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THE TRADE RELATED ENVIRONMENTAL MEASURES IN THE CONVENTION FOR THE CONSERVATION OF ATLANTIC TUNAS

*Full fathom five thy father lies;
Of his bones are coral made;
Those are pearls that were his eyes:
Nothing of him that doth fade,
But doth suffer a sea-change
Into something rich and strange.
Sea-nymphs hourly ring his knell:
Ding-dong.*

Hark! now I hear them—Ding-dong, bell¹.

The above mentioned song from “The Tempest” by Shakespeare clearly indicates that even in the eyes of the 17th century’s writers the sea contained two promises – a promise of pecuniary wealth and the promise of mystery. Today in the 21st century, with scientific research and intensive exploitation of its riches, the Global Ocean², still remains an area of possible wealth and riches and also a source of mystery. The modern perception of the sea has surely undergone a “sea-change”. The awareness of the importance of marine riches – resources is today much higher than in the Shakespeare’s times³. Their understanding of their meaning is

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¹ Act I, Scene II, Shakespeare, *William. Shakespeare’s Comedy of the Tempest*. William J. Rolfe, Ed. New York: Harper & Brothers, Publishers, 1892.

² On the normative role of a notion of World’s Ocean see D. Pyć: *Prawo Oceanu Światowego. Res usus publicum*. Gdańsk 2011 pp. 13–17.

³ FAO estimates that 37% of world fish catch is traded internationally. Food and Agriculture

wider, they include not only natural resources, but also biodiversity – they are all identified as common heritage of mankind⁴. The knowledge of the Sea has surely broadened since the Shakespeare's times, but sea still remains a mystery. This is due to the fact that the more we learn about the marine ecosystems, the bigger number of questions arise. Law cannot ignore the above mentioned fact. This is the reason why the numerous international legal acts were created to promote marine research as well as sustainable use of marine riches.

International environmental law in the last decades experiences a dynamic growth. Many scholars indicate that international environmental law together with international economic law are today the fastest growing bodies of international law⁵. What is important, there are the significant interlinkages between those two branches of public international law. International economic law regulates transboundary aspects of performing economic activity, which include trade, investment and other ones. International environmental law regulates the use and protection of the environment. One obvious area of overlapping those two regimes is the use of natural resources for the commercial purposes. Due to the risk of overexploitation of natural resources, led by the growing demand, the new conventions are being prepared. They aim at limiting the negative impact of economic activity in this area. An example of such an international environmental agreement is the Convention for the Conservation of Atlantic Tunas. It belongs to the group of the similar conventions which regulate and manage the stock of tunas on different seas and oceans⁶.

Agenda 21 in Chapter seventeen identified the main hazards to sustainable management of high sea fisheries. Among them unregulated fishing; overcapitalization; excessive fleet size; vessel reflagging in order to escape controls; insufficiently selective gear; unreliable databases and lack of sufficient cooperation among states were identified as the most important risk factors⁷. The aim of Chapter seventeen of Agenda 21, apart from identifying the risks to sustainable

Organization (FAO), *The State of World Fisheries and Aquaculture 2014* <http://www.fao.org/3/a-i3720e/i3720e01.pdf> (accessed 25 June 2016). The opportunities to trade with fish catch are rising with the rising technology of refrigeration and long range transportation of food. M. Palma, M. Tsamenyi, W. Edeson: *Promoting Sustainable Fisheries The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* Leiden – Boston 2010, p. 173

⁴ See art. 136 UNCLOS.

⁵ J. Jackson *Global economic an international economic law*. Vol. 1 (1) 1998 *Journal of international economic law*, p. 8.

⁶ M. Kenig-Witkowska: *Międzynarodowe Prawo Środowiska. Wybrane zagadnienia systemowe*. Warszawa 2011, p. 233.

⁷ Para. 17.45 UNCED, Agenda 21, Chapter 17, Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources, Rio de Janeiro, Brazil, 03–14 June 1992,

management of fish stock, is to call for international cooperation in management of fish stock, as well as raising the level of knowledge of the seas by research, statistics and handling of data⁸. We may use the Shakespeare's metaphor and say that Agenda 21 in Chapter seventeen aims at securing the seachange that the sea will remain "rich" and perhaps a little less "strange".

The Convention for the Conservation of Atlantic Tunas ("Convention") among other measures for the maximum sustainable catch of tuna and tuna-like fish in the Atlantic Ocean, introduces also the trade measures. The application of trade measures in the environmental regulation is becoming an important trend. The trade measures try to supplement the traditional command and control measures with economic incentives in order to achieve goals which probably would not be able to be achieved by the traditional instruments. They reflect the wider process of economization of environmental regulation⁹ the premises of which have been identified in principle 12 of the Rio de Janeiro Declaration. The Declaration confirms the important role of trade measures in environmental protection. On the other hand, however, it confirms, that trade policy measures for environmental protection should not constitute the means of arbitrary or unjustifiable discrimination or disguised restriction on international trade¹⁰. The use of trade measures for environmental regulation can lead to the conflict with the World Trade Organization (WTO), as WTO's law aims at the elimination of trade barriers, including non-tariff measures.

The trade related environmental measures are defined as the trade policy measures, which put the conditions, requirements and limits on imported or exported goods or services or the very process of exportation or importation, which aims at protecting the environment¹¹. Those measures can be identified at the international, regional and national levels¹². Their main aim is to prevent the environmental risks which stem from the international trade relations¹³. The trade related environmental measures are often alternative to the traditional command and

⁸ *Ibidem*.

⁹ J. Ciechanowicz-McLean: *Prawo ochrony i zarządzania środowiskiem* Warszawa 2015, p. 47.

¹⁰ Principle 12 Rio Declaration on Environment and Development <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163> (accessed 26 June 2016).

¹¹ C. Wold, S. Gains, G. Block: *Trade and the Environment. Law and Policy*. Durham 2011, pp. 642–643; P. Rao *International Trade Policies and Climate Change Governance*. Springer 2012, p. 12

¹² FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing agreed in Rome in 2001 refers to trade related environmental measures as Internationally Agreed Market-Related Measures, without properly defining them <http://www.fao.org/docrep/003/y1224e/y1224e00.htm> (accessed 26 June 2016).

¹³ D. Hrytzak *The Impact of Trade Related Environmental Measures on International Trade*. Saskatchewan Economics Journal vol. 4 (2002), p. 19.

control instruments of environmental protection. They create economic incentives for more sustainable use of natural resources, prevent regulatory race to the bottom and positively influence the effectiveness of the environmental policies¹⁴.

Among the trade related environmental measures environmental standards as well as market based instruments of environmental protection can be identified. The standards setting still remains one of the most popular instruments of the environmental protection, however, practice shows that economic incentives are becoming more and more popular¹⁵. What they have in common is the fact that they affect trade, directly or indirectly, in the selected categories of goods or services. These characteristics allow us to classify them as the trade related environmental measures, as they contain the specific trade obligations introduced in order to support other instruments of the environmental protection.

The trade related environmental measures can also form a part of international environmental protection agreements. It is estimated that one in every ten multilateral environmental agreements contains the specific trade obligations¹⁶. Among the trade measures which are introduced by the multilateral environmental agreements the product labelling requirements, licencing systems, information and consent requirements for exports and imports, export or import bans can be identified.¹⁷ It can be a direct environmental protection instrument, or an

¹⁴ UNEP *Economic instruments of in Biodiversity-Related Multilateral Environmental Agreements*. UNEP 2004, p. 24; see also A. Graczyk: *Wprowadzanie mechanizmów rynkowych w ochronie środowiska*. Warszawa 2011, p. 37.

¹⁵ UNEP *Trade-related Measures and Multilateral Environmental Agreements*. UNEP 2007.

¹⁶ UNEP *Trade-related Measures and Multilateral Environmental Agreements*. UNEP 2007; UNEP *Environment and Trade. A Handbook*. 2 ed. UNEP 2005, p. 14; U. Hoffman *Specific Trade Obligations in Multilateral Environmental Agreements and their relationship with the rules of the multilateral trading system – A developing country perspective*. UNCTAD Trade and Environment Review 2003 UNCTAD/DITC/TED/2003/4.

¹⁷ C. Wold, S. Gains, G. Block: *Trade and the Environment. Law and Policy*. Durham 2011, pp. 643–647; Other classification of the trade related environmental measures has been introduced by the European Union during the Doha round of World Trade Organization negotiations. EU identified (1) mandatory trade measures explicitly provided for under MEAs; (2) trade measures not explicitly provided for nor mandatory under the MEA itself but consequential of an ‘obligation of result’ of the MEA (this category covers cases where an MEA identifies a list of potential policies and measures that parties could implement to meet their obligations); (3) trade measures neither identified in, nor mandatory under the MEA, but consequential of the ‘obligation of result’ although not listed in the MEA, which gives the party more scope as regards the measure it wishes to deploy to achieve the objectives of the MEA; and (4) trade measures neither identified in nor mandatory under the MEA, but which parties can decide to implement. See R. Quick *Further liberalisation of trade in chemicals – can the DDA deliver? A summary of the chemical industry’s position on the Doha Development Agenda* [in:] *Agreeing and Implementing the Doha Round of the WTO*. H. Hohmann (ed.) Cambridge 2010, p. 188; WTO/TN/TE/W/1 of 21 March 2002, Multilateral Environmental

instrument implemented in order to ensure compliance with environmental regulations introduced by the multilateral environmental agreements¹⁸. The expected effects of using the specific trade obligations in the multilateral environmental agreements are the correction of market failures, and greater sustainability (in environmental and economic sense) of trade in the selected goods¹⁹. What is more, research also provides the positive social effects of such multilateral environmental agreements²⁰.

The Atlantic Tuna Convention regulates the catch of tuna and similar breeds of fish in the area of the Atlantic Ocean and adjacent seas, including also the Mediterranean Sea. It was signed in 1966 and came into force in 1969. Nowadays 50 states are members to the Convention²¹ which is a relatively big number especially when we consider its regional nature. In 1984 and in 1992 two important modifications of the agreement were adopted, firstly by the Paris Protocol and later by the Madrid Protocol. The main institutional body established by the Convention is the Atlantic Tuna Commission²². The Commission deals with joint planning of research, coordination of research carried on by the agencies of the Parties in accordance with its plans, and joint evaluation of the results of such research; the collection and analysis of statistical information relating to the condition of fishery resources in the Convention area; and joint formulation of regulatory recommendations for submission to the Parties. Its role in the use of the trade related instruments of protection of tuna stock is important due to the fact that it has the competence to issue recommendations (binding) and resolutions (non-binding)²³. Those documents contain the science based instruments aiming at maintaining the populations of tuna and tuna-like fish at the levels which permit

Agreements (MEAs): Implementation of the Doha Development Agenda, Submission by the European Communities.

¹⁸ *Ibidem*; see also D. Esty *Greening the GATT. Trade Environment and the Future*. Washington 1994, p. 103

¹⁹ C. Steevens: *Harmonisation, trade and environment*. International Environmental Affairs. vol. 5, no 1 (1993), p. 42.

²⁰ UNEP *Trade-related Measures and Multilateral Environmental Agreements*. UNEP 2007 p. 5.

²¹ <https://www.iccat.int/en/contracting.htm> (14 June 2016).

²² International Convention for the Conservation of Atlantic Tunas, art. 3.

²³ By the majority of votes of Contracting Parties with the quorum established at the level of 2/3 of the Contracting Parties. Pursuant to art. 3(3) Recommendations adopted by the Commission are submitted to contracting governments for acceptance. These recommendations become effective for all Parties to the Convention six months after their formal submission to all Parties (unless otherwise stated) provided objections are not made during that period by the concerned contracting governments. Each Contracting Party has the responsibility for implementing and enforcing the Commission's recommended conservation and management measures.

the maximum sustainable catch²⁴. The measures adopted by the Commission are binding to the parties to the Convention unless opposed within the 6 month period from the adoption of the measure²⁵.

The recommendations and resolutions which are adopted by the Commission in most cases are dependent on the adoption of the national implementation measures. This creates the possibility for the trade related environmental measures to be adopted as an international law measure which stems directly from the recommendation and resolution, as well as a national law trade related measure which aims at the implementation of an international measure which does not necessarily use the direct trade instruments²⁶. The trade related environmental measures adopted by the Commission can include catch quotas, time/area closures, size limits, and import bans²⁷. The Convention identifies three categories of states. The first category consists of the Parties to the Convention, the second category are the Cooperating Parties – states which despite the fact that they are not the parties to the Convention coordinate their fishery policy with measures adopted by the Commission. The last category consists of the non-member states. The Convention treats each of those categories of states differently also in relation to using the trade related environmental measures²⁸.

²⁴ ICCAT compiles fishery statistics from its members and from all entities fishing for these species in the Atlantic Ocean, coordinates research, including stock assessment, on behalf of its members, develops scientific-based management advice, provides a mechanism for Contracting Parties to agree on management measures, and produces relevant publications.

²⁵ The Party that wishes to object to the content of the recommendation brings within 6 months from the date of notification of an objection. The objection results in postponing the entry into force of the recommendation for 60 days. This is the time needed to carry out a series of actions that can be called the procedure of analysis and verification of the objections from the Commission's recommendations. In this additional time (60 days from objecting or 45 days from the date of notification to object) the other Member States shall have the opportunity to bring their objections. If they do not take advantage of this opportunity the Recommendation shall enter into force after the above-mentioned additional period of time, to all States Parties to the Convention apart from the State which raised objections. If the objection is brought only by one Member State, or when the number of the Member States which bring the objection is less than a quarter of all Member States, the Commission shall notify the States which brought the objections to confirm them within an additional period of 60 days. If such confirmation occurs, the recommendation shall enter into force for all States Parties to the Convention, which raised no objections. See art. VIII (2) of ICCAT.

²⁶ S. Barrett: *Environment and Statecraft: The Strategy of Environmental Treaty-Making* Oxford 2005, p. 326.

²⁷ A. Palmer, B. Chaytor, J. Werksman: *Interactions between the World Trade Organization and International Environmental Regimes*. [in:] *Institutional Interaction in Global Environmental Governance*. Synergy and Conflict among International and EU Policies. S. Oberthür, T. Ghering (ed.) Cambridge Massachusetts (MIT Press) 2006, p. 193.

²⁸ M. Hayashi: *Regional Fisheries Management Organisations and Non-Members* [in:] *Law of the*

Recommendation 06-13 of the Atlantic Tuna Commission sets out the rules concerning the adoption of the trade restrictive measures towards the Contracting Parties, Entities and Fishing Entities, Cooperating non-Contracting Parties Entities or Fishing Entities (CPCs) and finally non-Contracting Parties Entities or Fishing Entities (NCPs)²⁹. Such measures are an option of measures undertaken against the CPCs states which are identified as failing to control the compliance with the ICCAT conservation and management measures by the vessels flying those states flags or farming facilities subject to their jurisdiction. They can also be used against NCPs which have failed to discharge their obligations under international law to cooperate with the Commission in the conservation and management of tuna and tuna-like species. In the case of NCPs the trade measures can be taken against the countries which fail to ensure that vessels flying their flags as well as the farming facilities under their jurisdiction undertake activities which undermine the effectiveness of the ICCAT conservation and management measures³⁰. Such states are identified by the Commission each year what ensures that the potential trade measures are used in a precise way.

The process of adoption of the trade restrictive measures is far from automatism and the procedure which may lead to the adoption of the trade restrictive measures against a state creates the possibility for a state to present its arguments. The procedure is initiated by the Commission by sending the request to CPC or NCP to rectify an act or omission which results in undermining the effectiveness of the conservation and management measures. The response is evaluated by the Compliance Committee which is capable of proposing to the Commission three types of measures. It can revoke the identification, it can continue the identification status of the CPC or NCP or eventually it can propose the adoption of the trade restrictive measures. The trade measures are being treated as a last resort instrument. What is interesting, the trade restrictive measures, according to the recommendation, are to be adopted in a non-discriminatory way, which prevents the ICCAT measures from being used as a protectionist tool. The requirement of the non-discriminatory character of the trade measures is also an instrument of providing compliance of the Convention member states with their other international obligations including also the WTO trade liberalisation requirements. The similar purpose – avoidance of misuse of environmental trade measures serves the obligation of notification to the Commission of all trade restrictive measures which have been introduced by the CPCs³¹.

Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah. T. Ndiaye, R. Eolfrum (ed.) Leiden, Boston 2007, p. 753.

²⁹ Recommendation 06-13 concerning trade measures preamble.

³⁰ Par. 6 Recommendation 06-13 concerning trade measures.

³¹ Par 8 Recommendation 06-13 concerning trade measures.

One area of the trade related environmental measures application covers the catch limits and the related measures. The Convention provisions on environment protective measures are often undertaken in the form of various Conservation and Management Programs³². They introduce catch limits which are distributed among the Parties in accordance with special recommendations separate for different species of tuna and tuna-like fish. Recommendation 15-01 introduced the conservation and management program for tropical tunas. That Recommendation sets³³ and distributes the catch limits for the period 2016-2018, and distributes them among the parties to the Convention³⁴. The trade measures relating to that Recommendation are connected with the situation of exceeding the catch limits. Paragraph 10 introduces 125% of the reduction of catch limits for the parties to the Convention which exceed the harvest limits. The Commission is also empowered to recommend other measures against the state, including also the trade restrictive measures³⁵. The competences of the Commission are not limited to the type of the trade restrictive measures, but also to the conditions under such measures to be introduced and also the length of the period for which they will be used.

Another group of the trade restrictive measures are the measures relating to Illegal, Unreported, and Unregulated Fishing Activities (IUUs)³⁶ in the ICCAT Convention Area³⁷. A number of the non binding resolutions have been issued on

³² As examples of such programs Bluefin Tuna Catch Documentation Program (introduced by 09-11 Recommendation); Swordfish Statistical Document Program (introduced by 01-22 Recommendation) or currently active ICCAT Multi-annual Conservation and Management Program for Tropical Tunas (introduced by 15-01 Recommendation) can be mentioned.

³³ Par 2 of 15-01 Recommendation.

³⁴ Par. 3 of the 15-01 Recommendation.

³⁵ Par. 10 of 15-01 Recommendation.

³⁶ There are many various definitions of the notion illegal, unreported and unregulated fishing activities. Among the international conventions which aim at protection and management of marine biological resources the most detailed distinction between those three notions was made by the Convention on the Conservation of Antarctic Marine Living Resources (1980) (CCAMLR). In the Sixteenth Session of CCAMLR clearly distinguished the term “unregulated fishing” from “illegal fishing.” “Unregulated fishing” was used to describe the fishing activities of vessels flying the flags of non-CCAMLR members within the jurisdiction of members and on the high seas within the CCAMLR area. “Illegal fishing” was referred to as an activity that severely compromised the management of Patagonian toothfish, resulting in an unsustainable level of fishing. “Illegal catches” was also mentioned as capture that exceeded the legal catch limit set by CCAMLR. CCAMLR *Sixteen Meeting Report of the Scientific Committee* Hobart Australia 27–31 October 1997 see par. 4.55 and 5.100 <https://www.ccamlr.org/en/system/files/e-cc-xvi.pdf> (accessed 25 June 2016).

³⁷ International actions undertaken within the framework of regional fish stock protection and management conventions in the field of Illegal, Unreported, and Unregulated Fishing Activities are coordinated at the global level by other international documents. One of which, especially aiming

the subject of IUUs, forming political consensus on the need of using the trade measures – trade bans in order to combat this problem. It is worth to mention Resolution 99–11 of 16 December 1999, which provides that the Contracting Parties as well as the Cooperating Non-Contracting Parties, but also other actors like the Entities and the Fishing Entities should engage in the fight against IUUs. They are obliged to urge importers, transporters and other business people to refrain from engaging in transactions and transshipment of tunas and tuna-like species caught by the vessels which carry out IUUs activities. By these means the Commission wants to strike the whole supply chain and affect negatively the possibility of trading in illegally caught fish stock³⁸. The scope of trade restrictions was set more clearly in Resolution 01-18 of 22 March 2002. Apart from repeating 99-11 Resolution soft law regulations it explains that IUU activities include, *inter alia*, any fishing not in compliance with the relevant ICCAT conservation measures in the Convention Area and other areas³⁹. The third aspect of IUU fishing which is regulated with the instrument of resolution is a problem of “catches laundering” which usually takes the form of transshipment at sea or in unregistered ports⁴⁰. ICCAT for example exempts the small-scale albacore longline vessels from the prohibition on transshipment at sea⁴¹.

The resolutions which aim at combating the IUUs are supported by relevant recommendations which also aim at the elimination of this problem, by introducing the trade sanctions against certain states whose vessels were performing various IUUs actions. Recommendation 03-16⁴² obliges the Contracting Parties and the Cooperating non-Contracting Parties, Entities or Fishing Entities to take the necessary measures to prohibit landings from fishing vessels, placing in cages, farming and transshipment within their jurisdictions of tunas or tuna-like species caught by Illegal, Unreported, and Unregulated Fishing Activities⁴³. This general

at prevention of illegal, unreported and unregulated fishing is FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing agreed in Rome in 2001.

³⁸ Par. 2 Resolution 99–11 Calling for Further Actions Against Illegal, Unregulated and Unreported Fishing Activities by Large-Scale Longline Vessels in the Convention Area and other areas.

³⁹ Resolution 01-18 Further Defining the Scope of IUU Fishing.

⁴⁰ M. Palma, M. Tsamenyi, W. Edeson: *Promoting Sustainable Fisheries the International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing*, Leiden – Boston 2010, p. 206.

⁴¹ ICCAT, Recommendation by ICCAT Establishing a Programme for Transshipment, 06-01.

GEN, 13 June 2007, Sec. 2.3; see also M. Hayashi: *Regional Fisheries Management Organisations and Non-Members [in:] Law of the Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah. T. Ndiaye, R. Wolfrum (ed.)*, Leiden, Boston 2007, p. 753.

⁴² Recommendation 03-16 by ICCAT to adopt additional measures against illegal, unreported and unregulated (IUU) fishing.

⁴³ *Ibidem*.

recommendation is accompanied by recommendations which opt for introduction of the trade sanctions against the particular states. The examples of such individual measures cover over twenty recommendations concerning introduction of the trade measures against various contracting and non-contracting parties⁴⁴. They started to be issued in the middle of the nineties⁴⁵. The last recommendation

⁴⁴ S. Barrett *Environment and Statecraft: The Strategy of Environmental Treaty-Making* Oxford 2005, p. 326.

⁴⁵ The full list of recommendations issued by ICCAT with reference to the trade sanctions include the following:

11-19 Recommendation by ICCAT concerning the lifting of trade restrictive measures against Bolivia and Georgia,

04-15 Recommendation by ICCAT concerning the lifting of bigeye tuna trade restrictive measures against Cambodia,

04-14 Recommendation by ICCAT concerning the lifting of bigeye tuna, bluefin tuna, and swordfish trade restrictive measures against Sierra Leone,

04-13 Recommendation by ICCAT concerning the lifting of trade sanctions against Equatorial Guinea,

03-18 Recommendation by ICCAT for bigeye tuna trade restrictive measures on Georgia,

03-17 Recommendation by ICCAT concerning the continuance of trade measures against Equatorial Guinea,

02-20 Recommendation by ICCAT concerning the trade sanction against St. Vincent and the Grenadi,

02-19 Recommendation by ICCAT for trade restrictive measures on Sierra Leone,

02-18 Recommendation by ICCAT concerning the importation of bigeye tuna its products from Honduras,

02-17 Recommendation by ICCAT regarding Bolivia pursuant to the 1998 Resolution concerning the unreported and unregulated catches of tuna by large-scale longline vessels in the Convention Area,

02-16 Recommendation by ICCAT concerning the importation of Atlantic bluefin tuna, Atlantic swordfish, and Atlantic bigeye tuna and their products from Belize,

01-15 Recommendation by ICCAT concerning the importation of bluefin tuna and swordfish and their products from Honduras,

01-14 Recommendation by ICCAT concerning the importation of bigeye tuna and bigeye tuna products from St. Vincent and the Grenadines,

00-16 Recommendation by ICCAT regarding Equatorial Guinea pursuant to the 1998 Resolution concerning the unreported and unregulated catches of tuna by large-scale longline vessels in the Convention Area,

00-15 Recommendation by ICCAT regarding Belize, Cambodia, Honduras, and St. Vincent and the Grenadines pursuant to the 1998 Resolution concerning the unreported and unregulated catches of tuna by large-scale longline vessels in the Convention Area,

99-10 Recommendation by ICCAT regarding Equatorial Guinea pursuant to the 1996 "Recommendation regarding compliance in the bluefin tuna and North Atlantic swordfish fisheries",

99-09 Recommendation by ICCAT concerning the importation of bluefin tuna and its products from Panama,

Lifting of Trade Restrictive Measures against Bolivia and Georgia was issued in 2011. This record indicates that although the trade sanctions less frequently used now were relatively frequently used by ICCAT as the instrument to combat Illegal, Unreported, and Unregulated Fishing Activities.

Another specific group of measures which aim at fighting the IUUs are the measures undertaken against the specific vessels, which have been identified by Recommendation 11-18 which introduces the list of vessels presumed to have carried out IUUs in the ICCAT Convention Area⁴⁶. When included into the list the vessel is subject to the numerous sanctions which aim at preventing those vessels from undertaking any fishing activities. Such sanctions prevent fishing vessels, support vessels, refuelling vessels, the mother-ships and the cargo vessels flying CPCs flag from assisting in any way, engage in fishing processing operations or participate in any transshipment or joint fishing operations with the vessels included in the IUU Vessels List. The vessels of the IUU Vessels List are also not authorized to land, tranship re-fuel, re-supply, or engage in other commercial transactions under the jurisdictions of CPCs. They are also prohibited from by the CPCs to enter into their ports except in case of *force majeure*⁴⁷, unless the vessels are allowed to enter a port for the exclusive purpose of inspection and effective enforcement action. Other groups of measures prohibit the imports, or landing and/or transshipment, of tuna and tuna-like species from vessels included in the IUU list, encourage the importers, transporters and other sectors concerned, to refrain from transaction and transshipment of tuna and tuna-like species caught by vessels included in the IUU list – just to name the most important ones⁴⁸. Inclusion of the vessel in the IUU Vessel List results in the decrease in the technical capability of such vessels of performing any fishing activity in the Area. The process of deletion of a vessel from the IUU Vessel List is subject to the numerous requirements which aim at ensuring the effective control over the vessel of a non-Contracting

99-08 Recommendation by ICCAT regarding Belize and Honduras pursuant to the 1995 Swordfish Action Plan Resolution,

96-12 Recommendation by ICCAT regarding Panama pursuant to the 1994 ICCAT Bluefin Tuna Action Plan Resolution,

96-11 Recommendation by ICCAT regarding Belize and Honduras pursuant to the 1994 Bluefin Tuna Action Plan Resolution.

⁴⁶ Par. 8-13 Recommendation 11-18 by ICCAT Further Amending Recommendation 09-10 Establishing a List of Vessels Presumed to Have Carried out Illegal, Unreported, and Unregulated Fishing Activities in the ICCAT Convention Area.

⁴⁷ Par. 9 Recommendation 11-18 by ICCAT Further Amending Recommendation 09-10 Establishing a List of Vessels Presumed to Have Carried out Illegal, Unreported, and Unregulated Fishing Activities in the ICCAT Convention Area.

⁴⁸ *Ibidem*.

Party and preventing this vessel from undertaking any actions which would adversely affect the ICCAT conservation measures⁴⁹.

The above mentioned various trade related environmental protection measures can be also used as the instruments for providing compliance with the ICCAT reporting obligations. Starting from 2013 onwards, the Contracting Parties may be forbidden to fish for species for which data have not been provided in the previous years, under ICCAT Recommendation 11-15⁵⁰. Failure to fulfil the reporting obligation results in the prohibition of retaining of species reporting of which the reporting obligations were about in the year following the absence of or incomplete reporting until such data have been received by the ICCAT Secretariat⁵¹. The recommendation is related to the selected species protection programmes undertaken by the ICCAT.

The trade related environmental measures play an important role in the functioning of the Convention for the Conservation of Atlantic Tunas on International Trade. That type of measures is used in order to achieve various goals among which the conservatory goals and the compliance goals seem to play the most important role. Nowadays, in some areas, it can be seen that the use of the trade measures is declining. This is especially true for using this type of measures as a sanction against the non-contracting states. Among the different reasons for such a situation a phenomenon of the “regulatory chill” can play a relatively important role⁵². Due to the relationship not completely clearly set between the Convention and the World Trade Organization law there is a risk that the measures adopted on the basis of the ICCAT recommendations or resolutions can turn out to be in breach with the international obligations in the field of elimination of the trade barriers. The relatively effective system of the dispute settlement in the World Trade Organization can be a discouraging factor for the ICCAT contracting parties as well as the cooperating non-contracting parties to adopt the trade

⁴⁹ Par 14 Recommendation 11-18 by ICCAT further amending Recommendation 09-10 establishing a list of vessels presumed to have carried out illegal, unreported, and unregulated fishing activities in the ICCAT Convention Area.

⁵⁰ Recommendation 11-15 on penalties applicable in case of non fulfilment of reporting obligations.

⁵¹ Par 3 of ICCAT Recommendation 11-15 on penalties applicable in case of non fulfilment of reporting obligations.

⁵² Regulatory chill describes the situation when the states are reluctant to introduce new environmental measures due to their international obligations which are related to the trade liberalisation. More on the regulatory chill see K. Tienhaara *Regulatory chill and the threat of arbitration: A view from political science* [in:] *Evolution in Investment Treaty Law and Arbitration* C. Brown, K. Miles (ed.) Cambridge 2011, pp. 606–628.

measures. The situation of bringing the dispute against ICCAT measures to the Dispute Settlement Body of WTO is to time purely hypothetical⁵³.

The analysis of law and policy of the World Trade Organization shows that the trade restrictive measures adopted in order to protect the fish stock have serious chances of being considered as remaining in accordance with WTO law. Even despite the fact that they constitute the trade barriers, WTO and ICCAT cooperate with each other. However, some additional requirements have to be fulfilled. First of all, what has already been stressed, the measures should be undertaken in a non-discriminatory way. The second factor is the fact that the Panels and the Appellate Body of WTO are much less strict in analysing the conformity of the multilateral trade restrictive measures undertaken on the basis of the multilateral environmental agreements than unilateral measures undertaken individually by the states⁵⁴. Such measures often touch upon the problem of an extraterritorial environmental regulatory power of a state, which makes the field for the potential dispute even more serious. The potential conflict between the ICCAT norms and the WTO norms is also limited by the fact of coordination of actions between the ICCAT Commission and WTO. On the one hand, the ICCAT Commission has been given the observer status in the Committee on Trade and Environment functioning within WTO⁵⁵. The representatives of the World Trade Organization are being invited as the observers at the ICCAT Commission meetings. The ICCAT Commission also informs the WTO's secretariat about the adoption of the trade related environmental protection instruments, which creates the field to coordinate the actions adopted by the members of those two international organizations.

CONCLUSIONS

The Convention for the Conservation of Atlantic Tunas is one of the examples of the international environmental legal acts which aim at the protection of natural resources through the process of their management and sustainable use. The

⁵³ GATT/WTO Dispute Settlement Body has already analysed unilateral and plurilateral instruments which used the trade related environmental measures in US-Shrimp (US-Shrimp WT/DS58/R) and US-Tuna (US-Tuna DS29/R) cases.

⁵⁴ J. Ciechanowicz-McLean, M. Nyka: *Multilateralism as a way of obtaining compliance in national environmental policies with international economic law*. Gdańskie Studia Prawnicze, vol. XXII (2009) pp. 47–62.

⁵⁵ M. Young: *Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing*. E15 Expert Group on Oceans, Fisheries and the Trade System. International Centre for Trade and Sustainable Development Geneva 2015, p. 1.

marine resources – in this case tunas – serve both the function of providing food as well as providing tradable commodity, which leads to a risk of overexploitation. The Convention tries to warrant the maximum point of equilibrium between the need to harvest the marine resources and their preservation for their further development. The trade related environmental measures are among other instruments which are expected to serve this purpose. Those are the measures which by the application of the instruments of trade regulation aim at achieving certain environmental goals, in this case the sustainable management of fish stock. The use of the trade related environmental measures bring the risk of misuses of those measures. The states can use such measures as an instrument of the disguised discrimination – the trade protectionism. Such actions can undermine the very idea of the application of the trade related environmental measures as well as can constitute a breach of international obligations which stem from World Trade Organization law. This creates a situation in which the application of the trade related environmental measures has to remain under the strict control of the Atlantic Tuna Commission and has to be coordinated with the World Trade Organization's institutions, especially with the Committee on Trade and Environment.