

Chapter 8

Regional Fisheries Organisations and International Fisheries Governance

Are K. Sydnes

Department of Political Science, University of Tromsø, N-9037 Tromsø, Norway (ares@sv.uit.no)

1. INTRODUCTION

In this chapter, I discuss the establishment of exclusive economic zones (EEZs) and the changing role of regional fishery organisations in an historical perspective. Considering that there are more than 30 regional fisheries agreements in force, in addition to a number of dead letter agreements, I ask why is there so little regional fisheries management? Substantial ocean areas, predominantly high seas, are not managed by regional fisheries organisations. In the face of the problem of illegal, unreported, and unregulated (IUU) fishing and the unsustainable status of world fisheries in general, why is this so? It is now almost a decade since the adoption of the 1995 UN Fish Stocks Agreement (hereafter 1995 Agreement) and there is reason to ask, what has been achieved in terms of regional fisheries management. The chapter addresses the steps that regional fisheries management organisations that are managing straddling and highly migratory fish stocks have taken to implement the provisions of the 1995 Agreement. A particular focus of this chapter is on the duty to cooperate through regional fisheries organisations and other regional arrangements in the management of fisheries.

2. INSTITUTIONS OF FISHERIES GOVERNANCE

The term international institution encompasses established practices, issue-specific regimes, and formal organisations.¹ By global institutions of fisheries governance I mean the international fisheries law and agreements, organisations and practices, which are global in scope and form part of what constitutes the order of international fisheries governance. Examples of such institutions are the United Nations Convention on the Law of the Sea of 1982 (LOSC) and customary law such as the 'freedom of fishing on the high seas'.² The global institutions may be perceived of as a meta-regime that

¹ Here defined as 'sets of rules of the game or codes of conduct that serve to define social practices, assign roles to participants in these practices, and guide the interactions among the occupants of these roles' (Young, 1994: 3).

² The freedom of fishing was later codified by the 1958 Convention on Fishing and Conservation of the Living Marine Resources of the High Seas and reiterated by the LOSC (Part VII).

constitutes the institutions and interactions at regional and domestic levels of fisheries governance (Young 2002).

2.1 Regional Fishery Organisations

Regional fishery organisations are international institutions established by states that identify common gains in cooperating to overcome collective-action problems related to regional fisheries (Sydnes, 2002a: 373).³

One of the inherent problems of understanding and explaining regional fisheries cooperation is that there is a multitude of terms to define what qualifies under international fisheries law as a regional mechanism. Article 8(1) of the 1995 Agreement, states that coastal states and distant water fishing nations (DWFNs) shall pursue cooperation either directly, or through appropriate subregional or regional fisheries management organisations, or arrangements. There is an unresolved question of what distinguishes direct cooperation, an arrangement, and subregional or regional cooperation.

Regional fisheries cooperation may be established as formal organisations with personnel, infrastructure, budgets, and legal personality by a constituting agreement between the parties. Most of the cases discussed in this chapter are regional fishery organisations in this sense. However, regional fisheries cooperation may also be based on other arrangements without an independent organisational apparatus, but with similar functions.⁴ The concepts used in international fisheries law, regional and subregional organisations, direct cooperation and other arrangements, to a large extent leaves the institutional design of regional fisheries cooperation up to the specific context of the fisheries and the discretion of the states involved.⁴ At a global scale there are more than 20 operative regional fishery organisations (Marashi, 1996; Sydnes, 2001a) and a number of other regional arrangements.⁵

Regional fishery organisations should be differentiated according to their roles as cooperative mechanisms.⁶ In that respect it has proved fruitful to distinguish between 1) scientific *research* organisations, 2) regional coordination and *development* organisations, and 3) regional fisheries *management* organisations. Accordingly, regional fisheries organisations may be established to promote marine scientific research, such as the International Council for the Exploration of the Sea (ICES) and the North Pacific Marine Science Organization (PICES). Other regional fisheries organisations are set up to harmonise national fisheries politics and promote development – examples include the South Pacific Forum Fisheries Agency and the Latin American Organization for the Development of Fisheries. Finally, regional fisheries organisations may be established to manage fisheries in the traditional sense, by collecting and assessing scientific data, setting regulatory measures and establishing enforcement and control mechanisms. Among this category of organisations, one finds the Pacific Salmon Commission, the Northwest Atlantic Fisheries Organization, and the Indian Ocean Tuna Commission.

³ Efforts to discuss the functions and roles of regional fishery organisations include Koers (1973), Heck (1975), Marashi (1996) and Sydnes (2001a).

⁴ There are differences in the discretion of states in LOSC articles 63(2)-67 and 118 on specific regimes. The 1995 Agreement (Article 8(1)) leaves the form of cooperation to the discretion of state parties.

⁵ For examples see Stokke (2001).

⁶ For a discussion on the use of typologies on regional fisheries organisations, see Sydnes (2002b: Chapter 8).

3. THE HIGH SEAS REGIME AND THE ROLE OF REGIONAL FISHERIES ORGANISATIONS

In 1609, Hugo Grotius formulated the *mare liberum* doctrine, which became customary law, justifying that the oceans and its resources were free for all to use. The only limitations to these freedoms were the territorial seas, usually set to three nautical miles, within which the coastal states could claim sovereignty. From the 1950s onwards the fisheries off the coasts of several developed nations had become more economically marginal (Friedheim, 1991: 212). The fleets of developed fishing nations then moved their fishing operations to other ocean regions. Consequently the pressure on world fisheries increased, in certain cases leading to the collapse of fish stocks.

The sustainability of the old high seas regime rested on the ability of states to cooperate on the management of fisheries beyond the territorial seas. In several cases regional fishery organisations were established, such as in the North East Atlantic, Northwest Atlantic, Indo-Pacific and Mediterranean oceans.⁷ Regional fishery organisations established during this period were established to manage regional fisheries. However, their roles, in particular those established in developing regions, were broad in scope, geographically, functionally and in terms of membership (Sydnes, 2002a). Several of the organisations were established on the initiative of the Food and Agriculture Organization of the United Nations (FAO),⁸ mandated to gathering data, promoting economic development and policy coordination, and fisheries management.

While regional fishery organisations in developed regions were functionally more limited to management, many of them (for example the International Commission for the Northwest Atlantic Fisheries and the International Commission for the Conservation of Atlantic Tunas) also had broad scopes in terms of geographical mandate area, stock coverage and membership provisions (Sydnes, 2001a).⁹

The regional fisheries organisations established during the old high seas regime proved largely inefficient (Burke, 1994: 95). The freedom of the seas doctrine did not differentiate between the rights and duties of states to high seas fisheries resources. It also did not establish any sanctions for fishing nations that did not cooperate or abide by measures established under regional fishery organisations. As a consequence there were also limited incentives for member-countries of regional fisheries organisations to limit the efforts of their own fleets. As a result, member countries were often unable to agree upon or would not implement common regulations. There were commonly no enforcement schemes to ensure that regulations were complied with. Moreover, there

⁷ For overviews of these organisations see Koers (1973), Marashi (1996), Sydnes (2001a).

⁸ The Asia-Pacific Fisheries Commission (1948), General Fisheries Commission for the Mediterranean (1949), Regional Fishery Advisory Commission for the Southwest Atlantic (1962), Committee for the Eastern Atlantic Fisheries (1967), Indian Ocean Fishery Commission (1967) and the Western Central Atlantic Fisheries Commission (1973), were all established under the auspices of the FAO. In addition International Commission for the Conservation of Atlantic Tunas and International Commission for the Southeast Atlantic Fisheries were FAO initiatives, but established as independent organisations (Marashi 1996).

⁹ Notable exceptions being the International Pacific Halibut Commission, the tuna organisations, the International Commission for the Conservation of Atlantic Tunas and the Inter-American Tropical Tuna Commission, and the Permanent Commission for the South Pacific, the latter established to underline the coastal states claims to national jurisdiction.

was also the ‘free-rider’ problem of unregulated fishing by non-members – what is now known as IUU fishing – (Koers, 1973; Churchill and Lowe, 1988).

From the end of World War II onwards, a growing number of states came to regard the high seas regime as both inequitable and inefficient. A response of some coastal states was to make unilateral claims to jurisdiction over the waters beyond their territorial seas and the living marine resources there (Juda, 1996). These unilateral actions challenged the freedom of the seas doctrine and paved the way for the first United Nations Conference on the Law of the Sea (UNCLOS I) in 1958. At UNCLOS I several coastal states made claims to special interests to the fisheries off their shores (the claims ranging from 12 to 200 nautical miles). However, most developed fishing nations supported the continuation of the high seas regime. The 1958 ‘Convention on Fishing and Conservation of the Living Marine Resources of the High Seas’, reiterated the customary laws regarding the freedom of the high seas and the territorial seas (notably, without defining the extent of the territorial seas). However, duties were introduced on states to cooperate (Article 4(1)) and to adopt measures to regulate high seas fisheries (Articles 1(2) and 2). As these provisions collided both with the interests of coastal states and DWFNs, they proved to be dead letter. UNCLOS II was convened in 1960 to resolve the issue of the outer limits of the territorial seas. It failed to accomplish this task by one vote (Juda, 1996: 161). The failures of the UNCLOS I and II to address the pressing issues of international fisheries, spurred further unilateral claims among countries in Latin America and Africa.¹⁰ The proliferation of such claims in turn put the issue of coastal state jurisdiction onto the agenda of UNCLOS III, which was convened in 1973.

4. UNCLOS III, THE EEZ AND THE REGIMES FOR TRANSBOUNDARY FISH STOCKS

UNCLOS III lasted from 1973-1982 and culminated in the adoption of the LOSC on 10 December 1982. Agreement on the introduction of EEZs was reached at an early stage,¹¹ and was widely acknowledged by the second half of the seventies (Churchill and Lowe, 1988). The expectation was that the EEZ would provide coastal states with the authority and incentives to conserve and manage the living marine resources in a sustainable manner (Hey, 1999). The continued freedom of the high seas – including fishing – was considered a counter-point to the introduction of EEZs (LOSC, Article 87). Article 116 states that all states have the rights to fish on the high seas, subject to their treaty obligations, the rights, duties and interests of coastal states according to article 63(2)-67, and Part VII of the LOSC. As the overwhelming proportion of world fisheries at the

¹⁰ The process was initiated by the Truman Proclamation in 1945, followed by Chile, Ecuador and Peru in 1952, the Montevideo Declaration (1970), Lima Declaration (1970), Santa Domingo Declaration (1972) and the African States Regional Seminar (1972) (Juda, 1996: 193-94).

¹¹ The EEZ concept was based on a Kenyan proposal in 1972, fleshed out by the UN Seabed Committee. It was a compromise between certain Latin American and African claims to 200 nautical mile territorial seas, and states who opposed extended national sovereignty (for example Japan, US and USSR). Granting the coastal states sovereign rights to the living marine resources, in contrast to sovereignty over these ocean areas, was a concession made by the maritime powers to ensure their security interests in the freedom of movement (Churchill and Lowe, 1988: 133).

time were within waters now covered by EEZs, this was considered a minor issue.¹² Regional cooperation in the management of fisheries at the high seas is provided for by Article 118, stating ‘States shall cooperate with each other in the conservation and management of living marine resources in the areas of the high seas’. States exploiting the same fish stocks, or stocks in the same area, shall enter into negotiations with a view to establishing common measures, as appropriate, through subregional or regional fisheries organisations.

In the management of straddling fish stocks, coastal states and DWFNs shall seek, either directly or through established organisations, to agree upon management measures on the high seas (Article 63(2)). In the case of highly migratory fish stocks (listed in LOSC, Annex I), states shall cooperate directly or through established organisations, with a view to ensure the management of such stocks, both within and beyond EEZs. Where no appropriate management organisation exists for highly migratory species, states shall cooperate to establish such an organisation (Article 64). It is important to note that the LOSC provides a legal framework, rather than substantive provisions on how such cooperation is to be achieved and implemented (Hey, 1996). For an extended discussion on the LOSC see Edeson (Chapter 2).

The introduction of EEZs by implication directed the focus of politicians and managers to the exploitation of the living marine resources within their national jurisdictions. Management and development plans were introduced, often followed by investment schemes to increase the fishing capacity of coastal states and promote economic development. It was generally believed that the EEZ regime would provide coastal states with the means and incentives to ensure the sustainable management and development of the fisheries within their jurisdiction. The management of transboundary fish stocks was, due to established fishing patterns, considered to be a relatively minor issue.

5. POST-LOSC DEVELOPMENTS AND REGIONAL COOPERATION

In many cases the introduction of EEZs led to closer bi- and multilateral cooperation to manage shared fish stocks. Many fish stocks now fell exclusively within the jurisdiction of coastal states and could be managed by coastal states exclusively or by agreements between coastal states.¹³ Most established regional fisheries organisations and other arrangements were thereby circumscribed by the introduction of EEZs that covered most of the world catch at the time.¹⁴ There was also a political logic to abandoning regional fishery management organisations. In the view of many coastal states, ‘marine regionalism’ based on the freedom of fishing was the order they had sought to abolish by making claims to extended national jurisdiction. In the post-EEZ period it is possible to distinguish two patterns of development. First, the role of regional fisheries manage-

¹² The exception being the high-value highly migratory fish stocks (i.e., tuna).

¹³ For example, the Joint Norwegian-Russian Fisheries Commission was established in 1976 to manage the shared fish stocks in the Barents Sea. See Hoel, Chapter 3.

¹⁴ FAO estimated that high seas fisheries during the 1990s represented 10% of world catch (FAO, 1994: 3). It is reasonable to believe that this figure was lower during the 1970s due to established fishing patterns.

ment organisations was circumscribed by coastal states' claims to EEZs. Second, the EEZ provided a number of developing coastal states with incentives to cooperate to promote economic development.

A consequence of the introduction of the EEZs was that the statutes of regional fishery organisations had to be revised. For example, the International Commission for the Northwest Atlantic Fisheries (later Northwest Atlantic Fisheries Organization), North East Atlantic Fisheries Commission and International Pacific Salmon Fisheries Commission (later Pacific Salmon Commission) were re-established by new constituting agreements taking into account the claims of coastal states to EEZs. Some regional fisheries organisations became dormant (e.g. the 'new' North East Atlantic Fisheries Commission), while others were abolished (e.g. Regional Fishery Advisory Commission for the Southwest Atlantic). In general, regional fishery organisations had the role of filling the void created by the lack of institutional fit between the EEZs under national jurisdiction and the migratory patterns of fish stocks, as in the case of straddling and highly migratory fish stocks. They were established and maintained only in cases where the value of the fisheries in the region induced the need for cooperation (Sydnes, 2002a).

For many developing coastal states, the introduction of EEZs altered the incentives for regional cooperation, by strengthening interests in cooperating regionally for development purposes.¹⁵ For example, the Western Central Atlantic Fisheries Commission, the Committee for the Eastern Atlantic Fisheries, the Asia-Pacific Fisheries Commission, adapted to the introduction of EEZs by focusing more on their coordination and development roles in the region (Sydnes, 2002a). This was reinforced by their roles in the implementation of the FAO EEZ-programme (Loftas, 1981).¹⁶

The introduction of EEZs led to the displacement of many DWFNs. These fleets had established fisheries operations in waters that were now in the EEZs of coastal states. In a number of cases DWFNs negotiated bi- and multilateral fisheries agreements with developing coastal states to gain access to their fisheries, as for example in the South Pacific tuna fishery (Veitayaki, Chapter 10). However, as many coastal states sought to develop their national fisheries sectors this was a limited option. The fleets of many DWFNs therefore sought new fishing grounds on the high seas beyond national EEZs. In such cases economically valuable straddling and highly migratory fish stocks, where there often was an established market for the catches, became natural target species (Meltzer, 1994).

During the 1980s and 1990s regional fisheries cooperation re-emerged as a major issue on the international agenda. Several regional conflicts arose regarding the management of straddling and highly migratory fish stocks (Meltzer 1994). In some areas, coastal states were experiencing that their efforts to manage stocks sustainably within their EEZs were being undermined by destructive fishing practices on the high seas. There was also a general concern regarding the sustainability of established fishing practices both within the EEZs and on the high seas (Hey 1999). The Agenda 21

¹⁵ A prominent example is the South Pacific Forum Fisheries Agency, which was established as a direct response to the introduction of EEZs in 1979 for the EEZ management of tuna fisheries of the western and central Pacific Ocean (Veitayaki, Chapter 10; Sydnes, 2001b).

¹⁶ The FAO EEZ Programme was established to aid coastal States in implementing their EEZs.

adopted by the UNCED in 1992 recommended that the UN convene a conference on the international management of straddling and highly migratory fish stocks.

6. THE 1995 AGREEMENT AND THE 1995 FAO CODE OF CONDUCT

The UN Fish Stocks Conference was convened 1993-1995. The 1995 Agreement was adopted on the 4th of December 1995. The formal title of the agreement is 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. Its Article 4 states: 'Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention'. The Agreement entered into force on the 11th of December 2001. It seeks to complement the legal framework of the LOSC by way of detailed provisions on the substance and scope of regional fisheries organisations.¹⁷

The 1995 Agreement elaborates on articles 63(2) and 64 of the LOSC on the conservation and management of straddling fish stocks and highly migratory fish stocks. It builds on LOSC (Articles 116-119) on the duty to cooperate on the high seas. Only members of regional fisheries management organisations, or states which agree to apply their measures, shall have access to the fisheries where the measures apply. This duty to cooperate is balanced in that all states with 'real interests' in the fisheries can become members of such organisations or arrangements (Article 8 (3-4)). In cases where regional fisheries organisations or arrangements do not already exist, states shall cooperate to establish one (Article 8(5)). In sum, these provisions, and Part III in general, represent a limitation of the traditional freedom of fishing on the high seas and a strengthening of the duty to cooperate in international fisheries law. However, the 1995 Agreement is only binding on parties to the agreement. Several non-parties to the agreement, in particular DWFNs whose vessels fish under flag of convenience, are not legally bound by it.

Articles 9 and 10 outline the scope and functions of regional fisheries organisations. States are to agree upon the stocks and areas covered by the regional fisheries organisation (Article 9(a)-(b)). The management functions of collecting and assessing scientific information, and establishing and enforcing regulatory measures are outlined in general terms by Article 10.¹⁸

The 1995 Agreement breaks new ground regarding compliance and enforcement measures, providing for strengthened flag-state duties (Article 18), procedures for non-flag state enforcement (Articles 21-22), and port state measures (Article 23). According to Article 18, states are only to authorise vessels flying its flag to fish on the high seas when it effectively can exercise its duty to control the activities of such vessels. This includes establishing licensing schemes, ensuring the reporting of catches, the capacity to conduct monitoring, control and surveillance, and more generally the compliance

¹⁷ For further discussion on the 1995 Agreement see Balton (1996) and Henriksen (2001).

¹⁸ These functions are dealt with in more specific terms by other provisions of the 1995 Agreement.

with measures set by regional fisheries organisations (Article 18).¹⁹ The 1995 Agreement also establishes that authorised inspectors from parties to the agreement under special circumstances may board and inspect vessels flying the flag of another party to the agreement on the high seas, irrespective of the latter being a party to the regional fishery organisation within the area of which fishing operations are being conducted (Article 21(1)).²⁰ The procedures for boarding and inspection are outlined in Articles 21-22.

The 1995 Agreement puts heavy demands on science (Hoel, 1998). The agreement reflects the development of environmental principles in international cooperation,²¹ in that states are to apply a precautionary approach and protect biodiversity when adopting regulatory measures (Articles 5-6). The management of fisheries is to be based on the best scientific evidence available, and parties are to collect and share fisheries data.²² Enhanced scientific cooperation is a condition for effective regional fisheries management.

The 1995 Agreement introduces new obligations also in waters under national jurisdiction (Article 3(1)). First, a precautionary approach is to be applied on the high seas and in the EEZ when managing fisheries for straddling fish stocks and highly migratory fish stocks (Article 6). In practice, states appear to employ this principle also for shared fish stocks and exclusive fish stocks. Second, measures adopted for the high seas and in the EEZs are to be compatible, in terms of ensuring that measures adopted for fisheries at the high seas not undermine the effectiveness of conservation measures within EEZs, taking account of measures established for the high seas, and the biological characteristics of stocks, among other things (Article 7).

There is some practice emerging on the implementation of Article 7. In the cooperation among coastal states on the management of Norwegian Spring Spawning Herring, for instance, factors as historic harvest levels and geographical distribution of the stock were employed. In this case as well as others the important issue in this regard is however that it is the coastal states that determine the configuration of the actual management regime.²³ It can however be a politically contentious issue whether EEZ management concerns is to be given prevalence when ensuring the compatibility of measures for fisheries at the same stocks at the high seas.²⁴ In practice, political power and the will to exercise it is likely to be decisive for the actual distribution of fishing rights at the high seas.

The 1995 Agreement has built on the provisions of LOSC to provide a substantive international framework for the management of straddling and highly migratory fish stocks. Of particular importance are the provisions elaborating on the duty to cooperate, the emphasis on environmental principles as a basis for fisheries manage-

¹⁹ A problem in this regard is that several states with fishing fleets involved in IUU fishing are not parties to the 1995 Agreement.

²⁰ For an elaboration, see Hayashi (1996).

²¹ There has been considerable horizontal interplay between environmental and traditional international institutions of fisheries governance.

²² The requirements for the collection and sharing of data are outlined in Annex I of the agreement.

²³ Other cases involve the Bering Sea Agreement on pollock fisheries and the practices of the Northeast Atlantic Fisheries Commission.

²⁴ For an example of the treatment of the compatibility in a regional context, see Sydnnes (2001b).

ment, and the strengthening of states' duties in the control and enforcement of regionally established measures.

6.1 The FAO Code of Conduct: International Plan of Action on IUU Fishing

Based on the 1992 Declaration of Cancun,²⁵ the FAO established a Code of Conduct for Responsible Fisheries (FAO Code of Conduct). The process largely ran parallel to the negotiation of the 1995 Agreement with a considerable overlap of issues and individual representatives. The FAO Code of Conduct was adopted by the FAO Council in 1995. The agreement is not legally binding (Article 1(1)). It has a global scope establishing principles and standards applying to all levels of organisation and all aspects of fisheries (Articles 1-2). Notably, the FAO Compliance Agreement of 1993 – which *is* legally binding – forms an integral part of it. The FAO Code of Conduct reiterates the duty of states to cooperate through regional fishery organisations (Article 6(12)). Regional fishery organisations are integrated generally in all provisions pertaining to fisheries management (Article 7), fishing operations and the duties of states (Article 8) and fisheries research (Article 12), among others. The FAO holds bi-annual meetings for regional fishery organisations (both FAO and non-FAO organisations), for discussions on trends and challenges in their operations, including the implementation of international agreement.²⁶

The FAO's Committee of Fisheries has adopted four international plans of action and initiated a wide range of activities to support the implementation of the FAO Code of Conduct (Garcia and Douman, Chapter 11). Regional fishery organisations, especially those established under the auspices of the FAO, have been important mechanisms for diffusing and implementing the FAO Code of Conduct and the international plans of action. Regional fisheries management organisations are considered as important mechanisms in combating IUU fishing.²⁷ The international plan of action on IUU fishing 1) urges the members of regional fisheries management organisations to establish and enforce measures to prevent IUU fishing (Paragraph 78), 2) reiterates the duty to cooperate under international fisheries law, and thereby comply with such measures established by regional fisheries management organisations (Paragraph 79), 3) outlines a wide range of measures to be taken to combat IUU fishing (Paragraph 80), 4) encourages parties to gather information about the extent of such activities and disseminate such information to other regional fisheries management organisations and the FAO (Para. 81), 5) encourages non-parties to join regional fisheries management organisations or abide by established measures (Para. 83), 6) that members of regional fisheries organisations should inform flag states of the activities of vessels flying their flag and, if this does not trigger a response, consider adopting appropriate measures (Para. 84). In a study on IUU fishing, regional fishery organisations and other arrangements are given a pivotal role:

²⁵ Adopted by the International Conference on Responsible Fishing, Cancun, Mexico, 6-8- May 1992.

²⁶ The results of discussions are presented for the FAO Committee on Fisheries.

²⁷ For an extended discussion, see Swan (2004). FAO has published substantial information on IUU fishing. See, www.fao.org/figis/servlet/static?dom=org&xml=ipoa_IUU.xml&xp_banner=fi

RFBs [regional fishery organisations and other arrangements] serve as a gateway between international and national levels. They are well placed to contribute to global efforts to combat IUU fishing, both in relation to their own convention or regulatory area – which in many cases includes high seas – and in collaboration with NFAs [national fisheries administrations], other RFBs and international bodies. To do this effectively, the institutional and policy aspects of RFBs must be attuned to the task (Swan, 2000:2).

There are evident overlaps and substantial potential for synergies between the provisions of the 1995 Agreement on participation and enforcement measures in regional fisheries management organisations, and the FAO international plan of action on IUU fishing.²⁸ The question then, is how this potential has been capitalised on in practice.

7. TRENDS AND CHALLENGES IN THE REGIONAL MANAGEMENT OF STRADDLING AND HIGHLY MIGRATORY FISH STOCKS

7.1 Emerging Management Practices

With the entry into force of the 1995 Agreement and the adoption of the FAO Code of Conduct, in particular the international plan of action on IUU fishing, a new institutional framework for the regional management of fisheries has been established. Although not all members of regional fishery organisations are parties to these agreements, there is substantial pressure on non-parties to comply with them in practice (UN, 2003).²⁹ A more fundamental problem are in this regard are states that are neither party to the 1995 Agreement, nor members of regional organisations. Such states are often host to vessels flying their flag, but do not exercise the control functions a flag state is required to under the 1995 Agreement or LOSC. Fishing under flag of convenience is therefore a problem that is not easily tackled on the basis of existing treaties, and a number of countries are now arguing for a stricter enforcement of the real economic link requirement flag states are to abide by.

The 1995 Agreement has had the most direct impact on regional fishery organisations managing straddling and highly migratory fish stocks. The 1995 Agreement has established new principles and rules that the members of these organisations have to take into consideration. It has set the agenda for processes of institutional change taking place in the regional fishery organisations, in particular as regards enforcement. This has been supplemented by the efforts by the FAO, and in the regional fisheries manage-

²⁸ See Garcia and Douman (Chapter 11) on FAO efforts regarding the implementation of the FAO Code of Conduct and the international plans of action.

²⁹ FAO Code of Conduct is a legally non-binding agreement adopted by the FAO Council. As of 16 January, 2004 there were 51 ratifications, accessions and successions by states to the 1995 Agreement. For a continuous update see www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#Agreement, for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.

ment organisations, to formulate policies and implement measures to combat IUU fishing.

7.1.1 The Duty to Cooperate, IUU Fishing, Control and Enforcement

Regional fisheries management organisations or arrangements are to provide the institutional mechanisms for the management of fish stocks on the high seas, whether straddling, highly migratory, discrete³⁰ high sea or otherwise. This role is provided for by LOSC (Articles 116-119) and the 1995 Agreement (Part III).

The duty to cooperate, by becoming members or complying with measures, as elaborated by the 1995 Agreement, has been gaining foothold among several regional fisheries management organisations. Several of the organisations have adopted measures to deter activities by non-members. For example, the Inter-American Tropical Tuna Commission, the South Pacific Forum Fisheries Agency, the Indian Ocean Tuna Commission, and the Commission for the Conservation of Antarctic Marine Living Resources have registers of authorised fishing vessels, while the International Commission for the Conservation of Atlantic Tunas and the Commission for the Conservation of Antarctic Marine Living Resources (in addition) have such registers in addition to catch documentation schemes. Such schemes are frequently combined with port state measures to prohibit landings and transshipments of vessels considered to undermine the efforts of regional fisheries management organisations, as provided for by the 1995 Agreement (Article 23(3)). The measures adopted by the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) in this regard provide an example:

The CCSBT will publish a list of vessels over 24 metres which are authorised to fish for SBT on 1 July 2004. The list will include vessels from members and cooperating non-members and be updated as new vessels are notified. Members and non-members will not import SBT, which has been caught by a large scale fishing vessel not on the CCSBT approved list.³¹

The International Commission for the Conservation of Atlantic Tunas, Commission for the Conservation of Southern Bluefin Tuna, Inter-American Tropical Tuna Commission, Indian Ocean Tuna Commission, Northwest Atlantic Fisheries Organization, North Atlantic Salmon Conservation Organization, North Pacific Anadromous Fish Commission and the General Fisheries Council for the Mediterranean have also established schemes for cooperating with non-members (FAO, 2002: 57), acting upon the 1995 Agreement Article 8(3) stating that non-members are to apply the conservation and management measures established by regional fishery organisations or other arrangements.

Regional measures have also been established regarding registers and information relating to IUU fishing, inspection and enforcement, the use of vessel monitoring systems, controls of landings, port inspections transshipment, and trade measures (as noted above) (FAO, 2002: 57).

The majority of those regional fisheries management organisations that have adopted measures for cooperation on control and enforcement, manage straddling and highly migratory fish stocks. However, in some cases regarding highly migratory

³⁰ Fish stocks that are found only at the high seas, but do not appear on the LOSC appendix of highly migratory species.

³¹ www.ccsbt.org/docs/news.html.

species regional fishery organisations have established such measures for the EEZs of member countries, such as the case of the South Pacific Forum Fisheries Agency (Veitayaki, Chapter 10). This illustrates that there is a political process at the international level, through the UN and FAO, which provide substantial synergies in addressing challenges pertaining to regional fisheries management. However the operations of several of these regional fisheries management organisations continue to be hampered by IUU fishing by vessels flying flags of convenience.³²

7.1.2 Establishing and Reforming Regional Fisheries Management Organisations

The 1995 Agreement has led to regional initiatives to establish new regional fisheries management organisations to manage straddling and highly migratory fish stocks. Both in the southeast Atlantic Ocean and the western and central Pacific Ocean, this agreement spurred the initiation of negotiations to establish new regional fishery organisations: the South East Atlantic Fisheries Organisation (Sydnes, 2001c) and the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Sydnes, 2001b). A similar process has been initiated in the Southwest Indian Ocean.³³ The institutional changes in the global regime created by the 1995 Agreement and the FAO Code of Conduct have provided a ‘window of opportunity’ for states to establish new regional fishery organisations. The agreement also led to the revitalisation of established organisations. The North East Atlantic Fisheries Commission had largely been dormant following the introduction of EEZs by member countries. However, during the 1990s, the organisation established a secretariat and members agreed on established regulatory measures for Norwegian spring-spawning herring and redfish on the high seas.³⁴ Currently, the regulation also of blue whiting fisheries at the high seas is negotiated. Also, the enforcement regime for fishing at the high seas in the Northeast Atlantic is strengthened through the introduction of a vessel monitoring system mandatory for all member state vessels fishing in the area. Moreover, the member countries of the Inter-American Tropical Tuna Commission agreed to negotiate a new constituting agreement as a response to the global institutional changes during the 1990s.³⁵ As these examples illustrate there is a clear link between developments at the global arena of fisheries politics and the cooperation of states at the regional level.

7.2 If Regional Management Works, Why Isn’t Everyone Doing It?

In the latest report of the secretary-general of the UN on the implementation of the 1995 Agreement it was reported that there were three operative regional fisheries organisations managing straddling fish stocks, and four managing highly migratory fish stocks (tuna). Since then the convention establishing the Southeast Atlantic Fisheries Organisation (2003) and the Commission for the Conservation and Management of

³² In short, the operations of fishing vessels that fly the flags of states that do not enforce their flag state duties, and commonly are non-parties to the 1995 Agreement.

³³ See also Sydnes (2002a).

³⁴ For further information see www.neafc.org/about/about_history.htm.

³⁵ For further information refer to www.iattc.org/. For links to the regional fishery organisations websites see Sydnes (2001a: Appendix) or www.fao.org/fi/body/rfb/index.htm.

Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2004) have entered into force, taking the initial steps to establish a secretariat and holding the first meetings of their decision-making bodies.

On the basis of Table 6.1, the UN report states that there is a reasonably good coverage of regional fisheries management organisations at a global scale (UN, 2003: 30). In addition there are several other arrangements for the management of straddling fish stocks, for example in the Bering Sea, the Sea of Okhotsk, and a Joint Norwegian-Russian Fisheries Commission for the Barents Sea fisheries (Stokke, 2001; Hoel, Chapter 3), that need to be mentioned to provide a fuller picture of the situation. Finally there are ongoing negotiations to establish a South-West Indian Ocean Fisheries Commission.³⁶

Table 8.1. Regional fisheries management organisations for straddling and highly migratory fish stocks³⁷

<i>Competent regional fisheries management organisations</i>		
<i>Region</i>	<i>Straddling stocks</i>	<i>Highly migratory stocks</i>
Atlantic	North-East Atlantic Fisheries Commission North-West Atlantic Fisheries Organization South-East Atlantic Fisheries Organization	International Commission for the Conservation of Atlantic Tunas
<i>Pacific Ocean</i>		Inter-American Tropical Tuna Commission Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean
<i>Indian Ocean</i>		Indian Ocean Tuna Commission
<i>Trans-ocean</i>	Commission for the Conservation of Antarctic Marine Living Resources	Commission for the Conservation of Southern Bluefin Tuna

Source: UN (2003).

Despite the organisations and arrangements presented above, there seem to be significant gaps in the coverage of the world oceans in terms of competent regional fisheries management organisations. There are no regional fishery organisations managing straddling and discrete fish stocks at the high seas in the central Atlantic Ocean. Moreover, there are significant gaps adjacent to the Commission for the Conservation of Antarctic Marine Living Resources both in the Atlantic Ocean and Pacific Ocean.

One of the main problems of managing straddling fish stocks, is that there is limited knowledge regarding a number of existing fisheries, including to what extent are they straddling, and the extent of unregulated fisheries. IUU fishing contributes to

³⁶ For developments in this process, see www.fao.org/fi/body/rfb/SWIOFC/swiofc_home.htm.

³⁷ Updated following entry into force of the agreements constituting the South-East Atlantic Fisheries Organization and the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

uncertainties regarding the status of world fisheries in this respect. One considerable contribution to better understand this issue would be to map current fishing activities and the spatial distribution of fish stocks. This would, however, require a substantial international effort.³⁸

Why aren't there more operative regional fisheries management organisations at a global scale? In light of the known problems of IUU fishing and the FAO efforts to address this issue through its international plan of action, why are states not willing to make better use of the platform provided by international fisheries law to take effective measures against unsustainable fishing practices? The contractual environment at the global level never has been stronger in facilitating and enhancing regional fisheries management. The answers to the deficiencies in fisheries management have to be sought for in the institutional scope and design of the regional fisheries organisations, and among states in not acting upon their rights and duties under the prevailing institutional order. In practice, these two dimensions are interrelated. Regional fishery organisations rely on member countries to agree upon, implement, and enforce regulatory measures. On the other hand, established regional fishery organisations do structure the cooperation among member countries (Sydnes, 2002b), in the sense that they provide common rules for the use of resources. However, can we explain the deficit of management mainly by the established roles and functions of regional fishery organisations, and their inability to transform into effective management organisations? Or is the answer also to be found in a lack of human, technical and economic capacity or political will to implement international agreements in the member countries to regional fishery organisations?

The FAO has played a central role in promoting regional fisheries cooperation as a means to enhance regional economic development of the fishing industry, the exchange of scientific knowledge and the management of fisheries.³⁹ Most of the regional fishery organisations established under the auspices of the FAO, were established before LOSC.⁴⁰ Following the adoption of the 1995 Agreement and the FAO Code of Conduct, the regional fishery organisations established under the auspices of the FAO, have all undergone a review process, with a view to reform them into full-fledged regional fisheries management organisations with decision-making authority and autonomous budgets (FAO, 1997). This has posed a challenge for organisations that have the role of coordination and development (i.e., Asia-Pacific Fisheries Commission, Committee for the Eastern Atlantic Fisheries, Western Central Atlantic Fisheries Commission). As noted, these organisation's orientation towards development and policy harmonisation became cemented following the introduction of EEZs and through the FAO EEZ Programme. The organisations mainly achieve their ends through (often donor funded) development programs and capacity building projects. The primary objectives of these organisations have not been conservation and management of the fisheries, but rather the development of the fishing sector within their respective EEZs.⁴¹ Though these organisations in principle have adopted or endorsed the environmental

³⁸ A Global Marine Assessment has been suggested as a possible vehicle for for such an endeavour.

³⁹ For further discussion see Garcia and Doullman (Chapter 11).

⁴⁰ The only exception is the Indian Ocean Tuna Commission (1993).

⁴¹ This should be understood within a context in which cooperating states are also primarily developing nations with limited technical and economic capacities.

principles codified by the FAO Code of Conduct and the 1995 Agreement, the member-countries, by and large, resist changes in their operational practices and maintain their established roles as development-oriented organisations (Sydnes, 2002a). There are a number of regional fishery organisations with mandate areas covering both areas of EEZs and high seas that do not manage fisheries. Attempts at reforming the functions of these organisations have largely been unsuccessful. As a consequence there are substantial gaps in the oceans without competent regional fisheries management organisations.

For regional fishery organisations with mandate areas limited to the EEZs of member-countries, the 1995 Agreement has had less direct impact (Sydnes, 2002a: 378). For developing countries, the coastal fisheries have a higher priority than offshore or high seas fisheries. In light of that, many, or even most, countries are struggling to implement an effective management system within their EEZ, and less effort has been put into regional efforts. Moreover, often there is little knowledge and awareness of the extent of straddling fish stocks because of a fundamental lack of scientific research. Rather than establishing formal organisations, states have often chosen to establish direct bi- or trilateral cooperation between coastal states, or cooperation through access agreements between coastal states and DWFNs. Though providing mutual benefits for the parties to such agreement, they are often more limited in content, as regards fisheries management, than is envisioned by the 1995 Agreement.

There are certain management functions, such as monitoring, control, surveillance, enforcement, and the conduct of marine research, where there are substantial benefits in pooling limited resources. In particular, the development of compliance and enforcement schemes is one function that may provide the basis for further regional cooperation among coastal states. Veitayaki (Chapter 10) has analysed how member countries of the South Pacific Forum Fisheries Agency have established regional schemes for vessel monitoring systems, a regional register for licensing DWFNs, and other mechanisms to control to enforce regulations in the EEZs of regional coastal states. Such coastal state cooperation has been identified as one potential prerequisite for the establishment of efficient regional fisheries management organisations (UN, 2003). Again, in the case of the South Pacific Forum Fisheries Agency, coastal state cooperation provided an institutional basis on which to enter negotiation with DWFNs operative in the region to establish the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Veitayaki, Chapter 10).

In a consideration of the activities and constraints for developing countries in implementing the 1995 Agreement the Secretary-General of the UN concluded that:

Few, if any, major programmes of bilateral or multilateral assistance established or operating since the adoption of the Agreement specifically focus on its implementation (UN, 2003: Para. 77).

However, the establishment of a voluntary trust fund to support developing states (Article 26(1)) have been the subject of the two meetings of the states parties to the 1995 Agreement. Moreover, many donor-funded bi- and multilateral capacity-building projects targeting fisheries, form integral parts of access agreements between coastal states and DWFNs. There is increasing awareness that for international fisheries governance, and in particular the management of fisheries on the high seas, to move forward, substantial efforts have to be made to increase the capacity of developing

coastal states, enabling them to implement the provisions of LOSC, 1995 Agreement, FAO Code of Conduct, and other agreements pertaining to fisheries management.

Beyond the challenges outlined above, there is the problem of non-parties to regional fisheries management organisations, the LOSC and the 1995 Agreement. 'Free-riders' have been a problem hampering international fisheries management since the pre-LOSC high seas regime. As international treaties are binding only on the parties to them, the problem of IUU fishing by vessels flying flags of convenience continues to hamper regional and national efforts to conserve and manage fisheries. The FAO, regional fisheries management organisations and port states are tasking steps to curb IUU fishing. It remains to be seen whether the political and economic costs being imposed will be sufficient to make flag states and relevant fishing vessels put an end to such destructive fishing practices.

8. CONCLUSION

The role of regional fishery organisations has evolved following changes in the global institutions of fisheries governance. Under the old high seas regime, based on the freedom of fishing on the high seas, management through regional cooperation was the *modus operandi* of international fisheries governance. The widespread adoption of EEZs during the 1970s, limited the role of regional fishery management organisations to cases where there was an institutional misfit between the EEZs of coastal states and the distribution and migratory patterns of fish stocks. The provisions of the LOSC (Articles 63(2)-67) provided a legal framework to the management of such fisheries, which proved to be inadequate in the face of a rapidly growing fishing fleet and expansion of fisheries at the high seas. As a result the international community negotiated a series of international agreements during the 1990's, which emphasized the role of regional fishery organisations in managing transboundary fisheries.

The 1995 Agreement, the FAO Code of Conduct, and in particular the international plan of action on IUU fishing, have provided a new institutional framework for regional fisheries management, adding substance to the duty to cooperate on the high seas (LOSC, Article 118) and promoting regional cooperation regarding straddling and highly migratory fish stocks. Regional fishery organisations are critical in enhancing the institutional fit among the EEZ regimes and the temporal and spatial distribution of fish stocks.

The 1995 Agreement and the FAO Code of Conduct are international agreements that (although differing in legal status) enable states to take significant measures to ensure the sustainable conservation and management of fisheries. However, as is the case of any institution or agreement, their implementation relies on the extent to which states have the capacity and political will to act upon those enabling provisions. There is a clear distinction in international fisheries governance between, on the one hand, regional fishery organisations with a high degree of involvement from developed countries, and which are actively implementing the provisions of the 1995 Agreement and the international plan of action on IUU fishing and, on the other hand, those in developing regions that do not focus on management, but rather on development and capacity building among member countries. Cases of the first type include the various

tuna organisations: the International Commission for the Conservation of Atlantic Tunas, Inter-American Tropical Tuna Commission, Indian Ocean Tuna Commission and Commission for the Conservation of Southern Bluefin Tuna. Also included among this first type but focused on straddling fish stocks are the North East Atlantic Fisheries Commission, the Northwest Atlantic Fisheries Organization, and the Commission for the Conservation of Antarctic Marine Living Resources.

The General-Secretary of the UN acknowledges that coastal state cooperation and capacity building frequently are a pre-requisite for effective regional fisheries management both in EEZs and on the high seas (UN, 2003). However, such developments depend on substantial efforts among the coastal states and the international community to provide the means for capacity building for the management of fisheries. The efforts of the FAO through the FishCode programme may play an important role in providing assistance from the international community (Garcia and Doulman, Chapter 11). However, the willingness of the donor community to support the efforts of the FAO has varied. Moreover, the role of the FAO is limited to advising and assisting. The challenge remains with states to design and implement fisheries management institutions that are both politically viable and able to deliver biologically sustainable policies within the context of domestic and regional opportunities and constraints.

There is a substantial variation in the nature of institutions established to manage fisheries at the regional level. This is acknowledged by the 1995 Agreement (Article 8(1)), in granting states discretion in whether they cooperate directly, through regional or subregional organisations, or other arrangements. Though this may obscure what qualifies under which concepts, it also reflects the fact that no single format of regional management can fit all geopolitical and biophysical conditions. In lack of formal criteria this will be given content through state practice.

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