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# Fighting Fisheries Crime in Spain: A Critical Analysis from an International Law Perspective

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## Abstract

Many governments face the problem of IUU fishing. Spain is a state party to the United Nations Convention on the Law of the Sea (UNCLOS) and has comprehensive spatial planning compatible with international norms. In its maritime territory, the penal code is applied according to the legal regime applicable the different areas and within limitations imposed by international law. Based on this scenario, the sanctioning of IUU fishing will be conditioned by material, spatial, national and jurisdictional aspects. The aim of this article is to study the criminal prosecution and sanctioning of IUU fishing in waters under Spanish sovereignty and/or jurisdiction from a critical perspective, in the light of public international law.

**Keywords:** IUU fishing, criminal system, sovereignty, jurisdiction, UNCLOS

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## 1. Introduction

Illegal, unreported and unregulated (IUU) fishing accounts for up to one third of catches of certain species.<sup>1</sup> According to the FAO, IUU fishing is responsible for the loss of 11 to 26 million tons of fish,<sup>2</sup> which may account for 12 to 28% of the fishing volume of the world.<sup>3</sup> This type of activity generates significant social, economic and environmental costs and is one of the main obstacles to achieving sustainable fisheries. IUU fishing occurs mainly on the high seas and in the Exclusive Economic Zones of states that do not possess the resources to effectively control their waters. This type of behaviour also affects areas reserved for artisanal fishermen, with a detrimental impact on developing countries, endangering their food security.<sup>4</sup>

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1 WWF, 'Facts Figures: The Cold Hard Facts about Overfishing' <[www.fishforward.eu/en/topics/facts-figures/](http://www.fishforward.eu/en/topics/facts-figures/)> accessed 25 October 2022.

2 FAO, 'International Day for the Fight Against Illegal, Unreported and Unregulated Fishing' <[www.un.org/en/observances/end-illegal-fishing-day/](http://www.un.org/en/observances/end-illegal-fishing-day/)> accessed 25 October 2022.

3 See n 1.

4 IUU fishing is a major contributor to global overfishing, threatening food security, maritime livelihoods, and fisheries sustainability. See Daniel Pauly and others, 'Towards Sustainability in World Fisheries' (2002) 418 *Nature* 689. IUU fishing is widespread, comprising an estimated 20% of global fish catch with annual economic losses estimated between US\$26-\$50 billion. See David J. Agnew and others, 'Estimating the Worldwide Extent of Illegal Fishing' (2009) 4 *Public Library of Science ONE*, 1 and Ussif Rashid Sumaila and others., 'Illicit Trade in Marine Fish Catch and its Effects on Ecosystems and People Worldwide' (2020) 6 *Science Advance* 1.



In the field of maritime fisheries, there is no international convention requiring states to criminalise certain illegal fishing activities. States with fishing interests in a given area have formed regional fisheries management organisations to regulate this activity. The European Union (EU), now considered the fifth largest fishing power in the world,<sup>5</sup> is very active in some of these organisations. Within the European Community framework, the Spanish fishing fleet has great relevance and a significant influence on community fishing policies. The number of vessels or companies reported for practising or favouring IUU fishing has increased in recent years,<sup>6</sup> negatively affecting global food sovereignty and marine ecosystems. This type of activity is also linked to other forms of transnational organised crime, such as human trafficking (forced labour of crews), smuggling and document forgery.

The marine environment is the object of a significant economic activity marked by intense resource exploitation. IUU takes place both on the high seas and in areas within national jurisdiction and may be associated with organised crime. Therefore, governments are compelled to implement political and legal tools capable of guaranteeing a spatial and temporal distribution of human activities in the ocean in an organised and responsible manner. This is defined as marine spatial planning (MSP)<sup>7</sup> For this to be possible, states must enshrine in domestic legislation the sovereign and jurisdictional rights recognised by United Nations Convention on the Law of the Sea (UNCLOS).<sup>8</sup> This situation is not free of legal problems due to the very nature of the penal order. *Jus puniendi* arises from the sovereignty of each state. This explains why, by virtue of the principle of territoriality, criminal law governs within a state's own territory. Consequently, the fight against IUU fishing from a criminal point of view is strongly conditioned by the management of marine spaces and by the legal regime applicable to them under international and EU legislation.<sup>9</sup> Spain adopted the Royal Decree 363/2017 of 8 April establishing a framework for marine spatial planning,<sup>10</sup> that transposes into Spanish legislation the

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5 European Commission, European Market Observatory for Fisheries and Aquaculture Products. The EU Fish Market 2021 Edition, European Market Observatory for Fisheries and Aquaculture Products (2021) 20.

6 FAO, 'Global Action in Stepping up in the Fight Against Illegal, Unreported and Unregulated Fishing' <[www.fao.org/news/story/en/item/1402822/icode/](http://www.fao.org/news/story/en/item/1402822/icode/)> accessed 25 October 2022.

7 UNESCO, 'Intergovernmental Oceanographic Commission' <<https://ioc.unesco.org/our-work/marine-spatial-planning>> accessed 25 October 2022. For more information about this subject see Kjell Grip and Sven Blomqvist, 'Marine Spatial Planning: Coordinating Divergent Marine Interests' (2021) *Ambio*, 1172, and Jacek Zaucha and Kira Gree (eds), *Maritime Spatial Planning* (Palgrave Macmillan 2019).

8 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). On this particular question, see Jose Juste Ruiz, 'La entrada en vigor del Convenio de Naciones Unidas sobre Derecho del Mar y los intereses españoles' (1996-1997) *Anuario Argentino de Derecho Internacional* vol 7, 167-184; Jose Antonio de Yturriaga Barberán, 'Ámbitos de Jurisdicción en la Convención de Naciones Unidas sobre el Derecho del Mar. Una perspectiva española (Ministerio de Asuntos Exteriores 1995); Rosa Riquelme Cortado, *España ante la Convención sobre el Derecho del Mar. Las declaraciones formuladas* (Editum 1990).

9 Spain must comply with the EU environmental legislation and with environmental international treaties concerning maritime areas. Spain is bound to abide by the rules of the Common Fisheries Policy (CFP) based on the management of European fishing fleets and the conservation of fish stocks. EU law lays down general provisions concerning the authorisation of fishing in the waters of a third country under a fisheries bilateral and multilateral agreements, like the procedure and responsibilities of the Commission and Member states for the authorisation of fishing activities of EU fishing vessels. See Regulation (EU) No 1006/2008 on Authorisations for Fishing Activities of Community Fishing Vessels Outside Community Waters and the Access of Third Country Vessels to Community Waters [2008] OJ L286/33, amending Regulation 2847/93 and Regulation 1627/94, and repealing Regulation 3317/94.

10 Real Decreto 363/2017, de 8 de abril, por el que se establece un marco para la ordenación del espacio marítimo (BOE 86, 11 April 2017).



Directive 2014/89/EC of the European Parliament and of the Council of 23 July.<sup>11</sup> However, it should be noted that currently Spain has implemented no MSP.<sup>12</sup>

## 2. The fight against IUU fishing by Spain: jurisdictional and spatial aspects of the criminal system

With a coastline of nearly 8,000 kilometres, Spain borders open (the Atlantic Ocean) and semi-enclosed (the Mediterranean) seas. It is surrounded by States with adjacent or opposite coasts that can also extend their sovereignty and jurisdiction over the sea to the limits established by international law. Thus, both Spain's maritime space and that of its neighbouring countries are in a frontal, lateral, perpendicular or omnidirectional position, depending on the coastal features and their geographical location. Inevitably these potential claims overlap and the need arises to define boundaries through delimitation. Just like its neighbouring states, Spain is a party to UNCLOS<sup>13</sup> and, as such, it has claimed all internationally recognised ocean spaces. The outer limit of the Spanish internal waters is determined by the baselines from where the rest of the limits are measured. They are mostly determined by straight baselines unilaterally drawn by the Government along the whole coastline by virtue of Royal Decree 2510/1977 of August 5<sup>14</sup>. Spain has internal waters (IW), a territorial sea (TS) of 12NM,<sup>15</sup> and a contiguous zone extending to 24 NM.<sup>16</sup> Furthermore, it has unilaterally declared an Exclusive Economic Zones (EEZ) in the Atlantic without specifying its delimitation (1978)<sup>17</sup> and the Mediterranean (2013),<sup>18</sup> establishing in this case the relevant geographical coordinates. Spain had

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11 Council Directive 2014/89/EU establishing a Framework for Maritime Spatial Planning [2014], OJ L257/135, 2014.

12 Approval is expected before the end of 2022. The Draft Royal Decree (*Borrador del Real Decreto*) available on the Ministerio para la Transición Ecológica y el Reto Demográfico (MITECO) website <[www.miteco.gob.es/en/costas/temas/proteccion-medio-marino/ordenacion-del-espacio-maritimo/default.aspx](http://www.miteco.gob.es/en/costas/temas/proteccion-medio-marino/ordenacion-del-espacio-maritimo/default.aspx)> accessed 24 October 2022.

13 See n 8.

14 Real Decreto 2510/1977 de 5 de agosto, sobre trazado de líneas de base rectas en desarrollo de la Ley 20/1967 de 8 de abril sobre extensión de las aguas jurisdiccionales españolas a 12 millas, a efectos de pesca (BOE 86, 11 April 1967 and BOE 234, 30 September 1977).

15 The breadth of Spain's territorial sea up to a limit not exceeding 12 miles was determined by Ley 10/1977, de 4 de enero sobre mar territorial (BOE 374, 8 January 1977).

16 Real Decreto Legislativo 2/2011 de 5 de septiembre (Texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante) (BOE 253, 20 October 2011).

17 Ley 15/1978 de 20 de febrero sobre zona económica (BOE 46, 23 February 1978).

18 Real Decreto 236/2013 de 5 de abril, por el que se establece la Zona Económica Exclusiva de España en el Mediterráneo noroccidental (BOE 92, 17 April 2013).



previously declared a Fishery Protection Zone in the Mediterranean (1997)<sup>19</sup> of almost the same extension as the abovementioned EEZ. It also has a Continental Shelf (CS) around its whole coastline of a breadth in keeping with the provisions laid down in UNCLOS, considering that a nation's rights over this space are not contingent on any express declaration, according to Article 77 UNCLOS. Spain claims an extended CS in the Atlantic Ocean.

There is no doubt that any geographical feature of the Earth's surface can be taken into account to delimit and demarcate boundaries: a mountain range, a large lake or, even, a desert. They all can be used as legal boundaries for the purpose of separating territories or reinforcing a State's national security. However, it is not like that when it comes to the sea, where the unity of the physical medium, made of a continuous, uniform and homogeneous mass, makes the delimitation of boundaries more difficult. From a technical viewpoint, the determination of boundaries is carried out through an operation comprising two main stages: *a*) delimitation, a process to define spatial extensions in accordance with legal and political views, and *b*) demarcation, a technical operation by virtue of which the prior delimitation of the land is materially executed. Consequently, it is safe to say that to define a territory is to define its boundaries.

In light of the extension of its spaces and its geographical location, Spain has applied itself, together with its neighboring States, to the task of delimiting many spaces: with France, the TS, EEZ and CS in the Bay of Biscay and in the Mediterranean Sea<sup>20</sup> with Portugal, the TS, EEZ and CS in the mouth of the rivers Miño (Portuguese *Mihno*) and Guadiana (continental zone),<sup>21</sup> as well as the EEZ and CS

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19 Real Decreto 1315/1997 de 1 de agosto, por el que se establece una zona de protección pesquera en el mar Mediterráneo (BOE 204, 26 August 1997) amended by the Real Decreto 431/2000, de 31 de marzo (BOE 79, 1 April 2000). See notably Dolores Blázquez Peinado, 'El Real Decreto 1315/1997, de 1 de agosto, por el que se establece una zona de protección pesquera en el Mar Mediterráneo' (1997) 49 *Revista Española de Derecho Internacional* 334, and Antonio Pastor Palomar, 'La Nueva Zona de Protección Pesquera de España en el Mar Mediterráneo' (1997) 1 *Studia Carande* 87; Víctor Luis Gutiérrez Castillo and Eva María Vázquez Gómez, 'La zone de protection établie par l'Espagne' (1999-2000) 13 *Collection Espaces et Ressources Maritimes* 207.

20 In 1974, Spain and France concluded two treaties establishing maritime boundaries in the Bay of Biscay (Atlantic). The first treaty delimits the territorial sea between the two States, on the basis of equidistance, extending from the land boundary to a location that is 12 M from the nearest points on the respective territorial sea baselines of the two States. The second treaty delimits the continental shelf between the two States, extending seaward from the terminus of the territorial sea boundary. See Convention between France and Spain on the Delimitation of the Territorial Sea and the Contiguous Zone in the Bay of Biscay (Paris, adopted 29 January 1974, entered into force 5 April 1975) and Convention between Government of the French Republic and the Government of the Spanish State on the Delimitation of the Continental Shelves of the Two States in the Bay of Biscay (Paris, adopted 29 January 1974, entered into force 5 April 1975). See *Limits in the Seas* 83 (1979).

21 In 1976, Spain and Portugal concluded two treaties delimiting the territorial sea, contiguous zone, and continental shelf between the two States in the Atlantic Ocean. However, these treaties have not entered into force. See Jonathan I. Charney and Lewis M. Alexander (eds) *International Maritime Boundaries vol III* (Martinus Nijhoff Publishers 1993) 1791 (stating that 'Portugal is now opposed to ratification and favors the equidistant line for both boundaries').



between Madeira and the Canary Islands;<sup>22</sup> with Italy, the EEZ and CS;<sup>23</sup> and with Morocco, the TS in the Strait of Gibraltar, the TS and CS in the Alboran Sea, and the EEZ and CS along the Atlantic coast, both in the Gulf of Cádiz and off the Canary Islands.<sup>24</sup> This considerable potential for conflict contrasts with the few delimitation agreements reached to date, which still remain in force.

The Spanish territorial model is not consistent with the scheme of a federal State such as, for instance, the United States, nor does it meet the requirements of a centralised State like France. Therefore, it is safe to say that it complies with a hybrid model of decentralisation: the state of autonomous communities. Article 2 of the Spanish Constitution of 1978 (SC)<sup>25</sup> ‘recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all’. In this way, autonomous communities are governed according to the SC and their own organic laws, known as Statutes of Autonomy, which define the powers that they assume. The scope of powers varies for each community. The system of distribution of competences implemented in Spain falls within the so-called Germanic system, in which the constitutional text details, on one hand, the exclusive competences of the State, and on the other, those that decentralised entities may exercise. This distribution of competences is stipulated in Articles 148 and 149 of the SC.

In accordance with 149 SC, maritime fisheries fall under the exclusive jurisdiction of the State. Specifically, the scope of Law 3/2011, 20 March 2011, on State Maritime Fisheries,<sup>26</sup> amended by Law 33/2014,<sup>27</sup> which, in turn, repealed Law 71/1978, 26 December 1978, on Fisheries Development in the Canary Islands,<sup>28</sup> distinguishes between external waters (including the TS and EEZ) and internal ones, over which the autonomous communities have jurisdiction. In accordance with the provisions of Article 13 of the aforementioned Law 3/2011, the declaration by Ministerial Order, of fisheries protection zones to encourage the protection and regeneration of marine living resources also falls under the jurisdiction of what is today the Spanish Ministry of Agriculture and Fisheries, Food and the Environment.

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22 Víctor Luis Gutiérrez Castillo, ‘La delimitación de los espacios marinos entre España y Portugal’ in Francisco Pereira Coutinho and Mateus Kowalski (eds), *As fronteiras Luso-espanholas. Das questões de soberania aos fatores de Uniao* (Instituto Diplomático 2014).

23 In 1974, Spain and Italy concluded a treaty delimiting the continental shelf on the basis of equidistance between Minorca Island (Spain) and Sardinia (Italy) in the Mediterranean Sea. Convention between Spain and Italy on the Delimitation of the Continental Shelf between the two States (Madrid, adopted 19 February 1974, entered into force 16 November 1978). See *Limits in the Seas* (1980).

24 The issues of a markedly legal nature affecting the pending delimitation of Spain’s maritime zones include those related to the drawing of baselines by the states involved in the delimitation and the extension of the application of a delimitation agreement signed with regard to a given maritime zone to another zone that did not exist at the time of its conclusion. With regard to the baselines, the discrepancies have to do with the drawing itself, as some of those established, especially by Morocco, are contrary to the rules provided for under the law of the sea. Furthermore, the establishment of baselines closing the perimeter of the Canary archipelago could also be an obstacle to reaching a delimitation agreement with Morocco. On this issue, see Esperanza Orihuela Calatayud, ‘Pending delimitations’ (2017) 21 *Spanish Yearbook of International Law* 301.

25 Constitución Española de 6 de diciembre 1978 (BOE 311, 29 December 1978).

26 Ley 3/2011, de 26 de marzo de pesca marítima del Estado (BOE 75, 28 March 2011).

27 Ley 33/2014, de 26 de diciembre, por la que se modifica la Ley 3/2011, de 26 de marzo, de Pesca Marítima del Estado (BOE 313, 27 December 2014).

28 Ley 71/1978, de 26 de diciembre, de desarrollo de la pesca en Canarias (BOE 9, 10 January 1974).



Criminal and penitentiary matters are within the competence of the state.<sup>29</sup> Under Spanish law, this principle is observed in numerous provisions, including in the Civil Code, Article 8(1) of which states that: 'criminal, police and public security laws are binding on all those who are in Spanish territory'.<sup>30</sup> Consequently, the fight against IUU fishing from a criminal point of view is strongly conditioned by the management of marine spaces and by the legal regime applicable to them under international law. However, such exclusivity is not recognised in matters of management and administration of fisheries. Article 149(1). SC establishes sea fishing as an exclusive competence of the state, without prejudice to the powers that the regulations governing this sector confer on the autonomous communities, whose competence in internal water fishing is expressly recognised.<sup>31</sup> Likewise, based on this constitutional prerogative, the autonomous communities with access to the sea such as Galicia, Andalusia have assumed competences in the said sector and approved specific regulations on the management of fishery resources. These autonomic regulations coexist with those established by the state. All these regulations are administrative in nature, whereas the criminal legislation does not provide for such duality.

As a starting point, in practice the competence of the Spanish authorities to combat IUU fishing from a criminal point of view depends on several circumstances: the proclamation of sovereign and jurisdictional rights over the marine areas, the nature and legal regime of the marine space in which the criminal conduct occurs, the flag of the fishing vessel and the existence or lack of international agreements allowing for the intervention of external state authorities. It is also important to highlight that, from a procedural point of view, the Spanish legal system applies the principle of *non bis in idem*, by virtue of which the same act cannot be punished more than once, by an administrative sanction and by a criminal punishment.

Environmental crime was not fully introduced into the Spanish Criminal Code (CC) until 1995.<sup>32</sup> Until then, offences and sanctions against illegal conduct in the field of fisheries had only an administrative response, except in the case of fishing with explosives.<sup>33</sup> As the doctrine states, 'It is particularly relevant to us that, once CC reforms in 2010 and 2015 amended the 1995 provisions, the criminal regulations currently in force largely constitute white criminal norms, which need to be incorporated into other different regulations'.<sup>34</sup> Thus, after the 2015 reform, fishing or trafficking in protected species falls under the criminal category of Article 334(1) CC, becoming qualified if

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29 Article 149(1) SC 'The State holds exclusive competence over the following matters: [...] 5. administration of Justice; 6. commercial, criminal and penitentiary legislation [...]' [Original in Spanish: *El Estado tiene competencia exclusiva sobre las siguientes materias: 5. Administración de Justicia [...]* 6. *Legislación mercantil, penal y penitenciaria*].

30 Gaceta de Madrid 206, 27 July 1889.

31 Article 148(1)(11) SC 'The Autonomous Communities may assume competences over the following matters: [...] in internal water fishing, the shellfish industry and aquaculture, shooting and river fishing'.

32 Ley Orgánica 10/1995, de 25 de enero del Código Penal (BOE No 281, 24 November 1995).

33 The 2010 amendment of the Criminal Code involved amongst other issues, the transposition of Council Directive 2008/99/EC on Protection of the Environment through Criminal Law [2008] OJ L328/2008, which extended the scope of legal protection for wildlife.

34 Xavier Pons Rafols, 'Spain and the fight against IUU fishing' (2017) Spanish Yearbook of International Law 435.



it is an endangered species.<sup>35</sup> Furthermore, fishing without administrative authorisation or fishing for a prohibited species is regulated by Article 335 CC. In addition to these criminal offences, there are others that are useful to combat these activities, including money laundering or documentary fraud. Finally, Article 336 CC sanctions the use of destructive and non-selective fishing methods.

Article 23(1) of Organic Law 6/85 of 1 July 1985 on the Judiciary (OLJ) empowers Spanish courts to hear crimes and misdemeanours committed in Spanish territory or on board Spanish ships or aircraft, 'without prejudice to the provisions of international treaties to which Spain is a party.' This circumstance is complicated, as we shall see, when the offences take place in maritime areas located outside national jurisdiction. As far as maritime policing functions (surveillance, control and prosecution) are concerned, there is no single responsible agency. It could be said that the Spanish system is characterised by a certain dispersion of powers. In this regard, Article 223(2) of Royal Decree 876/2014, of 10 October, which approves the General Coastal Regulations, states that the functions of the General State Administration in IW, TS, EEZ and CS in matters of fishing and pollution control 'shall be exercised in the manner and by the Departments or bodies entrusted with them.' This dispersion of powers within the state itself (the different ministries) and the decentralised entities (autonomous communities and local entities) makes it difficult to effectively prosecute illegal fishing.

However, regardless of who is responsible for surveillance or control under a State's domestic law, international law requires that this function be carried out by vessels in the service of the government or authorised for this purpose. In the case of Spain, this function will be performed by government vessels assigned by law to the service of surveillance and repression of illicit activities: specifically, the ships of the Spanish Navy, those of the Customs Surveillance Service (auxiliary to the Navy)<sup>36</sup> and the Maritime Service of the Civil Guard (Spanish: *Guardia Civil*).<sup>37</sup> However, once again we note a certain dispersion of powers: not all of these vessels will be able to operate in all Spanish maritime areas. Under Spanish law, naval vessels and customs vessels may operate in the EEZ and waters beyond national maritime borders, and may not do so in TS.<sup>38</sup> The control and surveillance of this area is reserved to the services of the Civil Guard, which, exceptionally, may also operate outside the TS.<sup>39</sup>

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35 Article 334(2). See n 32.

36 Decreto 1002/1961, de 22 de junio, por el que se regula la vigilancia marítima del Servicio Especial de Vigilancia Fiscal para la Represión del Contrabando (BOE 157, 3 July 1961).

37 The Civil Guard is the oldest law enforcement agency in Spain and is one of two national police forces. As a national gendarmerie force, it is military in nature and is responsible for civil policing under the authority of both the Ministry of the Interior and the Ministry of Defence. The role of the Ministry of Defence is limited except in times of war when the Ministry has exclusive authority. As part of its daily duties, the Civil Guard patrols and investigates crimes in rural areas, including highways and ports, whilst the *National Police* deals with safety in urban situations.

38 Isabel Lirola Delgado & Jorge Urbina, 'Police at Sea' (2017) 21 Spanish Yearbook of International Law 439.

39 Sentencia del Tribunal Supremo n 1198/2010 [2010] ECLI: ES:TS:2010:1198 and Sentencia del Tribunal Supremo n 2756/2008 [2008] ECLI: ES:TS:2008:2756.





### 3. The criminal prosecution and sanctioning of IUU fishing in marine areas under Spanish sovereignty and/or jurisdiction: a multilevel perspective

#### 3.1 The application of criminal law in internal waters

UNCLOS defines IW as those located within the baseline used to measure the width of the TS. The Spanish legislator adopts this definition by including in its definition of Spanish waters 'ports and any other waters permanently connected to the sea up to where the effect of the tides is felt, as well as navigable stretches of rivers up to where there are ports of general interest [...]'.<sup>40</sup> The outer limit of these waters is determined in Spain by Royal Decree 2510/1977 of 5 August 1977, which establishes a mixed system of baselines, mostly straight baselines.<sup>41</sup>

These waters are subject to the sovereignty of the coastal state and have the same legal status as the land. In the absence of the right of innocent passage, foreign ships and aircraft may not enter or fly over these waters without the authorisation of the coastal state, except in exceptional situations provided for by international law.<sup>42</sup> In the case of Spanish IW, vessels must respect, *inter alia*, environmental and fisheries legislation, as well as the operating conditions established by the state authority. The state may also prohibit or condition the entry of foreign vessels into Spanish ports for reasons of repression of illegal fishing or environmental sustainability, in accordance with the provisions of Article 7(1) and (2) of Law 14/2014, of 24 July, on Maritime Navigation.<sup>43</sup> In line with UNCLOS, Law 14/2014 provides the application of the innocent passage regime in the territorial sea. It also specifies that such passage must be expeditious and uninterrupted, without threatening the peace, the good order or the safety of Spain.<sup>44</sup> Submarines and oth-

<sup>40</sup> See n 16.

<sup>41</sup> Real Decreto 2510/1997, currently in force, draws 123 straight baselines, most of which do not exceed 24 nautical miles. These lines, however, do not cover all Spanish coast, either because there are no geographical features allowing for it (for instance, in certain parts of the coast of the Balearic Islands), or for political reasons (in Algeciras Bay, bathing the territory of Gibraltar, and in Ceuta, Melilla and the Mediterranean islands, islets and island rocks close to the African coast). It is worth noting the drawing of straight baselines in river mouths without using the low-water points of riverbanks as reference, but also without deviating significantly from the rules later laid down in the 1982 UN Convention on the Law of the Sea. See Víctor Luis Gutiérrez Castillo, 'Análisis del sistema de líneas de base español a la luz de la Convención de Naciones Unidas sobre el Derecho del Mar de 1982' in José Manuel Sobrino Heredia (ed), *Mares y océanos en un mundo en cambio* (Tirant lo Blanch, 2007) 171.

<sup>42</sup> Article 8 UNCLOS 'Where the establishment of a straight baseline in accordance with the method set forth in Article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters'. For further information, see Rainer Lagoni, 'Internal Waters' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law II* (1995) 1036; Vladimir-Djuro Degan, 'Internal waters' (1986) 17 *Netherlands Yearbook of International Law* 3; Carlos F. Fernández Beistegui, 'El control de los buques por el estado del Puerto' (1993) 13 *Anuario de Derecho Marítimo* 141; Kare Bangert, 'Internal water' *Max Planck Encyclopedia of Public International Law* (2013) Law 1.

<sup>43</sup> Ley 14/2014, de 24 de julio de navegación marítima (BOE 180, 25 May 2014).

<sup>44</sup> Articles 37(1) and 37(2).



er underwater vessels are required to navigate on the surface and to show their flag.<sup>45</sup> With respect to over-flight, aircraft passage may be allowed through a special permit or pursuant to the treaties to which Spain is party.<sup>46</sup> Reference is made to UNCLOS for navigation through the Strait of Gibraltar (which comprises the TS of both Spain and Morocco). Furthermore, Law 14/2014 requires all vessels navigating through Spanish maritime zones to be registered in only one state, to show their name and registration number, and, pursuant to maritime uses, to fly the Spanish flag along with theirs.<sup>47</sup>

The decentralisation of powers which characterises the Spanish legal system, reaches its maximum expression in the control, surveillance and management of internal and port waters: the competence for the regulation and control of fishing in internal waters will rest with the autonomous communities.<sup>48</sup> However, they must act within the framework of the basic state regulations on the management of the fisheries sector, which is the exclusive competence of the state.<sup>49</sup> While administrative sanctions will therefore be imposed by the regional authorities, the state authorities (criminal courts) will be responsible for hearing cases, offences and misdemeanours committed in them, as in other marine areas.<sup>50</sup>

In some geographical points of the Spanish coast, the legal IW regime presents complex profiles due to the international dimension that affects them. Consider, for example, the waters of the Bay of Hondarribia, where Spain and France maintain co-sovereignty over Pheasant Island,<sup>51</sup> or the legal regime of the Bay of Gibraltar (Spanish: *Bahía de Algeciras*). In the latter case, the legal status of these waters is closely linked to the Spanish-British dispute over the colony of Gibraltar, as well as to the interpretation of Article X of the Treaty of Utrecht of 1713.<sup>52</sup> The United Kingdom has interpreted it broadly, extending its sovereignty in the waters within the bay to 2NM. and around the Rock to 3NM. By contrast, Spain, on the basis of a literal interpretation of this article, has traditionally denied any British sovereignty beyond the harbour waters which was the only one expressly ceded in the 1713 treaty.<sup>53</sup> The waters of this bay are thus subject to a fragmented and controversial legal regime: the

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45 Article 22(3).

46 Article 47.

47 Víctor Luis Gutiérrez Castillo and Juan J. García Blesa, 'Critical Analysis of the Law 14/2014 on Maritime Navigation' (2013-2014) 18 Spanish Yearbook of International Law 293.

48 Article 148(1) (11)(a) of the SC.

49 Article 149(1)(5) of the SC.

50 Article 1 Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (BOE 157 2 July 1985).

51 The Pheasant Island (Spanish: *Isla de los Faisanes*) is an uninhabited river island in the Bidasoa river, located between France and Spain, whose administration alternates between both nations. The island is a, the world's smallest, under joint sovereignty of Spain and France, and for alternating periods of six months is officially under the governance of the naval commanders of Spain (1 February – 31 July) and of France (1 August – 31 January). In practice, it is administered respectively by the mayors of (in Irún, Spain) and (in Hendaye, France).

52 For further information, see Jesús Verdú Baeza, 'La controversia sobre las aguas de Gibraltar: el mito de la costa seca' (2014) 66 Revista Española de Derecho Internacional 81.

53 'There appear to be two separate issues here: first, whether article X (Treaty of Utrecht) is to be read as limiting the cession to the land and the harbour, and excluding any territorial sea; and second, whether there has been British encroachment on Spanish waters in the Bay of Algeciras', see James Fawcett, 'Gibraltar: The Legal Issues' (1967) 43 International Affairs 84.



waters of the port of Algeciras (under Spanish sovereignty) and the waters of the port of Gibraltar (under British sovereignty) will be considered IW. The rest of the waters beyond the port of Gibraltar would be TS. In this way, the United Kingdom has sovereignty over the waters adjacent to the Rock of Gibraltar up to 3NM to the south and the east, and to the west up to the middle line of the Bay of Gibraltar, which amounts to about 1.5 NM and a half. Moreover, the Gibraltarian authorities have declared a large part of these waters a natural protected space and placed limits on navigation and fishing in them through the Nature Protection Act of 1991.<sup>54</sup> Both Spanish and the British governments have stated their disagreement with this decision in domestic<sup>55</sup> and international forums.<sup>56</sup>

From the point of view of Spanish domestic law, the Spanish Government will be competent to apply the criminal law relating to the protection of marine flora and fauna, as well as to the control of all waters in the Bay of Gibraltar. So, it is enshrined in the domestic legislation, as evidenced by Royal Decree 1620/2012 of November 30, which declares the waters east of the Strait of Gibraltar 'Special Area of Conservation'. In this area, called 'Eastern Strait', the Spanish Government is taking conservation measures and regulating its use for activities (such as fishing, aquaculture), assuming the right to prosecute and punish the infringement thereof. The opposing positions on the waters have been the subject of many diplomatic disagreements,<sup>57</sup> which have damaged bilateral relations and have hindered the prosecution and fight against illicit activities.

### 3.2 The prosecution and punishment of IUU fishing and other fisheries crime in the TS

Articles 3 and 4 of Law 10/77 of 4 January, on the territorial sea, states that the sovereignty of the Spanish State extends outside its territory and its internal waters, to the TS adjacent to its coasts. The Spanish TS is

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54 The latest delimitation of the boundaries of this zone was made under the Nature Protection Act of February 10, 2011. 'BGTW means British Gibraltar Territorial Waters which is the area of sea, the sea bed and subsoil within the seaward limits of the territorial sea adjacent to Gibraltar under British sovereignty and which, in accordance with the United Nations Convention on the Law of the Sea 1982, currently extends to three nautical miles and to the median line in the Bay of Gibraltar'. See Interpretation and General Clauses Act, Nature Protection Act 1991 (Amendment) Regulations 2011, Gibraltar Gazette No 12, 10 February 2011.

55 In the words of the Spanish government, 'as decolonisation has not yet taken place in accordance with the relevant UN Resolutions and due to differences of opinion as to the nature of the waters surrounding the Rock (apart from the legal status of the Isthmus), it does not seem appropriate to start delimitation negotiations. For the same reason, Spain has not established straight baselines in the Bay of Algeciras' (original version in Spanish). Answer given by the Spanish Government on 26 April 2017 to question 184/11793 submitted in writing in the Spanish Parliament by Mícaela Navarro Garzón and Felipe Jesús Sicilia Álvarez.

56 Jamie Trinidad, 'The Disputed Waters Around Gibraltar' (2015) 86 *British Yearbook of International Law* 101; Gino J. Naldi, 'The Status of the Disputed Waters Surrounding Gibraltar' 4 (2013) *International Journal of Marine and Coastal Law* 701; Gerry O'Reilly, 'Disputed Territories in the Gibraltar Region: The Crown Colony of Gibraltar and the Spanish Sovereign Territories in North Africa' (1993) 1 *Mediterranean Social Science Review* 7.

57 These boundaries were the object of parliamentary debates: 'The Government responds to each unacceptable action by Spain with a proportionate diplomatic protest. These are usually delivered in the form of a written protest from the British Embassy in Madrid to the Spanish Government. Over the last two years, they have most commonly been used to protest about maritime incursions. The protests form an 'audit trail' demonstrating the continuous exercise of British sovereignty over BGTW, should the UK ever need to prove this in an international court'. HC. Foreign Affairs Committee, *Gibraltar: Time to get off the Fence* (Second Report of Session 2014-2015, 1 July 2015).



currently formed by a belt of waters surrounding all the Spanish coasts with an extension of up to 12NM. At certain geographical points, this belt is interrupted by the waters subject to the sovereignty of neighboring states. In these cases, Spanish law stipulates that its outer boundary will be determined by delimitation agreements or, failing that, by a median line.<sup>58</sup> In line with UNCLOS, the 14/2014 Act provides the application of the innocent passage regime in the TS (without it being subject to charges, except for the services provided during the passage.<sup>59</sup> It also specifies that such passage must be expeditious and uninterrupted, without threatening the peace, the good order or the safety of Spain.<sup>60</sup> Furthermore, all vessels navigating through Spanish zones must be registered in only one state, to show their name and registration number, and, pursuant to maritime uses, to fly the Spanish flag along with their own.<sup>61</sup>

The Spanish Government is competent to regulate the different activities in this area (public order, research, fishing, etc.) that derive from its sovereignty. Sovereignty, which, however, is conditioned by the provisions of Article 27 UNCLOS, regarding the scope of criminal jurisdiction on the occasion of the navigation of foreign vessels under the innocent passage regime.<sup>62</sup> In general, the state may not exercise its criminal jurisdiction on board such vessels during innocent passage, unless certain conditions are met. In particular, when the offence has repercussions that affect the coastal state, or when the intervention of the coastal state is requested by the flag state.<sup>63</sup> In the case of Spain, the intervention of the Spanish authorities would be justified in the case of criminal conduct relating to the protection of the marine environment included in the CC, such as the catching or the destruction of protected species. However, in accordance with Article 27(5) UNCLOS, Spain may not take criminal measures on board a foreign ship or take proceedings in connection with an offence, when the following circumstances are met: a) the offence was committed before entering its TS, b) the ship comes from a foreign port, and c) the ship passes through the TS without having entered Spanish IW. In contrast, the Spanish authorities may intervene when the foreign vessel comes from its internal waters and makes an innocent transverse passage through the TS.<sup>64</sup>

On the other hand, all vessels navigating in the TS, as well to pass through, enter or leave ports or coastal terminals are obliged to respect Spanish laws and regulations relating to the protection of the marine environment.<sup>65</sup> In all these areas, Spanish maritime authorities may condition, restrict or prohibit navigation in

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58 Article 4.

59 Article 41.

60 Articles 37(1) and 37(2).

61 See also Orden ARM/2077/2010, de 27 de julio, para el control de acceso de buques de terceros países, operaciones de transito, transbordo, importación y exportación de productos de la pesca para prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada (BOE 185, 31 July 2010).

62 For further information, see Valentín Bou Franch, *La navegación por el mar territorial* (Iberoediciones, 1994); Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea: the Current Regimen of 'Free' Navigation in Coastal Waters of Third States* (Pinter, 1990).

63 Article 27(1)(c) UNCLOS.

64 Article 27(2) UNCLOS.

65 Article 38 Ley 14/2014.



certain places to prevent the carrying out of illegal activities or the exercise of prohibited traffic.<sup>66</sup> These provisions relating to the navigation are complemented by the regulations on State ports and the merchant navy. Thus, Royal Legislative Decree 2/2011, of 5 September,<sup>67</sup> which approves the Consolidated Text of the Law on State Ports and the Merchant Navy, establishes in its Article 301 'that the Government may prevent, restrict or condition the navigation of certain categories of civil vessels in internal waters, the territorial sea or the contiguous zone for the purpose of preventing unlawful activities or the exercise of any prohibited traffic'.<sup>68</sup>

As noted above, the surveillance and policing functions in the waters of this area are reserved by law to the Civil Guard. This is stipulated in Article 11(2)(b) of Organic Law 2/1986, of 13 March, on State Security Forces and Corps<sup>69</sup>. This attribution of powers has been confirmed by Royal Decree 246/1991, of 22 February,<sup>70</sup> which regulates the Maritime Service of the Civil Guard, Article 1 of which recognises this service the exercise of these functions up to the outer limit of the TS. Exceptionally, it will also be able to operate outside this area, since for the purposes of compliance with the criminal law it will be considered a 'State vessel'. This exception is stipulated in the Order of 26 July 1994 on the regime, flag and registration of vessels of the maritime service of the Civil Guard.<sup>71</sup>

### 3.3 The fight against IUU fishing in the Spanish EEZ

In its EEZ a coastal state exercises specific sovereign rights over activities set out in Article 56 UNCLOS. In this area, the rights and powers of the coastal state come together with the residual freedoms of the high seas from which other states benefit. In order to declare an EEZ, the State must take certain measures. In other words, this maritime space is not presumed but must be expressly proclaimed. According to Article 57 UNCLOS, the EEZ may extend up to 200NM from the same baselines from which the TS is measured. In the case of overlapping EEZs, States must delimit their respective boundaries. However, failure to reach an agreement shall not prevent the coastal State from exercising the rights it has recognised, in accordance with Article 56 UNCLOS.

Exclusivity means that only Spanish authorities may exercise rights with an economic purpose in the

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66 Article 20(1) Ley 14/2014.

67 The basic foundational moment of current legal port regulations comes from Ley 27/1992, de 24 de noviembre, de Puertos del Estado y de la Marina Mercante, to which there have been different partial reforms through other laws: Ley 62/1997, de 26 de diciembre, de modificación de la Ley 27/1992, de 24 de noviembre, de Puertos del Estado y de la Marina Mercante; Ley 48/2003, de 26 de noviembre, de régimen económico y de prestación de servicios de los puertos de interés general and Ley 33/2010, de 5 de agosto, de modificación de la Ley 48/2003, de 26 de noviembre, de régimen económico y de prestación de servicios en los puertos de interés general. After this process of regulatory evolution, the regulation of the structure and management of the state port system is based on Real Decreto Legislativo 2/2011 de 5 de septiembre, texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante.

68 Original in Spanish: A los efectos de prevenir la realización de actividades ilícitas o el ejercicio de cualquier tráfico prohibido, el Gobierno podrá impedir, restringir o condicionar la navegación de determinadas categorías de buques civiles en las aguas interiores, el mar territorial o la zona contigua (BOE 253, 20 October 2011).

69 BOE 63, 14 March 1986.

70 BOE 52, 1 March 1991.

71 Orden de 26 de julio de 1994 sobre el régimen, abanderamiento y matriculación de las embarcaciones del servicio marítimo de la Guardia Civil (BOE 181, 30 July 1994).



EEZ and, consequently, that other States need Spain's authorisation to act for such purposes in the zone. The coastal State authority can be exercised over the development of marine resources as well as over other economic exploitation and exploration of the zones (artificial islands, structures for economic purposes, scientific research), and over the preservation of the marine environment, including the adoption of sanctions. UNCLOS assigns rights and responsibilities to the coastal state. The regime of innocent passage is inapplicable in the EEZ, but there exist freedoms of navigation, overflight, cable-laying and pipeline-laying.<sup>72</sup>

The EEZ regime stipulated in UNCLOS is considered to have negative impact on powerful fishing fleets such as Spain's. Consequently, upon signature and ratification of UNCLOS Spain made a declaration with the following wording: 'arts. 69 and 70 of the Convention mean that access to fisheries in the EEZ of third states by the fleets of developed landlocked or geographically disadvantaged states shall depend on whether the relevant coastal states have previously granted access to the fleets of states which habitually fish in the relevant EEZ. In the same vein, the declaration adds that 'arts. 56, 61 and 62 of the Convention do not allow of an interpretation whereby the rights of the coastal state to determine permissible catches, its capacity for exploitation and the allocation of surpluses to other States may be considered discretionary'.<sup>73</sup>

In this context, Spain unilaterally proclaimed an EEZ with an extension of 200 NM by Law 15/78 of 20 February 1978 on EEZs (Law 15/78).<sup>74</sup> The Spanish Government initially limited its rights to the Atlantic coasts,<sup>75</sup> subsequently extending them to its Mediterranean coasts, with the exception of those in the Alboran Sea<sup>76</sup> (Royal Decree 236/2013 of 5 April 2013).<sup>77</sup> France protested against the limits of Spain's FZ in the Mediterra-

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72 For details, see Luis Ignacio Sánchez Rodríguez, *La Zona Exclusiva de Pesca en el Nuevo Derecho del Mar* (Universidad de Oviedo 1977); Benedetto Conforti (ed), *La Zona Económica Exclusiva* (Giuffrè 1983); Shigeru Oda, 'Exclusive Economic Zone', in *Encyclopaedia of Public International Law* (Max Planck Institute 1989) 305; Francisco Orrego Vicuña, *La Zona Económica Exclusiva: Régimen y Naturaleza Jurídica en el Derecho Internacional* (Editorial Jurídica de Chile 1991); Erick Franck and Philippe Gautier (eds), *La Zone Économique Exclusive et la Convention des Nations Unies sur le Droit de la Mer 1982-2000: Un Premier Bilan de la Pratique des États* (Bruylant 2003); Gemma Andreone, 'The Exclusive Economic Zone', in Donald R. Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015).

73 Division for Ocean Affairs and the Law of the Sea (DOALOS), Declarations made upon signature, ratification, accession or succession or anytime thereafter, as of 29 October 2013, Spain.

74 Ley 15/1978, 20 febrero, sobre zona económica exclusiva (BOE 46, 23 February 1978).

75 The EEZ of Spain is established in the Atlantic coasts and the Cantabrian sea, including mainland and islands, as well as in the North-West Mediterranean 'from the outer limit of the TS to a point of geographical coordinates and heading towards the East using the equidistant line with the coastal states, drew in accordance with international law, up to the maritime border with France'.

76 The Alboran Sea is the westernmost portion of the Mediterranean Sea, lying between Spain on the north and Morocco and Algeria on the south. See Juan Luis Suárez de Vivero, Juan Rodríguez Mateos and Rabia M'Rabet Tamsamani, 'Regional Context and Maritime Governance' in José Carlos Báez and others (eds), *Alboran Sea - Ecosystems and Marine Resources* (Springer 2021) 11.

77 Real Decreto 236/2013, de 5 de abril, por el que se establece la Zona Económica Exclusiva de España en el Mediterráneo noroccidental (BOE 92, 5 April 2013).



near Sea facing the French coasts<sup>78</sup> and proclaimed such an area in the Gulf of Lion,<sup>79</sup> ignoring the limits of the Spanish fisheries protection zone existing at the time. Before the establishment of the EEZ, France had already set up the ecological protection zone (EPZ) in the Mediterranean with the Law 2002-346, 15 April 2003, and Decree 2004-33, 8 January 2004.<sup>80</sup> For this reason, the Spanish government lodged a formal protest. For Spain ‘a line that is equidistant from the baselines from which the breadth of the territorial sea is measured would be the most just and equitable solution, and would be subject to modification only in the case of special or particular circumstances’, therefore the French EEZ, which has boundaries that extend far beyond the equidistant line, ‘contravene art. 74 of the LOSC’.<sup>81</sup> In 2018, Algeria also proclaimed an EEZ,<sup>82</sup> invading Spanish claimed waters (TS and EEZ) and Italian claimed waters in the Mediterranean.<sup>83</sup> This situation has given rise to another formal protest by the Spanish government<sup>84</sup> and the Italian government.<sup>85</sup>

78 It considered that ‘the delimitation resulting from the line joining the points specified in the Spanish communication (to the UN Secretariat) cannot be invoked against it. The French government recalls on this occasion that under international public law, the delimitation of a boundary must take place by agreement. Moreover, in this specific case of a maritime boundary, such delimitation must result in an equitable solution, thus ruling out in this instance use of the equidistance line employed by the Spanish side’. The French protest can be found in 38 Law of the Sea Bulletin (1998) 54.

79 Décret no 2012-1148, 12 octobre 2012, portant création d’une zone économique exclusive au large des côtes du territoire de la République en Méditerranée (Journal Officiel de la République Française [JORF], 14 octobre 2012). A study of the French EEZ claim in Víctor Luis Gutiérrez Castillo, ‘La zona económica exclusiva francesa en el Mediterráneo: causas y consecuencias de su creación’ in José Manuel Sobrino Heredia (ed) *La contribución de la convención de las Naciones Unidas sobre el derecho del mar a la buena gobernanza de los mares y océanos* (Editoriale Scientifica 2014).

80 JORF n 1 16 April 2004 and n 10 January 2004.

81 In fact, in a verbal note of 23 October 2012, sent through diplomatic channels after the 2012 enactment of the French EEZ, Spain reacted to the establishment of the French EEZ by stating that the state’s right to set an EEZ cannot be exercised in a unilateral manner but in accordance with article 74 of the UNCLOS ‘in order to achieve an equitable solution’. For Spain ‘a line that is equidistant from the baselines from which the breadth of the territorial sea is measured would be the most just and equitable solution, and would be subject to modification only in the case of special or particular circumstances’, therefore the French EEZ, which has boundaries that extend far beyond the equidistant line, ‘contravene article 74 of the LOSC’. Verbal note n 31661, 23 October 2012, from the Ministry of Foreign Affairs and Cooperation of Spain addressed to the Embassy of the Republic of France in Madrid.

82 Law of the Sea Bulletin (2019) 53-55. For further information see Didier Ortoland and Jean Pierre Pirat, ‘Nouvelle ZEE algérienne’ (2021) *Africa Intelligence* <[www.africaintelligence.fr/afrique-du-nord\\_politique/2018/04/05/boutef--annexe-la-mediterranee,108304108-art](http://www.africaintelligence.fr/afrique-du-nord_politique/2018/04/05/boutef--annexe-la-mediterranee,108304108-art)> accessed 25 October 2022.

83 For further information, see Larbi Boukabene, ‘The Algerian Exclusive Economic Zone and the Question of Maritime Boundaries with Neighboring States’ (2021), 1 *Revue de droit des transports et des activités portuaires* 6.

84 Presidential Decree n 18/1996 establishing an Exclusive Economic Zone off the Coast of Algeria, 20 March 2018. Transmitted by Note Verbale 72/MR/18 dated 4 April 2018 from the Permanent Mission of Algeria to the United Nations, addressed to the Secretary-General. A list of geographical coordinates of points was deposited with the Secretary-General under article 75(2) of the Convention (see Maritime Zone Notification M.Z.N.135.2018.LOS of 17 April 2018). For further information Víctor Luis Gutiérrez Castillo, ‘Ámbitos de soberanía y jurisdicción en el Mediterráneo: estudio de los nuevos procesos de territorialización a la luz del derecho internacional’ (2022) 32 *REIM* 118 <[https://revistas.uam.es/reim/article/view/reim2022\\_32\\_08](https://revistas.uam.es/reim/article/view/reim2022_32_08)> accessed 24 October 2022.

85 Italy objected the geographic coordinate points established by Algeria because the Algerian EZZ overlaps partly the Spanish-Italian continental shelf and the Italian Ecological Protection Zone, to the west of Sardinia, with the Algerian EZZ stretching north-westwards, in the gulf of Oristano, up to reaching the waters of Portovesme, Sant Antioco and Carloforte. For this reason the permanent representation of Italy to the United Nations addressed a communication on 28 th November 2018 to the Secretary General of the United Nations by which Italy expressed its opposition to the delimitation of the Algerian EZZ as indicated in Presidential Decree no 18/1996 since it overlaps on zones of legitimate and exclusive national Italian interests < [www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/2018\\_NV\\_Italy.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/2018_NV_Italy.pdf)> accessed 25 October 2022.



In Atlantic waters, the situation is not much different. Spain has attempted to delimit its EEZ with Morocco on the Atlantic coast (off the Canary Islands),<sup>86</sup> coinciding with the granting of nine hydrocarbon exploration permits to REPSOL<sup>87</sup> in that area. There were nine rounds of negotiations between 2003 and 2007, in which, although Spain presented a delimitation proposal (equidistance line), in practice no agreement was reached. With Portugal, there are different situations. On the one hand, Spain, applying its own doctrine in relation to Alboran Island, does not recognise the EEZ or continental shelf of Selvagens Islands,<sup>88</sup> in accordance with the provisions of Article 121 UNCLOS. Nor is there any delimitation on the peninsula to date. The old Spanish-Portuguese agreements, which could have regulated the issue, are not in force today. Consider the exchange of notes of 1893, which expired in 1913, and the Guarda Agreements of 1976, which were not ratified by Portugal.<sup>89</sup>

From the perspective of Spanish law, there is no lack of arguments justifying the penal protection of the natural resources of the EEZ. Article 132 of the SC qualifies them as 'state public domain goods'.<sup>90</sup> This status is

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86 Ley 44/2010, de 30 de diciembre, de aguas canarias (BOE 318, 31 December 2010).

87 REPSOL S.A. is a Spanish multinational energy and petrochemical company based in Madrid. It is engaged in worldwide upstream and downstream activities. In the 2021 Forbes Global 2000, Repsol was ranked as the 683rd-largest public company in the world. As of 2021, it has more than 24,000 employees worldwide. It is vertically integrated and operates in all areas of the oil and gas industry, including exploration and production, refining, distribution and marketing, petrochemicals, power generation and trading. The business strategy also includes a renewable energy division <[www.repsol.com/en/about-us/history/index.cshtml](http://www.repsol.com/en/about-us/history/index.cshtml)> accessed 25 October 2022.

88 The Savage Islands (Portuguese: *Ilhas Selvagens*) are located between the Portuguese island of Madeira and the Spanish archipelago of the Canary Islands. Their sovereignty was the object of dispute between both countries for five centuries until 1938, when the Standing Committee on International Maritime Law issued a ruling in favor of Portugal, although Spain had no opportunity to defend its interests because it was immersed in the Spanish civil war. Spain refused to accept Portugal's sovereignty over the said islands until 1997, but it has never accepted the extension of an Exclusive Economic Zone around them. The Spanish Government holds that inhabited islands without any economic life should be classified as 'rocks', pursuant to Article 121(3) of UNCLOS, a stance they also adopt regarding its own insular territories, specifically Alboran Island. This entails difficulties to delimit sea spaces in the area.

89 The competent authorities of both States have signed memorandums of understanding about the conditions to engage in fishing activities in their waters. These agreements do not constitute delimitation treaties. Suffice it to mention, by way of example, the Agreement of June 18, 2018 between the Kingdom of Spain and the Republic of Portugal on the conditions to exercise this activity in the waters of both countries, and the Agreement of Cooperation that these two nations signed on May 9, 2012 about the establishment of the Tagus International Natural Park. The content of these memorandums is available for consultation in the official webpage of the Ministry of Fisheries of the Government of Spain. See Ministerio de Agricultura Pesca y Alimentación, Portugal - Memorandos de entendimiento y otros acuerdos <[www.mapa.gob.es/es/ministerio/ministerio-exterior/europa/portugal/memorando/default.aspx](http://www.mapa.gob.es/es/ministerio/ministerio-exterior/europa/portugal/memorando/default.aspx)> accessed 25 October 2022.

90 Article 132(2) Constitución Española reads as follows: 'Assets under the state's public property shall be those established by law and shall, in any case, include the foreshore beaches, territorial waters and the natural resources of the exclusive economic zone and the continental shelf' [Original in Spanish: *Son bienes de dominio público estatal los que determine la ley y, en todo caso, la zona marítimo-terrestre, las playas, el mar territorial y los recursos naturales de la zona económica y la plataforma continental*].





also recognised by Article 3 of the Coastal Law 22/88 of 28 July 1988<sup>91</sup> and Article 5 of Law 33/2003, of 3 November, on Public Administration Assets<sup>92</sup>, which affirms its affectation to general use or public service. Similarly, Article 28 of Law 42/2007, of 13 December 2007, on Natural Heritage and Biodiversity (Law 42/2007), allows the waters of the EEZ to have special protection, and may be classified as 'protected natural spaces'.<sup>93</sup>

Law 42/2007 transposes EU directives on conservation of habitats and certain species. Article 5 lays down the duty of all public powers to secure the conservation and rational management of natural heritage. The General Administration of the State is the competent authority for the EEZ's natural heritage (Article 6). Spain implemented within this context the national legislation to carry out the EU Natura 2000. This is a network of protected areas in the 27 EU member states, aiming at ensuring the long-term survival of Europe's rare and most threatened species and habitats, listed under both the Birds Directive and the Habitats Directive.<sup>94</sup> According to art. 42 of the Law 42/2007, Natura 2000 is made up of Sites of Community Importance (SCI-LIC), which can be transformed into Special Areas of Conservation (SAC-ZEC), as well as of Special Protection Areas for Birds (SPAB-ZEPA). The LIC can be proposed by Spain and later be approved by the EU Commission in a TS, an EEZ or a CS (art. 43(2)). As a consequence, Spain's Administration shall declare a SAC-ZED in the area constituting a SCI-LIC (art. 43(3)). Similarly, the General Administration and the Autonomous Communities can declare the SPAB-ZEPA in the maritime zones of Spain (art. 44), without the need of a previous authorization of the EU Commission, which shall be informed after the declaration of an area (art. 45). As of September 2017, Spain has declared and brought into Natura 2000 a total of 40 areas.

Pursuant to Article 1 of Law 15/78, Spain may regulate the conservation, exploration and exploitation of the natural resources of the EEZ, as well as their preservation. In application of the provisions of Part V of UNCLOS, the Spanish Government may impose administrative and criminal penalties for infractions committed in the EEZ. However, Spanish courts may not apply custodial sentences in these cases, unless otherwise agreed with other States (Article 73 UNCLOS). Along the same lines, Article 24(3) of Law 14/2014 establishes that the Government shall ensure that foreign vessels (in this case fishing vessels) take due account of the rights of the Spanish State and comply with the provisions of Spanish fisheries regulations, in accordance with EU and international law.

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91 The Spanish Coastal Law is the one that regulates the determination, protection, use and policing of the maritime-terrestrial public domain and especially of the maritime shore. Until 2013, Ley 22/1988, de 28 de julio, de Costas, which repealed the Ley de Costas de 26 abril de 1969, and was developed in the Regulations of the Coastal Law, approved in Real Decreto 1471/1989, de 1 de Diciembre, por el que se aprueba el Reglamento General del procedimiento para desarrollo y ejecución de la Ley 22/1988, de 28 de Julio, de Costas. This law was modified by Ley no 2/2013 de protección y uso sostenible del litoral and by modification of Law 22/1988, of July 28, on Coasts, currently in force. See BOE 181, 29 July 1988 and BOE 30 May 2013.

92 Ley 33/2003 de 3 de noviembre del Patrimonio de las Administraciones Públicas (BOE 264, 4 November 2003).

93 Ley 42/2007 de 13 de diciembre del Patrimonio Natural y de la Biodiversidad (BOE 299, 14 December 2007).

94 Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L206/1992.



## 4. Considerations on the fight against IUU fishing outside waters under Spanish sovereignty and jurisdiction

In the case of conduct criminalised in Spanish territory, but committed outside of it, the jurisdiction of the Spanish courts will be conditioned by the principle of extraterritoriality. This means that in the case of the commission of offences against the environment by illegal fishing, Spanish courts will only have jurisdiction on the basis of the personal principle (or nationality). Specifically, by virtue of this principle (Article 23(2) OLJ) the Spanish courts may intervene when the following circumstances concur: a) that the perpetrators are Spanish or foreigners who have acquired Spanish nationality after the offence was committed; b) that the act is punishable in the place of execution (dual criminality requirement); c) that a complaint or accusation is lodged with the Spanish courts; and c) that the offender has not been acquitted, pardoned or convicted abroad or, if he has been, has not served the sentence imposed on him.

It does not appear, however, that Spanish courts can intervene outside these circumstances. The very nature of these offences excludes the possibility that they can be protected by the existence of a 'special interest of the State' (principle of protection of State interests). The offences against the environment for illegal fishing<sup>95</sup> do not seem to protect a legal asset of singular value for Spain, to the extent that it is justified to break the barriers imposed by the principle of territoriality. At least this can be inferred from recent Supreme Court case law. This circumstance explains why these criminal offences have not been preferred by the legislator in the closed list of Article 23(4)(d) of the OLJ. Neither do the Spanish courts have jurisdiction on the basis of the principle of universal justice. After the reform of Organic Law 1/2014, of 13 March, on universal jurisdiction,<sup>96</sup> this possibility has been severely limited. In fact, this jurisdiction can only be exercised in very specific circumstances and for the prosecution of certain crimes expressly set out in the criminal law (such as genocide, torture, trafficking in human beings, terrorism), which do not include the crimes dealt with in this article.

Special attention should be paid to the action of Spanish courts in areas subject to controversial legal regimes, such as the Antarctic and its surrounding waters (the so-called Convergence Zone). These waters are conditioned by the conventions of the Antarctic Treaty system, to which Spain is a consultative party. Jurisdictional issues are regularly discussed at Antarctic Treaty Consultative meetings and at the annual meetings of the Commission for the Conservation of Marine Living Species. The cases that have been raised on recognition of jurisdiction relate to the territorial claims of some countries, which are frozen by the Antarctic Treaty. Therefore, in practice, conduct related to IUU fishing has escaped the criminal jurisdiction of states. One example is the Spanish Supreme Court ruling of 23 September 2016. In this case, the Spanish high court made a restrictive interpretation of the rule and rejected the competence of Spanish courts to hear offences committed on the high seas against the environment (IUU fishing) by nationals on foreign-flagged vessels.

<sup>95</sup> Articles 334, 335 and 336 Código Penal.

<sup>96</sup> Ley Orgánica 1/2014 de 13 de marzo de modificación de la Ley Orgánica 6/1985 de 1 de julio del Poder Judicial relativa a la justicia (BOE 63, 14 March 2014).



As regards the inspection function of the Spanish authorities, this may be extended beyond Spanish territory in exceptional circumstances. It may be carried out in international waters, in the framework of internationally agreed commitments, or in waters under the jurisdiction of another EU Member State. The latter shall take place when acting in accordance with the framework for cooperation and coordination of fisheries control and inspection activities regulated in Regulation (EC) no 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy.<sup>97</sup>

Right of access to waters not subject to Spanish sovereignty or jurisdiction has not been specifically regulated in Spain. However, its content has been clarified by Spanish case law with regard to the exercise of extraterritorial police powers derived from Article 23(4)(d) OJ. The Supreme Court has clarified that this provision 'confers jurisdiction on the Spanish authorities for the boarding, inspection, seizure of substances and detention of the crew of any vessel flying the flag of another State, provided that it obtains the authorisation of that State'.<sup>98</sup> Practice also confirms that the right of access may be exercised without authorisation in cases where the ship is sailing without an identifiable flag or is officially sailing without a flag and where the State, the apparent flag-holder, is itself disregarding the right of access.<sup>99</sup>

## 5. Conclusion

The imprecise nature of the very notion of IUU fishing, the absence of a common concept of fishing crime (which fluctuates from broad to very restrictive interpretations), the existence of limits to the imposition of certain criminal sanctions (such as imprisonment) derived from international law itself, or the problems linked to the exercise of criminal jurisdiction in marine areas not subject to state control, are some of the existing obstacles in the fight against IUU fishing. At the international level, UNCLOS calls on states to incorporate measures for the responsible management of fisheries resources, both in their EEZs and on the high seas, into domestic legislation. In this scenario, it is up to the EU to establish these measures within its competences, as well as to cooperate with third countries and international organisations with the aim of conserving and protecting the marine environment. In this context, the appropriate definition of marine areas through planning compatible with international standards is a useful and necessary instrument for combating fishing crime.

Spain is bound as a party to UNCLOS and a member of the EU to abide by the rules of the Common Fisheries Policy, based on the management of European fishing fleets and the conservation of fish stocks, the EU environmental legislation and with environmental international treaties concerning maritime areas. Therefore, the EU rules on the establishment of a system for fisheries control were im-

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<sup>97</sup> OJ L 354/22, 28 December 2013.

<sup>98</sup> Sentencia del Tribunal Supremo n 648/2016 [2016] ECLI:ES:TS:2016: 3581.

<sup>99</sup> Sentencia del Tribunal Supremo 2040/2008 [2008] ECLI: ES:TS: 2008:2040.



plemented by the Law 3/2001, 26 March 2001, on marine fishing, and by the Royal Decree 176/2003, 14 February 2003, regulating control and inspection functions of the fishing activities. Also, the access of the Spanish fleet to waters in third countries is set out in the Royal Decree 1549/2004, 25 June 2004 has comprehensive spatial planning that is compatible with international norms.

In Spanish domestic law, illegal fishing activities have traditionally been conceived as administrative offences. In fact, the administrative order has been the main channel for the fight against these activities. However, there is a growing debate on the opportunity to intensify the criminal prosecution of the most serious aspects of IUU fishing with an international component. In Spanish marine territory, the CC is applied according to the legal regime of the different areas and the limitations imposed by international law. Based on this scenario, the sanctioning of conduct related to IUU fishing in Spain will be conditioned by three aspects: material (object of protection), spatial (nature of the marine space in which the criminal conduct is committed), national (flag of the fishing vessel) and jurisdictional (application of the criminal or administrative order). In this way, the Spanish maritime authorities will be competent to condition, restrict and even prohibit navigation in certain places in Spanish maritime spaces in order to prevent the carrying out of illegal activities or the exercise of any prohibited traffic. However, the intervention of one or the other authority (state or regional) will depend on the maritime space in which the infringement has been committed, and on the police powers and jurisdiction legally attributed to it.