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Improving Compliance with International Fisheries Law through Litigation

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19.1 INTRODUCTION

As recognized by the UN General Assembly, the rule of law requires that States 'abide by all their obligations under international law'.[1] Against this standard, the traditional regime regulating international fisheries appears inadequate, since many States are unwilling or unable to respect their relevant obligations. This issue is enabled or compounded, at the global level, by the absence of a well-established, inter-governmental compliance mechanism to hold them accountable.[2] Such a mechanism would be tasked, first, to verify, independently, whether States are respecting their obligations and then, if needed, to take measures to trigger modification of behaviour.

This chapter examines the potential of using litigation to increase compliance with existing norms in the field of fisheries. International courts and tribunals are indeed important contributors to the rule of law,[3] be it by solving the specific dispute in front of them[4] or clarifying the law.[5] Existing research has examined case-law

[1] United Nations General Assembly (UNGA), Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Level, A/Res/67/1, para. 37.

[2] On this, see S. Guggisberg, "Verifying and Improving States' Compliance with Their International Fisheries Obligations", in A. M. Cisneros-Montemayor, W. W. L. Cheung and Y. Ota (eds.), *Predicting Future Oceans* (Amsterdam: Elsevier, 2019) 453–464.

[3] UNGA, Resolution A/Res/67/1 (n 1), paras. 31–32.

[4] Statute of the International Court of Justice (ICJ), Article 38. On this role more generally, see for example A. von Bogdandy and I. Venzke, "On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority" (2012) ACIL Research Paper No 2012–10 1, 6.

[5] On other uses of international courts and tribunals, see e.g., V. Lowe, "The Function of Litigation in International Society" (2012) 41 *ICLQ* 209, 214.

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relevant to fisheries or the marine environment more generally,[6] and has analysed the potential of litigation for environmental purposes.[7] The present chapter aims to add to this body of literature by analysing the potential of and obstacles to using litigation in three specific fisheries-focused scenarios: litigation against a flag State, against a coastal State and against a fishing State.

The adjudicative bodies examined in the present chapter focus on public international law, leaving aside trade law as a more discrete field. In addition to references to contentious cases in front of the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals, the chapter considers advisory opinions and conciliation commissions. Litigation is hence understood in an expansive fashion.

It is worth noting at the outset that the main framework for the law of the sea, the United Nations Convention on the Law of the Sea (UNCLOS), establishes a robust and compulsory system for the settlement of disputes. Part XV of that nearly global treaty contains dispute settlement procedures applicable to all parties to the treaty since reservations are not allowed under the Convention, unless provided otherwise in specific provisions. Disputes regarding interpretation or application of the Convention can, if certain conditions are fulfilled, be submitted unilaterally to third-party dispute settlement.

19.2 LITIGATION AGAINST A FLAG STATE

A first possibility to improve compliance with existing obligations would be to focus litigation strategy on flag States, which are central players in maritime activities, including fisheries.

The obligations of the flag State are, inter alia, to control vessels flying its flag, both on the high seas and in the Exclusive Economic Zone (EEZ) EEZs of third States, and to ensure that they respect applicable conservation and management

[6] R. R. Churchill, "The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries: Is There Much in the Net?" (2007) 22 *IJMCL* 383–424; N. Klein, "Litigation over Marine Resources: Lessons for the Law of the Sea, International Dispute Settlement and International Environmental Law" (2009) 28 *Aust YBIL* 131–179; D. R. Rothwell, "The Contribution of ITLOS to Oceans Governance through Marine Environmental Dispute Resolution", in T. M. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber amicorum Judge Thomas A. Mensah* (Leiden: Nijhoff 2007) 1007–1024; T. Stephens, "Marine wildlife and ecosystems", in T. Stephens (ed.), *International Courts and Environmental Protection* (Cambridge: Cambridge University Press 2009) 196–244; T. Treves, "Fisheries disputes: Judicial and arbitral practice since the entry into force of UNCLOS", in R. Wolfrum, M. Seršić and T. Šošić (eds.), *Contemporary Developments in International Law* (Leiden: Brill 2015) 328–336.

[7] P. Sands, "International Environmental Litigation and Its Future" (1999) 32 *U Rich L Rev.* 1619–1641. See also, more generally, T. Stephens (ed.), *International Courts and Environmental Protection* (n 6).

measures (CMMs). The obligation is provided for in Article 94 of UNCLOS[8] and further elaborated, in relation to the fisheries sector, in other treaties.[9] This obligation of due diligence does not imply that a flag State will be held responsible for each violation of applicable rules by one of its vessels, but that it must 'take all necessary measures to ensure compliance and to prevent IUU [illegal, unreported and unregulated] fishing by fishing vessels flying its flag'.[10]

While this is an obligation of conduct rather than result, it should not be underestimated; the order of the oceans, in particular on the high seas, is based on assigning jurisdiction to the flag State. Unfortunately, the issue of flags of non-compliance is widespread in the fisheries field.[11] In that light, the potential impact of addressing this issue would be considerable. The law of the sea is not so much a legal regime with major gaps as a legal regime insufficiently implemented and enforced.

19.2.1 *Standing*

A potential challenge with this strategy would be in determining the entity competent to bring a case to a court or a tribunal. In contentious cases, only those States whose legal interests are infringed have standing to initiate proceedings in front of international courts.[12] It is indeed generally accepted that a State 'should be able to establish a legal interest in respect of the claim brought before an international tribunal'[13] and that 'a mere interest' is insufficient.[14] Traditionally, States with

[8] United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982, in force 16 November 1994, 1833 *UNTS* 396.

[9] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome, 24 November 1993, in force 24 April 2003, 2221 *UNTS* 120; 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 (UNFSA), New York, 4 August 1995, in force 11 December 2001, 2167 *UNTS* 88.

[10] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, ITLOS Reports 2015.*

[11] C. Goodman, "The Regime for Flag State Responsibility in International Fisheries Law: Effective Fact, Creative Fiction, or Further Work Required" (2009) 23 *A&NZ Mar LJ* 157, 164; D. D. Miller and U. R. Sumaila, "Flag Use Behavior and IUU Activity within the International Fishing Fleet: Refining Definitions and Identifying Areas of Concern" (2014) 44 *Marine Policy* 204–211; D. Warner-Kramer, "Control Begins at Home: Tackling Flags of Convenience and IUU Fishing" (2004) 34 *Golden Gate ULRev* 497, 499–502.

[12] P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (3rd ed. Oxford: Oxford University Press 2009) 252.

[13] P. Okowa, "Issues of Admissibility and the Law on International Responsibility" in M. D. Evans (ed.), *International Law* (3rd ed. Oxford: Oxford University Press 2010) 472.

[14] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) – Second Phase, Judgment, 5 February 1970, I.C.J. Reports 1970*, para. 46; C. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press 2005) 29–31.

standing are defending their rights or legal interests, not those of the international community generally.[15]

A category of States with clear standing are injured States, as defined in Article 42 of the International Law Commission (ILC) Articles on the Responsibility of States.[16] However, as the relevant obligations of flag States are not owed to any particular State, a State wanting to invoke a flag State's responsibility would have to be 'specially affected' or the situation would have to be such that 'each party's performance is effectively conditioned upon and requires the performance of each of the others'.[17] The former case could be that of a coastal State if a flag State did not control its vessels fishing in the coastal State's EEZ. The latter could, arguably, be invoked more generally by one State against another State whose conduct enables free-riding by vessels flying its flag, leading to the total fishing pressure on a stock exceeding sustainable levels.

A second category of States with potential standing are those that are not injured by the actions they may want to combat in court. That would be, for example, a State deciding to bring a well-known flag of non-compliance to court, in a situation where the applicant's interest is to fight impunity rather than to see a specific violation against its own interests remedied. De *lege lata*, the existence of a general right for a State to act for protection of the international community's rights and on its behalf, in what is called an *actio popularis*, is still controversial and unsettled even in relation to obligations owed to the international community.[18]

In terms of obligations relying on multilateral treaties, that is, obligations *erga omnes partes*, standing might actually not be an issue. Some compromissory clauses provide a basis for standing without the need to show any special interest.[19] Hence, States wishing to react to a breach of these conventional frameworks do not have to demonstrate an injury.[20] Article 286 of UNCLOS is one such clause that does not require the applicant to have directly or particularly suffered an injury. It provides that 'any dispute concerning the interpretation or application of this Convention shall . . . be submitted at the request of any party to the dispute'.

[15] M. Fitzmaurice, "The International Court of Justice and International Environmental Law" in C. J. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press 2013) 354.

[16] Articles on the Responsibility of States for Internationally Wrongful Acts, (2001) vol. II-2 *YILC*, Art. 42.

[17] Ibid., commentary on Art. 42, para. 13.

[18] R. Wolfrum, "Enforcing Community Interests through International Dispute Settlement: Reality or Utopia" in U. Fastenrath and others (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: Oxford University Press 2011) 1132.

[19] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, 20 July 2012 I.C.J. Reports 2012*, p. 422, para. 69; see also G. Gaja, "Obligations and Rights Erga Omnes in International Law: Preparatory Work" (2005) 71-I *Annuaire de l'Institut de Droit International* 117 at 123.

[20] Tams (n 14) 125.

Even for cases started on other jurisdictional bases, there are general signs that an international court or tribunal may be willing to hear a case related to obligations *erga omnes partes*. In particular, in the *Whaling* case, the applicant State, Australia, was not directly injured by the actions of Japan. Both States were parties to the International Convention for the Regulation of Whaling, the provisions of which Australia claimed that Japan had breached. The basis of jurisdiction relied on by the Applicant was unilateral declarations under Article 36(2) of the ICJ Statute. Japan did not raise an objection regarding Australia's standing to bring the case to the ICJ, which in turn did not consider the question.[21] When addressing matters of jurisdiction and admissibility, the ICJ must examine any potential issue *proprio motu* and its silence on the question of a non-injured State's standing seems to imply that it did not see this as an impediment to hearing the case on the merits.

As for obligations *erga omnes*, that is, not treaty-reliant but rather of a customary international law nature, the situation may be more precarious. On the one hand, the ILC acknowledged, in its Articles on the Responsibility of States, that a non-injured State can invoke a wrongdoing State's responsibility in order to protect collective interests, hence pointing to the possibility for such an *actio popularis*.[22] On the other hand, the consequences of a non-injured State's ability to invoke responsibility were acknowledged in the Commentary to be a progressive development of international law,[23] and the relevant provision more generally was controversial during the drafting process.[24] Hence, courts and tribunals might be reluctant to allow a case started by a non-injured State to proceed if the obligations binding the parties are not treaty-based. The practical impacts of this probable absence of standing are likely limited since UNCLOS is a nearly global treaty. Nonetheless, some noteworthy non-parties remain, such as the United States, which are not bound by Part XV.

19.2.2 *Jurisdiction*

After settling the question of standing, a court or tribunal would examine the question of jurisdiction. An issue may arise, in relation to cases started under the compulsory dispute settlement mechanism set up under UNCLOS, if both applicant and respondent are also parties to the same regional fisheries management

[21] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, 226.

[22] Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 48. On this, see e.g., J. R. Crawford, "State responsibility" *MPEPIL*, para. 46; Institut de Droit International (IDI), Resolution on the Obligations and rights erga omnes in international law, Session de Cracow 2005.

[23] Articles on the Responsibility of States for Internationally Wrongful Acts, commentary on Art. 48, para. 12.

[24] E. B. Weiss, "Invoking State Responsibility in the Twenty-First Century" (2002) 96 *AJIL* 798 at 805.

organization (RFMO). These are the main bodies entrusted with conservation and management of straddling and highly migratory species. Article 281 of the Convention gives precedence to other dispute settlement mechanisms, if so agreed by the parties.[25]

Most RFMOs have agreed to some sort of dispute settlement in their founding treaties. Hence, depending on the interpretation given to the terms of Article 281(1), an applicant might be precluded from accessing compulsory dispute settlement procedures under UNCLOS and instead be limited to potentially non-binding procedures. The arbitral tribunal in the *Southern Bluefin Tuna* cases brought by Australia and New Zealand against Japan found that the procedure established under the convention establishing the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) precluded recourse to compulsory jurisdiction provided by UNCLOS. While the relevant provision of that treaty[26] does not explicitly prohibit referral of a dispute to ITLOS, the ICJ or an arbitral tribunal under Part XV of UNCLOS, the Arbitral Tribunal found that it did not have jurisdiction because the agreement between the Parties excluded any further procedure.[27]

This decision has been widely criticized.[28] Instead of a binding compulsory mechanism under UNCLOS, a legally weaker mechanism took priority. If this decision were to serve as a precedent, it would exclude a number of treaties that could otherwise fall *ratione materiae* under UNCLOS dispute settlement procedures but have a clause related to some dispute settlement mechanism – usually a weak one – of their own.[29] Indeed, the convention establishing the CCSBT is not the only RFMO treaty with such a provision: at least three others include similarly worded articles in their founding treaties.[30]

However, the questionable reasoning found in the *Southern Bluefin Tuna* cases has been reversed in the more recent *South China Sea* case. In the decision on jurisdiction and admissibility, the Arbitral Tribunal examined Article 281 and found

[25] UNCLOS, Art. 281(1).

[26] Convention for the Conservation of Southern Bluefin Tuna, Canberra, 10 May 1993, in force 20 May 1994, 1819 *UNTS* 359, Art. 16.

[27] *Southern Bluefin Tuna (New Zealand* v. *Japan, Australia* v. *Japan)*, Arbitral Award, 4 August 2000, Arbitral Tribunal, (2006) *XXIII RIAA* 1, paras. 53–59, 72.

[28] A. Boyle, "The Southern Bluefin Tuna Arbitration" (2001) 50 *ICLQ* 447 at 451; J. Peel, "A Paper Tiger Which Dissolves in the Rain? The Future for Resolving Fisheries Disputes under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration" (2002) 3 *Melb J Int Law* 53–79; C. Romano, "The Southern Bluefin Tuna Dispute: Hints of a World to Come . . . Like It or Not" (2001) 32 *ODIL* 313, 331.

[29] D. L. Morgan, "Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Case" (2002) 43 Harv Int'l *LJ*. 541, 550; R. Salama, "Fragmentation of International Law: Procedural Issues Arising in Law of the Sea Disputes" (2005) 19 *A&NZ Mar LJ* 24, 36–37.

[30] Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980, in force 4 April 1982, 1329 *UNTS* 47, Art. XXV; General Fisheries Commission for the Mediterranean Convention, Art. 19; Inter-American Tropical Tuna Commission Convention, Washington, 31 May 1949, in force 3 March 1950, 80 *UNTS* 3, Art. XXV.

that, for the dispute settlement mechanisms established under UNCLOS not to be applicable pursuant to that provision, an express exclusion was required.[31] Under this interpretation of Article 281, most RFMO founding documents could not be used to preclude a dispute about UNCLOS provisions from being examined by an international court or tribunal. The line of argumentation in the recent award is certainly more convincing, but it will remain to be seen whether future courts and tribunals decide to widely follow it, in particular in light of the political considerations surrounding the *South China Sea* case.[32] The decision on competence in the *Timor Sea conciliation* is, in that sense, encouraging.[33] In any event, since the potential issue of jurisdiction is related to Article 281 of UNCLOS, cases started under other bases of jurisdiction would not be at risk.

19.3 LITIGATION AGAINST A COASTAL STATE

A second possibility to improve compliance with existing obligations would be to focus litigation strategy on coastal States, whose waters are the most productive in the oceans, and where most fishing occurs.[34]

Coastal States must ensure that the resources under their jurisdiction are not over-exploited.[35] To do so, they must set a total allowable catch, taking into account the best scientific evidence and adopting measures to maintain or restore stocks to a level where they can produce maximum sustainable yield.[36] Failings by the coastal State may be due to unwillingness and/or inability, as managing vast expenses of waters is a costly endeavour. Since a large proportion of stocks are overfished,[37] it seems clear that the obligation to avoid overexploitation is not properly respected.

[31] *The South China Sea Arbitration (The Republic of Philippines* v. *The People's Republic of China)*, Award, 12 July 2016, paras. 223–224.

[32] The People's Republic of China has clearly and incessantly worked on the international scene to discredit the award (see for example the press release of the Embassy of the People's Republic of China in the USA <www.china-embassy.org/eng/zt/abc123/> [last accessed 27 July 2021]) and the long special issue of the *Chinese JIL* on the award ((2018) 17 "The South China Sea Arbitration Awards: A Critical Study"; on this see D. Guilfoyle, "A New Twist in the South China Sea Arbitration: The Chinese Society of International Law's Critical Study" (2018) *EJIL: Talk!* <www.ejiltalk.org/a-new-twist-in-the-south-china-sea-arbitration-the-chinese-society-of-international-laws-critical-study/> [last accessed 27 July 2021]).

[33] *Timor Sea Conciliation (Timor-Leste* v. *Australia)*, Decision on Australia's Objections to Competence, 19 September 2016, paras. 56–58.

[34] U. Rashid Sumaila et al., "Winners and Losers in a World Where the High Seas Is Closed to Fishing" (2015) 5 *Scientific Reports* 8481 <https://doi.org/10.1038/srep08481>.

[35] UNCLOS, Art. 61(2).

[36] Ibid., Art. 61(1).

[37] Over 33 per cent of stocks are overfished (Food and Agriculture Organization (FAO), *The State of the World Fisheries and Aquaculture* (Rome 2018) 6).

19.3.1 *Scope of Jurisdiction*

A major problem with the strategy of bringing a coastal State to court is to be found in the limitations to UNCLOS' compulsory jurisdiction. Issues related to a coastal State's sovereign rights 'with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch . . . and the terms and conditions established in its conservation and management laws and regulations' are indeed listed in the automatic exceptions to the compulsory dispute settlement principle found in UNCLOS.[38]

In certain cases concerning fisheries, conciliation is possible under Annex V section (2) of UNCLOS. This procedure is open in specific situations when a coastal State 'manifestly failed' its conservation obligations and marine living resources in its EEZ are 'seriously endangered'.[39] This mechanism is clearly intended only for extreme situations.[40] Moreover, the coastal States' discretion is not to be put into question.[41] In any case, the results of a conciliation procedure are non-binding.[42]

Notwithstanding these limitations, Annex V conciliations remain an open avenue, and a precedent now exists for the establishment of a conciliation commission: the *Timor Sea* conciliation. While this concerned issues of maritime delimitations and oil and gas exploitation, rather than fisheries, it is nevertheless an interesting precedent. In particular, Australia objected to the competence of the conciliation commission,[43] an issue that may arise in the present scenario, due to the qualified wording of Article 297(3)(b) and the potential existence of other treaties between the parties. That the commission proceeded to hold hearings on the matter and issued a decision asserting jurisdiction[44] – which Australia did respect – is proof that this procedure is able to deal with complex issues. The format followed in that conciliation, where Australia and Timor-Leste were negotiating to find a mutually acceptable solution, requires the constructive involvement of both parties. It may consequently not be a viable way forward in the case of tense and confrontational relations. Nonetheless, one could envisage a conciliation of

[38] UNCLOS, Art. 297(3)(a); E. Scalieri, "Discretionary Power of Coastal States and the Control of Its Compliance with International Law by International Tribunals" in A. Del Vecchio and R. Virzo (eds.), *Interpretation of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Berlin, Heidelberg, New York: Springer 2019) 349–381.

[39] UNCLOS, Art. 297(3)(b)(i-iii).

[40] Churchill (n 6) 389.

[41] J. G. Merrills, *International Dispute Settlement* (5th ed. Cambridge: Cambridge University Press 2007) 172.

[42] UNCLOS, Art. 297(3)(b)(c) and annex V, Arts. 7(2) and (14).

[43] *Timor Sea Conciliation (Timor-Leste v. Australia)*, Decision on Australia's Objections to Competence, 19 September 2016, paras. 13–20.

[44] Ibid., para. 111.

a different type, with a decision issued by the commission, similar to an arbitration but of a non-binding nature.

In light of the potential challenges to starting litigation-like proceedings vis-à-vis a coastal State under UNCLOS, it may be worth considering having recourse to other bases of jurisdiction, such as unilateral declarations recognizing the competence of the ICJ, if available. In such cases, UNCLOS would still be the applicable law, but not the source of jurisdiction. The limits to the competence of the ICJ would consequently only be those included in the States' declarations.

19.3.2 *Remedies*

Even in the case of contentious litigation against a coastal State, questions related to the availability of remedies – and their adequacy – would arise. The remedies envisioned under the ILC Articles on the Responsibility of States are, inter alia, cessation and reparation. Remedies can be available for environmental damage, as illustrated by a case between Costa Rica and Nicaragua in front of the ICJ.[45] In a separate phase of this case addressing environmental damage in a disputed area between the two countries, the Court indeed awarded compensation to be paid to Costa Rica for the impairment or loss of environmental goods and services and for restoration costs.[46]

Cessation would be the first remedy – and the only one available if there is no injured State,[47] a situation quite likely in fisheries disputes. This might not actually solve the problem, especially if the violation has been ongoing for a long period of time and stocks are in need of support to re-establish themselves. Cessation could nonetheless include remedial measures if the violation of a positive obligation such as that 'to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield'[48] were to be found by a court or tribunal.

Reparations are due for injury caused, which 'includes any damage, whether material or moral, caused by the internationally wrongful act'.[49] They may, however, not be fully adequate, even if a State could show that it was victim of an injury. Restitution, which is the preferred form of reparation, requires knowing how the situation actually was before the wrongful act took place, in order to re-establish that situation – such information might not be available if a coastal State has not managed the stocks under its jurisdiction at all. Restitution is also conditional on not being 'materially impossible [nor…] involv[ing] a burden out of all

[45] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*.
[46] Ibid., para 157 (1).
[47] Gaja (n 19) 138.
[48] UNCLOS, Art. 61(3).
[49] Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 31.

proportion'.[50] Re-improving the status of stocks after unsustainable fishing does not appear an easy task and may be disproportionate to the expected benefit. A suitable alternative remedy might be compensation. In that respect, it may be possible – even easy – to quantify damage to target species, which have a market price attached to them, but it may prove more difficult for associated and dependent species, or even for the marine environment.

Finally, and in any case, one could wonder whether traditional remedies are appropriate to the actual issue of mismanagement of fisheries resources. A cause of – or at least an important factor in – such unsustainable practices is often the coastal State's inability to manage stocks, rather than its unwillingness to do so.[51] Hence, in the case of many developing States, facilitative measures will be more likely to lead to improvements than punitive measures.

19.4 LITIGATION AGAINST A STATE FISHING SHARED STOCKS

A third litigation possibility to improve compliance with existing obligations would be to address the duty that States involved in fishing transboundary, straddling or highly migratory fish stocks have to cooperate in conserving these resources.

Both coastal States – when dealing with fish stocks not exclusively located in their waters – and the flag States of vessels active on the high seas are under an obligation to cooperate in the conservation of marine living resources.[52] The obligation found in UNCLOS is further developed in the United Nations Fish Stocks Agreement (UNFSA), which provides that States shall cooperate with the relevant RFMO – or in the absence of one establish one – before they are allowed to fish straddling and highly migratory fish species in the high seas.[53] In practice, RFMOs adopt CMMs, which member States and cooperating parties are supposed to comply with – except if they have opted out, although this option only applies to parties.

This double obligation of cooperation and conservation stemming from UNCLOS is particularly crucial in areas beyond national jurisdiction, as, in its absence, the regime is one of free-for-all, leading to a potential tragedy of the commons.[54] The worrisome state of fish stocks, in particular in the high seas, speaks volumes as to the existence of problems in the regional management of these marine resources.

[50] Ibid., Art. 35.
[51] C. Mora et al., "Management Effectiveness of the World's Marine Fisheries" (2009) 7(6) *PLOS Biol* e1000131, <https://doi.org/10.1371/journal.pbio.1000131>.
[52] UNCLOS, Arts. 118–119.
[53] UNFSA, Art. 8.
[54] Shared stocks in general appear to be more likely to be overexploited (S. F. McWhinnie, "The Tragedy of the Commons in International Fisheries: An Empirical Examination" (2009) 57 *J Environ Econ Manage* 321–333).

19.4.1 *Content of Relevant Obligation*

Litigation might be used to tackle individual States' breaches of their obligation to cooperate in the conservation of fish stocks. A clear target would be a flag State that allows or enables its vessels to fish in the area under the mandate of an RFMO without cooperating with this regional organization. The flag State would need to actively permit such fishing or at the very least show a pattern of not responding to the RFMO's communications regarding the vessel. The mere fact that a vessel flying a non-member State flag is fishing within the area of an RFMO would indeed not necessarily entail the international responsibility of the flag State, as the actions of a vessel are not, as such, attributable to the flag State.[55]

The main issue in such a litigation strategy would be whether this behaviour is actually illicit. The content of the obligation to cooperate in the conservation of shared marine living resources is indeed somewhat lacking in clarity. Whereas UNCLOS Articles 118–119 are recognized as customary international law and hence binding on all States, the same cannot be said with certainty about the relevant provisions of the UNFSA.[56] Indeed, on the one hand, Article 8 of that latter treaty may be seen as customary international law in its own right, or as implementing UNCLOS provisions and hence being applicable through it. On the other hand, it can also be considered as further development of international law, since it effectively intends to put an end to the high sea's freedom of fishing. If the potential respondent is not a party to the UNFSA, in the absence of an authoritative decision with regard to the status of that rule, a State may be wary of starting proceedings with no certainty of outcome.

Another situation that might breach a single State's obligation to cooperate is that of an RFMO member violating CMMs or repeatedly opting out of those that have been adopted. While starting proceedings against a party to an RFMO for acting in breach of relevant CMMs could successfully contribute to the rule of law, doing so for opting out of CMMs might be more complicated. On the one hand, by repeatedly objecting to measures, a State could arguably be said to be an internal free-rider, endangering the mandate and functioning of the RFMO. On the other hand, it may be difficult to prove that such behaviour amounts to illicit non-cooperation, especially when opting out is formally allowed and reasons for doing so may be varied.

A solution to these issues of legal uncertainty could be to encourage an RFMO to request an advisory opinion respectively on the legal status of non-cooperating,

[55] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion*, *2 April 2015*, *ITLOS Reports 2015*, para. 129. see also Y. Takei, "Assessing Flag State Performance in Legal Terms: Clarifications of the Margin of Discretion" (2013) 28 *IJMCL* 97, 130.

[56] On this, see the author's discussion in a previous publication (S. Guggisberg, *The Use of CITES for Commercially-Exploited Fish Species* (Berlin, Heidelberg, New York: Springer 2016) 43–49).

non-contracting parties that are fishing in the areas under its mandate and on the relationship between cooperation and repeated objections. Provision of an advisory opinion is not *per se* a legal novelty, but until ITLOS declared that it was competent in relation to the Sub-Regional Fisheries Commission's request for an advisory opinion in 2013, the bodies allowed to make such a demand were limited.[57] It was originally unclear whether ITLOS was empowered to issue advisory opinions of a general nature (in opposition to those related to the deep seabed),[58] but ITLOS found an implied power to give such an advisory opinion. This opened the door to other occurrences where an international organization is entrusted with the mandate to request authoritative interpretations from ITLOS. In practice, before requesting an advisory opinion, an RFMO may have to amend its founding treaty, in order to prove that it has clear competence to do so.

19.4.2 *Bilateral Proceedings v. Complex Multilateral Reality*

An applicant State could also start proceedings against several RFMO members for their joint failure to cooperate in conservation of fish stocks, demonstrated by the adoption of unsustainable CMMs. Only cases where CMMs egregiously depart from scientific advice might be considered. Indeed, Article 119 of UNCLOS acknowledges that the maximum sustainable yield can be 'qualified by relevant environmental and economic factors, including the special requirements of developing States . . . ', giving States much leeway in adopting CMMs.

Even in a case of States manifestly disregarding conservation, litigation might be unsuccessful, in light of the procedural rules of courts and tribunals as these presently stand. There are no avenues under traditional international law to bring to court a group of States for their joint behaviour. Such limitation would be at odds with the multilateral nature of the issue, that is, of several States, through their negotiating processes, having failed to deliver on their obligations. Indeed, the applicant would need to start proceedings against several States, *separately* – while proving that, *jointly*, these States failed to cooperate. If past cases are to go by, the unsuccessful attempt by the Marshall Islands to litigate against nuclear-weapon States for their failure to negotiate denuclearisation[59] shows that international courts and tribunals are not well equipped for such cases. While the ICJ reached a decision on its lack of competence on the absence of a dispute at the critical date,[60] many

[57] Statute of the ICJ, Art. 65; Charter of the UN, Art. 96; ICJ, "Organs and Agencies Authorized to Request Advisory Opinions", <www.icj-cij.org/en/organs-agencies-authorized> [last accessed 27 July 2021].

[58] UNCLOS, Art. 191; Statute of ITLOS, Art. 40(2).

[59] See the cases started by the Marshall Islands at the ICJ against nine nuclear-weapon States on the Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament.

[60] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India) / (Marshall Islands* v. *Pakistan) / (Marshall*

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other grounds brought up in the objections of the Respondents, such as the absence of indispensable third parties, could also, arguably, have led to the same decision.[61] Similar arguments are bound to be raised if several members of an RFMO are targeted by a case for their joint management decisions.

This issue is related to the questioned adequacy of a judicial dispute settlement mechanism for public interest matters.[62] Dispute settlement in front of international courts is indeed typically aiming at solving bilateral disputes, while questions related to fisheries – the same as most global environmental issues – might rather need to be considered multilaterally.[63]

19.5 CONCLUSION

In light of the long-standing issue of non-compliance in the fisheries field and the resulting unsustainable management of stocks, litigation is an option that should be considered by States. As examined, recent cases have clarified that many avenues are open, even if some issues, such as jurisdictional restrictions or adequacy of remedies, may remain. Having recourse to litigation in some of the situations examined in this chapter would be beneficial for the rule of law, in that it could bring an end to specific violations, hence tackling the most egregious cases of non-compliance. By doing so, it would provide a strong message against impunity, hopefully serving as a deterrent against similar behaviour by others. In particular, cases with a non-negligible impact and which are likely to succeed are those against notorious flags of non-compliance. Moreover, bringing a case to a court or a tribunal may also enable clarification of certain obligations, especially by way of advisory opinions. In that respect, one should consider a request for an advisory opinion to clarify the content of the obligation to cooperate in the conservation of shared stocks.

However, litigation has serious limitations. First and foremost, it is costly to start proceedings against another State, in both monetary and political terms. Hence, it will remain a rarity, especially if States are not reacting to direct injury but acting on behalf of the international community. Moreover, beyond the indirect deterrent effect on third States, a case will only ever solve a specific bilateral dispute, thus coming nowhere close to a comprehensive review of States' compliance with their obligations in the fisheries field. Furthermore, litigation cannot replace well-functioning science-based management: judges are not scientists, and a case is

Islands v. *United Kingdom*), *Preliminary Objections, Judgment, I.C.J. Reports 2016*, respectively paras. 56(1) / 56(1) / 59(1).

[61] See Judge Xue's Declaration, for example, in the case against the United Kingdom, paras. 9–11.

[62] M. Bothe, "Compliance" *MPEPIL* para. 45; P. Okowa, "Environmental Dispute Settlement: Some Reflections on Recent Developments" in M. D. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Oxford: Hart Publishing 1998) 166–167.

[63] R. R. Churchill and G. Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law" (2000) 94 *AJIL* 623, 644–645.

brought *ex post*, instead of focusing on prevention of damage. Finally, litigation is only able to successfully address non-compliance due to lack of willingness. It is not geared towards solving the large(r) problem of lack of capacity.

Hence, while litigation may certainly have a role to play in the field of fisheries, and even if several cases were started in front of international courts and tribunals, other mechanisms should also be developed and/or strengthened. Compliance procedures under global or regional frameworks should serve for comprehensive, in-depth and regular review of States' compliance with their obligations. As established procedures, they furthermore have the advantage of not relying on a particular State's willingness to invest resources in litigation against another State. In comparison to the ad hoc nature of litigation, this characteristic of compliance procedures has the potential to add much-needed objectivity, impartiality and comprehensiveness to the pursuit of accountability.