, Indonesia*. FAO Regional Office for Asia and the Pacific, Bangkok, Thailand. RAP Publication 2009/09, (2009)

Malone, James L, 'The United States and the Law of the Sea after UNCLOS III' (1983) 46(2) *Law and Contemporary Problems* 30

Manley, Robert H, 'Developing Nation Imperatives for a New Law of the Sea: UNCLOS I and III as Stages in the International Policy Process' (1979) 7(1-2) *Ocean Development & International Law* 10

Marine Resources Assessment Group, *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries* (Marine Resources Assessment Group Ltd, 2005)

MaritimeneWS, *Disproportional Quota of Tuna* (23 May 2017) Maritime News <<https://maritimeneWS.id/disproportional-quota-of-tuna/>>

Marmo, Marinella and Nerida Chazal, *Transnational Crime and Criminal Justice* (Sage, 2016)

May, Robert, and Angela R. McLean, *Theoretical Ecology: Principles and Applications* (OUP Oxford, 2007)

McCloskey Jr, Paul N, and Ronald K Losch, 'UN Law of the Sea Conference and the US Congress: Will Pending US Unilateral Action on Deep Seabed Mining Destroy Hope for a Treaty?' (1979) 1 *Northwestern Journal of International Law and Business* 245

McDowell, R. and M Mason, *The World's Third-Largest Seafood Exporter has a Slavery Problem* (2 December 2015) Associated Press <<http://www.businessinsider.com/the-worlds-third-largest-seafood-exporter-has-a-slavery-problem-2015-2?IR=T>>

McLaughlin, Rob, 'Coastal State Use of Force in the EEZ Under the Law of the Sea Convention 1982' (1999) 18 *University of Tasmania Law Review* 11

McManus, John W, 'Tropical Marine Fisheries and the Future of Coral Reefs: A Brief Review with Emphasis on Southeast Asia' (1997) 16(1) *Coral Reefs* S121

Meere, Frank, *The Challenge of Combating Illegal, Unreported and Unregulated (IUU) Fishing*, Fishing for Development: Background Paper for Session 4, TAD/FI (2014) 9 (20 March 2014)

Metuzals, Kaija, et al, 'One Fish, Two Fish, IUU, and No Fish: Unreported Fishing Worldwide' (2010) *Handbook of Marine Fisheries Conservation and Management* (Oxford University Press, 2010) 166

Mickelson, Karin, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1997) 16 *Wisconsin International Law Journal* 408

Mickelson, Karin, 'South, North, International Environmental Law, and International Environmental Lawyers' (2000) 11 *Yearbook of International Environmental Law* 52

Miller, Denzil G M, 'Occupying the High Ground: Technology and the War on IUU Fishing' in Davor Vidas (ed), *Law, Technology and Science for Oceans in Globalisation* (Brill, 2010)

Milman, Oliver, *Large Fishing Nations Fail to Agree to Deep Cuts in Pacific Tuna Quotas* (6 December 2013) theguardian <<https://www.theguardian.com/world/2013/dec/06/fishing-nations-fail-cut-tuna-quotas>>

Ministry of Marine Affairs and Fisheries Indonesia, *Kelautan dan Perikanan Dalam Angka 2015 / Marine and Fisheries in Figures 2015* (December 2015) The Center for Data, Statistic and Information, 139 <<http://statistik.kkp.go.id/sidatik-dev/Publikasi/src/kpda2015.pdf>>

Ministry of Marine Affairs and Fisheries Indonesia, *Menteri Susi Ingin PBB Segera Tetapkan IUU Fishing Sebagai Kejahatan Transnasional Terorganisir / Minister Susi Urges UN to Immediately Categorise IUU Fishing as Transnational Organised Crime* (2017) <<http://kkp.go.id/2017/06/15/menteri-susi-ingin-pbb-segera-tetapkan-iuu-fishing-sebagai-kejahatan-transnasional-terorganisir/>>

Ministry of Marine Affairs and Fisheries Indonesia, *Pemerintah Bentuk Satgas Pemberantasan Illegal Fishing / Indonesian Government Established Illegal Fishing Task Force* (2014) <<http://kkp.go.id/index.php/pers/pemerintah-bentuk-satgas-pemberantasan-illegal-fishing/>>

Minister Susi: Indonesia is 3rd largest fish exporter in SE Asia (22 May 2017) Tempo.co.id <<https://en.tempo.co/read/877454/minister-susi-indonesia-is-3rd-largest-fish-exporter-in-se-asia>>

Munawwar, Muhammad, *Ocean States: Archipelagic Regimes in the Law of the Sea* (Martinus Nijhoff Publishers, 1995)

Munro, Gordon R, 'The United Nations Fish Stocks Agreement of 1995: History and Problems of Implementation' (2000) 15(4) *Marine Resource Economics* 266

Mutua, Makau, 'What is TWAIL?' (2000) 94 *American Society of International Law* 31

Natarajan, Usha, et al, *Introduction: TWAIL-on praxis and the intellectual* (Taylor & Francis, 2016)

Natarajan, Usha, *TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring* (2012) 14 *Oregon Review of International Law* 181.

National Intelligence Council, *Global Implications of Illegal, Unreported, and Unregulated (IUU) Fishing*, Memorandum, NIC WP 2016-02, (2016) <<https://fas.org/irp/nic/fishing.pdf>>

Nickler, Patrick A, 'A Tragedy of the Commons in Coastal Fisheries: Contending Prescriptions for Conservation, and the Case of the Atlantic Bluefin Tuna' (1998) 26 *Boston College Environmental Affairs Law Review* 553

Nikijuluw, Victor P H, *Blue Water Crime: Dimensi Sosial Ekonomi Perikanan Ilegal / Economy and Social Aspects of Illegal Fishing* (PT Pustaka Cidesindo, 2008)

Nikijuluw, Victor P H, *Review on Community-Based Fisheries Management in Eastern Indonesia*, WP No 21 (1997)

Nordquist, M, et al, *UNCLOS 1982 Commentary Vol. IV* (Martinus Nijhoff, 1991)

Nordquist, Myron H, *United Nations Convention on the Law of the Sea: A Commentary, Volume II* (Martinus Nijhoff Publishers, 1993)

Nurasa, Tjetjep, Nurzali Naamin and Riyanto Basuki, 'The Role of Panglima Laot "Sea Commander" System in Coastal Fisheries Management in Aceh, Indonesia' (1994) *Rapa Nui Journal* 395

Nusantara Maritime News, 'Susi's Authority to Eradicate Illegal Fishing Exceeds the Limit' (29 October 2015), <<https://maritimeneews.id/susis-authority-to-eradicate-illegal-fishing-exceeds-the-limit/>>

Oda, Shigeru, *Fifty Years of the Law of the Sea: With a Special Section on the International Court of Justice: Selected Writings of Shigeru Oda* (Kluwer Law International, 2003)

Oda, Shigeru, 'Fisheries Under the United Nations Convention on the Law of the Sea' (1983) *American Journal of International Law* 747

Odumosu, Ibironke T, 'Challenges for the (Present/) Future of the Third World Approaches to International Law' (2008) 10(4) *International Community Law Review* 467

Okafor, Obiora Chinedu, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall Law Journal* 171

Okafor, Obiora Chinedu, 'Praxis and the International (Human Rights) Law Scholar: Toward the Intensification of Twailian Dramaturgy' (2017) 33(3) *Windsor Yearbook of Access to Justice* 1

Organisation for Economic Co-operation and Development, 'Fishing for Development - Background Paper for Session 4: The Challenge of Combatting Illegal, Unreported and Unregulated (IUU) Fishing' (Paper presented at the Fishing for Development 2014 – Joint Session, Paris, 10-11 April 2014)

Österblom, Henrik, Andrew Constable and Sayaka Fukumi, 'Illegal Fishing and the Organized Crime Analogy' (2011) 26 *Trends in Ecology and Evolution* 7

Österblom, Henrik, and Örjan Bodin, 'Global Cooperation Among Diverse Organizations to Reduce Illegal Fishing in the Southern Ocean' (2012) 26(4) *Conservation Biology* 638

Palma, Mary Ann, *Analysis of the Adequacy of the Philippine Legal, Policy, and Institutional Framework to Combat Illegal, Unreported, and Unregulated Fishing* (PhD Thesis, University of Wollongong, 2006)

Palma, Mary Ann, 'Combating IUU fishing: international legal developments' in Q. Hanich and M. Tsamenyi (eds), *Navigating Pacific Fisheries: Legal and Policy Trends in the Implementation of International Fisheries Instruments in the Western and Central Pacific Region* (Australian National Centre for Ocean Resources and Security, 2009) 71.

Palma, Mary Ann, 'Fisheries Crime: Bridging the Conceptual Gap and Practical Response' (30 July 2014) *Center for International Maritime Security* <<http://cimsec.org/fisheries-crime-bridging-conceptual-gap-practical-response/12338>>

Palma, Mary Ann, 'Integrating Monitoring, Control and Surveillance and Anti-Money Laundering Tools to Address Illegal Fishing in the Philippines and Indonesia' in Gregory Rose (ed), *Following the Proceeds of Environmental Crime: Fish, Forests and Filthy Lucre* (Routledge, 2014) 100

Palma, Mary Ann, and Martin Tsamenyi, *Case Study on the Impacts of Illegal, Unreported and Unregulated (IUU) Fishing in the Sulawesi Sea* (Asia-Pacific Economic Cooperation, 2008)

Palma, Mary Ann, Martin Tsamenyi and William R Edeson, in David Freestone (ed.) *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill, 2010)

Palma-Robles, Mary Ann, 'Fisheries Enforcement and the Concepts of Compliance and Monitoring, Control and Surveillance' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge, 2016) 153

Prashanth, Parameswaran, *Indonesia Blows Up 81 Ships in War on Illegal Fishing* (April 2017) thediplomat.com <<https://thedi diplomat.com/2017/04/indonesia-blows-up-81-ships-in-war-on-illegal-fishing/>>

Parameswaran, Prashanth, *Vietnam 'Deeply Concerned' by Indonesia's War on Illegal Fishing* (August 2015) thediplomat <<http://thedi diplomat.com/2015/08/vietnam-deeply-concerned-by-indonesias-war-on-illegal-fishing/>>

Parameswaran, P, 2015, *Vietnam 'Deeply Concerned' by Indonesia's War on Illegal Fishing* (August 2015) thediplomat.com <<http://thedi diplomat.com/2015/08/vietnam-deeply-concerned-by-indonesias-war-on-illegal-fishing/>>

Pauly, Daniel 'Putting Fisheries Management Back in Places' (1997) 7(1) *Reviews in Fish Biology and Fisheries* 125

Pauly, Daniel, 'Major Trends in Small-Scale Marine Fisheries, With Emphasis on Developing Countries, and Some Implications for the Social Sciences' (2006) 4(2) *Maritime Studies* 7

Pauly, D, *On the Sex of Fish and the Gender of Scientists* (Springer Netherlands, 1994)

Pauly, Daniel, and V Budimartono, *Marine Fisheries Catches of Western, Central and Eastern Indonesia, 1950-2010*, Fisheries Centre Working Paper #2015-61 (2015)

Payoyo, P B, *Cries of the Sea: World Inequality, Sustainable Development and the Common Heritage of Humanity* (Springer Netherlands, 1997)

Pedroza, Carmen, 'Middlemen, Informal Trading and its Linkages with IUU Fishing Activities in the Port of Progreso, Mexico' (2013) 39 *Marine Policy* 135

Pet-Soede, C, H S J Cesar and J S Pet, (1999) 'An Economic Analysis of Blast Fishing on Indonesian Coral Reefs' 26(2) *Environmental Conservation* 83

Picard, M Johanne, 'International Law of Fisheries and Small Developing States: A Call for the Recognition of Regional Hegemony' (1996) 31 *Texas International Law Journal* 317

Polacheck, Tom, 'Assessment of IUU Fishing for Southern Bluefin Tuna' (2012) 36(5) *Marine Policy* 1151

Porras, Ileana M, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius De Iure Praedae – The Law of Prize and Booty, or “On How to Distinguish Merchants from Pirates”* (2006) 31(3) *Brooklyn Journal of International Law* 741

Potter, Ian C, et al, 'The Ways in Which Fish Use Estuaries: A Refinement and Expansion of the Guild Approach' (2015) 16 *Fish and Fisheries* 232

Press Association, *Sustainable Seafood: The First 20 Years: A History of the Marine Stewardship Council* (25 April 2017) <<http://20-years.msc.org/>>

Pudjiastuti, Susi, 'Fisheries Crime as Transnational Organized Crime' (Presentation delivered at the 2nd INTERPOL Environmental Compliance and Enforcement Events, Singapore, 16-18 November 2015)

Purves, Martin, 'Illegal, Unregulated and Unreported Fishing and Maritime Security in South Africa' in Thean Potgieter and Reiner Pommerin (eds), *Maritime Security in Southern African Waters* (Sun Media, 2009)

Putt, Judy, and Katherine M Anderson, 'A National Study of Crime in the Australian Fishing Industry' *Research and Public Policy Series* (Australian Institute of Criminology, 2007) vol 21

Putt, Judy, and Diana Nelson, 'Crime in the Australian Fishing Industry' (2008) 336 *Trends and Issues in Crime & Criminal Justice*

Raffaele, Gabriela, *INTERPOL Requested for the First Time to Detect Illegal Fishing Activities*
Fish Information and Service
<<http://fis.com/fis/worldnews/worldnews.asp?l=e&ndb=1&id=63402>>

Resosudarmo, Budy, Lydia Napitupulu and David Campbell, 'Illegal Fishing in the Arafura Sea' in Budy P Resosudarmo and Frank Jotzo (eds), *Working with Nature Against Poverty: Development, Resources and the Environment in Eastern Indonesia* (Institute of Southeast Asian Studies, 2009) 178

Retnowati, Endang, 'Indonesian Fishers in the Circle of Structured Poverty: Social, Economy and Legal perspective / Nelayan Indonesia Dalam Pusaran Kemiskinan Struktural: Perspektif Sosial, Ekonomi dan Hukum' (2011) 16(3) *Perspektif* 149

Reynolds, John, and Sujith Xavier. "The Dark Corners of the World" TWAIL and International Criminal Justice.' (2016) 14(4), *Journal of International Criminal Justice*, 959

Rigg, Kelly, Rémi Parmentier and Duncan Currie, 'Halting IUU fishing: enforcing international fisheries agreements' (2004) *Fish piracy: combating illegal, unreported and unregulated fishing*. Paris: OECD 369

Roach, J Ashley, 'Legal Aspects of Modern Submarine Warfare' (2002) 6(1) *Max Planck Yearbook of United Nations Law Online* 367

Rose, Gregory L, and Ben Tsamenyi, *Universalising Jurisdiction Over Marine Living Resources Crime* (University of Wollongong, 2013)

Ross, Jeffrey Ian, and Gregg Barak, *Varieties of State Crime and its Control* (Criminal Justice Press Monsey, 2000)

Rothwell, D R, and Tim Stephens, *The International Law of the Sea* (Hart Publishing 2016)

Ruttan, Lore M, F C Gayanilo, Ussif Rashid Sumaila and Daniel Pauly, *Small Versus Large-Scale Fisheries: A Multi-Species, Multi-Fleet Model for Evaluating Their Interactions and Potential Benefits*, Working Paper for the Fisheries Centre, Vancouver (2001)

Sato, Yoichiro, 'Fishy Business: A Political-Economic Analysis of the Southern Bluefin Tuna Dispute' (2002) 28(4) *Asian Affairs: An American Review* 217

Satria, Arif, *Fishermen Ecology and Politic / Ekologi Politik Nelayan* (PT LKiS Pelangi Aksara, 2009)

Satria, Arif, and Dedi S Adhuri, 'Pre-Existing Fisheries Management Systems in Indonesia, Focusing on Lombok and Maluku' in Kenneth Ruddle and Arif Satria (eds), *Managing Coastal and Inland Waters* (Springer, 2010) 31

Schatz, Valentin J, *The Battle Against Transnational Fisheries Crime* (3 March 2017) Völkerrechtsblog <<http://voelkerrechtsblog.org/the-battle-against-transnational-fisheries-crime/>>

Scheiber, Harry N, 'Origins of the Abstention Doctrine in Ocean Law: Japanese-US Relations and the Pacific Fisheries, 1937-1958' (1989) 16 *Ecology Law Quarterly* 25

Schumann, Sarah, and Seth Macinko, 'Subsistence in Coastal Fisheries Policy: What's in a Word?' (2007) 31(6) *Marine Policy* 706

Selak, Charles B, 'Fishing Vessels and the Principle of Innocent Passage' (1954) 48(4) *The American Journal of International Law* 627

Serdy, Andrew, 'Pacta Tertiiis and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal' (2017) *Ocean Development and International Law* 1

Serdy, Andrew, 'Postmodern International Fisheries Law, or We Are All Coastal States Now' (2011) 60(2) *International & Comparative Law Quarterly* 387

Serdy, Andrew, 'Simplistic or Surreptitious? Beyond the Flawed Concept(s) of IUU Fishing' in Abigail J Lynch, Michael G Schechter and William W Taylor (eds), *Sustainable Fisheries: Multi-Level Approaches to a Global Problem* (American Fisheries Society, 2011) 253

Serdy, Andrew, *The New Entrants Problem in International Fisheries Law* (Cambridge University Press, 2016)

Simpson, Gerry, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004)

Sowman, Merle, 'Subsistence and Small-Scale Fisheries in South Africa: A Ten-Year Review' (2006) 30(1) *Marine Policy* 60

Standing, André, *Corruption and State-Corporate Crime in Fisheries*, U4 Issue Paper, No 15 (2015)

Starr, Laurie Elizabeth, *Blowing It Out of the Water: How Breaking Down Illegal, Unreported, and Unregulated (IUU) Fishing Can Contribute to its Effective Management in Indonesia Using an Area Based Approach* (Master's Thesis, Dalhousie University, 2016)

Stop Illegal Fishing, *Stop Illegal Fishing in Southern Africa* (Stop Illegal Fishing Programme, 2008)

Sulmasy, Glenn M, and Chris Tribolet, 'The United Nations Convention on the Law of the Sea' in Paul Rosenzweig, Timothy J McNulty and Ellen Shearer (eds), *National Security Law in the News: A Guide for Journalists, Scholars and Policymakers, the American Bar Association* (American Bar Association, 2012)

Sumaila, U Rashia et al, 'Fisheries: Investing in Natural Capital' in *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (United Nations Environment Programme, 2011)

Sundström, Aksel, 'Corruption and Regulatory Compliance: Experimental Findings From South African Small-Scale Fishers' (2012) 36(6) *Marine Policy* 1255

Sundström, Aksel, 'Corruption in the Commons: Why Bribery Hampers Enforcement of Environmental Regulations in South African Fisheries' (2013) 7(2) *International Journal of the Commons* 454

Swan, Judith, *Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities: Information and Options* (Food and Agriculture Organization of the United Nations, 2002)

Syafputri, Ella, *Almost Half of Illegal Fishing in the World Occur in Indonesia* (19 July 2014) Tempo.co <<http://en.tempo.co/read/news/2014/07/19/056594269/Almost-Half-of-Illegal-Fishing-in-the-World-Occur-in-Indonesia>>

Sydney, Are K, 'Regional fishery organizations: how and why organizational diversity matters' (2001) 32(4) *Ocean Development and International Law* 349

Taiwan Queries Indonesia Allegation Fishing Boats Shot (24 March 2016) The Jakarta Post <<http://www.thejakartapost.com/news/2016/03/24/taiwan-queries-indonesia-allegation-fishing-boats-shot.html>>

Theilen, Jens T, 'What's in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing' (2013) 28(3) *The International Journal of Marine and Coastal Law* 536

Trent, Steve, Juliette Williams and Louis Buckley, *Pirates and Profiteers: How Pirate Fishing Fleets are Robbing People and Oceans* (Environment Justice Foundation, 2005).

Treves, Tullio, *Geneva Conventions on the Law of the Sea*, United Nations Office of Legal Affairs <<http://legal.un.org/avl/pdf/ha/gclos/gclose.pdf>>

Treves, Tullio, 'The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea' (1996) 11(2) *The International Journal of Marine and Coastal Law* 179

Tri Radityo, Agung, 'Criminal Responsibility of Corporate Crime Towards The Criminal Act Of Illegal Fishing (Study of Verdict No. 31/Pid. Sus/2013/PTR)' (2017) 1(1) *Legal Standing: Jurnal Ilmu Hukum* 16

Truman, Harry S, *Proclamation 2667—Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf* (28 September 1945) The American Presidency Project <<http://www.presidency.ucsb.edu/ws/?pid=12332>>

Truman, Harry S, *Proclamation 2668—Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas* (28 September 1945) The American Presidency Project <<http://www.presidency.ucsb.edu/ws/?pid=58816>>

Tsamenyi, Ben M, Lara Manarangi-Trott and Shilpa Rajkumar, *The International Legal Regime for Fisheries Management* The United Nations Environmental Program <[www.unep.ch/etu/fisheries%2520meeting/submittedPapers/MartinTsamenyiLaraManarangiTrottShilpaRajkumar .pdf](http://www.unep.ch/etu/fisheries%2520meeting/submittedPapers/MartinTsamenyiLaraManarangiTrottShilpaRajkumar.pdf)> 10.

Tsamenyi, Ben M, and Quentin A Hanich, *Addressing Corruption in Pacific Islands Fisheries: A Report/Prepared for IUCN PROFISH Law Enforcement, Corruption and Fisheries Project* (2008)

Tsamenyi, Martin, and Quentin Hanich, 'Fisheries Jurisdiction Under the Law of the Sea Convention: Rights and Obligations in Maritime Zones Under the Sovereignty of Coastal States' (2012) 27(4) *The International Journal of Marine and Coastal Law* 783

United Nations, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements* (23 September 2016) Oceans & Law of the Sea <http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm>

United Nations, *The United Nations Convention on the Law of the Sea: A Historical Perspective* (1998) The United Nations Division for Ocean Affairs and the Law of the Sea, <http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.html>

United Nations Conference on Trade and Development and Food and Agriculture Organization, *Trade-related Fisheries Targets: Sustainable Development Goal 14*, UN Doc UNCTAD/DITC/TED/2017/3

United Nations Environment Programme, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (UNEP, 2011) <<http://www.unep.org/greeneconomy>>

Van Der Burgt, Nienke *The Contribution of International Fisheries Law to Human Development: An Analysis of Multilateral and ACP-EU Fisheries Instruments* (Martinus Nijhoff Publishers, 2012)

Verzijl, Jan Hendrik Willem, *International Law in Historical Perspective* (Brill Archive, 1970).

Wagey, G A, et al, *A study of Illegal, Unreported and Unregulated (IUU) Fishing in the Arafura Sea, Indonesia* (Research Center for Capture Fisheries, Agency for Marine and Fisheries Research, Ministry of Marine Affairs and Fisheries, 2009)

Watt, Donald Cameron, 'First steps in the enclosure of the oceans: The origins of Truman's proclamation on the resources of the continental shelf, 28 September 1945' (1979) 3(3) *Marine Policy* 211

White, Crow, and Christopher Costello, 'Close the high seas to fishing?' [2014] 12(3) *PLOS Biology*

White, Rob, 'Depleted Uranium, State Crime and the Politics of Knowing' (2008) 12(1) *Theoretical Criminology* 3

Whiteleather, Richard T, *Fishermen's Protective Fund Aquatic Commons* <http://aquaticcommons.org/11936/1/gcfi_23-10.pdf>

World Wildlife Fund, *Blowing Up the Bad Guys: Will Indonesia's New Fisheries Laws Deliver?* (25 February 2015) WWF <http://wwf.panda.org/wwf_news/?240152/Blowing-up-the-bad-guys-Will-Indonesias-new-fisheries-laws-deliver>

Young, Margaret, *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing*. (E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015).

Yusran, Muhammad, *Ponggawa-sawi relationship in co-management: An interdisciplinary analysis of cfoastal resource management in South Sulawesi, Indonesia* (PhD Thesis, Dalhousie University, 2002)

Zabyelina, Yuliya G, 'The "Fishy" Business: A Qualitative Analysis of the Illicit Market in Black Caviar' (2014) 17(3) *Trends in Organized Crime* 187

II Cases

Case 21 (Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)) [2015] ITLOS

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Judgment) [1949] 35 ICJ Rep 7

M/V "Saiga" (No. 2) Case (St Vincent and the Grenadines v Guinea) (Judgment) [1999] ITLOS

III Legislation

Indonesian Law Number 7 of 2017 on Protection of Small Scale Fishers

Elucidation of Indonesian Law Number 7 of 2017 ch I

Indonesian Law Number 45 of 2009 on the Amendment of the Law Number 31 of 2004 on Fisheries

Indonesian Law Number 31 of 2004 on Fisheries

Elucidation of Law Number 31 of 2004 (Indonesia) ch I [6]

Presidential Regulation Number 115 of 2015 on Illegal Fishing Eradication Task Force

Ministry Regulation Number 10/PERMEN-KP/2015 on the Amendment of the Ministry Regulation Number 56/PERMEN-KP/2014 on the Moratorium of Licenses in Fishing Business Activities in Republic of Indonesia Fishing Management Area

Ministry Regulations Number 2/PERMEN-KP/2015 on Trawl and Seine Nets Banning.

Ministry Regulation Number 56/PERMEN-KP/2014 on the Moratorium of Licenses in Fishing Business Activities in Republic of Indonesia Fishing Management Area

Indonesian Ministry Letter Number 0600/MEN-KP/XI/2014 dated 7 November 2014

Indonesian Ministry Regulation Number 30 of 2012 on Fishing Business in Indonesian Fisheries Management Areas.

Indonesian Ministry Regulation Number PER.12/MEN/2012 on Fishing Business in the High Seas

IV Agreements/Conventions/Resolutions

Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, concluded 22 November 2009, ATNIF 41 (entered into force 5 June 2016)

Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, signed 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003)

Convention on Fishing and Conservation of Living Resources of the High Seas, signed 29 April 1958, 559 UNTS 258 (entered into force 20 March 1966)

Convention on Territorial Sea and Contiguous Zone, signed 29 April 1958, 516 UNTS 205 (entered into force 22 November 1964)

Convention on the Continental Shelf, signed 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964)

Convention on the High Seas, signed 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962)

Food and Agriculture Organization, *Code of Conduct for Responsible Fisheries* (1995)
<<http://www.fao.org/docrep/005/v9878e/v9878e00.htm>>

Food and Agriculture Organization, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001)

General Assembly of the United Nations, *Resolution Adopted by the General Assembly on 6 December 2011: Sustainable Fisheries, Including Through the 1995 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, and Related Instruments*, UN Doc A/RES/66/68, 66th sess United Nations Agreement for the Implementation of the Provision 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, concluded on 4 August 1995, 2167 UNTS 88 (entered into force 11 December 2001)

United Nations Agreement for the Implementation of the Provision 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, concluded on 4 august 1995, 2167 UNTS 88 (entered into force 11 December 2001)

United Nations Convention on the Law of the Sea, adopted 10 December 1982, UNTS 1833 (entered into force 16 November 1994)

United Nations Convention against Transnational Organized Crime, adopted 15 November 2000 (entered into force 29 September 2003)

‘United Nations Resolution No. A/RES/1307(XIII) (1958)’ [1958] *Yearbook of the United Nations* 381

Vienna Convention on the law of treaties, opened for signature 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980)