

Part I

Introduction



# 1

## *International Fisheries Law: Achievements, Limitations and Challenges*

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### 1. INTRODUCTION

**I**NTERNATIONAL FISHERIES LAW is the domain (or: ‘rule-complex’) of international law that relates specifically to the conservation, management and/or development of marine capture fisheries. It consists of substantive norms (e.g. rights, obligations and objectives), substantive fisheries standards (e.g. catch restrictions) as well as institutional rules and arrangements (e.g. mandates and decision-making procedures). International fisheries law is part of public international law and can also be seen as a branch or part of the domain of the international law of the sea. The origins of international fisheries law can be traced back to the end of the 19th century, when North Sea coastal States adopted multilateral rules on fisheries enforcement at sea, and the United States unsuccessfully asserted coastal State jurisdiction for the purpose of the conservation of fur seals in high seas areas adjacent to its territorial sea.<sup>1</sup>

The cornerstone in the current global jurisdictional framework for marine capture fisheries is provided by the LOS Convention,<sup>2</sup> which divides seas and oceans in maritime zones and specifies the basic rights and obligations of States therein. The LOS Convention regulates the exercise of entitlements to fishing that States have in their capacities as coastal or flag States through various key obligations. Whereas coastal States have exclusive access and jurisdiction over fisheries resources in essentially all their maritime zones,<sup>3</sup> the two main entitlements of flag States are their right to fish on the high seas, and access to the

<sup>1</sup> Y Takei *Filling Regulatory Gaps in High Seas Fisheries* (Brill, Leiden: 2013) 14–16.

<sup>2</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (1833 UNTS 3).

<sup>3</sup> Arts. 2(1), 49(1), 56(1)(a) and 77(4) of the LOS Convention.

surplus of the total allowable catch (TAC) in exclusive economic zones (EEZs) of coastal States.<sup>4</sup>

The general obligations included in the LOS Convention have been built upon by a suite of global fisheries instruments, in particular the Fish Stocks Agreement,<sup>5</sup> legally binding and non-legally binding instruments adopted by the United Nations Food and Agriculture Organization (FAO) – for instance the Compliance Agreement,<sup>6</sup> the PSM Agreement,<sup>7</sup> the Code of Conduct<sup>8</sup> and the IPOA-IUU<sup>9</sup> – as well as certain (parts of) United Nations General Assembly (UNGA) Resolutions. As a result, these obligations have now developed into the following:

1. to avoid over-exploitation of target species by setting a science-based TAC, which strives for Maximum Sustainable Yield as qualified by the precautionary approach;
2. to strive for the optimum utilization of target species within the EEZ by providing other States with access to the surplus of the TAC;
3. to pursue an ecosystem approach to fisheries (EAF), which often focuses in particular on (a) predator-prey relationships; (b) impacts of fisheries on non-target species and the ecosystem as a whole; and (c) impacts of oceanographic or climate processes, or pollution, on fish stocks;
4. to cooperate in relation to transboundary fish stocks and fish stocks that occur exclusively on the high seas (further “discrete high seas fish stocks”); and
5. to exercise effective jurisdiction and control over a State’s own vessels.

The LOS Convention, the Fish Stocks Agreement and FAO’s fisheries instruments are predominantly concerned with establishing the jurisdictional framework. They do not contain substantive fisheries measures such as catch restrictions through TACs, allocations of fishing opportunities through national quotas, gear restrictions, or temporal/seasonal or area-based measures (e.g. closed areas). Actual fisheries regulation is conducted by States acting individually or collectively. The primary means for collective regulation is through regional fisheries management organizations or arrangements (RFMO/As), which have

<sup>4</sup> Arts. 62(2) and 116 of the LOS Convention.

<sup>5</sup> 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).

<sup>6</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993 (2221 UNTS 91).

<sup>7</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 22 November 2009 (available at [www.fao.org/Legal](http://www.fao.org/Legal)).

<sup>8</sup> Code of Conduct for Responsible Fisheries of 31 October 1995 (available at [www.fao.org/3/a-v9878e.pdf](http://www.fao.org/3/a-v9878e.pdf)).

<sup>9</sup> International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 2 March 2001 (available at [www.fao.org/fi](http://www.fao.org/fi)).

the mandate to impose legally binding fisheries conservation and management measures on their members or participants.

RFMO/As are designated by the Fish Stocks Agreement as the preferred vehicles for the conservation and management of straddling fish stocks (i.e. stocks occurring within the maritime zones of one or more coastal States and on the high seas) and highly migratory fish stocks (e.g. tuna).<sup>10</sup> The adoption and entry into force of the Fish Stocks Agreement, in tandem with mounting concerns over the impacts of bottom-fishing on benthic habitats and deep-sea species since the late 1990s, have steadily led to the filling of geographical gaps in full high seas coverage with RFMO/As and the modernization of the constitutive instruments of existing RFMO/As. In addition, many existing RFMOs have conducted performance reviews. Some gaps in geographical coverage nevertheless remain and the performance of RFMO/As continues to be a concern.<sup>11</sup>

## 2. THE FRAGMENTED AND NON-HIERARCHICAL NATURE OF INTERNATIONAL FISHERIES LAW

As suggested above, international fisheries law is noticeably fragmented and non-hierarchical, in a similar manner to public international law more generally.<sup>12</sup> At the global level, both the UNGA and FAO – principally through its Committee on Fisheries (COFI) – have contributed to the development of international fisheries law. Neither the LOS Convention nor the Fish Stocks Agreement establish an overall decision-making body, but meetings of parties to these treaties have been held on a near-annual basis since their entry into force. Whereas the Meeting of States Parties to the LOS Convention (SPLOS) deals largely with issues that are essentially administrative in nature and not relevant to marine capture fisheries, the ICSP<sup>13</sup> were mainly intended to consider the regional, subregional and global implementation of the Agreement.<sup>14</sup> In addition, the (Resumed) Fish Stocks Agreement Review Conferences held in 2006, 2010 and 2016 pursuant to Article 36 of the Fish Stocks Agreement,

<sup>10</sup>See especially Arts. 8–14.

<sup>11</sup>See Chapter 5, Section 2 of this volume (Harrison). Note also that the 14th (2019) round of informal consultations of States Parties to the Fish Stocks Agreement (ICSP) will be devoted to performance reviews of RFMO/As (cf. the 2017 UNGA ‘Sustainable Fisheries’ Resolution (UNGA Res. 72/72 of 5 December 2017), para. 55).

<sup>12</sup>See the Report of the Study Group of the International Law Commission “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” (doc. A/CN.4/L.702 of 18 July 2006).

<sup>13</sup>See note 11.

<sup>14</sup>See the Report of ICSP1 (2002; doc. ICSP/UNFSA/REP/INF.1 of 9 October 2002), para. 1. The 2016 Resumed Fish Stocks Agreement Review Conference recommended that the ICSP “be dedicated, on an annual basis, to the consideration of specific issues arising from the implementation of the Agreement, with a view to improving understanding, sharing experiences and identifying best practices for the consideration of States parties, as well as the General Assembly and the Review Conference” (Doc. A/CONF.210/2016/5 of 1 August 2016, para. 15 of the Outcome (Annex)).

have assessed the adequacy and effectiveness of the provisions of the Agreement and proposed means to strengthen the substance of and methods for their implementation.

A much larger and diverse group of fisheries bodies operates at the regional level. In addition to the distinctions between RFMOs and RFMAs,<sup>15</sup> and between tuna-RFMOs and non-tuna RFMO/As, there are also a considerable number of regional fisheries bodies that do not qualify as RFMO/As for lack of a mandate to impose legally binding conservation and management measures on their members or participants (e.g. the Western Central Atlantic Fishery Commission (WECAFC)). Furthermore, some regional fisheries bodies are established within the framework of FAO, and some have functions or characteristics that make them ‘more than an RFMO’.<sup>16</sup>

Apart from the regional fisheries bodies established within the framework of the FAO (e.g. WECAFC and the Indian Ocean Tuna Commission (IOTC)),<sup>17</sup> and the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR) established in the context of the Antarctic Treaty System, regional fisheries bodies are entirely separate, autonomous bodies without formal hierarchical relationships with overarching bodies. Nevertheless, it can be assumed that any recommendations of the UNGA, COFI, ICSP or the (Resumed) Fish Stocks Agreement Review Conferences specifically directed at members or participants of RFMO/As will be given serious consideration by them. The UNGA’s recommendations relating to high seas bottom-fishing were a case in point.<sup>18</sup> Moreover, members or participants of RFMO/As with competence over straddling or highly migratory fish stocks that are also parties to the Fish Stocks Agreement are bound not only by the objectives of the Agreement but also the features, functions and other guidance for RFMO/As set out in Articles 8–14 of the Agreement.

As noted at the outset of this section, public international law as a whole is also highly fragmented and generally non-hierarchical. It is therefore appropriate to assume there are no hierarchical relationships between the domain of international fisheries law and other distinct, specialized domains of international law. In case of an overlap in substantive and/or geographical competence, actual conflicts in the exercise of such competence can be avoided by

<sup>15</sup> See Chapter 5, Section 3 of this volume (Harrison).

<sup>16</sup> See R Billé, L Chabason, P Drankier, EJ Molenaar and J Rochette “Regional Oceans Governance. Making Regional Seas Programmes, Regional Fishery Bodies and Large Marine Ecosystem Mechanisms Work Better Together” (*UNEP Regional Seas Reports and Studies* No. 197: 2016; available at [www.unenvironment.org/resources/report/regional-oceans-governance-making-regional-seas-programmes-regional-fishery-bodies](http://www.unenvironment.org/resources/report/regional-oceans-governance-making-regional-seas-programmes-regional-fishery-bodies)), 29–34. See also Chapter 6, Section 2 of this volume (Molenaar).

<sup>17</sup> Based on respectively Arts. VI and XIV of the Constitution of the Food and Agriculture Organization of the United Nations of 16 October 1945 (available at [www.fao.org/Legal](http://www.fao.org/Legal)).

<sup>18</sup> E.g. the proactive approach pursued by the North-East Atlantic Fisheries Commission described in EJ Molenaar “Addressing Regulatory Gaps in High Seas Fisheries” (2005) 20 *International Journal of Marine and Coastal Law* 533–570, at 538–539.

coordination – whether ad hoc or through dedicated mechanisms – or so-called ‘primacy arrangements’, as has increasingly framed the practices of multilateral environmental agreements in their dealings with each other. Primacy arrangements can be explicitly included in the constitutive instruments of relevant bodies<sup>19</sup> or in more informal arrangements agreed between them, for instance by means of a memorandum of understanding.

Specialized domains of international law are often in a constant state of flux due to a wide array of factors, including the evolving needs and views of the States involved, technological, economic or geopolitical developments, emerging new problems, deteriorating existing problems, or the desire to address existing problems by new regulatory tools or approaches. The potential for duplication or working at cross-purposes in such a fragmented and dynamic system is therefore quite high. States also use this system for so-called ‘forum shopping’ in order to achieve their desired result. Well-known examples in the context of marine capture fisheries are attempts to list commercially exploited fish species on the Annexes of CITES.<sup>20</sup> The primary motivation of the initiating States was their view that the balance of interests in RFMO/As was overly weighted towards utilization, and that progress in conservation could only be achieved by recourse to the more conservation-oriented balance of interests in CITES.

While interaction and conflicts between the domains of international fisheries law on the one hand, and international trade law and international environmental law on the other hand have existed for some time, new domains such as the international law on merchant shipping, maritime labour standards, human rights and transnational organized crime have entered into the fold more recently.<sup>21</sup>

### 3. ACHIEVEMENTS, LIMITATIONS AND CHALLENGES

The pace at which international fisheries law has developed since the 1990s is quite remarkable; a trend apparent not only at the global level but also at the

<sup>19</sup>E.g. the recognition of the primacy of the International Whaling Commission in Art. VI of the CAMLR Convention (Convention on the Conservation of Antarctic Marine Living Resources of 20 May 1980 (1329 UNTS 47; also available at [www.ccamlr.org](http://www.ccamlr.org))) or the acknowledgement that the OSPAR Commission does not have competence to regulate marine capture fisheries (Art. 4(1) of Annex IV to the OSPAR Convention (Convention for the Protection of the Marine Environment of the North-East Atlantic of 22 September 1992 (2345 UNTS 67, as amended); consolidated text available at [www.ospar.org](http://www.ospar.org))).

<sup>20</sup>Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973 (993 UNTS 243). For instance, Atlantic bluefin tuna (*Thunnus thynnus*) and Patagonian and Antarctic toothfish (*Dissostichus* spp.). See S Guggisberg *The Use of CITES for Commercially-exploited Fish Species – A Solution to Overexploitation and Illegal, Unreported and Unregulated Fishing?* (Springer, Heidelberg: 2016) and MA Young *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press, Cambridge: 2011) 134–188.

<sup>21</sup>See Chapters 4 (Stokke), 7 (Caddell), 8 (Scott), 14 (Churchill) and 17 (Caddell, Leloudas and Soyer) of this volume. See also the 2017 UNGA Sustainable Fisheries Resolution, note 11.

regional level. Since the adoption of the Fish Stocks Agreement in 1995, FAO has undeniably been the main source of new global international fisheries instruments. In addition to those mentioned in Section 1, the following are of key importance to this book:

- the Guidelines to Reduce Sea Turtle Mortality in Fishing Operations (2009);
- the International Plans of Action (IPOAs) on reducing incidental catch of seabirds in longline fisheries (1999) and on management and conservation of sharks (1999);
- the International Guidelines on Deep-sea Fisheries in the High Seas (2008);
- the Recommendations on a Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels (2010);
- International Guidelines on Bycatch Management and Reduction of Discards (2010);
- the Voluntary Guidelines for Flag State Performance (2013); and
- the Voluntary Guidelines for Catch Documentation Schemes (2017).<sup>22</sup>

Notwithstanding these achievements, the current state of global marine fishery resources leaves much to be desired.<sup>23</sup> The many challenges faced by the domain of international fisheries law are both internal and external. The former are well known and include over-exploitation, overcapacity, subsidies, illegal, unreported and unregulated (IUU) fishing, bycatch and discards of target and non-target species, impacts on benthic ecosystems, other unsustainable fishing practices (e.g. large-scale pelagic drift-net fishing and dynamite fishing) and abandoned, lost or discarded fishing gear.<sup>24</sup> External challenges are not as widely known, but this may well change once their seriousness becomes more broadly acknowledged. They include the various impacts of climate change – in particular, poleward shifts in the distributional range of fish stocks, and ocean acidification – other forms of marine pollution (e.g. microplastics) and alien invasive species.<sup>25</sup> Many of these internal and external factors are examined in detail in this volume.

Fortunately, despite the lack of improvement in – or even deterioration of – global marine fishery resources, there are also examples of States and regions

<sup>22</sup> All these are available at [www.fao.org/fishery/en](http://www.fao.org/fishery/en).

<sup>23</sup> See *The State of World Fisheries and Aquaculture 2018 – Meeting the Sustainable Development Goals* (FAO, Rome: 2018) at 6, which notes that the “state of marine fishery resources, based on FAO’s monitoring of assessed marine fish stocks, has continued to decline”.

<sup>24</sup> See the many references to these in the 2017 UNGA Sustainable Fisheries Resolution, note 11 and SOFIA 2018, note 23.

<sup>25</sup> See the references in the 2017 UNGA Sustainable Fisheries Resolution, note 11 and SOFIA 2018, note 23, in particular at 131–138 and 156–157. See also Chapter 2, Section 2 of this volume (Cheung, Lam, Ota and Swartz); and the 18th (2017) Meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (ICP; see doc. A/72/95 of 16 June 2017).

that have been quite successful in rebuilding fish stocks. These include Australia, the United States and the North-East Atlantic and adjacent seas.<sup>26</sup> Progress in rebuilding fish stocks in many other parts of the globe is therefore likely to depend to a considerable extent on capacity-building in developing States.

In addition to States that are unable to comply with their international obligations, there are also many others that are unwilling to do so and/or are hesitant to strengthen the compliance-component of international fisheries law. This paramount limitation of international fisheries law is no different from that of public international law in general, and derives directly from the sovereign equality of States, the consensual nature of international law and the principle of *pacta tertiis*. While some States may be opposed to strengthening the compliance-component of international fisheries law more generally, others may be motivated by the short-term benefits offered by a weak fisheries regime. Opposition from the former States may also be part of an overarching resistance to the strengthening of public international law as a whole. Reference should be made in that context to the non-participation by China and the Russian Federation in recent dispute settlement procedures instituted under the LOS Convention.<sup>27</sup> At least as troubling is the decision of the United States not to participate in the merits phase of the *Nicaragua case* before the International Court of the Justice (ICJ),<sup>28</sup> its subsequent withdrawal from the ICJ's compulsory jurisdiction, its continued non-participation in the LOS Convention,<sup>29</sup> as well as the Trump administration's withdrawal from various multilateral regimes, including the climate change regime. This isolationist stance is likely to provoke further unilateralism and thereby lead to an overall weakening of multilateral regimes.

Other States may be further concerned that international fisheries bodies may turn their newly acquired teeth against them or apply these powers in a discriminatory manner. While distant water and high seas fishing States and entities are often blamed for over-exploitation, failed fisheries management and conservation, or slow progress in the development of international fisheries law more generally, this often completely ignores or downplays the role and responsibility of coastal States with respect to fisheries management and conservation in their own maritime zones, including in relation to transboundary fish stocks.

<sup>26</sup> SOFIA 2018, note 23 at 6.

<sup>27</sup> *South China Sea arbitration (The Republic of Philippines v. The People's Republic of China (Philippines v. China))*, Award on the Merits of 12 July 2016; PCA Case No. 2013-19; available at [www.pccases.com/web/](http://www.pccases.com/web/); and *Arctic Sunrise arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015; PCA Case No. 2014-02; available at [www.pccases.com/web/](http://www.pccases.com/web/).

<sup>28</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986.

<sup>29</sup> Even though the United States is a party to the Fish Stocks Agreement, and thereby its system of compulsory third-party dispute settlement entailing binding decisions.

As unwilling or non-complying States are by no means a new phenomenon confined to the domain of international fisheries law, 'willing' States are accustomed to relying on an array of jurisdictional grounds in order to exert pressure on unwilling or non-complying States. This so-called "comprehensive and integrated approach" is included among the principles and strategies of the IPOA-IUU that States are encouraged to use.<sup>30</sup> Examples include jurisdiction in a State's capacity as a port or market State<sup>31</sup> or with respect to natural and juridical persons bearing its nationality.<sup>32</sup> Complementary action has been increasingly pursued by various non-State actors, such as fishing industry associations and environmental non-governmental organizations.<sup>33</sup>

<sup>30</sup> Para. 9.3.

<sup>31</sup> See Chapters 13 (van der Marel) and 14 (Churchill) of this volume.

<sup>32</sup> E.g. insurers (see Chapter 17 of this volume (Caddell, Leloudas and Soyer).

<sup>33</sup> See Chapters 4 (Stokke) and 16 (Massarella) of this volume.