

## Spain and the Law of the Sea: 20 years under LOSC

### Spain and the fight against IUU fishing

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#### (A) INTRODUCTION

There can be no doubt that the Convention on the Law of the Sea (the LOSC)<sup>1</sup> is the basis for contemporary international fisheries law, which is essentially completed by two other, very relevant international Conventions: the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas<sup>2</sup>, and the 1995 UN 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<sup>3</sup>. Spain is bound by these international treaties, and other multilateral or bilateral international regulations related to the conservation and sustainable management of living marine resources, either as an individual country or as a European Union (EU) Member State.

In this context, it should be noted at the outset that the effect of the LOSC and these international regulations on Spanish fishing legislation was influenced by the fact that Spain had already been a member of the then European Community (now the EU) since 1 January 1986 when the LOSC came into force for Spain on 14 February 1997, and protection of marine resources is an exclusive competence of the EU<sup>4</sup>. This basic premise, which influences absolutely everything, given that Spain must accomplish the Common Fisheries Policy (CFP), also applies to the fight against illegal, unreported and unregulated (IUU) fishing, in which the EU has developed a leading role internationally. It is also worth mentioning that the fight against IUU fishing, and the concept of IUU fishing itself, arose internationally from the Code of Conduct for Responsible Fisheries,

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<sup>1</sup> Official State Gazette [*Boletín Oficial del Estado*; BOE] No. 39, 14 February 1997 and Official Journal (OJ) of the European Union (or of the European Communities, as was) L 179, 23.6.1998.

<sup>2</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24 November 1993, entered into force 24 April 2003), [2221 UNTS 91](#) (OJ L 177, 16.7.1996).

<sup>3</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001), [2167 UNTS 3](#) (BOE No. 175, 21 July 2004).

<sup>4</sup> In the Spanish literature, see L.I. Sánchez Rodríguez (ed.), *España y el régimen internacional de la pesca marítima* (Tecnos, Madrid, 1986), generally and as a pioneer in the field of relations between fishing in Spain and international regulations. On this question, see the contribution in this volume by Casado Ragi3n on “Fisheries”.

approved by the United Nations Food and Agriculture Organization (FAO) Conference in 1995<sup>5</sup>, and that it was the EU which would spearhead and lead the fight against this type of fishing internationally by adopting the legislation of 2008–2009 which I will discuss later.

As an introduction, I am first going to present some basic aspects of fisheries regulation, in the context of both international and EU law. Secondly, I will address the general aspects of sea fishing regulation in Spain.

### (1) The international and European legal context for fishing

Referring to the international context, we only need mention that, since the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas<sup>6</sup>, fishing has been incorporated into international law as a new sphere of regulation with regards the essential conservation and sustainable management of fisheries resources<sup>7</sup>. This is occurring as the States not only become aware of the depletion of some species and discover that overfishing can exhaust these ichthyologic resources, but also as new marine spaces are being established, particularly the exclusive economic zone. As well as allowing the States to establish fisheries regulations to apply to all spaces under their jurisdiction, be it the territorial sea or the exclusive economic zone, these two factors have also led to the restriction of the traditional principle of international law: freedom of fishing on the high seas

With reference to the spaces which come under the jurisdiction of the States, the LOSC effectively establishes the duty to protect living marine resources from overexploitation and preserve the maximum sustainable yield, and to cooperate with in respect of straddling fish stocks and highly migratory fish stocks<sup>8</sup>. It also establishes the double obligation of the States on the high seas: conservation, respecting the principle of maximum sustainable yield, and the duty of cooperation between States whose nationals exploit identical living resources, or different living resources in the same area, and coastal States, in regard to straddling fish stocks and highly migratory fish stocks especially<sup>9</sup>.

In addition to these provisions, in the 1990s a systemic approach to fishing was adopted by the FAO, and the principle of responsible fishing was born<sup>10</sup>. In this dynamic, the FAO adopted the 1993 Agreement and then, in 1995, the Code of Conduct, both mentioned previously. These two

<sup>5</sup> Adopted by resolution 4/95, of 31 October 1995, of the FAO Conference ([FAO doc. C 1995/REP](#)).

<sup>6</sup> Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966), [559 UNTS 285](#) ([BOE No. 309](#), 27 December 1971).

<sup>7</sup> In the Spanish literature on this subject, see M. Corral Suárez, *La Conservación de los Recursos Biológicos del Mar en el Derecho Internacional Vigente* (University of Valladolid, 1993); J.M. Sobrino Heredia, “La cooperación internacional en la conservación y gestión de los recursos pesqueros”, in *2 Cursos Euromediterráneos Bancaja de Derecho Internacional* (1998), 429–525; and E.J. Martínez Pérez, *El desarrollo sostenible como justificación de las acciones unilaterales para la conservación de los recursos marinos* (MAPA, Madrid, 2004), especially pp. 103–172.

<sup>8</sup> Arts. 61–68 LOSC.

<sup>9</sup> Essentially Arts. 117–119 LOSC. In the Spanish literature, see R. Casado Raigón, *La pesca en alta mar* (Junta de Andalucía, Seville, 1994); M. Badenes Castillo, *La crisis de la libertad de pesca en alta mar* (McGraw-Hill, Madrid, 1997); and R. Casado Raigón, “La pêche en haute mer”, in D. Vignes, G. Cataldi, R. Casado Raigón, *Le Droit International de la Pêche Maritime* (Bruylant, Brussels, 2000), 117–242.

<sup>10</sup> This occurred at the 1992 Cancun Conference (FAO doc. CL 102/19).

international instruments were contemporaneous with the Fish Stocks Agreement, although the latter was closely linked to the LOSC and its implementation<sup>11</sup>. These three international instruments, together with the LOSC, are fundamental to the current international fisheries law, as they establish specific international conservation and management measures for fisheries resources. The two Agreements are obligatory judicial instruments for the signatory States, although one applies to a more restricted space scope (the high seas) and the other is applicable to more restricted material scope, as it only refers to straddling fish stocks and highly migratory fish stocks. The Code of Conduct itself is not legally binding, but it does cover all types of fisheries, in all maritime spaces.

The duties of conservation and sustainable management, and cooperation between States, also led to the adoption of the various regional agreements and, from an institutional perspective and mostly under the auspices of the FAO, to the establishment of the various Regional Fisheries Management Organizations (RFMOs) that have competence for sustainable management of the resources in a particular marine sector (regional or sub-regional) or of a particular species, or various species<sup>12</sup>. There is absolutely no doubt that current international law, with the LOSC at its heart, has established limits to fishing activities to give rise to reasonable and responsible exploitation of fisheries resources based on the principle of maximum sustainable yield, configuring international legal obligations for the States, be these mainly flag States, or port or coastal States<sup>13</sup>.

These same objectives of conservation and sustainable management of fisheries resources by establishing total allowable catches (TACs), a regime of fishing licences and technical conservation measures and measures to limit fishing, are also objectives of the EU's now fully mature CFP. Although European Community fishing policy became independent from Community agricultural policy through regulations on fisheries products and modernisation of the fisheries sector in the 1960s and 1970s, it was not until Council Regulation (EEC) No. 170/83 of 25 January 1983 that a Community system for the conservation and management of fisheries resources was established<sup>14</sup>. Spain became a part of this CFP on 1 January 1986 when it joined the European Community, in the framework of a transitional period which concluded on 1 January 1996<sup>15</sup>. The CFP was subject to its first reform via various regulations adopted between 1992 and 1995, then a second reform in 2002, and finally the third and current reform which was implemented through Regulation (EU) No. 1380/2013, of the European Parliament and of the Council of 11 December 2013<sup>16</sup>.

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<sup>11</sup> This came into force generally on 16 November 1994.

<sup>12</sup> For information on these fisheries organisations in Spanish literature, see E. Vázquez Gómez, *Las organizaciones internacionales de ordenación pesquera. La cooperación para la conservación y gestión de los recursos vivos del alta mar* (Junta de Andalucía, Seville, 2002). For the problems associated with participation in these organisations, see M. Hinojo Rojas, "El acceso de terceros Estados a las organizaciones internacionales de pesca: una cuestión a revisar", in J.M. Sobrino Heredia (Dir.), *La toma de decisiones en el ámbito marítimo: su repercusión en la cooperación internacional y en la situación de las gentes del mar* (Bomarzo, Albacete, 2016), 167-188.

<sup>13</sup> See the complete analysis by a member of the Spanish delegation at the LOSC in J.A. de Yturriaga, *The International Regime of Fisheries. From UNCLOS 1982 to the Presential Sea* (Kluwer Law International, Dordrecht, 1997).

<sup>14</sup> OJ L 24, 22 January 1983.

<sup>15</sup> Cf. Article 154-176 of the Act of Adhesion of 12 June 1985 (BOE No. 1, 1 January 1986) and the Council Regulation (EC) No. 1275/94 of 30 May 1994 on adjustments to the arrangements in the fisheries chapters of the Act of Accession of Spain and Portugal (OJ L 140, 3 June 1994)

<sup>16</sup> OJ L 354, 28 December 2013.

For our purposes, it must be noted that the CFP shall cover the conservation of marine biological resources and the management of fisheries and fleets exploiting such resources, as well as the processing and marketing of fisheries and aquaculture products. With respect to its scope, the CFP covers all these activities when they are carried out in the territory of a Member State to which the Treaty applies; in Union waters, including by fishing vessels flying the flag of, and registered in, third countries; by Union fishing vessels outside Union waters; or by nationals of Member States, without prejudice to the primary responsibility of the flag State<sup>17</sup>.

The fundamental issue in all cases is that conservation of marine biological resources within the CFP is the exclusive competence of the European Union, in accordance with Article 3.1.d) of the Treaty on the Functioning of the European Union (TFEU), while the EU shares competences with its Member States in the other areas covered by the CFP<sup>18</sup>. This is relevant in two ways, for the purposes of this study. First, the EU has exclusive competence to celebrate international fisheries agreements, is member of various RFMOs, and it is part of two important international agreements which exclude the Member States: the above-mentioned 1993 FAO Agreement and the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing<sup>19</sup>. Second, establishment of fisheries control regimes is also the exclusive competence of the EU<sup>20</sup>, based on Council Regulation (EC) No. 1224/2009 of 20 November 2009, establishing a Community control system for ensuring compliance with the rules of the common fisheries policy<sup>21</sup>, which includes the entirety of community legislation on the fight against IUU fishing.

## (2) Regulation of sea fishing in Spain

Spanish legislation on fishing matters has two constitutionally relevant dimensions: first, distribution of competence between the State and the Self-governing Communities and second, the constitutional principle of sustainable development. In the first case, and aside from other provisions on competence<sup>22</sup>, it should be noted that Article 149(1)(19) of the Spanish Constitution [*Constitución Española*, CE hereinafter] establishes that the State should have exclusive competence over “sea fishing, without prejudice to the powers that, in regulations governing this sector, may be vested to the Self-

<sup>17</sup> Art. 1 of Regulation (EU) No. 1380/2013. For general information on the CFP in Spanish literature, see R. Casado Raigón (Dir.), *L'Europe et la mer. Pêche, navigation et environnement marin / Europe and the Sea. Fisheries, Navigation and Marine Environment* (Bruylant, Brussels 2005); F.J. Carrera Hernández, “La Política Pesquera Común”, in M. López Escudero, J. Martín y Pérez de Nanclares (Coords.), *Derecho comunitario material* (McGraw Hill, Madrid, 2000), 222-233; G.A. Oanta, “La política pesquera común”, in M. Ortega Gómez (ed.), *Las políticas de la Unión Europea en el siglo XXI* (Bosch Editor, Barcelona, 2016), 117-151; and the monographic issue coordinated by J. Sobrino Heredia on the Common Fisheries Policy in the journal *Noticias de la Unión Europea*. No. 326. March 2012.

<sup>18</sup> Art. 4(2)(d) TFEU.

<sup>19</sup> OJ L 191, 22 July 2011.

<sup>20</sup> Specifically, the European Fisheries Control Agency (EFCA), established by Council Regulation (CE) No. 768/2005 of 26 April 2005 (OJ L 128, 21 May 2005), has its headquarters in the city of Vigo.

<sup>21</sup> OJ L343, 22 December 2009.

<sup>22</sup> The State also has exclusive competence for the “basic rules and coordination of general economic planning”, which cover the basic legislation on trading fisheries resources (Article 149(1)(13) CE) and the “merchant navy and registering of ships”, which also covers registration of fishing vessels (Article 149(1)(20) CE).

governing Communities”. Article 148(1)(II) CE allows the Self-governing Communities to assume exclusive competence over “inland water fishing, the shellfish industry and fish farming, hunting and river fishing”. The conflict of competence arising from these provisions was resolved by the Constitutional Court, by differentiating between two distinct concepts of competence in Article 149(1)(19) CE: sea fishing and management of the fisheries sector. The first refers to aspects related to protection of fisheries resources in external waters<sup>23</sup>, and the second refers to aspects related to the economic and social dimension of fishing, although the State retains exclusive competence for dictating the basic legislation on management of the fisheries sector<sup>24</sup>.

The second constitutionally relevant dimension is Article 45 CE which, among the governing principles of social and economic policy, incorporates the “right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it”. To this end, “public authorities shall watch over a rational use of all natural resources with a view to protecting and improving the quality of life, and preserving and restoring the environment” and, for anyone who should infringe these provisions: “criminal or, where applicable, administrative sanctions shall be imposed, under the terms established by the law, and they shall be obliged to repair the damage caused”. In other words, together with the recognition of the right to an adequate environment, Spain has a constitutional mandate to establish both administrative and criminal sanctions in the field of environmental protection.

In this respect, one of the first important Laws is Law 53/1982 of 13 July<sup>25</sup>, which categorises infringements and establishes administrative sanctions for fishing offences perpetrated in waters under Spanish jurisdiction, by Spanish or foreign vessels, and those committed by Spanish flagged vessels in waters which come under the jurisdiction of other States or on the high seas. This first post-constitutional Law was repealed by Law 14/1998 of 1 June<sup>26</sup>, which established a more complete control regime to protect fisheries resources. This takes us to fundamental Law 3/2001 of 26 March, the State Maritime Fisheries Law<sup>27</sup>, still in force, which has established a wide and comprehensive regulatory framework describing the general guiding principles of the legal framework for the economic and productive fishing sector. The Law regulates sea fishing, for which the State has exclusive competence, and establishes the basic legislation on management of the fisheries sector, facilitating its regulatory development and execution by the Self-governing Communities.

For our purposes, the Law first introduces a general regime of measures to conserve, protect and regenerate fisheries resources, inspired by international norms. These measures are applicable to fishing activity carried out by Spanish vessels in waters under Spanish jurisdiction, in waters under

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<sup>23</sup> Understood as the maritime waters under Spanish sovereignty or jurisdiction, located outside the baselines used to delimit marine spaces under the jurisdiction of the State.

<sup>24</sup> For general information, see G.A. Barrio García, *Régimen jurídico de la pesca marítima* (Marcial Pons, Madrid, 1998), especially at 130-193.

<sup>25</sup> [BOE No. 181](#), 30 July 1982.

<sup>26</sup> [BOE No. 131](#), 2 June 1998.

<sup>27</sup> Law 3/2001, of 20 March, on State Marine Fisheries ([BOE No. 75](#), 28 March 2001). See J. Juste Ruiz, “La Ley 3/2001, de 26 de marzo, de pesca marítima del Estado: análisis y evaluación”, 54 *Revista Española de Derecho Internacional* (2002), 95-114.

the jurisdiction of other EU Member States, in waters of third countries (without prejudice to the country's own legislation or to international treaties), as well as to these vessels in the high seas, in compliance with current international law. The measures are also applicable to EU vessels in waters under Spanish jurisdiction, in compliance with EU legislation, and to vessels from third countries in waters under Spanish jurisdiction, in compliance with both EU legislation and the rules laid down by international treaties. Secondly, compliance with this conservation legislation is guaranteed by the establishment and adoption of inspection and control measures, both on the sea and on land whenever fish catches and fishing gear is landed, unloaded and stored. Finally, the Law regulates a framework of infringements and sanctions (which I will refer to later) in which the material scope applicable to sea fishing is differentiated from that applicable to management of the fisheries sector and trading of fisheries products.

#### (B) ILLEGAL, UNREPORTED, AND UNREGULATED FISHING (IUU FISHING) AND THE INTERNATIONAL FIGHT AGAINST THIS TYPE OF FISHING

Now that we have established the antecedents, and the content and general scope of maritime fisheries legislation in Spain, I shall discuss the emergence of the concept of IUU fishing and the fight against this type of fishing, especially EU action in this respect.

##### (1) The concept of IUU fishing: emergence and international scope

In the last few decades, we have come to realise that a great deal of illegal or poorly regulated overfishing has been allowed to occur due to inadequate international regulation of the marine spaces, the ineffective regulation and control by certain flag States, the excessive capacity of some States' fisheries sectors and, especially, the considerable economic benefits that this activity generates<sup>28</sup>. So IUU fishing has become a large-scale international phenomenon with significant economic social and environmental consequences. The severity of these environmental and socio-economic effects led to the identification, in the late 1990s, of the IUU fishing phenomenon and to the first international actions which led to the adoption of the International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU) by the FAO Council in 2001<sup>29</sup>.

The Plan of Action included a definition of the phenomenon which shapes the entirety of current thinking on IUU fishing. So the IPOA-IUU essentially defines illegal fishing as fishing activities carried out in violation of current norms, whether these are of a national or international nature. The same IPOA-IUU also considers fishing activities which have not been declared, or which have been

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<sup>28</sup> For general information on these issues, see J.M. Sobrino Heredia, "La tensión entre la gobernanza zonal y la gobernanza global en la conservación y gestión de los recursos pesqueros", in J.M. Sobrino Heredia (Dir.), *La contribución de la convención de las Naciones Unidas sobre el derecho del mar a la buena gobernanza de los mares y océanos* (Ed. Sicientífica, Milano, 2014, Vol. 2), 455-483.

<sup>29</sup> Adopted 23 June 2001. FAO Council report, CL 120/REP. For more information in the Spanish literature on this Plan, see A. Rey Aneiros, J. Sobrino Heredia, "Plan de acción internacional para prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada (United Nations Food and Agriculture Organisation. Roma, 2001)", 54 *Revista Española de Derecho Internacional* (2002), 481-487.

incompletely declared, to be unreported fishing in violation of the relevant legal provisions. So unreported fishing is really no more than a form of illegal fishing, as it is defined by the violation of national regulations, or of the proceedings of an RFMO, regarding declaration of the activity or the catch resulting from the activity.

The IPOA-IUU also states that fishing activities which occur “in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law” are classed as unregulated fishing. The second part of this definition is difficult to grasp, as the absence of relevant legislation does not necessarily mean that the fishing activity is harmful, or that it should be prosecuted, or that it is necessarily associated with illegal fishing. This all generates a certain ambiguity, as it can mean that a component of IUU fishing, specifically the part known as unregulated fishing, does not represent a breach of regional and international measures for conservation and management of fisheries resources.

Ultimately, I consider that we are confronted with only two types of activity: either illegal or unregulated, but these are addressed as one, although, in my opinion, they should be differentiated<sup>30</sup>. In any case, despite these conceptual ambiguities, what is clear about the provisions of the IPOA-IUU and international action in this respect is that, generally, the concept of IUU fishing “aims to cover all forms of fishing that impoverish fisheries resources, whether carried out at the margin of international and national mechanisms whose objective is to ensure that fishing is developed in a responsible manner, or whether contravening these mechanisms”<sup>31</sup>.

The Plan of Action envisages measures to prevent, deter and eliminate IUU fishing which are applicable to all States (flag States, coastal States and port States), commercial measures, which are becoming increasingly relevant<sup>32</sup>, and cooperation with RFMOs, but the most significant development in international regulation has occurred in relation to port States and, to a much lesser degree, flag States. Indeed, in respect of the first two points, a Model Scheme on Port State Measures to Combat IUU Fishing was established by FAO in 2005 and finally, as mentioned previously, the FAO Port State Measures Agreement, in force since 5 June 2016, was adopted in 2009. The EU is a part of this Agreement and played a significant role in its adoption<sup>33</sup>. Regarding the last two points, and

<sup>30</sup> R. Casado Raigón, “El Acuerdo de la FAO de 2009 sobre medidas del Estado rector del puerto destinadas a prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada”, 326 *Noticias de la Unión Europea* (2012), at 4.

<sup>31</sup> T. Treves, “La pesca ilegal, no declarada y no reglamentada: Estado del pabellón, Estado costero y Estado del Puerto”, in J. Pueyo Losa, J. Jorge Urbina (Coord.), *La cooperación internacional en la ordenación de los mares y océanos* (Iustel, Madrid, 2009), at 135.

<sup>32</sup> On this subject: J. Jorge Urbina, “La cooperación internacional en la aplicación de medidas comerciales para luchar contra la pesca ilegal, no declarada y no reglamentada”, 33 *Revista Electrónica de Estudios Internacionales* (2017) [[doi: 10.17103/reei.33.04](https://doi.org/10.17103/reei.33.04)].

<sup>33</sup> X. Pons Rafols, “La Unión Europea y el Acuerdo de la FAO sobre las medidas del Estado rector del puerto

considering that an instrument which is legally binding for flag States may be adopted in the future, the FAO adopted the Voluntary Guidelines for Flag State Performance in 2014<sup>34</sup>.

## (2) EU activities in relation to IUU fishing

The EU has been a leader in the fight against IUU fishing for many years due to its own competences and the interests of its considerable coastline, its significant fishing fleet and extractive capacity, and its position as the largest importer of fisheries products worldwide. It originally adopted a Community action plan for the eradication of IUU fishing, proposed by the Commission in 2002<sup>35</sup>, complemented by the development, implementation and control of the CFP. Having realized that the most effective measures against IUU fishing are those which aim to reduce the benefit and increase the cost of this type of fishing, the Commission spearheaded a strategy which culminated in the adoption of two central regulations: Council Regulation (EC) No. 1005/2008 of 19 September 2008<sup>36</sup> and Commission Regulation (EC) No. 1010/2009 of 22 October 2009<sup>37</sup>. These aim to prevent, deter and eliminate IUU fishing, ensuring that all States, both member States and third States, comply with their international obligations to conserve and manage fisheries resources sustainably. This EU legal framework on IUU fishing, which complements the other EU fisheries regulations, came into force on 1 January 2010 and has been developed and updated various times since then.

With regards to the scope of this legislation specifically, it should be noted that it covers any type of sea fisheries activity, whether carried out in EU waters, in waters under the jurisdiction of a third State, or on the high seas, and whether or not these zones are subject to a special regulatory regime by an RFMO. It therefore involves a significant regulatory intent to combat IUU, which transcends waters under the jurisdiction of the Member States and goes further than the CFP itself, thereby including an extraterritorial component. Applying the same logic to its subjective scope of application, this legislation is applicable to all fishing vessels under the flag of an EU Member State, but also to all fishing vessels flagged by third States. The only requirement for the legislation to be applied is the existence of a link to the EU: either access to Member State ports, or fisheries products being traded to or from the EU, or that the fishing vessel is flagged in a Member State, or its owners, operators or charterers are Member State nationals.

Likewise, the EU regulation establishes that it is applicable to IUU fishing, using the FAO definition adopted by the EU to which I have just referred, and complementing it with some general assumptions about IUU fishing which enable the circumstances of IUU fishing to be defined and delimited more precisely. However, the regulations not only refer to fishing activities in the strict

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destinadas a prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada”, 27 *Revista General de Derecho Europeo* (2012).

<sup>34</sup> Adopted by the Committee on Fisheries and endorsed by the FAO Council (FAO doc. FIPI/R1101, Appendix H, p. 106ff).

<sup>35</sup> Document COM(2002) 180 final, 28 May 2002. For more on this plan, see J.M. Sobrino Heredia, “La reforma de la Política Pesquera Común y la pesca ilegal, no declarada y no reglamentada”, 277 *Noticias de la Unión Europea* (2008), especially pp. 85 ff.

<sup>36</sup> OJ L 286, 29 October 2008.

<sup>37</sup> OJ L 280, 27 October 2009.



sense, but also cover other activities associated with fishing or related activities, such as the dispatch, trans-shipment, processing, unloading, selling and distribution of fish and fisheries products that could be derived from IUU fishing.

In addition to requiring that all commercial exchanges are accompanied by a catch certificate validated by the flag State and strengthening the measures available to port Members State authorities to monitor and inspect fishing vessels from third countries, EU regulations establish a complete system of IUU fishing infringements and sanctions. The EU IUU fishing vessel list, which also lists vessels identified as such by the RFMOs, and the list of non-cooperating States which do not collaborate or do not adequately control fishing activities carried out in their jurisdiction, breaching international obligations, are particularly relevant. Third States to which sanctions will be applied, especially sanctions of a commercial nature, can be included in this list by a system of pre-identification and identification.

The commercial approach, via the requirement for catch certificates, is one of the axes of European regulations and there is no doubt that it has had a significant effect on the fight against IUU fishing, both within the EU and internationally. Linked to the EU fisheries control measures and the review of the CFP, these measures have improved compliance with measures of fish conservation and sustainable fisheries management by the EU Member States. In any case, the scope of the EU action has to be considered positively, as it has led third States to adopt measures against IUU fishing if they want fisheries products originating in their territory or caught by vessels under their flags to be able to be traded and to enter into the European market. This justifies the EU's reputation for leadership in the fight against IUU fishing<sup>38</sup>.

### (C) SPAIN'S LEADERSHIP IN THE FIGHT AGAINST IUU FISHING: MORE LIGHTS THAN SHADOWS

I will tackle specific analysis of Spanish activity in the fight against IUU fishing from three perspectives. Firstly, I will analyse the legal and regulatory changes adopted since 2002 to strengthen the fight against IUU fishing. Secondly, I will discuss the administrative and criminal penalties established by Spain in the fight against IUU fishing. Thirdly, I will consider activities against IUU fishing and, specifically, the jurisdictional limits of the Spanish courts to prosecute IUU fishing on the high seas.

#### (1) Legal and regulatory modifications to fortify the fight against IUU fishing

As I mentioned previously, Spanish legislation on prosecuting and sanctioning illegal fishing activities already existed, the most important of which was Law 3/2001 of 26 March, the State Maritime Fisheries Act<sup>39</sup>. This legislation is particularly relevant to illegal fishing activities committed by vessels

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<sup>38</sup> X. Pons Rafols, "El protagonismo de la Unión Europea en la lucha contra la pesca ilegal, no declarada y no reglamentada", in J. Pueyo Losa and J. Jorge Urbina (Coords.), *La gobernanza marítima europea. Retos planteados por la reforma de la política pesquera común* (Thomson Reuters Aranzadi, 2016), 177-201.

<sup>39</sup> Spain quickly signed up to the IPOA-IUU measures and the Community Action Plan, and also adopted its own

under flags of convenience, especially those of States which do not cooperate in the conservation of fisheries resources. In this respect, we need only summarise some provisions that are still valid: Royal Decree 798/1995 of 19 May<sup>40</sup>, which excludes the possibility of certain benefits for vessels which wish to export to particular countries; Royal Decree 601/1999 of 16 April<sup>41</sup>, which prohibits inscription of fishing companies domiciled in a state which does not cooperate in the conservation of fisheries resources; Royal Decree 1797/1999 of 26 November<sup>42</sup>, which establishes control of fishing operations by vessels from third countries in waters under Spanish sovereignty or jurisdiction; or Royal Decree 3448/2000 of 22 December<sup>43</sup>, which stipulates that authorisation to enter in joint ventures is conditional on satisfactory guarantees that international law will not be violated. Along these same lines, Part V of Law 3/2001 establishes a regime of sea fishing infringements and sanctions, categorising the infringements arising from non-compliance with, or violation of, the obligations established in international fishing covenants, agreements or treaties.

Once the IPOA-IUU had been adopted, Royal Decree 1134/2002 of 31 October<sup>44</sup>, on the application of sea fishing sanctions to Spanish crewmembers of vessels with flags of convenience, incorporated IPOA-IUU recommendations. It stipulated that a breach of marine fisheries obligations, especially those laid down in the LOSC, or violation of the conservation and management measures adopted by RFMOs of which the EU or Spain are part, by any physical or legal person with Spanish nationality legally associated with a vessel from a third country, will be penalised according to the regime of infringements and sanctions regulated by Law Law 3/2001 if the flag State does not have exercised the authority to sanction<sup>45</sup>. Also worthy of mention is Royal Decree 747/2008 of 9 May<sup>46</sup>, which regulates the sanctions regime for marine fisheries on the high seas, introducing the required changes to the sanctions procedure to make it more effective regarding IUU fishing.

Once EU IUU fishing regulations were approved, and without prejudice to the direct applicability of this legislation, procedures were established to control access to port services, and landing and trans-shipment of fishing vessels from third countries, and to control the introduction of fisheries products into Spanish territory and their exportation and re-exportation as well as to regulate those aspects which would require amendment to EU legislation<sup>47</sup>. This was implemented with effect from 1 January 2010, the date that EU legislation came into force, by Order ARM/3522/2009 of 23

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Plan of Action, joining the FAO in sponsoring an international conference on IUU fishing, held in Santiago de Compostela on 25–26 November 2002 (*Conferencia Internacional contra la pesca ilegal, no declarada y no reglamentada. La pesca INDNR/IUU*. MAPA. Madrid 2004).

<sup>40</sup> [BOE No. 154](#), 29 June 1995.

<sup>41</sup> [BOE No. 103](#), 30 April 1999.

<sup>42</sup> [BOE No. 301](#), 17 December 1999.

<sup>43</sup> [BOE No. 307](#), 23 December 2000.

<sup>44</sup> [BOE No. 262](#), 1 November 2002.

<sup>45</sup> Spanish legislation characterises a flag of convenience as that granted by a countries or territories classified by the RFMOs as non-cooperating in their regulatory area, according to the criteria established by said organisations, therefore considering that stateless vessels, or vessels without nationality, will be considered to be vessels with flags of convenience.

<sup>46</sup> [BOE No. 129](#), 28 May 2008.

<sup>47</sup> A computer application called the *Sistema Integrado de Gestión para el Control de la Pesca INDNR* [Integrated Management System to Control IUU Fishing], known as SIGCPI, was established by the General Secretariat for Fisheries for this purpose.

December<sup>48</sup>, repealed some months later by Order ARM/2077/2010 of 27 July<sup>49</sup>.

In any case, over and above these rules, it seemed reasonable to situate the concept of IUU fishing and the legal measures to fight against this type of fishing at the legislative level, to give it superior legal status. This was attempted initially by the Draft Bill for Sustainable Fishing, a legislative initiative presented to Congress in September 2010<sup>50</sup>. The Draft Bill's name itself highlighted its intention and its association with international developments on responsible fishing. The Draft Bill was all-embracing and intended to replace Law 3/2001 completely, but it expired on dissolution of Parliament and convocation of the general elections of 2011.

The successful legal change which incorporated measures against IUU fishing finally took place in 2014, with the adoption of Law 33/2014 of 26 December, which amended Law 3/2001, the State Maritime Fisheries Act<sup>51</sup>, and which is particularly relevant to us. Starting with the consideration that IUU Fishing is one of the greatest threats to the sustainable use of living aquatic resources and to marine biodiversity, and that the advances made at EU and international levels should be reflected in domestic law, various amendments were made to the prevailing Law, including changes to the measures against IUU fishing. In this respect, the new Article 40 *bis* of the Law establishes that the relevant control and inspection measures would be adopted to ensure that fisheries products imported into Spain and exported from Spain have all been caught in accordance with international conservation and management measures and are not derived from IUU fishing. These measures will be particularly directed at preventing, deterring and eliminating activity by stateless vessels, vessels registered in countries classified as offering flags of convenience or vessels from third countries identified as having engaged in illegal fishing activities. The new provision also envisages development of the actions required to effectively dissuade Spanish nationals from carrying out IUU fishing activities or facilitating these activities by vessels registered in third countries and fishing outside EU waters. This will include measures to identify these nationals, and audit activities carried out by nationals linked to vessels from third countries which fish outside EU waters<sup>52</sup>.

The most important aspect of the 2014 amendment to Law 3/2001 is complete renewal of Part V, on sea fishing infringements and sanctions, an amendment which also covers basic regulation of the sanctions regime for the fisheries sector and commercialisation of fisheries products. This sanctions regime is primarily aimed at those behaviours and events that occur within territory and maritime waters under Spanish sovereignty or jurisdiction. The secondary targets are behaviours and events occurring outside this territory or maritime waters but committed by physical or legal persons on board nationally flagged vessels or availing themselves of these vessels. In third place, again outside this territory or maritime waters but committed by physical or legal persons of Spanish nationality, on board stateless vessels or vessels with foreign flags or availing themselves of these, whenever the

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<sup>48</sup> [BOE No. 35](#), 31 December 2009.

<sup>49</sup> [BOE No. 185](#), 31 July 2010.

<sup>50</sup> *Proyecto de Ley de Pesca Sostenible* [Draft Bill for Sustainable Fishing] in the *Boletín Oficial de las Cortes Generales. Congreso de los Diputados*, Series A, No. 95-I, 8 September 2010.

<sup>51</sup> See Law 3/2001, of 20 March, on State Marine Fisheries ([BOE No. 75](#), 28 March 2001), consolidated text as amended.

<sup>52</sup> Trading fisheries products of any origin or provenance, including holding, possessing, transporting, trafficking, storing, transforming, displaying and selling, is prohibited if the products originate from IUU fishing (Article 79).

flag State has not exercised their sanctioning authority. Finally, in fourth place, this sanctions legislation will also be applicable to events or behaviours detected in territory or maritime waters under Spanish sovereignty or jurisdiction and considered to be IUU fishing, even when committed outside this territorial range. This is independent of the perpetrator's nationality and the vessel's flag<sup>53</sup>.

(2) The establishment of administrative and criminal sanctions in the fight against IUU fishing

It is worth considering some issues with the sanctions regime under the current State Maritime Fisheries Act. Firstly, the responsibility generated is strictly administrative, which does not exclude sanctions of a different class that may arise<sup>54</sup>. Therefore, according to the principle of *non bis in idem*, behaviours which have already been subject to criminal or administrative sanctions cannot be sanctioned again, in cases where the identity of subject, fact and legal ground are known<sup>55</sup>. If the behaviour could be considered an offence, the administration will pass the case to the competent jurisdiction and will abstain from following sanctions procedures until the judicial authority issues their final judgement, acquits or dismisses the case, or the case is returned by the public prosecution service.

Secondly, there is a notable '*plus*' in the classification, as infringements which are classified as minor are actually considered severe, and those that are classified as severe are considered very severe, in cases where the violation has been committed by a physical or legal person legally linked to stateless vessels, vessels with flags of convenience or vessels registered in third countries identified by the RFMOs or other international organisations as having engaged in IUU fishing activities or activities incompatible with conservation and management measures<sup>56</sup>. Likewise, breaching the duties established under international treaties on sea fishing or the rules established by the RFMOs are classed as severe infringements when they breach conservation and management measures<sup>57</sup>. When these violations could endanger or impede the normal execution of established obligations, or when these involve, or could involve, a breach of the duties assumed by the State, they will be considered very severe infringements<sup>58</sup>. Equally, participation in trans-shipments or joint fishing operations with stateless vessels or third-country vessels identified as having engaged in IUU fishing activities or activities incompatible with conservation measures for fisheries resources, or providing assistance or re-supplying such vessels are considered very severe infringements<sup>59</sup>; as is participating in the operation, management or ownership of stateless vessels, or third-country vessels identified as having engaged in IUU fishing activities or activities incompatible with conservation and management measures, or exercising mercantile, commercial, corporate, or financial activities with these vessels<sup>60</sup>.

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<sup>53</sup> Article 90.

<sup>54</sup> Article 92(1).

<sup>55</sup> Article 92(2).

<sup>56</sup> Article 100(1)(l) and Article 101(m).

<sup>57</sup> Article 100(1)(m).

<sup>58</sup> Article 101(j).

<sup>59</sup> Article 101(k).

<sup>60</sup> Article 101(l).

Royal Decree 182/2015 of 13 March<sup>61</sup>, which approved the current regulations for the sanctions regime for maritime fisheries in external waters and which replaces Royal Decree 747/2008, was adopted in application of the provisions of the modified Part V of the State Maritime Fisheries Act. The new regulations stem from substantial amendments to the infringements and sanctions regime, and they also support Spain's determination to lead the EU in applying the principles of fish stock sustainability driven by the CFP, by strengthening the policy of EU control, the fight against IUU fishing and respect for CFP rules.

In relation to the criminal dimension of the campaign against IUU fishing, we should highlight that environmental crime was not fully introduced into the Criminal Code [*Código Penal*; CP] until 1995. Infringements and sanctions against illegal fishing were an exclusively administrative issue in Spain, except in the case of fishing with explosives<sup>62</sup>. It is particularly relevant to us that, once CP reforms in 2010 and 2015 amended the 1995 provisions, the criminal regulations currently in force largely constitute white criminal norms, which need to be incorporated into other different regulations<sup>63</sup>. So Article 334 CP refers to national lists and existing legislation to criminally sanction the fishing of endangered species, which is aggravated if it involves species classified as endangered by extinction. In the same way, Article 335 CP penalises fishing when this is expressly prohibited under specific fishing legislation, whether this legislation arises from the State or the self-governing Communities. Finally, Article 336 CP sanctions fishing using methods which are destructive or non-selective for wildlife. Criminal legislation is territorial in all of these scenarios, since the CP can only pursue offences against natural resources and the environment committed on the high seas if they involve contaminating activities which cause, or could cause, significant damage to the quality of air, soil or water, or animals or plants, with an aggravated sub-type if this conduct severely prejudices the equilibrium of natural systems (Article 325 CP).

On the one hand, these provisions mean that we often find ourselves faced with a difficult and complex delimitation between administrative and criminal offence, which can often lead to a merely quantitative distinction without a precise definition. Conversely, these legal references can give rise to overlaps or concurrence between the criminal penalty and the authority to apply administrative sanctions, scenarios in which the principle of *non bis in idem*, recognised and developed in Spanish constitutional law as a fundamental right, would be applicable. Spanish administrative fisheries legislation, and its catalogue of infringements and sanctions, is much more complete and precise than criminal proceedings in this respect, and I believe that criminal penalties for IUU fishing should also be clearly addressed.

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<sup>61</sup> [BOE No. 63](#), 14 March 2015.

<sup>62</sup> The 2010 amendment of the Criminal Code involved amongst other issues, the transposition of Directive 2008/99/EC of the European Parliament and of the Council, of 19 November 2008 (OJ L 328, 6 December 2008), on protection of the environment through criminal law, which extended the scope of legal protection for wildlife.

<sup>63</sup> Such as the above mentioned State Law on Marine Fisheries, or Law 42/2007 of 13 December, on Natural Heritage and Biodiversity ([BOE No. 299](#), 14 December 2007), or Law 41/2010 of 29 December, on Protection of the Marine Environment ([BOE No. 317](#), 30 December 2010).

### (3) Actions against IUU fishing and the jurisdictional limits of the Spanish courts

Spain has a long fishing tradition, and IUU fishing activities have been recorded in Spain, or been committed by Spanish physical or legal persons, throughout this long history. Some non-governmental organisations have repeatedly condemned these cases<sup>64</sup> and questioned the use of certain Spanish ports by fishing vessels dedicated to IUU fishing<sup>65</sup>. The media have also referenced activities against IUU fishing, by highlighting recent Operations Sparrow I, Sparrow II and Yuyus, which resulted in significant financial penalties being issued by the Spanish Ministry of Agriculture and Fisheries, Food and the Environment. Government authorities have insisted publicly that the fight against IUU fishing is an absolute priority and that Spanish operations are the best in Europe against this type of fishing.

In this context, and that of judicial action against IUU fishing, we should highlight the recent Sentence 974/2016 of the Criminal Section of the Supreme Court, of 23 December 2016, which closed a case brought by the National Court (*Audiencia Nacional*) related to offences against wildlife and of money laundering committed in international waters by vessels with Spanish interests but flying flags of convenience, through the Spanish court's lack of jurisdiction. Beyond the procedural details of the case<sup>66</sup>, the most relevant point is that this Sentence reveals the extraterritorial weakness in criminal justice's fight against IUU fishing<sup>67</sup>.

The matter which was taken before the Supreme Court concerned a clan which is very well known to the police, both in Spain and abroad, as an international pirate fishing clan: *Vidal Armadores*. This episode actually started in January 2015, when vessels from this company, under flags of convenience and formally belonging to Panamanian companies, were detected and boarded by New Zealand sea patrols while fishing for toothfish (*Dissostichus* spp.) using dragnets, or gillnets, in the area protected by the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)<sup>68</sup>. During their investigations, the National Court prosecution service considered that Spanish jurisdiction was competent to try offences committed outside national territory, as long as the criminals were Spanish, and a case was opened which was the start of Operation Yuyus. This investigation led to the detention and imprisonment of various members of this criminal group in March 2016. They were investigated for offences against natural resources and the environment, membership of a criminal

<sup>64</sup> See, for example, the list of cases where Spanish companies associated with IUU fishing have been exposed by *Veterinarios sin Fronteras* [Veterinarians without Borders] in [Pesca ilegal en España. Suma y sigue](#). Barcelona, February 2010.

<sup>65</sup> Greenpeace [denounced](#) Puerto de la Luz in Las Palmas, Gran Canaria recently, with the subsequent denial of the Ministry of Agriculture and Fisheries, Food and the Environment.

<sup>66</sup> An appeal for reversal against an order issued by the Fourth Section of the National Court's Criminal Division (an interlocutory appeal) which dismissed the appeal and confirmed the ruling of the Central Court of Instruction No. 3, confirming the authority of the National Court to hear this complaint by the public prosecution service. In other words: the Supreme Court, in resolving a questionable appeal for reversal, dismissed the preliminary draft proceedings without setting a precedent resolution on the one hand; and, on the other hand, it discontinued the investigation started by the National Court and endorsed by its own Criminal Division, surprisingly without waiting for sentence.

<sup>67</sup> M.A. García García-Revillo, "Falta de jurisdicción de los tribunales españoles para conocer de delitos contra el medio ambiente (pesca IUU) cometidos por españoles mediante buques de pabellón extranjero en alta mar", 69 *Revista Española de Derecho Internacional* (2017), 345-351.

<sup>68</sup> BOE No. 125, 25 May 1985.

group, money laundering and falsifying documents.

However, the Supreme Court adjusted closely to the criminal law principle of territoriality and deemed that the principle of personality in the application of criminal norms, which acts as an exception to the principle of territoriality, demands that the behaviour be punishable also in the place of realization<sup>69</sup>. Double incrimination therefore operates as a *conditio sine qua non* so that an offence committed outside Spain by a Spaniard, or by any foreigner who has acquired Spanish nationality after the event in question, can be investigated and judged by the Spanish courts. For the Supreme Court, the behaviours that were the subject of the public prosecution's complaint were committed in international waters and the CAMLR Convention does not admit the existence of this double incrimination, as it does not include the intention to impose obligatory criminal sanctions on fishing infringements. The Supreme Court could not, therefore, fit these behaviours into either Article 23(2) or into the criminal types defined in Articles 23(3) and 23(4) of the Organic Law on the Judiciary to enable Spanish jurisdiction to be established<sup>70</sup>, and so it ordered that the case be closed<sup>71</sup>.

The Supreme Court ruling was accompanied by a dissenting vote from Judge Antonio del Moral, who, as well as voicing scathing criticism of the procedure, considered that the spaces situated at the limits of national sovereignty could not be converted "in the 21st century into 'lawless towns', where anything goes, except crimes governed by the principle of universal justice and which conform to an extensive, but nevertheless limited, list which has significant absences"<sup>72</sup>. To avoid this anomaly and impunity, I consider that the international rules, including CAMLR Convention and EU regulations on IUU fishing, and internal criminal legislation, should clearly establish the obligation to prosecute this type of IUU fishing with criminal sanctions, as is already the case in the administrative field, regardless of the marine space it occurs in, or the vessel's flag, or the nationality of the participants in these activities.

#### (D) FINAL REMARKS

In this section of final remarks, I should first indicate that international development of the duties of

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<sup>69</sup> Basing their reasoning strictly on the question of jurisdiction of the Spanish courts, without analysing whether the toothfish is an endangered species or included on the list of endangered species and whether this could fit into the criminal definitions in Arts 334 and 335 CP.

<sup>70</sup> Article 23(4)(d) of the Organic Law on the Judiciary refers to certain offences committed in marine spaces which can be prosecuted by the Spanish courts under the circumstances described in the treaties ratified by Spain, or in the legal proceedings of an international organisation of which Spain is a member, but it does not include the offence of illegal fishing amongst these offences.

<sup>71</sup> There were two more judicial proceedings in this matter: the NGOs Oceana and Greenpeace presented appeals for annulment in March 2017, but the Supreme Court rejected them (*La Voz de Galicia*, 26 April 2017). Furthermore, after dismissal, an action was brought before the Supreme Court which aimed to obtain formal recognition of a judicial error, which could serve to claim the corresponding compensation from the State. It is worth mentioning in this respect, at least, that the Supreme Court decided to reject the claim of judicial error (Supreme Court Order, Criminal Division, 15 June 2017).

<sup>72</sup> In the same vein, I also consider that the alleged offences which were the object of the complaint had unquestionably been committed in international waters, but, in their efforts to verify double incriminations, the Supreme Court should not have focussed on the simple criterion of the location where the alleged offence was committed, but should have concentrated on comparing the behaviours with the criminal legislation of the flag State, in this case, Equatorial Guinea. This consideration might have allowed the principle of personality to be applied as the exception to the rule of territoriality.

the States to conserve and manage fisheries resources sustainably, which is based on the axes and foundation formed by the LOSC, led to the IUU fishing phenomenon being identified and a wide range of international measures against this type of fishing being adopted. The EU has adopted comprehensive legislation in this fight against IUU fishing, centred on the commercial dimension and on the control exercised by the port State, which has a highly relevant internationally due to its extraterritorial effect. Both the international and the European aspects provide the context for, and influence, Spanish political and legal activity on fish sector.

Secondly, we should recognise that Spain, which has the largest EU fishing fleet and one of the most powerful internationally, has experienced and, unfortunately, continues to experience the phenomenon of IUU fishing on her borders and outside them. The immediate economic benefits of IUU fishing generate criminal groups worldwide, and Spain is not immune from this organised criminality. However, political will has been steadily increasing for some years, transcending governments of diverse political orientation. It has produced exhaustive legislation and defined a complete catalogue of fishing offences and penalties, and engaged in continuing judicial, police and inspection activities against IUU fishing, which has made Spain one of the leaders in the fight against this type of fishing, both within the EU and internationally.

Thirdly, I still believe that further developments should be made, both internationally and within Spain. Internationally, there is no doubt that the requirement for flag State compliance with international obligations should be further strengthened legally and that the work of the RFMOs should also be reinforced, by clarifying controversial aspects of their membership, giving their procedures legal standing and bolstering their capacity to enforce and penalise. I believe that new developments are required within Spanish law, especially in criminal and procedural matters, particularly allowing the exercise of Spanish jurisdiction in IUU fishing offences committed by Spanish or foreign physical or legal persons in the various marine spaces, whether or not these are under Spanish jurisdiction, in all circumstances covered by treaties ratified by Spain, or situations included in international organisations' legal instruments related to IUU fishing.