

TACKLING ILLEGAL, UNREPORTED AND UNREGULATED FISHING THROUGH PORT STATE MEASURES

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Alongside collective mismanagement, illegal, unreported and unregulated ('IUU') fishing practices pose a serious threat to marine species and ecosystems around the globe. Drastically reducing IUU fishing must form part of global efforts to promote more responsible and just exploitation of marine living resources. While attention on tackling IUU fishing has increased over the past two decades, progress toward its elimination remains slow, largely due to the inherently transboundary nature of IUU practices and the practical limitations of flag and coastal state jurisdiction. This article argues that port states can and should play a central role in international efforts to tackle IUU fishing. It considers the steps port states can lawfully take to remove IUU practices from global supply chains and explores the conditions and limitations general international law, the law of the sea and international trade law impose on various port state measures. While port state control raises significant issues of jurisdictional competence, substantive and procedural fairness, and multilateral coordination, it is shown that port state measures are both a feasible and defensible means of addressing IUU practices. By exploring the conditions that attach to the design, adoption and implementation of port state measures, the article resolves key debates concerning their lawfulness, thus allowing policymakers, practitioners and officials to renew their attention on developing the political will and technical capabilities necessary for such measures to play an effective and appropriate role in closing regulatory and enforcement gaps in conservation and management regimes.

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I INTRODUCTION

Due to human activity, the global ocean is on a path of serious decline. Alongside anthropogenic climate change, pollution and habitat destruction,¹ the over-exploitation of marine living resources is contributing to the risk of mass extinction of marine species.² As well as involving the tragic loss of biodiversity, the decline of marine species presents serious consequences for human populations, including decreased food security and impaired environmental regulation.³ Alongside regulatory gaps and collective mismanagement, the challenges posed in effectively enforcing existing conservation and management rules threaten the sustainability of marine populations.⁴ The persistence of illegal, unreported and unregulated (‘IUU’) fishing — estimated to account for up to a third of total global capture of marine species — is especially

¹ See, eg, *Summary of the First Global Integrated Marine Assessment*, 70th sess, Agenda Item 80(a), UN Doc A/70/112 (22 July 2015) [32]–[62]; *Oceans and the Law of the Sea*, GA Res 70/235, 70th sess, Agenda Item 79(a), UN Doc A/RES/70/235 (15 March 2016) [169]–[243]. See also UN Environment World Conservation Monitoring Centre, *Horizon Scan of Pressures on Biodiversity beyond National Jurisdiction* (Report, 2016).

² According to UN Food and Agriculture Organization (‘FAO’) figures, in 2017, 34.2% of global fish stocks were exploited at biologically unsustainable levels, 59.6% of stocks were maximally sustainably exploited and only 6.2% of stocks were ‘underfished’: Food and Agriculture Organization of the United Nations, *The State of World Fisheries and Aquaculture: Sustainability in Action* (Report, 2020) 47 (‘*The State of World Fisheries and Aquaculture*’). Other recent studies have returned more alarming results: see, eg, Daniel Pauly and Dirk Zeller, ‘Catch Reconstructions Reveal That Global Marine Fisheries Catches Are Higher than Reported and Declining’ (2016) 7 *Nature Communications* 10244:1–9.

³ IPBES, *The Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers* (Report, 2019) 106–9 (‘*Global Assessment Report*’).

⁴ See, eg, *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*, GA Res 71/123, 71st sess, Agenda Item 73(b), UN Doc A/RES/71/123 (13 February 2017) [64] (‘*2017 Sustainable Fisheries Resolution*’).

problematic.⁵ While global attention on IUU fishing has increased over the past two decades, progress toward eliminating it remains slow, largely due to the practical limitations of flag and coastal state jurisdiction. This article argues that port states can, do and *should* form a central part of international efforts to tackle IUU fishing, considers the steps that port states can lawfully take to remove IUU practices from global supply chains, and explores the conditions and limitations general international law, the law of the sea, and international trade law impose on various port state measures ('PSMs'). As we explore, the often transboundary nature of IUU fishing means the adoption and use of PSMs raise significant issues of jurisdictional competence, substantive and procedural fairness, and multilateral coordination.

A key aim of this article is to remove some of the doubt from debates concerning the lawfulness of PSMs and the conditions that attach to their adoption, thus allowing policymakers, practitioners and officials to renew their attention on developing the political will and technical capabilities necessary for PSMs to play an effective and appropriate role in closing regulatory and enforcement gaps. As we show below, PSMs are a feasible and defensible means of addressing IUU practices. Neither the law of the sea nor general international law present insurmountable obstacles for the effective exercise of port state jurisdiction aimed at tackling IUU activities — existing rules on jurisdiction permit port states to adopt a wide range of measures. Similarly, while international trade law presents certain additional conditions and considerations, these too can be successfully navigated if considered early and PSMs' design and application are adjusted appropriately.

Before continuing, it is vital to note that 'IUU fishing' encompasses a wide range of activities. According to the UN Food and Agriculture Organization's ('FAO') 2001 constitutive definition, 'illegal' fishing comprises fishing 'in violation of national laws or international obligations' and thus covers all fishing activities breaching either national law or the regulations of regional fisheries management organisations ('RFMOs') within and beyond areas subject to national jurisdiction.⁶ 'Unreported' fishing comprises all failures to report (or misreporting) catches as required by applicable national laws or RFMO procedures.⁷ 'Unregulated' fishing refers both to fishing conducted by unflagged vessels in areas subject to national jurisdiction or RFMO management⁸ and fishing by flagged vessels in areas not subject to either national jurisdiction or RFMO management where such fishing is conducted in a manner inconsistent with (flag) state responsibilities for the conservation of living resources.⁹ IUU fishing can thus occur through, inter alia, fishing without or in excess of the authorisation granted by a license in a state's exclusive economic zone ('EEZ')

⁵ *Global Assessment Report* (n 3) 115. According to one recent study, illegal fishing was estimated to account for around 70% of total annual landings in certain Chilean fisheries: C Josh Donlan et al, 'Estimating Illegal Fishing from Enforcement Officers' (2020) 10 *Scientific Reports* 12478:1–9, 5.

⁶ Food and Agriculture Organization of the United Nations, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2017) 2 [3.1] ('*International Plan of Action*').

⁷ *Ibid* 2 [3.2].

⁸ *Ibid* 2 [3.3.1].

⁹ *Ibid* 2–3 [3.3.2].

or Exclusive Fishery Zone ('EFZ') or an RFMO management area, exceeding catch limits for targeted or by-catch species, employing prohibited gear or methods, fishing during season or ground closures, or inadequately reporting effort or capture.

Article 192 of the *United Nations Convention on the Law of the Sea* ('UNCLOS') obliges all parties 'to protect and preserve the marine environment'.¹⁰ While this obligation is not limited geographically,¹¹ in areas subject to national jurisdiction — the territorial sea and, if applicable, EEZ or EFZ — primary responsibility for fisheries rests with the coastal state, which must regulate the activities of its own and foreign-flagged vessels, including through licensing, setting catch limits and shares, regulating seasons, specifying reporting obligations, regulating landing, and through inspection and enforcement.¹² Flag states, by contrast, bear primary responsibility for regulating activities in areas beyond national jurisdiction and — importantly — retain residual due diligence obligations when their vessels fish in areas subject to other states' jurisdiction.¹³ While, in principle, this enables complete geographic coverage of fisheries regulations and enforcement measures, numerous legal and practical realities undermine the effective exercise of coastal and flag state jurisdiction over IUU fishing. These include geographic and species gaps in the coverage of RFMO rules,¹⁴ the 'free riding' problem,¹⁵ limited enforcement capacity due to geographic and resource constraints,¹⁶ registers of convenience, flaglessness and flag-swapping,¹⁷ and supply chain practices such as bunkering, catch consolidation, transshipment and the landing of catches in remote ports.¹⁸

We thus must find ways to reinforce existing rules. Given that, to be marketed, all fisheries products must first be landed, PSMs can play a significant role in removing IUU practices from global supply chains. The exercise of jurisdiction by port states over foreign-flagged vessels has a well-established

¹⁰ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) art 192 ('UNCLOS').

¹¹ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* (2015) ITLOS Rep 4, 37 [120] ('SRFC AO'), citing *Southern Bluefin Tuna (New Zealand v Japan, Australia v Japan) (Provisional Measures)* (1999) ITLOS Rep 280, 295 [70] ('SBT PM'). See also *South China Sea Arbitration (Philippines v China) (Award)* (Permanent Court of Arbitration, Case No 2013-19, 12 July 2016) [940].

¹² See UNCLOS (n 10) arts 61(2), (3), 62(1), (4), 73(1); SRFC AO (n 11) 33 [104]–[106].

¹³ See SRFC AO (n 11) 38 [124], elaborating on flag states' duties under UNCLOS (n 10) arts 58(3), 62(4), 192.

¹⁴ For example, in the Southwest Atlantic and Central Arctic Oceans: see Jeff A Ardron et al, 'The Sustainable Use and Conservation of Biodiversity in ABNJ: What Can Be Achieved Using Existing International Agreements?' (2014) 49 *Marine Policy* 98, 101. See also Kristina M Gjerde et al, *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction* (IUCN, 2008) 5; Yoshinobu Takei, *Filling Regulatory Gaps in High Seas Fisheries: Discrete High Seas Fish Stocks, Deep-Sea Fisheries and Vulnerable Marine Ecosystems* (Martinus Nijhoff Publishers, 2013) vol 75, 194–8, 249–52.

¹⁵ See, eg, Megan Bailey, U Rashid Sumaila and Marko Lindroos, 'Application of Game Theory to Fisheries over Three Decades' (2010) 102(1–2) *Fisheries Research* 1, 4–5.

¹⁶ See, eg, Sjarief Widjaja, Tony Long and Hassan Wirajuda, 'Illegal, Unreported and Unregulated Fishing and Associated Drivers' (Blue Paper, High Level Panel for a Sustainable Ocean Economy, 2019) 34–5.

¹⁷ See *2017 Sustainable Fisheries Resolution*, UN Doc A/RES/71/123 (n 4) [77].

¹⁸ See, eg, Nathan A Miller et al, 'Identifying Global Patterns of Transshipment Behavior' (2018) 5 *Frontiers in Marine Science* 240:1–9, 1.

track record in the area of merchant shipping and — by subjecting vessels entering ports to mandatory inspection — has provided for more effective implementation of standards concerning, for example, vessel construction, pollution, crew safety and labour protection.¹⁹ PSMs' potential in addressing IUU fishing has been recognised through multilateral, regional and national instruments, and at least 35 states now have legislation permitting such measures.²⁰

Yet, while presenting significant opportunities to close regulatory and enforcement gaps, PSMs also face legal and practical obstacles. Despite the entry into force in 2016 of the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* and growing enthusiasm for PSMs, significant questions remain concerning their permissibility and the conditions that attach to them under, especially, general international law, the law of the sea and international trade law.²¹ As shown below, while not insurmountable, these obstacles must be considered and overcome if PSMs are to provide effective and enduring means of addressing IUU fishing practices.

The remainder of this article is structured as follows. Part II provides a typology of the PSMs envisaged and applied to date. Part III considers PSMs' lawfulness under general international law and the law of the sea. It addresses the jurisdictional bases through which port states may lawfully justify measures — including those aimed at the conduct of non-nationals beyond territorial jurisdiction — and outlines the conditions that general international law and the law of the sea place on various categories of measure. Part IV shows that, because most PSMs will be inconsistent with at least one discipline in the World Trade Organization *General Agreement on Tariffs and Trade* ('GATT'), port states must design and apply measures to take advantage of this agreement's general exceptions and, especially, to comply with the chapeau to

¹⁹ See Ted L McDorman, 'Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention' (1997) 28(2) *Journal of Maritime Law and Commerce* 305; Doris König, 'Article 218: Enforcement by Port States' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, 2017) 1487; Robin Churchill, 'Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships: What Degree of Extra-Territoriality?' (2016) 31(3) *International Journal of Marine and Coastal Law* 442. Judith Swan usefully highlights the practical potential of PSMs in addressing IUU activities with reference to a case study of national and regional efforts directed at the South Korean-flagged tuna purse seiner, F/V Premier: Judith Swan, 'Port State Measures: From Residual Port State Jurisdiction to Global Standards' (2016) 31(3) *International Journal of Marine and Coastal Law* 395, 398, 416–18.

²⁰ See, eg, *Fisheries Management Act 1998* (Papua New Guinea) No 48 of 1998, as amended by *Fisheries Management (Amendment) Act 2015* (Papua New Guinea) No 1 of 2015 ('PNG Fisheries Management Act'); *Implementation of Port State Measures to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing Regulations 2015* (Sri Lanka) Minister of Fisheries, 26 March 2015, LDB 1/2012(II); *Offshore Fisheries Management Decree 2012* (Fiji) Decree No 78 of 2012, 145(13) *Government of Fiji Gazette* 2145. The full list is on file with the authors.

²¹ *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, opened for signature 22 November 2009, [2016] ATS 21 (entered into force 5 June 2016) ('PSMA'). At time of final writing (September 2021), the PSMA has 69 parties.

GATT art XX.²² By way of conclusion, Part V reflects that, while the legal obstacles facing PSMs can be overcome, urgent attention must be directed at the other practical and political obstacles to PSMs' widespread and effective adoption if they are to play a meaningful role in closing regulatory and enforcement gaps.

II PORT STATE MEASURES: A TYPOLOGY

States and international organisations have proposed or adopted numerous categories of port state measures, which could be used to tackle IUU fishing.²³ Such measures are found in both binding instruments like the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* ('FAO Compliance Agreement')²⁴ and the *Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea* ('FSA'),²⁵ and in non-binding instruments like the *Code of Conduct for Responsible Fisheries* ('FAO Code of Conduct')²⁶ and the *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*.²⁷ The high water mark of this trend is the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* ('PSMA'), completed in 2009, which obliges its parties to take a range of steps against foreign-flagged vessels that voluntarily enter or attempt to enter port.²⁸

All port state measures involve the assertion of prescriptive and enforcement jurisdiction, raising important questions relating to their general permissibility and the conditions that attach to their implementation. We consider these in detail below (Part III). Before we can investigate such issues, however, it is useful to first consider the characteristics of the various PSMs envisaged and applied to date. Following the PSMA's useful framework, measures can be classified chronologically and substantively as follows: (i) those prior to port entry; and (ii) those after entry.

²² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') ('GATT').

²³ See generally Andrew Serdy, 'The Shaky Foundations of the FAO Port State Measures Agreement: How Watertight is the Legal Seal against Access for Foreign Fishing Vessels?' (2016) 31(3) *International Journal of Marine and Coastal Law* 422, 424.

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

²⁵ See *Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, 2167 UNTS 3 (entered into force 11 December 2001) ('FSA'). At time of final writing (September 2021), the FSA has 91 parties.

²⁶ Food and Agriculture Organization of the United Nations, *Code of Conduct for Responsible Fisheries*, 1995 ('FAO Code of Conduct') art 8(3).

²⁷ Food and Agriculture Organization of the United Nations, *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*, 2007 ('Model Scheme').

²⁸ See PSMA (n 21) pts 2–4. See also Swan (n 19) 402.

A Measures Prior to Entry

1 Designation of Ports

The prior designation of specific ports open to vessels engaged in fishing (and fishing-related activities) provides a relatively simple means to more effectively tackle IUU practices. Restricting entry or the landing or transshipment of catches to certain ports enables port states to limit the number of undetected port uses and to consolidate administrative and enforcement resources, thus more effectively monitoring activities and sanctioning breaches of relevant national, regional or global rules and standards, as well as enabling more accurate data collection.²⁹ Prior designation has become routine practice and is an element of states' legislation,³⁰ as well as regional management efforts.³¹ As addressed below, the power to designate ports arises as the logical corollary of a state's sovereignty over its internal waters and its power under international law to condition (or deny) access to territory.³²

Importantly, the *PSMA* goes a step further by obliging parties to 'designate and publicize the ports to which vessels may request entry'.³³ *PSMA* parties must provide the FAO with 'a list of its designated ports' which are duly published.³⁴ In the event that a party fails to send such a list to the FAO, it is assumed that all ports of that party are open to entry for foreign fishing vessels, subject to its prior decision to allow entry in its territory as well as subject to any other requirements set forth by that port state in accordance with the *PSMA* and other rules of international law. Significantly, *PSMA* parties must also 'to the greatest extent possible' ensure that all designated ports have 'sufficient capacity to conduct inspections' in accordance with the additional procedural and substantive obligations they have assumed in the Agreement.³⁵

²⁹ Arron N Honniball, 'Extraterritorial Port State Measures: The Basis and Limits of Unilateral Port State Jurisdiction to Combat Illegal, Unreported and Unregulated Fishing' (PhD Thesis, Utrecht University, 2019) 211.

³⁰ See, eg, *Fisheries Regulations 2010* (Ghana) LI 1968, arts 33, 79; *Expedir el reglamento general a la ley de pesca y desarrollo pesquero y texto unificado de legislación Pesquera* (Ecuador) Decree No 3198 of 2002, art 21.

³¹ See, eg, Northwest Atlantic Fisheries Organization, *Conservation and Enforcement Measures 2021*, Doc No 21-01, art 10(4)(b) ('*NAFO CEM*'), which requires Greenland halibut to be landed in designated ports. See also International Commission for the Conservation of Atlantic Tunas, *Recommendation by ICCAT Amending the Recommendation 12-03 by ICCAT to Establish a Multi-annual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean*, Doc No 13-07, 2013, [65], [69].

³² See, eg, *UNCLOS* (n 10) art 25(2). For further discussion, see below Part III.

³³ *PSMA* (n 21) art 7(1).

³⁴ *Ibid.* 545 ports are currently designated under the *PSMA*: 'Designated Ports App', *Food and Agricultural Organization of the United Nations* (Web Page) <<http://www.fao.org/fishery/port-state-measures/psmaapp/?locale=en&action=qry>>, archived at <<https://perma.cc/T8Y9-8Z2D>>.

³⁵ *PSMA* (n 21) art 7(2).

Following the approval of the *PSMA*, FAO initiated a global awareness-raising and capacity building campaign to ensure that states understand both the benefits of the *PSMA* as well as the requirements of implementation, should they become Party ... [Further, in order to] bolster FAO's technical assistance in combatting IUU fishing, the FAO developed a global Capacity Development Programme, which is currently ongoing, to provide assistance to developing states to implement the Port State Measures Agreement complementary instruments and tools.

2 Advanced Authorisation and Denial of Port Entry

To be marketed, all fisheries products must first be landed. Attaching conditions to vessels' entry into port thus provides effective means of removing IUU practices from global supply chains.³⁶ By conditioning entry on the advance provision of information regarding, for example, a vessel's identity, the purpose of port access, fishing authorisation and effort and capture, port states can contribute to identifying vessels engaged in, and ultimately dis-incentivise, IUU practices.³⁷ As above, this power stems from states' right to condition or deny access to territory.³⁸ It is largely at port states' discretion how far in advance such information must be provided. For example, Canada, Fiji and India require at least 24 hours' advance notice of entry for foreign fishing vessels,³⁹ while Gambia and New Zealand require 72 hours' notice.⁴⁰ The Commission for the Conservation of Southern Bluefin Tuna ('CCSBT') and International Commission for the Conservation of Atlantic Tunas ('ICCAT') members must require information at least 72 hours before estimated time of arrival.⁴¹ The 2008 *EU IUU Regulation* likewise requires requests be received 'at least three working days' before planned entry.⁴²

Based on information a vessel provides, port state authorities may permit or deny port entry. Where entry is permitted, authorisation must generally be presented upon arrival.⁴³ Denial usually occurs where information provided is

'Agreement on Port State Measures (PSMA): Capacity Development', *Food and Agricultural Organization of the United Nations* (Web Page) <<http://www.fao.org/port-state-measures/capacity-development/overview/en/>>, archived at <<https://perma.cc/3GE4-JSZY>>.

³⁶ See, eg, Mary Ann Palma, Martin Tsamenyi and William Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Martinus Nijhoff Publishers, 2010) 167.

³⁷ See *Model Scheme* (n 27) 2 [2.4], app A.

³⁸ See above n 32 and accompanying text and below Part III.

³⁹ Palma, Tsamenyi and Edeson (n 36) 162 offer the following examples: see *Coastal Fisheries Protection Regulations*, CRC, c 413, ss 4(f), 12(1); *Marine Spaces (Foreign Fishing Vessels) Regulations* (Fiji) ss 20, 21; *Fisheries Regulations of 1995* (Gabon) Sec 6; *Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Rules, 1982* (India) r 5.

⁴⁰ Ministry of Fisheries, *New Zealand Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated & Unreported Fishing* (May 2004) 39; *Fisheries Act 2007* (Gambia) s 41(1).

⁴¹ See Commission for the Conservation of Southern Bluefin Tuna, *Resolution for a CCSBT Scheme for Minimum Standards for Inspection in Port*, 25th mtg, 18 October 2018, [11]. The Resolution applies to foreign fishing vessels, including carrier vessels other than container vessels, carrying SBT or fish products originating from SBT that have not previously landed or been transhipped at port, and that are 12 metres or more in length. See also International Commission for the Conservation of Atlantic Tunas, *Recommendation by ICCAT for an ICCAT Scheme for Minimum Standards for Inspection in Port*, Doc No 12-07, 2012, [11].

⁴² *Council Regulation (EC) No 1005/2008 of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* [2008] OJ L 286/1, art 6 ('2008 EU IUU Regulation'). On the influence of the 2008 EU IUU Regulation on third states' legislation, see Arron N Honniball, 'What's in a Duty? EU Identification of Non-Cooperating Port States and their Prescriptive Responses' (2020) 35(1) *International Journal of Marine and Coastal Law* 19.

⁴³ See, eg, *PSMA* (n 21) art 9(2); Judith Swan, *Implementation of Port State Measures: Legislative Template* (FAO, 2016) 13.

inadequate or evidence exists of IUU fishing or related activities.⁴⁴ In addition to ad hoc denial of entry, denial may also be routine. This occurs when a vessel has been identified as having engaged in, or been suspected of, IUU activities (blacklisting), is not on a list of approved vessels (whitelisting) or flies the flag of a state that is subject to a blanket entry ban (flag blacklisting).

Prior authorisation and black and whitelisting are standard features of many national and regional management programmes. Numerous states, including key landing parties, like the European Union and the US, have adopted such measures, either unilaterally or in furtherance of their duties as RFMO members or *PSMA* parties.⁴⁵ For example, pursuant to the *2008 EU IUU Regulation*, non-EU-flagged vessels identified on the ‘Community IUU vessel list’ may not enter member states’ ports.⁴⁶ Under the *Magnuson-Stevens Act*, flag states whose vessels engage in IUU fishing may be identified in a report to Congress.⁴⁷ If a listed state does not show within three years that it has taken corrective action, it may be negatively certified, resulting in (inter alia) a blanket ban on port access for fishing vessels flying its flag.⁴⁸ Several RFMOs also require their members to deny port entry to vessels suspected of engaging in IUU practices. Illustratively, North East Atlantic Fisheries Commission (‘NEAFC’) and Northwest Atlantic Fisheries Organization (‘NAFO’) members are obliged to deny port entry to vessels that fail to adequately complete prior notification requirements.⁴⁹ CCSBT members must likewise deny entry to any vessel included on the CCSBT IUU Vessel List, unless entry is exclusively for the purposes of inspection and enforcement.⁵⁰ Authorisation and denial schemes are routinely applied to vessels

⁴⁴ For example, the South East Atlantic Fisheries Organisation (‘SEAFO’) and the General Fisheries Commission for the Mediterranean (‘GFCM’) leave to the discretion of the contracting parties to decide whether to authorise or deny entry after receiving the relevant information. See General Fisheries Commission for the Mediterranean, *On a Regional Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing Activities in the GFCM Area of Application*, Doc No REC.MCS-GFCM/40/2016/1, 2016, 4 [17]–[18]; South East Atlantic Fisheries Organisation, *Conservation Measure 21/11 on Port State Control*, Doc No CM21/11, 11 October 2011, art 5.

⁴⁵ See above nn 44–5. See also *High Seas Fishing Act 2013* (Belize) No 26 of 2013, 7 November 2013, s 25 <<http://extwprlegs1.fao.org/docs/pdf/blz174492.pdf>>, archived at <<https://perma.cc/Z2B4-NKKX>>; *Fisheries Management and Development Act 2016* (Kenya), No 35 of 2016, 3 September 2016, 156 *Kenya Gazette Supplement* 737, s 129 <<http://kenyalaw.org/8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/F/Fisheries%20Management%20and%20Development%20Act%20-%20No.%2035%20of%202016/docs/FisheriesManagementandDevelopmentAct35of2016.pdf>>, archived at <<https://perma.cc/4UDE-3CHC>>; *Fisheries Act 2014* (Seychelles) Act 20 of 2014, 27 October 2014, s 11(6) <<https://seylli.org/sc/legislation/act/2014/20->>, archived <<https://perma.cc/U5FU-T25K>>.

⁴⁶ See especially *2008 EU IUU Regulation* (n 42) art 37(5).

⁴⁷ *High Seas Driftnet Fishing Moratorium Protection Act*, 16 USC §§ 1826h, 1826j(a), (d) (2019).

⁴⁸ *Ibid* §§ 1826a, 1826j(d)(3).

⁴⁹ See, eg, North-East Atlantic Fisheries Commission, *NEAFC Scheme of Control and Enforcement*, 11 February 2021, art 39(2) (‘NEAFC Scheme’); *NAFO CEM* (n 31) art 51(2).

⁵⁰ Commission for the Conservation of Southern Bluefin Tuna, *Resolution on Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities for Southern Bluefin Tuna (SBT)*, Doc No CCSBT-CC/1610/16, 26th mtg, 17 October 2019, art 18(d).

not included on RFMO whitelists, an important consequence being that vessels not listed are not permitted to land species within the RFMO's competence.⁵¹

As well as being mandated by certain RFMOs, the *PSMA* provides its parties with another set of duties, making the exercise of their (otherwise discretionary) right to condition entry obligatory. *PSMA* parties must require fishing vessels and vessels involved in fishing-related activities to provide information concerning, inter alia, vessel identification, port of call and purpose of visit, fishing authorisation, catch and transshipment activities 'sufficiently in advance to allow adequate time ... to examine such information' and to decide whether to permit entry.⁵² Entry must be denied where there is 'sufficient proof' that a vessel has engaged in IUU fishing or related activities,⁵³ unless entry is permitted 'exclusively' for inspecting the vessel and taking enforcement action.⁵⁴ Decisions to deny entry must be communicated to the vessel's flag state and to relevant coastal states, RFMOs or other international organisations.⁵⁵

B Measures After Entry

1 Inspection

Once a vessel has entered port, physical inspection provides the next — more robust — link in the chain of port state measures. As well as inspecting vessels' authorisation, catches and gear, inspections typically also involve corroboration of digital evidence of activity including reviewing data from Vessel Monitoring Systems ('VMS').⁵⁶ While it is impossible for even well-resourced states to physically inspect every vessel entering its ports, states may be obliged to focus efforts on certain categories of vessel or inspect a certain number or proportion of vessels annually.⁵⁷ For example, certain RFMOs mandate the inspection of vessels flagged to non-parties — so-called non-cooperating, non-contracting

⁵¹ See eg, North-East Atlantic Fisheries Commission, *Recommendation on Conservation and Management Measures for Mackerel in the NEAFC Regulatory Area for 2021*, Doc No 20:2021, 24 December 2020, [4].

⁵² *PSMA* (n 21) arts 8, 9(1).

⁵³ *Ibid* art 9(4).

⁵⁴ *Ibid* art 9(5).

⁵⁵ *Ibid* art 9(3).

⁵⁶ See, eg, *Title 27: Fishing* (Palau) § 204; *Code of Maritime Fishing, 2015* (Guinea) art 190; *Code of Fisheries and Aquaculture, 2015* (Madagascar) art 73; *Law No 2015-017 Establishing the Code of Marine Fisheries* (Mauritania) art 73; *Pitcairn Islands Marine Protected Area Ordinance 2016* (Pitcairn, Henderson, Ducie and Oeno Islands) Act No 3 of 2016, s 24. See also Tullio Treves, 'Some International Law Aspects of the Use of Vessel Monitoring Systems for Preventing Illegal Unreported Unregulated Fishing' in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Martinus Nijhoff Publishers, 2007) 811, 815–20.

⁵⁷ For example, the US National Oceanic and Atmospheric Administration ('NOAA') estimates that around 60% of foreign-flagged fishing and support vessels entering US ports are physically inspected: Office of Law Enforcement, 'Frequent Questions: Implementing the Port State Measures Agreement', *NOAA Fisheries* (Web Page, 21 January 2020) <<https://www.fisheries.noaa.gov/enforcement/frequent-questions-implementing-port-state-measures-agreement>>, archived at <<https://perma.cc/XJX7-2RWU>>. The proportion is likely to be significantly lower in less well-resourced port states.

parties' vessels — when these voluntarily enter members' ports.⁵⁸ The *PSMA* likewise obliges parties 'to reach an annual level of inspections sufficient to achieve the objective of [the] Agreement' agreed upon through RFMOs, the FAO or otherwise.⁵⁹ The *PSMA* requires priority be given to vessels suspected of engaging in IUU activities, previously denied entry to, or use of, a port, or when inspection has been requested by a flag state, another *PSMA* party or RFMO.⁶⁰

2 *Import Prohibitions and Denial of Use of Port Facilities*

Prohibiting imports or the transshipment of fisheries products originating in flag states identified as taking inadequate steps to prevent IUU practices by flagged vessels comprises an important feature of, eg, the US's and EU's IUU programmes.⁶¹ As well as flag-based import bans, port states also routinely deny the use of port facilities on an ad hoc basis due to the results of inspections or when vessels fail to comply with authorisation and certification requirements.⁶² Such steps may include, eg, preventing landing, transshipping, packaging or processing catches, or denying the resupply, refuelling, repair or maintenance of vessels. Such measures have been adopted by the EU,⁶³ individual states⁶⁴ and by RFMOs.⁶⁵ *PSMA* parties are obliged to deny use of facilities when vessels entering port lack valid flag or coastal state authorisation, there is evidence that fish were taken illegally within a coastal state's waters, the flag state does not confirm capture was conducted in accordance with RFMO rules, or there is other

⁵⁸ See *NAFO CEM* (n 31) art 51(3); *NEAFC Scheme* (n 49) art 40; International Commission for the Conservation of Atlantic Tunas, *Recommendation by ICCAT concerning Ban on Landings & Transshipments of Vessels from Non-Contracting Parties Identified as Having Committed a Serious Infraction*, Doc No 98-11, 21 June 1999, [1]–[2].

⁵⁹ *PSMA* (n 21) arts 12(1), (2).

⁶⁰ *Ibid* art 12(3).

⁶¹ For the US and the EU respectively, see *High Seas Driftnet Fishing Moratorium Protection Act*, 16 USC §§ 1826d–k (2018); *High Seas Driftnet Fisheries Enforcement Act*, 16 USC §§ 1826a–c (2018); *2008 EU IUU Regulation* (n 42) art 38(1).

⁶² Catch documentation schemes ('CDS') play a particularly important role in this context. Compliance with CDS requirements is usually mandatory for the landing or importation of fisheries products under both national and RFMO regulations. See, eg, Commission for the Conservation of Antarctic Marine Living Resources, *Resolution 15/XXII: Use of Ports Not Implementing the Catch Documentation Scheme for *Dissostichus spp.**, Doc No 15/XXII. See also *The Philippine Fisheries Code of 1998* (The Philippines) Department of Agriculture, Administrative Order No 10, 2015, s 38.

⁶³ According to *2008 EU IUU Regulation* (n 42) art 11(2),

[i]f the results of the inspection provide evidence that a third country fishing vessel has engaged in IUU fishing in accordance with the criteria set out in Article 3, the competent authority of the port Member State shall not authorise such vessels to land or tranship their catch.

⁶⁴ See, eg, *Fisheries Enforcement Act* (Marshall Islands) § 506(2)(j).

⁶⁵ For example, the Inter-American Tropical Tuna Commission prohibits landing and transshipment where they are positively identified as originating from fishing activities that contravene the CMM: see Inter-American Tropical Tuna Commission, *Multiannual Program for the Conservation of Tuna in the Eastern Pacific Ocean During 2014–2016*, Resolution C-13-01, 85th mtg, 10–14 June 2013, para 12 ('*IATTC Resolution C-13-01*').

evidence of IUU activity;⁶⁶ the flag state and any relevant coastal states, RFMOs and other international organisations must be promptly notified.⁶⁷

3 Follow-Up Measures

Port states adopt various measures when a vessel is deemed to have engaged in or supported IUU activities. These include confiscation of catches or gear, detention of vessels and civil and criminal penalties for masters, owners or crews — including fines or imprisonment.⁶⁸ Significantly, penalties potentially apply in respect of extraterritorial conduct — ie when capture or fishing-related activity is performed by non-nationals of the port state, on foreign-flagged vessels, beyond territorial jurisdiction. For example, the US's *Lacey Act* makes it an offence to possess 'any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any state or in violation of any foreign law or Indian tribal law'⁶⁹ and the *Magnuson-Stevens Act* extends the application of United States legislation (including with regard to penalties) to areas beyond national jurisdiction and the conduct of non-US nationals.⁷⁰ Similarly, the *2008 EU IUU Regulation* provides for various enforcement measures, including 'effective, proportionate and dissuasive' administrative and criminal sanctions, and confiscation of 'fishing gear, catches or fishery products', to be applied to activities in port when capture or other relevant conduct occurs on the high seas.⁷¹ Certain RFMOs also indicate members may criminalise activities that take place in port — including possession, landing or transshipment of catches — if high seas conservation measures have been breached.⁷² While it acknowledges states' right to impose more onerous enforcement measures (particularly pursuant to RFMO rules),⁷³ when inspection reveals 'clear grounds' for believing a vessel has engaged in IUU activities, *PSMA* parties are (merely) obligated to notify the flag state, the master's state of nationality and any

⁶⁶ *PSMA* (n 21) art 11(1). See also Swan (n 19) 409.

⁶⁷ See, eg, *PSMA* (n 21) art 11(3); Indian Ocean Tuna Commission, *Resolution 16/11: On Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, 27 September 2016, s 9(3).

⁶⁸ See, eg, *Magnuson-Stevens Fishery Conservation and Management Act*, 16 USC §§ 1858–9 (2006) ('*Magnuson-Stevens Act*'). See also *Lacey Act*, 16 USC §§ 3373–4 (2018) ('*Lacey Act*'), which provides for civil and criminal penalties, permit sanctions and the forfeiture of fish and of vessels and other equipment used to aid in the violation of the Act; *Decreto-Lei No 53/2005* (Cape Verde) arts 52, 56, 56A, 61; *Loi No 2015–18 du 13 juillet 2015 portant Code de la Pêche maritime* (Senegal) arts 123, 135; *Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act 1981* (India) ss 10, 13, 16.

⁶⁹ *Lacey Act* (n 68) § 3372(a)(3)(A).

⁷⁰ See, eg, *Magnuson-Stevens Act* (n 68) §§ 1821, 1826a, 1826j.

⁷¹ *2008 EU IUU Regulation* (n 42) arts 43–4.

⁷² See Sophia Kopela, 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons' (2016) 47(2) *Ocean Development and International Law* 89, 99, citing Northwest Atlantic Fisheries Organization, *The 2015 NAFO Conservation and Enforcement Measures*, 2014, ch V. See also Commission for the Conservation of Antarctic Marine Living Resources, *Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures*, Doc No 10-07, 2009, [22(iv)]; Commission for the Conservation of Antarctic Marine Living Resources, *Scheme to Promote Compliance by Contracting Party Vessels with CCAMLR Conservation Measures*, Doc No 10-06, 2016, [18(v)(a)]–[18(v)(b)].

⁷³ *PSMA* (n 21) art 4(1)(b).

relevant coastal states or RFMOs, and to deny the use of port facilities except those essential for the vessel's safety or crew's health and safety.⁷⁴

III PERMISSIBILITY UNDER GENERAL INTERNATIONAL LAW AND LAW OF THE SEA

While the above illustrates the PSMs envisaged and adopted at multilateral, regional and national levels, a significant set of questions remains: whether (and when) PSMs are in fact permitted under general international law and the law of the sea, and what conditions attach to their adoption and implementation. In this context, it has been questioned whether port states may lawfully seek to regulate the conduct of non-nationals beyond national jurisdiction.⁷⁵ While extraterritorial environmental measures are not, as such, prohibited by general international law,⁷⁶ as in all cases, port states must be able to point to a valid base of prescriptive jurisdiction in order to lawfully extend their laws to IUU activities.⁷⁷ Because global fisheries are necessarily of common concern,⁷⁸ and because all *UNCLOS* parties have a duty to cooperate to conserve high sea living resources,⁷⁹ it has been suggested that traditional nationality and territoriality-based conceptions of jurisdiction have been, or should be, displaced.⁸⁰ While an attractive idea, given state practice does not yet support such a paradigm shift, we must find legal bases for port state measures within orthodox approaches to jurisdiction.

As noted earlier, responsibility for fisheries has historically been shared between coastal states (in areas subject to territorial jurisdiction) and flag states

⁷⁴ *Ibid* art 18.

⁷⁵ See, eg, Erik Jaap Molenaar, 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage' (2007) 38(1–2) *Ocean Development and International Law* 225, 229; McDorman (n 19) 312.

⁷⁶ See, eg, André Nollkaemper, 'Rethinking States' Rights to Promote Extra-Territorial Environmental Values' in Friedl Weiss, Erik Denters and Paul de Waart (eds), *International Economic Law with a Human Face* (Kluwer Law International, 1998) 175, 185–7. But see Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press, 2009) 181.

⁷⁷ *SS Lotus (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 19–22 ('*Lotus*'). See also Churchill (n 19) 461–2. There is scope for the argument that damage to marine ecosystems and depletion of fish stocks are inherently of global (and therefore *erga omnes*) concern, even when stocks are not straddling or highly migratory: Kopela (n 72) 91, 112. See also FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours Academie Droit International* 1, 36–7; Nollkaemper (n 76) 192–5; Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights' (2002) 36(2) *Journal of World Trade* 353, 367–9; Jaye Ellis, 'Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns' (2012) 25(1) *Leiden Journal of International Law* 397, 401–4; Thomas Cottier et al, 'The Principle of Common Concern and Climate Change' (2014) 52(3) *Archiv des Völkerrechts* 293.

⁷⁸ See generally Food and Agriculture Organization of the United Nations, *The State of World Fisheries and Aquaculture* (n 2).

⁷⁹ *UNCLOS* (n 10) arts 116–19.

⁸⁰ See Kopela (n 72) 112. In 1992, the Court of Justice of the European Union upheld in principle the confiscation of a catch taken on the high seas by a vessel not flying the flag of an EU Member State: *Anklagemyndigheden v Poulsen* (C-286/90) [1992] ECR I-6019, [28]–[34]. See generally Ronan J Long and Peter A Curran, *Enforcing the Common Fisheries Policy* (Fishing News Books, 2000) 87–91, 128–30; Natalie L Dobson and Cedric Ryngeart, 'Provocative Climate Protection: EU "Extraterritorial" Regulation of Maritime Emissions' (2017) 66(2) *International and Comparative Law Quarterly* 295.

(in areas beyond territorial jurisdiction). Importantly, while *UNCLOS* art 218 permits port states to bring proceedings in respect of violations by foreign-flagged vessels of international rules and standards on discharge pollution occurring on the high seas whenever vessels voluntarily enter port, notably, it does not expressly authorise a port state to exercise prescriptive or enforcement jurisdiction over foreign-flagged vessels' fisheries activities outside its EEZ.⁸¹ According to the *expressio unius est exclusio alterius* maxim, this could mean that no such rights exist in respect of fisheries.⁸² This view is misconceived. Rather, art 218 is merely a treaty-based expression of the general jurisdiction all port states possess under general international law. *UNCLOS*'s silence on port state jurisdiction over fisheries does not imply port states are prohibited from exercising prescriptive or enforcement jurisdiction to this end. Rather, where *UNCLOS* is silent, general international law on jurisdiction continues to operate. We address the extent of this jurisdiction and the conditions attached to its exercise below.

A *Justifying Port States' Exercise of Prescriptive Jurisdiction under General International Law*

Port states may validly exercise prescriptive jurisdiction in respect of IUU fishing in three circumstances, addressed in turn below: (i) when provided by treaty; (ii) when there is a link of nationality; and (iii) when relevant conduct occurs within territorial jurisdiction.

1 *'Pooling' or 'Delegating' Jurisdiction via Treaty*

Treaty-based jurisdiction provides the most straightforward avenue for justifying PSMs and may entitle port states to directly extend their laws to IUU activities in circumstances not otherwise permitted under custom. We can see this as a form of 'pooling' or 'delegation' of jurisdictional competence, whereby third states consent in advance to port states exercising jurisdiction over their vessels, nationals or conduct that occurred in an area subject to their territorial jurisdiction (ie, for fisheries, the territorial sea or EEZ). RFMOs are the clearest example of such jurisdictional delegation. For example, under art 31 of the NEAFC Scheme,

[e]ach Contracting Party shall ensure that the appropriate measures be taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where NEAFC measures have not been respected.⁸³

Likewise, *FSA* art 23(3) permits port states to 'adopt regulations empowering the relevant national authorities to prohibit landings and transshipments' whenever a catch 'has been taken in a manner which undermines the

⁸¹ See *UNCLOS* (n 10) art 218.

⁸² See Serdy (n 23) 425; Churchill (n 19) 463–4.

⁸³ See *NEAFC Scheme* (n 49) art 31. In the same vein, see also *NAFO CEM* (n 31) art 47; General Fisheries Commission for the Mediterranean, *On a Regional Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing Activities in the GFCM Area of Application*, Doc No REC.MCS-GFCM/40/2016/1, 2016, [38].

effectiveness of subregional, regional or global conservation and management measures on the high seas.⁸⁴

There are obvious limits to (purely) treaty-based jurisdiction. The *pacta tertiis* rule (for example, reflected in *Vienna Convention on the Law of Treaties* art 34)⁸⁵ means that the lawfulness of port state action would seem to depend on the port and (especially) the flag state being party to the same instruments. This is particularly important in the context of port states' efforts to address unregulated fishing on the high seas.⁸⁶ In the absence of some residual nationality or territoriality-based connection (addressed below) port states would thus be required to limit prescriptive action to implementing existing RFMO rules and could not lawfully fill regulatory gaps by adopting national legislative measures in the absence of or in excess of RFMO rules.

However, this limitation can be overcome to the extent we read the relevant *UNCLOS* provisions as implying a permissive base for port states to exercise prescriptive jurisdiction over unregulated fishing on the high seas. According to this view, port states could claim an entitlement to prescribe against vessels of another state party to *UNCLOS* which manifestly fails to take measures for the conservation of living resources on the high seas (art 117)⁸⁷ or cooperate with other states to this end (art 118)⁸⁸ — duties that have been inexorably linked with the protection and preservation of the marine environment under arts 192 and 194(2).⁸⁹ Such a situation might arise when vessels engage in fishing activities in high seas areas under no RFMO competence and subject to no effective flag state control and management or when a flag state is neither a member of nor cooperates with the competent RFMO. In both cases, as the conservation of high seas marine living resources would be heavily undermined, port states could, arguably, assert prescriptive jurisdiction over vessels' conduct as a necessary corollary of their rights and duties under the above cited provisions. While undoubtedly a broad interpretation which is not free of criticism, since the above-mentioned provisions were never meant to grant jurisdictional powers vis-à-vis third states' conduct but just to impose duties on states vis-à-vis their own conduct, this approach has many practical benefits and finds support in recent

⁸⁴ *FSA* (n 25) art 23(3).

⁸⁵ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 34.

⁸⁶ See Molenaar (n 75) 233–6. Cf Arron N Honniball, 'The Exclusive Jurisdiction of Flag States: A Limitation on Pro-Active Port States?' (2016) 31(3) *International Journal of Marine and Coastal Law* 499.

⁸⁷ *UNCLOS* (n 10) art 117. Rosemary Rayfuse argues that 'the duty to take conservation measures [under art 117] applies to all states, including flag states, coastal states, port states, landlocked, and non-fishing states': Rosemary Rayfuse, 'Article 117: Duty of States to Adopt with Respect to Their Nationals Measures for the Conservation of the Living Resources of the High Seas' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, 2017) 803, 809.

⁸⁸ *UNCLOS* (n 10) art 118.

⁸⁹ See *SBT PM* (n 11) 295 [70]; *SRFC AO* (n 11) 37 [120]. For discussion of these provisions in relation to port state jurisdiction over activities on the high seas, see König (n 19) 1495.

adjudicative practice.⁹⁰ It remains to be seen if this evolutive interpretation of *UNCLOS* provisions will also find support in state practice and serve as the basis for broader extraterritorial prescription by port states within or beyond the marine conservation context.

2 *Regulating the Conduct of Nationals*

As reflected in the FAO IPOA-IUU,⁹¹ while not strictly attaching to their status as *port* state, it is uncontroversial that states in whose ports vessels seek to land catches or engage in activities in support of fishing practices may lawfully legislate in respect of the conduct of their own nationals, even if such conduct is performed beyond territorial jurisdiction and on a foreign-flagged vessel.⁹² Illustratively in this respect, in 1998, Norway made it a criminal offence for its nationals to breach relevant RFMO rules when fishing on the high seas.⁹³ Spanish legislation similarly requires nationals intending to enlist as masters on foreign-flagged vessels of RFMO non-member states to notify the Spanish General Secretariat for Maritime Fishing.⁹⁴ The *2008 EU IUU Regulation* likewise forbids EU nationals to engage in or support IUU fishing under any flag.⁹⁵ Of course, a national of the port state — whether a natural or legal person — must participate in relevant IUU fishing or fishing-related activities. The latter particularly provides an avenue through which port states may lawfully regulate IUU practices even when capture is itself performed by non-nationals, on foreign-flagged vessels, beyond territorial jurisdiction.

3 *Regulating Activities within Territorial Jurisdiction*

The regulation of conduct performed within territorial jurisdiction provides perhaps the clearest justification for port states' exercises of prescriptive jurisdiction relating to IUU activities performed by non-nationals beyond territorial jurisdiction. It is unproblematic that port states may lawfully exercise prescriptive jurisdiction over conduct occurring within an area subject to territorial jurisdiction — for fisheries, its EEZ, territorial sea, internal waters, archipelagic waters or land territory. This does not mean, however, that a port state can never validly attempt to regulate IUU activities when capture occurs beyond these areas. This results from the important distinction between the

⁹⁰ See, eg, the International Court of Justice's elaboration of the 'no harm' principle, which is closely linked to the right and duty of states to take measures concerning activities that may endanger the conservation of marine living resources: *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 241–2 [29]; *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14, 78 [191], [193]; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Judgment)* [2015] ICJ Rep 665, 706–7 [104].

⁹¹ Food and Agriculture Organization of the United Nations, *International Plan of Action* (n 6) 6 [18]–[19].

⁹² See *ibid* 6 [18]. See also Swan (n 19) 420.

⁹³ *Forskrift om regulering av fiske i farvann utenfor noen stats fiskerijurisdiksjon* (Norway) Decree No 173 of 1998, 4 March 1998, ss 4, 7, discussed in Diane Erceg, 'Deterring IUU Fishing through State Control over Nationals' (2006) 30(2) *Marine Policy* 173, 174.

⁹⁴ *Real decreto 1134/2002, de 31 de octubre, sobre aplicación de sanciones en materia de pesca marítima a españoles enrolados en buques con abanderamiento de conveniencia* (Spain), discussed in Erceg (n 93) 174.

⁹⁵ *2008 EU IUU Regulation* (n 42) art 39.

(lawful) territorial extension of domestic law and the (unlawful) exercise of extraterritorial jurisdiction proper.⁹⁶ Within the former, ‘a measure is triggered by a territorial connection’ but is required ‘as a matter of law, to take into account conduct or circumstances’ occurring outside territorial jurisdiction.⁹⁷ By contrast, measures within the latter category wholly relate to ‘something other than a territorial connection with the regulating state’.⁹⁸ State practice within and beyond ocean governance supports the view that conduct occurring entirely beyond national jurisdiction may be indirectly regulated, provided the direct object of regulation occurs *within* territorial limits.⁹⁹

As such, acts including attempted port entry, or use of facilities and landing, processing, transshipping or marketing catches can lawfully be subjected to regulation by, eg, prohibiting false or incomplete declarations concerning catch methods, locations or timings — even if the port state could not in the circumstances *directly* prescribe rules concerning capture.¹⁰⁰ Similarly, state practice supports the view that port states may lawfully target so-called ‘static conditions’ — relating to a vessel’s design or equipment — rather than ‘non-static conditions’ — relating to a vessel’s or crew’s conduct.¹⁰¹ For present purposes, such conditions would include, eg, fishing gear and the installation and use of VMS. Importantly, by indirectly linking conduct performed within territorial jurisdiction to conduct performed beyond such jurisdiction, port states may lawfully ‘territorialise’ — and thus exercise prescriptive jurisdiction in respect of — the extraterritorial activities of non-nationals.¹⁰²

Despite being widely supported by state practice and scholarly opinion, the above view is potentially undermined by a recent International Tribunal for the Law of the Sea (‘ITLOS’) decision on freedom of navigation. *M/V ‘Norstar’* arose from Italian efforts to address tax fraud by regulating the bunkering (ship-to-ship fuel transfer) of mega-yachts on the high seas.¹⁰³ The (Panamanian-registered) tanker *Norstar* transferred fuel purchased tax free in Italian ports to vessels in areas outside Italy’s territorial waters. Receiving vessels then returned to Italian ports without declaring the bunkering, circumventing customs duties.¹⁰⁴ Among other measures, the *Norstar* was

⁹⁶ See Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62(1) *American Journal of Comparative Law* 87, 91.

⁹⁷ *Ibid* 90.

⁹⁸ *Ibid*.

⁹⁹ See *M/V ‘Norstar’ (Panama v Italy) (Judgment)* (International Tribunal for the Law of the Sea, Case No 25, 10 April 2019) [36] (Judges Cot, Pawlak, Yanai, Hoffman, Kolodkin, Lijnzaad and Judge Ad Hoc Treves) (*‘M/V Norstar’*). See also *Council Regulation No 338/97 of 9 December 1996 on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein* [1997] OJ L 61/1, arts 8, 12, 14, 16.

¹⁰⁰ On the imposition of an ‘unreasonable bond’ with respect to violation of fisheries legislation extending to France’s EEZ, see *Monte Confurco (Seychelles v France) (Judgment)* (International Tribunal for the Law of the Sea, Case No 6, 18 December 2000) [73]–[91].

¹⁰¹ See Bevan Marten, ‘Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation’ in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff, 2015) 105, 106–8. But see Churchill (n 19) 446–7.

¹⁰² See Cedric Ryngaert and Henrik Ringbom, ‘Introduction: Port State Jurisdiction’ (2016) 31(3) *International Journal of Marine and Coastal Law* 379, 384.

¹⁰³ *M/V Norstar* (n 99).

¹⁰⁴ *Ibid* [166]–[169], [178].

subjected to a Decree of Seizure. Panama alleged, inter alia, that Italy's action breached the right of its vessels to freedom of navigation on the high seas.¹⁰⁵ In the Tribunal's view, while also regulating conduct that occurred within its territory — and while enforcement occurred solely in internal waters — Italy's measures had the effect of extending Italy's 'criminal and customs laws extraterritorially to activities of foreign ships on the high seas'.¹⁰⁶ The Tribunal elaborated that regardless of whether such an act, physically or otherwise, impacts the free passage of a vessel on the high seas, 'any act which subjects activities of a foreign ship on the high seas to the jurisdiction of states other than the flag state constitutes a breach of the freedom of navigation' unless expressly provided for in *UNCLOS* or other treaty.¹⁰⁷ This is, to say the least, a rather laboured interpretation of arts 87 and 92, arguably based on a misconstruction of the Italian measures.¹⁰⁸ As well as having far-reaching consequences in other areas, if taken up by other courts and tribunals applying art 87, the Tribunal's approach would have the lamentable effect of reducing the capacity of port states to curb IUU fishing by non-nationals through regulating conduct ancillary to capture unless expressly authorised by *UNCLOS* or another treaty. It is to be hoped the Tribunal's logic will not be followed in future disputes.¹⁰⁹

B Justifying Measures Prior to Entry

The existence of a valid base of prescriptive jurisdiction does not end our inquiry. The extension of domestic law over conduct is generally by enforcement action,¹¹⁰ and the existence of a valid base of prescriptive jurisdiction does not mean that the application of domestic regulations will be lawful in all circumstances.¹¹¹ In these circumstances, we need to separate measures taken prior to entry from those taken after vessels have entered ports.

The lawfulness of measures prior to port entry is contingent upon a state's ability to lawfully condition access to its ports. While *UNCLOS* does not

¹⁰⁵ Ibid [68]. See also *UNCLOS* (n 10) art 87.

¹⁰⁶ *M/V Norstar* (n 99) [226].

¹⁰⁷ Ibid [224] (emphasis added).

¹⁰⁸ See ibid [15] (Judges Cot, Pawlak, Yanai, Hoffman, Kolodkin, Lijnzaad and Judge Ad Hoc Treves); *M/V 'Norstar' (Panama v Italy) (Preliminary Objections)* (International Tribunal for the Law of the Sea, Case No 25, 4 November 2016) [34]–[42] (Judges Wolfrum and Attard). The conclusions reached in these Opinions closely resemble our view presented above. See Richard Collins, 'Delineating the Exclusivity of Flag State Jurisdiction on the High Seas: ITLOS Issues Its Ruling in the M/V "Norstar" Case', *EJIL:Talk!* (Blog Post, 4 June 2019) <<https://www.ejiltalk.org/delineating-the-exclusivity-of-flag-state-jurisdiction-on-the-high-seas-itlos-issues-its-ruling-in-the-m-v-norstar-case/>>, archived at <<https://perma.cc/PZZ6-PY99>>; Vincent P Cogliati-Bantz, 'Freedom of the High Seas and Extent of Coastal State Jurisdiction: Reflections on the Norstar Case' (2020) 5(1) *Cambridge Law Review* 1, 10–11; Cameron Miles, 'The MV "Norstar" Case (Panama v Italy)' (2020) 114(1) *American Journal of International Law* 116, 121–3. See also Douglas Guilfoyle, 'Article 92: Status of Ships' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, 2017) 700.

¹⁰⁹ But see '*Enrica Lexie* Incident (Italy v India) (Award) (Permanent Court of Arbitration, Case No 2015-28, 21 May 2020) [468]; *M/V Norstar* (n 99) [2]–[15] (Judge Kittichaisaree).

¹¹⁰ *M/V 'Virginia G' (Panama v Guinea-Bissau) (Judgment)* (International Tribunal for the Law of the Sea, Case No 19, 14 April 2014) [217], [264] ('*M/V Virginia G*').

¹¹¹ See, eg, *Duzgit Integrity Arbitration (Malta v São Tomé and Príncipe) (Award)* (Permanent Court of Arbitration, Case No 2014-07, 5 September 2016) [210] ('*Duzgit Integrity*'); *M/V Virginia G* (n 110) [268].

expressly recognise states' right to control access to ports, this necessarily follows from the fact that coastal states enjoy full sovereignty over the territorial sea and internal waters and thus the ports that lie within these areas.¹¹² Like any other part of its territory, according to general international law, all states are entitled to regulate — ie to condition or deny — access to ports. Importantly, neither general international law nor the law of the sea grants vessels a general right of access to foreign ports.¹¹³ Despite the *Saudi Arabia v Arabian American Oil Co Arbitration* tribunal's (we argue) inaccurate dictum that '[a]ccording to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interest of the State so require',¹¹⁴ the International Court of Justice,¹¹⁵ and most scholars,¹¹⁶ consider there is no general right of free access to foreign ports and that states may 'deny entry to their ports at will'.¹¹⁷

A necessary implication of a state's general right to deny access to its ports is that it may also make access conditional. This view is supported by the recognition in *UNCLOS* art 25(2) that a coastal state may take all 'necessary steps to prevent any breach of the conditions to which admission of [ships attempting to call at a port or enter internal waters] is subject'.¹¹⁸ It is implicit in art 25(2) that a vessel may be denied entry if it does not meet such conditions. A vessel attempting to breach port entry conditions would thus be engaged in non-innocent passage.¹¹⁹ States are at liberty to set the conditions of access and the information that vessels must provide when requesting authorisation for entry. In this context, annex A *PSMA* provides (only) an indication of what is considered international best practice: parties may request information on, inter alia, estimated date of arrival, last port of call, vessel ownership, registry ID, the name and nationality of a vessel's master, relevant national or RFMO authorisations and catch details.¹²⁰

¹¹² See *UNCLOS* (n 10) arts 2(1), 8(1); *M/V Norstar* (n 99) [221].

¹¹³ But see Molenaar (n 75) 226.

¹¹⁴ *Saudi Arabia v Arabian American Oil Company (Award)* (1958) 27 ILR 117, 212, citing Paul Guggenheim, *Traité de Droit international public: Avec mention de la pratique internationale et suisse* (Librairie de l'Université, Georg & Cie SA, 1953) vol 1, 419.

¹¹⁵ According to the Court, the 'basic legal concept of state sovereignty in customary international law, ... extends to the internal waters and territorial sea of every state ... It is also by virtue of its sovereignty that the coastal state may regulate access to its ports': *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, [212]–[213].

¹¹⁶ See, eg, Robin Churchill and A Vaughan Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 63; DP O'Connell and IA Shearer, *The International Law of the Sea: Volume II* (Oxford University Press, 1988) vol II, 848; George C Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port State Regime* (Brill Nijhoff, 1993) 22; Vasilios Tasikas, 'The Regime of Maritime Port Access: A Relook at Contemporary International and United States Law' (2007) 5 *Loyola Maritime Law Journal* 1, 4–5. Cf Charles Rousseau, *Droit International Public* (Recueil Sirey, 1953) 431.

¹¹⁷ Louise de La Fayette, 'Access to Ports in International Law' (1996) 11(1) *International Journal of Marine and Coastal Law* 1, 12; AV Lowe, 'The Right of Entry into Maritime Ports in International Law' (1976–77) 14(3) *San Diego Law Review* 597, 619. Cf Molenaar (n 75) 229; McDorman (n 19) 312.

¹¹⁸ *UNCLOS* (n 10) art 25(2).

¹¹⁹ See Richard A Barnes, 'Article 25: Rights of Protection of the Coastal State' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, 2017) 222, 225.

¹²⁰ *PSMA* (n 21) annex A.

Further, it follows as a matter of logic that conditioning entry can involve limiting access to designated ports. Given designation is widespread — not only in the fisheries protection context — such a right is clearly supported by state practice.¹²¹ Port states may thus lawfully prescribe and enforce conditions for port entry.¹²² While states can be seen to be exercising enforcement jurisdiction even when no physical interference with a vessel occurs, such as in the communication of a decision to deny entry, as shown above, nothing precludes such conditions linking to activities performed by non-nationals beyond territorial jurisdiction; states conditioning or denying entry are not as such regulating activities beyond territorial jurisdiction because the direct object of regulation — attempted port entry — occurs *within* territorial jurisdiction.¹²³

States' freedom to condition or deny port entry is, however, subject to two important limitations. First, states can (and do) assume treaty obligations guaranteeing other states' vessels access. This is a common feature, for example, of 'legacy' friendship, commerce and navigation ('FCN') treaties. While the circumstances in which access must be granted necessarily vary from treaty to treaty, relevant provisions often contain duties of national and most-favoured nation treatment.¹²⁴ Importantly for present purposes, fishing vessels are often excluded from the categories of vessels entitled to liberty of port entry.¹²⁵ As Andrew Serdy rightly notes however, where they are not, such obligations impose limits on port states' freedom to restrict access.¹²⁶ States may also assume treaty obligations that less directly limit their capacity to condition port access, eg, in trade and investment agreements.¹²⁷

Second, custom obliges coastal states to permit vessels in distress or situations of force majeure to access a port, offshore terminal or other place of refuge.¹²⁸ Distress must be 'something of a grave necessity',¹²⁹ and '[t]he necessity must

¹²¹ Lowe (n 117) 606. This practice is, for example, reflected in *PSMA* (n 21) art 7. We address the trade law implications of prior designation in Part IV below.

¹²² See, eg, *PSMA* (n 21) art 8, annex A.

¹²³ See above text to nn 99–103. See also Bevan Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer, 2014) 130; Kopela (n 72) 94–5.

¹²⁴ See, eg, *Treaty of Friendship, Commerce and Navigation (with Protocol and Exchange of Notes)*, Netherlands–United States, signed 27 March 1956, 285 UNTS 231 (entered into force 5 December 1957) art XIX(2): 'Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation.' See also *Convention and Statute on the International Régime of Maritime Ports and Protocol of Signature*, signed 9 December 1923, 58 LNTS 285 (entered into force 26 July 1926) arts 2–3 ('1923 Maritime Ports Convention').

¹²⁵ See, eg, *1923 Maritime Ports Convention* (n 124) art 14; *Treaty of Friendship, Commerce and Navigation (with Protocol)*, United States–Nicaragua, signed 21 January 1956, 367 UNTS 3 (entered into force 24 May 1958) art XIX(6).

¹²⁶ Serdy (n 23) 430–2.

¹²⁷ The WTO Agreements are considered in Part IV below. While still underexplored, the potential for conflict with bilateral and multilateral trade and investment agreements is beyond this article's scope.

¹²⁸ See Molenaar (n 75) 227–8. Both force majeure and distress are circumstances precluding wrongfulness under the law of state responsibility: International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (23 April – 1 June and 2 July – 10 August 2001) ch IV(E)(2) ('Draft Articles on Responsibility of States for Internationally Wrongful Act with Commentaries') arts 23–4 ('ARSIWA').

¹²⁹ *The Eleanor*, Edwards 135, 161 (1809).

be urgent, and proceed from such a state of things as may be supposed to produce on the mind of a skilful mariner, a well-grounded apprehension of the loss of vessel and cargo, or of the lives of the crew'.¹³⁰ The *International Convention on Maritime Search and Rescue*, defines distress as a 'situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance'.¹³¹ The coastal state is not obliged to grant access if the life of persons on board a vessel is no longer at risk: 'If safety of life is not a factor, then there is a widely recognised practice among maritime states to have proper regard to their own interests and those of their citizens in deciding whether or not to accede' to a request for refuge.¹³² It is thus within the coastal state's purview to assess whether a genuine situation of distress exists and, if not, to deny access.

Finally, it must be stressed that, while the customary principle of *abus de droit* (reflected eg in *UNCLOS* art 300) conditions port states' freedom to deny access and implies entry requirements must be promulgated in good faith and not disproportionately affect other states' rights,¹³³ given there is no general *right* of port entry, the onus would be on a complaining state to show some other customary or treaty-based right is infringed, or requirements were applied *mala fide*.¹³⁴

C *Justifying In-Port Measures*

While all states' sovereign right to regulate access to territory entitles port states to prescribe and enforce measures prior to entry, new considerations arise once a vessel has entered port. Because a port state must be able to point to a valid base of enforcement jurisdiction justifying measures directly targeting activities performed beyond territorial jurisdiction,¹³⁵ as Henrik Ringbom notes, it can be easier 'for a state to defend its right to refuse entry to its ports' than to find a legal basis for enforcing fisheries regulations 'once the ship has actually entered'.¹³⁶ As already shown, enforcement measures directly regulating IUU activities will be lawful when provided for by treaty, when relevant conduct is performed by nationals or occurs in areas subject to territorial jurisdiction, or (absent such links) with the flag or coastal states' ad hoc consent. Below we consider the avenues for justifying (i) inspections and denying use of facilities; and (ii) sanctions.

¹³⁰ *The New York*, 16 US (3 Wheat) 59, 68 (1818).

¹³¹ *International Convention on Maritime Search and Rescue, 1979 (with Annex)*, opened for signature 27 April 1979, 1405 UNTS 97 (entered into force 22 June 1985) annex para 1.3.11.

¹³² See, eg, the Irish High Court of Admiralty's decision in *ACT Shipping (PTE) Ltd v Minister for the Marine* [1995] 2 ILRM 30, 48.

¹³³ Kopela (n 72) 95. See also Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2nd ed, 2015) 160–1.

¹³⁴ Lowe (n 117) 621.

¹³⁵ *Lotus* (n 77) 18–19; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, 35–7 [4] (President Guillaume).

¹³⁶ Henrik Ringbom, 'Global Problem — Regional Solution? International Law Reflections on an EU CO₂ Emissions Trading Scheme for Ships' (2011) 26(4) *International Journal of Marine and Coastal Law* 613, 627.

1 Inspections and Denial of Use of Facilities

Routine in-port inspection is fundamental to the effectiveness of all fisheries conservation and management rules, especially those addressing IUU fishing. As already shown, there is no doubt that by virtue of its territorial jurisdiction within internal waters, a port state may lawfully inspect fishing vessels voluntarily in port in order to apply national, regional and global management and conservation measures. This view is supported, *inter alia*, by the *FAO Compliance Agreement* and the *FAO Code of Conduct*,¹³⁷ and is expressly acknowledged in the *FSA* and *PSMA*.¹³⁸ This right is, naturally, limited by the port state's relevant treaty obligations and by the residual operation of general international law.

Concerning the latter, according to recent adjudicative practice relating to coastal states' exercise of enforcement jurisdiction, all enforcement actions are subject to the 'principle of reasonableness'. While the precise content and source of this 'principle' remain somewhat unclear,¹³⁹ if we accept the *UNCLOS* annex VII tribunal's logic in *Duzgit Integrity Arbitration*, all enforcement actions must be necessary and proportionate to their aims.¹⁴⁰ As such, certain minimum standards of substantive and procedural fairness attach to in-port inspections. While inspection might generally be considered a necessary and proportionate means of monitoring and preventing IUU activities, compliance with these requirements must be assessed *ad hoc* and might require port states taking active steps to ensure respect for crews' human rights, avoiding undue delays and accounting for environmental or commercial concerns.

Illustratively, *PSMA* parties must take several such precautions during inspection. Inspections must be carried out by properly qualified persons presenting a vessel's master with valid identity documents. Inspectors must actively avoid delay, ensure that vessels suffer minimum interference and inconvenience and must prevent degradation of the catch. Whenever required, inspectors must be accompanied by an interpreter. Port states must not conduct inspections in a manner constituting harassment.¹⁴¹ After inspection, port states must furnish masters with inspection results, allow for a response to its findings and permit contact with the relevant authorities of the flag state if masters require assistance in understanding the report.¹⁴² Flag states must be notified, especially if inspection results in suspicion of IUU activities.¹⁴³

In addition to the right to inspect, state, RFMO and FAO practice clearly support the view that port states may also lawfully take further steps to ensure

¹³⁷ See *FAO Compliance Agreement* (n 24) art V(2); *FAO Code of Conduct* (n 26) art 8(3).

¹³⁸ See *FSA* (n 25) arts 23(1), (2), (4); *PSMA* (n 21) art 4(1)(b).

¹³⁹ For further analysis, see James Harrison, 'Patrolling the Boundaries of Coastal State Enforcement Powers: The Interpretation and Application of *UNCLOS* Safeguards Relating to the Arrest of Foreign-Flagged Ships' (2018) 42(1) *L'Observateur des Nations Unies* 117.

¹⁴⁰ *Duzgit Integrity* (n 111) [209], citing *Arctic Sunrise Arbitration (Netherlands v Russia) (Award on Merits)* (Permanent Court of Arbitration, Case No 2014-02, 14 August 2015) [222], [326] ('*Arctic Sunrise*'); *M/V 'Saiga' (Saint Vincent and the Grenadines v Guinea) (Judgment)* (International Tribunal on the Law of the Sea, Case No 2, 1 July 1999). See also *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment)* [2009] ICJ Rep 213, 249–50 [87].

¹⁴¹ *PSMA* (n 21) annex B art 13.

¹⁴² *Ibid*; *Model Scheme* (n 27) art 3.

¹⁴³ *PSMA* (n 21) art 15.

the effectiveness of national, regional and global conservation and management measures, including by setting conditions on the use of port facilities for, inter alia, landing, transshipping, packaging or processing catches, or resupplying, refuelling, repairing or maintaining vessels.¹⁴⁴ Numerous RFMOs permit or require contracting parties to do so, including against vessels flagged to non-contracting parties.¹⁴⁵ The limits already discussed — deriving from states' treaty obligations and general international law — apply. Perhaps more significantly, according to the 'reasonableness' test employed in recent case law,¹⁴⁶ port states would only be justified in restricting use of facilities if this was a 'necessary' and 'proportionate' response — eg where inspection reveals clear grounds for suspecting a vessel has engaged in IUU activities.

2 *Sanctions*

As an exercise of enforcement jurisdiction, the imposition of sanctions on vessels or crew depends on the existence of a jurisdictional nexus between the port state and proscribed conduct. This will generally be unproblematic if relevant conduct is performed within territorial jurisdiction, by or on a vessel flagged to the port state, or by the port state's nationals. Likewise, port states may exercise jurisdiction 'delegated' by a flag or coastal state by treaty or on an ad hoc basis. It must be noted that whereas *FSA* and *PSMA* parties are expressly permitted to adopt measures prior to entry, inspect vessels and deny use of facilities,¹⁴⁷ these agreements do not expressly empower parties to take direct enforcement action over activities performed on the high seas. Neither, in other words, expressly 'pools' delegated enforcement jurisdiction. However, this fact does not mean that the *FSA* and *PSMA* preclude the adoption of enforcement measures targeting the activities of foreign-flagged vessels beyond territorial jurisdiction. Rather, it simply means the lawfulness of such measures must be assessed with reference to general international law and any of the concerned states' treaty obligations.¹⁴⁸ State and RFMO practice supports this conclusion.¹⁴⁹

Absent a delegation of jurisdiction, for a port state to lawfully take enforcement action, proscribed conduct must have occurred in its territory. If, for example, capture or bunkering occurs *outside* its EEZ, a port state may

¹⁴⁴ See, eg, *PSMA* (n 21) art 18(1)(b); *FSA* (n 25) arts 23(3); *Paris Memorandum of Understanding on Port State Control*, signed 26 January 1982, (1982) 21 ILM 1 (entered into force 1 July 1982) art (4) ('*Paris MOU*'). See also Erik Jaap Molenaar, 'The EC Directive on Port State Control in Context' (1996) 11(2) *International Journal of Marine and Coastal Law* 241, 245; Ted L McDorman, 'Regional Port State Control Agreements: Some Issues of International Law' (2000) 5(2) *Ocean and Coastal Law Journal* 207.

¹⁴⁵ See eg, *IATTC Resolution C-13-01* (n 65); *NEAFC Scheme* (n 49) art 23; *NAFO CEM* (n 31) art 43; Commission for the Conservation of Antarctic Marine Living Resources, *Port Inspections of Fishing Vessels Carrying Antarctic Marine Living Resources*, Doc No 10-03, 2019, [7].

¹⁴⁶ See above n 140 and accompanying text.

¹⁴⁷ *FSA* (n 25) art 23; *PSMA* (n 21) arts 8–11, 18.

¹⁴⁸ See *FSA* (n 25) art 23(4); *PSMA* (n 21) art 4(1)(b). See also Kopela (n 72) 98.

¹⁴⁹ See, eg, International Commission for the Conservation of Atlantic Tunas, *Recommendation by ICCAT on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Doc No 18-09, 21 June 2019, [35]; *NEAFC Scheme* (n 49) art 31; *2008 EU IUU Regulation* (n 42) art 11(4); *PNG Fisheries Management Act* (n 20) s 66.

nevertheless lawfully sanction any ancillary acts occurring within its territory, including the possession, landing, processing or transshipment of catches, or the failure to present or falsification of documents. Perhaps more tenuously, a port state might also justify its (otherwise excessive) exercise of enforcement jurisdiction as a lawful countermeasure responding to a flag or coastal state's prior breach of, eg, its conservation, management and supervision obligations.¹⁵⁰ Of course, this argument would depend on the port state satisfying the conditions of *Articles on Responsibility of States for Internationally Wrongful Acts* arts 49–53, including commensurability.¹⁵¹ It must be observed that the above and the comparative effectiveness of measures prior to entry mean that there is only limited state practice of (especially unilateral) post-entry enforcement.¹⁵²

However, according to the reasonableness requirement emerging in recent case law, whenever port states elect to sanction vessels, crews, owners or operators, such sanctions must be both necessary and proportionate to their aims.¹⁵³ While necessarily context-dependent, at a minimum it requires balance between the severity of an infringement and the punishment.¹⁵⁴ It is also likely that this standard would be informed by elementary rule of law considerations — what in other contexts is known as the ‘the legality principle’ — requiring port states to have subjected conduct to civil or criminal penalties under domestic law.¹⁵⁵ In the light of the limited state practice referred to, it remains to be seen, however, how this standard might be applied in practice.

Finally, an issue applying to all in-port measures deserves attention; given the lawfulness of asserting territorial jurisdiction over foreign vessels is often said to hinge on their *voluntary* presence in port,¹⁵⁶ the question arises whether port states may lawfully inspect vessels, deny the use of facilities or impose sanctions when vessels are in port *involuntarily* — ie, due to a situation of force majeure or distress. While force majeure and distress only preclude the wrongfulness of state conduct,¹⁵⁷ applying a similar *ratio juris*, it might plausibly be argued that port states cannot lawfully take enforcement action over a vessel's entry and presence in port. This would preclude, for example, the application of rules prescribing advance notification or documentation — and territorial offences built upon these entry requirements. The preferable view, however, is that port states may lawfully take enforcement action against vessels in respect of conduct that occurred prior to the vessel's entry and prior to the situation of force majeure

¹⁵⁰ Exploring this somewhat controversial notion: see Kimberley N Trapp, ‘Jurisdiction and State Responsibility’ in Stephen Allen et al (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press, 2019) 356, 363; Daniel Franchini, ‘Jurisdictional Countermeasures: The Use of Jurisdiction and Immunity for the Implementation of State Responsibility’ (DPhil Thesis, University of Oxford, 2020) (on file with authors).

¹⁵¹ See especially *ARSIWA* (n 128) arts 51–3 and accompanying commentary.

¹⁵² Molenaar (n 75) 234–5.

¹⁵³ See above nn 142–143 and accompanying text.

¹⁵⁴ See, eg, *Arctic Sunrise* (n 140) [197], [225]–[235]. The approach taken here is not uncontroversial.

¹⁵⁵ See Churchill (n 19) 446.

¹⁵⁶ See, eg, *FSA* (n 25) art 23(2); *NAFO CEM* (n 31) art 51(2)(d); *NEAFC Scheme* (n 49) arts 25(2), (6).

¹⁵⁷ See above n 133 and accompanying text.

or distress which compelled its territorial presence.¹⁵⁸ This would be the case, eg, if a jurisdictional link existed and there was evidence that a vessel had previously fished unlawfully in the port state's EEZ, in another coastal state's EEZ or in breach of RFMO rules on the high seas. Questions of comity will, however, often discourage enforcement in such cases.¹⁵⁹ It seems to follow that port states would also only be obliged to permit access to port services essential to the crew's health and safety and the safety of the vessel, and not to permit, eg, landing, processing or transshipment.¹⁶⁰

IV PERMISSIBILITY UNDER INTERNATIONAL TRADE LAW

Even if PSMs are lawful under general international law and law of the sea and a port state's exercise of jurisdiction in the circumstances remains within the bounds these rules set, their trade-restrictive effects nevertheless raise important questions concerning PSMs' compatibility with international trade law — both WTO law and states' obligations under preferential trade agreements. By limiting access to markets and preventing products from entering supply chains, PSMs present powerful means of tackling IUU fishing. But as the *Chile — Measures Affecting the Transit and Importation of Swordfish* ('*Chile — Swordfish*') and *European Union — Measures on Atlanto-Scandian Herring* ('*EU — Herring*') disputes illustrate, they can also generate tensions in trade relations.¹⁶¹ Illustratively, in *Chile — Swordfish*, the European Community invoked the *GATT* to challenge Chile closing its ports to Spanish vessels attempting to land swordfish caught on the high seas.¹⁶² Similarly, in *EU — Herring*, Denmark (for the Faroe Islands) challenged EU import bans on herring and mackerel caught in Faroese waters and the EU closing ports to vessels capturing those species under Faroese licenses. Given neither challenge reached a panel, we lack clear answers to the many questions these disputes generated. It is not our ambition here to dissect all the issues raised by certain states' measures under global or regional trade rules.¹⁶³ Rather, this Part shows that PSMs will generally infringe at least one WTO discipline concerning trade in goods,

¹⁵⁸ Cf *Anklagemyndigheden v Poulsen* (n 80) 6046 (Advocate General Tesouro).

¹⁵⁹ See, eg, *Churchill and Lowe* (n 116) 68.

¹⁶⁰ See *PSMA* (n 21) arts 10, 11(2)(a), 18(2).

¹⁶¹ See *Chile — Measures Affecting the Transit and Importation of Swordfish*, WTO Docs WT/DS193/1 and G/L/367 (26 April 2000) (Request for Consultations by the European Communities) ('*Chile — Swordfish*'); *European Union — Measures on Atlanto-Scandian Herring*, WTO Docs WT/DS469/1 and G/L/1058 (7 November 2013) (Request for Consultations by Denmark in Respect of the Faroe Islands) ('*EU — Herring*').

¹⁶² Chile in turn filed an application under *UNCLOS* (n 10), and an ITLOS special chamber was established: see *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v European Union)* (Order of 20 December 2000) (International Tribunal for the Law of the Sea, Case No 7, 20 December 2000). Both sets of proceedings were settled prior to merits determination. See also Marcos A Orellana, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71(1) *Nordic Journal of International Law* 55; Yoshimichi Ishikawa, 'The EU-Faroe Islands Herring Stock Dispute at the WTO: The Environmental Justification' (2014) 18(4) *ASIL Insights*.

¹⁶³ See generally Margaret A Young, 'International Trade Law Compatibility of Market-Related Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing' (2016) 69 *Marine Policy* 209; Margaret A Young, 'Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues' (2014) 23(3) *Review of European, Comparative and International Environmental Law* 302.

notably the *GATT*'s prohibition on quantitative restrictions (Section A), duty to afford freedom of transit (Section B), duty to afford most-favoured nation ('MFN') treatment (Section C), and/or publication and fair administration obligations (Section D). As explored in Section F, port states must therefore design and apply measures to fall within a *GATT* general exception — or risk the WTO Dispute Settlement Body determining that measures breach WTO rules and, ultimately, authorising retaliation.

A *Prohibition on Quantitative Restrictions*

Article XI(1) of the *GATT* prohibits WTO members from instituting or maintaining any 'prohibitions or restrictions other than duties, taxes or other charges' on the importation or exportation of any product, 'whether made effective through quotas, import or export licences or other measures'. Given we tend not to think of fishermen as 'traders', one might reasonably question whether measures aimed at IUU fishing concern the cross-border supply of goods. As a general matter, WTO law largely leaves the determination of products' (legal) origin to WTO members.¹⁶⁴ In respect of wild-caught fisheries products, many members regard fish caught within the territorial sea as originating solely 'wholly obtained' in the coastal state — irrespective of the capturing vessel's flag or ownership — whereas fish captured outside the territorial sea will generally be deemed to originate in the capturing vessel's flag state.¹⁶⁵ Rules of origin matter for, eg, the application of tariffs and sanitary and phytosanitary measures, but also help indicate when fisheries products are deemed to cross a border — an important threshold issue, given 'importation' within art XI includes any cross-border transfer of products intended for sale in the receiving state.¹⁶⁶ A nascent importation thus exists whenever vessels intend to land and market catches in a foreign port, when products do not originate in the port state. While considerations sometimes overlap, the process of determining products' origin for customs and regulatory purposes is logically separate from the rules of general international law on jurisdiction considered above.

It is also not determinative that most PSMs do not directly prohibit the importation of fisheries products, but rather target vessels and individuals engaged in IUU fishing or related activities. WTO panels and the Appellate Body ('AB') interpreting art XI have repeatedly held that 'restriction' covers

¹⁶⁴ The *Agreement on Rules of Origin* provides only a broad framework: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Rules of Origin*') arts 3–7.

¹⁶⁵ See, eg, *Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 Supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as Regards Detailed Rules concerning Certain Provisions of the Union Customs Code* [2015] OJ L 343/1, arts 31(e), 31(f), 60(4); *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part* [2021] OJ L 149/10, arts 41(1)(f), (h), (j).

¹⁶⁶ See, eg, Panel Report, *United States — Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS/381/R (15 September 2011) [7.228], [7.230].

both de jure and de facto limitations.¹⁶⁷ Obviously, bans on the importation of fisheries products — provided, eg, by EU and US regulations — will constitute quantitative restrictions.¹⁶⁸ But so too will any measure that negatively affects products' 'opportunities for importation'.¹⁶⁹ This has been found, inter alia, when measures limited market access,¹⁷⁰ created uncertainties for would-be importers¹⁷¹ or when importation became prohibitively costly.¹⁷² Further, it need not be established that trade flows were actually impacted, merely that measures could potentially adversely affect the conditions of importation.¹⁷³

Any measure that dis-incentivises imports may therefore constitute a quantitative restriction.¹⁷⁴ As such, denying landing — through an import ban or restricting port access or use of facilities — will likely be considered an in principle impermissible quantitative restriction. So too will prior designation rules if their likely effect is to restrict market access, including by raising the cost

¹⁶⁷ See, eg, GATT Panel Report, *Japan — Trade in Semi-Conductors*, GATT Doc L/6309–35S/116 (24 March 1988, adopted 4 May 1988) [104]; Panel Report, *Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WTO Doc WT/DS155/R (19 December 2000) [11.17] ('*Argentina — Hides and Leather*'); Panel Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/R (12 June 2007) [7.9]–[7.34] ('*Brazil — Retreaded Tyres*'). The Appellate Body has held that any measure with a 'limiting effect on the quantity or amount of a product being imported or exported' constitutes a 'restriction': Appellate Body Reports, *China — Measures Related to the Exportation of Various Raw Materials*, WTO Docs WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R (30 January 2012) [320] ('*China — Raw Materials*').

¹⁶⁸ See, eg, *EU IUU Regulation* (n 42) art 18; 21 USC §123.12(F)(d) (2020).

¹⁶⁹ Panel Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, WTO Doc WT/DS302/R (26 November 2004) [7.261]. See also Panel Report, *Colombia — Indicative Prices and Restrictions on Ports of Entry*, WTO Doc WT/DS366/R (27 April 2009) [7.240] ('*Colombia — Ports of Entry*'); Panel Report, *India — Measures Affecting the Automotive Sector*, WTO Docs WT/DS146/R and WT/DS175/R (21 December 2001) [7.269]–[7.270]; Panel Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc WT/DS90/R (6 April 1999) [5.128]–[5.129].

¹⁷⁰ See Panel Reports, *Argentina — Measures Affecting the Importation of Goods*, WTO Docs WT/DS438/R, WT/DS444/R and WT/DS445/R (22 August 2014) [6.453]–[6.454] ('*Argentina — Import Measures*'); Panel Report, *Colombia — Ports of Entry*, WTO Doc WT/DS366/R (n 169) [7.275]; GATT Panel Report, *Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, GATT Doc L/6304–35S/37 (5 February 1988, adopted 22 March 1988) [4.24]–[4.25]; GATT Panel Report, *Canada — Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, GATT Doc DS17/R–39S/27 (16 October 1991, adopted 18 February 1992) [4.9].

¹⁷¹ Panel Report, *Argentina — Import Measures*, WTO Docs WT/DS438/R, WT/DS444/R and WT/DS445/R (n 170) [6.453]–[6.454]; Panel Reports, *China — Measures Related to the Exportation of Various Raw Materials*, WTO Docs WT/DS394/R, WT/DS395/R and WT/DS398/R (5 July 2011) [7.948], [7.957] ('*China — Raw Materials*').

¹⁷² Panel Report, *Argentina — Import Measures*, WTO Docs WT/DS438/R, WT/DS444/R and WT/DS445/R (n 170) [6.453]–[6.454]; Panel Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/R (n 167) [7.370]–[7.372].

¹⁷³ See especially Panel Report, *Colombia — Ports of Entry*, WTO Doc WT/DS366/R (n 169) [7.240], [7.252]–[7.253]. But see Panel Report, *Argentina — Hides and Leather*, WTO Doc WT/DS155/R (n 167) [11.49]–[11.55]; Panel Report, *Indonesia — Measures concerning the Importation of Chicken Meat and Chicken Products*, WTO Doc WT/DS484/R (17 October 2017) [7.609]–[7.610].

¹⁷⁴ See also Panel Report, *Argentina — Import Measures*, WTO Docs WT/DS438/R, WT/DS444/R and WT/DS445/R (n 170) [6.453]–[6.458]; Appellate Body Reports, *Argentina — Measures Affecting the Importation of Goods*, WTO Docs WT/DS438/AB/R, WT/DS444/AB/R and WT/DS445/AB/R (15 January 2015) [5.272]–[5.288], which endorsed the Panel's approach.

of importation.¹⁷⁵ While much depends on their design and implementation, certification and inspection regulations and practices may also constitute de facto quantitative restrictions — especially if measures are deemed to be designed or applied in a non-transparent or overly complex manner, or if delays generate significant costs.

B Freedom of Transit

PSMs may breach trade disciplines even if a catch is not intended for market in the port state. *GATT* art V(2) requires WTO members to ensure free movement through their territories of goods in transit to or from another member ‘via the routes most convenient’ and without distinction ‘based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport’.¹⁷⁶ Goods are considered ‘in transit’ whenever movement through a state’s territory ‘is only a portion of a complete journey beginning and terminating’ outside the state’s borders.¹⁷⁷ Members may impose ‘reasonable’ ‘regulations’ on goods in transit, provided transit goods from all members are afforded equally favourable treatment.¹⁷⁸ Finally, while port states are permitted, pursuant to *GATT* art V(3), to conduct customs checks on goods in transit, these may not result in ‘unnecessary delays or restrictions’ and any fees levied must be commensurate to their actual cost or be charges for transportation.¹⁷⁹

While art V has only been elaborated in two WTO disputes to date, existing decisions suggest that measures’ practical effect is the determining factor. For example, the *Colombia — Ports of Entry* panel stated that ‘freedom of transit’ requires members to extend ‘unrestricted access via the most convenient routes for the passage of goods’.¹⁸⁰ Similarly, the *Russia — Measures concerning Traffic in Transit* panel considered that absolute or conditional prohibitions on goods’ entry, and measures that distinguish conditions of access based on goods’ countries of departure, destination or origin will be inconsistent with *GATT* art V(2).¹⁸¹ Thus, all measures that (de facto) restrict entry or exit from territory when goods are destined for a third member will be considered inconsistent with art V(2). The full range of factors relevant in assessing a route’s ‘convenience’ have yet to be explored and will depend on geography and the particularities of supply chains. We can draw some guidance from *Colombia — Ports of Entry*, however, in which the panel concluded that by requiring goods originating in

¹⁷⁵ The Panel considered that Colombia’s designation of certain (air and maritime) ports for textiles imports constituted a restriction within the meaning of art XI(1): Panel Report, *Colombia — Ports of Entry*, WTO Doc WT/DS366/R (n 169) [7.275]. See also the EC’s arguments in *Chile — Swordfish*, WTO Docs WT/DS193/1 and G/L/367 (n 161) and Denmark’s arguments in *EU — Herring*, WTO Docs WT/DS469/1 and G/L/1058 (n 161).

¹⁷⁶ *GATT* (n 22) art V(2).

¹⁷⁷ *Ibid* art V(1).

¹⁷⁸ *Ibid* arts V(4)–(5).

¹⁷⁹ *Ibid* art V(3).

¹⁸⁰ Panel Report, *Colombia — Ports of Entry*, WTO Doc WT/DS366/R (n 169) [7.401].

¹⁸¹ Panel Report, *Russia — Measures concerning Traffic in Transit*, WTO Doc WT/DS512/R (5 April 2019) [7.183], [7.196] (*‘Russia — Traffic in Transit’*).

Panama to be transhipped, Colombia had ‘failed to extend freedom of transit via the most convenient routes’.¹⁸²

Adapting these approaches to port state measures, whenever part of a catch is intended for sale outside a port state, port designation requirements would breach the duty to afford freedom of transit if the ports designated, for example, lack proximity to transit infrastructure including port facilities, airports or rail or road links, or because they are remote from fishing grounds vis-à-vis other potential ports of entry. Denying entry, landing, warehousing or processing, or the use of internal or territorial waters for transshipment (for example from fishing vessels to ‘reefers’), would similarly likely be considered restrictions on transit. Likewise, whenever problem vessels are identified by flag, ownership or origin (ie, suspected presence in fishing grounds), measures will also likely be deemed contrary to the non-discrimination component in the second sentence of art V(2) and the MFN obligation in art V(5),¹⁸³ which require that ‘goods from all Members’ be afforded ‘an identical level of access and equal conditions when proceeding in international transit’.¹⁸⁴

As noted, art V(4) permits members to subject traffic in transit to ‘regulations’, provided these are ‘reasonable, having regard to the conditions of the traffic’.¹⁸⁵ These terms’ meaning and operation have not yet been elaborated in WTO dispute settlement. When read in context, however, it seems that ‘regulations’ refers to any customs formalities imposed on goods in transit.¹⁸⁶ While it remains to be seen how a panel, the AB or an arbitral tribunal might approach this issue, it seems unlikely that the bounds of these terms can be stretched to permit regulations aimed, for example, at goods’ production and processing methods (such as capture of fisheries products) or other conduct of vessels, crews or owners unrelated to the mode or conditions of transit or transshipment.¹⁸⁷

C *Most-Favoured Nation Treatment*

By distinguishing between products based on their country of origin, flag-based measures will likely run afoul of WTO members’ duty to afford MFN treatment. Article I(1) of the *GATT* requires that ‘with respect to all rules and formalities in connection with importation’ and all internal taxes and regulations, WTO members must grant ‘any advantage, favour, privilege or immunity ... to any product originating in or destined for any other country’ to all ‘like product[s] ... originating in or destined for the territories of all other contracting

¹⁸² Panel Report, *Colombia — Ports of Entry*, WTO Doc WT/DS366/R (n 169) [7.423]. See also at [7.368]–[7.414].

¹⁸³ *GATT* (n 22) arts V(2), (5).

¹⁸⁴ Panel Report, *Colombia — Ports of Entry*, WTO Doc WT/DS366/R (n 169) [7.402]. It is noteworthy that allegations of inconsistency with art V were central to the complaints in *Chile — Swordfish*, WTO Docs WT/DS193/1 and G/L/367 (n 161) and *EU — Herring*, WTO Docs WT/DS469/1 and G/L/1058 (n 161).

¹⁸⁵ *GATT* (n 22) art V(4).

¹⁸⁶ This is based especially on the text of *GATT* (n 22) arts V(3), (5).

¹⁸⁷ See generally Vitaliy Pogoretsky, ‘Freedom of Transit and the Principles of Effective Right and Economic Cooperation: Can Systemic Interpretation of GATT Article V Promote Energy Security and the Development of an International Gas Market?’ (2013) 16(2) *Journal of International Economic Law* 313, 321–7.

parties'.¹⁸⁸ This obligation has been construed as applying to a very wide range of trade-related measures, and, importantly, applies to both 'at-the-border' and 'behind-the-border' measures.¹⁸⁹ Discrimination may be de jure or de facto,¹⁹⁰ and the terms 'advantage, privilege, favour or immunity' have been very broadly construed in *GATT* and WTO jurisprudence.¹⁹¹ The AB has stressed that art I requires a 'holistic assessment' of whether a measure affects the conditions of competition between like products originating in different countries.¹⁹² Further, art I creates an obligation of result, not of intent — no evidence of discriminatory intent is necessary to establish an unlawful advantage has been granted and a complainant need not show that an actual advantage (in terms of demonstrable effects on trade) has in fact resulted from differentiated treatment.¹⁹³

Given the MFN obligation applies only to 'like' products, it must be determined whether fish caught using IUU practices are 'like' lawfully caught, traceable, fish, or, in respect of 'unregulated fishing' whether fish caught outside or in the absence of RFMO or national management measures are 'like' fish caught within such measures. While one might intuitively argue that they are not, WTO panels and the AB have routinely held that likeness should not be determined with reference to processes and production methods ('PPMs') that are not discernible in the physical characteristics of a product — so-called 'non-product-related' PPMs ('NPR-PPMs'), unless these have a marked bearing on consumer preferences — essentially upsetting the existence of a competitive relationship.¹⁹⁴ Panels and the AB applying *GATT* arts I(1) and III(4) and *Agreement on Technical Barriers to Trade* art 2(1) ('*TBTA*')¹⁹⁵ establish likeness with reference to four factors: (i) products' physical characteristics; (ii) products'

¹⁸⁸ *GATT* (n 22) art I(1).

¹⁸⁹ See, eg, Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas — Complaint by Ecuador*, WTO Doc WT/DS27/R/ECU (22 May 1997) [7.188] ('*EC — Bananas III*'); GATT Panel Report, *Belgian Family Allowances*, GATT Doc G/32-1S/59 (6 November 1952, adopted 7 November 1952) [3].

¹⁹⁰ Appellate Body Report, *Canada — Certain Measures Affecting the Automotive Industry*, WTO Docs WT/DS139/AB/R and WT/DS142/AB/R (31 May 2000) [78] ('*Canada — Automotive Industry*').

¹⁹¹ See, eg, Panel Report, *EC — Bananas III*, WTO Doc WT/DS27/R/ECU (n 189) [7.239]; Appellate Body Report, *Canada — Automotive Industry*, WTO Docs WT/DS139/AB/R and WT/DS142/AB/R (n 190) [79]; Appellate Body Reports, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (22 May 2014) [5.87] ('*EC — Seal Products*').

¹⁹² Appellate Body Report, *United States — Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc WT/DS381/AB/RW (20 November 2015) [7.280]. The Appellate Body's approach in these proceedings strongly suggests that the majority of PSMs will be considered to result in unequal treatment for the purposes of art I.

¹⁹³ Panel Report, *EC — Bananas III*, WTO Doc WT/DS27/R/ECU (n 189) [7.239]–[7.240].

¹⁹⁴ See generally Christiane R Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press, 2011) chs 1–2, 7.

¹⁹⁵ *GATT* (n 22) arts I(1), III(4); *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') art 2(1) ('*TBTA*').

end uses; (iii) consumer preferences and the ‘nature and extent of a competitive relationship’;¹⁹⁶ and (iv) products’ tariff classification.¹⁹⁷

As already explored, most PSMs do not distinguish between fisheries products based on physical characteristics, but rather on a producer’s or importer’s identity, characteristics or behaviour — especially their ability to evidence compliance with conditions relating to NPR-PPMs.¹⁹⁸ IUU-caught Atlantic cod is, for example, physically indiscernible from Atlantic cod caught in compliance with national, regional, and international rules and standards. Despite the argument that preferences regarding sustainability are changing, a hypothetical consumer would likely view the products as identical, or at least substitutable.¹⁹⁹ Unless a sea change occurs in WTO bodies’ approaches to the relevance of NPR-PPMs or willingness to steer a brazen course on reasonable consumer preferences on sustainability, the presence of IUU activities in supply chains is unlikely to affect the likeness of fish and fish products derived from the same species.²⁰⁰

Regardless of a measure’s objective, whenever a vessel is prevented from marketing its catch, an ‘advantage’ for the purposes of art I(1) is granted to unrestricted vessels — including those flying other flags. Similarly, any differences in the design or application of certification and inspection requirements that — either on paper or in fact — discriminate between vessels flying different flags will confer an (in principle) impermissible advantage, privilege, favour or immunity. In the case of the black and whitelisting of individual vessels, the procedures employed in setting and reviewing vessel lists may also run afoul of members’ MFN obligations. It is conceivable that these procedures might in practice, depending on how they are designed and applied, favour certain flags over others.²⁰¹ Given neither *Chile — Swordfish* nor *EU — Herring* reached a panel, and *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (‘*US — Shrimp*’) was ultimately decided on other grounds, we lack direct guidance on the application of art I(1) with respect to the

¹⁹⁶ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001) [99]–[102] (‘*EC — Asbestos*’), interpreting GATT (n 22) art III(4); Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.82].

¹⁹⁷ See especially Appellate Body Report, *Korea — Taxes on Alcoholic Beverages*, WTO Docs WT/DS75/AB/R and WT/DS84/AB/R (18 January 1999) [118]; Panel Report, *United States — Certain Measures Affecting Imports of Poultry from China*, WTO Doc WT/DS392/R (29 September 2010) [7.424]–[7.429].

¹⁹⁸ See GATT Panel Report, *United States — Measures Affecting Alcoholic and Malt Beverages*, GATT Doc DS23/R–39S/206 (16 March 1992, adopted 19 June 1992) [5.19]; Panel Reports, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/R and WT/DS401/R (25 November 2013) [7.136]–[7.140] (‘*EC — Seal Products*’).

¹⁹⁹ See Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R (n 196) [117]–[123].

²⁰⁰ Albeit interpreting *TBTA* (n 195) art 2(1), see Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011) [7.235]–[7.251]. See especially at [7.249]. See also Robert Howse and Donald Regan, ‘The Product/Process Distinction: An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’ (2000) 11(2) *European Journal of International Law* 249.

²⁰¹ Panel Report, *Colombia — Ports of Entry*, WTO Doc WT/DS366/R (n 169) [7.352]; Panel Report, *EC — Seal Products*, WTO Docs WT/DS400/R and WT/DS401/R (n 198) [7.597].

relevant fisheries regulations.²⁰² Responding to somewhat analogous facts, the AB in *EC — Seal Products* upheld the panel's finding that measures' regulatory motives are irrelevant in applying art I(1), which requires (only) assessment of whether measures caused 'detrimental impact' to the 'competitive opportunities for like imported products'.²⁰³

D Publication and Administration

Finally, according to *GATT* art X(1), WTO members must 'promptly' publish all '[l]aws, regulations, judicial decisions and administrative rulings of general application' pertaining to, inter alia, 'requirements, restrictions or prohibitions on imports' or that affect 'their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use'.²⁰⁴ Publication must be made so as 'to enable governments and traders to become acquainted' with such regulations.²⁰⁵ The range of measures falling within the scope of art X(1) is broad and includes non-binding instruments when these are deemed sufficiently authoritative.²⁰⁶ While it does not prescribe a particular form, WTO case law shows that publication must be made prior to measures' entry into force and be made through the official channels most likely to bring rules to the attention of traders and other WTO members.²⁰⁷ While decisions identifying particular traders are not considered 'of general application', country-wide measures are, and so too are measures that potentially affect a class of traders.²⁰⁸ *GATT* art X thus adds additional layers aimed at ensuring procedural fairness to those already identified in the *PSMA*, *FSA* and *RFMO* rules.

To comply with art X(1), port states must publish the regulations underlying their PSMs — whether these are generated by national or *RFMO* processes.²⁰⁹ Measures will also likely be considered inconsistent with art X(1) if port states have not published, in advance, the grounds on which port access, use of facilities, or landing will be denied. If denial is based on black or whitelisting vessels, such lists must be regularly updated and published. The precise requirements of certification schemes and inspection procedures — including

²⁰² See Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/R (15 May 1998) [3.11], [7.22]–[7.23] ('*US — Shrimp*').

²⁰³ Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.89]–[5.93].

²⁰⁴ *GATT* (n 22) art X(1).

²⁰⁵ *Ibid.*

²⁰⁶ See Panel Reports, *European Communities and Its Member States — Tariff Treatment of Certain Information Technology Products*, WTO Docs WT/DS375/R, WT/DS376/R and WT/DS377/R (16 August 2010) [7.1027] ('*EC — IT Products*'); Panel Report, *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO Doc WT/DS371/R (15 November 2010) [7.779] ('*Thailand — Cigarettes*').

²⁰⁷ See, eg, Panel Reports, *EC — IT Products*, WTO Docs WT/DS375/R, WT/DS376/R and WT/DS377R (n 206) [7.1015], [7.1088]. The requirement that publication precede application is enshrined in *GATT* (n 22) art X(2).

²⁰⁸ Appellate Body Report, *United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WTO Doc WT/DS24/AB/R (10 February 1997) 12.

²⁰⁹ *GATT* (n 22) art X(1).

non-binding practice guidelines or explanatory notes — must likewise be published in advance of their application.²¹⁰

Perhaps most importantly, art X(3)(a) requires that members administer the ‘laws, regulations, decisions and rulings’ captured by its paragraph 1 ‘in a uniform, impartial and reasonable manner’.²¹¹ According to the AB, members must therefore meet minimum standards of due process and procedural fairness, but art X does not permit *de novo* review of measures’ substance.²¹² Claimants bear the burden of proving (with sufficient evidence) that administration is biased or otherwise unreasonable²¹³ and must demonstrate either that a single decision was grossly mis- or maladministered, or that such practices are systemic.²¹⁴ This would likely be the case if there was a lack of formality or predictability in certification schemes, or the grounds on which catch certifications are reviewed were unclear or inconsistently applied.²¹⁵

Port states must therefore ensure certification schemes are applied uniformly, affording minimum standards of consistency and predictability.²¹⁶ Measures will likely run afoul of art X(3)(a) if, in similar circumstances, rules are administered inconsistently (*de jure* or *de facto*) for different flag states,²¹⁷ or, in the context of certification and inspection, (unjustifiable) distinctions are routinely made based on the category or identity of the vessel.²¹⁸ Given no port state can inspect all fishing vessels entering port, the process of selecting vessels for inspection may be deemed partial, non-uniform or unreasonable — for instance, if vessels flying certain flags are disproportionately subjected to inspection. Similarly, and of particular concern, would be administrative practices that favour the port state’s own vessels.²¹⁹ Crucially, port states must ensure that flag states can challenge blacklisting and the decisions of fisheries management and customs officials to, eg, deny port entry, use of facilities, or landing before competent administrative

²¹⁰ See 2008 EU IUU Regulation (n 42) art 22(3).

²¹¹ Article X(3)(a) generates three independent and cumulative obligations of uniformity, impartiality and reasonableness: see *GATT* (n 22) art X(3)(a). Claimants bear a relatively onerous burden of proof: see Panel Report, *Thailand — Cigarettes*, WTO Doc WT/DS371/R (n 206) [7.866]–[7.867], [7.874]; Appellate Body Report, *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WTO Doc WT/DS268/AB/R (29 November 2004) [217].

²¹² See, eg, Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R (9 September 1997) [200] (‘*EC — Bananas III*’); Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) [182]–[183] (‘*US — Shrimp*’). See also Panel Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Docs WT/DS384/R and WT/DS386/R (18 November 2011) [7.850]–[7.863] (‘*US — COOL*’).

²¹³ Panel Report, *Thailand — Cigarettes*, WTO Doc WT/DS371/R (n 206) [7.874].

²¹⁴ Panel Report, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WTO Doc WT/DS184/R (28 February 2001) [7.268].

²¹⁵ See, eg, Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [183].

²¹⁶ Panel Reports, *China — Raw Materials*, WTO Docs WT/DS394/R, WT/DS395/R and WT/DS398/R (n 171) [7.751]–[7.752].

²¹⁷ Appellate Body Report, *EC — Bananas III*, WTO Doc WT/Ds/AB/R (n 212) [200].

²¹⁸ Panel Report, *Argentina — Hides and Leather*, WTP Doc WT/DS155/R (n 167) [11.67]–[11.68], [11.71]–[11.72].

²¹⁹ Panel Report, *United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WTO Doc WT/DS244/R (14 August 2003) [7.305]–[7.306]. See also Panel Reports, *China — Raw Materials*, WTO Docs WT/DS394/R, WT/DS395/R and WT/DS398/R (n 171) [7.742]–[7.743], [7.751]–[7.752].

or adjudicative bodies and that sufficient information is provided to facilitate such challenges.²²⁰ While members retain significant discretion on how review is afforded, processes must be ‘prompt’ and ‘objective and impartial’.²²¹ As Zoe Scanlon highlights, due process and review mechanisms are either absent from or rudimentary in many listing procedures, ringing potential alarm bells under both art X and the chapeau to art XX of the *GATT* (considered below).²²² As ever, much will turn on measures’ administration in the circumstances.

E PSMs as ‘Technical Regulations’

Before turning to the question of how PSMs can be justified within the *GATT* exceptions framework, a further issue deserves attention: whether PSMs constitute ‘technical regulations’ subject to the requirements of the *TBTA* — which provide additional layers of obligation to those (already addressed) arising under the *GATT*. Most significantly, technical regulations must be based on ‘relevant international standards’,²²³ may not have the intent or effect of ‘creating unnecessary obstacles to international trade’,²²⁴ and, perhaps most significantly, must be no ‘more trade-restrictive than necessary to fulfil a legitimate objective’.²²⁵ According to *TBTA* annex 1.1, a ‘technical regulation’ is: (i) a ‘[d]ocument’; (ii) ‘which lays down product characteristics or their related processes and production methods, including ... applicable administrative provisions’; and (iii) ‘with which compliance is mandatory’.²²⁶ As well as the characteristics of the product itself, a technical regulation ‘may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method’.²²⁷

²²⁰ Panel Report, *European Communities — Selected Customs Matters*, WTO Doc WT/DS315/R (16 June 2006) [7.536].

²²¹ Panel Report, *Thailand — Cigarettes*, WTO Doc WT/DS371/R (n 206) [7.1015]. The latter requirements flow from *GATT* (n 22) art X(3)(c).

²²² For further examination of this issue, see Zoe Scanlon, ‘Safeguarding the Legitimacy of Illegal, Unreported and Unregulated Fishing Vessel Listings’ (2019) 68(2) *International and Comparative Law Quarterly* 369, 378–83.

²²³ *TBTA* (n 195) art 2(4).

²²⁴ *Ibid* art 2(2).

²²⁵ *Ibid*.

²²⁶ The Appellate Body and panels applying *TBTA* (n 195) annex 1 [1] have adopted a ‘three-tier test’ inquiring into whether a measure: (i) applies to an identifiable product or products; (ii) lays down characteristics; and (iii) is mandatory. See Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R (n 196) [66]–[70]; Appellate Body Report, *European Communities — Trade Description of Sardines*, WTO Doc WT/DS231/AB/R (26 September 2002) [176]; Appellate Body Report, *United States — Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012) [183] (*‘US — Tuna II’*); Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.21]–[5.23]; Panel Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/R (2 September 2011) [7.24]–[7.25]; Panel Report, *US — COOL*, WTO Docs WT/DS384/R and WT/DS386/R (n 212) [7.147]–[7.148]. For a recent, more detailed elaboration of this test, see Panel Reports, *Australia — Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (28 June 2018) [7.115]–[7.183] (*‘Australia — Tobacco Plain Packaging’*).

²²⁷ *TBTA* (n 195) annex 1 [1].

At first glance, whenever PSMs condition market access on certification that fisheries products were captured by authorised persons, in an authorised area, employing authorised gear and methods, they seem to ‘lay down’ or define ‘administrative provisions’ connected to ‘processes and production methods’ and thus to fall within the scope of *TBTA* annex 1.1.²²⁸ However, according to the AB’s reasoning in *EC — Seal Products*, because PPMs must be ‘related’ to products’ ‘characteristics’, for measures to constitute technical regulations, a ‘sufficient nexus’ must exist between regulated PPMs and products’ (physical) characteristics.²²⁹ The AB considered that while the EU’s ban on the importation and sale of products containing seal included a mandatory (negatively expressed) product characteristic — that goods *not* contain seal²³⁰ — this requirement was merely ‘derivative of the three ... market access conditions’ constituting ‘the permissive component of the measure’ — seal products could be imported if harvested by indigenous communities using traditional methods or in the course of marine resource management, or, in limited circumstances, were brought by travellers.²³¹ Most importantly, the AB held that issues related to ‘the identity of the hunter or the type or purpose of the hunt from which the product [was] derived’, did not ‘relate’ to product characteristics.²³² While not entirely clear from the AB’s reasoning, it would thus appear that the regulated PPM must be somehow discernible in, or connected to, products’ physical qualities for the *TBTA* to apply.

As already discussed in the context of *GATT* art 1, the central features of PSMs relate to NPR-PPMs; whether fish are caught using IUU methods has no bearing on, and is indiscernible in, products’ physical qualities or effects. Thus, given they do not address products’ labelling or marketing, the PSMs identified in Part II will not fall within the scope of the *TBTA* and will not, therefore, be subject to its additional requirements.²³³ This means that in any disputes arising from PSMs, the thorny questions of what constitute ‘relevant international standards’ in the context of international fisheries management, when port states’ enforcement actions will be deemed to be ‘in excess’ of any such standards, and what is required by least trade restrictive approaches to fisheries management and enforcement could likely be avoided.

F *Justifying the Trade-Restrictive Effects of PSMs*

Because, as shown above, PSMs will often run afoul of the *GATT*’s disciplines on trade in goods, measures’ compliance with WTO law turns on

²²⁸ Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.12]–[5.13].

²²⁹ Ibid [5.12]. See also Soledad R Sánchez-Tabernero, ‘For Whom the Bell Tolls: The EU ETS in Aviation under the TBT Agreement’ (2015) 49(5) *Journal of World Trade* 781, 782–3.

²³⁰ Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.39].

²³¹ Ibid [5.41].

²³² Ibid [5.41], [5.45].

²³³ But see Appellate Body Report, *US — Tuna II*, WTO Doc WT/DS381/AB/R (n 226) [190]–[199].

whether they can be justified under the general exceptions in *GATT* art XX.²³⁴ While most PSMs will likely fall within a head of exception and thus be considered provisionally justified,²³⁵ art XX's chapeau presents port states with additional substantive and procedural requirements which mean unilateral PSMs will not normally be permitted as a matter of first resort and that certain administrative, diplomatic and procedural burdens must be fulfilled. It is thus vital to examine how art XX might be applied by a WTO panel, the AB or (given the ongoing AB appointment crisis, discussed below) an arbitral tribunal, and the steps port state WTO members can take to improve measures' chances of art XX consistency.

Before we do so, two threshold issues deserve brief attention. The first is whether coercive measures are a priori excluded from the scope of art XX; the second is whether art XX is limited territorially.²³⁶ The first issue can be given short shrift. While *GATT* panels in the *United States — Restrictions on Imports of Tuna* cases considered that art XX could not save unilateral measures aimed at influencing environmental policies abroad,²³⁷ the AB has since rejected this view, noting that 'conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member' is a common feature of art XX measures.²³⁸

The second issue is slightly more complex. Because they arguably undermine the multilateral trading order and infringe target states' autonomy, it has been suggested that extraterritorial measures should be excluded from art XX's scope or subjected, as a matter of general international law, to additional conditions.²³⁹ Such a view is perhaps plausible when we consider the AB's attempts to find

²³⁴ *GATT* (n 22) art XX. Importantly, the burden of proof largely shifts from the claimant to the respondent in the exceptions context: Appellate Body Report, *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc WT/DS33/AB/R (25 April 1997) 15–16.

²³⁵ Since 1996, panels and the Appellate Body have employed a 'two-tiered' analysis in applying art XX, requiring (i) 'provisional justification' under arts XX(a)–(j); and (ii) compliance with art XX's 'chapeau': Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (29 April 1996) 22 ('*US — Gasoline*'). See also Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.169].

²³⁶ See especially Bartels (n 77) 358–65. See also Steve Charnovitz, 'Free Trade, Fair Trade, Green Trade: Defogging the Debate' (1994) 27(3) *Cornell International Law Journal* 459, 492; Brigitte Stern, 'Can the United States Set Rules for the World?: A French View' (1997) 31(4) *Journal of World Trade* 5; Nollkaemper (n 76) 184–201; Laurence Boisson de Chazournes, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues' (2000) 11(2) *European Journal of International Law* 315; Daniel Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?' (2000) 11(2) *European Journal of International Law* 339; Joel P Trachtman, 'Regulatory Jurisdiction and the WTO' (2007) 10(3) *Journal of International Economic Law* 631, 635–6.

²³⁷ *GATT* Panel Report, *United States — Restrictions on Imports of Tuna*, *GATT* Doc DS21/R–39S/155 (3 September 1991) [5.27]–[5.28], [5.32]; *GATT* Panel Report, *United States — Restrictions on Imports of Tuna*, *GATT* Doc DS29/R (16 June 1994) [5.16]–[5.17], [5.26]. Neither of these reports were adopted.

²³⁸ Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [121].

²³⁹ For an example of justification and proportionality, see Vranes (n 76) 177–83. For a more nuanced account of extraterritoriality, see generally Barbara Cooreman, 'Addressing Environmental Concerns through Trade: A Case for Extraterritoriality?' (2016) 65(1) *International and Comparative Law Quarterly* 229.

territorial links and reluctance to explicitly rule out an ‘implied jurisdictional limitation’ on arts XX(g) or (a) in *US — Shrimp* and *EC — Seal Products*.²⁴⁰ This issue would seem particularly relevant for measures aimed at ‘unregulated’ fishing, which aim to remedy flag states’ failures to implement RFMO rules or, absent such rules, coastal and flag states’ failures to develop and implement appropriate conservation measures in accordance with their respective duties.²⁴¹ Such measures will necessarily be both coercive and extraterritorial. However, the (admittedly unanswered) extraterritoriality question is unlikely to pose WTO members justifying PSMs under art XX significant problems for two reasons.

First, and notwithstanding the AB’s somewhat cryptic approaches in *US — Shrimp* and *EC — Seal Products*, given marine species’ and ecosystems’ interdependencies and the dire state of many fish stocks globally, it is likely that a member relying on art XX could successfully argue that promoting sustainable fisheries management is an objective of global concern in which all WTO members have a legitimate interest, but also that the performance and effects of IUU activities often elide territorial boundaries.²⁴² Second, as Lorand Bartels rightly argues, art XX should be interpreted in light of general international law on jurisdiction.²⁴³ While art XX should not be read as implicitly extending states’ prescriptive and enforcement jurisdiction, it equally should not be read as implicitly limiting the circumstances in which states can lawfully extend and apply their laws. As we showed in Part III, while — absent treaty basis or RFMO authorisation — general international law and the law of the sea do not permit port states to directly prescribe or enforce rules concerning conduct performed by non-nationals beyond territorial jurisdiction, port states may nevertheless indirectly proscribe such conduct by regulating activities performed within territorial jurisdiction or by their nationals. In most cases, therefore, PSMs are not in fact ‘extraterritorial’. As shown below, this view is reinforced by the fact that many of the risks associated with extraterritoriality are addressed in panels’ and the AB’s approaches to art XX’s chapeau.

1 *Protecting Public Morals and Human, Animal or Plant Life or Health*

GATT arts XX(a) and (b) provide a first pair of avenues for provisionally justifying PSMs. Article XX(a) permits WTO members to adopt otherwise *GATT*-inconsistent measures when these are ‘necessary to protect public morals’; art XX(b) permits measures ‘necessary to protect human, animal or plant life or health’.²⁴⁴ The AB in *Colombia — Textiles* recently held that provisional justification under art XX(a) (and by extension art XX(b)) requires a two-stage

²⁴⁰ Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [133], applying *GATT* (n 22) art XX(g); Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.173], applying *GATT* (n 22) art XX(a). The *EC — Tariff Preferences* panel similarly determined that, because measures were designed to protect interests outside the EC, they could not be justified as necessary to protect human life or health under art XX(b): Panel Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (1 December 2003) [7.207]–[7.210] (*‘EC — Tariff Preferences’*).

²⁴¹ See above nn 10–23 and accompanying text.

²⁴² See Cooreman (n 239) 236. See also Cottier et al (n 77) 297–309; Nollkaemper (n 76) 192–5; Ellis (n 77) 401–4.

²⁴³ Bartels (n 77) 365–7.

²⁴⁴ *GATT* (n 22) arts XX(a)–(b).

test. First, a member must pass a threshold test by demonstrating that a measure is ‘designed’ to protect its objective, meaning that its ‘content, structure, and expected operation’ are not ‘incapable’ of protecting (respectively) public morals or human, animal, or plant life or health.²⁴⁵ This threshold examination will be satisfied whenever it can be shown there exists some factual or causal relationship between a measure and a genuine risk or objective.²⁴⁶ Second, a member must demonstrate that its measure was ‘necessary’ to achieve its objective.²⁴⁷ As shown below, it is at this second — more intrusive — stage that many attempts to invoke art XX(a) and (b) come unstuck.

Satisfying the threshold test will not often present too many difficulties. For the purposes of art XX(a), panels and the AB have held that ‘public morals’ denotes ‘standards of right and wrong’ conduct maintained by or on behalf of a community or nation, noting that ‘the content of these concepts ... can vary in time and space, depending upon a range of factors’, particularly ‘prevailing social, cultural, ethical and religious values’.²⁴⁸ Members thus possess a certain latitude when identifying and defining public morals issues — what matters is whether the issue has generated concern or debate in the public sphere.²⁴⁹ The fact that a government is taking action against an issue — eg through sanctions — is likely sufficient to demonstrate it is a public morals issue.²⁵⁰ It is an interesting exercise to consider whether IUU fishing (or for that matter anthropogenic climate change or biodiversity loss) could be successfully framed as a public morals issue in a given member’s polity.²⁵¹ This is increasingly plausible, given growing public concern over unsustainable fishing practices and the health of marine ecosystems and the recent growth in national, regional, and international efforts — including by the WTO itself.²⁵²

²⁴⁵ Appellate Body Report, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear*, WTO Doc WT/DS461/AB/R (7 June 2016) [5.68]–[5.69] (‘*Colombia — Textiles*’). See also Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007) [151] (‘*Brazil — Retreaded Tyres*’).

²⁴⁶ Appellate Body Report, *Colombia — Textiles*, WTO Doc WT/DS461/AB/R (n 245) [5.85]–[5.88].

²⁴⁷ *Ibid* [5.90]–[5.117].

²⁴⁸ See Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.458]–[6.461], interpreting the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1B (‘*General Agreement on Trade in Services*’) art XVI. This has been cited favourably in the context of *GATT* (n 22) art XX(a) in Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.199]–[5.200].

²⁴⁹ Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.199]; Panel Reports, *Brazil — Certain Measures concerning Taxation and Charges*, WTO Docs WT/DS472/R and WT/DS497/R (30 August 2017) [7.516]–[7.568].

²⁵⁰ Appellate Body Report, *Colombia — Textiles*, WTO Doc WT/DS461/AB/R (n 245) [5.97].

²⁵¹ On this theme, see generally Robert Howse and Joanna Langille, ‘Permitting Pluralism: The *Seal Products* Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values’ (2012) 37(2) *Yale Journal of International Law* 367; Oisín Suttle, ‘What Sorts of Things Are Public Morals? A Liberal Cosmopolitan Approach to Article XX GATT’ (2017) 80(4) *Modern Law Review* 569.

²⁵² See Callum Musto, ‘The Draft WTO Agreement on Fisheries Subsidies: Are We Closing the Net?’, *EJIL:Talk!* (Blog Post, 1 June 2021) <<https://www.ejiltalk.org/the-draft-wto-agreement-on-fisheries-subsidies-are-we-closing-the-net/>>, archived at <<https://perma.cc/79Q8-DTP5>>.

Measures aimed at addressing IUU fishing also plausibly fit within art XX(b) — to the extent they can be shown to be designed to protect human, animal or plant life or health. Although this exception quintessentially permits members to adopt health and safety measures and sanitary and phytosanitary regulations, its reference to the protection of ‘animal life’ is broad enough to capture measures aimed at protecting marine species.²⁵³ Applying the logic employed in *EC — Asbestos*, a member would have to credibly demonstrate, however, that regulated species or stocks are threatened by IUU practices.²⁵⁴ This need not be based on a majority scientific opinion, but the existence of a risk must be supported by a ‘qualified and respected opinion’ and credible technical evidence.²⁵⁵ It is also likely that in assessing whether a measure is ‘designed’ to protect animal life, a panel, the AB or an arbitral tribunal would consider its place within domestic and regional fisheries conservation programmes and any evidence of IUU practices within a given fishery or management area.²⁵⁶

While passing the threshold ‘design’ test would likely prove relatively straightforward, art XX(a) and (b)’s necessity requirement presents an obvious barb to PSMs’ provisional justification under these paragraphs. As is well known, the AB has consistently held that for a measure to be ‘necessary to protect’ public morals or human, animal or plant life or health, it must successfully pass a ‘weighing and balancing’ test that considers ‘a series of factors’, notably: the objective’s ‘importance’, the degree of the measure’s contribution to its objective and the measure’s trade restrictiveness.²⁵⁷ As measures will be viewed in their entirety and in their context, this would likely entail analysis of particular stocks’ health, relevant national, regional and international conservation measures and consideration of how individual PSMs fit within the port state’s general fisheries regulations.²⁵⁸ Most importantly, the measure adopted will then be compared to any less trade-restrictive alternatives that were reasonably available that would achieve the member’s desired level of protection — if any are reasonably available, the measure will not be considered ‘necessary’ in the circumstances and will not be provisional justified.²⁵⁹

²⁵³ See, eg, Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (29 January 1996) [6.21] (*‘US — Gasoline’*); Panel Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/R (n 167) [7.46].

²⁵⁴ As has, for example, historically been the case with Patagonian toothfish: DJ Agnew, ‘The Illegal and Unregulated Fishery for Toothfish in the Southern Ocean, and the CCAMLR Catch Documentation Scheme’ (2000) 24(5) *Marine Policy* 361.

²⁵⁵ Appellate Body Report, *EC — Asbestos*, WTO Doc WT/DS135/AB/R (n 196) [178]. For further discussion of risk regulation, proof and the sometimes fraught role of technical evidence in the WTO context, see, eg, Lukasz Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement* (Oxford University Press, 2010); Jacqueline Peel, ‘Of Apples and Oranges (and Hormones in Beef): Science and the Standard of Review in WTO Disputes under the SPS Agreement’ (2012) 61(2) *International and Comparative Law Quarterly* 427.

²⁵⁶ See Appellate Body Report, *Colombia — Textiles*, WTO Doc WT/DS461/AB/R (n 245) [5.96]–[5.99].

²⁵⁷ See especially Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009) [238]–[242].

²⁵⁸ See, eg, Appellate Body Report, *US — Gasoline*, WTO Doc ST/DS2/AB/R (n 235) 19.

²⁵⁹ Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R (n 245) [156]. The onus then shifts to the claimant to suggest alternative measures.

It is this latter requirement that potentially poses the biggest obstacles. It should be remembered that the denial of landing is a core aspect of many of the PSMs discussed in Part II. Denying landing where catches are intended for market or transshipment is, by necessity, highly trade restrictive. Even prior port designation might be considered highly restrictive if geographical and supply-chain factors make the designated ports particularly inconvenient for landing. On the other side of the ledger, addressing IUU and other unsustainable practices clearly constitute important objectives — especially where stocks or species are threatened. Depending on their design and implementation, PSMs also contribute to a great extent to achieving their objectives. The principal issue, however, will be whether less trade-restrictive alternatives are available to achieve the same objectives and levels of protection.

In the case of highly restrictive measures such as the denial of landing, the onus would thus fall on the port state member to demonstrate that, eg, consultations with flag states, information sharing, the provision of technical assistance, inspections and fines or other penalties could not have achieved the same level of protection. While much will turn on the given circumstances, including the severity of the risk posed to particular stocks or species, and whether PSMs are adopted as part of broader conservation and management programmes, port states' best argument in this respect is that such alternatives cannot contribute an equivalently high degree of protection.²⁶⁰ The least restrictive means test will be more easily satisfied when — as is usually the case — port states employ a variety of more or less restrictive measures simultaneously, ranging, eg, from prior notification and inspection to denial of entry, landing or use of facilities.²⁶¹ Once again, this factor will be particularly relevant if measures are aimed at 'unregulated' fishing. Port states would thus need to show that efforts at encouraging 'problem' flag, coastal (or port) states to adopt appropriate management measures and either to participate in relevant RFMOs or abide by RFMO rules were — or would have been — ineffective. We see such a gradation from notification, to consultation, to listing, for example, in the 2008 EU IUU Regulation's 'yellow card' and 'red card' approach to identifying non-cooperating third countries.²⁶²

2 *Securing Compliance with GATT-Consistent Laws or Regulations*

GATT art XX(d) permits WTO members to adopt measures 'necessary to secure compliance with laws or regulations' that are themselves 'not inconsistent with the provisions' of the GATT.²⁶³ This requires, essentially, that the laws or regulations in question are themselves not GATT-inconsistent, that measures are not incapable of securing compliance with such laws and that — as per

²⁶⁰ See *ibid* [156]–[175]; Appellate Body Report, *Colombia — Textiles*, WTO Doc WT/DS461/AB/R (n 245) [5.114]–[5.116]. See also Panel Reports, *Australia — Tobacco Plain Packaging*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 226) [7.1704]–[7.1732], which interpreted the largely equivalent *TBTA* (n 195) art 2(2).

²⁶¹ See Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R (n 245) [172]; Panel Reports, *Australia — Tobacco Plain Packaging*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 226) [7.1729]–[7.1731].

²⁶² 2008 EU IUU Regulation (n 42) arts 31, 33.

²⁶³ GATT (n 22) art XX(d).

paragraphs (a) and (b) — measures are the least trade restrictive means of achieving the member's objectives.²⁶⁴ Perhaps most significantly for present purposes, given the potentially broad construction afforded by 'laws or regulations', art XX(d) would seem to provide a route for port states to justify trade restrictive measures as necessary to fulfil their obligations under third party agreements such as *UNCLOS*, the *PSMA*, *FSA* or *RFMO* regulations — or even general international law. Indeed, WTO members have previously argued as much.²⁶⁵ The AB has, however, clarified that 'laws' and 'regulations', for the purposes of art XX(d), include only those 'rule[s] or principle[s] governing behaviour or practice',²⁶⁶ that 'form part of the [invoking member's] domestic legal system'.²⁶⁷ This means that the international obligation must form part of domestic law under the member's constitutional structure — through, eg, direct effect or incorporation — and must clearly establish a 'rule' with which the member must comply.²⁶⁸ Paragraph (d) might also be invoked where PSMs form an integral part of a member's programme of domestic fisheries and conservation regulations. Importantly, whatever their origin, members' laws and regulations will be assumed to be not inconsistent with the *GATT* until a complaining member successfully proves otherwise.²⁶⁹

However, members' successful reliance on art XX(d) will turn on their abilities to justify each measure adopted as necessary in the circumstances to secure compliance with the relevant laws or regulations. As with paras (a) and (b), this means members must scale the not insignificant hurdle of the least restrictive means test elaborated above.²⁷⁰

3 *Conserving Exhaustible Natural Resources*

While by no means insurmountable, the above complexities mean that *GATT* art XX(g) — allowing WTO members to adopt *GATT*-inconsistent measures 'relating to the conservation of exhaustible natural resources' provided that 'such measures are made effective in conjunction with restrictions on domestic production or consumption' — provides a more straightforward avenue for provisional justification.²⁷¹ As it is long settled that 'renewable' exhaustible resources — like clean air,²⁷² sea turtles²⁷³ and fish²⁷⁴ — are in principle within

²⁶⁴ See above n 259 and accompanying text.

²⁶⁵ See Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/R (7 October 2005) [8.162]; Panel Report, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc WT/DS456/R (24 February 2016) [7.269]–[7.301].

²⁶⁶ Appellate Body Report, *India — Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc WT/DS456/AB/R (16 September 2016) [5.106].

²⁶⁷ *Ibid* [5.140]–[5.141].

²⁶⁸ *Ibid*. See also Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/AB/R (6 March 2006) [79].

²⁶⁹ See Panel Report, *Colombia — Measures Relating to the Importation of Textiles, Apparel and Footwear*, WTO Doc WT/DS461/R (27 November 2015) [7.511]; Appellate Body Report, *United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WTO Doc WT/DS213/AB/R (28 November 2002) [157].

²⁷⁰ See generally Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Docs WT/DS161/AB/R and WT/DA169/AB/R (11 December 2000) [162]–[166].

²⁷¹ *GATT* (n 22) art XX(g) (emphasis added).

²⁷² Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R (n 235) 14–19.

para (g)'s ambit, analysis will largely turn on whether a measure sufficiently 'relates' to conservation.²⁷⁵ Significantly, while entailing similar analyses, para (g) requires a less stringent nexus than paras (a) and (b)'s necessity requirement: a member must demonstrate a substantial connection and 'close and genuine relationship' between a measure's ends and means.²⁷⁶

As a general matter, the conservation and sustainable management of marine species are clearly genuine conservation concerns. Like para (b) though, para (g) implicitly raises questions concerning risk and evidence. While a port state will more likely be able to justify measures when a particular stock, species or ground has been identified as being of concern,²⁷⁷ it need not show that certain stocks (or species) are threatened. Given that regional and national management measures — including catch limits — largely do not (and are often unable to) account for the impact on fisheries of IUU practices and that IUU fishing is estimated to account for a significant portion of global capture, satisfying the 'direct connection' requirement will also likely be unproblematic: any reduction in IUU practices will have the result of contributing to existing regional and national conservation efforts. Finally, to satisfy para (g)'s second main condition, a port state must demonstrate that it regulates its own fisheries vessels' activities in an equivalent — or at least complementary — manner. This would likely be satisfied when the port state subjects its own vessels and nationals to, eg, mandatory certification and inspection and civil or criminal sanctions for breach of regional or national fisheries regulations.

4 *Chapeau Requirements*

The chapeau to *GATT* art XX requires that measures not be 'applied in a manner' constituting a means of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.²⁷⁸ While, as shown, provisionally justifying PSMs under arts XX(g), (a), or (b) is not likely to present many challenges, PSMs' WTO consistency will often turn on the application of the second tier of analysis — compliance with the chapeau's (not insignificant) substantive and procedural

²⁷³ Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [134].

²⁷⁴ *Ibid* [131]; GATT Panel Report, *United States — Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Doc L/5198–29S/91 (22 December 1981, adopted 22 February 1982) [4.9]; GATT Panel Report, *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc L/6268–35S/98 (20 November 1987, adopted 22 March 1988) [4.4].

²⁷⁵ On the evolution of *GATT* and WTO bodies' approaches to para (g) and the Appellate Body's engagement with multilateral environmental agreements, see Callum Musto and Catherine Redgwell, 'US — Import Prohibition of Certain Shrimp and Shrimp Products (1998)' in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Hart Publishing, 2017) 489, 496–508.

²⁷⁶ See especially Appellate Body Reports, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Docs WT/DS431/AB/R, WT/DS432/AB/R and WT/DS433/AB/R (7 August 2014) [5.94]; Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [136], [141]; Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R (n 235) 19.

²⁷⁷ In Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212), the Appellate Body noted that all seven species of sea turtles were listed on CITES appendix I: at [132].

²⁷⁸ *GATT* (n 22) art XX.

requirements.²⁷⁹ In the AB's own words, this is often a 'heavier task' than demonstrating a measure is provisionally justified by an exception.²⁸⁰ Since the AB's 'procedural turn',²⁸¹ questions concerning procedural fairness, good administration and due process are also likely to play central roles in any dispute concerning PSMs.

The AB considers its role in applying the chapeau is to identify 'a line of equilibrium' between a WTO member's right 'to invoke an exception' and other members' rights under the *GATT*.²⁸² In considering whether a measure constitutes 'arbitrary' or 'unjustifiable' discrimination, it is not determinative that a measure was, or was not, found to discriminate under a substantive obligation (eg *GATT* arts I or III).²⁸³ A measure will be deemed to discriminate both if it treats similarly-situated members differently and if it fails to consider the 'appropriateness of the regulatory program for the conditions prevailing' in a particular member: in other words when it fails to account for differences *between* members, or between affected members and the imposing state.²⁸⁴ Essentially, measures must be framed and applied in a sufficiently flexible manner, discrimination may not be a deliberate or inherent feature, and any distinctions in rules' content or application must be based on grounds bearing a reasonable relationship to measures' aims.²⁸⁵ Importantly, the chapeau reinforces and adds to *GATT* art X by requiring members' to ensure measures are administered transparently and predictably, that adequate reasons are given, that affected members have a right to be heard and to respond to measures' application, and that rules, guidelines and decisions are published in a timely fashion.²⁸⁶

Given PSMs necessarily distinguish between vessels (based, eg, on their flag, the information they provide, or their suspected activities) WTO bodies are likely to closely scrutinise the grounds and processes informing port states' distinctions — both the formal grounds in applicable regulations and the ways these grounds are applied in practice. These inquiries will aim to ensure that fisheries products originating in different members — which, it will be recalled, under typical rules of origin will commonly be determined by a vessel's flag — are not afforded

²⁷⁹ These additional requirements must be met once it has been demonstrated a measure is provisionally justified. See Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [119].

²⁸⁰ Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R (n 235) 23.

²⁸¹ See Musto and Redgwell (n 275) 500–2.

²⁸² Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [159].

²⁸³ Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R (n 235) 23, 28–9; Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [150]; Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.298].

²⁸⁴ Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [164]–[165].

²⁸⁵ See Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products — Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc WT/DS58/AB/RW (22 October 2001) [144] ('*US — Shrimp — Article 21.5*'); Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R (n 245) [226], [229]–[230]; Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.306]; Appellate Body Report, *United States — Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products — Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW (20 November 2015) [7.316] ('*US — Tuna II (Mexico) — Article 21.5*').

²⁸⁶ Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [180].

differentiated treatment without justification, but, rather, that in the particular circumstances any differences in design or application can be ‘reconciled with’ or ‘rationally related to’ a measure’s policy objective.²⁸⁷

One area where this is especially relevant is when vessels of a particular nationality are singled out, either formally or in practice, through, eg, black or whitelisting or prevailing inspection practices. To justify differentiation, the member must show that the conditions prevailing in the exporting members (ie, two or more flag or coastal states) are not ‘relevantly “the same”’ in the context of fisheries regulation and, especially, the elimination of IUU practices.²⁸⁸ A port state must thus be prepared to defend the policies and practices underpinning such selective application and, for example, demonstrate that differentiated treatment stems from the need to address vessels’ actual or suspected practices. This might be the case, for example, where a particular flag state exercises insufficient regulatory or enforcement oversight of its vessels, or, as the EU alleged in *EU — Herring*, where a coastal state issues licenses in violation of regional or international conservation and management rules.²⁸⁹ The chapeau thus echoes and adds further layers to the *FSA* art 23(1) non-discrimination requirement.²⁹⁰ Similarly, if foreign-flagged vessels are subjected to, eg, more onerous port designation, prior notification, reporting, or inspection requirements than the port state’s own vessels, such distinctions must likewise be rationally motivated and evidence-based and relate to the elimination of particular IUU practices.²⁹¹ It is worth noting that in both situations, if the AB’s logic in *Brazil — Retreaded Tyres* is followed, the performance of obligations arising under an extraneous agreement — for example the *PSMA* or *FSA* — would not, alone, be considered sufficient grounds for differentiated treatment.²⁹²

A final aspect of the chapeau’s operation is perhaps most significant for port states seeking to extend fisheries control measures to foreign-flagged vessels. In addition to ensuring measures are applied flexibly and without unreasonable differentiation, if measures aim to address transboundary environmental concerns — like IUU fishing, or marine management and conservation more generally — to avoid measures constituting ‘arbitrary or unjustifiable discrimination’, the AB has read the chapeau as requiring imposing members to attempt good faith consultation with affected members aimed at developing collective solutions — before resorting to unilateral, coercive, measures.²⁹³ This

²⁸⁷ Appellate Body Report, *US — Tuna II (Mexico) — Article 21.5*, WTO Doc WT/DS381/AB/R (n 285) [7.316]; Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R (n 245) [229]–[230]. See also Panel Report, *EC — Tariff Preferences*, WTO Doc WT/DS246/R (n 240) [7.228]–[7.234].

²⁸⁸ Appellate Body Reports, *EC — Seal Products*, WTO Docs WT/DS400/AB/R and WT/DS401/AB/R (n 191) [5.299] (emphasis omitted).

²⁸⁹ See *EU — Herring*, WTO Docs WT/DS469/1 and G/L/1058 (n 161) [10].

²⁹⁰ *FSA* (n 25) art 23(1).

²⁹¹ See Andrew Serdy, ‘*Pacta Tertis* and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal’ (2017) 48(3–4) *Ocean Development and International Law* 345, 356.

²⁹² Appellate Body Report, *Brazil — Retreaded Tyres*, WTO Doc WT/DS332/AB/R (n 245) [228].

²⁹³ Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [171]–[172]; Appellate Body Report, *US — Shrimp — Article 21.5*, WTO Doc WT/DS58/AB/RW (n 285) [122]–[124].

duty to negotiate stems in part from the AB's dictum in *US — Shrimp* that 'consensual and multilateral procedures' for dealing with transboundary environmental challenges are to be preferred whenever these are 'available and feasible'.²⁹⁴ Such efforts can be pursued either bilaterally or through such 'international mechanisms as exist' and, vitally, need not result in agreement.²⁹⁵ However, where multiple exporting countries (for our purposes flag or coastal states) are potentially affected, comparable efforts must be made — in terms of 'energies' and 'resources' expended — to secure agreement with all affected exporters.²⁹⁶

While undoubtedly adding an additional layer of considerations and diplomatic and procedural burdens, this pre-consultation requirement should not pose too many additional obstacles to PSMs' effective adoption. Whereas at the time of the dispute in *US — Shrimp* the conservation of sea turtles was subject to relatively sparse multilateral regulation, global fisheries are, in principle, subject to more comprehensive national, regional and international rules. Under six out of seven of the FAO IPOA definition's limbs, efforts against IUU fishing — including PSMs — are largely aimed at ensuring these rules are complied with and adequately enforced.

Given this, rather than having to negotiate new agreements, for measures aimed at 'unlawful' and 'unreported' fishing, the chapeau's requirements would seem to be satisfied if a port state has genuinely attempted to resolve non-compliance by a coastal, flag (or port) state with its conservation, management and due diligence duties.²⁹⁷ This could be achieved either through relevant RFMOs (if the affected member is a member or cooperating non-contracting party) or on a bilateral basis. Especially in the case of flag-based blacklisting, at a minimum, the port state would likely need to show it had repeatedly notified the flag state of its non-compliance and requested it to fulfil its obligations under, inter alia, *UNCLOS* arts 58(3), 62(4), 94 and 192 (arguably all reflecting custom) and, if applicable, the *FSA* and *PSMA*.²⁹⁸ For measures aimed at the first limb of 'unregulated' fishing,²⁹⁹ where the affected member has not joined relevant RFMOs, a port state would need to show diplomatic efforts had been made to encourage ratification or participation, as well as the enactment and effective implementation of national management measures implementing regional rules. Finally, depending on its capacities, to maximise the chance of chapeau compliance, it would be prudent for the port state to offer

²⁹⁴ Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R (n 212) [170]. Discussing the Appellate Body's reasoning, see also Musto and Redgwell (n 275) 505–6; Margaret A Young, 'Fragmentation, Regime Interaction and Sovereignty' in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, 2015) 71, 81.

²⁹⁵ Appellate Body Report, *US — Shrimp — Article 21.5*, WTO Doc WT/DS58/AB/RW (n 285) [123]–[124], [127]–[128], [134].

²⁹⁶ *Ibid* [122]. See also Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R (n 235) 28–9.

²⁹⁷ See above nn 13–23 and accompanying text.

²⁹⁸ This does not mean, however, that the complaining member must be an RFMO member or party to the *FSA* or *PSMA* for a measure to pass muster under the chapeau: see Musto and Redgwell (n 275) 505–6; Young, 'Fragmentation, Regime Interaction and Sovereignty' (n 294) 81. But see Serdy (n 291) 348–56.

²⁹⁹ See above nn 10–12 and accompanying text.

to share information or provide technical assistance aimed at assisting the flag state to fulfil its responsibilities before adopting coercive measures.³⁰⁰

Of course, the FAO IPOA definition covers a diverse range of activities and the application of the chapeau will necessarily ‘flex’ depending on whether PSMs are aimed at addressing ‘unlawful’, ‘unreported’ or ‘unregulated’ fishing. In terms of demonstrating that measures were appropriately tailored to addressing their objectives and justifying differentiated treatment, measures aimed at addressing ‘unlawful’ and ‘unreported’ activities are likely to be more readily justifiable — not least in evidentiary terms: it is more readily factually determinable whether vessels have fished in contravention of national or RFMO rules or have failed to adequately report effort or capture and if any flag states are ‘repeat offenders’ in terms of lax enforcement. However, as when considering the necessity component of art XX(a) or (b),³⁰¹ measures aimed at ‘unregulated’ fishing and related activities may prove more difficult and require further justificatory steps. This is especially the case for measures falling within the second limb of the FAO’s ‘unregulated’ definition, addressing inaction in the *absence* of relevant RFMO or coastal state conservation measures. This is so because this limb requires a port state to determine that the failure to establish and implement management and conservation measures amounts to a dereliction of the targeted member’s obligations under international law (including *UNCLOS*, the *FSA* and the *PSMA* if applicable) as coastal, port or flag state.³⁰² A panel, the AB, or an arbitral tribunal reviewing such measures would likely closely scrutinise the port state member’s determinations concerning the conservation status of the stocks, species or ecosystems in question and the network of obligations impacted members are subject to, as well as whether the port state had made sufficiently prolonged and concerted good faith attempts to encourage or induce impacted members to fulfil their conservation obligations and, crucially, applied similar control measures to other similarly recalcitrant members.

V CONCLUSIONS AND FINAL REFLECTIONS

As we have shown, neither the law of the sea nor general international law present insurmountable obstacles for the effective exercise of port state jurisdiction aimed at tackling IUU activities. The existing rules on jurisdiction permit port states to adopt a wide range of measures — without needing to resort to more novel approaches such as the (arguably emerging) common concern principle. While treaty-based jurisdiction will often provide the simplest route of justification and enables port states to directly prescribe in respect of conduct performed by non-nationals beyond territorial jurisdiction, all states have the power to lawfully condition or deny port access. This flows from all states’ sovereign right to determine the conditions of entry to territory. The exercise of this power is nevertheless limited by the customary rules on distress and force majeure, as well as by any countervailing treaty obligations the port state has assumed.

³⁰⁰ See 2008 EU IUU Regulation (n 42) art 33. See also 50 CFR § 300.202 (2017).

³⁰¹ See above nn 263–265 and accompanying text.

³⁰² See above nn 10–23 and accompanying text.

Once a vessel has entered port, port states may validly inspect it and deny the use of port facilities. States may likewise lawfully impose sanctions for IUU activities when relevant conduct occurs within territorial jurisdiction or is performed by its nationals, or where the relevant flag or coastal state has delegated enforcement jurisdiction via treaty or on an ad hoc basis. If this is absent, port states may nevertheless lawfully sanction acts ancillary to IUU activities that occur within territorial jurisdiction or are performed by its nationals — such as the possession, landing or transshipment of catches, possession of banned gear, failure to report effort or catch, or falsification of certification documents. Based on recent arbitral practice, port states must ensure any enforcement action meets minimum standards of reasonableness and respect for the human rights of crews.³⁰³

Similarly, while WTO law presents certain additional conditions and considerations, these too can be overcome if built into PSMs' design and application. Given the majority of PSMs will infringe at least one discipline concerning trade in goods, port state WTO members must ensure measures fall within the ambit of the general exceptions contained in *GATT* art XX. In this regard, art XX(g) provides the simplest route. Port states must ensure that, in addition to being justified by sufficient technical evidence, measures are applied in a transparent and even-handed manner and are only adopted after good faith attempts have been made at seeking alternative bilateral or multilateral solutions. Significantly, the majority of PSMs adopted to date will likely be capable of justification under *GATT* art XX. While precisely how a panel, the AB, or an arbitral tribunal might approach the questions arising in a dispute remains to be seen, this conclusion is reinforced by the fact that IUU fishing is now squarely within the Organization's frame of reference,³⁰⁴ and by recent panels' willingness to engage meaningfully with WTO-extraneous rules and standards.³⁰⁵

All this said, at time of writing the AB appointment crisis risks making many of the above considerations moot. With no present ability to form an AB division to hear appeals, WTO members unsatisfied with a panel's findings can simply appeal 'into the void', thereby indefinitely suspending reports' adoption and

³⁰³ See above nn 140–141 and accompanying text. Recall especially the Tribunal's indirect incorporation of human rights considerations in *Arctic Sunrise* (n 140) [197], [225]–[235].

³⁰⁴ Musto (n 252).

³⁰⁵ See Panel Reports, *Australia — Tobacco Plain Packaging*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R and WT/DS467/R (n 226) [7.290].

denying them formal effect.³⁰⁶ This step could be taken by members challenging PSMs, or, equally, by port state members following adverse findings. While the EU-championed Multi-Party Interim Appeal Arbitration Arrangement provides an avenue for ad hoc, mutually agreed appeal, less than one sixth of the WTO membership have agreed to use this mechanism,³⁰⁷ and it remains to be seen how arbitrators will approach the issues discussed above. Despite a change in administration, the US remains unlikely to permit AB appointments in the short or middle term absent fundamental institutional and procedural reform.³⁰⁸ While this means that WTO rules currently have little formal ‘bite’, it also means that

³⁰⁶ Despite the Appellate Body currently having no members, disputing parties may nevertheless notify the Dispute Settlement Body (‘DSB’) of their decision to appeal, thereby preventing the DSB from adopting and implementing the panel report: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (‘*Understanding on Rules and Procedures Governing the Settlement of Disputes*’) arts 16(4), 17(1). Several members have already made use of this loophole, including the United States: see, eg, *Morocco — Definitive Anti-Dumping Measures on School Exercise Books from Tunisia*, WTO Doc WT/DS578/5 (4 August 2021) (Notification of an Appeal by Morocco under Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review); *United States — Tariff Measures on Certain Goods from China*, WTO Doc WT/DS543/10 (27 October 2020) (Notification of an Appeal by the United States under Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (‘DSU’)); *Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights*, WTO Doc WT/DS567/7 (30 July 2020) (Notification of an Appeal by the Kingdom of Saudi Arabia under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review); *India — Export Related Measures*, WTO Doc WT/DS541/7 (22 November 2019) (Notification of an Appeal by India under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review).

³⁰⁷ At the time of writing, 25 WTO members have endorsed the Multi-Party Interim Appeal Arbitration Arrangement: Australia; Benin; Brazil; Canada; Chile; China; Colombia; Costa Rica; Ecuador; the European Union; Guatemala; Hong Kong, China; Iceland; Macao, China; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Peru; Singapore; Switzerland; Ukraine; and Uruguay. See *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc JOB/DSB/1/Add.12 (30 April 2020) (Addendum); *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc JOB/DSB/1/Add.12/Suppl.1 (19 May 2020) (Supplement); *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc JOB/DSB/1/Add.12/Suppl.2 (20 May 2020) (Supplement); *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc JOB/DSB/1/Add.12/Suppl.3 (29 June 2020) (Supplement); *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc JOB/DSB/1/Add.12/Suppl.4 (28 July 2020) (Supplement); *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc JOB/DSB/1/Add.12/Suppl.5 (3 August 2020) (Supplement); *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc JOB/DSB/1/Add.12/Suppl.6 (22 September 2020) (Supplement); *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc JOB/DSB/1/Add.12/Suppl.7 (11 February 2021) (Supplement).

³⁰⁸ At the DSB meeting in May 2021, the United States reiterated that it ‘was not in a position to support the proposed decision [to begin Appellate Body appointments]’ and that it ‘continued to have systemic concerns with the Appellate Body’, which it ‘had raised and explained ... for more than 16 years and across multiple US Administrations’: *Minutes of Meeting*, WTO Doc WT/DSB/M/452 (12 July 2021) (Held in the Centre William Rappard on 28 May 2021) [6.17].

trade-impacting PSMs may cause affected members to adopt — unsanctioned, unilateral — retaliatory trade measures, further dis-incentivising PSMs' adoption.

This final point further highlights our earlier observation: while the legal obstacles facing PSMs' implementation and effectiveness can be overcome, as with many multifaceted transboundary conservation challenges, practical and political factors present as many — if not more — obstacles in effectively addressing IUU fishing and promoting sustainable uses of marine living resources. A key aim of this article has been to remove some of the doubt from debates concerning the lawfulness of PSMs and the conditions that attach to their adoption, thus allowing policymakers, practitioners and officials to renew their attention on developing the political will and technical capabilities necessary for PSMs to play an effective and appropriate role in closing regulatory and enforcement gaps. While doing so will not, alone, avert the crises many marine ecosystems face, reducing IUU fishing is a necessary and achievable step.