



Amsterdam Center for International Law  
University of Amsterdam



## RESEARCH PAPER SERIES

SHARES Research Paper 99 (2016)

### **The Practice of Shared Responsibility in relation to Fisheries**

**Yoshinobu Takei**

*World Maritime University, Malmö*

Cite as: SHARES Research Paper 99 (2016)  
available at [www.sharesproject.nl](http://www.sharesproject.nl) and [SSRN](https://ssrn.com)

Forthcoming in: André Nollkaemper and Ilias Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016)

---

The Research Project on Shared Responsibility in International Law (SHARES) is hosted by the [Amsterdam Center for International Law](http://www.acil.uva.nl) (ACIL) of the University of Amsterdam.

The research leading to this paper has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013) / ERC grant agreement n° 249499.

# The Practice of Shared Responsibility in relation to Fisheries

Yoshinobu Takei\*

## 1. Introduction

The international responsibility of states and international organisations has been invoked in the context of fisheries in various ways. In the recent years, especially since the entry into force of the United Nations Convention on the Law of the Sea (LOSC)<sup>1</sup> in 1994, the invocation of international responsibility has been on the rise in number and became diversified in terms of actors and fora involved.<sup>2</sup> One characteristic of this trend is that the invocation of international responsibility is linked to the conservation of fisheries resources, and not necessarily to access to fisheries resources.

---

\* World Maritime University, Malmö, Sweden. The author is grateful to Professor Tullio Treves and other participants in the SHARES Seminar held in April 2013 for their valuable comments on an earlier version of this chapter and to the members of the SHARES project team for their excellent work throughout the writing of this chapter. Research for this chapter was conducted as part of the research project CP1205 within the Cluster of Excellence 'The Future Ocean' funded by the German Research Foundation. The research leading to this chapter has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007–2013)/ERC grant agreement n° 249499, as part of the research project on Shared Responsibility in International Law (SHARES), carried out at the Amsterdam Center for International Law (ACIL) of the University of Amsterdam. All websites were last accessed in December 2014. Views expressed here are those of the author and do not necessarily reflect those of the organisation with which he is affiliated.

<sup>1</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3 (LOSC).

<sup>2</sup> Examples include: the *Shrimp-Turtle* case at the World Trade Organization (WTO) (*United States – Import Prohibition of Certain Shrimp and Shrimp Products*), see [www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm); the *M/V Saiga (No. 2)* case before the International Tribunal for the Law of the Sea (ITLOS) (*The M/V 'Saiga' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea, ITLOS Case No. 2)*); the *Swordfish* case before ITLOS (*Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*, Case No. 7) and at the WTO (*Chile – Measures affecting the Transit and Importing of Swordfish*), see [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds193\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm); the *Southern Bluefin Tuna* case before an arbitral tribunal established under Annex VII of the LOSC (*Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility*), see (2000) 23 RIAA 1; the *M/V 'Virginia G'* case before ITLOS (*The M/V 'Virginia G' Case (Panama/Guinea-Bissau)*, Case No. 19); the Review Panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, see [www.pca-cpa.org/showpagedf5a.html?pag\\_id=1520](http://www.pca-cpa.org/showpagedf5a.html?pag_id=1520); and the *Atlanto-Scandian Herring* case before an arbitral tribunal established under Annex VII of the LOSC (*The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)*, see [www.pca-cpa.org/showpage9190.html?pag\\_id=1554](http://www.pca-cpa.org/showpage9190.html?pag_id=1554)) and at the WTO (*European Union – Measures on Atlanto-Scandian Herring*), see [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds469\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds469_e.htm). Some of these cases were concluded at the jurisdictional phase or suspended/terminated by the parties to the dispute. In addition, there are some other instances where the determination of international responsibility of states was done by those taking action against them, rather than impartial third parties, or where no such determination was done in a technical sense. Some of these instances are further elaborated in section 5.

Fisheries conservation efforts often fail due to: first, the lack of agreement on necessary conservation and management measures at regional fisheries management organisations (RFMOs); second, fishing activities by vessels from RFMO non-member states, as well as member states that have objected to conservation and management measures in order to exclude the applicability of such measures to their vessels; and third, inadequate enforcement of fisheries regulations. To address such situations, the invocation of state responsibility, including the use of sanctions with a view to facilitating compliance with the relevant rules of international law, has become a frequent phenomenon, used especially after inter-governmental negotiations fail to solve disagreements among the states concerned. The invocation of international responsibility seems to have a more significant role to play in a fisheries context than in the context of other environmental problems.<sup>3</sup>

The conservation and management of fisheries resources often involve a number of actors: states (e.g. flag states, coastal states, port states and market states); international bodies (e.g. RFMOs, the Food and Agriculture Organization of the United Nations (FAO), the conferences of the parties to multilateral environmental agreements such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>4</sup> and the Convention on Biological Diversity,<sup>5</sup> and the United Nations, in particular the General Assembly); and private actors (e.g. fishermen, beneficial owners of fishing vessels, the fishing industry and environmental non-governmental organisations). Although their respective roles vary considerably and it is difficult to single out the importance of particular actors, this chapter focuses on states, the European Union (EU) and RFMOs,<sup>6</sup> which are the primary actors

---

<sup>3</sup> Importance is attested to by the request for an advisory opinion of ITLOS by the Sub-Regional Fisheries Commission (SRFC). The request concerns, inter alia, obligations of the flag state in relation to illegal, unreported and unregulated (IUU) fishing within the exclusive economic zone (EEZ) of other states, liability of flag states for IUU fishing by their vessels, liability of an international organisation and rights and obligations of the coastal state regarding shared stocks and stocks of common interest. Information is available at [www.itlos.org/en/cases/list-of-cases/case-no-21](http://www.itlos.org/en/cases/list-of-cases/case-no-21). See *Request for an Advisory Opinion submitted by the Sub-regional Fisheries Commission (SRFC)*, Advisory Opinion, ITLOS Case No. 21, 2 April 2015 (SRFC Advisory Opinion).

<sup>4</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973, in force 1 July 1975, 993 UNTS 243 (CITES).

<sup>5</sup> Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 79.

<sup>6</sup> Regional fisheries management 'arrangements' also play an important role in international fisheries management. They work through the conferences of parties without establishing international organisations and do not normally have a separate international legal personality. For the description of the concept 'arrangement', see Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, in force 11 December 2001, 2167 UNTS 3 (UNFSA), Article 1(1)(d). For the above reasons, this chapter primarily deals with 'organisations' as it relates to regional fisheries management mechanisms.

associated with the determination and implementation of shared responsibility under international law in this context.

In the context of fisheries, it is likely that questions of shared responsibility will arise.<sup>7</sup> This chapter seeks to articulate how states, the EU and RFMOs share responsibility in a fisheries context. In line with other chapters of this volume, the term ‘responsibility’ is used here in the sense of *ex post facto* responsibility for harm<sup>8</sup> to fisheries resources and their marine ecosystems, although in the context of the law of the sea, including fisheries, the term ‘responsibility’ often refers to ‘obligations’.<sup>9</sup> First, the chapter briefly introduces factual scenarios where shared responsibility may be involved (section 2). It then describes the international legal regime for fisheries, focusing on primary rules governing the conduct of various actors whose breach may entail shared responsibility (section 3) and secondary rules on shared responsibility for a possible harmful outcome to fisheries resources and their marine ecosystems (section 4). On the basis of the foregoing analyses, the chapter discusses processes in which shared responsibility is (potentially) determined and implemented in the context of fisheries (section 5).

## 2. Factual scenarios

There are a virtually unlimited number of potential scenarios where multiple actors may be held responsible with regard to the conservation and management of fisheries resources. The following paragraphs describe some of the potential scenarios in accordance with the types of conduct and actors that might be held responsible.

On the one hand, shared responsibility may arise out of joint or concerted action, such as joint patrols on the high seas and the joint management of fish stocks in disputed waters. The

---

<sup>7</sup> I. Plakokefalos, ‘Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention’ (2013) 4(2) JIDS 385, 386.

<sup>8</sup> See Introduction of this volume, Chapter 1 in this volume, P.A. Nollkaemper and I. Plakokefalos, ‘The Practice of Shared Responsibility: A Framework for Analysis’, in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), 1. See also P.A. Nollkaemper and D. Jacobs, ‘Shared Responsibility in International Law: A Conceptual Framework’ (2013) 34 MIJIL 359.

<sup>9</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No. 17, 1 February 2011, (2011) 50 ILM 458, paras. 64-71. For instance, the term ‘flag state responsibility’ is primarily used in the sense of ‘flag state duties’. On the development of this concept, see M.A. Palma, M. Tsamenyi, and W. Edeson, *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Leiden: Martinus Nijhoff Publishers, 2010), 264-265.

collective failure of states to take certain action (e.g. a failure to adopt effective conservation and management measures within the framework of a regional fisheries management arrangement) may also result in shared responsibility.

On the other hand, questions of shared responsibility may also arise without concerted action. In particular, this concerns the scenario where multiple actors separately contribute to the depletion of fisheries resources, either by breaching common obligations or by breaching different sets of obligations. The ineffective control of fishing vessels by flag states, together with the lack of proper management by the coastal state, may lead to such a scenario. In a more deplorable scenario, responsibility may arise where flag states encourage their vessels to conduct fishing in an unsustainable manner (e.g. through unilaterally setting an excessively high quota without regard for fishing activities by vessels flying the flag of other states).

Regarding the breach of a common obligation, for example, in the high seas part of the Indian Ocean, orange roughy fisheries by vessels from several states took place, which led to the collapse of the fish stock. By the time the Southern Indian Ocean Fisheries Agreement was adopted in 2006, the stock had already collapsed.<sup>10</sup> The flag states of these vessels could arguably be held responsible for their breach of the obligation to take necessary conservation measures for their nationals engaged in high seas fishing. Another example of shared responsibility arising out of a breach of a common obligation concerns the management of shared stocks in the exclusive economic zone (EEZ). For example, in a controversy over the management of mackerel in the North-East Atlantic, the so-called ‘mackerel wars’, some EU member states accused Iceland and the Faroe Islands of unilaterally raising their quotas, consequently leading to unsustainable fishing in breach of their obligations.<sup>11</sup>

Regarding the breach of different sets of obligations, for example, fisheries in the EEZ by distant water fishing nations (DWFNs) may give rise to shared responsibility where a coastal state and DWFNs in their capacity as flag states have failed to discharge their respective obligations.<sup>12</sup> A further complicated scenario concerns the overfishing of a straddling stock

---

<sup>10</sup> See E.J. Molenaar, ‘Unregulated Deep-Sea Fisheries: A Need for a Multi-Level Approach’ (2004) 19(3) *IJML* 223, 228.

<sup>11</sup> Details of this controversy are further explained in section 5.

<sup>12</sup> Another scenario in which shared responsibility of flag and coastal states may arise relates to fishing activities by vessels from EU member states that fish in Moroccan waters off the coast of Western Sahara in disregard of the wish and interest of the peoples in that region. Fishing by EU vessels in this area became controversial when the European Parliament refused to extend a protocol to the fisheries partnership agreement between the EU and Morocco in 2011. See S. Simanowitz, ‘Unexpected Victory for Western Sahara Campaigners at the European Parliament’, *Think Africa Press*, 21 December 2011.

managed by an RFMO. For example, Canada, acknowledging its past contribution to the decline of fish stocks in its EEZ, argued that fishing activities by the non-members of the Northwest Atlantic Fisheries Organization (NAFO), as well as members taking advantage of objections to the relevant conservation and management measures adopted by the NAFO, hampered its conservation efforts, leading Canada to take enforcement actions.<sup>13</sup>

There may be a situation where shared responsibility is engaged by virtue of a mixture of joint/concerted action and individual action. One may consider a scenario where conservation and management measures adopted by a regional fisheries management arrangement become ineffective due to a disregard for the fishing activities of non-cooperating non-participants. This may happen when the conference of parties to a regional fisheries management arrangement fails to accommodate the interests of a non-participating state by rejecting its participation and setting the total allowable catch allocated only among existing participants (i.e. joint action), while the non-participating state in question continues fishing outside the regional management regime (i.e. action not in concert).

### **3. Primary rules**

The international legal regime for fisheries, as established by the LOSC and elaborated by various subsequent fisheries-related instruments such as the United Nations Fish Stocks Agreement (UNFSA),<sup>14</sup> is based on the division of various maritime zones. Regulatory powers are allocated to states in different capacities in each of these zones and, where appropriate, to sub-regional and regional organisations.

As discussed in section 2, shared responsibility may arise out of the breach by two or more states or international organisations of obligations common to them. Such obligations may require separate performance by individual subjects, or may generally or by definition require joint/concerted action. Shared responsibility may also arise where a state or international organisation breaches its obligation requiring a certain conduct and another state or

---

<sup>13</sup> A thorough examination of this dispute as well as related legal issues is found in P.G.G. Davies and C. Redgwell, 'The International Legal Regulation of Straddling Fish Stocks' (1996) 67 BYIL 199.

<sup>14</sup> See n. 6. It should be noted, however, that, while the LOSC enjoys quasi-universal participation and its provisions relating to fisheries are widely considered to be part of customary international law, the same cannot be said for the UNFSA. On the legal significance of the provisions of the UNFSA, see also n. 32 and the literature cited therein.

international organisation breaches an obligation requiring a different conduct (separate sets of obligations).

The relevant obligations are discussed separately for states (3.1) and international organisations (3.2).

### *3.1 States*

Rights and obligations of coastal states and other states differ considerably between areas under the sovereignty or jurisdiction of coastal states, where they have wide discretion in the regulation of fisheries, and areas not subject to the exclusive jurisdiction of any single state. Coastal states have sovereignty in internal waters and the territorial sea.<sup>15</sup> They have sovereign rights for the purpose of exploring and exploiting, as well as conserving and managing marine living resources in the EEZ,<sup>16</sup> and for the purpose of exploring the continental shelf and exploiting its sedentary species.<sup>17</sup> On the high seas, all states enjoy the freedom of fishing.<sup>18</sup> The specific duties of each category of states are described as follows.<sup>19</sup>

Flag states are under the obligation to effectively exercise jurisdiction and control over their ships, including fishing vessels.<sup>20</sup> For high seas fisheries, the LOSC provides for their duties to take conservation measures, and to cooperate with each other and with relevant coastal states for straddling and highly migratory fish stocks.<sup>21</sup> The duties of flag states for high seas fisheries have been developed in the UNFSA and the FAO Compliance Agreement. The duties of flag states also concern fisheries in areas under national jurisdiction, including foreign EEZs. Building on the LOSC,<sup>22</sup> instruments developed after its adoption such as the

---

<sup>15</sup> Article 2 LOSC, n. 1.

<sup>16</sup> Article 56 LOSC, *ibid.*

<sup>17</sup> Article 77 LOSC, *ibid.*

<sup>18</sup> Articles 87 and 116 LOSC, *ibid.*

<sup>19</sup> As noted in n. 3, in the context of IUU fishing, the duties and liability of flag states, as well as those of the EU as an international organisation to which member states' competence in respect of fisheries has been transferred, and the duties of coastal states are elaborated in the advisory opinion of ITLOS in response to the request by the SRFC.

<sup>20</sup> See, e.g., Article 94(1) LOSC, n. 1; Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, approved by FAO Conference on 24 November 1993, in force 24 April 2003, 2221 UNTS 91 (FAO Compliance Agreement), preambular para. 8. See also SRFC Advisory Opinion, n. 3, para. 119.

<sup>21</sup> Articles 63(2), 64 and 117-19 LOSC, *ibid.*

<sup>22</sup> In examining the duties of flag states in respect of IUU fishing engaged in by their vessels in the EEZ of other states, ITLOS referred to various duties arising from articles in the LOSC, such as Articles 58, 62, 94 and 192 LOSC, *ibid.* See, e.g., SRFC Advisory Opinion, n. 3, paras. 119 and 124.

UNFSA that elaborate on the duties to ensure that their vessels do not conduct unauthorised fishing within areas under the national jurisdiction of other states,<sup>23</sup> as well as other duties in respect of vessels flying their flag and engaged in fisheries in areas under the jurisdiction of other states. Where flag states have concluded bilateral fisheries (partnership) agreements with coastal states, such agreements often require the control of fishing vessels by their flag states, in connection with access to fisheries resources in the EEZ.<sup>24</sup>

As a corollary to their extensive right, coastal states are required to regulate fishing conducted within areas under their jurisdiction.<sup>25</sup> The LOSC stipulates the obligation to conserve and manage fisheries resources in their own EEZ, arguably, with regard to both vessels flying their flag and foreign fleet.<sup>26</sup> For certain stocks and species, coastal states need to cooperate with other coastal states and high seas fishing states.<sup>27</sup> In addition, certain obligations may be imposed on coastal states under fisheries access agreements.<sup>28</sup>

The regulation of fisheries engaged in by vessels from two or more states requires institutionalised cooperative mechanisms among relevant flag states and, in many cases, coastal states. States need to cooperate through sub-regional or regional organisations as appropriate.<sup>29</sup> In particular, this aspect of the international law of high seas fisheries has been elaborated for straddling and highly migratory fish stocks. For example, on the one hand, the UNFSA requires flag states to become members of RFMOs,<sup>30</sup> or agree to apply their conservation and management measures, as a condition for access to fisheries resources in question. On the other hand, membership of RFMOs shall be open to states having a real interest in the fisheries concerned.<sup>31</sup> One could argue that RFMOs are now considered to be the primary actor in the regulation of high seas fisheries. In addition to the above global

---

<sup>23</sup> Article 18(3)(b)(iv) UNFSA, n. 6. Cf. ‘International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’, approved by the FAO Committee on Fisheries on 2 March 2001 (IPOA-IUU), para. 51.3.

<sup>24</sup> See Palma et al., *Promoting Sustainable Fisheries*, n. 9, 264-265.

<sup>25</sup> The duties, as well as the rights, of coastal states were examined in detail by ITLOS in the SRFC Advisory Opinion. SRFC Advisory Opinion, n. 3, paras. 175-218.

<sup>26</sup> Articles 61-2 LOSC, n. 1. At the global level, coastal state obligations under the LOSC have been elaborated by some of the instruments developed after the adoption of the LOSC. See, e.g., IPOA-IUU, n. 23, para. 51. See also Voluntary Guidelines for Flag State Performance, adopted on 8 February 2013 and endorsed by the FAO Committee on Fisheries at its thirty-first session held on 9-13 June 2014, paras. 39-43.

<sup>27</sup> See Articles 63-4 LOSC, *ibid.*

<sup>28</sup> See fisheries partnership agreements between the EU and third countries, available at [www.ec.europa.eu/fisheries/cfp/international/agreements/index\\_en.htm](http://www.ec.europa.eu/fisheries/cfp/international/agreements/index_en.htm).

<sup>29</sup> Articles 63-4 and 118-19 LOSC, n. 1.

<sup>30</sup> Under the UNFSA, provisions relating to members of RFMOs always address not only members of RFMOs but also participants in arrangements but, given the scope of this chapter, the following sentences focus on RFMOs.

<sup>31</sup> See, e.g., Article 8(3)-(4) UNFSA, n. 6.



instruments, constitutive instruments of RFMOs and their conservation and management measures also provide for various obligations for DWFNs and coastal states in the regulation of fisheries for specific species and/or in specific regions. These measures address not only members and cooperating non-members, but sometimes also non-cooperating non-members.<sup>32</sup>

States other than flag or coastal states also have obligations with regard to fisheries. Port states assume the right and the duty in their ports under international law, as noted in the UNFSA in the context of straddling and highly migratory fish stocks.<sup>33</sup> However, the scope of the ‘duty’ in this respect is unclear under the UNFSA. To the contrary, the 2009 FAO Port State Measures Agreement specifies various duties port states shall fulfil in relation to illegal, unreported and unregulated (IUU) fishing.<sup>34</sup> Furthermore, some of the regional instruments as well as global instruments address other categories of states, such as market states and states whose nationals are engaged in IUU fishing.<sup>35</sup>

The obligations to take conservation and management measures elaborated above could be discharged either through separate performance by individual states or jointly. The

---

<sup>32</sup> The UNFSA provides for boarding and inspection of fishing vessels on the high seas by non-flag states to ensure compliance with RFMO conservation and management measures, whether or not the flag state is a party to the RFMO concerned. Article 21(1) UNFSA, *ibid.* See also Article 8(3)-(4) UNFSA. In relation to states other than parties to the UNFSA, however, the legal effect of RFMO measures, as well as the legality of non-flag state enforcement actions, is controversial, in view of the *pacta tertiis* principle and the consensual nature of international law. On this issue, see, e.g., P.W. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, 3<sup>rd</sup> edn (New York: Oxford University Press, 2009), 740-741; E. Franckx, ‘*Pacta Tertiis* and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks’, FAO Legal Papers Online, No. 8, June 2000, available at [www.fao.org/fileadmin/user\\_upload/legal/docs/lpo8.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/lpo8.pdf); Y. Takei, *Filling Regulatory Gaps in High Seas Fisheries: Discrete High Seas Fish Stocks, Deep-sea Fisheries and Vulnerable Marine Ecosystems* (Leiden: Martinus Nijhoff Publishers, 2013), 33-34 and 66-67. Some argue that freedom of fishing under the LOSC is not unconditional and a legal basis for RFMO measures against third parties can be found in the provisions of the LOSC. For a discussion, see, e.g., T. Henriksen, ‘Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations’ (2009) 40(1) ODIL 80.

<sup>33</sup> Article 23(1) UNFSA, *ibid.* Under the UNFSA, the right of port states concerns inspections, and the prohibition of landings and transshipments, see Article 23(2). States may also deny access to their ports in accordance with other rules of international law. L. de La Fayette, ‘Access to Ports in International Law’, (1996) 11(1) IJMCL 1.

<sup>34</sup> The duty of port states, for example, concerns the principle of non-discrimination. See, e.g., Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome, 22 November 2009, not yet in force, (2011) OJ L 191/3 (2009 FAO Port State Measures Agreement), Article 13(2)(h): ‘Each Party shall, in carrying out inspections in its ports: ... ensure that inspections are conducted in a fair, transparent and non-discriminatory manner and would not constitute harassment of any vessel’.

<sup>35</sup> See, e.g., Convention on the Conservation and Management of the High Seas Fishery Resources of the South Pacific Ocean, Auckland, 14 November 2009, in force 24 August 2012, (2012) OJ L 67/3 (Auckland Convention), Articles 24(3) and 32(4); IPOA-IUU, n. 23, paras. 18-19, 21, 65-76 and 84. Although not using the term ‘market state’, CITES addresses the state of import as well as the state of introduction, Articles III-IV CITES, n. 4.

obligations to cooperate (between flag states, between coastal states, or between flag and coastal states) would naturally require joint performance by multiple states and, unless the non-performance of the obligation can entirely be attributed to the action of only one state, shared responsibility would arise for these multiple states.

As regards the nature of obligations, obligations of states in the field of fisheries, including flag state duties, are often obligations to take certain measures, which can be characterised as due diligence obligations.<sup>36</sup> It is therefore not easy to demonstrate a direct causal link between the breach of such obligations, on the one hand, and impacts on fisheries resources and marine ecosystems, on the other. It is even more difficult to argue that the breach has led to an ‘injury’ in the sense of state responsibility. This is especially the case where cumulative impacts, caused by vessels from different states, are discernible.

The law of the sea aims to protect both individual states’ interests and collective interests; certain rules are intended to serve both interests at the same time. The objectives of the obligations concerning the conservation of marine living resources relate to the protection of the individual interest of coastal states (in whose marine areas the fishery resource concerned occurs); flag states (whose vessels are, or plan to be, engaged in fishing for the fishery resource concerned); and market states (whose nationals consume the fishery resource concerned). The conservation of these resources, as well as marine ecosystems in which they occur, also relates to the collective interest of the international community.

Differential treatment of states in a fisheries context is, in some cases, specifically mentioned in the LOSC. Coastal states in the EEZ and flag states in high seas fisheries are to take conservation measures, taking into account, inter alia, special requirements of developing states.<sup>37</sup> When a coastal state determines access to a surplus, consideration is given to developing land-locked and geographically disadvantaged states.<sup>38</sup> Recognition of the special requirements of developing states is contained in various other global fisheries-related instruments, including assistance and technology transfer to developing states.<sup>39</sup> Such differentiation is also found in RFMO constitutive instruments.<sup>40</sup> At least one RFMO is

---

<sup>36</sup> See, for example, SRFC Advisory Opinion, n. 3, paras. 125-40.

<sup>37</sup> Articles 61(3) and 119(1)(a) LOSC, n.1.

<sup>38</sup> Article 62(2) LOSC, *ibid*.

<sup>39</sup> See, e.g., Articles 24-26 UNFSA, n. 6.

<sup>40</sup> Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu, 5 September 2000, in force 19 June 2004, 2275 UNTS 43, Articles 5(b), 7(2), 10(3)(d), (i) and (j), 18(2), 24(8) and 30; Convention on the Conservation and Management of Fishery

seeking to further clarify the implication of differential treatment between developed and developing states (especially small island developing states (SIDS)). For example, one conservation and management measure of the Western and Central Pacific Fisheries Commission refers to cooperation to mitigate the burden for the implementation of specific obligations by the relevant SIDS and territories through: first, phased or delayed implementation of specific obligations; second, exemption of specific obligations; third, proportional or rotational implementation; and fourth, the establishment of a compensatory funding mechanism in accordance with the financial regulations of the Commission.<sup>41</sup> In addition, its conservation and management measures state that '[members, cooperating non-members and participating territories] shall develop, interpret and apply conservation and management measures in the context of and in a manner consistent with the [LOSC] and Articles 24, 25 and 26 of the [UNFSA]'.<sup>42</sup> Thus, there is room to argue that certain developing states are allowed to discharge their conservation duties in a less stringent manner, with or without explicit provision to this effect in the conservation and management measure in question.

### *3.2 International organisations*

Apart from states, international organisations also incur obligations in the context of fisheries. Two types of international organisations may be involved here: (regional) international organisations to which member states have transferred competence concerning fisheries; and RFMOs. The following discussion on the first category of international organisation focuses on the EU, as the EU is currently the only organisation of this type.

The EU has been transferred competence by its member states with regard to the conservation and management of living marine resources. As a consequence, it has exclusive competence on certain matters, while both the EU and its member states have competence for certain

---

Resources in the South East Atlantic Ocean, Windhoek, 20 April 2001, in force 13 April 2003, 2221 UNTS 189, Articles 20(1)(d) and 21; Southern Indian Ocean Fisheries Agreement, Rome, 7 July 2006, in force 21 June 2012, (2006) OJ L 196/15, Articles 2, 4(g), 5(4) and 13; Article 3(1)(a)(viii), 19 and 21(1)(e) Auckland Convention, n. 35.

<sup>41</sup> Western and Central Pacific Fisheries Commission, Conservation and Management Measure 2013-06, para. 4, available at [www.wcpfc.int/conservation-and-management-measures](http://www.wcpfc.int/conservation-and-management-measures).

<sup>42</sup> *Ibid.*, para. 1; Conservation and Management Measure 2013-07, para. 2.

other matters.<sup>43</sup> Importantly, the EU has exclusive competence to adopt relevant rules and regulations in this field, while member states enforce these rules and regulations. It is also within the competence of the EU to enter into external undertakings with third states or competent organisations in this field. The EU therefore has the duty to determine conservation and management measures for vessels flying the flag of its member states, and the duty to cooperate with other states in RFMOs. The duty to enforce such measures is assumed by member states for vessels flying their flag.<sup>44</sup> Furthermore, the EU and member states share competence on matters such as scientific research, port state measures, and measures adopted in respect of non-members of regional fisheries organisations and non-parties to the UNFSA.

RFMOs are international organisations: they are established on the basis of constituent instruments in the form of treaties and have independent international legal personality.<sup>45</sup> Accordingly, they may assume obligations under international law and, if a breach occurs, they may be held responsible. First of all, RFMOs are bound by their constituent instruments, even though these instruments are treaties concluded by contracting parties. Conservation and management measures and other decisions of RFMOs also impose obligations on RFMOs, to the extent that they are formulated in a way to require RFMOs to act in a certain manner.<sup>46</sup> In addition, RFMOs would be bound by obligations assumed under legally binding instruments concluded with other subjects of international law (e.g. with their member states and with other international organisations).<sup>47</sup> Last but not least, RFMOs are bound by the rules of customary international law. It would not be easy to identify particular rules under customary international law which bind all RFMOs, since RFMOs vary in terms of functions and

---

<sup>43</sup> Matters not falling under the exclusive or shared competence of the EU are subject to the exclusive competence of member states. For details concerning the matters for which the EU has exclusive or shared competence, see the declarations by the then European Community upon signature and upon ratification of the LOSC and the UNFSA, available at [www.un.org/depts/los/index.htm](http://www.un.org/depts/los/index.htm).

<sup>44</sup> But note that, according to the European Community declarations mentioned above, the EU enjoys the regulatory competence to ensure that member states adopt provisions allowing for the implementation of conservation and management measures for marine fisheries resources applicable to vessels flying the flag of member states.

<sup>45</sup> See, e.g., T. Henriksen, G. Hønneland, and A. Sydnes, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (Leiden: Martinus Nijhoff Publishers, 2006), 6 and 17-8. As opposed to RFMOs, regional fisheries management arrangements do not necessarily take the form of international organisations. See n. 6 above.

<sup>46</sup> These decisions are taken by consensus, a qualified majority or a simple majority, in accordance with the constituent instruments.

<sup>47</sup> This concerns, for example, headquarter agreements and agreements regarding requests for scientific advice from scientific bodies.

structures.<sup>48</sup> Nevertheless, at least some basic rules are binding not only states but also RFMOs: e.g. the requirement that the jurisdictional framework set by the law of the sea needs to be respected by RFMOs.

#### 4. Secondary rules

The law of international responsibility as elaborated in the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)<sup>49</sup> and Articles on the Responsibility of International Organizations (ARIO)<sup>50</sup> applies to the responsibility of states and international organisations in the context of fisheries. It is not evident that there exists a relevant *lex specialis*.<sup>51</sup> The LOSC does not have any specific provision on responsibility and liability for fisheries, but this should not be interpreted to exclude the possibility to invoke the responsibility of states in this context. Indeed, the non-prejudice clause under Article 304 LOSC implies that the general principles of state responsibility apply to fisheries.<sup>52</sup> A few Articles in the LOSC provide for consequences of a breach of the relevant rule of international law applicable to fisheries, or procedures to be followed. One such provision is Article 94(6) LOSC, which only refers to a ‘report’ to the flag state by another state in respect of the lack of proper exercise of jurisdiction and control with respect to its ships. The word ‘may’ in that provision suggests that the reporting to the

---

<sup>48</sup> Article 10 of the UNFSA, n. 6, lists core functions of RFMOs and it might be argued that some of the functions listed there could be considered as reflecting the duties of RFMOs under customary international law. However, note that the provision is formulated in the form of state parties’ duties.

<sup>49</sup> Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA). Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary).

<sup>50</sup> Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO). Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary).

<sup>51</sup> For an extensive analysis of the application of the principles of state responsibility to fisheries, including complex issues that may arise, see A. Serdy, ‘Accounting for Catch in Internationally Managed Fisheries: What Role for State Responsibility?’ (2010) 15(1) OCLJ 23, 27-39.

<sup>52</sup> Note that Article 235 of the LOSC, n. 1, provides for responsibility and liability in the context of marine environmental protection. Arguably, this provision applies to fisheries where a fishing activity causes harm to the marine environment (e.g. adverse impacts caused by bottom trawling). In fact, as noted in section 5 below, a European Commission decision regarding IUU fishing refers to an article concerning pollution of the marine environment from vessels in the context of fisheries. In any case, in relation to state responsibility, Article 235 LOSC does not go beyond the mere confirmation of state responsibility in this field and is subject to the non-prejudice clause in Article 304 LOSC.

flag state under this Article is not a precondition for invoking state responsibility.<sup>53</sup> Furthermore, Article 35 of the UNFSA entitled ‘Responsibility and Liability’ suggests that general international law principles apply to responsibility in the context of fisheries for straddling fish stocks and highly migratory fish stocks by stating that: ‘States Parties are liable in accordance with international law for damage or loss attributable to them in regard to this Agreement’.

In principle, most scenarios involving the responsibility of multiple actors in the context of fisheries, as discussed in section 2, could be solved by the principle that each actor is responsible for its own internationally wrongful conduct.<sup>54</sup> However, there are situations where the principle of independent responsibility cannot adequately address the problem. While member states of an international organisation cannot be held responsible for the internationally wrongful act of that organisation solely due to their membership,<sup>55</sup> states may be held responsible, under certain circumstances, in connection with the internationally wrongful act of an international organisation of which they are member.<sup>56</sup> Such a scenario may unfold where RFMO member states circumvent their obligations by adopting a conservation and management measure at the RFMO that does not respect the jurisdictional framework provided by the law of the sea and consequently interferes with other states’ right of fishing.<sup>57</sup> In addition, under certain circumstances, an international organisation cannot escape its responsibility even if an internationally wrongful act itself was committed by its members.<sup>58</sup> An example of this scenario would be the case where member states of an RFMO enforce a conservation and management measure that is contrary to the obligation of that RFMO (and the obligation of its member states) against third states.<sup>59</sup>

Regarding links between the breach of an obligation and its impacts, elements such as damage, harm, or injury are not required for international responsibility to be incurred, although the relevant primary rule may require the existence of such elements as part of a

---

<sup>53</sup> If a state intends to use compulsory dispute settlement procedures entailing binding decisions or to take countermeasures, prior reporting to the flag state on the lack of proper exercise of jurisdiction and control seems necessary. See Article 283 LOSC, *ibid.*; Article 52 ARSIWA, n. 49.

<sup>54</sup> Cf. ARSIWA Commentary, n. 49, Commentary to Chapter IV, para. 1, and Commentary to Article 47 ARSIWA, para. 3.

<sup>55</sup> ARIO Commentary, n. 50, Commentary to Article 62 ARIO, para. 2.

<sup>56</sup> Articles 58-62 ARIO, *ibid.*

<sup>57</sup> Cf. Article 61 ARIO, *ibid.*

<sup>58</sup> Articles 14-17 ARIO, *ibid.*

<sup>59</sup> Cf. Article 17 ARIO, *ibid.*

breach of an obligation.<sup>60</sup> However, a causal link between the act or omission of (potentially) responsible states or organisations, and the harm impacting the fishery resource concerned and its marine ecosystem, may be relevant in determining the form and extent of reparation.<sup>61</sup> It is not easy to identify such a link in the context of fisheries, though.<sup>62</sup> The causal link becomes even more ambiguous in the case of multiple actors responsible for the same harmful outcome through cumulative impacts. Furthermore, the identification of injured states would prove to be difficult in a fisheries context.

Regarding the EU, shared responsibility of the EU and its member states potentially arises under at least two circumstances. First, it is straightforward that such responsibility may arise in relation to matters that fall under competences shared by the EU and its member states, as mentioned in the previous section. Second, for matters falling under the exclusive competence of the EU, such as the determination of conservation and management measures, the responsibility is in principle allocated solely to the EU, but a violation of an international rule might result from the combination of the adoption of inappropriate conservation and management measures by the EU, and improper enforcement by its member state(s).<sup>63</sup>

Under certain circumstances, the question of shared responsibility may arise with regard to RFMOs.<sup>64</sup> Responsibility may be shared by an RFMO and, first, a state other than its members (e.g. where an RFMO refuses the membership of a state with a real interest in the fishery in question, that state continues fishing without taking conservation measures, and the RFMO disregards such fishing in determining conservation and management measures); second, its member;<sup>65</sup> or, third, another RFMO (e.g. where both of these RFMOs fail to adopt necessary conservation and management measures for a stock straddling the geographic

---

<sup>60</sup> ARSIWA Commentary, n. 49, Commentary to Article 2 ARSIWA, para. 9, and Commentary to Article 31 ARSIWA, para. 6.

<sup>61</sup> ARSIWA Commentary, *ibid.*, Commentary to Article 31 ARSIWA, paras. 7-9.

<sup>62</sup> A link between a breach and harm to fisheries resources and marine ecosystems is even more remote in the case of non-compliance with due diligence obligations.

<sup>63</sup> However, there are situations where shared responsibility would not arise in this type of setting. For example, ITLOS in the SRFC Advisory Opinion clearly indicates that, in the context of a fisheries access agreement concluded between the EU and a SRFC member state, only the EU as a contracting party, and not its member state, could be held liable for IUU fishing engaged by vessels flying the flag of its member state in the EEZ of a SRFC member state. SRFC Advisory Opinion, n. 3, paras. 167-173. For the potential shared responsibility of the EU and its member states regarding the provision of information in respect of the division of competence, see section 5.

<sup>64</sup> On the invocation of the responsibility of international organisations by injured states and international organisations, see Article 43 ARIO, n. 50. Invocation of responsibility by a state or international organisation other than an injured state or international organisation is provided for in Article 49 of the ARIO.

<sup>65</sup> Various circumstances where an international organisation and its member may incur shared responsibility have been already discussed earlier in this section.

scope of these RFMOs). However, so far, the determination of responsibility and related processes are mostly focused on states, although the effectiveness of the work of some RFMOs has sometimes been questioned.<sup>66</sup>

## **5. Processes**

States as well as international institutions may potentially be involved in the determination of shared responsibility, either unilaterally or through third party mechanisms. They may contemplate responses (i.e. retorsions and countermeasures) to induce compliance by the state or international organisation held responsible with the primary rule in question through various processes. This section looks at unilateral actions, including the practice of the United States, the EU and RFMOs, as well as dispute settlement mechanisms involving third parties. The section addresses both processes involving the formal determination of responsibility and those not entailing the determination of responsibility in the technical sense. First, it analyses the relevant legislation and practice thereunder in the United States and the EU (5.1). This is followed by the examination of the conservation and management measures taken by RFMOs to address non-compliance with their measures (5.2). Third, it discusses dispute settlement mechanisms available under the LOSC and the UNFSA as well as within RFMOs (5.3).

### *5.1 Unilateral actions by states and the EU*

A wide range of unilateral actions have been taken by states, the EU and RFMOs as responses to non-compliance with global, regional and national rules concerning fisheries. They take the form of port and trade measures, at-sea enforcement action, as well as less confrontational action such as requesting consultations. These actions include, inter alia, import prohibitions of fish and fish products in question, those of associated species, as well as measures concerning access to fisheries resources in the EEZ, vessel purchase and joint fishing operations.

There is ample state practice addressing flag states, aimed at compliance with conservation and management measures by their vessels (e.g. port state measures<sup>67</sup> and at-sea

---

<sup>66</sup> But see section 5 on an example of questioning the consistency of an RFMO conservation and management measure with international law.



enforcement). An example would be the action Canada took in relation to straddling stocks in the NAFO Regulatory Area. Through amendments to its fisheries regulations, it identified Belize, the Cayman Islands, Honduras, Panama, Saint Vincent and the Grenadines and Sierra Leone as well as Spain and Portugal as states whose fishing vessels are subject to its fishing prohibitions and corresponding enforcement actions.<sup>68</sup> Soon after the amendments, this led to the boarding and seizure of the *Estai* by Canada on the high seas adjacent to its EEZ.

The United States has adopted a legal framework to identify, consult with, and take action against nations whose vessels are engaged in IUU fishing activities, and fishing activities resulting in bycatch of protected living marine resources (PLMR).<sup>69</sup> Sanctions available within this framework include the denial of port privileges, importation restrictions on fish and fish products, and additional economic sanctions if fish and fish products restrictions are determined not effective.<sup>70</sup> The identification and sanctions under this legal framework are not necessarily based on the finding of the breach of an international obligation or the determination of responsibility in a technical sense, although it could be the case that identified nations are often considered to have breached their obligations under national and international law.<sup>71</sup>

The target of sanctions by the United States is limited to states. Under the 2006 Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA),<sup>72</sup> an ‘international fishery management organization’ or ‘international organization’ is not directly targeted by sanctions. They may indirectly be condemned, however, because the taking of

---

<sup>67</sup> On port state measures, see, e.g., O.S. Stokke, ‘Managing Fisheries in the Barents Sea Loophole: Interplay with the UN Fish Stocks Agreement’ (2001) 32(3) ODIL 241, 245; De La Fayette, ‘Access to Ports in International Law’, n. 33, 9.

<sup>68</sup> *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, ICJ Reports 1998, 432, at 441-443. On developments leading to the designation of these states, see Davies and Redgwell, ‘The International Legal Regulation of Straddling Fish Stocks’, n. 13, 202-215.

<sup>69</sup> United States, Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, P.L. 109-479 (MSRA). Note that while the Act primarily targets flag states, the provision on equivalent conservation measures with regard to the bycatch of PLMR also concerns ‘foreign governments which are engaged in, or which have persons or companies engaged in, fishing activities or practices [resulting in the bycatch of PLMR]’ (in other words, the state of nationality of captains and crew as well as fishing companies involved in such fishing activities or practices). See 16 United States Code (USC) §1826k(b)(2).

<sup>70</sup> See 16 USC §1826a.

<sup>71</sup> On the definition of IUU fishing and PLMR, as well as criteria for identification and certification, see US, Code of Federal Regulations §300.201-§300.203.

<sup>72</sup> See n. 69.

measures may be triggered by the lack of effective conservation measures agreed at such an organisation.<sup>73</sup>

The Department of Commerce of the United States has published biennial reports on the implementation of the international provisions of the MSRA since 2009, in which it has identified a number of nations for IUU fishing and fishing activities resulting in bycatch of PLMR.<sup>74</sup> So far, all of the nations identified for IUU fishing have taken corrective actions following consultations with the United States, and no state has yet been subject to sanctions under this Act.<sup>75</sup>

The EU adopted a comprehensive Regulation dealing with IUU fishing in 2008.<sup>76</sup> This Regulation addresses flag states, coastal states, port states and market states failing to cooperate in fisheries conservation under international law ('non-cooperating third countries'). Multiple non-cooperating third countries identified by the EU, and not having corrected their behaviour, may simultaneously be subject to sanctions stipulated in the Regulation. Identification as non-cooperating third countries is based on the determination of the breach of obligations under international law.<sup>77</sup>

On the basis of Council Regulation 1005/2008, the European Commission has notified many states of the possibility of being identified as non-cooperating third countries: Belize, the Kingdom of Cambodia, the Republic of Fiji, the Republic of Guinea, the Republic of Panama, the Democratic Socialist Republic of Sri Lanka, the Togolese Republic and the Republic of Vanuatu (2012);<sup>78</sup> Curaçao, the Republic of Ghana and the Republic of Korea (2013);<sup>79</sup> and

---

<sup>73</sup> See MSRA, *ibid.*, 16 USC §1826j(a)(1) and §1826k(a)(1)(B).

<sup>74</sup> See generally Y. Takei, 'International Legal Responses to the Flag State in Breach of Its Duties: Possibilities for Other States to Take Action against the Flag State' (2013) 82(2) *Nord JIL* 283, at 292-293.

<sup>75</sup> Mexico, which is the only state identified for bycatch of PLMR, still awaits a certification determination to be issued in May 2015. U.S. Department of Commerce, 'Improving International Fisheries Management, Report to Congress Pursuant to Section 403(a) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006', February 2015, at 50-51.

<sup>76</sup> Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999, (2008) OJ L 286/1.

<sup>77</sup> Article 31(3), *ibid.*: 'A third country may be identified as a non-cooperating third country if it fails to discharge the duties incumbent upon it under international law as flag, port, coastal or market State, to take action to prevent, deter and eliminate IUU fishing'.

<sup>78</sup> Commission Decision of 15 November 2012 on notifying the third countries that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2012/C 354/01), (2012) OJ C 354/1.

<sup>79</sup> Commission Decision of 26 November 2013 on notifying the third countries that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No.

the Philippines and Papua New Guinea (PNG)<sup>80</sup> as well as Solomon Islands, Tuvalu, St. Kitts and Nevis and St. Vincent and the Grenadines (2014),<sup>81</sup> and Thailand (2015).<sup>82</sup> Obligations which the states concerned have failed to discharge relate not only to those in their capacity as flag state,<sup>83</sup> but also to those in their capacity as coastal and market state. Among the eight states notified in 2012, three states were considered to have failed to show progress and were recommended to be included in the list of non-cooperating third countries in 2013.<sup>84</sup> The Council of Ministers formally established a list of non-cooperating third countries and included these three states in the list, which action triggered sanctions under Article 38 of Regulation 1005/2008 in March 2014.<sup>85</sup> The states notified of the possibility of listing or

---

1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2013/C 346/03), (2013) OJ C 346/26.

<sup>80</sup> Commission Decision of 10 June 2014 on notifying the third countries that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2014/C 185/02), (2014) OJ C 185/2; Commission Decision of 10 June 2014 on notifying a third country that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2014/C 185/03), (2014) OJ C 185/17.

<sup>81</sup> Commission Decision of 12 December 2014 notifying a third country that the Commission considers as possible of being identified as non-cooperating third country pursuant to Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2014/C 447/09), (2014) OJ C 447/6; Commission Decision of 12 December 2014 notifying a third country that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2014/C 447/10), (2014) OJ C 447/16; Commission Decision of 12 December 2014 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing (2014/C 447/11), (2014) OJ C 447/23; Commission Decision of 12 December 2014 notifying a third country that the Commission considers as possible of being identified as non-cooperating third countries pursuant to Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2014/C 453/04), (2014) OJ C 453/5.

<sup>82</sup> Commission Decision of 21 April 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing (2015/C 142/06), (2015) OJ C 142/7.

<sup>83</sup> The Commission identified violations of various LOSC and UNFSA Articles relating to flag states, including, interestingly, Article 217 LOSC, n. 1, which requires flag states to take specific enforcement actions in relation to pollution of the marine environment from vessels. See Commission Decision of 15 November 2012, n. 78, recitals 26, 116, 160, 237, 298 and 353. However, none of the other relevant secondary legislation adopted subsequently refers to Article 217 LOSC. It may be the case that the European Commission and the Council of Ministers now take a view that Article 217 LOSC is not particularly relevant in the context of the fight against IUU fishing under Regulation 1005/2008, n. 76.

<sup>84</sup> Commission Implementing Decision of 26 November 2013 identifying the third countries that the Commission considers as non-cooperating third countries pursuant to Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2013/C 346/02), (2013) OJ C 346/2.

<sup>85</sup> Council Implementing Decision of 24 March 2014 establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2014/170/EU), (2014) OJ L 91/43. Subsequently, Sri Lanka was added to the list of non-cooperating third countries subject to sanctions while sanctions against Belize were removed. Council Implementing Decision of 15 December 2014 amending Implementing Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal,

those already formally listed under the Regulation need to show progress with a view to avoiding listing or removing them from the list as non-cooperating third countries.

Sanctions under Article 38 of Regulation 1005/2008, *inter alia*, consist of a wide range of trade measures and those relating to bilateral agreements. Interestingly, the denial of access to ports by vessels authorised to fish is only allowed as one of the emergency measures under Article 36, taken in response to third country measures evidenced to undermine RFMO conservation and management measures, in line with the European Commission's international obligations.

Over the past few years, the Commission's determinations have involved aspects of shared responsibility in several ways. First, the European Commission referred to non-compliance with the same RFMO conservation and management measure by multiple flag states (e.g. the prohibition of transshipment by non-registered vessels under the International Commission for the Conservation of Atlantic Tunas (ICCAT) Recommendation 06-11). Second, in identifying non-cooperating third countries, the Commission referred to the breaches of separate sets of obligations of states in their capacity as flag and coastal states: e.g. Korea and Curaçao were considered to have breached their obligations as flag states in relation to fishing by their vessels in the waters of Ghana, which was found to have failed to discharge obligations as a coastal state. Third, the Commission identified the lack of cooperation between flag and coastal states: e.g. the Philippines and PNG in relation to fishing by Philippine vessels in PNG waters.

Reflecting the need to fill potential gaps by addressing all states implicated in the harmful outcome to a particular fishery or fisheries, the EU and the United States have coordinated their fight against IUU fishing, or at least their actions are converging to some extent.<sup>86</sup> The identification of non-cooperating third countries by the European Commission takes into

---

unreported and unregulated fishing as regards Belize (2014/914/EU), (2014) OJ L 360/53; Council Implementing Decision (EU) 2015/200 of 26 January 2015 amending Implementing Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing as regards Sri Lanka, (2015) OJ L 33/15.

<sup>86</sup> Among other actions, they adopted joint statements on IUU fishing in 2011 and 2012, where they shared the objective of the fight against IUU fishing, committed to improving bilateral coordination and strengthening monitoring and enforcement and confirmed the importance of regional and global actions. Statements are available at [www.ec.europa.eu/commission\\_2010-2014/damanaki/headlines/press-releases/2011/09/20110907\\_jointstatement\\_eu-us\\_iuu\\_en.pdf](http://www.ec.europa.eu/commission_2010-2014/damanaki/headlines/press-releases/2011/09/20110907_jointstatement_eu-us_iuu_en.pdf) and [www.nmfs.noaa.gov/stories/2012/05/docs/joint\\_statement\\_us\\_eu\\_post\\_parliament.pdf](http://www.nmfs.noaa.gov/stories/2012/05/docs/joint_statement_us_eu_post_parliament.pdf).

account the result of the IUU fishing state identification process by the United States.<sup>87</sup> Nevertheless, the states identified are not the same and, in fact, there is a very limited overlap between these two lists.<sup>88</sup> Potentially, the United States might identify one state, while the EU might identify another state in relation to fisheries for the same stock or in the same area.

In 2012, the EU adopted another Regulation dealing with the lack of fisheries conservation and management measures.<sup>89</sup> In accordance with Regulation 1026/2012, the EU may impose sanctions against states allowing non-sustainable fishing, including the imposition of quantitative restrictions on importations of fish from the stock of common interest that have been caught under the control of these countries.<sup>90</sup> The identification of such states is based on the determination of the failure to cooperate in full compliance with the provisions of the LOSC, UNFSA, or other international agreements or norms of international law.

Unlike Regulation 1005/2008, Regulation 1026/2012 has its origin in a particular dispute between the EU and Norway, on the one hand, and Iceland and the Faroe Islands, on the other, over mackerel and herring overfishing in the North-East Atlantic.<sup>91</sup> The EU, together with Norway, accused Iceland and the Faroe Islands of unilaterally imposing unsustainable quotas lacking good will to work towards agreed measures, and leading to the depletion of the fish stock in question. To the contrary, Iceland and the Faroe Islands argued that the change of migration patterns should allow them to have a larger share of the stock.<sup>92</sup> The European Commission adopted trade measures against the Faroe Islands to protect the Atlanto-Scandian herring stock in August 2013.<sup>93</sup> It also announced that it was taking the initial steps towards the application of the Trade Instrument (i.e. Regulation 1026/2012) in relation to a

---

<sup>87</sup> The Commission Decision extensively referred to the United States Department of Commerce Report published in 2011 ('Implementation of Title IV of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, Report to Congress Pursuant to Section 403(a) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006', January 2011), in explaining the identification of each country.

<sup>88</sup> One reason for the lack of coordination in identification may be found in the fact that the United States has identified several EU member states in its reports, including Italy three times in a row.

<sup>89</sup> Regulation (EU) No. 1026/2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing, (2012) OJ L 316/34.

<sup>90</sup> Article 4, *ibid.*

<sup>91</sup> See EU Commission Staff Working Paper, 'Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on certain measures in relation to countries allowing non-sustainable fishing for the purpose of the conservation of fish stocks', 14 December 2011, SEC(2011) 1576 final. See *Atlanto-Scandian Herring* cases, n. 2.

<sup>92</sup> C. Davies, 'Fishermen back sanctions against Iceland over mackerel catch', *The Guardian*, 6 January 2013.

<sup>93</sup> European Commission, 'Commission adopts trade measures against Faroe Islands to protect the Atlanto-Scandian herring stock', press release, 20 August 2013.

dispute with Iceland on the management of the North-East Atlantic mackerel stock.<sup>94</sup> In response to the EU action, the Faroe Islands had a recourse to an arbitral tribunal under Annex VII of the LOSC and a panel of the Dispute Settlement Body of the World Trade Organization (WTO), with a view to requesting that the EU be declared in breach of its obligations under the LOSC and the WTO Agreement, respectively.<sup>95</sup> Eventually, negotiations among the main stakeholders on the management of the Atlanto-Scandian herring stock as well as on the management of mackerel proved to be mostly successful. For herring, coastal states, except for the Faroe Islands, agreed on the total allowable catch and quotas in March 2014.<sup>96</sup> Subsequently, the European Commission and the Faroe Islands agreed on: (1) the lifting of EU sanctions; (2) putting an end to ‘unsustainable fishery’ of the Atlanto-Scandian herring stock by the Faroe Islands; and (3) closing proceedings at the WTO and before the Annex VII tribunal.<sup>97</sup> For mackerel, coastal states, except for Iceland, agreed on the total allowable catch and quotas.<sup>98</sup> Although Iceland did not participate in this agreement concluded in March 2014, subsequently, it unilaterally declared its quota the same as the one reserved for Iceland by other coastal states.<sup>99</sup> Therefore, the dispute between Iceland and other coastal states over the allocation of mackerel was suspended for the time being.

The trade measures taken by the European Commission against the Faroe Islands included an import ban on herring and mackerel from the Atlanto-Scandian stocks, and restrictions on the use of EU ports by vessels fishing for the herring and mackerel stocks. The trade measures concerned not only herring, but also mackerel because, according to the EU, the Faroese fishery for herring was a mixed fishery in some seasons, and herring could be taken as a by-

---

<sup>94</sup> Ibid.

<sup>95</sup> See *Atlanto-Scandian Herring* cases, n. 2.

<sup>96</sup> European Commission, ‘Coastal state consultations on blue whiting and Atlanto-Scandian (Norwegian spring-spawning) herring in the North-East Atlantic for 2014’, press release, 31 March 2014.

<sup>97</sup> European Commission, ‘Herring dispute between European Union and Faroe Islands nears end’, press release, 11 June 2014. The Faroe Islands noted that they had informed other coastal states of Faroese catch limit for herring in 2014 as 40,000 tonnes. See Faroe Islands, ‘Prime Minister welcomes understanding to resolve dispute on EU’s economic measures’, newsletter, 12 June 2014, see [www.mfa.fo/Default.aspx?ID=11730&M=News&PID=25703&NewsID=5705](http://www.mfa.fo/Default.aspx?ID=11730&M=News&PID=25703&NewsID=5705). The figure is much smaller than the original unilaterally-set quota of 105,230 tonnes, but much larger than the catch limit of 21,594 tonnes, set aside by the other coastal states on the basis of the sharing arrangement agreed in 2007. The EU insists that their agreement does not represent a tacit agreement that 40,000 tonnes is the legitimate share of the stock for the Faroe Islands, and it is merely indicative of the fact that the sustainability of the stock is no longer in jeopardy. European Commission, ‘Herring dispute: EU lifts measures against the Faroe Islands’, press release, 18 August 2014.

<sup>98</sup> European Commission, ‘Deal on Mackerel in the North-East Atlantic’, press release, 12 March 2014.

<sup>99</sup> European Commission, ‘European Commission welcomes Iceland’s announcement of mackerel quota for 2014’, press release, 23 April 2014.

catch of its mackerel fishery.<sup>100</sup> As the alleged overfishing of mackerel by Iceland and the Faroe Islands was at the heart of the long-standing disputes among these coastal states, it would not be surprising to see that the issue of mackerel management and that of herring management will be linked to each other if the disputes arise again in the future, potentially giving rise to shared responsibility.<sup>101</sup>

## *5.2 Unilateral actions by RFMOs*

As discussed in section 2, where an RFMO is put in place to regulate fisheries in a particular region, fisheries occurring outside or in contravention of RFMO management regimes could arguably be considered to be a violation of applicable rules (i.e. the LOSC, the UNFSA, or RFMO constitutive instruments or their measures). RFMOs or their members could be held responsible if they adopt measures in disregard of other states' interests that should be recognised under applicable global or regional instruments. In some cases, action not in concert and joint action could give rise to responsibility at the same time.

Regarding action not in concert, many RFMOs have identified states (members, cooperating non-members and non-cooperating non-members) whose action or whose vessels' action undermine the effectiveness of their measures, and have taken action addressing non-compliance or non-cooperation, including: first, consultation with responsible states; second, request for compliance/cooperation; third, port measures; fourth, trade measures; fifth, deprivation of a cooperating non-party status; sixth, requesting delisting of particular vessels flying their flag; seventh, at-sea enforcement; eighth, IUU listing; and ninth, adjustments of

---

<sup>100</sup> Commission Implementing Regulation (EU) No. 793/2013 of 20 August 2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock, (2013) OJ L 223/1, preambular para. 23.

<sup>101</sup> Cf. Information Note from the Irish, United Kingdom, French and Spanish Delegations on North East Atlantic Mackerel Management and Trade Measures, 10 July 2013, 12122/13, PECH 315. Indeed, Norway, which supported the EU measures and intended to introduce a ban on landings of herring from the Faroe Islands if the latter in 2013 should exceed their traditional share of the herring quota, already introduced a ban on landings of mackerel from Icelandic and Faroese vessels as early as 2010. See Norwegian Ministry of Fisheries and Coastal Affairs, press release, 'New measures against irresponsible fisheries of herring and mackerel', 1 August 2013, available at [www.regjeringen.no/en/dep/fkd/press-centre/Press-releases/2013/new-measures-against-irresponsible-fishe.html?id=733091#](http://www.regjeringen.no/en/dep/fkd/press-centre/Press-releases/2013/new-measures-against-irresponsible-fishe.html?id=733091#).

fishing quota.<sup>102</sup> For example, ICCAT has used trade measures extensively against non-member states, identifying a large number of states as their target.<sup>103</sup>

Regarding the form of implementation, interesting practice is found in the Commission for the Conservation of Southern Bluefin Tuna (CCSBT). Although no formal determination of state responsibility occurs, quota ‘pay back’ by CCSBT member states in case of actual or anticipated excess of allocated quotas by their fishing vessels has been attempted from time to time.<sup>104</sup>

### *5.3 Dispute settlement mechanisms*

Disputes involving questions of shared responsibility in fisheries are subject to dispute settlement mechanisms contained in the LOSC, the UNFSA and other global and regional treaties.<sup>105</sup> The compulsory dispute settlement procedures entailing binding decisions, as provided for in the LOSC, were to a great extent followed by the UNFSA and many, but not all, RFMOs.<sup>106</sup> Some new aspects, such as ad hoc expert panels to deal with disputes of a technical nature, were added to the range of potentially available dispute settlement procedures by the UNFSA and some RFMO constitutive instruments.

With regard to dispute settlement procedures entailing binding decisions, while the relevant LOSC provisions generally offer procedures that can accommodate disputes involving shared responsibility, exceptions and limitations to compulsory procedures entailing binding decisions, such as Articles 281, 282 and 297(3) LOSC would complicate the adjudication of fisheries disputes.<sup>107</sup> Notably, limitations on applicability of section 2 of LOSC Part XV to

---

<sup>102</sup> See Y. Takei, ‘Institutional Reactions to the Flag State That Has Failed to Discharge Flag State Responsibilities’ (2012) 59(1) NILR 65, 68-71. An idea to give such an assessment role to a global organisation has not been widely supported. For example, the FAO Voluntary Guidelines assign only a limited role to the FAO in the assessment of flag state performance and subsequent actions. Voluntary Guidelines for Flag State Performance, n. 26, paras. 56-58.

<sup>103</sup> Palma et al., *Promoting Sustainable Fisheries*, n. 9, 229.

<sup>104</sup> Serdy, ‘Accounting for Catch in Internationally Managed Fisheries’, n. 51, 50-54.

<sup>105</sup> An in-depth analysis of dispute settlement procedures under the LOSC goes well beyond the scope of this chapter. For an overview, see, e.g., N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005); S. Rosenne and L.B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. V (Dordrecht: Martinus Nijhoff Publishers, 1989).

<sup>106</sup> Unilateral recourse to dispute settlement procedures entailing binding decisions is not allowed in some global and regional treaties relating to fisheries. See Takei, ‘International Legal Responses to the Flag State in Breach of Its Duties’, n. 74, 297.

<sup>107</sup> Plakokefalos, in his analysis of the dispute settlement procedures in the LOSC, reaches a similar conclusion. On the one hand, he states that the LOSC dispute settlement procedures do not present any peculiar obstacles to



fisheries disputes may lead to a result that DWFNs are subject to compulsory procedures entailing binding decisions, while coastal states are exempted from such procedures, even if both of these states may be responsible for the same harmful outcome.<sup>108</sup> As the UNFSA explicitly refers to Article 297(3) of the LOSC, this limitation also applies under the UNFSA.<sup>109</sup>

Invocation of shared responsibility would be complicated when the EU is involved. Whereas the declarations concerning the competence of the EU and member states with regard to the LOSC are silent on dispute settlement provisions, UNFSA dispute settlement provisions apply to both the EU and its member states in accordance with its declarations. In the *Swordfish* dispute between Chile and the EU, Chile brought the case to ITLOS against the (then) European Community, and not against any individual member state, although the activities of Spanish vessels were at the heart of the dispute.<sup>110</sup> However, one may envisage that third parties bring fisheries-related cases in a different manner in other circumstances, possibly addressing EU member states in addition to, or instead of, the EU itself. For example, third parties might bring claims against both the EU and its member state(s), in situations of shared competence. Third parties may accuse the EU and its member state(s) of different aspects of a single harmful outcome, or bring claims against both in case of doubt about the division of competences within the EU legal system. Indeed, if information as to who has responsibility in respect of any specific matter is requested pursuant to Article 6(2) of Annex IX to the LOSC, failure to do so within a reasonable time or the provision of contradictory

---

the adjudication of issues pertaining to shared responsibility. On the other hand, in discussing procedural aspects of the LOSC dispute settlement procedures, including problems associated with limitation to compulsory procedures under Article 297 as well as the application of Articles 281 and 282 of the LOSC, n. 1, he notes that the limitation of application of compulsory dispute settlement procedures ‘crucially affects aspects of the LOSC, such as fisheries’, in the context of shared responsibility. Plakokefalos, ‘Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention’, n. 7, 387-395 and 404-405. Importantly, he points to the problem caused by the application of Article 281(1) LOSC that ‘may lead to a fragmented treatment of the case leading to dubious results’ and proposes that Article 281(1) be interpreted to mean that ‘*all* parties to the dispute must be parties to the agreement that excludes the application of the LOSC [dispute settlement procedures]’ (emphasis in original at 390-391). It should be noted that the concern of fragmentation caused by the LOSC dispute settlement provisions has been discussed extensively and many, including ICJ and ITLOS judges, emphasise that this concern has been (largely) unfounded. See speeches by ITLOS President Yanai and ICJ Judge Greenwood at the United Nations General Assembly on the occasion of the commemoration of the thirtieth anniversary of the opening for signature of the LOSC in 2012, UN Doc. A/67/PV.49 (2012), at 17-18 and 21-22.

<sup>108</sup> On this issue, see also Plakokefalos, *ibid.*, 389-390. The limitation relates to ‘sovereign rights’ or ‘their exercise’; in the EEZ, coastal states have ‘sovereign rights for the purpose of ... conserving and managing the natural resources’, Article 56(1)(a) LOSC, *ibid.*

<sup>109</sup> Article 32 UNFSA, n. 6.

<sup>110</sup> See also F. Hoffmeister, ‘Litigating against the European Union and Its Member States: Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?’ (2010) 21 EJIL723, at 738 and 745. *Swordfish* case before ITLOS, n. 2.

information would result in joint and several liability of the EU and its member states concerned.<sup>111</sup>

The breach of an international obligation by an RFMO has been, or may potentially be, discussed at some RFMOs. Two recent RFMO constituent instruments provide for mechanisms to examine the legality of conservation and management measures and of the use of objection procedures for such measures.<sup>112</sup> In these processes, these RFMOs establish mechanisms involving third parties to consider: first, whether or not the use of objection procedures<sup>113</sup> by a party or parties is in accordance with the provisions of the constitutive instruments in question, in particular whether or not equivalent measures are adopted by the party or parties in question; and second, whether or not the conservation and management measure in question unjustifiably discriminates in form or in fact against a particular state, and whether or not it is inconsistent with the LOSC, the UNFSA and respective constituent instruments. In both RFMOs, the outcome of third party deliberation – ‘findings and recommendations’ and ‘advice’ – is, as their names suggest, non-binding. Nevertheless, such findings would carry political importance and the RFMOs and their objecting parties would find it difficult to simply disregard them.

In the case of the South Pacific RFMO, a Review Panel was established for CMM 1.01 (Conservation and Management Measure for *Trachurus murphyi*). The Panel gave findings and recommendations regarding the Russian Federation’s objection.<sup>114</sup> In this process, the

---

<sup>111</sup> SRFC Advisory Opinion, n. 3, para. 174.

<sup>112</sup> The Auckland Convention provides for a review panel to examine the use of objection procedures, Article 17(5) Auckland Convention, n. 35. The North Pacific Fisheries Commission to be established under the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean will provide a forum to discuss the use of objection procedures including advice on the matter in question by invited experts from non-member states with sufficient knowledge of international law related to fisheries and of the operation of RFMOs. Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, Tokyo, 24 February 2012, in force 19 July 2015, available at [www.sprfmo.int](http://www.sprfmo.int) (NPFC Convention), Article 9(1)(g).

<sup>113</sup> In many RFMOs, parties are entitled to opt out of conservation and management measures adopted by these RFMOs under their constitutive instruments, with a view to excluding, for their vessels, the legally binding force of the measures in question (‘objection procedures’). See, generally, H.S. Schiffman, *Marine Conservation Agreements: The Law and Policy of Reservations and Vetoes* (Leiden: Martinus Nijhoff Publishers, 2008). Under recently adopted constitutive instruments or recent amendments to constitutive instruments, the use of objection procedures is often constrained by several factors. Most notably, to use such procedures, the parties need to show that they consider that the measure in question unjustifiably discriminates in form or in fact against them or that the measure is inconsistent with the LOSC, the UNFSA or respective constitutive instruments. Article 17(2) Auckland Convention, *ibid.*; Article 9(1)(c) and (e) NPFC Convention, *ibid.*

<sup>114</sup> Findings and Recommendations of the Review Panel, 5 July 2013, in Proceedings Conducted by the Review Panel Established under Article 17 and Annex II of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean with regard to the Objection by the Russian Federation to a decision of the Commission of the South Pacific Regional Fisheries Management Organisation, available at [www.southpacificrfmo.org/objections](http://www.southpacificrfmo.org/objections). The Russian Federation decided to follow the recommendations of the

Panel concluded that the failure to allocate any catch to the Russian Federation had resulted in unjustifiable discrimination against the Russian Federation, but the relevant provisions of CMM 1.01 were not inconsistent with the provisions of the Auckland Convention, or other relevant international law as reflected in the LOSC or the UNFSA.<sup>115</sup> If the Panel had found the measure inconsistent with the provisions of the Auckland Convention or other relevant international law, it might have needed to address the responsibility of the South Pacific RFMO, its member states or both.

Apart from a Review Panel at the South Pacific RFMO and a Commission meeting to discuss this matter at the North Pacific Fisheries Commission, the objecting member may also institute proceedings under dispute settlement procedures under the respective conventions. In these procedures, objecting states and other states may seek legally binding decisions on the legality of measures and the use of objection procedures. However, it should be noted that the dispute settlement procedures under these conventions are formulated to address inter-state disputes and do not allow for proceedings against RFMOs.<sup>116</sup>

## 6. Conclusion

Questions of shared responsibility are likely to arise in the context of fisheries. In fact, practice, albeit limited, shows that multiple states have been identified simultaneously for the breach of obligations relating to fisheries, either by breaching the same obligation (e.g. the obligation to take necessary conservation measures for high seas fisheries resources as flag states), or by failing to discharge different sets of obligations (e.g. the obligation of a flag state to take necessary conservation measures in respect of its vessels operating in a foreign EEZ, and the obligation of a coastal state to take necessary conservation and management measures applicable to its EEZ). Shared responsibility in this field would most likely involve multiple flag states and, in some cases, multiple coastal states at the same time. RFMOs may also be held responsible for their internationally wrongful act, for example, through the review of the consistency of their conservation and management measures with their constitutive instruments and other relevant rules of international law. Nevertheless, processes

---

Panel. South Pacific Regional Fisheries Management Organisation, 'Russian Federation accepts Recommendations', see [www.southpacificrfmo.org/russian-federation-accepts-recommendations](http://www.southpacificrfmo.org/russian-federation-accepts-recommendations).

<sup>115</sup> Findings and Recommendations of the Review Panel, *ibid.*, para. 93.

<sup>116</sup> Apart from provisions relating to fishing entities, these conventions refer to the *mutatis mutandis* application of the provisions of Part VIII of the UNFSA, n. 6, which in turn refers to Part XV of the LOSC, n. 1.

to hold RFMOs responsible are not adequately provided for in global or regional fisheries instruments. Therefore, compared with the responsibility of individual states (and the EU), a gap exists regarding the processes to invoke the international responsibility of RFMOs where shared responsibility arises for RFMOs and states.<sup>117</sup>

In terms of actors conducting assessments, the United States and the EU, as well as RFMOs, have been actively identifying groups of states in connection with IUU fishing. All of these identification processes, in particular the EU and RFMOs, have a good potential to involve shared responsibility. Coexistence of multiple identification bodies and criteria, however, implies the possibility of partially overlapping and potentially contradictory identifications, a scenario which may weaken the impact of their actions.

With regard to the implementation of responsibility, while there are a limited number of examples of self-imposed pay-back/quota adjustments, the bulk of examples of implementation are externally-driven: sanctions such as trade restrictive measures (including their threats) are occasionally used in inducing the strengthening of regulatory frameworks, and enhanced enforcement actions against IUU fishing. None of the examples of processes discussed in this chapter seems to suggest any new phenomenon in relation to the implementation of shared responsibility as opposed to that of individual responsibility. The existing practice of the implementation of shared responsibility is no different from the traditional individual responsibility model. However, this aspect of shared responsibility should be further examined in the light of (future) practice, inter alia, where the calculation of compensation for the loss of fisheries resources is involved. In such a case, we need to investigate how responsibility will be allocated among the responsible actors concerned.

---

<sup>117</sup> See also Birnie et al., *International Law and the Environment*, n. 32, 741.