

Part V

Options and Pathways to Strengthen
International Fisheries Law
in an Era of Changing Oceans



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1. INTRODUCTION

AS ADVANCED IN Chapter 1 of this volume, the domain of international fisheries law has made significant progress since the 1990s, in particular through the adoption and establishment of international instruments and bodies at the global and regional levels. While this has unquestionably strengthened international fisheries law, global fish stocks remain in a troubling state. Fisheries management authorities face a wide array of internal and external challenges, as well as the critical limitations associated with States that are unable or unwilling to comply with their international obligations.

A multitude of options and pathways to address these challenges and limitations has been identified over the years. Some are laid down in legally binding or non-legally binding fisheries instruments or acts of regional fisheries management organizations or arrangements (RFMO/As). Others have the form of recommendations and were adopted by a diverse number of bodies and fora, including the United Nations General Assembly (UNGA) through its annual ‘Sustainable Fisheries’ Resolutions, the (Resumed) Fish Stocks Agreement Review Conferences – whose next resumption is provisionally scheduled for 2021¹ – the ICSP,² panels established to review the performance of RFMO/As, fishing industry associations,³ the ministerially-led Task Force

¹ See the Report of the 13th (2018) round of informal consultations of States Parties to the Fish Stocks Agreement (ICSP), para. 87.

² See note 1.

³ E.g. the best practices advocated by the International Seafood Sustainability Foundation (ISSF) available at iss-foundation.org/.

on IUU Fishing on the High Seas (High Seas Task Force),⁴ the Organization for Economic Co-operation and Development (OECD)⁵ and independent associations.⁶ In light of these myriad recommendations and the significant repetition and overlap among them, it may even be opportune to create order and overview by means of a consolidation effort.

In view of the recent commencement of negotiations towards the third implementation agreement of the LOS Convention⁷ – the BBNJ Implementation Agreement⁸ – the question logically arises as to whether this represents an option and pathway to strengthen international fisheries law. Unquestionably, fishing in areas beyond national jurisdiction (ABNJ) – the high seas and the international sea-bed beyond (outer) continental shelves (the ‘Area’) – is among the main threats, if not the main threat, to the conservation and sustainable use of marine biodiversity in ABNJ. The negotiation-mandate is nevertheless subject to the constraint that the negotiations “and its result should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”.⁹ As regards the impacts of fishing in ABNJ, the rationale of this constraint is that these impacts must be addressed in the existing domain of international fisheries law. However, even if it is indeed true that delegations primarily had the domain of international fisheries law in mind when they negotiated the constraint, this is by no means clear from its wording. Accordingly, the constraint may be invoked for numerous other domains and bodies, both within and outside the domain of the international law of the sea, for instance international intellectual property law. On the other hand, the words “should not undermine” still give delegations a considerable margin of appreciation to ensure at least some impact on the domain of international fisheries law.¹⁰ The authors of Chapters 9 (Dunn, Ortuño Crespo and Caddell) and 10 (Marsden) are hopeful that delegations will do exactly that in relation to area-based management tools and environmental assessment.

⁴ See Closing the Net: Stopping Illegal Fishing on the High Seas (High Seas Task Force: 2006).

⁵ E.g. Strengthening Regional Fisheries Management Organisations (OECD: 2009).

⁶ E.g. Recommended Best Practices for Regional Fisheries Management Organizations (Chatham House: 2007).

⁷ United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 3).

⁸ The implementation agreement to the LOS Convention on “the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction” is envisaged by UNGA Res 72/249 of 24 December 2017.

⁹ *Ibid.*, para. 7.

¹⁰ See also R Barnes “The Proposed LOSC Implementation Agreement on Areas Beyond National Jurisdiction and Its Impact on International Fisheries Law” (2016) 31 *International Journal of Marine and Coastal Law* 583–619; and Z Scanlon “The Art of ‘Not Undermining’: Possibilities within Existing Architecture to Improve Environmental Protections in Areas beyond National Jurisdiction” (2018) 75 *ICES Journal of Marine Science* 405–416.

2. INTERCONNECTEDNESS AND INTERNATIONAL FISHERIES LAW

While the interconnectedness of international fisheries instruments and bodies has advanced significantly over the years, the effectiveness or problem-solving capacity of the domain of international fisheries law can be enhanced further by steadily broadening the set of relevant institutions and other actors. Increasing efforts in cooperation and coordination between these institutions and other actors will nevertheless be required to ensure internal coherence. This will constitute a significant element of a broader strategy to respond to climate change-induced impacts upon fish and their associated ecosystems, including projected changes in species productivity, composition, distribution and abundance. Cooperation and coordination in relation to the scientific research that is necessary to predict such changes will be crucial, among other things for reasons of cost-efficiency and the limited expertise that is available.

While some regional fisheries bodies have been established under an overarching body or system – such as the United Nations Food and Agriculture Organization (FAO) or the Antarctic Treaty System – most are entirely separate, autonomous bodies. Thus Molenaar (Chapter 6) highlights that the uniqueness of individual RFMO/As is reflected, *inter alia*, in the number and composition of their participants as well as their rules and practices concerning participation. As concluded by Harrison (Chapter 5), however, a growing ethos towards interconnectedness between regional fisheries bodies has led to the emergence of a system of regional fisheries governance. This has provided a pathway to improved fisheries management through the exchange of data and enhanced enforcement capacity, through the sharing of lists of illegal, unreported and unregulated (IUU) fishing vessels and information about their whereabouts and practices. Cross-fertilization between regional fisheries bodies should thus be encouraged further. This may ultimately prove to be a particularly important pathway to improved fisheries governance, especially as the productivity, composition, distribution and abundance of important fish stocks are increasingly impacted by climate change and associated processes. As highlighted by Rayfuse (Chapter 11), closer cooperation and coordination between RFMO/As will become increasingly significant as stocks begin to straddle regulatory boundaries. While this could be facilitated through bilateral or multilateral arrangements, Stokke (Chapter 4) also highlights that diffusion of best practices among regional fisheries bodies is enhanced by overlaps in participation.

While RFMO/As are increasingly interacting with each other to positive effect, the scope for strengthening international fisheries law through its interconnections with alternative domains of international law has generally been little explored. Many chapters in this volume therefore canvas the potential role and contribution of such other specialized domains – such as international trade law, international environmental law and the international law on merchant shipping, maritime labour standards, human rights and transnational organized crime – in addressing the manifold challenges and limitations faced

by international fisheries law. Here too, the solution lies largely in an acknowledgement of the autonomy of these domains and the need for cooperation and coordination to ensure a mutually satisfactory outcome of the different balances of interests represented within them.

Interactions with alternative domains of international law could represent a further pathway to strengthening current fisheries provisions, as advocated further in Chapters 7 (Caddell), 8 (Scott) and 9 (Dunn, Ortuño Crespo and Caddell). Particular advantages are apparent in promoting strategic alignments with institutions more closely associated with international environmental law. This has particular merit in the context of data-sharing initiatives, where RFMO/As often lack fisheries-independent data concerning their areas of operation, while multilateral environmental agreements (MEAs) frequently lack data from fisheries which, as noted above, constitute arguably the most significant anthropogenic activity impacting upon these ecosystems. With both sets of institutions holding complementary information that has not always been freely available to the other, access to such information may enable more holistic management in support of the respective objectives of these sectoral regulators. This has also enabled the development of further synergies, most notably a closer alignment between the protected areas established by MEAs and fisheries restrictions adopted by particular RFMO/As, strikingly exemplified by the cooperation between the North-East Atlantic Fisheries Commission (NEAFC) and the OSPAR Commission. Interactions of this nature have also been identified as a pathway for strengthening international fisheries law in other influential fora, such as the BBNJ Process and the UNGA Sustainable Fisheries Resolutions. While such synergies remain dependent upon the unique regulatory conditions that vary markedly between individual regions, it is apparent that considerable operational advantages can be forthcoming in pursuing this particular pathway.

3. THE ECOSYSTEM APPROACH TO FISHERIES MANAGEMENT

The ecosystem approach to fisheries management is generally accepted by the international community and has been integrated explicitly or implicitly into most international fisheries instruments adopted since the 1990s and adopted by most RFMO/As, especially those established in the wake of the Fish Stocks Agreement.¹¹ Operationalizing this approach is nevertheless fraught with problems. A prominent example in this regard are the persistent problems posed by bycatch and discards. In view of the disappointing progress towards addressing these issues in many parts of the world, Scott (Chapter 8) proposes the development of a global legally binding instrument that would contain minimum

¹¹ 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 of 4 August 1995 (2167 UNTS 3).

standards for parties, a global oversight mechanism and clear guidance for RFMO/As.

Rayfuse (Chapter 11) calls for the reframing and adaptation of precautionary and ecosystem approaches to fisheries management in light of climate change. As a first step, RFMO/As will need to promote and then utilize scientific research that focuses on understanding the impacts of climate change and the broader environmental and climate-related stresses on the fish stocks they manage. This call is echoed by Cheung, Lam, Ota and Swartz (Chapter 2), who also argue that greater consideration of local fishing conditions is required, given that the impacts of climate change on stocks is highly likely to create and perpetuate inherent inequalities between individual fishers and States. This re-oriented scientific basis will then have to be reflected in strategies, stock assessments and key fisheries measures such as total allowable catches (TACs) and allocations of fishing opportunities. A considerable degree of operational flexibility to respond to changing conditions will be increasingly required not only for RFMO/As, but other multilateral bodies regulating marine resources. This is particularly apparent in the context of area-based management tools (ABMTs), which remain largely static designations, for which Dunn, Ortuño Crespo and Caddell (Chapter 9) advocate a greater use of emerging management approaches to promote further dynamism in spatial regulation.

Improving the available panorama of scientific information evidently contributes to more informed decision-making and improved fisheries management. Thus Dunn, Ortuño Crespo and Caddell (Chapter 9) further highlight the need to acquire significant data concerning not only the status of fish stocks, but also to achieve as full an inventory as possible of associated species and their habitat preferences in order to minimize conflicts and thus establish more effective ABMTs. Similarly, Marsden (Chapter 10) argues that current participatory and decision-making tools can be strengthened considerably by adopting clearer obligations towards the more widespread use of environmental assessment. At present, it is unclear when such assessments ought to be conducted and what form they should take – both for marine-based projects more generally and for fisheries specifically – resulting in highly variable practices between individual States concerned with the management of common stocks. Similar problems are encountered in the purported establishment of protected areas in ABNJ. A further pathway to strengthening the implementation of the ecosystem approach to fisheries management is therefore through the identification of standardized methodologies and explicit guidance on the appropriate conditions under which environmental assessment and spatial management should proceed.

4. COMPLIANCE AND ENFORCEMENT

As argued in Chapter 1, the challenges related to compliance and enforcement in international fisheries law are rooted in the sovereign equality of States, the

consensual nature of international law and the principle of *pacta tertiis*. As part of the “comprehensive and integrated approach” advocated by the IPOA-IUU,¹² States are encouraged to invoke an array of jurisdictional grounds in order to exert pressure on unwilling or non-complying States. As argued by van der Marel (Chapter 13), the use of market power has considerable potential to enhance the effectiveness of international fisheries law. Care should nevertheless be taken to ensure fairness, non-discrimination, transparency and meaningful consideration of the rights and interests of those affected, as counselled by Churchill (Chapter 14).

Klein (Chapter 15) sees particular opportunities in relation to technological developments, holding flag States accountable – whether through dispute settlement mechanisms or direct intervention – and further efforts to agree on consequences for non-compliance. Prospects also exist for an enhanced role for private actors, such as environmental non-governmental organizations. As detailed by Massarella (Chapter 16), there appears to be shift away from unsolicited direct action, towards undertaking compliance-related activities within the general framework of the law – for instance through evidence-gathering – notably in partnership with national and international authorities. However, the role of private actors in enforcement activities remains more ambiguous and contentious, although as amply demonstrated by the unlamented demise of the notorious *Thunder*, these interventions are not without great practical utility. There is accordingly considerable scope for developing this pathway further, and establishing clearer principles and procedures underpinning the prospective involvement of (quasi-) private actors, given that enforcement actions by orthodox maritime authorities have been unable to prevent IUU fishing fleets operating with relative impunity.

In a similar vein, there is also a strong case for expanding the traditional nexus of instruments combating IUU fishing to establish clearer obligations upon those providing ancillary services to fishing vessels. This remains an intriguing but under-utilized approach. As argued by Caddell, Leloudas and Soyer (Chapter 17), further scrutiny of the industries that operate concentrically around the fishing sector, such as financial and insurance services, transshipment and other forms of material support, could be subject to additional scrutiny so as to increase the risks and costs associated with IUU fishing and to inhibit the opportunity for and attraction of such activities. Improving labour standards also has an under-appreciated role to play in this respect, although as Caddell advocates (Chapter 7), this should be pursued as a distinct objective in its own right for which a number of regulatory pathways could be further advanced, rather than (as current practices indicate) merely aggregating responses to this problem within the already congested umbrella conglomeration of ‘IUU fishing’.

¹²International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 2 March 2001 (available at www.fao.org/fi), para. 9.3.

Likewise, the toolkit provided by alternative regimes presents intriguing possibilities for strengthening fisheries provisions, as are being tentatively explored on a global, regional and domestic basis. Thus as Stokke (Chapter 4) and Caddell, Leloudas and Soyer (Chapter 17) argue, a greater use of extra-territorial enforcement opportunities, such as the United States Lacey Act,¹³ provides a pathway for the imposition of intimidating sanctions against fisheries infractions where domestic provisions in other jurisdictions have proved ineffective. Moreover, these authors also point to the increased focus upon IUU fishing within INTERPOL, whose procedures and operational tools provide a helpful pathway towards vital intelligence-gathering and information-sharing. These in turn facilitate the pursuit of IUU fishing vessels and actions against the ports used by them, diminishing the safe havens available for such vessels to ply their illicit trade. Moreover, the toolkit of transnational organized crime prevention provides a further and under-utilized pathway to pursue the ultimate profiteers from IUU fishing. While this route faces considerable challenges – not least a lack of connectivity between the concepts of illegal fishing and fisheries-based illegality – a growing number of States are increasingly seeking to facilitate this approach domestically.

Finally, a number of chapters highlight the under-utilized potential of international dispute resolution mechanisms as an option and pathway to strengthen international fisheries law. This could for instance be pursued to ensure enhanced flag State accountability or to obtain clarification on particular aspects of the flag State's obligation to exercise effective jurisdiction and control over vessels flying its flag and the implications of non-compliance with these aspects, the rules and practices of RFMO/As concerning participation and allocation, and their competence to impose trade measures against non-Members in light of these rules and practices.

¹³ 16 U.S.C. §§3371–3378.

