

## Introducing the Special Issue 22.4 Regime Convergence and *Lex Ferenda* in IUU Fishing Disputes: Introductory Remarks

*Hélène Ruiz Fabri*

Director, Max Planck Institute Luxembourg for Procedural Law, Luxembourg  
Professor, Sorbonne Law School, Université Paris 1 Panthéon-Sorbonne,  
Paris, France  
[helene.ruizfabri@mpi.lu](mailto:helene.ruizfabri@mpi.lu)

*Makane Moïse Mbengue*

Professor and Director, Department of International Law and International  
Organization, Faculty of Law, Université de Genève, Geneva, Switzerland  
[makane.mbengue@unige.ch](mailto:makane.mbengue@unige.ch)

*Brian McGarry*

Assistant Professor of Public International Law, Grotius Centre for  
International Legal Studies, Faculty of Law, Leiden University. Leiden,  
the Netherlands  
[b.k.mcgarry@law.leidenuniv.nl](mailto:b.k.mcgarry@law.leidenuniv.nl)

It is a beautiful coincidence to finish compiling this collection of scholarship on 5 June 2020, which the UN has dubbed ‘International Day for the Fight against Illegal, Unreported and Unregulated Fishing’. Each year, this is a day to reflect on disagreements as to what the future of this fight requires. Illegal, unreported, and unregulated (IUU) fishing continues to critically threaten food security, economic opportunity, and other indicators of healthy societies. This phenomenon poses the greatest risk for States and peoples who are most severely impacted by the effects of climate change upon marine ecosystems. IUU fishing often leads to human rights abuses for those directly involved in this practice, which are perpetuated through lax enforcement by the responsible flag or coastal States. The complex reasons for IUU fishing persist despite existing efforts by the international community, such as Goal 14 of the Sustainable Development Agenda and, in particular, the 2009 FAO Port State Measures

Agreement – the first binding instrument on this subject, which entered into force four years ago today.<sup>1</sup>

In practice, the dynamics of IUU fishing encompass myriad legal regimes and jurisdictional challenges. As a result, the management of IUU fishing disputes now takes place across a diverse range of dispute settlement modalities and fora, including institutions for global and regional cooperation, international courts and tribunals, and domestic jurisdictions. For this reason, the Max Planck Institute Luxembourg for Procedural Law and the University of Geneva convened an expansive conference in Luxembourg in November 2019, inviting internationally renowned academics as well as practitioners, jurists, representatives of international organizations, and government officials to evaluate the progress made thus far in addressing IUU fishing from these different angles.<sup>2</sup> This issue of the *International Community Law Review* collects a selection of papers informed by that discussion, and as such raises holistic considerations that could constructively serve as the basis for future developments in this area.

This collection begins with *Nilufer Oral's* brief but masterful account of the history and prospects of this field, 'Reflections on the past, present, and future of IUU fishing under international law'. Exploring this collection's themes of regime convergence and *lex ferenda*, Oral emphasizes the direct link between IUU fishing and other transnational crimes such as human trafficking and forced labour, and parallels the evolution of fisheries instruments with the development of the concept of environmental crime. The article argues that the future of IUU fishing disputes requires a consolidated effort to address this phenomenon from the perspectives of management, conservation, human rights, and transnational crime – including through enhanced roles for international courts and tribunals.

Following this overview, the Special Issue first explores a number of perspectives on the multidimensional implications of IUU fishing disputes. *Christina Voigt* informs this approach with 'Oceans, IUU and climate change: implications for international law'. Voigt underlines that the projected impacts of climate change on the oceans could outpace the stress which IUU fishing places upon marine life, and that focusing on the role of oceans in addressing climate change and its adverse impacts may open a window of opportunity

1 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 55 ILM 1157 (Rome, 22 November 2009).

2 The authors wish to acknowledge and thank the staff of the MPI Luxembourg for their excellent organization of this conference.

for making headway on effectively addressing the challenges of IUU fishing disputes. Observing that there is no clear regime under international law addressing fisheries management within the context of climate change and the oceans, this article argues that a confluence of global, regional, and national legal frameworks are required to comprehensively govern this phenomenon.

*Yoshifumi Tanaka* provides a different perspective on this regime convergence in 'Reflections on the implications of environmental norms for fishing: the link between the regulation of fishing and the protection of marine biological diversity'. Using the *Chagos Marine Protected Area* and *South China Sea* arbitrations as case studies, Tanaka considers the application of Articles 192 and 194 of the UN Convention on the Law of the Sea for the regulation of environmentally harmful fishing, the latter provision's implications for State fishing rights, and the balance between such rights and marine environmental considerations. In so doing, the article argues that environmentally harmful fishing can be regarded as a key concept when considering the regulation of fishing from the viewpoints of marine environmental protection.

*Malgosia Fitzmaurice* and *Mercedes Rosello* then turn this discussion to 'IUU fishing as a disputed concept and its application to vulnerable groups: a case study on Arctic fisheries'. Focusing on the potential effects of the uncritical inclusion of indigenous stakeholders within the broad interpretative and compliance paradigm of IUU fishing, Fitzmaurice and Rosello develop their study from a vulnerability perspective, highlighting the need to take into account interdependencies between fragile ecosystems and at-risk human communities. The article formulates a normative pathway for the regulation of Arctic fisheries that explicitly integrates legal frameworks established for the protection of indigenous peoples and their rights, promoting a nuanced, legally informed and inclusive understanding of the IUU fishing paradigm.

The Special Issue proceeds with a number of contributions assessing the roles of deliberative fora and compliance committees at both global and regional levels. *Cymie Payne* begins this discussion by focusing on a matter of broad importance to the effectiveness of dispute prevention and resolution in this field, 'Negotiation and dispute prevention in global cooperative institutions: international community interests, IUU fishing, and the biodiversity beyond national jurisdiction negotiation'. Payne examines how the four elements of the pending BBNJ agreement can contribute to preventing disputes, how apparent limitations in the scope of the agreement could prevent it from performing that role, and the question of legal standing to represent community interests in a healthy ocean in fisheries disputes before international courts and tribunals. Concluding that IUU fishing is in some respects a consequence of regime weaknesses, the article asserts that BBNJ institutions designed to

lead effective cooperation with other regimes should be viewed as strengthening the legal order of the ocean.

*Barbara Hutniczak* and *Frank Meere* next address the potential of 'International co-operation as a key tool to prevent IUU fishing and disputes over it'. Hutniczak and Meere assert that gaps in the legal frameworks for eliminating IUU fishing exist even among developed States, that international collaboration can result in improved management of fishery resources in developing States, and that the adoption of best practices at the national level does not necessarily go hand-in-hand with introducing state-of-the-art measures at the regional level. By focusing on the comprehensiveness of legal frameworks adopted by States at both the national and regional levels, the article identifies essential first steps in the fight to globally reduce IUU fishing.

*Namira Negm* thereafter approaches IUU fishing disputes in the light of highly sensitive regional considerations in 'AU AIM Strategy and the fragmentation of IUU fishing regulations in Africa: the case of West Africa'. The African Union 2050 Africa's Integrated Maritime Strategy and the fragmentation of IUU fishing regulations in Africa: the case of West Africa'. Negm reviews the 2050 Africa's Integrated Maritime Strategy and the African Union's legal mechanisms for addressing the area of the continent most affected by IUU fishing, assessing them in the context of the potential fragmentation or harmonization of relevant rules of the Economic Community of West African States. In order to address the challenge of harmonizing these regional and sub-regional rule systems, the article prescribes the identification of potential collaborative areas of mutual benefit, in addition to expert meetings to share implementation experiences and deficiencies.

The Special Issue then highlights a number of relevant challenges for both the roles of international dispute settlement institutions and the jurisdiction and effectiveness of domestic judiciaries. *Valentin Schatz* considers IUU fishing as a consequence of fisheries access disputes in 'The snow crab dispute on the continental shelf of Svalbard: a case-study on options for the settlement of international fisheries access disputes'. Schatz examines this current dispute between the European Union and Norway to illustrate the distinct opportunities and complexities of both Part xv of the UN Convention on the Law of the Sea and jurisdictional instruments unique to the International Court of Justice. In respect of either forum, the article asserts that submitting aspects of fisheries access disputes to international settlement provides legal clarifications which may, in turn, facilitate the fuller resolution of the dispute through the political means explored in the contributions discussed above.

*Marco Benatar* then expands upon issues of access and the effectiveness of international mechanisms in 'Not like the others? The position of associated

states and dependent territories in fishing disputes'. Benatar considers certain linkages between associated States and dependent territories, on the one hand, and international dispute settlement concerning fishing on the other. In particular, the article highlights the establishment of arrangements within regional fisheries management organizations to facilitate representation of non-metropolitan territories' interests, and hypothesizes whether similar innovations can be found in the field of dispute resolution.

*Eve de Coning* thereafter infuses this discussion with key perspectives on the role of domestic authorities in 'Why are some flag states unable or unwilling to address IUU fishing?'. De Coning analyses behavioural patterns of owners and operators of vessels engaged in IUU fishing, and draws causal links between the supply and demand of ship registration and the degree to which some flag States are willing and able to take action to address IUU fishing. The article presents a perspective on the bargaining process that takes place within a certain category of flag States considered economically and politically vulnerable, and that tend to be overrepresented on the list of un-cooperative flag States.

The Special Issue then concludes with an illustration of potential future currents in the management of IUU fishing disputes, as *Solène Guggisberg* presents 'Independent, compulsory, and centralized verification of states' obligations in fisheries: can the International Maritime Organization Audit Scheme for shipping law be used as an example to follow?'. Guggisberg examines procedures currently in place in relation to fisheries obligations and considers corresponding mechanisms in the shipping field, evaluating whether the transposition of such mechanisms to the regulatory regime of fisheries would improve upon current processes for verifying State compliance in this field. While there may be challenges in importing the IMO Audit Scheme to the task of gauging compliance with fisheries obligations, the article asserts that transposing at least some features of this mechanism would be possible and desirable for the comprehensiveness, regularity, predictability, and centralization of monitoring as concerns IUU fishing.

In summary, this issue of the *International Community Law Review* captures key threads and timely proposals regarding an urgent threat across legal regimes and existing jurisdictions. Featuring diverse perspectives from authorities in these fields and insightful research approaches, this collection of studies reflects the kaleidoscopic spirit of the discussions convened in Luxembourg, and suggests the need for a comprehensively integrated approach to IUU fishing disputes in the future.