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TACKLING IUU FISHING – DEVELOPING A HOLISTIC LEGAL RESPONSE

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Abstract: Illegal, unreported and unregulated (IUU) fishing is a global problem which threatens marine ecosystems in addition to putting food security and regional stability at risk. It is often linked to major human rights violations and even organized crime. Legal measures, such as introducing monitoring and surveillance systems or denying services to vessels engaged in IUU fishing, are often implemented at national and international levels to combat such practices. Academics and economists have suggested that IUU fishing might be discouraged equally well by taking the profit out of it. Building on this premise, this article analyzes the extent to which the availability of liability insurance contributes to the problem of IUU fishing. To this end, an empirical study has been carried out which supports the contention that vessels suspected of involvement in IUU fishing have no serious difficulty in obtaining liability insurance from the market and insurance sector, therefore, inadvertently facilitates IUU fishing. The authors conclude that, to deter IUU fishing, access to insurance to those involved in it should be restricted. Some success can be achieved if certain steps are taken to improve the risk assessment procedures of underwriters. However, it is advocated that the most effective approach would be reforming European Union or domestic legislation and putting providers of liability insurance under a clear positive obligation to decline cover to those involved in IUU fishing.

Keywords: illegal, unreported and unregulated (IUU) fishing, empirical study, liability insurance, underwriting practices, EU legislation, BREXIT

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1. Introduction

Wild fish from the oceans are a vitally important, internationally shared and traded food resource. Officially reported landings from marine fisheries worldwide currently amount to nearly 80 million tonnes per year, and the global marine fishing fleet is thought to include approximately 4.6 million vessels.¹ Combined with aquaculture and inland fisheries, it has been estimated that marine fisheries assure the livelihoods of 12 % of the world's population.² It is, however, troubling that this global industry and the health of the marine ecosystems which support it are currently under threat. Illegal, unreported and unregulated (IUU) fishing activities³

¹ Food and Agriculture Organization of the United Nations (FAO), *The State of World Fisheries and Aquaculture 2016: Contributing to Food Security and Nutrition For All* (FAO, 2016), pp. 38 and 35 respectively (FAO report).

² *Ibid.*, p. 81.

³ The term 'illegal, unreported and unregulated fishing' (IUU fishing) has been formally described in the International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU), adopted in 2001 by the FAO. The authors acknowledge that there is an ongoing debate on the precise definition of IUU fishing and, in particular, the possible overlap between the three components of the term, namely illegal, unreported and unregulated fishing (see FAO, *Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally* (FAO, 2015), pp. 26-35). It is also acknowledged that there could be instances of unregulated and unreported fishing which do not amount to 'contravention of national laws or RFMO [Regional Fisheries Management Organizations] conservation and management measures' (*ibid.*, p. 34). It is outside the scope of this article to engage in this debate. In most instances, those involved in unregulated or unreported fishing are involved in illegal fishing activities as well. The insurance-related analysis in section 3 below cuts across these three components, in that it focuses on illegality in the broad sense of 'contravention of national laws or RFMO conservation and management measures'. In a similar vein, the discussion on regulatory aspects in section 4 below follows the formal definition of IPOA-IUU as reproduced in almost identical terms in Art. 2(2) –(4) of the EU's Regulation (EC) No. 1005/2008 establishing a Community System to Prevent, Deter and Eliminate Illegal,

are undermining efforts by fishers and industry stakeholders worldwide to sustainably, efficiently, and fairly manage ocean resources.

Though incredibly difficult to assess, it has been estimated that illegal and unreported catches amounting to between 11 and 16 million tonnes (valued at between USD 10 and 23.5 billion) are made worldwide each year.⁴ Illegally caught fish may gain access to global seafood markets and recent investigations indicated that, in 2011, illegal and unreported catches represented between 20 and 32 % (USD 1.3 to 2.1 billion) of wild-caught seafood imports into the United States (US).⁵ The coastal waters of West Africa have been identified as a hotspot for illegal fishing activity, to the extent that if total reported catches were to integrate estimated illegal and unreported catches, they would be 40 % higher than they currently are.⁶

Efforts to reduce or eliminate IUU fishing traditionally involve monitoring, control and surveillance (MCS) activities by government agencies of coastal or flag states (i.e., the country that a vessel is registered under).⁷ MCS may entail the tracking of vessel movements and monitoring of vessel activities through the use of vessel monitoring systems (VMS), onboard

Unreported and Unregulated Fishing, Amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and Repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999 [2008] OJ L286/1 (EU IUU Regulation).

⁴ D.J. Agnew et al., 'Estimating the Worldwide Extent of Illegal Fishing' (2009) 4 *PLoS ONE*, pp. 1-8, at 4.

⁵ G. Pramod et al., 'Estimates of Illegal and Unreported Fish in Seafood Imports to the USA' (2014) 48 *Marine Policy*, pp. 102-13, at 105.

⁶ Agnew et al., n. 4 above, p. 1.

⁷ K. Bray, 'A Global Review of Illegal, Unreported and Unregulated (IUU) Fishing' (FAO, 2000) AUS:IUU/2000/6.

observers and aerial or at-sea surveillance activities.⁸ The physical inspection of catch, gear and documentation may also help to ensure fishing vessels abide by all applicable laws.⁹ Port States can take action through the inspection and/or detention of visiting vessels, and access of IUU catches to markets can be blocked.¹⁰ Efforts within the private sector have also emerged, aiming to discourage IUU fishing through the use of traceability and labelling schemes.¹¹ Lastly, the efforts of several non-governmental organizations (NGOs) have uncovered valuable information for the authorities and the public, lending assistance towards arrests and raising general awareness about IUU fishing and related issues.¹² Vessels implicated in IUU fishing activities do not only include those primarily designed for catching fish, but also vessels such as fuel supply ships and refrigerated cargo vessels ('reefers') which help to distribute IUU catches.¹³ As such,

⁸ Ibid.; J.M. Davis, 'Monitoring Control Surveillance and Vessel Monitoring System Requirements to Combat IUU Fishing' (FAO, 2000) AUS:IUU/2000/14.

⁹ Bray, n. 7 above; J. Swan, 'Port State Measures to Combat IUU Fishing: International and Regional Developments' (2006) 7(1) *Sustainable Development Law & Policy*, pp. 38-43.

¹⁰ Swan, n. 9 above; D. Erceg, 'Deterring IUU Fishing through State Control over Nationals' (2006) 30 *Marine Policy*, pp. 173-9; The most important international measure against IUU fishing is the binding FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) of 2009, n. 15 below. Further discussion on this measure will follow in this section.

¹¹ R. Ogden, 'Fisheries Forensics: The Use of DNA Tools for Improving Compliance, Traceability and Enforcement in the Fishing Industry' (2008) 9(4) *Fish and Fisheries*, pp. 462-72; J. Jacquet et al., 'Conserving Wild Fish in a Sea of Market-Based Efforts' (2010) 44 *Oryx*, pp. 45-56.

¹² I. Urbina, 'A Renegade Trawler, Hunted for 10,000 Miles by Vigilantes', *The New York Times*, 28 July 2015, available at: <http://www.nytimes.com/2015/07/28/world/a-renegade-trawler-hunted-for-10000-miles-by-vigilantes.html>.

¹³ Environmental Justice Foundation (EJF), *Pirate Fishing Exposed: The Fight against Illegal Fishing in West Africa and the EU* (EJF, 2012).

organizations and governments around the world recognize and penalize vessels of many types for involvement in IUU fishing activity, and IUU vessel lists may include vessels of a variety of sizes and designs.

Furthermore, in recent decades a number of international agreements, whether legally binding or merely aspirational, have implicitly or explicitly addressed IUU fishing. Of great relevance are the non-binding FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing of 2001 (the IPOA-IUU),¹⁴ and the binding FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing (PSMA).¹⁵ The IPOA-IUU has led to the formal adoption and implementation of dedicated legislation, such as the EU IUU Regulation.¹⁶ The EU IUU Regulation includes, inter alia, measures for blocking access to EU markets at EU ports for blacklisted vessels recognized for their involvement in IUU fishing, or for vessels registered under countries that have a poor reputation for cooperating with international efforts to deter and eliminate IUU fishing.¹⁷ Similarly, the PSMA requires parties to the Agreement to close their ports and deny services to vessels that have engaged in IUU fishing, and to prohibit the landing of illegally caught fish.¹⁸ As the PSMA is international and legally binding on States Parties, there is great potential for this arrangement to bring about impactful and long-lasting

¹⁴ FAO, *International Plan of Action to Prevent, Deter and Eliminate IUU Fishing* (FAO, 2001) (IPOA-IUU), available at: <http://www.fao.org/docrep/003/y1224E/Y1224E00.HTM>.

¹⁵ Rome (Italy), 22 Nov. 2009, in force 5 June 2016, available at: <http://www.fao.org/3/a-i5469t.pdf>.

¹⁶ N. 3 above.

¹⁷ Chapter VII, n. 3 above

¹⁸ See Arts 9, 11 and 18. See also S. Flothmann et al., 'Closing Loopholes: Getting Illegal Fishing under Control' (2010) 328(5983) *Science*, pp. 1235-6.

positive change to the global fishing industry, provided that it is widely ratified and enforced by participating states.¹⁹

Alternative strategies for addressing IUU fishing can potentially be found outside the more traditional sphere of direct policy reform. It has been suggested that IUU fishing is primarily an economic activity and that those who engage in IUU fishing activities are likely to do so as long as the profits outweigh the costs.²⁰ Nevertheless, both tangible and intangible motivations may influence individuals' decisions whether or not to comply with fishing regulations, and these may include moral obligations as well as social influence.²¹ Thus, the costs associated with the risk of apprehension for IUU fishing, which may, for example, include monetary fines and/or social consequences, should be considered along with the expected benefits when devising compliance strategies.²² Measures that may render IUU fishing activities unprofitable may include: actions aimed at reducing revenues; increasing operating costs; and increasing the cost of risk of engaging in IUU activities.²³

Like any other medium-to-large-scale business, one suspects that IUU vessel owners or operators may seek financial services—in particular, liability insurance cover—in order to

¹⁹ As of June 2017, the PSMA has 48 Parties. For the challenges associated with implementing the requirements of the PSMA, see: www.chathamhouse.org/sites/files/chathamhouse/Matthew%20Camilleri.pdf.

²⁰ C. Schmidt, 'Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing' (2005) 20(3-4) *International Journal of Marine and Coastal Law*, pp. 479-507; U.R. Sumalia, J. Alder & H. Keith, 'Global Scope and Economics of Illegal Fishing' (2006) 30 *Marine Policy*, pp. 696-703, at 697.

²¹ J.G. Sutinen & K. Kuperan, 'A Socio Economic Theory of Regulatory Compliance' (1999) 26 *International Journal of Social Economics*, pp. 174-93.

²² Sumalia, n. 20 above, p. 697.

²³ B. Gallic & A. Cox, 'An Economic Analysis of Illegal, Unreported and Unregulated (IUU) Fishing: Key Drivers and Possible Solutions' (2006) 30 *Marine Policy*, pp. 689-95, at 690.

maintain profitability or reduce exposure to risk and accidental losses. Insurance cover is moreover required of larger fishing vessels under the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers Convention).²⁴ It can, therefore, be suggested that restricting access to liability insurance, which is often provided by Protection and Indemnity (P&I) clubs, for vessels suspected of involvement in IUU fishing, might well help to combat IUU fishing. This article analyzes two main issues: i) is there empirical evidence to suggest that vessels suspected of involvement in IUU fishing encounter little difficulty in obtaining liability insurance (which effectively enables them to freely access ports around the world)? ii) if so, what practical and legal steps can be taken to reduce the prospect of such vessels obtaining liability insurance, in particular if there are indications that they are regularly involved in IUU fishing? To this end, in the following part the empirical study carried out, that demonstrates that those involved in IUU fishing have no serious difficulty in obtaining liability cover, will be presented. In Section 3, deficiencies in current underwriting practices that allow IUU vessels to obtain liability cover with ease will be discussed and suggestions as to how the current system can be improved will be made. In Section 4, it will be argued that to ensure a change in the current

²⁴ London (UK), 23 Mar. 2001, in force 21 Nov. 2008, available at: [http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-civil-liability-for-bunker-oil-pollution-damage-\(bunker\).aspx](http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-civil-liability-for-bunker-oil-pollution-damage-(bunker).aspx). The Bunkers Convention requires the registered owner of ships over 1000 gross tonnage to obtain compulsory insurance against oil pollution damage from bunker oil or have in place financial security (Art. 7). In order to prove that the compulsory insurance or financial security is in place, the vessel carrying the flag of a Contracting State should carry on board a Bunker Convention Certificate. Similarly, a vessel, although she does not carry the flag of a Contracting State, would be required to present a Bunker Convention Certificate in order to enter into a port in a Contracting State. This means that fishing vessels over 1000 gross tonnes will need to have such a certificate in place if they are flying the flag of a Contracting State or attempting to enter into a port in a Contracting State. As of June 2017, the Convention has 84 Parties.

practices of liability insurers, the best solution will be reforming European Union or domestic legislation and putting them under a clear positive obligation to decline cover to those involved in IUU fishing.

2. Empirical Study

An empirical study conducted during 2014 and 2015 confirms that vessels suspected of having involvement with IUU fishing had no serious difficulty in finding liability insurance cover.²⁵ For the purposes of the study, 94 fishing vessels of 1,000 gross tonnes or higher, officially listed or suspected to be involved in IUU fishing, were identified. They were identified by screening information provided online by (a) INTERPOL; (b) nine Regional Fisheries Management Organizations (RFMOs), namely, —the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Inter-American Tropical Tuna Commission (IATTC), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), the Northwest Atlantic Fisheries Organization (NAFO), the North-East Atlantic Fisheries Commission (NEAFC), the South East Atlantic Fisheries Organization (SEAFO), the South Pacific Regional Fisheries Management Organization (SPRFMO), and the Western and Central Pacific Fisheries Commission (WCPFC), (c) the European Union (EU); (d) Greenpeace International; (e) the Environmental Justice Foundation (EJF); (f) various national and/or regional government authorities; and (g) news articles.

²⁵ For more extensive findings of the authors who worked with other academics on this project, see D. Miller, et al., ‘Cutting A Lifeline to Maritime Crime: Marine Insurance and IUU Fishing’ (2016) 14(7) *Frontiers in Ecology and the Environment*, pp. 357-62.

Once the list of vessels had been compiled and supplementary descriptive information gathered, liability risk insurers were contacted. Their websites were screened for information relating to vessels currently under their coverage. It transpired that 31 providers of liability insurance had a searchable database accessible from their website and containing vessel information. Between August 2014 and May 2015, all vessels on the list compiled were then searched for within all 31 databases, and each time one was found, the identity of the associated insurer was recorded. Vessels can typically be searched for by either International Maritime Organization (IMO) ship identification number or name. When a vessel was listed without an IMO number and a match was retrieved searching solely on the basis of a vessel's name, the insurer was only recorded if the listed owner, year of build, gross tonnage and/or flag State also matched and other listed details did not contradict the match.

The results of the study are shown in Table 1.

Table 1. Numbers of IUU vessels (1000 GT or greater) found on liability insurers' databases

<i>Insurer</i>	<i>Identified as IUU by governments or intergovernmental organizations</i>	<i>Identified as IUU only by NGOs or in news articles</i>	<i>Total IUU vessels</i>
Unknown	26	23	49
A	2	7	9
B	6	2.5	8.5*
C	5	1	6
D	2	3	5
E	1	2.5	3.5*
F		2	2
G	1	1	2
H		2	2
I		2	2
J		1	1
K	1		1
L		1	1
M	1		1
N		1	1
Total vessels found on insurers' websites (%)	19 (42.2)	26 (53.1)	45 (47.9)
Total vessels	45	49	94
Total insurers	8	13	14

*A single vessel was found on two different insurers' websites.

The study reveals that at least 47.9% of fishing vessels (1,000 gross tonnes or more) known for involvement in IUU fishing had secured liability insurance. These vessels were associated with a total of 14 liability insurers. The study also shows that an appreciable number of the vessels that had purple notices issued in respect of them by INTERPOL, requesting international cooperation in obtaining information that could lead to an arrest, were associated with one particular insurer. These results confirm the original hypothesis that IUU fishing is not yet an issue that is being adequately addressed by insurers, and thus that the insurance sector inadvertently facilitates IUU

fishing. The rest of this article discusses underwriting and legal measures that can be taken to reduce the availability of liability insurance for vessels suspected to be involved in IUU fishing.

3. Underwriting Practices

There are two main providers of liability insurance for large fishing and support vessels (e.g. reefers). Such vessels might be entered in a P&I Club²⁶ or insured in the commercial market, although the cover provided by commercial insurers is likely to be more restricted and possibly costlier for the assured.²⁷ All P&I clubs based in the United Kingdom (UK) provide that their

²⁶ P&I clubs are mutual insurance organizations which traditionally provide cover for a wide range of third party liabilities arising from the operation and use of the entered vessels, such as collisions, pollution, loss of life, personal injury and illness, wreck removal and also fines. The cover generally includes civil penalties, exemplary damages and other impositions similar in nature to fines. Although the maxim *ex turpi causa non oritur actio* (a tainted source gives rise to no cause of action) would certainly prevent the benefit of a policy of life insurance to be accrued to the murderer of the assured, the maxim must be applied with caution when it comes to liability insurance. If the assured is not allowed to recover for fines imposed at all, this would to a large extent defeat the purpose of such insurance. Furthermore, recovery for fines in this context would not be against public policy as stressed by Friedman J in *Shooter v. Incorporated General Insurances Ltd (The Morning Star)* 1984 4 SA 269, at 282-4, especially if the assured itself is not at fault. In practice, cover for fines is generally provided only where the owner is not personally at fault, and often only as a matter of discretion.

²⁷ Central to the operation of P&I Clubs is the concept of mutuality, i.e. that their members, usually shipowners, insure each other, being at the same time assured and insurer. As a result, and in contrast to commercial insurers, the Clubs are non-profit organizations that prioritize the insurance needs of their members. This is reflected in the omnibus rule that appears in the Rule Book of most P&I Clubs, namely, that the Directors of the Clubs have discretion to settle claims that fall outside the cover provided by the Club provided that they are P&I in nature. No such discretion is normally exercised by commercial insurers. It should also be borne in mind that P&I Clubs,

rules are subject to English law (including 8 of the 13 Clubs that are part of the IG of P&I Clubs). Considering that the vast majority of vessels worldwide are entered into UK-based P&I Clubs, English insurance law has global reach and implications for assureds worldwide.²⁸ Thus, the discussion below is carried out essentially from the perspective of English law.

3.1 No Cover for Loss Arising When Involved in IUU Fishing

The empirical study described above shows that, in practice, the owners of fishing vessels which have had previous involvement in IUU fishing activities have little difficulty in obtaining liability insurance from the market, in particular from P&I Clubs. This is despite the fact that if such a vessel incurs liability whilst involved in IUU fishing, the law would preclude recovery in most instances.²⁹ This is because the rules of most, if not all, P&I Clubs expressly exclude

which have formed the International Group of P&I Clubs (IG), operate a pooling agreement and obtain reinsurance cover. Such measures help to keep the cost of insurance cover low compared to the cover provided by commercial insurers.

²⁸ For the 2015-2016 statistics, see FP Marine Risks, P&I Review 2015-2016, available at: <http://www.fp-marine.com/content/uploads/2015/12/PI-Review-15-16-final.pdf>.

²⁹ Recovery might be possible for pollution liability caused by bunkers as the Bunkers Convention 2001 allows third parties to bring direct action against liability insurers for such claims (Art. 7(10)). As against a third party, a liability insurer (which will be invariably a P&I Club) may invoke all the defences under the Convention which the assured would have been able to take (i.e., the damage resulting from an act or war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character or the damage resulting from an act or omission done with the intent to cause damage by a third party or the damage resulting from the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function) together with an additional defence where the pollution damage arises out of the assured's wilful misconduct. However, other defences which a liability insurer may have

liability if a loss or fine is incurred as a result of illegal activities. For example, Rule 31 of Shipowners' Mutual P&I Club stipulates that '[t]here shall be no right of recovery of any claim from the Association if it arises out of or is consequent upon an insured vessel carrying contraband, blockade running or being employed in an unlawful trade or engaged in illegal fishing'.³⁰ Interestingly, the Club Rules do not expressly stipulate under which law illegality should arise but P&I representatives interviewed as part of this study were strongly of the view that illegality arising under international law or a national law that the vessel was closely connected with would suffice for the purposes of this exclusion.³¹ In fact, most Club Rules extend the exception to avoid liability to cases where directors of the club consider that the

been able to raise against the assured under the contract cannot be raised in any direct action brought against the insurer. The position would be the same for wreck removal liabilities given that Art. 12(10) of the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi, (Kenya), 18 May 2007, in force 14 Apr. 2015, available at: <http://www.imo.org/en/About/conventions/listofconventions/pages/nairobi-international-convention-on-the-removal-of-wrecks.aspx>) allows direct action against the liability insurer by third parties.

³⁰ The Shipowners' Club Rules 2016 (2016), available at: <https://www.shipownersclub.com/publications/club-rules-2016/>. Other clubs offering cover for fishing vessels have similar provisions: see, e.g., Rule 23 of British Marine (2015).

³¹ The matter will be discussed further below in this section.

adventure is ‘improper’.³² On that basis, a voyage that is illegal under international or the national law of a foreign state is likely to be treated as ‘improper’ by the directors.³³

The position is unlikely to be different in the context of commercial liability policies, even though most of these policies would not contain an express exclusion of this nature. This is because under such policies, the claim of the assured is still fairly likely to fail, on the basis that engaging in IUU fishing would almost certainly amount to a breach of the implied warranty of legality contained in s 41 of the Marine Insurance Act 1906. This section stipulates that ‘[t]here is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured

³² An example of such an exclusion may provide as follows: ‘No claim shall be recoverable from the club if it arises out of or is consequent upon the entered vessel carrying contraband, blockade running or being employed in an unlawful trade, or if the committee having regard to all circumstances shall be of the opinion that the carriage, trade, voyage, or any other activity on board or in connection with the insured vessel, was imprudent, unsafe, unduly hazardous or improper’ (this kind of exclusions often appear in P&I Rules)

³³ As indicated earlier, see n. 3 above, it needs to be stressed that not all IUU fishing is necessarily illegal. Technically speaking, unregulated fishing occurs because (a) there is no RFMO to regulate the stock in the geographical area, or (b) it is a new and unregulated stock, or (c) the stock is fished within the boundaries of an RFMO that has a regulatory focus on other species, or (d) fishing occurs within the boundaries of an RFMO and the vessel implicated is either without nationality or registered in a country not party to the RFMO. A vessel that incurs liability when involved in unregulated fishing activity could, therefore, be able to recover from liability insurers. However, it is common to see in practice that vessels are often involved not only in unregulated fishing activities, but also fish illegally. That is, they fish in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations; or operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

can control the matter, the adventure shall be carried out in a lawful manner'. As regards an insured vessel involved in IUU fishing activities with the knowledge and consent of the assured, there would be a clear breach of this warranty. It is reasonably clear that illegality under this section includes illegality under the law that applies to the contract, namely, English law³⁴ (including international conventions which have been implemented in English law).³⁵ It might also include illegality under the law of the vessel's flag and the law of any state in whose exclusive economic zone (EEZ) the vessel was fishing, by analogy with the rule that English law will not enforce any contract involving the commission in a given jurisdiction of an act illegal in that jurisdiction.³⁶

At this juncture, it is worth examining whether the introduction of the Insurance Act 2015³⁷ will alter the analysis carried out above. Under s. 10, the remedy for breach of a marine warranty is suspension of the cover for the duration of the breach. It follows that if a vessel is

³⁴ *Royal Boskalis Westminster v. Trevor Rex Mountain* [1997] LRLR 523, per Rix, J, at 589. On appeal, Phillips LJ indicated that s. 41 warranty 'probably refers to English law, not foreign law', but did not express a final view: see [1999] QB 674, at 736. See also, *Sea Glory Maritime Co v. Al Sagr National Insurance Co (The Nancy)* [2013] EWHC 2116 (Comm), [2013] 2 All ER 913, Blair J, at [295]. It is not thought that the submission made here is affected by the recent decision of the Supreme Court on the illegality principle in general in *Patel v. Mirza* [2016] UKSC 42; [2016] 3 WLR 399.

³⁵ Most of such rules are implemented into English law by secondary legislation. See, e.g., the Iraq (United Nations Sanctions) Order 2003 (SI 2003/1519), which incorporates United Nations (UN) sanctions against Iraq.

³⁶ See, e.g., *Foster v Driscoll* [1929] 1 KB 470, and *Regazzoni v. KC Sethia (1944) Ltd* [1956] 2 QB 490; also more recently *Beijing Jianlong Heavy Industry Group v. Golden Ocean Group Ltd* [2013] EWHC 1063 (Comm); [2013] 1 CLC 906, at [17]-[20]. See also, *Euro Diam Ltd v. Bathurst* [1987] 2 WLR 1368, which indicates that common law would bar a claim if the insurance contract is sufficiently connected with the illegal acts arising under the foreign law.

³⁷ The Act came into force on 12 Aug. 2016 and is applicable to all marine insurance contracts entered into on or after this date.

involved in IUU fishing, cover will be suspended during this period. It might be argued that in so far as a loss of liability had no connection with the illegal fishing (for example, a fire in the engine-room), then s11 could apply. This provision allows an assured to claim despite a breach of warranty if the claimant proves that the warranty was aimed at reducing the risk of loss of a particular kind, or a loss occurring at a particular location or time, and that the non-compliance could not have increased the risk of the loss that actually occurred in the circumstances in which it occurred. However, this is unlikely. Section 11 is not applicable to warranties that serve the purpose of delineating the cover as a whole. It is respectfully suggested that this is the case here. The main function of the warranty of legality under the Marine Insurance Act is to assist the underwriters in the risk assessment process by determining the limits of the cover. In case of its breach, the risk assessment undertaken by the insurer at the outset is in tatters. For that reason, there is no room for the application of s. 11 in this context. A contrary solution would reduce the role this warranty is expected to play, affording an assured a potential lifeline in cases where the insured adventure is performed in an illegal fashion under his control. The authors are strongly of the view that such an outcome would be inconsistent with public policy.

3.2 Recovery for Loss Arising When the Vessel Not Involved in IUU Fishing

The prospects of recovery under a liability policy or P&I cover are bleak if a vessel with previous involvement in IUU fishing activities incurs a liability, even when she is not involved in IUU fishing at the time. Assuming that the liability insurance is subject to English law, the assured is expected to disclose all material circumstances relating to the risk when applying for P&I membership or seeking commercial insurance. Under s 7(3) of the Insurance Act 2015, ‘a circumstance or representation is material if it would influence the judgement of a prudent

insurer in determining whether to take the risk and, if so, on what terms'.³⁸ Naturally, if the vessel in question has previously been involved in IUU fishing activity and detained or fined, one would expect this to be a 'material circumstance' which would have to be disclosed to a Club or commercial insurer at the time of making an application to obtain insurance cover.³⁹

In the case of non-disclosure, the insurer could potentially avoid the policy later when he discovers failure on the part of the assured to make a fair presentation, as long as he demonstrated either that he would not have entered the contract on any terms had he known the true state of affairs, or that the assured had acted deliberately or recklessly.⁴⁰ One lifeline for the assured in that case would be to argue there was no obligation on her to disclose the detention or fine on the basis that such facts were presumed to be known by the insurer.⁴¹

³⁸ Eight P&I clubs with Rules subject to English law have agreed to contract out of various provisions of the Insurance Act 2015. These clubs are content to apply the provisions of the Act that deal with pre-contractual information duties of the assured (duty of 'fair presentation' as referred to in the Insurance Act 2015) but they have made provision in their Rules to exclude the application of new proportionate remedies stipulated in 2015 Act. Accordingly, any breach of the duty of fair presentation shall entitle the Association to avoid the policy regardless of whether the breach of the duty of fair presentation is innocent, deliberate or reckless.

³⁹ See, e.g., *March Cabaret Club & Casino Ltd v. The London Assurance* [1975] 1 Lloyd's Rep 169 (QB); *James v. CGU Insurance Co plc* [2002] Lloyd's Rep IR 206 (Com Ct) and *North Star Shipping v. Sphere Drake Insurance plc* [2006] EWCA Civ 378, [2006] 2 All ER 65.

⁴⁰ Insurance Act 2015, sch 1. If the P&I Club has contracted out of this provision, avoidance will be available as the sole remedy regardless of whether non-disclosure is fraudulent, negligent or innocent.

⁴¹ By virtue of the Insurance Act 2015, s. 5(3), the insurer is presumed to know '(a) things which are common knowledge, and (b) things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know in the ordinary course of business'.

Presumed knowledge would be a plausible argument if the detention or fine had been made public in a press release or could be found by a simple search of the relevant databases, which are easily available to insurers.⁴² Another plausible argument would be that no duty exists under the Act to disclose matters covered by a warranty. Hence, in the presence of the implied warranty of illegality in the policy, it would be superfluous to disclose the matters concerning IUU fishing in which the vessel was engaged prior to the contract.⁴³ Although this looks promising at first sight, it is likely that such argument would not succeed because concealing previous fines and/or convictions associated with IUU fishing would in all probability be a material fact that relates to the moral hazard of the assured.⁴⁴

3.3 Cancellation of Cover Following Engagement in IUU Fishing

A P&I Club could cancel the cover if it becomes aware of a vessel being involved in illegal activities, even though at that stage no liability has been incurred. According to the rules of some clubs, such cancellation is automatic if the vessel is involved in an illegal activity. For instance,

⁴² It was deliberated recently in *The Nancy* (n. 34 above) whether the underwriter in question was deemed to possess information that appears on databases, such as Lloyd's MIU and Sea-web. Blair J was convinced that the fact that the information is available online does not give rise to a presumption of knowledge on the part of underwriters. However, from the judgment it is clear that an underwriter is presumed to hold information that he has access to as long as he has an interest in such information when it is received.

⁴³ *Inversiones Manria SA v. Sphere Drake Insurance Co (The Dora)* [1989] 1 Lloyd's Rep 69.

⁴⁴ A series of authorities indicates that courts have been receptive to the idea that the assured's running of its business affairs in a dishonest and criminal fashion could amount to moral hazard. See, e.g., *Insurance Corporation of Channel Islands v. Royal Hotel Ltd* [1998] Lloyd's Rep IR 151; *James v. CGU Insurance Co plc* [2002] Lloyd's Rep IR 206, and more recently *Sharon's Bakery (Europe) Ltd v. AXA Insurance UK plc* [2011] EWHC 210 (Comm); [2012] Lloyd's Rep IR 164.

Rule 25(2)(j) of Gard (2016) indicates that ‘[t]he Member shall (...) cease to be covered by the Association in respect of any Ship entered by him (...) if the Ship, with the consent or knowledge of the Member, is being used for the furtherance of illegal purposes’.⁴⁵ A similar stance may well be taken by a commercial liability insurance provider.

3.4 The Role of Liability Insurance

The legal analysis thus far demonstrates that an assured engaged in IUU fishing activities will find it difficult to enforce its liability cover for a variety of reasons. One might, therefore, wonder what kind of contribution the availability of such insurance makes to the business affairs of those involved in IUU fishing. It may well be that the primary motivation of those obtaining insurance is not to secure cover that provides protection against potential liabilities, but rather to have a certificate to satisfy compulsory insurance requirements under international liability regimes such as the Bunkers Convention 2001. Certificates enable the owners of vessels involved in IUU fishing to carry out their trade, as without such a document their vessels is subject to detention by the relevant port authority.⁴⁶

If the process is indeed driven by the need for certification, then the fact that a large number of vessels which had previous involvement in IUU fishing or were suspected of being

⁴⁵ Gard, ‘Rules for Ships’ (2016), available at: www.gard.no/web/publications/document/chapter?p_subdoc_id=781872&p_document_id=781871.

⁴⁶ In the UK, s. 163A(5) of the Merchant Shipping Act 1995 provides that a ship entering or leaving a port without having a certificate to show that there is insurance cover with regard to liabilities that might arise under the Bunker Convention will be detained by the port authority that has jurisdiction, and the master or the owner shall be liable on summary conviction to a fine not exceeding the statutory maximum (£5000).

involved in such practices, manage to secure liability cover with ease -- and in most instances without any qualification in cover⁴⁷ -- affirms the assumption that liability insurers inadvertently contribute to the problem of IUU fishing. This possibly arises due to the fact that the underwriting process of liability insurers lacks thorough risk assessment analysis. Those who are more cynical might even suggest that liability insurers are tempted to offer cover to such vessels on the basis of a superficial risk assessment in the knowledge that they would be able to deny liability under the policy if and when such liability arose.

The authors have no evidence to suggest that liability insurers' risk assessment with regard to fishing vessels is inadequate or slapdash. In fact, most P&I Clubs pride themselves on their commitment to conducting their business based on ethical, legal and transparent standards.⁴⁸

The real question is therefore how risk assessment process can be amended to flag up problems of IUU fishing. It , for example, focus the minds of assureds seeking cover if a specific question at the proposal stage were put to them concerning fines paid and detentions incurred as a result of IUU fishing activities within the last five years. There is, however, no guarantee that such question would engender the necessary disclosure, especially if the purpose of seeking

⁴⁷ E.g., it would be very effective if vessels with a history in IUU fishing are offered liability cover with a condition that they must keep their GPS system in operation at all times so as to monitor their whereabouts. Equally, it would be very prudent if such vessels are required by the provisions of the insurance policy to undergo spot checks on a regular basis to prevent IUU catches.

⁴⁸ See Sunderland Marine, 'Anti-corruption and Ethics Statement' (2014), available at: www.sunderlandmarine.com/assets/Publications/UK-2014/Anti-Corruption-Ethics-Statement-010814.pdf.

Sunderland Marine is part of North of England P&I Association and a provider of liability cover for fishing vessels.

liability insurance was merely to satisfy the compulsory insurance requirements of international liability regimes.

Perhaps a more effective measure could be to establish an international organization specifically charged with raising awareness in the sector of IUU fishing activities and, for example, introducing a tailor-made website or database to record data about IUU fishing, searchable by anyone including liability insurers. The maritime industry has engaged in a similar initiative to tackle piracy and armed robbery at sea with the establishment of the International Maritime Bureau Piracy Reporting Centre, based in Kuala Lumpur, which immediately identifies any trends and shifts in patterns in piracy and armed robbery activities, alerts all concerned parties and maintains an interactive map illustrating piracy hot-spots.⁴⁹ The Centre is funded purely by donations. There is no reason why a similar initiative could not be developed to tackle IUU fishing. The successful implementation of such initiative would require the continuous and timely supply of data to populate the database especially from RFMOs. However, RFMOs currently experience a number of political, operational and financial challenges that might impact on their ability (and desire) for collecting and sharing data on IUU fishing.⁵⁰ The EU does publish a list of vessels involved in IUU fishing.⁵¹ The data used to form this list is obtained from various RFMO IUU vessels lists. However, the EU needs to rely on the cooperation and efficiency of various RFMOs. Since the EU's IUU list is usually updated once a year, there could be a time gap between a vessel appearing on the list of a particular RFMO and on the EU's IUU

⁴⁹ Available at: <https://icc-ccs.org/piracy-reporting-centre>.

⁵⁰ For an analysis of the challenges, refer to the FAO report, n. 1 above, pp. 94-5.

⁵¹ See https://ec.europa.eu/fisheries/cfp/illegal_fishing/info.

list. It is submitted that, if established, an independent body could collect and update this data regularly making it available for the public and insurance sector.

The measures suggested above would certainly assist liability insurers at the underwriting stage to deny coverage to those likely to engage in IUU fishing activities. Alternatively they could qualify the coverage offered so that those planning to engage in IUU fishing could be deterred. However, it is submitted that in order to incentivize liability insurers to engage in a more robust underwriting process, such steps might not be sufficient. The authors opine that legal measures outside insurance law are vital. The following section reviews how the existing legal regime could be amended to achieve this objective. We are aware that, even if such steps are taken, this will not eliminate the possibility that an insured vessel might be involved in IUU fishing activity. However, with the changes proposed, liability insurers will be required to undertake a more robust risk assessment exercise than they currently. This would place them in a position to deny coverage to vessels which are blacklisted for their involvement in IUU fishing, or to impose restrictions when there is sufficient ground to suspect involvement in IUU fishing, which could deter vessels from engaging in such activities in the future.

Finally, it should be stressed that although the analysis above based on principles of English insurance law, similar outcomes would follow under alternative contemporary jurisdictions. For example, under clause 3-16 of the Nordic Marine Insurance Plan of 2013,⁵² the insurer will not be liable ‘for loss which results from the ship being used for illegal purposes, unless the assured neither knew nor ought to have known of the facts at such a time that it would

⁵² This Plan can be incorporated into marine insurance contracts on a voluntary basis and is often incorporated into contracts entered into in Scandinavian insurance markets. Available at: <http://www.nordicplan.org/The-Plan/>.

have been possible for him to intervene'.⁵³ By virtue of the same provision, the insurer may cancel the insurance by giving 14 days' notice if the assured fails to intervene without undue delay after becoming aware of the illegal activity. Also, given that the Marine Insurance Act 1906 has formed the basis of marine insurance legislation in New Zealand,⁵⁴ Australia,⁵⁵ India,⁵⁶ Hong Kong,⁵⁷ Canada,⁵⁸ and Singapore,⁵⁹ the analysis above holds for fishing vessels insured under any of these legal regimes.

4. Controlling IUU Fishing: the EU dimension

The EU plays an active role in the fight against IUU fishing because it considers it an activity with wide social and economic as well as environmental repercussions. IUU fishing 'depletes fish stocks, destroys marine habitats, distorts competition, puts honest fishers at an unfair disadvantage, and weakens coastal communities, particularly in developing countries.'⁶⁰ As such, the EU has implemented a sophisticated system of controls and leads the discussions for identifying global best practices. It is the firm view of the authors that prohibiting the provision

⁵³ A huge number of fishing vessels are insured under the Nordic Plan which provides a separate set of rules concerning fishing vessels.

⁵⁴ Marine Insurance Act 1908.

⁵⁵ Marine Insurance Act 1909.

⁵⁶ Marine Insurance Act 1963.

⁵⁷ Marine Insurance Ordinance 1997.

⁵⁸ Marine Insurance Act 1993.

⁵⁹ Marine Insurance Act 1994.

⁶⁰ European Commission, 'Communication from the Commission to the European Parliament and the Council on the Application of Council Regulation (EC) No 1005/2008 establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' COM (2015) 480, p. 1 (IUU Communication).

of insurance cover for vessels involved, or suspected to be involved, in IUU fishing activities should become an integral part of the European regulatory framework. The remainder of this article explains why insurance regulation needs to clearly form part of the European IUU fishing regime and examines to what extent, if any, the existing legal system prohibits the provision of insurance to IUU vessels and their fishery products. It then explores how a full prohibition could be achieved, and argues that this could happen with minimal disruption to the current legal regime.

4.1 EU IUU Regulation: ‘from the net to the plate’

The original philosophy of the EU was to regulate what could be called the 'sharp end' of IUU fishing, namely, ‘the monitoring, control and surveillance of activities occurring at sea and the identification of IUU operators’.⁶¹ However, it soon transpired that this approach resulted in a fragmented, reactive system of controls, mainly because it left untreated the root causes of IUU fishing and the financial gains for those involved. Reflecting international consensus, the EU decided in 2007 to expand the scope of its legal framework to ‘all fishing and related activities linked to IUU practices (harvesting, transshipment, processing, landing, trade, etc.)’.⁶² The objective of this expansion was to secure the entire supply chain or, evocatively put, to ‘address (...) these activities (...) from the net to the plate’.⁶³ As a result, two European regulations have

⁶¹ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Strategy for the Community to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ COM (2007) 601, p. 7.

⁶² Ibid.

⁶³ Ibid.

been implemented to proactively address IUU fishing.⁶⁴ A detailed examination of this legal framework is outside the scope of this article, however, any issues that are relevant to our empirical study⁶⁵ will be covered. .

The centrepiece of the EU legal framework is the EU IUU Regulation,⁶⁶ which establishes ‘a Community system to prevent, deter and eliminate illegal, unreported and unregulated...fishing’.⁶⁷ Its geographical scope of application is wide: it applies ‘to all IUU fishing and associated activities carried out within the territory of Member States to which the Treaty applies, within Community waters, within maritime waters under the jurisdiction or sovereignty of third countries and on the high seas(...)’.⁶⁸

One of the main deterrents employed by the EU IUU Regulation is the creation of the following two blacklists:

⁶⁴ EU IUU Regulation, n. 3 above, and Commission Regulation (EC) No. 1010/2009 laying down detailed Rules for the Implementation of Council Regulation (EC) No 1005/2008 establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing [2009] OJ L280/5. These two regulations are supplemented by a number of implementing regulations and decisions of the Commission that deal, among other things, with the IUU vessel/NCTCs lists and the arrangements with third countries regarding the catch certificates. The Commission, occasionally, amends the said Regulations with respect to the definition of fishery products and certain inconsequential provisions of Regulation (EC) No. 1010/2009. For a full list of the EU’s IUU legal framework, see: http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/index_en.htm.

⁶⁵ See Table 1 above.

⁶⁶ EU IUU Regulation, n. 3 above.

⁶⁷ Ibid., Art. 1(1).

⁶⁸ Ibid., Art. 1(3).

- i) a list of (EU⁶⁹ and third country) fishing vessels that are identified by the Commission as engaging in IUU fishing;⁷⁰ and
- ii) a list of non-cooperating third countries (NCTCs),⁷¹ i.e., countries which fail to discharge their duties under international law as flag, port, coastal or market states, or do not take action to control IUU fishing.⁷²

The former list, which also includes fishing vessels blacklisted by RFMOs,⁷³ is published in the Official Journal of the European Union and is supposed to be updated every three months.⁷⁴ The latter list is also published in the Official Journal of the European Union and is updated regularly, without the EU IUU Regulation specifying the frequency of the updates.⁷⁵

Articles 37 and 38 of the EU IUU Regulation provide for the measures to be imposed on blacklisted vessels and NCTCs respectively. They prohibit a number of fishing-related

⁶⁹ A Community fishing vessel is defined in EU IUU Regulation, n. 3 above, Art. 2(6) as ‘a fishing vessel flying the flag of a Member State and registered in the Community’.

⁷⁰ EU IUU Regulation, n. 3 above, Art. 27(1).

⁷¹ Ibid., Art. 33.

⁷² Ibid., Art. 31(3). Art. 31(4)-(7) provides a list of factors that the Commission takes into consideration when evaluating the anti-IUU fishing efforts of third countries.

⁷³ EU IUU Regulation, n. 3 above, Art. 30(1). RFMOs are regional fishing management organizations set up to regulate fishing in particular areas, such as, e.g., the Indian Ocean Tuna Commission.

⁷⁴ Ibid., Art. 29(2) and (3). The blacklist was set up by Commission Regulation (EU) No. 468/2010 of 28 May 2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing [2010] OJ L131/22. Since 2010, it is amended on a yearly basis, with the latest amendment being Commission Implementing Regulation (EU) No. 2015/1296 of 28 July 2015 Amending Regulation (EU) No. 468/2010 establishing the EU List of Vessels Engaged in Illegal, Unreported and Unregulated Fishing [2015] OJ L 199/12.

⁷⁵ EU IUU Regulation, n. 3 above, Art. 35.

activities⁷⁶ and additionally the Regulation sanctions the following commercial activities: third country IUU fishing vessels are prohibited from being chartered or being purchased by European operators; they are not to be supplied in ports with provisions, fuel or other services; and the exportation of European vessels to NCTCs is prohibited. So it is fair to say that with these measures, the objective is to prevent vessels involved in IUU fishing activities from operating within the EU waters.

This is not, however, the end of the story. The EU IUU Regulation further attempts to bring into its scope commercial activities that support IUU fishing. Article 39(1) states that EU nationals shall neither support nor engage in IUU fishing as operators or beneficial owners of blacklisted fishing vessels. Furthermore, Article 40 (1) provides that EU nationals shall be encouraged by Member States to ‘notify any information pertaining to legal, beneficial or financial interests in, or control of, fishing vessels flagged to a third country which they hold and the names of the vessels concerned’. At the same time, the Regulation prohibits selling or exporting any fishing vessels to operators, managers and/or owners of blacklisted vessels.⁷⁷ This prohibition is supplemented by a restriction on granting community funds to these operators. Here, the objective is to prevent EU nationals from engaging in IUU fishing activities or making commercial gains from such activities.

⁷⁶ To name a few: any engagement in fish processing operations or participation in any transshipment with IUU fishing vessels is prohibited; EU IUU fishing vessels are only permitted to access their home ports, and third country IUU vessels are not permitted to enter Community ports; the importation of fishery products caught by IUU fishing vessels/vessels of NCTCs is prohibited, including the exportation/re-exportation of fishery products from IUU fishing vessels for processing.

⁷⁷ EU IUU Regulation, n. 3 above, Art. 40(2).

The EU IUU Regulation creates the following three offences, or serious infringements, in Chapter IX:⁷⁸ engaging in IUU fishing as defined in Article 3;⁷⁹ conducting business directly connected to IUU fishing;⁸⁰ and falsifying or using false documents referred to in the Regulation.⁸¹ If a natural or legal person is suspected of having committed or is caught in the act of committing any of these offences, the Member State shall start an immediate investigation and take immediate enforcement measures.⁸² The actual administrative and criminal sanctions are left to the discretion of the Member State,⁸³ with a list of recommended accompanying measures included in Article 45.⁸⁴ The EU IUU Regulation provides that the measures imposed by the Member State in the application of Article 44 shall strive to strike a balance between depriving

⁷⁸ For the infringements to be subject to the Regulation, they must be committed within the territory of a Member State, including maritime waters under their jurisdiction, by Community fishing vessels or Member State nationals: EU IUU Regulation, n. 3 above, Art. 41(1) and (2). The EU IUU Regulation also provides in Art. 41(3) that it applies to ‘serious infringements detected within the territory or within waters as referred [above]...but which have been committed on the high seas or within the jurisdiction of a third country and are being sanctioned pursuant to Article 11(4)’.

⁷⁹ EU IUU Regulation, n. 3 above, Art. 42 (1)(a) which refers to Art. 3.

⁸⁰ Ibid., Art. 42(1)(b).

⁸¹ Ibid., Art. 42(1)(c).

⁸² Ibid., Art. 43(1). The Regulation in Art. 43(1) recommends a number of immediate enforcement measures, such as the immediate cessation of fishing activities, the rerouting of the vessel to the port, the seizure of the fisheries products and the suspension of the authorization to fish.

⁸³ EU IUU Regulation, n. 3 above, Art. 44.

⁸⁴ These sanctions include the temporary immobilization of the fishing vessel, the confiscation of prohibited fishing gear, catches or fishery products, the suspension or withdrawal of authorization to fish, the reduction or withdrawal of fishing rights and the temporary or permanent ban on access to public assistance or subsidies.

the perpetrators of any economic benefits and the legitimate right to exercise a profession.⁸⁵ With respect to England and Wales, the relevant penalties are found in s. 10 of The Sea Fishing (Illegal, Unreported and Unregulated Fishing) Order 2009.⁸⁶ The IUU Fishing Order imposes a fine on any person found guilty of conducting business directly connected to IUU fishing, without making provision for a prison term.⁸⁷ Article 47 of the EU IUU Regulation clarifies that legal persons can also be held liable for serious infringements in addition to or instead of the natural persons ‘who are perpetrators, instigators or accessories in the infringements concerned’.⁸⁸

The EU IUU Regulation clearly focuses on IUU vessels and predominantly purports to contain the dissemination of the IUU fishery products via the supply chain. The prohibitions against chartering such vessels and selling vessels to blacklisted operators are steps in the right direction as they aim to cut off the financial supply of the perpetrators. Yet, it is doubtful that they are sufficient to deter investment in such activities. The fact that the relevant provisions are not clear on the matter raises the question whether the EU IUU Regulation covers the provision of insurance to IUU vessels. This is the main point of discussion in the following section.

⁸⁵ EU IUU Regulation, n. 3 above, Art. 46.

⁸⁶ SI 3391/2009 (IUU Fishing Order). This Order implements the EU IUU Regulation and its Implementing Regulation No. 1010/2009 into English law.

⁸⁷ IUU Fishing Order, ss. 9(7) and 10(1). At the same time, ss. 12 to 15 and 20 of the IUU Fishing Order define the powers of British officers when investigating whether an infringement under the EU IUU Regulation has been committed.

⁸⁸ EU IUU Regulation, n 3 above, Art. 47(3). The IUU Fishing Order, n. 83 above, implements this provision in s. 18.

4.2 Insurance and the EU IUU Regulation

The EU IUU Regulation makes no express reference to insurance. Still, can its provisions be interpreted to prohibit the provision of insurance to IUU vessels and related activities? This is possible, though perhaps not immediately obvious. Firstly, the measures imposed against blacklisted vessels and NCTCs are exhaustively described in Articles 37 and 38 of the EU IUU Regulation. They do not include providing insurance. The reference to ‘other services’ in Article 37(6) evidently relates to the remainder of the provision which does not permit the supply of these vessels ‘with provisions, fuel’ in EU ports. This too suggests that insurance is excluded from the scope of Article 37(6).

It might be argued that Article 39(1) of the Regulation (‘Nationals subject to the jurisdiction of Member States (...) shall neither support nor engage in IUU fishing, including by engagement on board or as operators or beneficial owners of fishing vessels included in the Community IUU vessel list’) should be construed to include a prohibition on providing insurance. Could it be concluded that those who provide insurance for vessels involved in IUU vessels support such activities within the meaning of this article? If this is the accurate construction, Member States have authority to ‘take appropriate action, subject to and in accordance with their applicable laws and regulation’.⁸⁹ A similar argument could be made to the effect that insuring a blacklisted vessel is an activity which is ‘directly connected to IUU fishing’ under Article 42(1)(b).

It is submitted that while both arguments are ambitious, the first is plausible under an expansive interpretation of the Regulation. The expression ‘support (...) IUU fishing’ can more easily be argued to apply to insurance as the word ‘support’ potentially has a wider meaning than

⁸⁹ EU IUU Regulation, n. 3 above, Art. 39(3).

‘directly connected to’. It certainly covers beneficial owners of blacklisted vessels, as they stand in a direct legal relation to the fishing vessels, and opens up the possibility that the provision could be extended to cover insurers, as well as other financial institutions that lend to or invest in the businesses that partake in IUU fishing. Given that ‘support’ does not equal ‘control’, a presumption of control over the activities of the IUU fishers may not be needed for this provision to apply. Therefore, it is certainly plausible that insurers could be treated similar to beneficial owners although they have little, if any, control over the activities of the vessels. The fact that insurance supports the IUU fishing activities indirectly might be sufficient to bring this activity under the scope of the Regulation, even if such inclusion was not contemplated by the drafters of the Regulation.

The expression ‘directly connected to IUU fishing’ must be interpreted by reference to the overarching philosophy of the Regulation, namely, to regulate the supply chain from the net to the plate. Liability insurance is not ‘directly connected to IUU fishing’. It covers the liability exposure of the vessels’ owners, providing support to IUU fishing in a remote, indirect manner. The prohibition in the EU IUU Regulation is reserved for activities that have an immediate impact on IUU fishing. These activities are to be identified by reference to the remainder of Article 42(1)(b), namely ‘the trade in/or the importations of fishery products’. Admittedly, Article 42(1)(b) does not describe the prohibited activities in an exhaustive manner. Yet, the listed activities colour the interpretation of the expression ‘directly connected to IUU fishing’, with liability (and hull) insurance falling outside its scope. It is possible that cargo insurance over IUU fishery products falls into this prohibition as it relates to the transit of the goods. Still, a purposive interpretation would suggest that any type of insurance is excluded from the scope of this article.

Despite the possibility of construing Article 39 in an expansive fashion to include liability insurers, the penalties imposed in Articles 37 and 38 (actions in respect of blacklisted vessels and NCTCs), as well as in Articles 43, 44 and 45 (immediate enforcement measures and sanctions) are not suitable for infringements concerning insurance. They primarily target the vessel and its unlawful proceeds rather than the providers of ancillary services. For example, the EU IUU Regulation provides that the relevant fines for serious infringements shall be calculated by reference to the value of the fishery products.⁹⁰ This is hardly a reasonable or fair threshold to calculate the fine against insurers.

The exclusion of insurance from the scope of fisheries regulation is also reflected in Article 4(31) of Regulation (EU) No. 1380/2013 on the Common Fisheries Policy (as amended)⁹¹ which retains in force Article 90(1) of Regulation (EC) No. 1224/2009.⁹² This

⁹⁰ EU IUU Regulation, n 3 above, Art. 44(2).

⁹¹ Regulation (EU) No. 1380/2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Regulations (EC) No. 2371/2002 and (EC) No. 639/2004 and Decision 2004/585/EC [2013] OJ L 354/22. The Regulation was minimally amended recently by Regulation (EU) No. 2015/812 amending Regulations (EC) No. 850/98, (EC) No. 2187/2005, (EC) No. 1967/2006, (EC) No. 1098/2007, (EC) No. 254/2002, (EC) No. 2347/2002 and (EC) No. 1224/2009, and Regulations (EU) No. 1379/2013 and (EU) No. 1380/2013, as regards the Landing Obligation, and repealing Regulation (EC) No. 1434/98 [2015] OJ L 33/1.

⁹² Regulation (EC) No. 1224/2009 establishing a Community Control System for Ensuring Compliance with the Rules of the Common Fisheries Policy, amending Regulations (EC) No. 847/96, (EC) No. 2371/2002, (EC) No. 811/2004, (EC) No. 768/2005, (EC) No. 2115/2005, (EC) No. 2166/2005, (EC) No. 388/2006, (EC) No. 509/2007, (EC) No. 676/2007, (EC) No. 1098/2007, (EC) No. 1300/2008, (EC) No. 1342/2008 and repealing Regulations (EEC) No. 2847/93, (EC) No. 1627/94 and (EC) No. 1966/2006 [2009] OJ L 343/1.

provision adds three ‘dissuasive sanctions’ for serious infringements under Article 42(1) of the EU IUU Regulation.⁹³ The reason behind this addition was the persistence of IUU fishing as a result of the ‘non-deterrent level of sanctions for serious infringements of those rules laid down in national legislation’.⁹⁴ Still, such sanctions are closely related to the fishing activities of the vessel, for example by prohibiting ‘(a) the non-transmission of a landing declaration or a sales note when the landing of the catch has taken place in the port of a third country; (b) the manipulation of an engine with the aim of increasing its power...’.⁹⁵ Unsurprisingly, neither Regulation refers explicitly to the role of insurance or purports to bring insurance within their scope of application.

The same is true for the IUU Fishing Order. Section 9(7) of the Order mirrors the Regulation by providing that ‘it is an offence for a person to conduct business directly connected to IUU fishing, within the meaning of Article 42(1)(b) of the Council Regulation’. There is nothing to suggest that the interpretation of the expression ‘directly connected’ in the Order should be different to that of the Regulation. The explanatory memorandum to the Order states that one of the aims of the EU IUU Regulation is to widen the scope of enforcement via the fishery supply chain.⁹⁶ In that respect, the Order clarifies that this provision captures activities emanating from the supply chain. Having said that, it is possible that the references to ‘ancillary operations’ and ‘ancillary activities’ in ss. 12 and 13 respectively can be and are given a broad interpretation to cover insurance.

⁹³ Ibid., Recital 39.

⁹⁴ Ibid.

⁹⁵ Ibid., Art. 90(1)(a)-(b).

⁹⁶ Explanatory Memorandum to IUU Fishing Order, n. 83 above, pp. 21–25.

In light of this analysis, it is the view of two of the authors of the article that the EU IUU Regulation offers some basis of support for an expansive interpretation of related or ancillary activities that would cover insurance, but the connection between the IUU regulatory regime and insurance is tenuous at best.⁹⁷ The Regulation deals with the supply chain, and the clear inclusion of insurance has not been considered.

4.3 Reasons for Not Including Insurance Prohibition into the Relevant Legislation

If the provision of insurance is not clearly within the scope of the EU IUU fishing framework, ought this to change?

The EU Commission recently published an evaluation of the application of the EU IUU Regulation.⁹⁸ The report focuses on the supply chain, with the Commission commenting that the ‘industry now pays increased attention to all components of the supply chain in order to ensure that only legally caught fishery products enter the EU’.⁹⁹ Most importantly, the report states that

⁹⁷ Conversely, the UK Marine Management Organization (MOO) interprets the Regulation to cover insurance by means of Art. 42(1)(b): ‘[u]nder IUU regulations it is an offence to conduct business directly with any IUU vessel; this includes providing insurance to such vessels’: see www.gov.uk/government/news/mmo-and-fco-host-joint-iuu-workshop-with-the-uk-insurance-industry. Dr Miller is sympathetic to this view. Furthermore, it is the opinion of the European Commission that insurers should not be providing support to IUU fishing vessels through the provision of insurance, see: Commission communication of 28 May 2002. Action plan to eradicate illegal, unreported and unregulated fishing (COM(2002) 180), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l66008&from=EN>. For the reasons analyzed in this section of the paper, the authors believe that Art. 39 provides a better avenue to bring insurance into the scope of the Regulation. Also, it should be borne in mind that this matter is not definitely resolved and a clarification might be sought from the European Court of Justice on the correct interpretation of the Regulation.

⁹⁸ IUU Communication 1, n. 58 above.

‘the Commission has become aware of a number of practical issues that could be addressed in order to enhance the effectiveness of the IUU Regulation’.¹⁰⁰ However, insurance does not seem to be in the Commission’s sights. Instead, the proposed measures expand existing arrangements. For example, they recommend the creation of an electronic catch certificate scheme, the continuing provision of technical aid to third countries with regard to IUU fishing, and the improvement of international ocean governance.¹⁰¹

The EU’s approach towards insurance is not unique. The prevailing tendency among drafters of domestic IUU fishing legislation is to avoid insurance-specific prohibitions.¹⁰² The authors believe that this is a short-sighted approach that fails to address the problem of IUU fishing in a proactive, holistic manner. This trend is not based on an evidence-based decision on the role of insurance in IUU fishing. On the contrary, the evidence examined below suggests that insurance has a major role to play in the fight against IUU fishing.

In that respect, the IPOA-IUU is illuminating. One of its recommendations is to impose trade measures ‘to ensure that...insurers...are aware of the detrimental effects of doing business with vessels identified as engaged in IUU fishing...and...measures to deter such business. Such measures could include...legislation that makes it a violation to conduct such business...’.¹⁰³ At the same time, the IPOA-IUU goes a step further and recommends measures to notify and deter

⁹⁹ Ibid., p. 9.

¹⁰⁰ Ibid.

¹⁰¹ Ibid, p. 10.

¹⁰² A review of the legislation of 10 countries, including Canada, the USA, Australia, and Chile (all significant fishing jurisdictions), revealed no such measures in anti-IUU fishing legislation.

¹⁰³ IPOA-IUU, n. 14 above, para. 73.

(compliant) fishers from dealing with insurers that are ‘doing business with vessels identified as engaged in IUU fishing’.¹⁰⁴

The Organisation for Economic Co-Operation and Development (OECD) further supports the imposition of insurance-related measures. In a comprehensive report on the economics of IUU fishing, the OECD argues that IUU legislation should aim to reduce the revenues while increasing the costs of IUU operators.¹⁰⁵ One recommended means of increasing costs is by restricting their access to insurance services, as ‘[r]ecent examples suggest that such measures may be efficient in some situations, at a relatively limited cost’.¹⁰⁶

The recommendations in both reports raise the question of why the insurance-related recommendations failed to find their way into relevant legislation. The likely reason is that trade measures, including insurance-related ones, traditionally have been viewed as secondary measures that can be applied only if other measures have proven unsuccessful to prevent, deter and eliminate IUU fishing, and they can only be deployed after prior consultation with interested states.¹⁰⁷ In that respect, it is likely that the explicit implementation of insurance-related measures has been postponed and ultimately overlooked.

EU legislators may have expanded the supply chain-related measures in the mistaken belief that underwriters would react to such expansion by not dealing with companies suspected of IUU fishing . It may have been hoped that a prohibition of insuring IUU fishing activities

¹⁰⁴ Ibid., para. 74.

¹⁰⁵ OECD, *Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unregulated Fishing* (OECD, 2005), p. 42, available at: http://www.oecd-ilibrary.org/agriculture-and-food/why-fish-piracy-persists_9789264010888-en .

¹⁰⁶ Ibid., p. 98.

¹⁰⁷ IPOA-IUU, n 14 above, para. 66.

would be imposed as a *de facto* measure by the insurance market. However, our empirical study demonstrates that this is not the case. At present, the safeguards imposed by insurers in their policies and insurance law are not sufficient to deter the owners of IUU vessels from using insurance as a way of protecting their commercial activities. Furthermore, availability of liability insurance presents another advantage for the operators of IUU fishing vessels in that it enables them to have the necessary insurance certificates to be able to access ports around the world. Without such certificates, operational capacity of such vessels would be restricted, with a severe impact on the commercial viability of such operations.

4.4 An Insurance-Related Amendment to the EU IUU Regulation

The fact that at least 47.9% of fishing vessels over 1,000 tonnes suspected of being involved in IUU fishing activity have secured liability cover is a serious impediment to the fight against IUU fishing.¹⁰⁸ There is little doubt that the existing supply-related measures have reduced the levels of IUU fishing. Yet, the evidence suggests that the problem is far from eradicated or even controlled,¹⁰⁹ as both the IPOA-IUU and the OECD suggest that cutting the insurance supply will further reduce IUU fishing by impeding the operation of IUU vessels.

The EU is in a privileged position since it has a comprehensive set of IUU fishing regulations. As a result, there is no need to reinvent the wheel. The EU IUU Regulation can be amended, subject to the prior consultation requirement of the IPOA-IUU, to explicitly incorporate insurance-related measures and thereby eliminate room for debate on how, or to what extent the Regulation applies to the provision of insurance. Article 11(1)(d) of Regulation (EU)

¹⁰⁸ See data in Section 2 of this article.

¹⁰⁹ Pramod, n. 5 above.

No. 267/2012, which prohibits any ‘financial assistance’ for the transport of petroleum products of Iranian origin, can be used as a roadmap.¹¹⁰ As such, a future amendment of the relevant EU IUU Regulation might read as follows:

It shall be prohibited to provide insurance and reinsurance with regard to: i) vessels included in the Community IUU vessel list; ii) fishing vessels flying the flag of countries included in the list of non-cooperating third countries; and iii) the importation, exportation, purchase, or transport of fishery products obtained from vessels in paras i) and ii) above.

At the same time, the sanctions provided in the IUU fishing regulation could be amended to reflect the extension of its scope to insurers. This would be an extensive prohibition, as it covers hull and liability insurance (i and ii), as well as cargo insurance (iii). We strongly argue that such a wide provision is essential for the measure to have a positive effect. As a concession, the prohibition would not cover vessels issued with alerts under Articles 23 and 24 of the EU IUU Regulation, unless they have officially been ‘named and shamed’ via the two blacklists. An expansion to cover such vessels might be part of a further amendment to the Regulation once it is established that the original prohibition has begun to take effect in practice. The aims of the suggested amendment are twofold:

- i) explicitly barring any access to European insurance markets for the owners/operators of IUU vessels and/or owners/traders of IUU fishery products; and

¹¹⁰ Regulation (EU) No. 267/2012 of 23 March 2012 concerning Restrictive Measures against Iran and Repealing Regulation (EU) No. 961/2010 [2012] OJ L 88/1.

- ii) providing insurers with an unambiguous legal argument to change their underwriting practices and (it is hoped) to take awareness measures along the lines of those proposed in section 3 of this paper.

It is likely that insurers will raise the issue of the costs of adapting to the suggested prohibition. Yet it is expected that any increase in the cost of doing business for insurers would be minimal as, firstly, the two blacklists of the EU IUU Regulation are publicly available and frequently updated and, secondly, insurers have already developed sophisticated compliance procedures to deal with the wide range of political sanctions that are in force around the world. If insurers are able to establish due diligence procedures to comply with the labyrinth of political sanctions, compliance with the IUU blacklists is unlikely to be found challenging.

5. Domestic Legislation Post Brexit

On 23 June 2016, the UK population voted to leave the EU, with the decision causing quite a stir on both sides of the English Channel. At the time of writing there is little to suggest whether we will witness a ‘hard’ departure where neither party would have full access to each other’s markets, or a light version based either on the model of the so-called ‘fax democracy’ usually associated with Norway or the Swiss ‘a la carte’ model.¹¹¹

In the case of IUU fishing, it is expected that the (relatively small) British catch fisheries industry will exercise disproportionate political pressure to ‘renegotiate quota shares, as well as

¹¹¹ For further analysis see S. Dhingra & T. Sampson, ‘Life after BREXIT: What are the UK’s Options Outside the European Union?’, LSE Centre for Economic Performance, Brexit Paper 01/2016, available at: <http://cep.lse.ac.uk/pubs/download/brexit01.pdf>.

access arrangements' on a bilateral basis, cognizant of the fact that 'it is not politically or legally possible just to ring-fence most of our fish resources'.¹¹² The European Union (Withdrawal) Bill (once enacted) will incorporate the EU IUU fishing regulations into UK law. This development aims to provide legal certainty and stability in the immediate aftermath of Brexit as it ensures that the current EU laws on IUU fishing, including the IUU Fishing Order, will continue to apply uninterrupted. Still, in the long term the British Government will be required to develop a domestic scheme of monitoring, preventing and sanctioning IUU fishing. In that respect, it is expected that Norway will be used as an example of a country that enjoys independence over its fishery policy while being part of the European Economic Area.

This presupposition overlooks that Norway has been a pioneer in the fight against IUU fishing, having established its own blacklist of vessels since 1994.¹¹³ For the UK, following the Norwegian example would reinvent the wheel as it would require, among other things, the drafting of blacklists, the funding of research to ensure the continuing development of measures against IUU fishing, and the conclusion of bilateral agreements with third countries (including the EU) on catch certificates. Creating such a framework is feasible, yet it would require substantial funds and legislative time without strengthening the fight against IUU fishing. The end result will be the creation of yet another regime that will impede the flow of information among the various stakeholders and reduce the effectiveness of the measures. Fragmentation is never the answer to combatting criminal activities, especially when they are perpetrated at an

¹¹² F. Harvey, 'British Fishermen Warned Brexit Will Not Mean Greater Catches', *The Guardian*, 28 June 2016, available at: www.theguardian.com/environment/2016/jun/28/british-fishermen-warned-brexit-will-not-mean-greater-catches.

¹¹³ See: www.fisheries.no/resource_management/control_monitoring_surveillance/Control_and_enforcement/#.V-PQE4WcGcw.

international level; it is not surprising then that the trend is towards the international harmonization of the measures against IUU fishing.

The authors believe that a sensible course of action is to isolate the issue of IUU fishing from the political negotiations over the EU Common Fisheries Policy. It is a technical issue which requires a level of cooperation and information exchange that is unlikely to ensue from the political minefield of the negotiations over border controls. In that respect, it is to be hoped that, despite the unfavourable current political climate,¹¹⁴ a *sui generis* solution can be achieved whereby the UK remains an integral part of the EU IUU fishing measures, development and funding.

Our insurance-related recommendation, on the other hand, is not expected to be adversely affected by Brexit, irrespective of the form it may take. Any prohibition to insure IUU vessels can be implemented into English law with minimal disruption. Considering the international clientele of British-based insurers and P&I clubs, we consider that even a strictly domestic prohibition would contribute to the prevention of IUU practices worldwide. At the same time, it would send a strong message to the EU and the rest of the world that insurance should not be overlooked in the war against IUU fishing.

6. Conclusion

So far, various legal measures have been taken to tackle IUU fishing activities within the EU and worldwide. There is no denying that these measures have yielded positive results. However, this article demonstrates that the war is far from over. It is evident from the empirical study carried out that those involved or suspected to be involved in IUU fishing have no difficulty in obtaining

¹¹⁴ See F. Perraudin, 'UK to "Take Back Control" of Waters after Exiting Fishing Convention', *The Guardian*, 2 July 2017, available at: <http://www.theguardian.com/environment/2017/jul/02/uk-take-back-control-london-fisheries-convention-michael-gove>.

liability insurance which enables them to carry out their activities. We argue that changes in underwriting practices are desirable to ensure that liability insurance coverage is denied to those vessels with a history of IUU fishing activities. However, without the explicit backing of law that will force liability insurers to decline cover to such vessels, it will prove a greater challenge to incentivize insurers to change their current practices. Such a change should be relatively easy to implement even in the context of EU law, which is rather fragmented in the manner it deals with IUU fishing. At the national level, however, it should be relatively easy to implement changes in the relevant legislation to explicitly prohibit insurance providers from offering insurance cover for vessels involved in IUU fishing on a regular basis. Even in the case of the UK leaving the EU, such measures could be taken unilaterally.

The concluding message of this article is clear: in order to combat IUU fishing, a holistic approach is needed. Explicitly prohibiting insurance companies from providing liability cover to those involved in IUU fishing activities on a regular basis can, and should be, incorporated into this approach. This would not eliminate IUU fishing altogether as it is possible that fishing vessels with no previous record of IUU fishing might be opportunistically involved in such activities after obtaining liability insurance cover. However, improved clarity in interpretations and changes in relevant legislation will certainly make it more difficult for regular offenders to obtain liability cover with ease and no qualification, and thus put a restriction on their ability to operate.