

Achieving Sustainable Marine Fisheries: A Legal Analysis of the Settlement of Fishing Disputes

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A dissertation

submitted in partial fulfillment of the  
requirements for the degree of

Doctor of Philosophy

University of Washington

2020

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Program Authorized to Offer Degree:

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**Abstract**

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UNCLOS steers the legal order of the oceans toward sustainable use of marine resources and simultaneously promotes the peaceful use of the seas. The Convention's two primary goals are enumerated in its preamble, and the dispute settlement procedures established in UNCLOS Part XV are the principle method to accomplish those goals and stabilize the legal order. Since UNCLOS came into force in 1994, the majority of adjudicated cases arising under the law have been related to fishing and fish-related activities. However, these judicial decisions rarely resolve substantive issues regarding fisheries disputes and, instead, merely deal with procedural matters. Accordingly, whether courts or tribunals will incorporate marine sustainability in resolving fishing disputes under the UNCLOS framework remains unclear. In addition to the lack of analysis by tribunals, scholars have paid little attention to the function of dispute settlement mechanisms in resolving fishing disputes. This research therefore analyzes nineteen existing fisheries cases that have been adjudicated under the UNCLOS framework and examines the role of international

adjudications in promoting marine sustainability. This dissertation proposes suggestions on how the UNCLOS dispute settlement system should respond to global fisheries challenges and develop progressive jurisprudence.

A robust and comprehensive framework for the settlement of fishing disputes is necessary to incorporate sustainability in such jurisprudence. To be effective, such a framework must include all fishing actors. This research found that Taiwan, which joins the international fisheries law regime under a uniquely coined term, “fishing entity,” is often missing in the dispute settlement system. Excluding Taiwan from accessing judicial mechanisms creates foundational challenges for dispute resolution and the broader legal order. Therefore, with the goal of achieving marine sustainability, this study investigates the role of fishing entities in the systems of dispute settlement mechanisms. This dissertation argues that fishing entities—i.e., Taiwan—should have legal access to dispute settlement mechanisms and such incorporation into the UNCLOS dispute settlement system is indispensable to a sustainable legal order of the oceans.

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## Acronyms and Abbreviations

ATF	authorization to fish
BIOT	British Indian Ocean Territory
CCAMLR	Commission for the conservation of Antarctic Marine Living Resources
CCSBT	Convention for the Conservation of Southern Bluefin Tuna
CCSBT Convention	Convention for the Conservation of Southern Bluefin Tuna
CFCLR	Convention on Fishing and Conservation of the Living Resources of the High Seas
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COFI	Committee on Fisheries
Compliance Agreement	Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
DARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
EEZ	exclusive economic zone
FAO	Food and Agriculture Organization
FSA	United Nations 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
GFCM	General Fisheries Commission for the Mediterranean
ICCAT	International Commission for the Conservation of Atlantic Tuna
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
IOTC	Indian Ocean Tuna Commission
ITLOS	International Tribunal for the Law of the Sea
IUU	illegal, unreported and unregulated fisheries
IWC	International Whaling Commission

JARPA II	Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic
MPA	Marine Protect Area
MSY	maximum sustainable yield
NAFO	North Atlantic Fisheries Organization
NEAFC	North East Atlantic Fisheries Commission
NPOA	National Plan of Action
PCA	Permanent Court of Arbitration
PRC	People’s Republic of China
PSMA	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
SBT	southern bluefin tuna
SEAFO	South East Atlantic Fisheries Organisation
SIOFA	South Indian Ocean Fisheries Agreement
SPRFMO	South Pacific Regional Fisheries Management Organisation
SRFC	Sub-Regional Fisheries Commission
TAC	total allowable catch
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
VMS	Vessel Monitoring System
WTO	World Trade Organization

# Achieving Sustainable Marine Fisheries: A Legal Analysis of the Settlement of Fishing Disputes

## Chapter 1. Introduction

### I. Introduction

The inexhaustibility of fisheries resources is a concept that no longer exists. Instead, fish stock depletion has become a crisis around the globe. The United Nations has identified overfishing and over-exploitation as adverse actions that lead to the exhaustion of fisheries.<sup>1</sup> Accordingly, the legal order for the seas and oceans has responded to rebuild the marine ecosystem and achieve ocean sustainability.<sup>2</sup> The institutions responsible for formulating international

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<sup>1</sup> The Food and Aquaculture Organization of the United Nations recognized these issues in the 1996 State of World Fisheries and Aquaculture, stating that: “Overfishing is not a recent issue. It was formally recognized internationally in the early 1900s and was the subject of the London Conference on Overfishing in 1947.” U.N. FAO, *World Review of Fisheries and Aquaculture*, <http://www.fao.org/docrep/003/w3265e/w3265e02.htm#b1-Recent%20trends%20in%20world%20fish%20production,%20utilization%20and%20trade>; see also Christopher C. Joyner, *Compliance and Enforcement in New International Fisheries Law*, 12 TEMP. INT’L & COMP. L.J. 271, 271 (1998).

<sup>2</sup> “Sustainability” is a complex concept that has not been defined, but areas of environment, economy, and society have embraced the concept. The Brundtland Report is a notable report that gives the meaning of sustainable development, i.e., the “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” The concept of sustainable development has been adopted throughout international agreements and state practices. It also dominates environmental policy towards long-term use of resources. International fisheries law, by the same token, considers sustainable development to be paramount, and abide by the concept in the use of oceans and marine resources. PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND

fisheries law developed an abundance of treaties, both binding and non-binding, to address fisheries issues. The United Nations Convention on the Law of the Sea (UNCLOS) is the basis for these treaties. Some international agreements target specific stocks to support regulations in the UNCLOS<sup>3</sup> e.g., the United Nations 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 (FSA)<sup>4</sup> and the International Plan of Action for Conservation and Management of Sharks (IPOA-Sharks).<sup>5</sup> Some agreements focus on enhancing compliance and law enforcement, such as the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and the Code of Conduct for Responsible Fisheries.<sup>6</sup> Other

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THE ENVIRONMENT 53–58 (3d ed. 2009); Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 EUR. J. INT'L L. 377 (2012).

<sup>3</sup> UNCLOS contains provisions regulating particular stocks, prescribed in Articles 63 to 68, and covers highly migratory species, marine mammals, anadromous stocks, catadromous species, and sedentary species.

<sup>4</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea December 10, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 4, 1995, 34 I.L.M. 1542 (1995) [hereinafter FSA].

<sup>5</sup> International Plan of Action for the Conservation and Management of Sharks, *available at* <http://www.fao.org/3/x3170e/x3170e03.htm>.

<sup>6</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, 33 I.L.M. 968 (1994) [hereinafter Compliance Agreement].

treaties regulate the responsibilities of coastal States,<sup>7</sup> flag States,<sup>8</sup> and port States.<sup>9</sup> As UNCLOS grants a coastal State exclusive jurisdiction within the States' territorial waters and its exclusive economic zone (EEZ) and establishes exclusive flag State jurisdiction on the high seas, the regulations gradually shift responsibilities among the States. For instance, the binding Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) came into force in 2016 and recognizes the role of port States in adopting and implementing measures to promote marine resource sustainability.<sup>10</sup>

Besides international treaties, Regional Fisheries Management Organizations (RFMOs) play key roles in ocean governance.<sup>11</sup> As UNCLOS Articles 117 to 119 require States to cooperate

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<sup>7</sup> UNCLOS does not provide a definition of “coastal State,” but coastal States are generally referred to as States with a sea-coastline, connecting to seawater. *See* Erik Jaap Molenaar, *Port and Coastal States*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 280, 280–81 (Cesare P.R. Romano et al. eds., 2014).

<sup>8</sup> A flag State is a State that grants its nationality to ships and allows those ships to fly its flag. The flag State has the exclusive jurisdiction over vessels flying its flag in accordance with UNCLOS Article 92(1).

<sup>9</sup> UNCLOS does not contain a definition of “port State.” “Ports,” however, are defined in UNCLOS Article 11 as the outermost permanent harbor works that are regarded as forming part of the coast, and, accordingly, a port State refers to a State’s exercise of jurisdiction over its ports in comparison to a coastal State. *See* Molenaar, *supra* note 7, at 280–93.

<sup>10</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, *opened for signature* Nov. 22, 2009, 129 Stat. 664 (entered into force June 5, 2016), *available at* <http://www.fao.org/3/i5469t/I5469T.pdf> [hereinafter PSMA].

<sup>11</sup> For more information on RFMOs, *see generally* Erik Jaap Molenaar, *Regional Fisheries Management Organizations: Issues of Participation, Allocation and Unregulated Fishing*, in *OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES* 69, 69–86 (Alex G. Oude Elferink & Donald R. Rothwell eds., 2004).

in the conservation and management of high seas fisheries, RFMOs are established to carry out the duty to cooperate, aiming to promote long-term sustainable fisheries. More than fifty RFMOs currently exist.<sup>12</sup> RFMOs are international bodies made up of countries sharing a regional fishing interest, usually either a highly migratory species or a specific geographic zone. RFMOs set fishing limits, exchange information and technical support, and conduct control measures on fishing activities. Some RFMOs also contain dispute settlement provisions to settle conflicts among member States.

Despite the emergence of numerous treaties and RFMOs, the ocean crisis—characterized by overfishing and unsustainable use—still exists. The international rule of law relies not only on the promulgation of laws and measures, but also on stable and accountable dispute settlement mechanisms. Even so, scholars have devoted little attention to research on fisheries disputes concerning the interpretation and application of the provisions of the law of the sea. The mechanisms by which the international fisheries law system handles fishing disputes and the role of conservation in significant judicial judgments merit a focused analysis. As such, examining and critiquing the role and function of mechanisms for the settlement of international fisheries disputes is critical to a stable, sustainable rule of law in this context.

## **II. Background**

### **A. Why Dispute Settlement Mechanisms Matter**

The use of dispute settlement mechanisms to resolve law of the sea disputes has a relatively short history but has been significantly influential. Dispute settlement procedures for the law of

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<sup>12</sup> *Regional Fisheries Bodies and Arrangements*, FAO, <http://www.fao.org/fishery/rfb/collection/en> (last visited June 5, 2020).

the sea were not established until the Third United National Conference on the Law of the Sea, which began in 1972 and concluded in 1982 with a comprehensive code of law, the United Nations Convention on the Law of the Sea (UNCLOS).<sup>13</sup> Until then, dispute settlement provisions were adopted only in the Optional Protocol, and only those States that signed the Protocol were bound by the procedures according to 1958 Geneva Convention on the Law of the Sea.<sup>14</sup> In contrast, UNCLOS integrated compulsory procedures for the settlement of disputes in Part XV. Accordingly, notwithstanding certain enumerated limitations and exceptions, States must now submit disputes to ICJ, ITLOS, or an arbitral tribunal even when they are unable to reach an agreement as to the method of resolution. Unfortunately, a wide range of fisheries disputes are among the enumerated exceptions to the compulsory Convention procedures. Since coming into force in 1994, UNCLOS has become the predominant legal resource for settlement of disputes on

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<sup>13</sup> U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

<sup>14</sup> The Optional Protocol is not widely considered to be successful. There are only thirty-eight State signatories to the Protocol, and no disputes have been submitted to the ICJ under this Protocol. However, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas provided a compulsory mechanism of settlement through a special commission of five members in case the dispute could not be solved by another means of peaceful settlement as provided for in Article 33 of the U.N. Charter.

marine-related matters.<sup>15</sup> Within three decades of implementation, more than forty cases have been referred for judicial settlement under UNCLOS for judicial settlement.<sup>16</sup>

The promulgation of dispute settlement provisions illustrates the necessity of both peaceful means for dispute settlement and third-party adjudicatory mechanisms. The dispute settlement mechanisms adopted in UNCLOS are advantageous for several reasons. Firstly, dispute settlement procedures are essential for stabilizing and maintaining the equilibrium of UNCLOS, as emphasized by the first President of the Third UN Conference on the Law of the Sea Ambassador, Hamilton Shirley Amerasinghe, during the drafting period.<sup>17</sup> As UNCLOS is a delicate Convention that covers nearly every legal aspect of the oceans, the inclusion of such dispute settlement provisions assisted in balancing member States' concerns and facilitated States' in reaching an agreement on the Convention. The inclusion of a compulsory, impartial, and equitable resolution system for disputes made the sweeping Convention more accessible, and therefore acceptable, to the States.<sup>18</sup> Responding to the failure of the dispute settlement provisions in the

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<sup>15</sup> Satya N. Nandan, *An Introduction to the 1982 United Nations Convention on the Law of the Sea*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 9, 10 (Davor Vidas & Østreng Willy eds., 1999).

<sup>16</sup> To date, twenty-nine cases have been submitted to the International Tribunal for the Law of the Sea (ITLOS) pursuant to Annex VI of the UNCLOS, and fifteen cases have been submitted to an Arbitral Tribunal pursuant to Annex VII.

<sup>17</sup> See Third U.N. Conference on the Law of the Sea, Montego Bay, Jamaica, Memorandum by the President of the Conference, U.N. Doc. A/CONF.62/WP.9/ADD.1 (Mar. 31, 1976).

<sup>18</sup> See IGOR V. KARAMAN, DISPUTE RESOLUTION IN THE LAW OF THE SEA 3 (2012).

Optional Protocol in the 1958 Geneva Law of the Sea Conventions,<sup>19</sup> the 1982 UNCLOS includes dispute settlement provisions and requires States to be bound without any opt-out opportunity.<sup>20</sup>

Further, the establishment of dispute settlement provisions is essential because binding legal procedures help to ameliorate political and economic pressures.<sup>21</sup> Absent the provisions, UNCLOS would have failed to provide stable and binding solutions to disputes resulting from the interpretation and application of the Convention.<sup>22</sup> Thirdly, the dispute settlement procedures directly affect compliance.<sup>23</sup> The procedures help to resolve disputes arising over the non-implementation of international obligations.<sup>24</sup> Not only do they improve States' compliance of

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<sup>19</sup> Optional Protocol Concerning the Compulsory Settlement of Dispute, Apr. 29, 1958, 450 U.N.T.S. 169.

<sup>20</sup> See KARAMAN, *supra* note 18, at 6.

<sup>21</sup> *Id.* at 5; see also Robin Churchill, *The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use*, 48 OCEAN DEV. & INT'L L. 216, 218 (2017).

<sup>22</sup> Third U.N. Conference on the Law of the Sea, Montego Bay, Jamaica, Statement of Mr. Beeby, ¶ 30, p. 11, U.N. Doc. A/CONF.62/SR.58 (Apr. 5, 1976).

<sup>23</sup> Joyner, *supra* note 1, at 274.

<sup>24</sup> Philippe Sands, *Compliance with International Environmental Obligations: Existing International Legal Arrangements*, in IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW 48, 71 (James Cameron et al. eds., 1996).

substantive treaty articles,<sup>25</sup> but they also provide uniformity in the interpretation and application of the law of the sea.<sup>26</sup>

Finally, the inclusion of dispute settlement provisions embodies one of the central UNCLOS principles, namely, to establish a legal order for the seas and the oceans, as described in the preamble.<sup>27</sup> Regulations affecting rights and obligations of States inevitably opens the possibility for disputes.<sup>28</sup> Dispute settlement mechanisms protect the integrity of those rights and obligations and contribute to stability of the legal order.<sup>29</sup> Thus, dispute settlement mechanisms are necessary to “promote peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.”<sup>30</sup>

In sum, UNCLOS included mechanisms for the settlement of disputes in Part XV and added four related annexes in the Convention. With many States ratifying and adopting

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<sup>25</sup> John King Gamble Jr, *The Law of the Sea Conference: Dispute Settlement in Perspective*, 9 VAND. J. TRANSNAT'L L. 323, 323 (1976).

<sup>26</sup> See A.O. Adede, *Settlement of Disputes Arising under the Law of the Sea Convention*, 69 AM. J. INT'L L. 798, 798 (1975); Louis B. Sohn, *Settlement of Disputes Arising out of the Law of the Sea Convention*, 12 SAN DIEGO L. REV. 495, 516 (1975).

<sup>27</sup> UNCLOS pmbl.

<sup>28</sup> See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 447 (3d ed.).

<sup>29</sup> Stephen Allen, *Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction*, 48 OCEAN DEV. & INT'L L. 313, 318 (2017).

<sup>30</sup> UNCLOS pmbl.

UNCLOS,<sup>31</sup> the Convention has become the most fundamental and comprehensive treaty governing the ocean and is considered “the constitution for the oceans.”<sup>32</sup>

## **B. The Deficiency of Dispute Settlement Mechanisms in Resolving Fisheries**

### **Disputes**

The exclusion of a wide range of fisheries disputes from compulsory third-party judicial settlement may undermine the purpose of incorporating dispute settlement provisions under UNCLOS. During the drafting of UNCLOS, dispute settlement, set out in Part XV, was intended to cover various disputes.<sup>33</sup> However, after negotiations among drafters, some limitations and exceptions to the applicability of Part XV were set. Fisheries disputes are among those singled out pursuant to Article 297(3) of the Convention. This Article precludes a coastal State from being subject to mandatory juridical settlement of disputes relating to its sovereign rights over the living resources in its EEZ or the exercise of those rights.<sup>34</sup> In other words, any fisheries disputes that

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<sup>31</sup> As of June 8, 2020, there are 168 parties to UNCLOS. See U.N. Oceans & Law of the Sea, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm) (last updated Mar. 9, 2020).

<sup>32</sup> *A Constitution for the Oceans, Remarks of President Tommy Koh, of Singapore President of the Third United Nations Conference on the Law of the Sea*, at xxxiv (1983), [http://www.un.org/depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf).

<sup>33</sup> See generally Sohn, *supra* note 26; J. Peter A. Bernhardt, *Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment*, 19 VA. J. INT'L L. 69 (1978).

<sup>34</sup> UNCLOS art. 297(1)(a): Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the

occur within a coastal State's EEZ are not subject to compulsory dispute settlement procedures. Such disputes can only be settled by consensual methods between the parties in a dispute or submitted to conciliation at the request of any party.<sup>35</sup>

This provision shows that the rights of coastal States exceeded those of flag States, meaning that a coastal State enjoys sovereign rights and jurisdiction in its extended maritime areas.<sup>36</sup> Consequently, any dispute over living resources within a coastal State's EEZ, for example, concerning the State's allowable catch, its harvesting capacity, or its conservation and management laws and regulations, falls within a coastal State's discretionary power. As EEZs cover almost forty percent of the world's ocean space and yield ninety percent of marine living resources,<sup>37</sup> disagreements will inevitably occur, yet not be subject to compulsory resolution under the Convention.

In addition, the design of the dispute settlement provisions also prevents international courts or tribunals from taking fishery conservation and management into account. Current judicial practices show that the International Tribunal for the Law of the Sea (ITLOS) has processed twenty-nine cases, and fourteen of those cases were related to fishing activities.<sup>38</sup> However, among

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allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

<sup>35</sup> UNCLOS art. 297(3)(b); see William T. Burke, *The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction*, 63 OR. L. REV. 73, 117–18 (1984).

<sup>36</sup> See *Id.* at 117; JOSÉ A. DE YTURRIAGA, *THE INTERNATIONAL REGIME OF FISHERIES: FROM UNCLOS 1982 TO THE PRESENTIAL SEA* 149 (1997).

<sup>37</sup> Joyner, *supra* note 1, at 271 & 277.

<sup>38</sup> As of July 19, 2020.

the fourteen listed cases, two of them are being withdrawn (ITLOS Case Nos. 7 and 9),<sup>39</sup> eight are prompt release cases (ITLOS Case Nos. 1, 5, 6, 8, 11, 13, 14, and 15),<sup>40</sup> two are provisional

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<sup>39</sup> Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/E.U.), ITLOS Case No. 7, Order of Dec. 16, 2009, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_7/published/C7\\_Ord\\_161209.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_7/published/C7_Ord_161209.pdf) [hereinafter *Swordfish*, Order]; Chaisiri Reefer 2 (Pan. v. Yemen), ITLOS Case No. 9, Prompt Release, Order of July 13, 2001, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_9/published/C9-O-13\\_jul\\_01.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_9/published/C9-O-13_jul_01.pdf) [hereinafter *Chaisiri Reefer 2*, Order].

<sup>40</sup> M/V Saiga (St. Vincent v. Guinea), ITLOS Case No. 1, Prompt Release, Judgment of Dec. 4, 1997, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_1/published/C1-J-4\\_Dec\\_97.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_1/published/C1-J-4_Dec_97.pdf) [hereinafter *M/V Saiga (No.1)*, Judgment]; Camouco (Pan. v. Fr.), ITLOS Case No. 5, Prompt Release, Judgment of Feb. 7, 2000, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_5/published/C5-J-7\\_feb\\_20.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_5/published/C5-J-7_feb_20.pdf) [hereinafter *Camouco*, Judgment]; Monte Confurco (Sey. v. Fr.), ITLOS Case No. 6, Prompt Release, Judgment of Dec. 18, 2000, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_6/published/C6-J-18\\_dec\\_20.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_6/published/C6-J-18_dec_20.pdf) [hereinafter *Monte Confurco*, Judgment]; Grand Prince (Belize v. Fr.), ITLOS Case No. 8, Prompt Release, Judgment of Apr. 20, 2001, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_8/published/C8-J-20\\_apr\\_01.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_8/published/C8-J-20_apr_01.pdf) [hereinafter *Grand Prince*, Judgment]; Volga (Russ. v. Austl.), ITLOS Case No. 11, Prompt Release, Judgment of Dec. 23, 2002, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_11/11\\_judgment\\_231202\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_11/11_judgment_231202_en.pdf) [hereinafter *Volga*, Judgment]; Juno Trader (St. Vincent v. Guinea-Bissau), ITLOS Case No. 13, Prompt Release, Judgment of Dec. 18, 2004, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_13/13\\_judgment\\_181204\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_13/13_judgment_181204_en.pdf) [hereinafter *Juno Trader*, Judgment]; Hoshinmaru (Japan v. Russ.), ITLOS Case No. 14, Prompt Release, Judgment of Aug. 6, 2007, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_14/14\\_judgment\\_060807\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_14/14_judgment_060807_en.pdf) [hereinafter *Hoshinmaru*, Judgment]; Tomimaru (Japan v. Russ.), ITLOS Case No. 15, Prompt Release, Judgment of Aug. 6, 2007, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_15/15\\_judgment\\_060807\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_15/15_judgment_060807_en.pdf) [hereinafter *Tomimaru*, Judgment].

measure cases (ITLOS Case Nos. 3 and 4),<sup>41</sup> and one is advisory opinion (ITLOS Case No. 21).<sup>42</sup> ITLOS has delivered a judgment on the merits on only a single case.<sup>43</sup> Thus, despite a number of cases involving fisheries disputes coming before ITLOS, most of the cases turn on procedural rather than core fishery management issues.

### **C. The Deficiency of Incorporating Fishing Entities into the Procedures for Settlement of Disputes**

The term “fishing entity” was first seen in 1995 in the official document of the United Nations 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 (FSA).<sup>44</sup> The term is known to be used to incorporate Taiwan into the FSA regime so that Taiwan is subject to the substantive rules of the

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<sup>41</sup> Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), ITLOS Case Nos. 3&4, Provisional Measures, Order of Aug. 27, 1999, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_3\\_4/published/C34-O-27\\_aug\\_99.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf) [hereinafter *SBT*, Order].

<sup>42</sup> Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), ITLOS Case No. 21, Advisory Opinion of Apr. 2, 2015, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/advisory\\_opinion\\_published/2015\\_21-advop-E.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf) [hereinafter *SRFC Advisory Opinion*, Advisory Opinion].

<sup>43</sup> *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, ITLOS Case No. 2, Judgment of July 1, 1999, [http://www.itlos.org/fileadmin/itlos/documents/cases/case-no\\_2/merits/Judgment.0107-99.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case-no_2/merits/Judgment.0107-99.E.pdf) [hereinafter *M/V Saiga (No. 2)*, Judgment].

<sup>44</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea December 10, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 4, 1995, 34 I.L.M. 1542 (1995) [hereinafter FSA].

FSA.<sup>45</sup> Without the special designation, political challenges prevent Taiwan from being incorporated into this agreement and others like it.

Taiwan is known for distant water fishing—its catch of tuna and tuna-like species ranks in the top three in the world.<sup>46</sup> According to a report from the Food and Agriculture Organization of United Nations (FAO), Taiwan is one of the twenty-five major producers in marine capture, capturing over a million tons in 2014.<sup>47</sup> It also has one of the largest global fishing fleets with over 2,000 fishing vessels engaged in distant water tuna fishing.<sup>48</sup> So far, distant water fisheries production accounts for fifty-eight percent of Taiwan’s total fisheries production,<sup>49</sup> bringing about NTD 37.7 billion. Taiwan has a strong fishing capacity and its vessels actively capture at sea, and this poses threats to the marine ecosystem. Thus, the international community considers it

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<sup>45</sup> Erik Jaap Molenaar, *Non-Participation in the Fish Stocks Agreement: Status and Reasons*, 26 INT’L J. MARINE & COASTAL L. 195, 208 (2011).

<sup>46</sup> Michael W. Lodge, *The Practice of Fishing Entities in Regional Fisheries Management Organizations: The Case of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, 37 OCEAN DEV. & INT’L L. 185, 187 (Aug. 2006); see also Hsiang-Wen Huang & Ching-Ta Chuang, *Fishing Capacity Management in Taiwan: Experiences and Prospects*, 34 MARINE POL’Y 70, 71 (Jan. 2010).

<sup>47</sup> FOOD AND AGRICULTURE ORGANIZATION OF UNITED NATIONS, *THE STATE OF WORLD FISHERIES AND AQUACULTURE 2016*, at 11 (2016). The Food and Agriculture Organization (FAO) is a specialized agency of the United Nations. Since Taiwan is not a member to the United Nations, it is not a member of the FAO either. However, Taiwan appeared in the cited FAO report under the name “Taiwan Province of China.” The report showed that Taiwan’s marine capture in 2014 was 1,068,244 tons.

<sup>48</sup> Zoe Scanlon, *Incorporating Taiwan in International Fisheries Management: The Southern Indian Ocean Fisheries Agreement Experience*, 48 OCEAN DEV. & INT’L L. 35, 35 (2017).

<sup>49</sup> FISHERIES AGENCY, COUNCIL OF AGRICULTURE, EXECUTIVE YUAN, *FISHERIES OF THE REPUBLIC OF CHINA* 5 (2018).

important to incorporate Taiwan into the international regulatory system, even though it has special international status and is not a State Party to UNCLOS.

Under the *pacta tertiis* rule, States are only bound by agreements or rules of international law when they have signed or acceded to the agreement and expressed consent.<sup>50</sup> Thus, if Taiwan is not a party to an agreement, it does not have any obligation to be concerned about the interests of coastal States nor restrictions on marine capture. This explains why many international fisheries conventions and RFMOs incorporate Taiwan into their agreements. Otherwise, excluding Taiwan would contradict the purpose of the establishment of RFMOs and undermine the effectiveness of ocean conservation.<sup>51</sup>

Due to the necessity of including Taiwan in the legal framework, the concept of a “fishing entity” was created.<sup>52</sup> Pursuant to Article 1(3) of the FSA,<sup>53</sup> the Agreement extensively applies *mutatis mutandis* to fishing entities whose vessels fish on the high seas. Taiwan, as a result, observes the conservation and management measures enumerated in the FSA. These regulations

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<sup>50</sup> Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *VCLT*].

<sup>51</sup> See Rosemary Rayfuse, *Regional Fisheries Management Organizations*, in OXFORD HANDBOOK OF INTERNATIONAL LAW OF THE SEA 439, 444 (Donald R. Rothwell et al. eds., 2015).

<sup>52</sup> See United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Report of the Technical Consultation on High Seas Fishing and the Papers Presented at the Technical Consultation on High Seas Fishing, U.N. Doc. A/CONF.164/INF/2 (May 14, 1993), reprinted in JEAN-PIERRE LEVY & GUNNER G. SCHRAM, UNITED NATIONS CONVENTION ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS—SELECTED DOCUMENTS 358 (1996); see also Michael Sheng-Ti Gau, *The Practice of the Concept of Fishing Entities: Dispute Settlement Mechanisms*, 37 OCEAN DEV. & INT’L L. 221 (2006); Hasjim Djalal, *The Emergence of the Concept of Fishing Entities: A Note*, 37 OCEAN DEV. & INT’L L. 117, 119 (2006).

<sup>53</sup> FSA art. 1(3): This Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas.

ensure that the effectiveness of the conservation and sustainable use of straddling fish stocks and highly migratory fish stocks will not be undermined.

The concept of “fishing entity” is also adopted by RFMOs. So far, Taiwan has participated as a member in six RFMOs under the name Chinese Taipei—four in the Pacific Ocean,<sup>54</sup> one in the Indian Ocean,<sup>55</sup> and one that targets specific species.<sup>56</sup> It also joins two other RFMOs under a different status: the International Commission for the Conservation of Atlantic Tunas (ICCAT) as a Cooperating non-Contracting Party,<sup>57</sup> and the Indian Ocean Tuna Commission (IOTC) as an invited expert.<sup>58</sup> Although Taiwan is a member of these RFMOs, its rights and obligations are

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<sup>54</sup> These are Inter-American Tropical Tuna Commission (IATTC), Western and Central Pacific Fisheries Commission (WCPFC), South Pacific Regional Fisheries Management Organisation (SPRFMO), and North Pacific Fisheries Commission (NPFC).

<sup>55</sup> It is South Indian Ocean Fisheries Agreement (SIOFA).

<sup>56</sup> The Commission for the Conservation of Southern Bluefin Tuna (CCSBT) targets specifically on the management of southern bluefin tuna throughout its distribution. Its objective is to ensure, through appropriate management, the conservation and optimum utilization of southern bluefin tuna.

<sup>57</sup> The ICCAT is an intergovernmental organization responsible for the management and conservation of tuna and tuna-like species in the Atlantic Ocean and adjacent seas. Pursuant to Article XIV of the ICCAT Convention, the Convention is only open for signature by the Government of any State which is a Member of the United Nations or of any Specialized Agency of the United Nations. To encourage non-Contracting Parties, Entities, or Fishing Entities with vessels fishing for ICCAT species in the Convention area to implement ICCAT conservation measures, the Commission urge them to become a Contracting Party to ICCAT or to attain the status of a Cooperating non-Contracting Party. Therefore, Taiwan participates as a Cooperating non-Contracting Party.

<sup>58</sup> Since the IOTC is established within the framework of FAO, membership to the Commission is as limited as the UN. Therefore, Taiwan joined the IOTC as an invited expert, by which it may attend IOTC sessions and those of its

slightly different in each one. For example, Taiwan can vote for proposals for amendments to the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC Convention) as a commission member,<sup>59</sup> but it has no such right in South Pacific Regional Fisheries Management Organisation (SPRFMO).<sup>60</sup> Notwithstanding these differences, these RFMOs all exclude Taiwan from applying the same dispute settlement provisions as other member States. Instead, specific provisions were established, directing disputes involving a fishing entity to submit the dispute to arbitration or another peaceful means as agreed upon by the parties in the dispute.

Aside from disputes within RFMOs, fishery conflicts between Taiwan and other countries occur frequently. For example, in adopting zero tolerance on fighting against illegal fishing, the European Commission identified Taiwan as an uncooperative country in combating illegal, unreported, and unregulated (IUU) fishing and warned Taiwan with yellow cards.<sup>61</sup> If Taiwan fails

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subsidiary bodies. *See* Indian Ocean Tuna Commission, Observers to the IOTC Meetings, <http://www.iotc.org/about-iotc/observers-iotc-meetings> (last visited Sept. 30, 2018).

<sup>59</sup> Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean art. 40(2), Sept. 5, 2000, 2275 U.N.T.S. 43, *available at* <https://www.wcpfc.int/system/files/text.pdf> [hereinafter WCPFC Convention].

<sup>60</sup> Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean art. 35(2). Such proposals for amendment to this Convention shall be adopted by the Commission by a three-fourths majority of the Contracting Parties present and casting affirmative or negative votes. Adopted amendments shall be transmitted by the Depositary to all Contracting Parties without delay.

<sup>61</sup> *Fighting Illegal Fishing: Commission Warns Taiwan and Comoros with Yellow Cards and Welcomes Reforms in Ghana and Papua New Guinea*, E. C. PRESS RELEASE (Oct. 1, 2015), [http://europa.eu/rapid/press-release\\_IP-15-5736\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5736_en.htm) (last visited Nov. 20, 2018).

to meet the EU's requirements—including strengthening its domestic fisheries law and improving compliance—fisheries products caught by its vessels cannot be imported into the EU.<sup>62</sup> In addition, the long-lasting overlapping EEZ conflicts between Taiwan and adjacent States imply that the international community should reconsider the dispute settlement mechanisms under the UNCLOS framework. Taiwan signed a fishery agreement with Japan to deal with contentious waters in the East China Sea and thus created an institutionalized mechanism for further fishery cooperation and consultation.<sup>63</sup> Even so, this instance cannot be used as the reference for Taiwanese relations with the Philippines and China. Relations between Taiwan and the Philippines have intensified since 2013 when a Taiwanese fisherman was shot dead by the Philippines Coast Guard in the countries' overlapped EEZ.<sup>64</sup> With respect to China, the countries' entangled history and the “One China Policy” prevents both sides from negotiating. All in all, these controversies draw attention to the

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<sup>62</sup> Council Regulation (EC) No 1005/2008 of 29 Sept. 2008, art. 38, 2008 O.J. (L 286) 1. EU lifted Taiwan's yellow card warning on June 27, 2019. *See Illegal Fishing: EU Lifts Taiwan's Yellow Card following Reforms*, E. C. PRESS RELEASE (June 27, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_3397](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3397) (last visited Apr. 28, 2020).

<sup>63</sup> *Republic of China, Republic of China (Taiwan) Signs Fisheries Agreement with Japan*, MINISTRY OF FOREIGN AFFAIRS (Apr. 15, 2013), [https://www.mofa.gov.tw/en/News\\_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=E80C25D078D837BB](https://www.mofa.gov.tw/en/News_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=E80C25D078D837BB) (last visited Nov. 15, 2018).

<sup>64</sup> *See e.g.*, Jethro Mullen, *Relations Sour between Taiwan and Philippines over Fisherman's Death*, CNN (May 17, 2013, 7:22 AM), <https://www.cnn.com/2013/05/17/world/asia/philippines-taiwan-dispute/index.html> (last visited Nov. 15, 2018); Ralph Jennings, *The Philippines Is Struggling to Stop Taiwan and Vietnam from Entering A Disputed Sea*, FORBES (Apr. 4, 2017), <https://www.forbes.com/sites/ralphjennings/2017/04/04/philippines-struggles-to-keep-defense-of-disputed-maritime-claims/#76fd9d245e85> (last visited Nov. 15, 2018).

system of dispute settlement, the procedures by which it functions, and the associated judicial practices.

### **III. Research Questions**

Early in 1983, the then International Court of Justice judge, Shigeru Oda, pointed out some difficulties in applying dispute settlement procedures in the fisheries regime and predicted that these mechanisms created under UNCLOS might “fail to function properly in the resolution of fishery disputes.”<sup>65</sup> More than two decades after the implementation of UNCLOS, scholars have paid little attention to the function of dispute settlement mechanisms, particularly in resolving fishing disputes.

Accordingly, this dissertation examines the primary question: Under the UNCLOS framework, do courts and tribunals incorporate marine sustainability in resolving fishing disputes?

In answering this question, the following related questions are addressed:

- Do existing dispute settlement mechanisms adequately resolve fishing disputes?
- From the perspective of sustainability, what dispute settlement mechanisms are available to States to resolve fishing disputes?
- What is the role of fishing entities under UNCLOS dispute settlement systems?
- Should fishing entities be included in dispute settlement mechanisms systems? If the answer is yes, what methods should be used to hold fishing entities accountable?

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<sup>65</sup> Shigeru Oda, *Fisheries under the United Nations Convention on the Law of the Sea*, 77 AM. J. INT’L L. 739, 742 (1983).

## IV. Research Methodology

The dissertation relies primarily on a qualitative research approach. It is library-based research and begins with case study methods. The principle sources, as set out in Article 38(1) of the Statute of the International Court of Justice,<sup>66</sup> are international conventions, customary international law, and the general principles of law recognized by civilized nations.<sup>67</sup> The secondary sources are judicial decisions and legal scholarship. In answering whether existing dispute settlement mechanisms resolve fishing disputes, the research analyzes cases related to fishing activities and the various means used to reach settlements based on Article 33 of the U.N. Charter. This study is a small number case study analysis, collecting cases relevant to fishing disputes filed after the enforcement of UNCLOS,<sup>68</sup> from November 16, 1994 to present. Data may be collected from both within the UNCLOS framework and outside the UNCLOS framework. Under the UNCLOS framework, this research includes fifteen of twenty-nine cases submitted to ITLOS regarding fishing activities,<sup>69</sup> and three cases involving fisheries arbitrated under the auspices of the PCA.<sup>70</sup> No fisheries disputes have been submitted to the ICJ pursuant to Part XV

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<sup>66</sup> Statute of the International Court of Justice art. 38(1), 33 U.N.T.S. 993, 3 Bevens 1153 [hereinafter Statute of ICJ].

<sup>67</sup> Article 38 of the Statute of ICJ is regarded as the traditional and authoritative source of international law and doctrines. *See generally* HUGH W. A. THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* (2d ed. 2019).

<sup>68</sup> The UNCLOS entered into force on November 16, 1994, upon deposition of the 60th instrument of ratification.

<sup>69</sup> The fishing activities include bunkering fishing vessels, illegal fishing, and conservation and management disputes. More detail will be discussed.

<sup>70</sup> Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case Repository No. 2011-03, Award of Mar. 18, 2015, <http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf> [hereinafter *Mauritius v. U.K.*, Award]; Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), Award on Jurisdiction and Admissibility Decision of Aug. 4,

of the LOSC. Nor have such disputes been submitted for special arbitration.<sup>71</sup> In terms of fisheries cases outside the UNCLOS framework, this research includes one case submitted to the ICJ.<sup>72</sup> The total data sample is nineteen cases. This research aims to provide an in-depth analysis of courts and tribunals' decisions concerning the resolutions of fishing conflicts. In reviewing these cases, this research distinguishes procedural and substantial issues, examines the substance of fishing disputes, and then considers whether the adjudications have taken sustainable development into account. After analyzing the relationship between judicial settlements and the conservation and management of fisheries, this research proposes appropriate means for settling fisheries disputes and analyzes how ocean sustainability may be achieved through the rule of law established by courts and tribunals.

With respect to the analysis of the fishing entities' role under the UNCLOS dispute settlement system, this study applies legal doctrinal analysis. This analysis is supplemented with academic research as neither a court nor tribunal has dealt with a case involving a fishing entity to date. The creation of the concept of fishing entities has a unique background involving environmental concerns. This study begins with surveying the origin of the concept of fishing

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2000, [https://legal.un.org/riaa/cases/vol\\_XXIII/1-57.pdf](https://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf) [hereinafter *SBT Arbitration*, Award on Jurisdiction and Admissibility Decision]; Atlanto-Scandian Herring Arbitration (Den. in respect of Faroe Is. v. E.U.), PCA Case Repository No. 2013-30, Termination Order of Sept. 23, 2014, <https://pcacases.com/web/sendAttach/781> [hereinafter *Herring Arbitration*, Termination Order].

<sup>71</sup> See Churchill, *supra* note 21, at 224 (pointing out that the probable reason is that few States chose the ICJ and Annex VIII Special Arbitration as a preferred means of settlement.)

<sup>72</sup> Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), Judgment, 2014 I.C.J. 226 (Mar. 31) [hereinafter *Whaling*, Judgment].

entities and researching the role of fishing entities within the normative regime. In the process of law compliance and implementation of responsibilities, controversies may occur. Accordingly, whether a court or tribunal has both jurisdiction *ratione personae* and *ratione materiae* over disputes involving fishing entities becomes a critical question.<sup>73</sup> Here, the issue may lie in Article 20(2) and 21 of the Statute of the International Tribunal for the Law of the Sea concerning the Tribunal's jurisdiction.<sup>74</sup> Finally, this research suggests feasible means for the settlement of fisheries disputes between a fishing entity and States.

The overall purpose of this dissertation is to promote peaceful uses of the oceans and strengthen the international fisheries law regime by analyzing how dispute settlement mechanisms function and the practices, as well as the loopholes, regarding fishing entities' standing to sue.

### **Limitations**

It is difficult to obtain comprehensive records regarding dispute settlement under UNCLOS Part XV section 1, which requires the parties to a dispute to settle that dispute by any agreed means of their choice. Most attempts at dispute settlement remain confidential or are otherwise not widely

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<sup>73</sup> "*Ratione personae*" is a Latin term that means "by reason of the person." *Ratione personae*, or personal jurisdiction, refers to a court or tribunal's competence in deciding a case submitted by a person. In contrast, "*ratione materiae*," also a Latin term, means "by reason of the matter." It is known as subject-matter jurisdiction, in which a court or tribunal can hear a case on a particular subject. See Aaron X. Fellmeth & Maurice Horwitz, "*Ratione materiae*," in GUIDE TO LATIN IN INTERNATIONAL LAW (2009), <https://www-oxfordreference-com.offcampus.lib.washington.edu/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1791> (last visited July 8, 2020).

<sup>74</sup> Statute of the International Tribunal for the Law of the Sea of UNCLOS Annex VI, art. 20(2) & 21 [hereinafter Statute of ITLOS].

publicized. Thus, the data selected here are publicized fisheries cases, and most of them are judicial settlements.

## **V. Review of Existing Studies**

Dispute settlement in Part XV of UNCLOS has been significantly researched. A number of academic works focus on the application and operation of the dispute resolution mechanisms under UNCLOS. Some of these works provide detailed reviews of the judgments of particular cases, while others analyze specific subject matters, such as provisional measures or maritime boundary delimitation. However, few scholars have conducted a systematic review of fishery disputes.

### **A. Critique of Current Judicial Cases**

One scholar, R. Churchill, categorized the subject matter of cases that have been brought before UNCLOS judicial bodies and found that none of the three fisheries cases resulted in a decision on the merits.<sup>75</sup> Those fisheries disputes concerned the obligation to cooperate over the conservation and management of highly migratory species as well as Article 63(1) of shared stocks. Since the cases were either withdrawn by a party or dismissed for lack of jurisdiction, the judicial bodies were unable to make judgments on the merits and clarify the relevant obligations.<sup>76</sup>

C. Romano, D. Colson and Dr. P. Hoyle, and N. Klein have written in-depth analyses on the *Southern Bluefin Tuna* case and point out the insufficiency of the dispute settlement

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<sup>75</sup> Churchill, *supra* note 21, at 228 (analyzing cases brought before judicial bodies of UNCLOS as of December 1, 2016 and listing three cases that are related to fisheries disputes, including *Swordfish Case*, *SBT Arbitration*, and *Herring Arbitration*).

<sup>76</sup> *Id.*

mechanisms under UNCLOS as it relates to that case.<sup>77</sup> In *Southern Bluefin Tuna*, the Tribunal decided that it lacked jurisdiction as the disputing parties had their own dispute settlement procedure in accordance with the CCSBT. As a result, the Tribunal decided that it was not competent to elucidate the parties' duties concerning high seas fishing, nor could it flesh out the requirements imposed on States by UNCLOS for fishing on the high seas.<sup>78</sup> Romano states that the case itself did not settle the dispute regarding southern bluefin tuna,<sup>79</sup> but the Tribunal's interpretation of Article 281(1), concerning the relationship between UNCLOS dispute settlement procedures and that of the RFMOs, will create more issues in the future.<sup>80</sup> D. R. Rothwell also suggest that "[t]his broad interpretation . . . appears unwarranted."<sup>81</sup>

With regard to the prompt release cases,<sup>82</sup> N. Klein refers to the *Volga* case as a disappointment because the Tribunal refused to consider conservation efforts in determining the

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<sup>77</sup> Cesare Romano, *The Southern Bluefin Tuna Dispute: Hints of a World to Come ... Like It or Not*, 32 OCEAN DEV. & INT'L L. 313 (2001); David A. Colson & Dr. Peggy Hoyle, *Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 Law of the Sea Convention: Did the Southern Bluefin Tuna Tribunal Get It Right?*, 34 OCEAN DEV. & INT'L L. 59 (2003); Natalie Klein, *Litigation over Marine Resources: Lessons for Law of the Sea, International Dispute Settlement and International Environmental Law*, 28 AUSTL. Y.B. INT'L L. 131 (2009).

<sup>78</sup> Klein, *supra* note 77, at 141.

<sup>79</sup> Romano, *supra* note 77, at 334.

<sup>80</sup> *Id.* at 335.

<sup>81</sup> Donald R. Rothwell, *Building on the Strengths and Addressing the Challenges: The Role of Law of the Sea Institutions*, 35 OCEAN DEV. & INT'L L. 131, 141 (2004).

<sup>82</sup> According to UNCLOS Article 73(2), the detaining State must promptly release arrested vessels and their crews upon the posting of reasonable bond or other security. If the detaining State fails to comply with the prompt release

reasonableness of a bond.<sup>83</sup> Klein suggests that the case had an adverse effect on three subsequent prompt release cases: the *Grand Prince*, the *Monte Confurco*, and the *Camouco*.<sup>84</sup> D. R. Rothwell holds the same opinion and provides a detailed analysis of such. In the *Volga* case, a Russian vessel and attached crews were detained by Australia due to alleged illegal fishing within Australia's EEZ. Russia instituted prompt release proceedings, requesting that Australia release its vessel and crews upon the posting of a reasonable bond or other financial security. Australia argued that its efforts in conservation and managing the fish stocks should be considered. However, the Tribunal did not permit the imposition of a non-financial condition to release the vessel and conducted a contextual analysis of the prompt release provision.<sup>85</sup> The Tribunal adopted a relatively narrow interpretation of the provision and ultimately decided the amount of the bond without considering conservation and management efforts of fisheries. This case reveals the tensions and challenges of a coastal State's enforcement of fishery conservation law.<sup>86</sup> It also shows the lack of attention courts and tribunals pay to the protection of marine resources and the insufficiency of relying on them to do so.

The available analysis concerning jurisprudence in resolving fishing disputes is fairly fragmented. Scholarly works provide critiques of specific cases, and some concentrate particularly on prompt release procedure and provisional measures. However, these fishery disputes should be

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requirement, the flag State may submit the question of release from detention to a court or tribunal in accordance with UNCLOS Article 292; see Chapter 3(1)(b) for detailed discussion.

<sup>83</sup> Klein, *supra* note 77, at 152.

<sup>84</sup> *Id.* at 149.

<sup>85</sup> *Volga*, Judgment, *supra* note 37, ¶ 77.

<sup>86</sup> Rothwell, *supra* note 81, at 139.

examined as a whole to investigate how the goal of achieving marine sustainability has affected the jurisprudence of courts and tribunals. This research, therefore, further develops Churchill's study and analyzes all fisheries cases that have been brought before UNCLOS judicial bodies. The research explores why few fisheries cases resulted in a decision on the merits, and further examines whether courts or tribunals will incorporate marine sustainability in resolving fishing disputes under the UNCLOS framework.

### **B. Discussions Concerning Mechanisms for Settling Fisheries Disputes**

Most scholars broadly examine the complex system of dispute settlement mechanisms under the UNCLOS framework, introducing methods to settle disputes.<sup>87</sup> Many scholars have been devoted to analyzing how UNCLOS dispute settlement mechanisms address environmental concerns, but few scholars focus on the settlement of fishing disputes or the appropriate means for achieving marine sustainability within the dispute settlement system. The discussion of the settlement of fishing disputes under UNCLOS can be categorized by the location in which the dispute occurs—either an EEZ or on the high seas. Since coastal States have full sovereignty within their territorial waters, disputes occurring in such maritime zones are, undoubtedly, not subject to any dispute settlement mechanisms.

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<sup>87</sup> See e.g., J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 177–204 (6th ed. 2017); KARAMAN, *supra* note 18; NATALIE KLEIN, *DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA* (2005); Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 *INT'L & COMP. L.Q.* 37, 38–42 (1997); Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 *AM. J. INT'L L.* 277, 277–312 (2001).

## 1. Fisheries Disputes in an EEZ

If a fishery dispute occurs within a coastal State's EEZ, as discussed earlier, such a dispute cannot be submitted to compulsory procedures pursuant to Article 297(3) of UNCLOS. Scholars have commented that this Article reflects the hesitancy of coastal States to subject their sovereign rights or jurisdiction to any form of adjudication.<sup>88</sup> Another scholar, Nelson, believes that this provision mirrors the substantive law and concerns the historical development of the concept of the EEZ.<sup>89</sup>

There is no disagreement about whether a coastal State is obliged to submit disputes occurring in its EEZ to compulsory settlement.<sup>90</sup> A coastal State enjoys exclusive jurisdiction on issues such as the discretion to determine allowable catch, harvesting capacity, allocation of surpluses, and terms and conditions of conservation laws and management regulations. For disputes concerning a coastal State's sovereign rights, conciliation becomes obligatory when no settlement has been reached by recourse to section 1 of Part XV.<sup>91</sup> That said, such disputes may be first settled by negotiation and then by recourse to any procedure agreed upon by the concerned parties. For those disputes that are not settled, parties in the dispute shall submit their disputes to

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<sup>88</sup> MERRILLS, *supra* note 87, at 182; Oda, *supra* note 65, at 746.

<sup>89</sup> L.D.M. Nelson, *The International Tribunal for the Law of the Sea: Some Issues*, in THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE 49, 54 (P. Chandrasekhara Rao & Rahmatullah Khan eds., 2001).

<sup>90</sup> *E.g.*, Oda, *supra* note 65, at 746; A.O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 254 (1987); Nelson, *supra* note 89, at 54; Boyle, *supra* note 87, at 42–44; Joyner, *supra* note 1, at 298.

<sup>91</sup> UNCLOS art. 297(3)(b).

the conciliation procedure set out in Annex V of UNCLOS as the last resort.<sup>92</sup> Notably, the Conciliation Commission cannot substitute its discretion for that of the coastal State, and the Commission's report cannot be binding on both parties.<sup>93</sup>

## **2. Fisheries Disputes in High Seas**

Unlike fishery disputes arising in an EEZ, disputes that happen on the high seas are not exempt from compulsory settlement procedures under UNCLOS.<sup>94</sup> Accordingly, when a dispute occurs on the high seas, the involved States face a choice of forum if they cannot reach a consensual settlement of the dispute.<sup>95</sup> Although UNCLOS designates an arbitral tribunal as a default measure when parties to a dispute have not accepted the same procedure for the settlement of disputes,<sup>96</sup> it provides flexibility for parties in disputes to choose the most appropriate forum to resolve their dispute. As Igor V. Karaman pointedly suggests, “the phenomenon of forum shopping is evident in the Convention probably like nowhere else.”<sup>97</sup> The issue then turns to which dispute settlement mechanism is appropriate to resolve the existing fishery dispute between the parties.

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<sup>92</sup> MERRILLS, *supra* note 87, at 182; Oda, *supra* note 65, at 746.

<sup>93</sup> Oda, *supra* note 65, at 746.

<sup>94</sup> Boyle, *supra* note 87, at 43; Bernard H. Oxman, *The Rule of Law and the United Nations Convention on the Law of the Sea*, 7 EUR. J. INT'L L. 353, 368 (1996).

<sup>95</sup> According to Article 286, compulsory procedures set out in UNCLOS section 2 come into play when no settlement has been reached by the parties by recourse to section 1 procedures. The binding settlement shall be made by one of four means—ITLOS, the ICJ, an arbitral tribunal, or a special arbitral tribunal—for the settlement of disputes concerning the interpretation or application of this Convention according to Article 287 of UNCLOS.

<sup>96</sup> UNCLOS art. 287(1)(5).

<sup>97</sup> KARAMAN, *supra* note 18, at 251.

Karaman observes the structure of Part XV of UNCLOS and points out that “the Convention recognizes the central role of negotiations, with the appropriate emphasis being made on the role of informal dispute settlement means.”<sup>98</sup> He calculates the amount of times “negotiation” and “consultation” are mentioned in the Convention: negotiations are mentioned thirteen times,<sup>99</sup> and consultations are mentioned twenty-four times.<sup>100</sup> These numbers reveal that the Convention relies heavily on informal means for dispute settlement. Karaman also analyzes the risks and advantages of forum shopping under the UNCLOS system.<sup>101</sup> He argues that “forum shopping is in general a positive phenomenon, since it embodies one of the main principles of international law: settlement of disputes by any peaceful means of the States’ own choice.”<sup>102</sup>

Churchill and Lowe argue that, given the sensitivity of States to international dispute settlement obligations, most States have not made a declaration indicating their choice of means for the settlement of disputes under UNCLOS Article 287 even if they are free to do so.<sup>103</sup> As a result, the authors think choices of forum differ from State to State.<sup>104</sup>

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<sup>98</sup> *Id.* at 11.

<sup>99</sup> UNCLOS Articles 74(1), 83(1), 118, 187(d), 283 (1), 298(1)(a)(i), 298(1)(a)(ii), Article 19(1) of Annex II, Article 6 of Annex IV, and paragraph 5(c) of resolution II of the Final Act of UNCLOS III.

<sup>100</sup> UNCLOS Articles 41(5), 66(2), 66(3)(a), 142(2), 163(13), 154(2)(c), 169(1), 211(6)(a), 283(2), 289; Articles 2(2), 5(5), 13(8), 13(9)(a) of Annex II; Articles 3(3), 6(1), 14(4), 36(2) of Annex V; Article 3(e) of Annex VIII; paragraph 19(b) of Resolution III of the Final Act of UNCLOS III.

<sup>101</sup> KARAMAN, *supra* note 18, at 255–85.

<sup>102</sup> *Id.* at 313.

<sup>103</sup> CHURCHILL & LOWE, *supra* note 28, at 458.

<sup>104</sup> *Id.*

Oda points out that fishing activities concern not only fishermen's interests but also the State's financial profit and social or political interests.<sup>105</sup> Hence, the power of the diplomatic negotiations of each nation will inevitably come into play and negotiations will determine how the allocation of fishery resources is settled.<sup>106</sup> He concludes that such disputes will hardly be suitable for submission to any judicial body.<sup>107</sup> David H. Anderson reaches the same conclusion, arguing that negotiation is the preferable means to settle disputes, but for a different reason. He argues that, from a practitioner's standpoint, the negotiator has greater control over the entire process and can reach a mutually satisfying result; while, in litigation, the result is either win or lose and the risks to States are much greater.<sup>108</sup> However, he admits that "litigation may be a way of resolving differences on the basis of law" in some situations.<sup>109</sup> Anderson evaluates the decisions of past cases based on Part XV and determines that the outcomes have been generally positive.<sup>110</sup>

John E. Noyes is less optimistic about the prospect that the Convention's third-party mechanisms will be used to settle disputes in many new cases. He posits four scenarios and argues that minor issues are best settled by negotiation and mutual accommodation since adjudication is

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<sup>105</sup> Oda, *supra* note 65, at 753.

<sup>106</sup> *Id.* at 754.

<sup>107</sup> *Id.*

<sup>108</sup> David H. Anderson, *Maritime Dispute Settlement and the Practitioner*, 24 OCEAN Y.B. 51, 65–66 (2010).

<sup>109</sup> David H. Anderson, *Peaceful Settlement of Disputes Under UNCLOS*, in *LAW OF THE SEA: UNCLOS AS A LIVING TREATY* 385, 413 (Jill Barrett & Richard Barnes eds., 2016).

<sup>110</sup> *Id.*

“an overly cumbersome way to deal with routine disputes or differences of opinion.”<sup>111</sup> Politically sensitive issues involve high risk, and States are more resistant to pursue an adjudication in such cases. Several important issues are already excluded from Part XV pursuant to section 3, and the Convention’s provisions for third-party adjudication do not apply in cases where States have already agreed upon an adjudication method. Noyes nonetheless maintains that some significant categories of disputes can be adjudicated under Part XV and may demonstrate the Convention’s potential contribution in this area.<sup>112</sup> Such disputes include alleged coastal State interference with rights of navigation, disputes relating to the protection of the marine environment, and disputes concerning the high seas.<sup>113</sup>

So far, the existing analyses indicate that negotiation is an initial and primary means for dispute resolution. The UNCLOS framework demonstrates this, and States can flexibly utilize the negotiation method to deal with sensitive issues, have control over the entire process, and make the best effort to reach a mutually satisfactory result. Despite the advantages of negotiation, many scholars still hold a positive view of the adjudicatory mechanism established by UNCLOS, suggesting that certain types of disputes may be submitted to adjudicatory bodies under UNCLOS for the best result. However, these studies do not illustrate the preferences of choices of forum among States for resolving fisheries disputes. None of the current studies further research why

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<sup>111</sup> John E. Noyes, *The Third-Party Dispute Settlement Provisions of the 1982 United Nations Convention on the Law of the Sea: Implications for States Parties and for Nonparties*, in ENTRY INTO FORCE OF THE LAW OF THE SEA CONVENTION 213, 217 (Myron H. Nordquist & John Norton Moore eds., 1995).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 218.

States submit their fisheries disputes to specific bodies or mechanisms, nor do they explain how fisheries disputes should be settled by those mechanisms.

### **C. The Uncertainty of the Status of Fishing Entities**

#### **1. The Legal Status of Fishing Entities**

The term “fishing entity,” as discussed above, appears originally in the 1995 UN Fish Stocks Agreement,<sup>114</sup> primarily to incorporate entities such as Taiwan into international fishing regimes. Even so, the definition and legal status of fishing entities have not been intelligibly clarified. Furthermore, the rights and obligations of fishing entities vary from RFMO to RFMO, based on the relevant background and negotiation situation. The ambiguous concept causes controversies over whether a dispute involving a fishing entity can use any UNCLOS dispute settlement mechanisms.

Only a few articles focus on reviewing the status of Taiwan as a fishing entity. Andrew Serdy discusses how Taiwan was brought into the international fisheries fold as a fishing entity.<sup>115</sup> He illustrates how Taiwan joined the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) in detail, points out the hurdles to Taiwan’s participation, and precisely analyzes the impact.<sup>116</sup> Serdy focuses on the political and negotiation processes during the debate over including Taiwan in the CCSBT. In doing so, he analyzes the broader consequences of Taiwan

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<sup>114</sup> Djalal, *supra* note 52, at 118; W R Edeson, *An International Legal Extravaganza in the Indian Ocean: Placing the Indian Ocean Tuna Commission Outside the Framework of FAO*, INT’L J. MARINE & COASTAL L. 485, 485 (2007).

<sup>115</sup> Andrew Serdy, *Bringing Taiwan into the International Fisheries Fold the Legal Personality of a Fishing Entity*, 75 BRIT. Y.B. INT’L L. 183, 183–221 (2005).

<sup>116</sup> *Id.*

joining other international organizations.<sup>117</sup> One journal includes a specific discussion regarding the legal status of fishing entities. Hasjim Djalal points out that the FSA is neither open for signature by the fishing entities nor ratification by the fishing entities.<sup>118</sup> He compares different concepts of “entities” under international law with the concept of fishing entity,<sup>119</sup> and confirms that “Taiwan acts as a subject under international law, having rights, obligations, and legal personality and capacity.”<sup>120</sup> Martin Tsamenyi also considers fishing entities to be a new subject of international law that should be accorded to States.<sup>121</sup>

Authors from Taiwan also provide insights into fishing entity analysis. Peter S. C. Ho analyzes the process and subsequent impact of Taiwan’s participation in various international fisheries fora.<sup>122</sup> Nien-Tsu Alfred Hu focuses on the context of the FSA and explains the concept of fishing entities and their emergence and evolution.<sup>123</sup> He provides a detailed background on negotiation and policy concerns from Taiwan’s perspective concerning its participation in WCPFC

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<sup>117</sup> *Id.*

<sup>118</sup> Djalal, *supra* note 52, at 119.

<sup>119</sup> *Id.* at 117–21.

<sup>120</sup> *Id.* at 120.

<sup>121</sup> Martin Tsamenyi, *The Legal Substance and Status of Fishing Entities in International Law: A Note*, 37 OCEAN DEV. & INT’L L. 123, 123–31 (2006).

<sup>122</sup> Peter S. C. Ho, *The Impact of the U.N. Fish Stocks Agreement on Taiwan’s Participation in International Fisheries Fora*, 37 OCEAN DEV. & INT’L L. 133, 133–48 (2006).

<sup>123</sup> Nien-Tsu Alfred Hu, *Fishing Entities: Their Emergence, Evolution, and Practice from Taiwan’s Perspective*, 37 OCEAN DEV. & INT’L L. 149, 149–83 (2006).

and IATTC,<sup>124</sup> and indicates that, “[t]he incorporation of fishing entities into regional fisheries management regimes should no longer have significant legal difficulty.”<sup>125</sup>

Other scholars detail the practice of RFMOs, particularly as they relate to Taiwan. Michael W. Lodge discusses the practice of fishing entities in the case of WCPFC,<sup>126</sup> Dustin Kuan-Hsiung Wang emphasizes Taiwan’s participation in IATTC,<sup>127</sup> and William Edeson points out the obstacles Taiwan encountered in participating in the IOTC and suggests placing the IOTC outside the FAO framework.<sup>128</sup> Moreover, the book titled, “The Theory and Practice of Participation in Regional Fisheries Management Organizations,” written in Chinese and coauthored by Peter S. C. Ho and Huang-Chih Chiang, also provides abundant references in terms of Taiwan’s participation.<sup>129</sup>

## **2. Fishing Entities’ Access to Dispute Settlement Mechanisms Under UNCLOS**

Very few scholars have focused on fishing entities and analyzed their access to dispute settlement mechanisms under UNCLOS.<sup>130</sup> Most scholars generally pay attention to the contentious meaning of “entities other than States Parties,” regulated in Article 20(2) of the Statute

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 175.

<sup>126</sup> Lodge, *supra* note 46, at 185–207.

<sup>127</sup> Dustin Kuan-Hsiung Wang, *Taiwan’s Participation in Regional Fisheries Management Organizations and the Conceptual Revolution on Fishing Entity: The Case of the IATTC*, 37 OCEAN DEV. & INT’L L. 209, 209–19 (2006).

<sup>128</sup> William Edeson, *Some Future Directions for Fishing Entities in Certain Regional Fisheries Management Bodies*, 37 OCEAN DEV. & INT’L L. 245, 245–64 (2006).

<sup>129</sup> PETER S. C. HO & HUANG-CHIH CHIANG, *THE THEORY AND PRACTICE OF PARTICIPATION IN REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS* (2012).

<sup>130</sup> *See* Gau, *supra* note 52, at 212–43; Boyle, *supra* note 87, at 52–53.

of ITLOS. Article 20(1) of the Statute of ITLOS provides that the Tribunal is open to States Parties.<sup>131</sup> Article 20(2) further specifies two categories of “entities other than States Parties” that may have access to the Tribunal including: (1) cases expressly provided for in Part XI, and (2) cases submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all Parties to that case. The first category of cases is not contentious because the Seabed Dispute Chamber of the Tribunal decides these cases.<sup>132</sup> Controversies occur when cases are submitted pursuant to any other agreement conferring jurisdiction on the Tribunal.

Thomas A. Mensah interprets “entities other than States parties” more broadly.<sup>133</sup> He makes an argument in conjunction with Article 21 of the Statute of UNCLOS regarding the Tribunal’s jurisdiction. He states that one of the characteristics of UNCLOS is its “very comprehensive scope.”<sup>134</sup> According to the article, the Tribunal has conferred jurisdiction by any other agreement to deal with any dispute. Due to the characteristics of UNCLOS and its comprehensiveness, Mensah argues that any agreement that relates to the purposes of UNCLOS cannot be excluded from the jurisdiction of the Tribunal. In other words, if the agreement relates to the purposes of UNCLOS, it can confer jurisdiction to the Tribunal, so the Tribunal can potentially manage the

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<sup>131</sup> UNCLOS defines the meaning of “States Parties” in Article 1(2), which includes States that have consented to be bound by this Convention and entities referred to in Article 305, paragraph 1(b), (c), (d), (e), and (f).

<sup>132</sup> See P. Chandrasekhara Rao, *International Tribunal for the Law of the Sea: An Overview*, in *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE* 1, 6 (P. Chandrasekhara Rao & Rahmatullah Khan eds., 2001).

<sup>133</sup> Thomas A. Mensah, *The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea*, 2 *MAX PLANCK YEARBOOK OF UNITED NATIONS LAW* 307, 320–21 (1998).

<sup>134</sup> *Id.* at 321.

dispute. Such agreements may involve a private commercial corporation, an inter-governmental organization, or an NGO, as a party.<sup>135</sup> Therefore according to this scholar, the term “entities other than States parties” must have a wider interpretation to allow these entities to be a party to a dispute before the Tribunal.

Allen Boyle observes that, compared to other provisions,<sup>136</sup> the wording of Article 20 of the Statute of ITLOS does not limit itself to States Parties.<sup>137</sup> Furthermore, the use of the wording “agreement” in Article 20(2) sets no further qualification either. Thus, Boyle argues that such “agreement” need not be a treaty, and that the parties involved are not required to have the capacity to conclude treaties either.<sup>138</sup> The entities here may include a wide range of parties, even other entities which are not States or whose international status is doubtful, such as Taiwan.<sup>139</sup> Boyle then emphasizes that fishing entities should fall under the terms of Article 20(2) as the FSA incorporates fishing entities into the agreement.<sup>140</sup> Nelson echoes Boyle’s comments, arguing that this provision, “sets no limits *ratione personae* and on the face of it lay the Tribunal wide open to

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<sup>135</sup> *Id.*

<sup>136</sup> For example, Article 37 of UNCLOS Annex VI, regarding access to the Seabed Disputes Chamber, clearly states that the Chamber shall be open to States Parties, the Authority, and the other entities referred to in Part XI section 5, while Article 20 of the same Annex does not say so.

<sup>137</sup> Boyle, *supra* note 87, at 53.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

a variety of entities.”<sup>141</sup> So he thinks that the Tribunal is, “open to a wide range of non-state entities including even non-governmental organizations.”<sup>142</sup>

Budislav Vukas also supports a broader interpretation of “entities other than States Parties.” Since the statute opens the Tribunal to such entities, “in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal,” he suggests that the range must be wider than the one envisaged in Article 305 of the Convention to be compatible to the agreement that confers jurisdiction.<sup>143</sup> Vukas believes that the entities may include intergovernmental organizations, or even NGOs, active and competent in the field of the law of the sea.<sup>144</sup>

P. Chandrasekhara Rao interprets the term by referring to UNCLOS. By looking at the scheme of the Convention, he concludes that the Statute only supplements the provisions of the Convention instead of replacing the Convention.<sup>145</sup> Therefore, access to the Tribunal and its jurisdiction should be read together with Article 291(2) and Article 288 of the Convention on access to dispute settlement procedures and jurisdiction. Since Article 288 stipulates that the Tribunal has jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, the provision constrains the scope of “any other agreement” of Article 20 and 21 of the Statute. In other words, only those

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<sup>141</sup> Nelson, *supra* note 89, at 57.

<sup>142</sup> *Id.*; see also Boyle, *supra* note 87, at 53.

<sup>143</sup> Budislav Vukas, *The International Tribunal for the Law of the Sea: Some Features of the New International Judicial Institution*, in *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE* 59, 66 (P. Chandrasekhara Rao & Rahmatullah Khan eds., 2001).

<sup>144</sup> *Id.*

<sup>145</sup> Rao, *supra* note 132, at 7.

agreements “that are connected with, or have effects on, the purposes of the Convention,” can confer jurisdiction on the Tribunal.<sup>146</sup> Accordingly, he argues that, “such agreements, like the Convention itself, could open the doors of the Tribunal not only to States Parties, but also to non-State entities.”<sup>147</sup>

Lastly, J. G. Merrills, conversely, has a relatively narrow interpretation of the term. He recognizes that ITLOS has greater access than the ICJ—the Tribunal is open to entities other than States, including international organizations in certain circumstances.<sup>148</sup> He merely states that “the same provision may be used by states which are not parties to the Convention,”<sup>149</sup> without discussing whether NGOs or fishing entities can submit a dispute nor the legal reasoning behind the interpretation.

In sum, on one hand, Allen Boyle explicitly says fishing entities should have access to the Tribunal. He seems to adopt the widest interpretation toward “entities other than States Parties,” and argues that Taiwan may submit its disputes to the Tribunal. On the other hand, Nelson and Budislav Vukas adopt a broader interpretation and maintain that non-state entities and NGOs are included in the term. They, however, do not further discuss whether fishing entities are included. Thomas A. Mensah and P. Chandrasekhara Rao also broadly interpret the term, but Rao says that only non-state entities are included, and Mensah provides no further explanation. Thus, the precise contours of the term fishing entity remain undefined.

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> MERRILLS, *supra* note 87, at 193.

<sup>149</sup> *Id.*

## **VI. Research Structure**

This dissertation includes the following five chapters:

**Chapter 1** describes the motivation for this dissertation and provides necessary background information. This research presents challenges with respect to the settlement of fishery disputes under the UNCLOS framework that may undermine its effectiveness. The framework's dispute settlement mechanisms are deficient, and often do not go far enough to adequately resolve fishery disputes. Further, the procedures for the settlement of dispute is unclear when a dispute involves fishing entities. This chapter identifies research questions, existing literatures, research methodology, and the purpose and significance of this dissertation.

**Chapter 2** broadly outlines international fisheries law under the UNCLOS framework. The entire system centers on UNCLOS and involves other international agreements and regional fisheries management conventions. Several agreements that are important to the regulation of the world fisheries will be discussed, such as the FSA, Code of Conduct, and Compliance Agreement. This research also examines regional practices, including major RFMOs. Against this backdrop, the legal regime incorporates Taiwan, whose vessels fish globally, under the status of a "fishing entity" so that regulatory framework is more comprehensive. Chapter 2 sets the foundation for the analysis of dispute settlement mechanisms in Chapters 3 and 4.

**Chapter 3** surveys nineteen fisheries cases and examines whether the adjudications have properly taken marine sustainability into account. These cases can be categorized into four types: (1) alleged illegal fishing, (2) conflicts derived from fishing related activities, (3) issues related to conservation and management measures, and (4) disputes involving RFMOs. Under the lens of sustainability, this study points out overlooked and unresolved issues regarding fishing disputes and provides solutions to make better use of dispute settlement mechanisms.

**Chapter 4** examines how fishing entities should be deposited into the UNCLOS system, especially its application of dispute settlement mechanisms. The creation of the concept of fishing entities makes Taiwan adaptive to the international fisheries law regime, but its application of dispute settlement mechanisms under the UNCLOS framework remains unclear. This chapter analyzes dispute settlement provisions regarding fishing entities and explores viable solutions for Taiwan to resolve fisheries disputes with other States.

**Chapter 5** summarizes and concludes this dissertation.

## Chapter 2. International Fisheries Law Regime

### I. World Fisheries and the Role of Taiwan

#### A. World Fisheries

International law has responded to international concern over global fisheries challenges and continues to develop in response to ongoing issues. Today, 90% of the world's wild-caught fisheries are fully exploited, overexploited, or depleted.<sup>150</sup> When fisheries capture exceeds the maximum amount that can be harvested, fish populations are unable to grow in a healthy and long-term sustainable way. States and other entities, such as Taiwan, compete for finite resources and exacerbate such challenges. Therefore, this research focuses on the association between ecological sustainability and legal resolutions for international fishing disputes.

Statistics shows that fish populations are under great capture pressure. According to the biennial FAO report, global fish production in 2016 totaled 171 million tons, with an estimated sale value of \$362 billion.<sup>151</sup> Of all fish production in that year, 79.3 million tons, or about 46%, of fish production was a result of marine capture,<sup>152</sup> and 80 million tons came from aquaculture.<sup>153</sup> Production has increased at a dramatic rate since 1950 which saw an estimated fish production of merely 20 million tons. The FAO's statistical report suggests that the rise of global fisheries

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<sup>150</sup> *Fisheries: Status*, OCEAN HEALTH INDEX, <http://www.oceanhealthindex.org/methodology/components/fisheries-status> (last visited Oct. 21, 2019).

<sup>151</sup> FAO, *THE STATE OF WORLD FISHERIES AND AQUACULTURE 2018 - MEETING THE SUSTAINABLE DEVELOPMENT GOALS 2* (2018).

<sup>152</sup> FAO capture fishery statistics mainly come from reports submitted by country governments, meaning that the statistics are largely dependent on the accuracy and reliability of nationally collected data. *Id.* at 8.

<sup>153</sup> *Id.* at 2.

production is a result of the increase of aquaculture production, while capture fisheries have remained relatively stable over the past thirty decades.

Currently, the most caught species at the global level is the Alaska pollock, with about 3.48 million tons captured in 2016. In terms of global catch, pollock is followed by anchoveta and then skipjack tuna.<sup>154</sup> The Northwest Pacific is the most productive fishing area globally, with a catch of 22.4 million tons in 2016. The FAO estimates 4.6 million fishing vessels exist around the world, and approximately 75% of them—about 3.5 million—are in fleets in Asia.<sup>155</sup>

These considerable fish production numbers reflect an enormous international need. As fish provides necessary nutrition and protein, human consumption of fish has grown significantly over the decades.<sup>156</sup> The increasing rate of fish consumption even exceeds human population growth.<sup>157</sup> Moreover, fish consumption per capita has ascended at an average rate of 1.5 percent per year from 9.0 kg in 1961 to 20.2 kg in 2015.<sup>158</sup> These numbers indicate that humans consume fish more than twice as much as we did fifty years ago. Despite the fact that aquaculture production has grown to support total fish consumption, the rate of wild-caught fish continues to level off relative to consumption, indicating that human consumption poses pressures on marine capture.

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<sup>154</sup> The top ten species that contributed most to global catches in 2016 were Alaska pollock, anchoveta, skipjack tuna, *Sardinellas nei*, Jack and horse mackerels *nei*, Atlantic herring, Pacific chub mackerel, Yellowfin tuna, Atlantic cod, and Japanese anchovy. *Id.* at 10.

<sup>155</sup> *Id.* at 5.

<sup>156</sup> *Id.* at 69.

<sup>157</sup> The average annual increase of global food fish consumption rate between 1961 and 2015 is 3.2 percent, which is higher than the population growth at 1.6 percent. *Id.* at 2.

<sup>158</sup> *Id.* at 69.

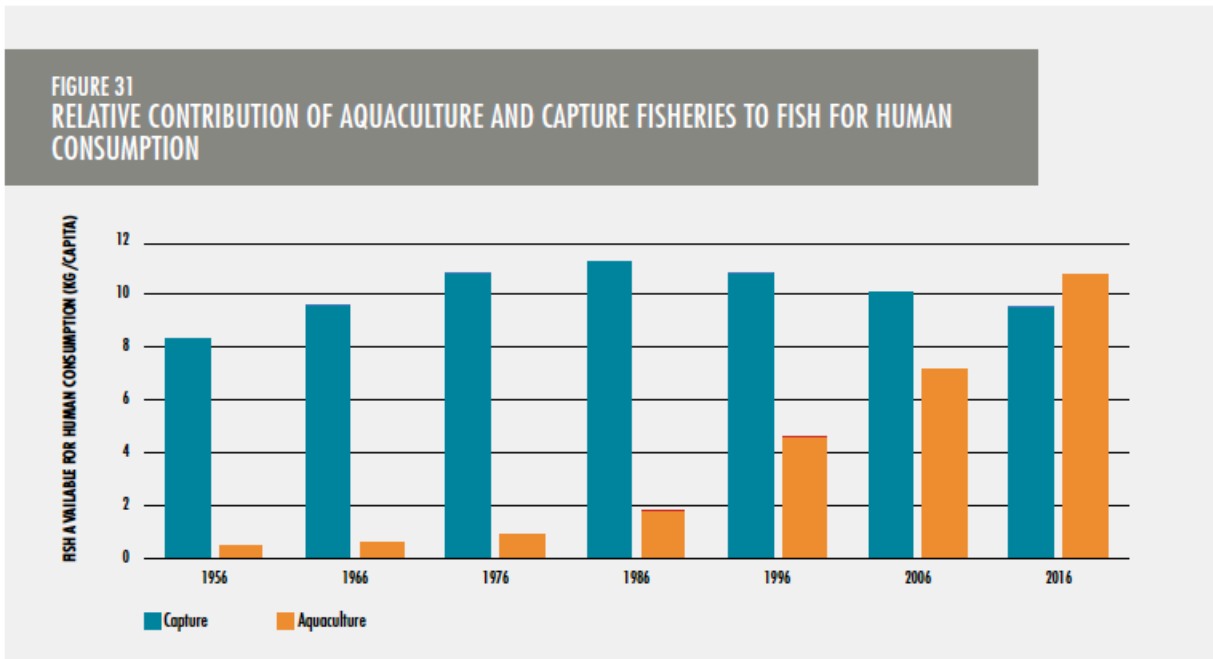


Figure 1 *Relative Contribution of Aquaculture and Capture Fisheries to Fish for Human Consumption, Collected by the FAO*<sup>159</sup>

Due to high market demands, fish and fish products are essential to international trade. The largest exporter of fish and fish products globally is China, with an estimated \$20.1 billion in exports in 2016, followed by Norway, Viet Nam, and Thailand.<sup>160</sup> The top ten countries by rank export nearly 53% of the value of total fish products in the world. The European Union is the largest single market while the U.S. and Japan rank the second and third, respectively.<sup>161</sup> These markets accounts for nearly 64% of the total value of fishery products.

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<sup>159</sup> *Id.* at 73.

<sup>160</sup> The top ten exporters are China, Norway, Viet Nam, Thailand, United States of America, India, Chile, Canada, Denmark, and Sweden. *Id.* at 55.

<sup>161</sup> *Id.* at 56.

In addition to its impacts on international economics, fishery product trading involves social, legal, and ecological concerns. Under increasing international pressure, the state of marine fishery resources has continued to decline—33.1% of world fish stocks were fished at biologically unsustainable levels and considered overfished in 2015.<sup>162</sup> Biologically unsustainable level is an indicator that the FAO applies to examine whether fish stocks are healthy. If stocks are fished at or below the level associated with maximum sustainable yield (MSY), they are classified as fished within biologically sustainable levels. In contrast, stocks less abundant than the level needed to produce MSY are classified as biologically unsustainable levels. The concept of maintaining MSY means that fish stocks are produced at their maximum harvest amount without compromising the reproductive capacity of the stock.<sup>163</sup> This concept is at the core of fisheries management and affects decision-making, such as determining fishing quotas, gear restrictions, season timing, and area closures.

### **B. Taiwan within World Fisheries**

Despite its population of only 23 million, Taiwan is one of the five flag States that accounts for over 85% of all high sea fishing.<sup>164</sup> These countries have quickly expanded their mean

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<sup>162</sup> *Id.* at 6 & 45.

<sup>163</sup> ANDREW B COOPER, A GUIDE TO FISHERIES STOCK ASSESSMENT: FROM DATA TO RECOMMENDATIONS 11 (Kristen Weir ed., 2006).

<sup>164</sup> These countries are China, Japan, Spain, South Korea, and Taiwan. Tony Long, *Global Fishing Watch 2018 – the Year in Transparency*, GLOBAL FISH WATCH (Dec. 18, 2018), <https://globalfishingwatch.org/data/global-fishing-watch-2018-the-year-in-transparency/> (last visited Oct. 1, 2019).

distances to more than 3000 km between home port and fishing grounds from 1950 to 2014.<sup>165</sup> Situated in the sub-tropic region and surrounded by seas, Taiwan developed its fishery industry in the early 1950s.<sup>166</sup> However, it was not until coastal fishing encountered overfishing that Taiwan began to explore distant water fisheries. Freezing technology accelerates the growth of the distant water fishing industry. Taiwan benefits from its location and advanced technology and has become one of the world's major marine capture countries. According to the biennial FAO report, Taiwan was ranked the twenty-third in terms of world marine capture in 2016, with a total catch production of 0.75 million tons of the world's 79.3 million tons.<sup>167</sup>

More than 1,100 Taiwanese vessels engage in distant water fishing all over the world, capturing 760 thousand tons of fish production on average annually. Distant water fisheries produce approximately \$1.37 billion a year.<sup>168</sup> Main fishing methods include tuna long-line fishing, tuna purse seine fishing, light inductive saury fishing, and squid jigging. Tuna purse seine fishing is conducted in the Western Pacific Ocean around Micronesia, while tuna long-line fishing is operated across three major oceans, e.g., the Pacific Ocean, the Atlantic Ocean, and the Indian

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<sup>165</sup> David Tickler et al., *Far from Home: Distance Patterns of Global Fishing Fleets*, 4 SCIENCE ADVANCES eaar3279 (Aug. 2018), available at <https://advances.sciencemag.org/content/4/8/eaar3279/tab-pdf>.

<sup>166</sup> During the Japanese colonial period (1895-1945), the colonial government began to build infrastructures, construct ninety-seven fishing ports, train fishing techniques, and set up fisheries institutions. Although the infrastructures were destroyed during World War II, the construction laid the foundation for the government to establish new fisheries policy; see also Shui-Kai Chang et al., *Distant Water Fisheries Development and Vessel Monitoring System Implementation in Taiwan—History and Driving Forces*, 34 MARINE POL'Y 541, 542 (2010); Huang & Chuang, *supra* note 46, at 71.

<sup>167</sup> Chang et al., *supra* note 166, at 542.

<sup>168</sup> FISHERIES AGENCY, COUNCIL OF AGRICULTURE, EXECUTIVE YUAN, *supra* note 49, at 8.

Ocean. Squid and saury fisheries apply torch lights to attract fish. Some squid jiggers catch saury part-time when squid fishing season is over. Squid jigging takes place mainly in the Southwestern Atlantic Ocean near the Falkland Islands and Eastern Pacific Ocean in the first half of the year. By August, these vessels return to Taiwan to get replenished. In the last half of the year, the vessels navigate north to the fishing ground of pacific saury in the northeast of Hokkaido, Japan, as the fishing season for saury is between August and December annually.<sup>169</sup>

The enormous fishing capacity of Taiwanese vessels raises sustainability concerns. For example, Japan proposed setting catch limits due to the Taiwan's Pacific saury catch amounts—i.e., approximately 178,000 tons in 2018.<sup>170</sup> Although the measure was presented for all members of the NPFC, Japan's concern undoubtedly arose due to the significant reduction of saury stocks in recent years.<sup>171</sup> Other RFMOs also enforce catch quotas on tuna fishing, which also affects Taiwan's distant water fishery.

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<sup>169</sup> RI-YAO CAI ET AL., GENGYUN TAIWAN NONGYE DA SHIJI: YUYE FENGHUA [耕耘臺灣農業大世紀：農業紀實] 102 (2012).

<sup>170</sup> Mitsuko Nishikawa, *Japan's Efforts to Save the Saury*, NHK WORLD (Jul. 24, 2019), <https://www3.nhk.or.jp/nhkworld/en/news/backstories/622/> (last visited Sept. 29, 2019).

<sup>171</sup> *Id.*

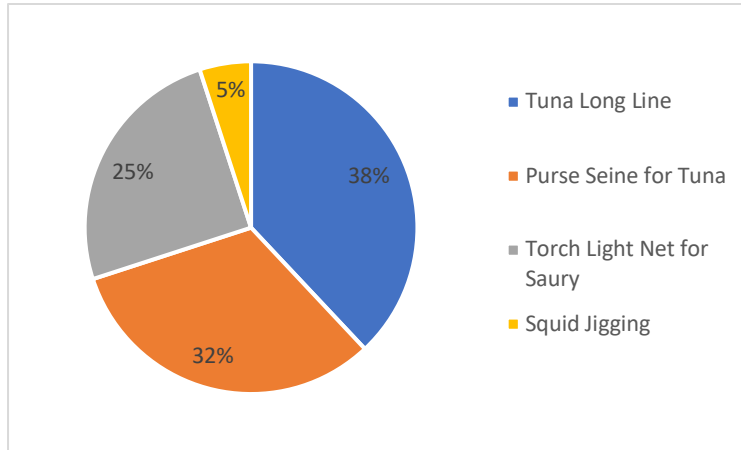


Table 1 *The Proportion of Production in Distant Water Fisheries Drown by Fisheries Agency in Taiwan*<sup>172</sup>

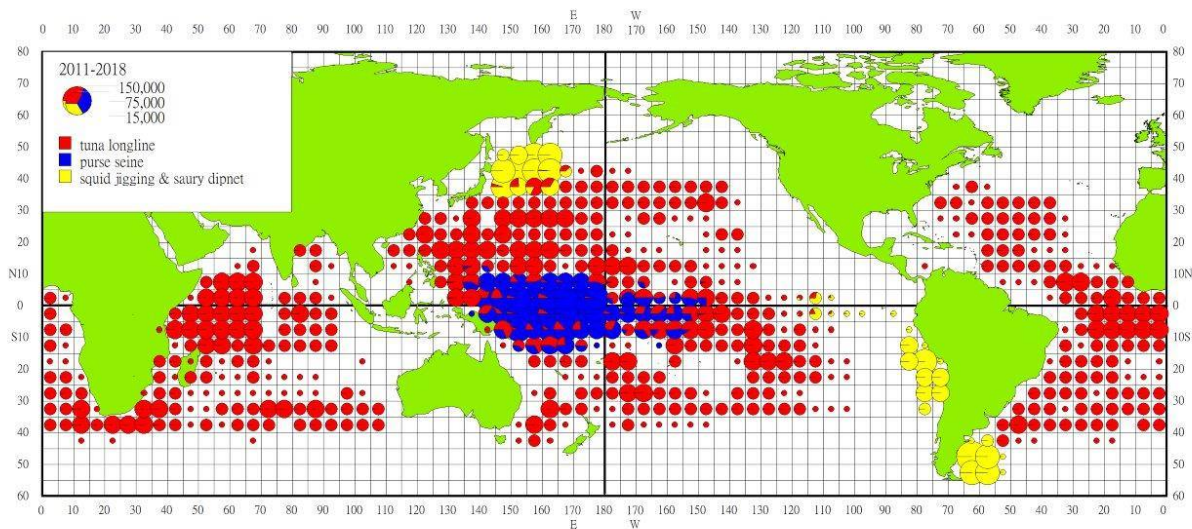


Figure 2 *Catch Distribution of Taiwan's Distant Water Fisheries in 2011-2018 Made by Overseas Fisheries Development Council of the Republic of China*<sup>173</sup>

<sup>172</sup> FISHERIES AGENCY, COUNCIL OF AGRICULTURE, EXECUTIVE YUAN, *supra* note 49, at 8.

<sup>173</sup> Figure provided by Overseas Fisheries Development Council of the Republic of China.

## II. UNCLOS Framework

Before the codification of the 1982 UNCLOS, the traditional international law of the sea was dominated by two major concepts: the territorial sea and the high seas.<sup>174</sup> States upheld the principle of freedom of the high seas as customary international law, while controversies remained surrounding the limits of the territorial waters. In 1958, the first United Nations Conference on the Law of the Sea attempted to codify the law of the sea and decide the breadth of the territorial sea.<sup>175</sup> The attendant States failed to reach a consensus on the breadth of the territorial sea but adopted four Conventions and an optional protocol at the Conference: the Convention on the Territorial Sea and the Contiguous Zone,<sup>176</sup> the Convention on the High Seas,<sup>177</sup> the Convention on Fishing and Conservation of the Living Resources of the High Seas (CFCLR),<sup>178</sup> the Convention on the Continental Shelf,<sup>179</sup> and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.<sup>180</sup>

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<sup>174</sup> Oda, *supra* note 65, at 739.

<sup>175</sup> L.D.M. Nelson, *Reflections on the 1982 Convention on the Law of the Sea*, in *THE LAW OF THE SEA: PROGRESS AND PROSPECTS* 28, 29 (David Freestone et al. eds., 2006).

<sup>176</sup> Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205.

<sup>177</sup> Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

<sup>178</sup> Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285 [hereinafter CFCLR].

<sup>179</sup> Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 1171, 499 U.N.T.S. 311.

<sup>180</sup> Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Adopted by the United Nations Conference on the Law of the Sea, Apr. 29, 1958, 450 U.N.T.S. 172.

These four Conventions laid the foundation for the contemporary international fisheries law regime as States recognized the need to conserve fish stocks. The codification of the CFCLR demonstrated the change of States' attitudes toward conserving marine living resources. The CFCLR upheld the freedom of fishing on the high seas but imposed obligations on States. It required each State to develop conservation and management measures for its own nationals and to cooperate when its nationals engaged in fishing the same stock or areas of the high seas as nationals of another State.<sup>181</sup> The CFCLR entered into force on March 20, 1966 with only thirty-nine parties as State signatories.<sup>182</sup> In addition to having too few States sign the convention, the CFCLR achieved limited success on conservation due to the fundamental restraints of the convention.<sup>183</sup> The conservation and management measures were unilaterally implemented by coastal States on their own nationals. The flag States whose vessels are fishing on the high seas remain unrestrained. The restricted implementation of the conservation and management of fish stocks led to the ultimate ineffectiveness of the CFCLR.<sup>184</sup> Finally, the lack of compulsory dispute settlement provisions within the Convention reveals that the CFCLR is not practical nor efficient in resolving fisheries disputes.<sup>185</sup>

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<sup>181</sup> CFCLR arts. 3 & 4.

<sup>182</sup> As of March 7, 2018, there are 39 Parties as State signatories.

<sup>183</sup> See WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND* 9–14 (1994); Tullio Treves, *Historical Development of the Law of the Sea*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 1, 13–16 (Donald R. Rothwell et al. eds., 2015).

<sup>184</sup> FRANCISCO ORREGO VICUÑA, *THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES* 20 (1999).

<sup>185</sup> BURKE, *supra* note 183, at 13.

The Second UN Conference on the Law of the Sea was convened in 1960 to discuss the outer limit of the territorial sea and the fishery zone. The negotiations at this Conference failed because States could not reach a consensus. Given the frustration experienced by States at previous Conferences, the Third UN Conference on the Law of the Sea used a different approach to reach a more comprehensive agreement concerning the law of the sea. At this Conference, three committees were designed to negotiate and draft convention provisions. The Third Conference lasted for ten years and finally concluded with an overarching Convention—the 1982 UNCLOS. UNCLOS is comprised of seventeen parts with a total of 320 articles and nine annexes. It not only codified existing customary international law but also set forth new dominant principles. Most significantly, UNCLOS was extensively adopted and has 164 States as parties.

#### **A. 1982 UNCLOS Provisions on Fisheries<sup>186</sup>**

The fisheries provisions under UNCLOS can be understood by analysis of the three areas and six stocks categorizations within the provisions.<sup>187</sup> The provisions divide the area of the seas by the authority of coastal States. Coastal States exercise sole sovereignty in internal waters, archipelagic waters, and the territorial sea and enjoy sovereign rights in their own EEZs and the continental shelf. In contrast, the high seas are open to all States and only flag States exercise exclusive jurisdiction in high seas.<sup>188</sup> Fish stocks are categorized by their characteristics such as: shared stocks, straddling stocks, highly migratory species, marine mammals, anadromous stocks, and catadromous species.

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<sup>186</sup> See generally Burke, *supra* note 35; Oda, *supra* note 65; Ellen Hey, *The Fisheries Provisions of the LOS Convention*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 13 (Ellen Hey ed., 1999).

<sup>187</sup> See generally Burke, *supra* note 35; Oda, *supra* note 65; Hey, *supra* note 186.

<sup>188</sup> UNCLOS art. 89.

## **1. Zonal Management**

### **a. Coastal State sovereignty**

Pursuant to UNCLOS Article 2, coastal States enjoy full sovereignty in international waters, archipelagic waters, and territorial seas.<sup>189</sup> Within the sovereign zones, coastal States exercise exclusive jurisdiction over marine living resources. Therefore, regulations on fisheries' measures are subject to domestic laws.<sup>190</sup> Coastal States only follow minimum requirements in accordance with UNCLOS and other rules of international law.<sup>191</sup>

### **b. Coastal State sovereign rights**

An EEZ is an area extending outward from a coastal State's baseline for up to 200nms where that coastal State has sovereign rights for the purpose of exploring, exploiting, conserving, and managing marine living resources.<sup>192</sup> As discussed in the introduction, EEZs are important because they covers vast areas of the oceans, and nearly ninety percent of fish stocks are caught commercially within EEZs.<sup>193</sup> UNCLOS gives coastal States relatively broad discretion in regulating fisheries within their own EEZs, but coastal States must have due regard to the rights and duties of other States and take on the conservation and management obligations under the

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<sup>189</sup> UNCLOS art. 2.

<sup>190</sup> Nele Matz-Lück & Johannes Fuchs, *Marine Living Resources*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 491, 498 (Donald R. Rothwell et al. eds., 2015).

<sup>191</sup> UNCLOS art. 2(3).

<sup>192</sup> UNCLOS art. 56(1).

<sup>193</sup> YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 234 (2d ed. 2015).

Convention. Firstly, each coastal State must determine the total allowable catch (TAC)<sup>194</sup> of the living resources in its EEZ.<sup>195</sup> Coastal States have an obligation to use the best available scientific research to ensure that their TAC does not lead to over-exploitation. Moreover, coastal States are obliged to manage fishing stocks that are captured by MSY status.<sup>196</sup>

In accordance with UNCLOS' provisions on the conservation of living resources, coastal States are required to utilize living resources in conformity with optimum utilization.<sup>197</sup> Optimum utilization is a general idea that is set out but not defined in UNCLOS.<sup>198</sup> However, this research provides a series of steps to reach the goal. First, a coastal State shall determine its capacity to harvest. If that State is not capable of harvesting the entire allowable catch, which is called surplus of the allowable catch, then it shall give other States access to fish pursuant to UNCLOS. When granting other States access to fish, the coastal State should consider all factors relevant to the conditions for access to fish. Again, such decisions fall within a coastal State's discretion, and other States must abide by the coastal State's terms and conditions as well as laws and regulations or other arrangements made with the coastal State. Finally, once foreign vessels are permitted to

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<sup>194</sup> Total allowable catch (TAC) means the maximum amount of a particular fish stock that can be sustainably caught in a given year; see FAO, GUIDELINES FOR THE ROUTINE COLLECTION OF CAPTURE FISHERY DATA (1999), <http://www.fao.org/3/x2465e/x2465e0h.htm#ANNEX%205.%20GLOSSARY>.

<sup>195</sup> UNCLOS art. 61(1).

<sup>196</sup> UNCLOS art. 61(3).

<sup>197</sup> UNCLOS art. 62(1).

<sup>198</sup> Although "optimum utilization" is not defined in UNCLOS, it is an important concept that guides the utilization of marine living resources. The wording, compared to "full utilization," gives a coastal State broader discretion in determining its management policy for allowable catch; see William T Burke, *Highly Migratory Species in the New Law of the Sea*, 14 OCEAN DEV. & INT'L L. 273, 277-78 (1984).

fish in a coastal State's EEZ, they shall observe the laws and regulations of that State, for instance, licensing requirements, fishing seasons limitations, and requirements for the training of personnel, etc.<sup>199</sup>

Within its EEZ, a coastal State has the competence to enforce laws. It may take necessary measures, including boarding, inspection, arrest, and judicial proceedings, to ensure compliance with its laws and regulations.<sup>200</sup> When a foreign vessel is arrested, Article 73(2) provides that coastal States shall promptly release arrested vessels and their crews upon the posting of a reasonable bond or other security.<sup>201</sup>

### **c. Flag States' Exclusive Jurisdiction in High Seas**

The high seas are open to all States and permit freedom of fishing. Every ship shall sail under the flag of one State,<sup>202</sup> and that State exercises exclusive jurisdiction and control over the ship flying its flag. Although freedom of the high seas is customary international law, it is not an absolute right. UNCLOS has prescribed conditions concerning conservation and management of the living resources of the high seas in Section 2 of Part VII.<sup>203</sup> Article 116 confirms States' right to fish on the high seas, but the right for their nationals to engage in such fishing is subject to three conditions: (1) treaty obligations; (2) the rights and duties as well as the interests of coastal States; and (3) the provisions of Section 2. The first condition is derived from the principle of *Pacta Sunt*

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<sup>199</sup> UNCLOS art. 62(4).

<sup>200</sup> UNCLOS art. 73(1).

<sup>201</sup> UNCLOS art. 73(2).

<sup>202</sup> UNCLOS art. 92(1).

<sup>203</sup> UNCLOS art. 87(1)(e).

*Servanda*,<sup>204</sup> meaning that a State shall observe treaty obligation once it agrees to be bound by it. After the World Summit in 1992, international instruments bloomed, and the FAO took the lead on invoking concerns over conserving and managing marine living resources. Hence, international agreements become important sources in fisheries management and will be discussed in the following section.

The provisions of UNCLOS Section 2 place duties on States to adopt necessary domestic measures and cooperate with other States in the conservation and management of living resources.<sup>205</sup> Article 118 lays the foundation for establishing subregional or regional fisheries organization by requiring States whose nationals exploit identical living resources, or different living resources in the same area, to cooperate and enter into negotiations to take necessary measures. Article 119 and Article 16 provide similar approaches to the conservation of living resources in high seas. The States' primary goal under these articles is to determine total allowable catch—i.e., the catch limits for commercial fish stocks. Therefore, States aim to use the best scientific evidence available to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield.<sup>206</sup> Article 119 also obliges States to exchange

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<sup>204</sup> VCLT art. 26.

<sup>205</sup> UNCLOS arts. 117-18.

<sup>206</sup> UNCLOS does not provide a definition of “best scientific evidence available” but obliges States to manage fishing efforts based on this principle. This requirement is set to accommodate scientific uncertainty regarding the absence of data or insufficient scientific research. Incorporating scientific considerations in the regulations enables States to abide by legal obligations and, on the other hand, enhances scientific study when making management decisions. The concept of “best scientific evidence available” has been adopted by several RFMOs in determining conservation and management measures; *see* Rayfuse, *supra* note 51, at 450–51.

available scientific information regarding the conservation of fish stocks in the high seas through competent international organizations.

## **2. Stock-Specific Regulations**

### **a. Shared stocks**

Shared stocks refer to fish stocks that frequently occur within the EEZs of adjacent States. UNCLOS requires these States to seek to coordinate and take measures necessary for the conservation and development of such stocks.<sup>207</sup> Article 63(1) of UNCLOS imposes a duty to negotiate and carry out measures by way of subregional or regional organizations.<sup>208</sup> In other words, there is no obligation for States to enter into agreements for conserving shared stocks.<sup>209</sup> A coastal State regulates the fish stock in accordance with rules in its EEZ when no agreement has been made.

### **b. Straddling stocks**

Straddling stocks are stocks that migrate between an EEZ and the adjacent high seas. Similar to shared stocks, UNCLOS places a duty to negotiate on the coastal State and a duty to conserve stocks on States fishing for such stocks in the adjacent area.<sup>210</sup>

### **c. Highly migratory species**

UNCLOS provides no definition for highly migratory species but enumerates seventeen kinds of species in Annex I. The list includes various species of tuna, marlins, sailfish, swordfish,

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<sup>207</sup> UNCLOS art. 63(1).

<sup>208</sup> CHURCHILL & LOWE, *supra* note 28, at 294.

<sup>209</sup> Moritaka Hayashi, *The Management of Transboundary Fish Stocks under the LOS Convention*, 8 INT'L J. MARINE & COASTAL L. 245, 249 (1993); CHURCHILL & LOWE, *supra* note 20, at 294; TANAKA, *supra* note 184.

<sup>210</sup> UNCLOS art. 63(2).

dolphins, oceanic sharks, and cetaceans. Pursuant to Article 64, a coastal State and the States whose nationals fish in the region for highly migratory species shall cooperate directly or through an appropriate international organization. The purpose for cooperation is to ensure that such species are captured in adherence with optimum utilization. Unlike shared and straddling stocks, UNCLOS imposes a duty to cooperate on States.<sup>211</sup> Even in regions where no appropriate international organization exists, the coastal State and other States whose nationals harvest the highly migratory species are required to cooperate to establish one.<sup>212</sup>

#### **d. Marine mammals**

UNCLOS has two provisions protecting marine mammals in both EEZs and on the high seas.<sup>213</sup> However, as the history of the conservation of marine mammals began earlier than other fish stocks, so did developments of international conventions on regulating marine mammals. Since the drafters of UNCLOS had no intention of prejudicing former conventions,<sup>214</sup> UNCLOS permits coastal States and competent international organizations to promulgate stricter rules to prohibit, limit, or regulate the exploitation of marine mammals. Thus, Article 65 of UNCLOS merely requires States to take on obligations to cooperate. The conservation of marine mammals relies primarily on other international instruments.

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<sup>211</sup> UNCLOS art. 64(1).

<sup>212</sup> Hayashi, *supra* note 198, at 250.

<sup>213</sup> UNCLOS arts. 65 & 120.

<sup>214</sup> Hayashi, *supra* note 209, at 251.

#### e. Anadromous stocks

Anadromous stocks are stocks that are born in fresh water, spend most of their life in the ocean, and then return to the river where they were born to spawn.<sup>215</sup> Salmon, smelt, and striped bass are common examples. UNCLOS considers the State of origin to have “the primary interest in and responsibility for such stocks.”<sup>216</sup> Accordingly, the State of origin has the responsibility to conserve such stocks by establishing appropriate regulatory measures. Fisheries for anadromous stocks shall be conducted only within the jurisdiction of the State of origin, unless this provision would result in economic dislocation for other States. On the high seas, concerned States must maintain consultations to reach agreements on terms and conditions of such fishing, but such agreements must take into account the conservation requirements and needs of the State of origin.<sup>217</sup> The jurisdiction of the State of origin does not extend beyond its EEZ, but UNCLOS underscores the primary interest in the State of origin and requires other States to cooperate with that State. States fishing for anadromous stocks shall arrange through regional organizations to carry out conservation and management of such stocks.<sup>218</sup>

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<sup>215</sup> See generally BURKE, *supra* note 183, at 151–98; CHURCHILL & LOWE, *supra* note 28, at 314–16; Joseph Zydlewski & Michael P. Wilkie, *Freshwater to Seawater Transitions in Migratory Fishes*, in EURYHALINE FISHES 253, 255–57 (Stephen D. McCormick et al. eds., 2012).

<sup>216</sup> UNCLOS art. 66(1).

<sup>217</sup> UNCLOS art. 66(3).

<sup>218</sup> UNCLOS art. 66(5).

#### **f. Catadromous species**

The life cycle of catadromous species is opposite that of anadromous stocks.<sup>219</sup> They spend most their lives in fresh water but spawn at sea. Most eels, for example, are catadromous species.<sup>220</sup> A coastal State in whose waters these species spend the majority of their lifecycles has responsibility for the management of these species.<sup>221</sup> In cases where catadromous fish migrate through different EEZs, all concerned States cooperate in regulation by agreement. Such an agreement ensures the rational management of the species and must take into account the special interest of the former State.<sup>222</sup>

#### **B. International Instruments**

After the establishment of UNCLOS in 1982, international fisheries regulations, regional, and species-specific international fisheries management regulations have emerged to fill in the gaps of the Convention.<sup>223</sup> Most fisheries instruments were adopted during the first half of the 1990s, and UNCLOS is regarded as the jurisdictional framework for these regulations.<sup>224</sup>

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<sup>219</sup> See CHURCHILL & LOWE, *supra* note 28, at 316–17; John Warren Kindt, *The Law of the Sea: Anadromous and Catadromous Fish Stocks*, 11 SYRACUSE J. INT’L L. & COM. 9 (1984); Zydlewski & Wilkie, *supra* note 215, at 257–58.

<sup>220</sup> Zydlewski & Wilkie, *supra* note 215, at 257.

<sup>221</sup> UNCLOS art. 67(1).

<sup>222</sup> UNCLOS art. 67(3).

<sup>223</sup> Ellen Hey, *Global Fisheries Instruments Adopted in the Post-UNCLOS III Period*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 3, 8 (Ellen Hey ed., Kluwer Law International 1999) (commenting that UNCLOS “mainly address[es] jurisdictional issues and only contain[s] a minimum of substantive rules”).

<sup>224</sup> *Id.* at 3.

In 1992, the United Nations Conference on Environment and Development (the Rio “Earth Summit”) called upon States to be aware of the environmental problems brought about by economic development, and the sustainability of the marine environment was discussed during the conference.<sup>225</sup> Two of the three major agreements established at the conference relate to marine issues.<sup>226</sup> Chapter 17 of Agenda 21 mentions the protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, coastal areas and the protection, rational use, and development of their living resources.<sup>227</sup> The other agreement, the Rio Declaration on Environment and Development, sets principles for States and urges them to set out goals and programs to manage their oceanic resources.<sup>228</sup> With a growing recognition of the importance of biological diversity for evolution and maintaining life sustaining systems of the biosphere, the Convention on Biological Diversity was adopted as a legally binding Convention that aims to conserve and sustain the use of biological diversity.<sup>229</sup>

In response to the increased general awareness, the FAO adopted several agreements to deal with global fisheries problems, including: (1) the Agreement to Promote Compliance with

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<sup>225</sup> United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).

<sup>226</sup> Three major agreements were made during the Conference: (1) Agenda 21, (2) the Rio Declaration on Environment and Development, and (3) the Statement of Forest Principles.

<sup>227</sup> The Agenda 21 (Report of the UNCED, U.N. Doc. A/CONF.151/26 (Vol. II), 13 August 1992). The title of its Chapter 17 is “Protection of the oceans, all kinds of seas, including enclosed and semi enclosed seas, and coastal areas and the protection, rational use and development of their living resources.”

<sup>228</sup> Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874.

<sup>229</sup> Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818.

International Conservation and Management Measures by Fishing Vessels on the High Seas,<sup>230</sup> (2) the Code of Conduct for Responsible Fisheries,<sup>231</sup> (3) the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea December 10, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,<sup>232</sup> (4) the International Plan of Actions,<sup>233</sup> and (5) the Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing.<sup>234</sup>

In general, these agreements emphasize the responsibilities of coastal States, port States, and flag States and combine those agreements with species-centered conventions and plans.

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<sup>230</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 24, 1993, 33 I.L.M. 968 (1994) [hereinafter Compliance Agreement].

<sup>231</sup> The Code of Conduct for Responsible Fisheries was adopted within the FAO on October 31, 1995, *available at* <http://www.fao.org/docrep/005/v9878e/v9878e00.htm>.

<sup>232</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea December 10, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 4, 1995, 34 I.L.M. 1542 (1995) [hereinafter FSA].

<sup>233</sup> There are four International Plans of Action (IPOA) formulated at FAO. These are: The International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-Seabirds); The International Plan of Action for Conservation and Management of Sharks; (IPOA-Sharks); The International Plan of Action for the Management of Fishing Capacity (IPOA-Capacity) and; International plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). Full text, *see* <http://www.fao.org/fishery/code/ipoa/en>.

<sup>234</sup> The Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing was approved on November 22, 2009 and entered into force on June 5, 2016, which was 30 days after it was ratified by a 25th state [hereinafter Port State Measures Agreement].

## **1. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas**

The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) was adopted by the FAO in 1993. It is a legally binding agreement and builds on the results of negotiations at the World Summit. The core of the Compliance Agreement addresses the issue of “reflagging” and underlines the responsibility of flag States to regulate illegal fishing activities.<sup>235</sup> As its preamble points out, fishing vessels can reflag to avoid compliance with international conservation and management measures. If a flag State’s vessels fail to observe the regulations, this seriously undermines the effectiveness of such measures. Therefore, this agreement applies to all fishing vessels that are used or intended for fishing on the high Seas.<sup>236</sup> The Compliance Agreement reiterates flag State responsibility.<sup>237</sup> Each Party to the conventions shall take necessary measures to ensure that its fishing vessels do not engage in any activity that undermines the effectiveness of international conservation and management measures. The agreement allows each State to gain control over the

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<sup>235</sup> “Reflagging” refers to vessel operators registering their vessels under those States who do not sign or comply with any of the international fisheries agreements to avoid stringent conservation and management measures. Reflagging is a term that is often associated with “flag of convenience.” “Flag of convenience” or “open registry” States are States who have lax regulation on conservation and management and do not exercise effective law enforcement of fishing vessels. These States allow foreign-owned vessels to fly their flag. The foreign vessels, on the other hand, are attracted because they can reduce costs by avoiding certain legal requirements, such as labor conditions of the crew, fisheries operation standards, and marine pollution. Flag of convenience is disadvantageous to fisheries management and gives rise to IUU fishing. *See* TANAKA, *supra* note 193, at 162–64.

<sup>236</sup> Compliance Agreement art. II (1).

<sup>237</sup> Compliance Agreement art. III.

fishing vessels entitled to fly its flag, including granting the appropriate authorization and ability to exercise its responsibility, and permitting the State to take enforcement measures.<sup>238</sup> In addition, each State must maintain a record of fishing vessels flying its flag to ensure that their fishing operations conform to their management measures. To achieve the purpose of the Agreement, international cooperation is essential. Each Party has a duty to cooperate as appropriate in the implementation of this agreement. This duty includes exchanging information and notifying the flag State of which its fishing vessels are reported to have engaged in illegal activities.<sup>239</sup>

In all, forty-two States acceded to the Compliance Agreement. The agreement also includes dispute settlement provisions that require Parties to seek consultations when any dispute over its interpretation or application arise with other States.<sup>240</sup> If the disputes cannot be settled by consultation, the Parties in question shall consult among themselves and aim to settle the dispute by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, or other peaceful means of their own choice. With the consent of all Parties involved in the dispute, they shall refer the dispute to ICJ, ITLOS, or arbitration. In the absence of a referral agreement, Parties are obliged to continue to consult and cooperate to reach a settlement.

## **2. Code of Conduct for Responsible Fisheries**

The Code of Conduct for Responsible Fisheries is a voluntary agreement, which was adopted within the FAO on October 31, 1995.<sup>241</sup> The agreement aims to have a broader scope of

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<sup>238</sup> *Id.*

<sup>239</sup> Compliance Agreement art. IV.

<sup>240</sup> *Id.* art. IX.

<sup>241</sup> Code of Conduct for Responsible Fisheries, UN Doc. A/CONF.151/15, annex, <http://www.fao.org/3/v9878e/v9878e00.htm> [hereinafter Code of Conduct].

application and encourage more States to engage in fishing responsibly and, therefore, its obligations are not legally binding.<sup>242</sup> Without creating legal obligations for States, the agreement sets out principles and international standards for conducting responsible fishing for all fisheries. The agreement applies broadly, including members and non-members of the FAO, fishing entities, regional and global organizations, and all persons concerned with the conservation and management of fishery resources.<sup>243</sup> It covers many aspects of fisheries, including marine capture, agriculture, fishing operations, and seafood trading. The ultimate goal of the Code of Conduct is to ensure long-term sustainable use of fisheries resources. In doing so, the Code of Conduct encourages consideration of all aspects of fishing, including biological, technological, economic, social, environmental, and commercial considerations.<sup>244</sup> Hence, the Code of Conduct urges States to achieve the goal through appropriate policies and legal and institutional frameworks, and to carry out management measures, whether at local, national, subregional or regional levels, based on the best scientific evidence.

The Code does not contain provisions on dispute settlement as it is a voluntary instrument. However, it urges States to cooperate to prevent disputes.<sup>245</sup> All fishing activity disputes should be resolved peacefully and in a timely manner.

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<sup>242</sup> See generally Tullio Treves, *The FAO Code of Conduct for Responsible Fisheries between Soft and Hard Law*, in PEACEFUL ORDER IN THE WORLD'S OCEANS: ESSAYS IN HONOR OF SATYA N. NANDAN 301, 301–7 (2014); Jurgen Friedrich, *Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries*, 9 GERMAN L.J. 1539 (2008).

<sup>243</sup> Code of Conduct art. 1.2.

<sup>244</sup> Code of Conduct art. 2.

<sup>245</sup> Code of Conduct art. 6.15.

### **3. United Nations 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**

Considering the call for effective implementation and the promotion of conservation and management of high seas fisheries in Agenda 21, the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks convened in 1993.<sup>246</sup> In 1995, the United Nations 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 (FSA) was adopted.<sup>247</sup> The agreement came into force in 2001 and has become one of the most important agreements in international fisheries law. It currently has ninety-one States as parties, including the European Union.<sup>248</sup> The agreement applies

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<sup>246</sup> See generally André Tahindro, *Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 28 OCEAN DEV. & INT'L L. 1 (1997).

<sup>247</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea December 10, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 4, 1995, 34 I.L.M. 1542 (1995) [hereinafter FSA].

<sup>248</sup> United Nations Oceans and Law of the Sea, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, [https://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#Agreement%20for%20the%20Implementation%20of%20the%20provisions%20of%20the%20Convention%20relating%20to%20the%20conservation%20and%20management%20of%20straddling%20fish%20stocks%20and%20highly%20migratory%20fish%20stocks](https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#Agreement%20for%20the%20Implementation%20of%20the%20provisions%20of%20the%20Convention%20relating%20to%20the%20conservation%20and%20management%20of%20straddling%20fish%20stocks%20and%20highly%20migratory%20fish%20stocks) (last updated Mar. 9, 2020).

not only to States Parties, those States that have consented to be legally bound, but it also applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas.<sup>249</sup>

The FSA applies to the conservation and management of straddling fish stocks and highly migratory fish stocks, both in EEZs and the high seas. The agreement sets out principles of conservation and management of straddling fish stocks and highly migratory fish stocks to achieve sustainable use of targeted stocks. The FSA imposes a duty to cooperate on States Parties, requiring them to adopt collaborative measures in pursuit of optimum utilization. These measures shall be developed based on the best scientific evidence available and applied with the precautionary approach. The precautionary approach was adopted in the FSA and later used among all international instruments.<sup>250</sup> FSA Article 6 provides a general idea of how the precautionary approach works.<sup>251</sup> To carry out the approach, States obtain and share the best scientific information available and implement improved techniques for dealing with risk and uncertainty. The shared information is used to determine stock-specific reference points and the necessary actions that States should take. When scientific information is not available, States shall not use this as a reason for postponing or failing to take conservation and management measures.<sup>252</sup> Instead, States should take these uncertainties, such as the size and productivity of the stocks, reference points, stock condition, the impact of fishing activities on non-target and associated or

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<sup>249</sup> FSA art. 1(3).

<sup>250</sup> Ellen Hey, *Global Fisheries Regulations in the First Half of the 1990s*, 11 INT'L J. MARINE & COASTAL L. 459, 473 (1996).

<sup>251</sup> FSA art. 6 (defining the application of precautionary approach).

<sup>252</sup> FSA art. 6(2).

dependent species, as well as existing and predicted oceanic, environmental, and socio-economic conditions, into account when developing procedures for conservation and management.<sup>253</sup>

With regard to the mechanisms used to conduct these measures, the FSA encourages States fishing for the stocks and relevant coastal States to pursue cooperation either directly or through appropriate subregional or regional fisheries management organizations or “arrangements.”<sup>254</sup> Under the FSA, States must enter into consultation in good faith and without delay.<sup>255</sup> Where a RFMO or arrangement exists, such States have obligations to give effect to their duty to cooperate by becoming members of the organizations or participating in the arrangements.<sup>256</sup> The FSA limits only those States that are members or participants in the RFMOs or arrangements to have access to the fishery resources.<sup>257</sup>

The FSA responds to UNCLOS Articles 117 and 119 and fulfills such principles through RFMOs. As mechanisms for compliance and enforcement of international conservation and management measures, RFMOs allocate allowable catch of fishing effort, set international minimum standards for the responsible conduct of fishing operations, review the status of the stocks and assess the impact of fishing, conduct scientific assessments of the stocks, establish

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<sup>253</sup> FSA art. 6(3)(b).

<sup>254</sup> FSA art. 1(1)(d): “arrangement” means a cooperative mechanism established in accordance with the Convention and this Agreement by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.

<sup>255</sup> FSA art. 8(2).

<sup>256</sup> FSA art. 8(3).

<sup>257</sup> FSA art. 8(4).

appropriate cooperative mechanisms, and promote the peaceful settlement of disputes.<sup>258</sup> Namely, RFMOs serve as decision-making bodies and implement cooperative mechanisms for effective monitoring, control, surveillance, and enforcement. Even so, non-members of RFMOs and non-participants in arrangements are not discharged from the obligation to cooperate, as they are parties to the FSA.<sup>259</sup>

To ensure these measures are enforced, the FSA imposes duties on flag States. Flag States take on responsibilities through monitoring, control, and surveillance of fishing activities. Under their supervision, flag States may control these fishing vessels by authorizing fishing licenses, installing vessel tracking equipment for data collection, and conducting relevant inspection schemes. Such measures shall comply with regional or globally accepted monitoring, control, and surveillance systems.<sup>260</sup> Additionally, flag States' duties arise from RFMOs as the FSA relies on these regional organizations to regulate conservation and management. Flag States shall enforce such measures irrespective of where violations occur, conduct legal investigations, and undertake notification obligations.<sup>261</sup> These enforcement measures require international cooperation as well.

Apart from setting up management measures, RFMOs establish boarding and inspection procedures based on provisions in the FSA.<sup>262</sup> In any high sea areas covered by RFMOs, a State Party of the RFMO may board and inspect foreign fishing vessels flying the flag of another State Party to the FSA for the purpose of ensuring compliance with conservation and management

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<sup>258</sup> FSA art. 10.

<sup>259</sup> FSA art. 17(1).

<sup>260</sup> FSA art. 18(4).

<sup>261</sup> FSA art. 19.

<sup>262</sup> FSA art. 21.

measures.<sup>263</sup> Such enforcement shall follow regulations, for example, giving proper notifications, having valid authorization to inspect, and conducting appropriate evidence collecting process. Serious violations include fishing without a valid license, failing to record catch data, fishing in an illegal area or with prohibited gear, and any actions constituting severe disregard of conservation and management measures. With boarding and inspection mechanisms, flag States are forced to fulfill their obligations and execute flag State control over vessels flying their flags.

The FSA now has ninety parties.<sup>264</sup> These parties have obligations to settle disputes peacefully. With respect to dispute settlement, procedures for the settlement of disputes of UNCLOS applies *mutatis mutandis* to the FSA.<sup>265</sup> It means that States Parties, even though they are not parties to UNCLOS, follow the provisions in Part XV of UNCLOS—i.e., they are subject to compulsory procedures when parties in dispute cannot reach an agreement as to another means. Once a dispute is submitted pursuant to Article 30 of the FSA, the court or tribunal shall apply all relevant provisions—including UNCLOS, the FSA, any relevant RFMOs, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law—to ensure the conservation of the straddling fish stocks and highly migratory fish stocks concerned.<sup>266</sup> In terms of fishing entities, the FSA has no clear provision as to how fishing entities should settle disputes with other States. However, according to FSA Article 30, the dispute settlement procedure is limited to any dispute between States Parties to the FSA concerning

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<sup>263</sup> FSA art. 21(1).

<sup>264</sup> As of October 2019. See UN website, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-7&chapter=21&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-7&chapter=21&clang=_en).

<sup>265</sup> FSA art. 30(1).

<sup>266</sup> FSA art. 30(5).

the interpretation or application of the agreement. Accordingly, fishing entities are likely to be excluded from employing the procedure under the FSA.<sup>267</sup>

#### **4. International Plans of Action**

Based on the framework of the Code of Conduct for Responsible Fisheries, the Committee on Fisheries (COFI), a subsidiary body of the FAO Council, developed four International Plans of Action (IPOA) to address fisheries issues.<sup>268</sup> These voluntary instruments are: the International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-Seabirds);<sup>269</sup> the International Plan of Action for the Conservation and Management of Sharks (IPOA-Sharks);<sup>270</sup> the International Plan of Action for the Management of Fishing Capacity (IPOA-Capacity);<sup>271</sup> and the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).<sup>272</sup>

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<sup>267</sup> Gau, *supra* note 52, at 222–27.

<sup>268</sup> See generally William Edeson, *Closing the Gap: The Role of “Soft” International Instruments to Control Fishing*, 20 AUSTL. Y.B. INT’L L. 83, 93–102 (1999).

<sup>269</sup> International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, *available at* <http://www.fao.org/3/X3170E/x3170e02.htm>.

<sup>270</sup> International Plan of Action for the Conservation and Management of Sharks, *available at* <http://www.fao.org/3/x3170e/x3170e03.htm>.

<sup>271</sup> International Plan of Action for the Management of Fishing Capacity, *available at* <http://www.fao.org/3/x3170e/x3170e04.htm>.

<sup>272</sup> The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (adopted by the FAO Committee on Fisheries on March 2, 2001 and endorsed by the FAO Council on June 23, 2001) (IPOA-IUU), *available at* <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>.

The IPOA-Seabirds focuses on reducing the incidental catch of seabirds, particularly in longline fishing. Commercial longline fishing is a fishing technique that uses a long line connecting many branches of lines, and each branch is attached to baited hooks.<sup>273</sup> When fishermen deploy a longline, which can be more than 30 miles in length, seabirds often dive after the bait and are hooked by the barb. Scientists have found that the bycatch of seabird is a serious problem that leads to the fatality of seabirds and is harmful to seabird population and, by extension, the entire ecosystem.<sup>274</sup> As such, the IPOA-Seabirds provides guidance for States conducting longline fisheries on the high seas and in the EEZs of other States. Under this IPOA, States with longline fisheries should assess these fisheries to determine whether seabirds bycatch exists. If a problem exists, the IPOA-Seabirds encourages States to adopt a National Plan of Action (NPOA) to deal with the incidental catch of seabirds.

The IPOA-Sharks has similar approach as the IPOA-Seabirds to conserve shark species. Sharks have slow rates of growth, late age-of-maturity, and low fecundity compared with other fish stocks.<sup>275</sup> These biological features make them susceptible to fishing activities, and shark

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<sup>273</sup> NOAA Fisheries, *Fishing Gear: Pelagic Longlines*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/bycatch/fishing-gear-pelagic-longlines> (last visited Apr. 4, 2020).

<sup>274</sup> See generally Nigel P. Brothers et al., *The Incidental Catch of Seabirds by Longline Fisheries: Worldwide Review and Technical Guidelines for Mitigation*, <http://www.fao.org/tempref/docrep/fao/005/w9817e/W9817e00.pdf>.

<sup>275</sup> John A. Musick & Susanna Musick, *Fisheries and Aquaculture Reviews and Studies: Sharks 1*, <http://www.fao.org/fishery/docs/DOCUMENT/reviews&studies/sharks.pdf>.

population has decreased noticeably in recent years.<sup>276</sup> Therefore, the IPOA-Sharks suggests that States adopt and implement a national Shark-plan if their fishermen directly capture sharks or regularly bycatch sharks.<sup>277</sup> The scope of the IPOA-Sharks covers a wide range of shark species and catch patterns. The term “shark” includes all species of sharks, skates, rays, and chimaeras (Class Chondrichthyes), and the term “shark catch” encompasses both target and non-target catches.<sup>278</sup> The broad coverage of the IPOA-Sharks provides guidance to States for establishing a shark conservation plan including carrying out a regular assessment of the status of shark stocks, minimizing incidental catch of sharks, constructing a healthier shark protection system, and collaborating with other States.

The IPOA-Capacity applies to all States whose fishermen engage in capture fisheries. Its goal is to achieve efficient, equitable, and transparent management of fishing capacity.<sup>279</sup> Thus, the IPOA-Capacity focuses on four aspects: conducting assessments of capacity and its

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<sup>276</sup> See Rachel D. Cavanagh et al., *Pelagic Sharks and the FAO International Plan of Action for the Conservation and Management of Sharks*, in *SHARKS OF THE OPEN OCEAN: BIOLOGY, FISHERIES AND CONSERVATION* 478, 478–79 (Merry D. Camhi et al. eds., 2008).

<sup>277</sup> “Shark-plan” refers to a plan that IPOA-Sharks encourages States to adopt to ensure the adequate conservation and management of shark stocks. IPOA-Sharks ¶ 18: States should adopt a national plan of action for conservation and management of shark stocks (Shark-plan) if their vessels conduct directed fisheries for sharks or if their vessels regularly catch sharks in non-directed fisheries. Suggested contents of the Shark-plan are found in Appendix A. When developing a Shark-plan, experience of subregional and regional fisheries management organizations should be taken into account, as appropriate.

<sup>278</sup> IPOA-Sharks ¶¶ 11 & 12.

<sup>279</sup> IPOA-Capacity ¶ 7.

surveillance, implementing national plans, strengthening mechanisms of regional fisheries organizations for improved management of fishing capacity, and conducting urgent actions for targeted stocks. These four aspects rely on coordinated efforts among States to eliminate excessive fishing capacity. States, meanwhile, should develop national plans to manage fishing capacity.

Lastly, the IPOA-IUU is an important instrument in dealing with IUU fishing issues.<sup>280</sup> IUU fishing, as it is named, has three categories, including illegal, unreported, and unregulated fishing activities. It broadly refers to any fishing activities that violates legal obligations derived from national regulations or relevant RFMOs. IUU fishing overrides onerous legal requirements, destroys marine biodiversity, overexploits fish stocks, and distorts global markets with low-cost catching.<sup>281</sup> It poses threats to the management and sustainability of fisheries.<sup>282</sup> As IUU fishing undermines the effectiveness of fisheries management, the FAO Committee on Fisheries addressed the need to prevent, deter, and eliminate such concerns, especially by eradicating fishing vessels flying “flags of convenience.”<sup>283</sup> Accordingly, the Committee approved the IPOA-IUU to call

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<sup>280</sup> “IUU fishing” is a term that was developed against the backdrop of the emergence of international environmental agreements in the 1990s and firstly appeared in 1997 at the Sixteenth Meeting of the Commission for the Conservation of Antarctic Marine Living Resources. IUU fishing was subsequently used in the meeting reports for the FAO Sessions and other international organizations. The term was not given a legal definition until the codification of IPOA-IUU. See Seokwoo Lee et al., *Slipping the Net: Why Is It So Difficult to Crack Down on IUU Fishing*, in FREEDOM OF NAVIGATION AND GLOBALIZATION 88, 94–95 (Myron H. Nordquist et al. eds., 2015).

<sup>281</sup> Lee et al., *supra* note 280; *Illegal, Unreported and Unregulated (IUU) Fishing*, FAO, <http://www.fao.org/iuu-fishing/background/what-is-iuu-fishing/en/> (last visited Apr. 14, 2020).

<sup>282</sup> See Lee et al., *supra* note 280.

<sup>283</sup> “Flag of convenience” or “open registry” States are States that have lax regulation on conservation and management and do not exercise effective law enforcement of fishing vessels. These States allow foreign-owned vessels to fly their

upon all States to combat IUU fishing as reflected in UNCLOS and other international norms. The IPOA-IUU focuses on flag State responsibilities and underscores the responsibility of all States, including coastal States, port States, and market States in addressing the issue. The IPOA-IUU defines the scope of fishing activities and creates a framework for implementing measures to combat IUU fishing, but it relies on individual States or RFMOs to create their own Plans of Action. In doing so, each State should take on duties to regulate fishing vessels and fishing activities in a fair, transparent, and non-discriminatory manner.

As an institution that endorses the four IPOAs, the FAO plays a supporting role and coordinates conservation schemes by reporting biennially on the state of progress in the implementation of these IPOAs. The FAO not only assists States in developing national plans, but also collaborates with other international organizations to facilitate sustainable fishery management on issues of seabirds, sharks, and IUU fishing.

#### **5. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing**

The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) is a binding international agreement that focuses on combatting

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flag. The foreign vessels, on the other hand, are attracted because they can reduce costs by avoiding certain legal requirements, such as labor conditions of the crew, fisheries operation standards, and marine pollution. Flag of convenience is disadvantageous to fisheries management and gives rise to IUU fishing. *See* TANAKA, *supra* note 193, at 162–64.

IUU fishing.<sup>284</sup> It was approved by the FAO Conference in 2009 and came into force in 2016. The PSMA became an important international agreement and now has sixty-six parties as member organizations, including the European Union.<sup>285</sup> Many of these parties are major fish trading States, such as the United States of America, France, and Japan.<sup>286</sup> Unlike former international agreements, which emphasized the responsibility of coastal States and flag States, the PSMA turns to emphasize the role and responsibility of port States and prevents vessels engaged in IUU fishing from using its port service. By denying vessels that engage illegal fishing entry into the port, the PSMA is considered a remedy for the lack of compliance and inefficient enforcement by flag States in dealing with reflagging and flags of convenience concerns.<sup>287</sup>

The PSMA follows the definition of IUU fishing in the IPOA-IUU and applies it to all vessels engaging in fishing related activities.<sup>288</sup> “Fishing related activities” is not limited to fishing operations—it contains landing, packaging, transshipping or transporting of fish, as well as fueling, and positioning personnel and other supplies at sea. Moreover, the PSMA not only regulates

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<sup>284</sup> PSMA art. 2: The objective of this Agreement is to prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.

<sup>285</sup> As of June 10, 2020. *Parties to the PSMA*, FAO, <http://www.fao.org/port-state-measures/background/parties-psma/en/> (last visited June 10, 2020).

<sup>286</sup> FAO, *supra* note 151, at 55.

<sup>287</sup> Matz-Lück & Fuchs, *supra* note 190, at 507. *See generally* Yoshifumi Tanaka, *Protection of Community Interests in International Law: The Case of the Law of the Sea*, 15 MAX PLANCK Y.B. U.N. L. 329, 368 (2011); Judith Swan, *Port State Measures—from Residual Port State Jurisdiction to Global Standards*, 31 INT’L J. MARINE & COASTAL L. 395 (2016).

<sup>288</sup> PSMA art. 1(e).

fishing vessels, it also applies to any vessel or boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities. The broad application allows each State Party to decide whether to authorize or deny the entry of foreign vessels upon entering or using its port.<sup>289</sup> If a port State has sufficient proof that a vessel seeking entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing, the State shall deny that vessel entry into its ports.<sup>290</sup> Similarly, where a foreign vessel has entered one of its ports, the port State shall refuse to provide any port services, such as landing, transshipping, refueling, or maintenance.<sup>291</sup>

Notwithstanding that the entry into or use of a port falls within a port State's full discretion, the PSMA strengthens a port State's obligation to combat IUU fishing and thwarts access to the market for illegal fish products. In addition, the PSMA attaches six annexes that provide information forms and minimum standards as guidelines. Before a vessel enters the designated port, the port State must require the vessel to provide identifiable information pursuant to Annex A, for example.<sup>292</sup> The port State shall then follow the inspection procedures and ensure that its inspectors carry out the functions set forth in Annex B.<sup>293</sup> The annexes also include guidelines for reporting inspection results and the training of inspectors.

The dispute settlement provisions in the PSMA are the same as those in the Compliance Agreement.<sup>294</sup> Under the PSMA, a party in dispute may seek to consult with the other party or

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<sup>289</sup> PSMA art. 9 & 11.

<sup>290</sup> PSMA art. 9.

<sup>291</sup> PSMA art. 11.

<sup>292</sup> PSMA Annex A, Information to Be Provided in Advance by Vessels Requesting Port Entry.

<sup>293</sup> PSMA art. 13.

<sup>294</sup> PSMA art. 22

parties. If consultations do not suffice, the States may consider any peaceful means listed in U.N. Charter. States may also refer the dispute to the ICJ, ITLOS, or arbitration with the consent of all parties. The States must continue to consult and cooperate to settle the dispute in accordance with the rules of international law relating to the conservation of living marine resources if no referrals to the court or tribunal are made.

### **C. Regional Fisheries Management Organizations (RFMOs)**

RFMOs are referenced by many of international agreements and have gained significance as a legal source in managing fisheries resources. RFMOs were created pursuant to UNCLOS, which requires all States to cooperate regarding the conservation of the living resources of the high seas.<sup>295</sup> Currently, there are approximately fifty regional fishery bodies, including international organizations, that cover the world's ocean areas.<sup>296</sup>

Some RFMOs are formed by States and dedicated to sustainable management of high seas fisheries or highly migratory species of fish. These RFMOs play increasingly important roles in the conservation of highly migratory stocks and high seas fisheries because they effectively enforce fisheries management through the decision-making process. In terms of highly migratory fish, the RFMOs of primary importance are those regulating tuna and tuna-like species in different

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<sup>295</sup> UNCLOS arts. 117-119.

<sup>296</sup> See *FAO Fishery Fact Sheets Collections*, <http://www.fao.org/fishery/rfb/search/en> (last visited July 3, 2019). The FAO defines Regional Fishery Body as “a mechanism through which States or international organizations that are parties to an international fishery agreement or arrangement collaboratively engage each other in multilateral management of fishery affairs related to transboundary, straddling, highly or high seas migratory stocks, through the collection and provision of scientific information and data, serving as technical and policy forum, or taking decisions pertaining to the development and conservation, management and responsible utilization of the resources.”

regions, including: International Commission for the Conservation of Atlantic Tunas (ICCAT), Western and Central Pacific Fisheries Commission (WCPFC), Indian Ocean Tuna Commission (IOTC), Inter-American Tropical Tuna Commission (IATTC), and Commission for the Conservation of Southern Bluefin Tuna (CCSBT).

Additionally, some RFMOs are region-centered, including: Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),<sup>297</sup> Northwest Atlantic Fisheries Organization (NAFO),<sup>298</sup> North East Atlantic Fisheries Commission (NEAFC),<sup>299</sup> South East Atlantic Fisheries Organisation (SEAFO),<sup>300</sup> General Fisheries Commission for the Mediterranean (GFCM),<sup>301</sup> South Pacific Regional Fisheries Management Organisation (SPRFMO),<sup>302</sup> South Indian Ocean

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<sup>297</sup> CCAMLR was established by the Convention for the Conservation of Antarctic Marine Living Resources, which was adopted in 1980, and entered into force in 1982. Its Secretariat is located in Hobart, Australia.

<sup>298</sup> NAFO was established by the Convention, which was adopted in 1978, and entered into force in 1979. Its Secretariat is located in Halifax, Canada.

<sup>299</sup> NEAFC was established by the Convention, which was adopted in 1959, and entered into force in 1963. Its Secretariat is located in London, United Kingdom.

<sup>300</sup> SEAFO was established by the Convention, which was adopted in 2001, and entered into force in 2003. Its Secretariat is located in Swakopmund, Namibia.

<sup>301</sup> GFCM was established under the provisions of Article XIV of the FAO Constitution adopted in 1949 and entered into force in 1952. Its Secretariat is located in Rome, Italy.

<sup>302</sup> SPRFMO was established by the Convention, which was adopted in 2010, and entered into force in 2012. Its Secretariat is located in Wellington, New Zealand.

Fisheries Agreement (SIOFA),<sup>303</sup> and, most recently, North Pacific Fisheries Commission (NPFC).<sup>304</sup>

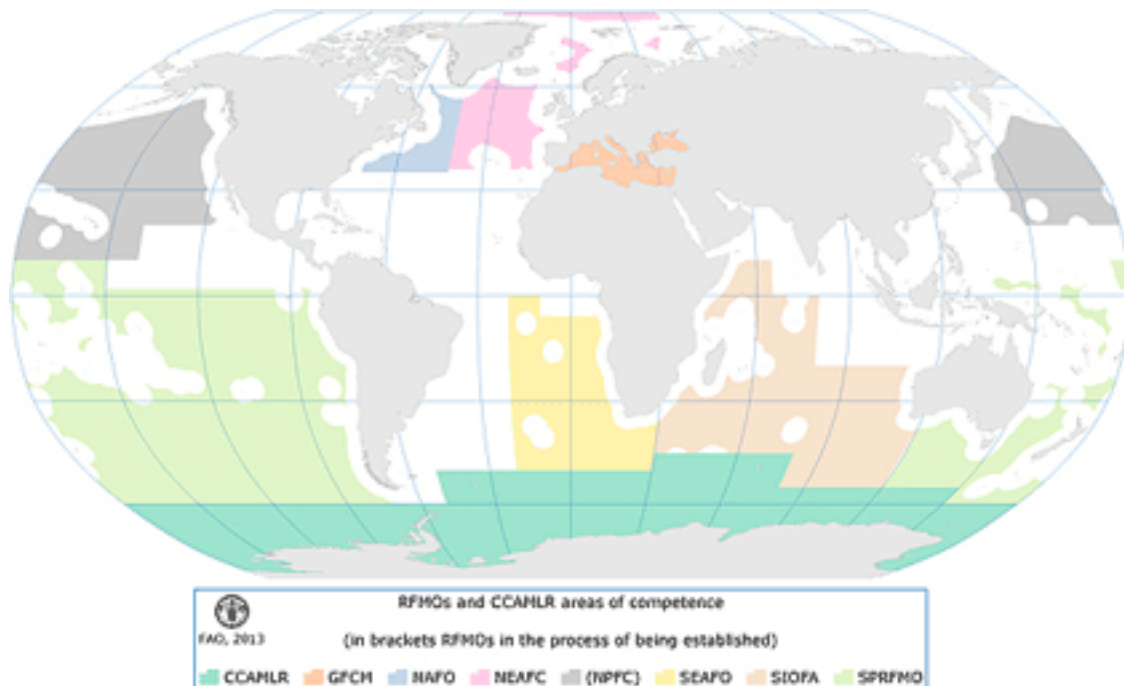


Figure 3 Existing RFMOs and the Areas of Competence Sourced from the FAO<sup>305</sup>

Overall, ocean governance pivots on the UNCLOS legal system and is intertwined with the regimes of many international fisheries laws and regulations from various regional fishery bodies. These norms establish legal orders for State actors utilizing the ocean. The ocean law regime seeks

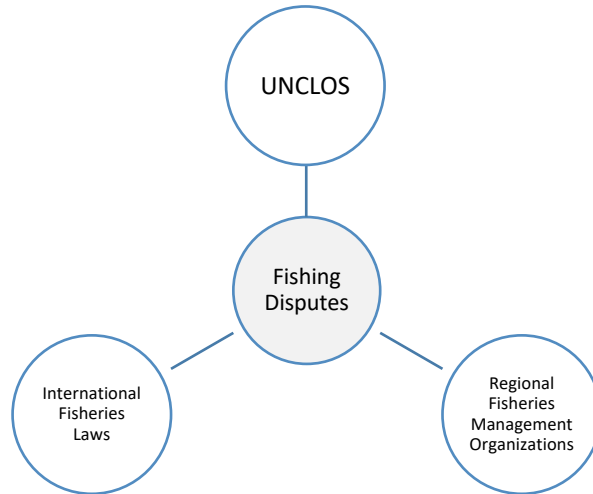
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<sup>303</sup> The Southern Indian Ocean Fisheries Agreement (SIOFA) was signed in Rome on July 7, 2006 and entered into force in June 2012.

<sup>304</sup> NPFC was established by the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean in February 2012 and entered into force in 2015.

<sup>305</sup> *Regional Fisheries Management Organizations and Deep-Sea Fisheries*, FAO, <http://www.fao.org/fishery/topic/166304/en> (last visited July 8, 2020).

to strike a balance between ocean utilization and ocean preservation, and ultimately to maintain the sustainability of the ocean and an abundance of biodiversity.



*Figure 4 The Background Concept for Studying Solutions for Fishing Disputes*<sup>306</sup>

### **III. Taiwan’s *Sui Generis* Status Under the International Law of the Sea Regime**

#### **A. International Status of Taiwan**

Debates over Taiwan’s international status are ongoing even though Taiwan meets the criteria for statehood—a permanent population, a defined territory, a government, and the ability to engage in diplomatic affairs.<sup>307</sup> To be more specific, Taiwan, or Republic of China (ROC), is

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<sup>306</sup> Figure made by author.

<sup>307</sup> Article I of the 1933 Montevideo Convention on the Rights and Duties of States provides criteria for statehood, which are: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States. The four requirements in the Convention is regarded as basic criteria for examining statehood. Convention on the Rights and Duties of States, Montevideo, Dec. 26, 1933, 165 L.N.T.S. 19; *see generally* JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2d ed. 2006).

comprised of a group of islands, including Taiwan island, Penghu, Kinmen, Matsu and other outlying islets with a total population of 23 million. These people are eligible to elect their own president, legislators, and parliamentarians pursuant to the Constitution of the Republic of China (Taiwan),<sup>308</sup> which was announced on January 1, 1947 and became effective in the same year on December 25th. In addition, Taiwan has official diplomatic relations with fifteen countries, receiving recognition as a country.<sup>309</sup> However, the reality is that Taiwan has a complicated relationship with the People's Republic of China (PRC or China) and, therefore, its legal status remains a conundrum.<sup>310</sup>

The China-Taiwan relationship, commonly referred to as cross-strait relations, has an intricate and delicate background. In 1895, Japan defeated the Qing Empire in the Sino-Japanese war, and Taiwan, along with associated islands, was ceded to Japan under the Treaty of Shimonoseki. By the end of World War II, a group of the allied powers—the United States, the United Kingdom, and the Republic of China—made two announcements, the 1943 Cairo Declaration and the 1945 Potsdam Declaration, requiring Japan to return territories that were stolen

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<sup>308</sup> Constitution of the Republic of China (Taiwan), available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000001> (last visited Sept. 30, 2019).

<sup>309</sup> China has been putting international pressure on Taiwan and squeezing Taiwan's diplomatic space. As a result, Taiwan has lost seventeen diplomatic allies since 2000. Such pressure has increased since President Tsai Ing-Wen took office in 2016. Seven countries have terminated diplomatic relations with Taiwan and turned to China. As of June 2020, Taiwan recognizes fifteen diplomatic allies.

<sup>310</sup> See Jonathan I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 AM. J. INT'L L. 453, 453–77 (2000); LUNG-CHU CHEN, *THE U.S.-TAIWAN-CHINA RELATIONSHIP IN INTERNATIONAL LAW AND POLICY* (2016); CRAWFORD, *supra* note 307, at 197–221.

from the Chinese. Before Japan renounced all rights, title, and claim to these territories in accordance with Treaty of Peace with Japan,<sup>311</sup> the Chinese civil war broke out within mainland China between the Government of the Republic and the Chinese Communist Party in 1945. Failing to resist the Chinese Communist Party, the Government of the Republic of China, led by Chiang Kai-shek, fled to Taiwan in December 1949 with the remnants of the Kuomintang (KMT). The PRC was founded subsequently and ruled by Chinese Communist Party.

The withdrawal of the ROC to Taiwan did not bring the battle to an end. Instead, the retreat led to renewed controversy over the status of Taiwan, such as statehood recognition and representation in the United Nations. Moreover, the officially signed Treaty of Peace with Japan did not clearly state to whom these islands, including Diaoyutai Islands, were to belong.<sup>312</sup> It stated that Japan must renounce relevant rights and title to Taiwan as well as to the surrounding islands. At that time, both governments, the ROC and PRC, were claiming entitlement to mainland China. By the 1970s, a majority of States recognized the PRC as China's representative. Hence, the United Nations General Assembly issued Resolution 2758, deciding to "restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations."<sup>313</sup>

Notwithstanding the decision to unseat Taiwan, the cross-strait conflict remains, and no certain conclusion can be made that Taiwan is part of China. Taiwan gradually developed its relationship with other States in various ways. For example, besides formal diplomatic relations

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<sup>311</sup> Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45, <https://treaties.un.org/doc/publication/unts/volume%20136/volume-136-i-1832-english.pdf>.

<sup>312</sup> Treaty of Peace with Japan art. 2.

<sup>313</sup> G.A. Res. 2758 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, at 2, U.N. Doc. A/8439 (1971).

with other countries, Taiwan maintains de facto diplomatic relations with the United States pursuant to the Taiwan Relations Act.<sup>314</sup> The Act permits and establishes commercial, cultural, and other relations between the people of the United States and the people on Taiwan and helps the United States maintain peace, security, and stability in the Western Pacific. In terms of international governmental organizations, Taiwan participates in Asia-Pacific Economic Cooperation under the name Chinese Taiwan. It joined the World Trade Organization as a full member under the name Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in 2002.<sup>315</sup> In addition, Taiwan competes as Chinese Taipei at the Olympic games. These diverse status and relationships imply that Taiwan's international legal status cannot be equated with that of China.

#### **B. Taiwan as a “Fishing Entity” under International Fisheries Law**

As discussed in the introduction, the concept of “fishing entity” was first seen in the 1995 FSA. Article 1(3) of the FSA states that “[t]his Agreement applies mutatis mutandis to other fishing entities whose vessels fish on the high seas.” The concept was created to incorporate Taiwan into the regulatory system of international fishery management law.<sup>316</sup> Accordingly, the

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<sup>314</sup> 22 U.S.C. ch. 48 § 3301 et seq.

<sup>315</sup> Full list of international governmental organizations in which Taiwan participates, <https://www.mofa.gov.tw/enigo/Link3enigo.aspx?n=58BD38F4400A7167&sms=A72EC821FB103DD9> (last visited June 10, 2020).

<sup>316</sup> See United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Report of the Technical Consultation on High Seas Fishing and the Papers Presented at the Technical Consultation on High Seas Fishing, U.N. Doc. A/CONF.164/INF/2 (May 14, 1993), reprinted in JEAN-PIERRE LEVY & GUNNER G. SCHRAM,

FSA's conservation and management measures apply to Taiwanese vessels fishing on the high seas. In so doing, the law ensures that the effectiveness of the conservation and sustainable use of straddling fish stocks and highly migratory fish stocks will not be undermined. Taiwan joins current RFMOs under the status of fishing entity.

### C. Taiwan's Current Fisheries Relations

The highest authority that governs fishing in Taiwan is the Fishery Agency under the Council of Agriculture of Executive Yuan. Three main laws regulate distant water fishing. The Fisheries Act is the primary law that covers fisheries matters, including aquaculture, directed fishery, and recreational fishery.<sup>317</sup> The Act for Distant Water Fisheries deals with distant water fisheries permit and management.<sup>318</sup> The Act ensures the conservation of marine fisheries resources, promotes the sustainable operation of distant water fisheries, deters IUU fishing, and regulates issues regarding fisheries development and guidance. Lastly, the Act to Govern Investment in the Operation of Foreign Flag Fishing Vessels regulates Taiwanese nationals who invest in or operate foreign flag vessels to conserve marine fisheries resources and to comply with international fisheries governance.<sup>319</sup> The Act obliges people involved in the operation of foreign fishing vessels to obtain specific permission and report relevant fishing data.

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UNITED NATIONS CONVENTION ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS—SELECTED DOCUMENTS 358 (1996); *see also* Djalal, *supra* note 52, at 119; Gau, *supra* note 52, at 237 n.8.

<sup>317</sup> Fisheries Act, *available at* <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=M0050001>.

<sup>318</sup> Act for Distant Water Fisheries, *available at* <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=M0050051>.

<sup>319</sup> Act to Govern Investment in the Operation of Foreign Flag Fishing Vessels, *available at* <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=M0050037>.

## 1. Fisheries Relations Between Taiwan and International Organizations

To date, Taiwan has become a member of six RFMOs—four in the Pacific Ocean, one in the Indian Ocean, and one targeted on a specific species. In the Pacific Ocean, the Inter-American Tropical Tuna Commission (IATTC) has the longest history of all RFMOs. The Commission was originally created by the Convention for the Establishment of an Inter-American Tropical Tuna Commission, signed by the United States and Costa Rica in 1949. As a number of additional countries later joined this Commission, members decided to revise the Convention and strengthen the Commission's powers. In 2013, the Antigua Convention was established and continue to conserve tunas and tuna-like species in the region.<sup>320</sup> The new Convention also includes provisions on the admission of fishing entities as members. In accordance with Article XXVIII of the Convention, any fishing entity whose vessels have fished for fish stocks covered by the Convention may express its firm commitment to abide by the Convention. Through written communication of commitment, Taiwan became a member to the Commission, under the name of Chinese Taipei, as a fishing entity in 2010.

The Western and Central Pacific Fisheries Commission (WCPFC) was established to conserve and manage tuna and other highly migratory fish stocks across the western and central areas of the Pacific Ocean. The Convention of WCPFC entered into force in 2014 and is the second

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<sup>320</sup> The full name of the Antigua Convention is the Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica. Full text available at: [https://www.iattc.org/PDFFiles/IATTC-Instruments/\\_English/IATTC\\_Antigua\\_Convention%20Jun%202003.pdf](https://www.iattc.org/PDFFiles/IATTC-Instruments/_English/IATTC_Antigua_Convention%20Jun%202003.pdf) [hereinafter IATTC Antigua Convention].

regional fisheries management agreement negotiated since the conclusion of the 1995 FSA.<sup>321</sup> According to Article 9 and Annex I, the Convention includes any fishing entity whose vessels fish for highly migratory fish stocks in the Convention Area when they accede to the convention.<sup>322</sup> Accordingly, a fishing entity may participate in the work, including decision-making, and must comply with the obligations under the Convention. Taiwan joined as a fishing entity under the name Chinese Taipei.

The South Pacific Regional Fisheries Management Organisation (SPRFMO) and the North Pacific Fisheries Commission (NPFC) follow the same arrangement as the WCPFC. Taiwan became members in both organizations as a fishing entity under the name Chinese Taipei. The SPRFMO Convention applies to the high seas of the South Pacific, covering about a fourth of the Earth's high seas areas. The main commercial resources fished in the SPRFMO area are jack mackerel and jumbo flying squid.<sup>323</sup> Annex IV of the SPRFMO Convention regulates relevant rights and obligations for fishing entities. The NPFC, which came into force in 2015, regulates the high seas area of the North Pacific Ocean. The Convention aims at ensuring the long-term conservation and sustainable use of the fisheries resources. Article 5(2) and the Annex of the NPFC Convention are the legal sources for fishing entities.

The newest RFMO in which Taiwan participates is the Southern Indian Ocean Fisheries Agreement (SIOFA), joining in 2019.<sup>324</sup> The agreement was signed in Rome in July 2006 and

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<sup>321</sup> Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sept. 5, 2000, 2275 U.N.T.S. 43 [hereinafter WCPFC Convention].

<sup>322</sup> WCPFC Convention art. 9 & Annex I.

<sup>323</sup> SPRFMO, <https://www.sprfmo.int/> (last visited Aug. 17, 2020).

<sup>324</sup> On July 4, 2019, Taiwan joined the SIOFA under the name "Chinese Taipei."

entered into force in June 2012. The purpose of the agreement is to promote the long-term conservation and sustainable use of fishery resource in Southern Indian Ocean through cooperation among member States. Nine contracting parties, besides fishing entities, have signed the agreement. This agreement covers fishery resources including fish, mollusks, crustaceans, and other sedentary species within the area, but excludes sedentary species subject to the fishery jurisdiction of coastal States and highly migratory species.<sup>325</sup> In its preamble, the SIOFA considers the inclusion of fishing entities necessary to ensure compatible conservation and management measures. According to Article 15 of the SIOFA, any fishing entity who has a fishery interest in the area may express its firm commitment to be bound by the terms of this agreement.<sup>326</sup> Taiwan, whose fishing vessels annually catch around 17,000 metric tons of fish, has a significant role in the Indian Ocean.<sup>327</sup> Therefore, it joined the SIOFA under the name Chinese Taipei. A fishing entity has rights to participate in the annual meeting and partake in decision-making.<sup>328</sup>

The Commission for the Conservation of Southern Bluefin Tuna (CCSBT) demonstrates another method for incorporating Taiwan into its RFMO. The CCSBT targets the management of southern bluefin tuna throughout its distribution. Its objective is to ensure, through appropriate management, the conservation and optimum utilization of southern bluefin tuna.<sup>329</sup> Instead of appending an annex, the CCSBT adopted a resolution to establish an Extended Commission and

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<sup>325</sup> SIOFA art. 1(f).

<sup>326</sup> SIOFA art. 15(1).

<sup>327</sup> *Taiwan joins Southern Indian Ocean Fisheries Agreement*, TAIWAN NEWS (July 10, 2019), <https://www.taiwannews.com.tw/en/news/3741787>.

<sup>328</sup> SIOFA art. 15(2).

<sup>329</sup> CCSBT art. 3.

an Extended Scientific Committee to incorporate fishing entities into the system.<sup>330</sup> A fishing entity whose vessels have caught southern bluefin tuna can be admitted to membership by the Extended Commission pursuant to this Resolution.

Apart from member status, Taiwan also participates in two other RFMOS under a different status. Taiwan participates in the International Commission for the Conservation of Atlantic Tunas (ICCAT) as a Cooperating non-Contracting Party. This Convention is only open for signature by the government of any State that is a member of the United Nations or of any Specialized Agency of the United Nations.<sup>331</sup> The ICCAT is an intergovernmental organization responsible for the management and conservation of tuna and tuna-like species in the Atlantic Ocean and adjacent seas. To encourage non-Contracting Parties, Entities, or fishing entities with vessels fishing for ICCAT species in the Convention area to implement ICCAT conservation measures, the Commission urged them to become a Contracting Party to ICCAT or to attain the status of a Cooperating non-Contracting Party.<sup>332</sup> The status shall be annually reviewed and renewed unless revoked by the Commission due to non-compliance with ICCAT conservation and management measures.<sup>333</sup>

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<sup>330</sup> CCSBT, *Resolution to Establish an Extended Commission and an Extended Scientific Committee and Rules of Procedure of the Extended Commission for the observation of southern Bluefin Tuna*, available at [https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs\\_english/basic\\_documents/the%20Extended%20Commission.pdf](https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs_english/basic_documents/the%20Extended%20Commission.pdf) [hereinafter Resolution on CCSBT Extended Commission].

<sup>331</sup> Article XIV of the ICCAT Convention.

<sup>332</sup> [03-20] Recommendation by ICCAT on Criteria for Attaining the Status of Cooperating Non-Contracting Party, Entity or Fishing Entity in ICCAT, available at <https://www.ofdc.org.tw/components/Editor/ICCAT/files/03-20.pdf>.

<sup>333</sup> *Id.*

Lastly, Taiwan also joins the Indian Ocean Tuna Commission, an intergovernmental organization that coordinates the regulation and management of tuna in the Indian Ocean. However, since IOTC is established within the framework of the FAO, membership to the Commission is as limited to U.N. members. Therefore, Taiwan joined the IOTC as an invited expert, through which status it may attend sessions for IOTC and its subsidiary bodies.<sup>334</sup>

	<b>Status</b>	<b>Name as It Appears in the RFMO</b>	<b>Convention Area</b>	<b>Number of States Parties</b>
<b>WCPFC</b>	Member	Chinese Taipei	Western and central areas of the Pacific Ocean	26
<b>SPRFMO</b>	Member	Chinese Taipei	South Pacific Ocean	15
<b>NPFC</b>	Member	Chinese Taipei	North Pacific Ocean <sup>335</sup>	8
<b>IATTC</b>	Member	Chinese Taipei	Easter Pacific Ocean	21
<b>SIOFA</b>	Member	Chinese Taipei	Southern India Ocean	10
<b>CCSBT</b>	Member of the Extended Commission	Chinese Taipei	No geographic limits of competence; it extends over all national waters and the high seas, where southern bluefin tuna are found.	9
<b>ICCAT</b>	Cooperating non-Contracting Party	Chinese Taipei	Atlantic Ocean and adjacent seas	48
<b>IOTC</b>	Invited Expert	Taiwan, China	Indian Ocean	32

<sup>334</sup> Observers to the IOTC Meetings, IOTC, <http://www.iotc.org/about-iotc/observers-iotc-meetings> (last visited Sept. 30, 2018).

<sup>335</sup> NPFC Convention art. 4 (1): This Convention applies to the waters of the high seas area of the North Pacific Ocean, excluding the high seas areas of the Bering Sea and other high seas areas that are surrounded by the exclusive economic zone of a single State.

Table 2 *RFMOs in which Taiwan Participates*

## 2. Fisheries Relations Between Taiwan and Opposite States

Due in part to its geographic location, Taiwan has constant, and sometimes tense, fisheries relations with opposite states. UNCLOS allows States to extend their EEZ to 200 nm and, thus, Taiwan's EEZ often overlaps with that of other States.<sup>336</sup> Japan enacted its EEZ laws in 1996, followed by China in 1998. The Philippines proclaimed its 200 nautical miles EEZ based on Presidential Decree No. 1596 in 1978. The overlapping EEZs of these States causes conflicts when it comes to the enforcement of fisheries law. More pointedly, the existing territorial disputes among these States often exacerbate fishery challenges.

To resolve the fisheries disputes and set aside the controversial sovereignty dispute concerning Diaoyutai Islands, Taiwan and Japan signed a fisheries agreement in April 2013 under the principles of parity and reciprocity.<sup>337</sup> The agreement aimed to resolve fishing disputes arising over overlapping EEZs. It designates two zones—a special cooperation zone and also “waters

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<sup>336</sup> Taiwan promulgated the Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China in January 21, 1998, and, based on Article 2, claimed outwardly 200 nautical miles from the baseline of the territorial sea. Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China, *available at* <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0000010>.

<sup>337</sup> *Republic of China (Taiwan) Signs Fisheries Agreement with Japan, Ministry of Foreign Affairs of Republic of China* (Apr. 15, 2013), [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=E80C25D078D837BB](http://www.mofa.gov.tw/en/News_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=E80C25D078D837BB) (last visited Oct. 1, 2019).

where the other party's laws are not applicable"—to coordinate law enforcement.<sup>338</sup> The agreement also sought to establish an institutionalized mechanism in the form of a Taiwan-Japan Fisheries Committee to conduct consultations. The Committee is dedicated to the conservation and management of marine living species as well as to reasonable utilization to maintain the order of maritime fishing operations.

Taiwan is also negotiating with the Philippines regarding fisheries disputes deriving from overlapped EEZs. In 2013, the fatal shooting of Taiwanese fishermen by the Philippines facilitated the first meeting on Taiwan-Philippines fisheries cooperation.<sup>339</sup> Both sides reached a consensus, agreeing to refrain from using force and violence in fishing disputes and looking forward to establishing law enforcement cooperation mechanisms.<sup>340</sup>

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<sup>338</sup> "Waters where the other party's laws are not applicable" is a relatively large area where fishing vessels from both countries can operate without being subject to the jurisdiction of the other side. The other smaller area, special cooperation zone, is under joint management by the Taiwan-Japan Fisheries Committee.

<sup>339</sup> *1st Preparatory Meeting on ROC-Philippines Fisheries Cooperation Yields Concrete Results, with Both Sides Guaranteeing Avoidance of the Use of Force to Prevent Recurrence of Incidents Such as That Involving the Guang Da Xing No. 28*, MINISTRY OF FOREIGN AFFAIRS OF REPUBLIC OF CHINA (June 15, 2013), [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=35F559BCACDB0B2B](http://www.mofa.gov.tw/en/News_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=35F559BCACDB0B2B) (last visited Sept. 20, 2019).

<sup>340</sup> *Id.*

### **Chapter 3. Dispute Resolutions in Fisheries Cases**

The 1982 UNCLOS, as analyzed in Chapter 2, ensures a coastal State's exclusive rights. At the same time, UNCLOS creates obligations for both coastal States and flag States to establish measures for the conservation of marine living resources and protection of the marine environment. Such provisions have received more attention as world fishery resources are in decline. UNCLOS and other international fisheries laws have developed into a complex regime, constructed with treaty obligations and international cooperation, toward the aim of marine resource conservation and protection. However, the success of the entire UNCLOS framework with respect to fisheries and conservation of marine living resources heavily depends upon UNCLOS' innovative provisions concerning the peaceful resolution of disputes.

This chapter focuses on peaceful resolutions of existing fisheries disputes and provides recommendations for improving future adjudications. In Section I, this research provides context for legal sources regarding the settlement of fishing disputes. The U.N. Charter and UNCLOS Part XV are the primary sources for the settlement of disputes. In Section II, by categorizing fishing disputes into four categories, this research analyzes whether these adjudications solve the fishing dispute per se, and whether courts and tribunals incorporate fisheries conservation concerns into their judicial decision-making. Section III of this chapter observes the rules of the settlement of fishing disputes, identifies underlying problems, and suggests better utilization of dispute settlement mechanisms that contribute to the progressive development of international law.

## **I. Legal Sources for the Settlement of Fishing Disputes**

### **A. U.N. Charter Article 33**

States have an obligation to settle disputes by peaceful means pursuant to the U.N. Charter.<sup>341</sup> Such dispute settlement resolution mechanisms include: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of a State's choice.<sup>342</sup> States can freely choose any means listed in Article 33 of the U.N. Charter for peaceful settlement unless States are bound by treaty obligation to a specific procedure.<sup>343</sup> These mechanisms are neither hierarchical nor exhaustive—States may choose among the means to reach the best available and appropriate result for the settlement of a dispute, and may also use different means at different stages of the dispute.<sup>344</sup> The UNCLOS framework provides additional options for the settlement of disputes, such as ITLOS, an arbitral tribunal, and a special arbitral tribunal.

### **B. Fisheries Dispute Settlement under UNCLOS Part XV**

#### **1. Dispute Settlement Procedures**

There are three sections in UNCLOS Part XV. Section 1 of Part XV lists general provisions that all States Parties must follow. States Parties have an obligation under UNCLOS to settle disputes by peaceful means. Section 1 details the various above-listed dispute resolution

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<sup>341</sup> Charter of the United Nations, June 26, 1945, 1 U.N.T.S. XVI art. 2(4): All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered [hereinafter U.N. Charter].

<sup>342</sup> U.N. Charter art.33 para. 1.

<sup>343</sup> *See generally* CHURCHILL & LOWE, *supra* note 28, at 449.

<sup>344</sup> *See id.*

mechanisms from which a State may choose.<sup>345</sup> When a dispute arises, both States Parties involved shall proceed expeditiously to exchange views regarding settlement through one of these mechanisms.<sup>346</sup> States in dispute may choose a dispute resolution mechanism by consensus to settle the dispute,<sup>347</sup> or submit their dispute to a specific procedure with a binding decision through a general, regional, or bilateral agreement.<sup>348</sup> A State may also invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V.<sup>349</sup>

Section 2 of Part XV comes into play when no settlement has been reached by recourse to the States' chosen means, and the agreement between the parties does not exclude any further procedure.<sup>350</sup> Either party to the dispute may apply to the court or tribunal without consent from the other party.<sup>351</sup> Although this section is compulsory, a State is free to choose among four different means for the settlement of a dispute: (1) the International Court of Justice (ICJ), (2) the International Tribunal for the Law of the Sea (ITLOS), (3) an international arbitral tribunal constituted pursuant to UNCLOS Annex VII, or (4) a special arbitral tribunal constituted pursuant to Annex VIII.<sup>352</sup> If the parties to a dispute accept the same tribunal, the dispute may be submitted

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<sup>345</sup> UNCLOS art. 279.

<sup>346</sup> *Id.* art. 283.

<sup>347</sup> *Id.* art. 280.

<sup>348</sup> *Id.* art. 282.

<sup>349</sup> *Id.* art. 284.

<sup>350</sup> *Id.* art. 281.

<sup>351</sup> *Id.* art. 286. See KLEIN, *supra* note 87, at 53.

<sup>352</sup> UNCLOS art. 287 (1).

according to their agreement.<sup>353</sup> After States choose a procedure pursuant to Article 287, the designated court or tribunal gains jurisdiction over any dispute concerning the interpretation or application of this Convention<sup>354</sup> and shall apply UNCLOS and other rules of international law not incompatible with it.<sup>355</sup> If a consensus cannot be reached and a forum is not designated between the disputing States, an arbitral tribunal pursuant to Annex VII becomes the mandatory forum to resolve the dispute and make a binding decision.<sup>356</sup>

A court or tribunal with jurisdiction may, at the request of a party or *proprio motu*,<sup>357</sup> consult with experts if such dispute involves scientific or technical matters.<sup>358</sup> It may also conduct preliminary proceedings to determine whether the claim constitutes an abuse of process or is not well-founded.<sup>359</sup> A court or tribunal may prescribe any provisional measures it considers appropriate under the circumstances to preserve the respective rights of the parties or to prevent serious harm to the marine environment.<sup>360</sup> It may order the prompt release of vessels and crews

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<sup>353</sup> *Id.* art. 287(4).

<sup>354</sup> *Id.* art. 288.

<sup>355</sup> *Id.* art. 293.

<sup>356</sup> *Id.* art. 287(3) & (5).

<sup>357</sup> “*Proprio motu*” means “of his own motion” in Latin. The phrase describes a court or tribunal taking actions on its own initiative and without any application by the parties. See Jonathan Law & Elizabeth A. Martin, “*ex proprio motu*”, in A DICTIONARY OF LAW, <https://www-oxfordreference-com.offcampus.lib.washington.edu/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-1498>.

<sup>358</sup> *Id.* art. 289.

<sup>359</sup> *Id.* art. 294.

<sup>360</sup> *Id.* art. 290.

if the dispute involves the detention of a vessel flying the flag of another State Party.<sup>361</sup> ITLOS has compulsory jurisdiction regarding provisional measures or prompt release unless another court or tribunal was agreed upon by the parties.<sup>362</sup> In general, local remedies must have been exhausted before referring to international law.<sup>363</sup> Any decision rendered by a court or tribunal having jurisdiction under Section 2 is final and all parties to the dispute must comply with it.<sup>364</sup>

Section 3 of Part XV sets up some limitations and exceptions to the applicability of Section 2. Article 297 exempts certain disputes from the compulsory binding dispute settlement system. Three categories of disputes do not fall into compulsory jurisdiction. The first type is disputes involving the exercise of sovereign rights or jurisdiction by a coastal State, including freedom of navigation, overflight, or the laying of submarine cables and pipelines by other States in the coastal State's EEZ and disputes over the protection and preservation of the marine environment.<sup>365</sup> The second type of disputes are those concerning marine scientific research within a coastal State's EEZ.<sup>366</sup> Lastly, disputes relating to fisheries in the EEZ of the coastal State are also excluded from compulsory jurisdiction.<sup>367</sup> Moreover, Article 298 allows a State to make a written declaration and not to submit certain disputes to Section 2 procedures. Optional exceptions were provided with

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<sup>361</sup> *Id.* art. 292.

<sup>362</sup> *Id.* arts. 290(5) & 291(1); see also Helmut Tuerk, *The Work of the International Tribunal for the Law of the Sea*, 26 OCEAN Y.B. 181, 187–88 (2012).

<sup>363</sup> *Id.* art. 295.

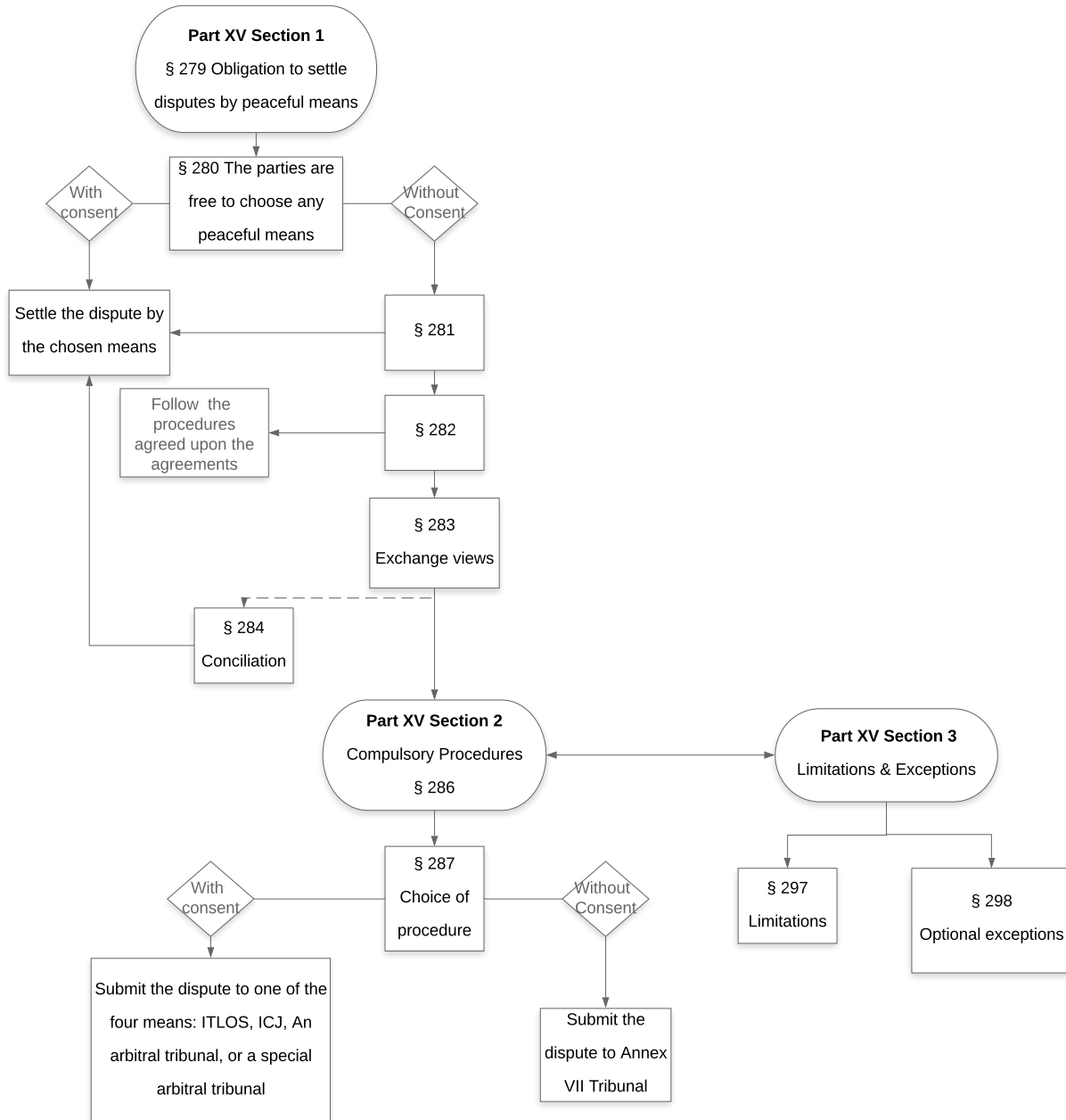
<sup>364</sup> *Id.* art. 296.

<sup>365</sup> *Id.* art. 297 (1).

<sup>366</sup> *Id.* art. 297 (2).

<sup>367</sup> *Id.* art. 297 (3).

respect to disputes concerning sea boundary delimitations, disputes concerning military and enforcement activities, and disputes over which the U.N. Security Council is exercising its functions.<sup>368</sup>



<sup>368</sup> *Id.* art. 298(1)

Figure 5 UNCLOS Part XV Dispute Settlement Procedures<sup>369</sup>

## 2. Prompt Release

Prompt release<sup>370</sup> is designed to free a flag State's vessel and its crew from prolonged detention upon the posting of a reasonable bond or other financial security on the coastal State.<sup>371</sup> As previously explained, a coastal State enjoys sovereign rights in its EEZ. It is eligible to promulgate laws and regulations regarding exploration, exploitation, conservation, and management of the living resources within its jurisdiction.<sup>372</sup> To enforce those laws and regulations, a coastal State may take necessary measures, such as boarding, inspection, and arrest and detention. These measures enable a coastal State to enforce its jurisdiction and preserve evidence for conducting criminal or civil proceedings in its national courts. As judicial proceedings in domestic courts may take time to conclude, UNCLOS has a special mechanism—prompt release—to manage arrested and detained vessels and crews.

Under the doctrine of prompt release, a coastal State shall promptly release an arrested vessel and its crew upon the posting of reasonable bond or other security.<sup>373</sup> The purpose of prompt

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<sup>369</sup> Figure drawn by author.

<sup>370</sup> See generally TANAKA, *supra* note 193, at 445–49; David H Anderson, *Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements*, 11 INT'L J. MARINE & COASTAL L. 165 (1996); KARAMAN, *supra* note 18, at 21–93; Seline Trevisanut, *Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends*, 48 OCEAN DEV. & INT'L L. 300, 300–312 (2017); Thomas A. Mensah, *The Tribunal and the Prompt Release of Vessels*, 22 INT'L J. MARINE & COASTAL L. 425, 425–50 (2007).

<sup>371</sup> *Camouco*, Judgment, *supra* note 37, ¶ 57.

<sup>372</sup> UNCLOS art. 73(1).

<sup>373</sup> UNCLOS art. 73(2).

release is to balance the interests of the detaining State and the flag State. The coastal State safeguards its interest and secures the appearance of the crew in court upon the posting of a bond or security whereas the flag State's vessel and its crew are released promptly.<sup>374</sup> The obligation of prompt release serves to protect not only humanity but due process of law.<sup>375</sup>

Under circumstances where a detaining State has not promptly released the detained vessel and crews of another State upon the posting of a bond, the flag State of the vessel may submit the question of release from detention to ITLOS or any agreed upon court or tribunal.<sup>376</sup> The prompt release request in accordance with Article 292 of UNCLOS is an independent proceeding rather than incidental.<sup>377</sup> Similarly, ITLOS gains jurisdiction under that Article so it can deal only with the question of release and has nothing to do with the merits of the case against the vessel.

UNCLOS explicitly dictates that a coastal State may not render any sentence of imprisonment or any other form of corporal punishment for a violation of its fisheries laws, unless there is an agreement between the coastal State and the detained State.<sup>378</sup> The coastal State also has an obligation to notify the flag State in cases of arrest or detention of foreign vessels and crews.<sup>379</sup>

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<sup>374</sup> Camouco, Judgment, *supra* note 37, ¶ 63; *Monte Confurco*, Judgment, *supra* note 37, ¶¶ 70 & 71; *Volga*, Judgment, *supra* note 37, ¶ 69.

<sup>375</sup> *Juno Trader*, Judgment, *supra* note 37, ¶ 77.

<sup>376</sup> UNCLOS art. 292(1) & (2).

<sup>377</sup> TANAKA, *supra* note 193, at 446.

<sup>378</sup> UNCLOS art. 73(3).

<sup>379</sup> UNCLOS art. 73(4).

### 3. Provisional Measures

Article 290 of UNCLOS gives jurisdiction to courts or tribunals hearing disputes to determine and proscribe provisional measures. Parties to a dispute may request that a court or tribunal exercise that jurisdiction under two circumstances: (1) to preserve the respective rights of the parties to the dispute is necessary, and (2) to prevent serious harm to the marine environment.<sup>380</sup> By taking appropriate actions, the requesting party assures that its rights and claims before the court will not be prejudiced. Such a request prevents the aggravation of the dispute and helps to ensure the effectiveness of a court judgement.<sup>381</sup> Moreover, Article 290 enables a party to a dispute to request measures to prevent serious harm to the marine environment. The court or tribunal may take actions to prevent harm to the marine environment without evidence as long as it determines that such measures are appropriate under the circumstances.<sup>382</sup>

For a court or tribunal to prescribe provisional measures, three elements must exist. First, the parties to the dispute must make a request for provisional measures.<sup>383</sup> Then, the court or tribunal must have *prima facie* jurisdiction over the dispute. *Prima facie* jurisdiction is temporary and revocable.<sup>384</sup> As long as no manifest reason exists that denies the court or tribunals'

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<sup>380</sup> UNCLOS art. 290(1).

<sup>381</sup> See TANAKA, *supra* note 193, at 439; KARAMAN, *supra* note 18, at 95.

<sup>382</sup> Thomas A Mensah, *Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 43, 45–46 (2002).

<sup>383</sup> UNCLOS art. 290(3). Provisional measures may be prescribed only at the request of a party to a dispute. To the contrary, the ICJ may prescribe provisional measures *proprio motu*. See TANAKA, *supra* note 193, at 440.

<sup>384</sup> KARAMAN, *supra* note 11, at 117.

jurisdiction, the court or tribunal has jurisdiction based on evidence presented by the applicant.<sup>385</sup> Last but not least, the relevant situation must be urgent.<sup>386</sup> Even so, the standard of “urgency” is not defined, and ITLOS seems to be flexible in determining whether a situation meets the requirement.<sup>387</sup> These measures may be prescribed, modified, or revoked to accommodate changed circumstances or circumstances that have ceased to exist.<sup>388</sup> Once provisional measures are made, parties to a dispute shall comply accordingly.<sup>389</sup>

#### **4. Dispute Settlement Procedures of Fishing Disputes**

In accordance with Article 279, parties in a dispute agree upon a method to resolve disagreements when a fishery conflict exists. If the parties cannot reach a consensus, they shall follow compulsory procedures and choose among four means listed in UNCLOS Article 287—ITLOS, ICJ, an Annex VII arbitral tribunal, or an Annex VIII special arbitral tribunal—to resolve the dispute. If parties cannot even agree on one of those four means, an arbitral tribunal constituted in accordance with Annex VII becomes the default mechanism for resolving the fishery dispute. In addition, States may request two interim measures, prompt release procedures and provisional measures, if necessary. A party may request that the tribunal issue prompt release orders pursuant to Article 292 to release detained vessels and crews upon the posting of a bond or security. A party to a dispute may also request provisional measures in accordance with UNCLOS Article 290 to mitigate an urgent situation prior to a final judgment by the tribunal.

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<sup>385</sup> TANAKA, *supra* note 185, at 441; KARAMAN, *supra* note 11, at 141–48.

<sup>386</sup> UNCLOS art. 290(5).

<sup>387</sup> TANAKA, *supra* note 193, at 441; KARAMAN, *supra* note 18, at 141–48.

<sup>388</sup> UNCLOS art. 290(2).

<sup>389</sup> UNCLOS art. 290(6).

Noteworthy, the dispute settlement procedure has particular limitations on subject matter jurisdiction. A coastal State is not obliged to submit fishery disputes relating to its sovereign rights to compulsory settlement according to Article 297(2) of UNCLOS. Namely, it is not mandatory for disputes regarding conservation and management in a coastal State's EEZ to be resolved by international courts or tribunals. A coastal State has discretionary power in deciding its allowable catch, harvesting capacity, allocation of surpluses, and measures taken in its EEZ. The role of dispute settlement mechanisms is extremely limited in regard to the conservation and management of living resources of an EEZ.<sup>390</sup> However, areas outside a coastal State's jurisdiction follow the above-mentioned dispute settlement procedures.

## **II. Adjudications Concerning Existing Fisheries Cases**

Since UNCLOS came into force in 1994, twenty-nine cases have been submitted to ITLOS,<sup>391</sup> and numerous cases have been adjudicated pursuant to UNCLOS. Of these cases, nineteen cases have been related to fishing and fish-related activities. In terms of judicial settlement, ITLOS is the primary institution for the settlement fishery disputes. Fifteen of those nineteen cases have been submitted to ITLOS since 1994, and more than half were related to fishing disputes. Three cases were settled by arbitral tribunals constituted in accordance with Annex VII of UNCLOS and deposited to the Permanent Court of Arbitration (PCA).<sup>392</sup> Only one case has been adjudicated by the ICJ.

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<sup>390</sup> KLEIN, *supra* note 87, at 189.

<sup>391</sup> As of May 25, 2020. *List of Cases*, ITLOS, <https://www.itlos.org/cases/list-of-cases/> (last visited May 25, 2020).

<sup>392</sup> PCA is an international organization established to facilitate arbitration and allows non-State entities access to arbitration. According to the arbitration rules, parties to a dispute may tailor procedural matters by consent, such as the selection of arbitrators and rules of procedures. Proceedings under PCA emphasize flexibility and party autonomy.

<b>Means for the Settlement of Disputes</b>	<b>Number of Cases</b>
Cases adjudicated by the ITLOS	15
Cases arbitrated under the auspices of the PCA	3
Cases adjudicated by the ICJ	1

Table 3 *Fishing and Fishing Related Cases under the UNCLOS Framework*

The disputes that have been settled under UNCLOS can be broadly divided into the following four categories: (1) alleged illegal fishing, (2) conflicts derived from fishing related activities, (3) issues related to conservation and management measures, and (4) disputes involving RFMOs. Cases involving alleged illegal fishing are the main category of disputes submitted for judicial settlement. This type of dispute concerns a coastal State’s discretionary power within its jurisdiction and the prompt release mechanism under UNCLOS. The second type of dispute is associated with fishing-related activities. Of the twenty-nine total cases, three cases were related to bunkering fishing vessels in the coastal State’s EEZ without authorization. The third type of dispute are cases involving conservation and management measures. These disputes involve specific fish stocks, such as the conservation and management of herring stocks or swordfish. Lastly, five cases deal with both UNCLOS and RFMOs. This type of dispute involves the interpretation and application of the States’ rights and obligations in conditions where the States are parties to both UNCLOS and the specific conventions of an RFMO.

<b>Categories of fishing disputes</b>	<b>Number of cases</b>	<b>Case name</b>
Alleged illegal fishing	8	ITLOS Case Nos. 5, 6, 8, 9, 11, 13, 14, and 15

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*See Permanent Court of Arbitration Arbitration Rules 2012, available at <https://pca-cpa.org/wp-content/uploads/sites/6/2015/11/PCA-Arbitration-Rules-2012.pdf> (last visited July 2, 2020).*

Conflicts derived from fishing related activities	3	ITLOS Case Nos. 1, 2, and 19
Issues related to conservation and management measures	3	ITLOS Case No. 7, Mauritius v. U.K. Arbitration, and Herring Arbitration
Disputes involving RFMOs	5	ITLOS Case Nos. 3&4, 21, Whaling case, and SBT Arbitration

Table 4 *Case Distribution of Four Categories of Fishing Disputes*

The following sections discuss the sample of this research—nineteen cases in total—to examine the courts and tribunals’ rulings on settling fishing disputes and assess how marine environmental concerns have influenced the decisions of courts and tribunals involved in settling fishery disputes. The case studies analyze whether existing dispute settlement mechanisms resolve fishing disputes and provide trajectories on what dispute settlement mechanisms States can use to resolve fishing disputes if marine sustainability is an important goal.

#### **A. Alleged Illegal Fishing**

Eight cases submitted under UNCLOS were concerned with alleged illegal fishing.<sup>393</sup> All of these cases were decided by ITLOS with the exception of one, which was removed from the Tribunal’s docket by the parties before ITLOS could hear it.<sup>394</sup> Each of these cases were prompt release cases involving detentions of foreign vessels, their crews, and cargo on board, and each of the relevant arrests and detentions were made for alleged violations of the fishery law of the detaining State. In each of the cases, the dispute was primarily over concerns as to the

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<sup>393</sup> These are ITLOS No.5 *Camouco* case, No. 6 *Monte Confurco* case, No. 8 *Grand Prince* case, No. 9 *Chaisiri Reefer 2* case, No. 11 *Volga* case, No. 13 *Juno Trader* case, No. 14 *Hoshinmaru* case, and No. 15 *Tomimaru* case.

<sup>394</sup> ITLOS No. 9 *Chaisiri Reefer 2* case.

reasonableness of the posted bond or financial security.<sup>395</sup> Most importantly, in each of these cases, the tribunal recognized the sovereign rights of a coastal State within its EEZ in prescribing fisheries regulations.

### **1. Case Removed after Negotiation**

In the No. 9 *Chaisiri Reefer 2* case, *Chaisiri Reefer 2* was a reefer ship flying the flag of Panama.<sup>396</sup> The vessel was arrested by Yemeni coastguard for an alleged violation of fishery laws while leaving a port within Yemen's jurisdiction. Panama submitted the dispute to ITLOS under Article 292 of UNCLOS, requesting prompt release of the vessel *Chaisiri Reefer 2* and its crew and cargo.<sup>397</sup> Soon after Panama submitted the application, the parties reached a settlement and discontinued the case.<sup>398</sup> The vessel *M/V Chaisiri Reefer 2* and its cargo and were released and were free to sail from Mukalla Port.

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<sup>395</sup> See generally Rachel Baird, *Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to Its Development and Persistence*, 5 MELB. J. INT'L L. 299 (2004); Adrienne J Oppenheim, *The Plight of the Patagonian Toothfish: Lessons from the Volga Case*, 30 BROOK J. INT'L L. 293 (2004); Christoph Schwarte, *Environmental Concerns in the Adjudication of the International Tribunal for the Law of the Sea*, 16 GEO. INT'L ENVTL. L. REV. 421 (2003–2004); Erik Franckx, "Reasonable Bond" in the Practice of the International Tribunal for the Law of the Sea, 32 CAL. W. INT'L L.J. 303 (2002).

<sup>396</sup> *Request for the Prompt Release of Vessel Cargo and Crew Pursuant to Article 292 of the 1982 United Nations Convention on the Law of the Sea by the Republic of Panama against the Republic of Yemen*, ITLOS, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_9/application\\_panamama\\_030701.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_9/application_panamama_030701.pdf).

<sup>397</sup> *Chaisiri Reefer 2*, Order, *supra* note 36, at 82.

<sup>398</sup> *Id.*

## 2. Cases Decided by ITLOS Regarding Illegal Fishing

### a. Salient Facts and Issues

#### (1) *No. 5 Camouco Case*

In the *No. 5 Camouco* case, the *Camouco* was a fishing vessel flying the flag of Panama. The French authorities boarded the vessel within the Crozet Island EEZ because the vessel was accused of engaging in unlawful fishing of Patagonian toothfish and failed to declare its entry into French jurisdiction.<sup>399</sup> The applicant, Panama, argued that the vessel was merely intending to cross the French EEZ and that the fish on board were caught outside the EEZ.<sup>400</sup> It also contended that the respondent set a unreasonable bond.

This case presented two main issues: whether exhaustion of local remedies is required and whether the bond was reasonably determined. The parties did not contest the Tribunal's jurisdiction over the case and, therefore, the Tribunal found that it had jurisdiction to hear the dispute. With regard to admissibility, the Tribunal found that the allegations were well-founded and that there is no time limit after the detention of a vessel or its crew for filing an application.<sup>401</sup> As to the exhaustion of local remedies requirement, the Tribunal held that Article 292 provides an independent remedy.<sup>402</sup> As the purpose of prompt release is to free a ship and its crew from prolonged detention and to safeguard the interests of the coastal State within a short period of time, the exhaustion of local remedies is not required.<sup>403</sup>

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<sup>399</sup> *Camouco*, Judgment, *supra* note 37, ¶ 29.

<sup>400</sup> *Id.* ¶ 32.

<sup>401</sup> *Id.* ¶ 55.

<sup>402</sup> *Id.* ¶ 58.

<sup>403</sup> *Id.* ¶¶ 57 & 58.

In determining the reasonableness of the bond, the Tribunal referenced the criteria set forth in *M/V Saiga (No. 1)* and considered the following factors: the gravity of the alleged offenses, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State, and its form.<sup>404</sup> Accordingly, the Tribunal rejected the amount that the French court set and decided on what, in its view, was a proper amount to be posted.

**(2) *No. 6 Monte Confurco Case***

In the *No. 6 Monte Confurco* case, the *Monte Confurco*, a fishing vessel flying the flag of Seychelles, was boarded by French authorities within its EEZ of the Kerguelen Islands. Similar to the *Camouco* case, the *Monte Confurco* was accused of entry without announcement and fishing without authorization.<sup>405</sup> The applicant, Seychelles, contested that the vessel was outside the French EEZ and did not engage in fishing at that time. In this case, the parties did not dispute the Tribunal's jurisdiction. Instead, they debated over whether the bond imposed by the French court was reasonable.

**(3) *No. 8 Grand Prince Case***

In this case, the Tribunal found that it had no jurisdiction over the dispute, and the case was concluded without elaboration on the merits. The *Grand Prince*, a fishing vessel that obtained a provisional patent of navigation issued by Belize, was accused of illegal fishing in the EEZ of the Kerguelen Islands under French jurisdiction. Belize argued that France failed to comply with

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<sup>404</sup> *Id.* ¶ 67.

<sup>405</sup> *Monte Confurco*, Judgment, *supra* note 37, ¶ 30.

prompt release provisions and contested the reasonableness of the French bond.<sup>406</sup> France responded that the vessel was confiscated by the French court as a penalty, so the Tribunal had no jurisdiction.<sup>407</sup> The Tribunal did not consider Belize to be the flag State of the vessel when the application was made as the provisional patent of navigation was expired at the time of the submission.<sup>408</sup> Since the application must be made by the flag State of the vessel, the Tribunal had no jurisdiction to hear the case submitted by Belize. Therefore, the Tribunal was not called upon to deal with the merits of the dispute.

#### ***(4) No. 11 Volga Case***

This case directly tests how a tribunal appraises divergent interests—the interests of a coastal State and the interests of environmental preservation.<sup>409</sup> In this case, the *Volga*, a Russian fishing vessel, was boarded by the Australian Navy at a location in the Australian Heard Island and McDonald Island EEZ in the Southern Ocean.<sup>410</sup> Australia alleged that the vessel conducted illegal fishing operations in the Australian EEZ, so the authorities detained the vessel and the crews on board.<sup>411</sup> The authorities indeed found approximately 131 tons of Patagonian toothfish on board. Australian authorities sold the catch on board and calculated the amount of a bond including the catch value, penalty, vessel value, fuel, lubricants, and equipment. In addition, Australia added

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<sup>406</sup> *Gran Prince*, Judgment, *supra* note 37, ¶ 64.

<sup>407</sup> *Id.* ¶ 65.

<sup>408</sup> *Id.* ¶ 93.

<sup>409</sup> See generally Michael White & Stephen Knight, *ITLOS and the Volga Case: The Russian Federation v. Australia*, 17 AUSTL. & N.Z. MAR. L.J. 39, 39–53 (2003).

<sup>410</sup> *Volga*, Judgment, *supra* note 37, ¶ 32.

<sup>411</sup> The *Volga* was accused of not having a valid foreign fishing license.

two conditions on the release of the vessel to prevent IUU fishing. It required the vessel to carry a Vessel Monitoring System (VMS) and submit the collected information to the authorities.<sup>412</sup>

The Tribunal considered two issues related to the bond in this case: whether the bond set by the respondent was reasonable, and whether a coastal State can impose conditions on prompt release other than financial guarantees. Australia urged the Tribunal to take into account the IUU fishing problem in the Southern Ocean, the serious depletion of the Patagonian toothfish, and the importance of maintaining the ecological balance of the environment.<sup>413</sup> Such international concern justifies the penalties provided in its legislation and the amount of the bond set for the release of the ships and crews. The main purpose of setting a bond is to secure the completion of judicial procedures before the courts of the detaining State; therefore, the Tribunal may evaluate the gravity of the alleged offenses by reference to the penalties imposed under the domestic laws of that State.<sup>414</sup> As to the second issue, the Tribunal rejected conditional prompt release finding that non-financial conditions cannot be considered components of a bond or other financial security, which may go beyond the meaning and the object and purpose of UNCLOS.<sup>415</sup> However, the Tribunal did not determine whether a coastal State is entitled to impose such conditions in the exercise of its sovereign rights under UNCLOS.

***(5) No. 13 Juno Trader Case***

The No. 13 *Juno Trader* case also involved a similar debate over the reasonableness of an imposed bond. The *Juno Trader* was a reefer vessel flying the flag of Saint Vincent and the

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<sup>412</sup> *Volga*, Judgment, *supra* note 37, ¶ 75.

<sup>413</sup> *Id.* ¶ 67.

<sup>414</sup> *Id.* ¶ 69.

<sup>415</sup> *Id.* ¶ 77.

Grenadines. It was accused by the Guinea-Bissau of a serious fishing infraction, having fish species from Guinea-Bissau's water.<sup>416</sup> The vessel and its crew were detained. Guinea-Bissau imposed a fine and confiscated the fish found aboard.<sup>417</sup> Because the owner of the vessel was unable to pay the fines, the vessel reverted to the Guinea-Bissau.

In the Tribunal's view, the vessel was still flying the flag of Saint Vincent and the Grenadines as there is no legal basis for a definitive change in the nationality of the vessel while considering the gravity of the alleged offenses.<sup>418</sup> Accordingly, the Tribunal found that it had jurisdiction over the case and the parties did not object to the admissibility. Since the application was well-founded,<sup>419</sup> the Tribunal examined whether the posted bond was reasonable. It referred to previous cases, the *Camouco* case and the *Monte Confurco* case, indicating that the assessment of the relevant factors must be objective and take into account all information provided by the parties.<sup>420</sup> However, in the present case, the Tribunal did not consider the circumstances of the seizure of the vessel as one of the factors in determining the amount of the bond.

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<sup>416</sup> *Id.* ¶ 41.

<sup>417</sup> *Id.* ¶ 43.

<sup>418</sup> The Tribunal abides by the sovereign rights of a coastal States under the UNCLOS, so the decisions taken by the Tribunal in a prompt-release case must not prejudice the merits of any case before the appropriate domestic forum of the detaining State against the vessel, its owner or its crew.

<sup>419</sup> Rules of the Tribunal art. 113(2), adopted on 28 October 1997 (amended on 15 March and 21 September 2001 and on 17 March 2009), [https://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/Itlos\\_8\\_E\\_17\\_03\\_09.pdf](https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf).

<sup>420</sup> *Juno Trader*, Judgment, *supra* note 37, ¶ 85.

***(6) No. 14 Hoshinmaru Case***

In the No. 14 *Hoshinmaru* case, the Japanese fishing vessel *Hoshinmaru* was boarded by Russian authorities in Russia's EEZ. The *Hoshinmaru* obtained a fishing license to fish within the Russian EEZ, but the authorities found that the actual catch on board exceeded the permitted amount. Thus, the vessel was accused of illegal fishing and was detained along with its crew for further judicial process. Both parties disagreed on the bond in accordance with Article 73(3) of UNCLOS for releasing the vessel and its crew.

The Tribunal noted that Russia and Japan have a close fishing relationship and have even established an institutional framework for consultations concerning the management and conservation of fish stocks in the EEZ of the Russian Federation in the Pacific.<sup>421</sup> Although the *Hoshinmaru* held a valid fishing license, the Tribunal viewed this violation as an offense subject to the cooperative framework, in which monitoring catches is one of the most essential means to manage marine living resources.<sup>422</sup> Thus, the Tribunal determined that the security should be set in the total amount of 10,000,000 roubles.

***(7) No. 15 Tomimaru Case***

Lastly, the No. 15 *Tomimaru* case also concerns illegal fishing, but the issue is distinguishable from that in the *Hoshinmaru* case. A licensed Japanese vessel, *Tomimaru*, was found to have unreported fish by Russian authorities in Russia's EEZ. The *Tomimaru* was charged with illegal fishing and "causing enormous environmental damages to the marine living

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<sup>421</sup> *Hoshinmaru*, Judgment, *supra* note 37, ¶ 98.

<sup>422</sup> *Id.* ¶ 99.

resources.”<sup>423</sup> The vessel and the master were detained but the crew was allowed to leave Russia after investigation. The main issue in this case is whether Japan was eligible to submit the case as the flag State of the vessel after the vessel changed its nationality due to confiscation. The respondent argued that the confiscation of the *Tomimaru* rendered the application under Article 292 of UNCLOS without object as the domestic court had already decided on the merits and completed execution. In its judgment, the Tribunal found that the application for the release of the vessel *Tomimaru* was ineligible.

The Tribunal set forth two questions: (i) whether confiscation may have an impact on the nationality of a vessel, and (ii) whether confiscation renders an application for the prompt release of a vessel without object.<sup>424</sup> The Tribunal answered no to the first question finding that the confiscation of a vessel only changes the ownership of the vessel and does not result per se in an automatic change of the vessel’s nationality.<sup>425</sup> With regard to the second question, though confiscation of a vessel, in general, does not prevent the Tribunal from admitting prompt release, this case reached the end of domestic procedure. As a result, the Tribunal found it unnecessary to decide on the case in an effort not to contradict the decision which concluded the proceedings before the appropriate domestic fora and encroach upon national competences.<sup>426</sup>

#### **b. Reasonableness of a Bond**

Of the alleged illegal fishing cases, the two cases on which the Tribunal ultimately did not proceed to judgment on the merits are the No. 8 *Grand Prince* case and the No. 15 *Tomimaru* case,

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<sup>423</sup> *Tomimaru*, Judgment, *supra* note 37, ¶ 26.

<sup>424</sup> *Id.* ¶ 69.

<sup>425</sup> *Id.* ¶ 70.

<sup>426</sup> *Id.* ¶ 80.

where the applicants failed to prove the jurisdiction of the Tribunal. The remaining five cases considered a similar issue—the reasonableness of bonds. With respect to this issue, the UNLCOS provision itself does not provide any indication of the determination of the amount of a bond or security. The only normative guidance is stated in Article 113 of the Rules of the Tribunal, stating that the Tribunal “shall determine the amount, nature and form of the bond or financial security to be posted for the release of the vessel or the crew.”<sup>427</sup> Accordingly, judicial practices provide further elaboration on the interpretation and application of the Tribunals’ view on the reasonableness of bonds.<sup>428</sup> These five cases demonstrate that the Tribunals’ interpretation of “reasonableness” lacks a serious consideration of marine conservation and management.

Examining judicial practice, ITLOS, arguably, developed its criteria for a bond or financial security in the *M/V Saiga (No. 1)* case, the first case in which the Tribunal considered a prompt release proceeding.<sup>429</sup> In that case, ITLOS noted that the overall balance of the amount, form, and nature of the bond or financial security must be reasonable.<sup>430</sup> It took into account the commercial value of the gasoil discharged by order of the respondent and the difficulties that might be incurred

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<sup>427</sup> Rules of the Tribunal art. 113(2).

<sup>428</sup> *See generally* Franckx, *supra* note 395.

<sup>429</sup> The *M/V Saiga* is an oil tanker flying the flag of Saint Vincent and the Grenadines. While supplying fuel oil to fishing vessels and other vessels operating off the coast of Guinea, the vessel was arrested by Guinean Customs patrol boats for smuggling and violating Customs Code of Guinea. The vessel and its crews were detained. However, Guinea authorities released the vessel and its crew without the posting of a bond or other financial security.

<sup>430</sup> *M/V Saiga (No. 1)*, Judgment, *supra* note 37, ¶ 82.

in restoring the gasoil.<sup>431</sup> Since the respondent had not posted a bond, the Tribunal unilaterally determined the amount of a bond, considering all relevant circumstances.

In the No. 5 *Camouco* case, the Tribunal referred to the *M/V Saiga (No. 1)* case and enumerated the factors to be considered, including: the gravity of the alleged offenses, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, and the amount of the bond imposed by the detaining State, and its form.<sup>432</sup> The French court assessed these factors in light of the value of the vessel and the penalties incurred, and confirmed the bond to be 20,000,000 FF.<sup>433</sup> In contrast, the applicant disputed that the amount of a reasonable bond should be fixed at 1,300,000 FF, from which the value of the cargo seized (350,000 FF) should be deducted.<sup>434</sup> The Tribunal took note of the gravity the alleged offenses and the penalties imposed under French law. It also considered the value of the vessel, which was estimated by expert testimony to be approximately 3,700,000 FF. The Tribunal ultimately found that the bond of 20,000,000 FF imposed by the French court was not reasonable.<sup>435</sup> It then fixed the amount of the bond at 8,000,000 FF. Similar to the *M/V Saiga (No. 1)* case, the Tribunal did not provide detail as to how that amount was determined.

In the No. 6 *Monte Confurco* case, the Tribunal emphasized that the reasonableness of a bond cannot be determined in isolation from facts,<sup>436</sup> nor can it be listed in terms of absolute

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<sup>431</sup> *Id.* ¶ 84.

<sup>432</sup> *Camouco*, Judgment, *supra* note 37, ¶ 67.

<sup>433</sup> *Id.* ¶ 36.

<sup>434</sup> *Id.* ¶ 64.

<sup>435</sup> *Id.* ¶ 70.

<sup>436</sup> *Monte Confurco*, Judgment, *supra* note 37, ¶ 74.

factors.<sup>437</sup> It followed the criteria set out in the *M/V Saiga (No. 1)* case and the *Camouco* case.<sup>438</sup> It considered the gravity of the offenses alleged, the range of penalties under French law, and the value of the vessel, the catch on board, and the fishing gear. Notably, the Tribunal affirmed that the gravity of the offenses related to the conservation of the fishery resources in the EEZ.<sup>439</sup> As a member to the CCAMLR, the respondent took seriously the conservation of Patagonian toothfish and regarded unlawful fishing as a threat to future resources. Thus, French law gives weight to the penalties to the alleged offenses. The Tribunal was deferential to the penalties imposed by French Law in determining the gravity of the allegation. Moreover, the respondent contended that the seizure of the fish on board and of the fishing gear were in accordance with French law. The Tribunal took into account relevant facts in the assessment of the reasonableness of the bond,<sup>440</sup> but it was aware that the entirety of the fish onboard was not caught within the French EEZ. For these reasons, the Tribunal determined that the bond or other security would consist of the value of the fish seized by the French authorities and a bond calculated the Tribunal.<sup>441</sup> According to the Tribunal, the security should have been in the total amount of 18,000,000 FF instead of 56,400,000 FF imposed by the French court.<sup>442</sup>

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<sup>437</sup> *Id.* ¶ 76.

<sup>438</sup> *Id.* ¶ 82.

<sup>439</sup> *Id.* ¶ 78.

<sup>440</sup> *Id.* ¶¶ 85 & 86.

<sup>441</sup> *Id.* at 115 (The detail of the amount consists of: (1) an amount of nine million French francs (9,000,000 FF) as the monetary equivalent of the 1058 tons of fish seized by the French authorities and (2) a bond in the amount of nine million French francs (9,000,000 FF)).

<sup>442</sup> *Id.* ¶ 93.

The No. 11 *Volga* case raised distinct issues because both parties disputed not only the reasonableness of the bond but also the added condition on the release of the vessel. The case challenges the relationship between prompt release proceedings and a State's concern about conservation of marine living resources. The respondent, Australia, argued that the bond—which was calculated based on the value of the vessel, its fuel, lubricants and fishing equipment; the gravity of the offenses and potential penalties; the level of international concern over illegal fishing; and the need to secure compliance with Australian laws and international obligations pending the completion of domestic proceedings—was reasonable.<sup>443</sup> Australia stressed its domestic laws related to combatting IUU fishing and the conservation of Patagonian toothfish. This fish stock is currently in a serious depletion status.<sup>444</sup> Several States and international organizations, particularly CCAMLR, have managed to deter illegal fishing, since such fishing poses threats to the conservation of fisheries resources and the maintenance of the ecological balance of the environment.<sup>445</sup> As a result, Australia argued that the bond should be AU\$ 3,332,500, which consists of three components: (1) the assessed value of the vessel, fuel, lubricants and fishing equipment (AU\$ 1,920,000), (2) potential fines (AU\$ 412,500), and (3) a security related to the carriage of a fully operational VMS and observance of CCAMLR conservation measures (AU\$ 1,000,000).<sup>446</sup>

The Tribunal considered the totality of the circumstances in the present case and referred to the *Camouco* and *Monte Confurco* cases in its holding. Neither party disputed the value of the

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<sup>443</sup> *Volga*, Judgment, *supra* note 37, ¶ 61.

<sup>444</sup> *Id.* ¶ 67.

<sup>445</sup> *Id.* ¶ 67.

<sup>446</sup> *Id.* ¶ 72.

vessel and its cargo; therefore, the Tribunal upheld the security posted by the respondent to cover the assessed value of the vessel, its fuel, lubricants, and fishing equipment, totaling AU\$ 1,920,000.<sup>447</sup> As to the gravity of the offenses alleged, the Tribunal stated that it understood the concerns about IUU fishing; however, it reiterated that the purpose of prompt release is to ensure that a vessel and its crews will be released promptly upon the posting of a reasonable bond, pending completion of judicial procedures before the courts of the detaining State.<sup>448</sup> The Tribunal recognized that the offenses under Australia law were grave, but three members of the crew had already departed from Australia, and, therefore, posting a bond served no practical purpose.<sup>449</sup>

In addition, Australia added two conditions on the release of the vessel to prevent IUU fishing—it required the vessel to carry a VMS and submit the information to the authorities.<sup>450</sup> This, then, raises the issue of whether a coastal State may impose conditions on prompt release other than the posting of a bond or security. The Tribunal did not answer whether a coastal State is entitled to impose such conditions in the exercise of its sovereign rights under UNCLOS. Rather, it conducted contextual as well as object and purpose analysis on the expression of “bond or other security” set out in Article 73(3).<sup>451</sup> In the context of UNCLOS provisions,<sup>452</sup> a bond or security is of a financial nature. In addition, the object and purpose of a bond or other security is to provide the flag State with a mechanism for obtaining the prompt release of a vessel and crew arrested for

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<sup>447</sup> *Id.* ¶ 73.

<sup>448</sup> *Id.* ¶ 69.

<sup>449</sup> *Id.* ¶ 74.

<sup>450</sup> *Id.* ¶ 75.

<sup>451</sup> *Id.* ¶ 77.

<sup>452</sup> These provisions are UNCLOS Articles 292, 220(7), and 226(1)(b).

alleged fisheries violations. If additional non-financial conditions were to be assessed, they would go beyond reasonableness and would defeat this object and purpose. Accordingly, non-financial conditions cannot be considered components of a bond or other financial security.<sup>453</sup>

The Tribunal also considered whether the sale of catch onboard a vessel should be regarded as part of the bond and security. In this case, the fish and bait that were on board the *Volga* at the time of its arrest were sold by the Australian authorities. The Tribunal held that this depends on the domestic laws of the detaining State as long as the overall amount meets the purpose of prompt release.<sup>454</sup> Based on these assessments, the Tribunal held that the amount sought by the respondent was not reasonable. According to the Tribunal, the bond for the release of the *Volga*, the fuel, lubricants, and fishing equipment should have been set in the amount of AU\$1,920,000.<sup>455</sup>

In the No. 13 *Juno Trader* case, the Tribunal was also asked to assess relevant factors in determining a reasonable bond. The Tribunal referred to the *Camouco* and *Monte Confurco* cases, indicating that assessment of the relevant factors must be objective and take into account all information provided by the parties.<sup>456</sup> In this case, the Tribunal considered the gravity of the alleged offenses, the value of the vessel, and the value of the cargo.<sup>457</sup> It excluded the circumstances of the seizure of the vessel. Regarding the conservation of marine living resources, the Tribunal merely noted the concern of IUU fishing presented by the respondent but failed to provide a calculation of how penalties posed by its domestic court affect the bond's amount. The

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<sup>453</sup> *Volga*, Judgment, *supra* note 37, ¶ 77.

<sup>454</sup> *Id.* ¶ 87.

<sup>455</sup> *Id.* ¶ 90.

<sup>456</sup> *Juno Trader*, Judgment, *supra* note 37, ¶ 85.

<sup>457</sup> *Id.* ¶¶ 86-94.

Tribunal found that the amount of the bond or other financial security should have been 300,000 euros.<sup>458</sup>

In the last case, the No. 14 *Hoshinmaru*, the Tribunal expressed its views on the reasonableness of a bond by referring to the criteria set out in precedent cases, i.e., the *Camouco* case, the *Monte Confurco* case, the *Volga* case, and the *Juno Trader* case.<sup>459</sup> However, the Tribunal considered this case to be distinct because both parties cooperated closely with respect to fisheries. Russia and Japan have established an institutional framework for consultations concerning the management and conservation of fish stocks. The *Hoshinmaru* also held a valid license to fish.<sup>460</sup> The respondent argued that the bond should be 22,000,000 roubles, containing the release of the *Hoshinmaru* calculated on the basis of the potential fines imposable upon the Master and the owner of the vessel, a penalty calculated on the basis of the amount of sockeye salmon allegedly taken illegally, the value of the vessel and administrative expenses incurred by the Russian authorities for carrying out the investigation.

The Tribunal, in this case, found that the amount of the bond posted by the respondent was unreasonable. In the view of the Tribunal, it was not reasonable because a bond should not be set based on the maximum penalties applicable to violators, nor should it be calculated based on the confiscation of the vessel.<sup>461</sup> As the respondent was aware, the violation fell within the cooperate framework, and monitoring catches is one of the most essential means of managing marine living resources. Not only is it the right of Russia to implement conservation measures in its EEZ but

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<sup>458</sup> *Id.* ¶ 98.

<sup>459</sup> *Hoshinmaru*, Judgment, *supra* note 37, ¶ 82.

<sup>460</sup> *Id.* ¶ 98.

<sup>461</sup> *Id.* ¶ 93.

also obligations resulting from provisions of Article 61(2) of UNCLOS.<sup>462</sup> Taking this into consideration, the Tribunal considered the offense to be a grave one. The Tribunal ultimately decided that the Russian Federation must promptly release the *Hoshinmaru*, including its catch on board, upon the posting of a bond in the amount of 10,000,000 roubles, and that the Master and the crew were free to leave without any conditions.

### 3. Remarks

Among the cases regarding alleged illegal fishing, the violations include fishing without the permission of the coastal State,<sup>463</sup> contravening the coastal State's laws and regulations,<sup>464</sup> and unreported or misreported fishing.<sup>465</sup> These activities fall into broadly defined illegal fishing under IPOA-IUU. Coastal States conduct law enforcement procedures, such as boarding, inspection, arresting vessels, and detaining the crews, not only because these measures are subject to the rights and jurisdiction of the coastal State but also their obligations in accordance with UNLCOS Articles 61 and 62. UNCLOS ensures a coastal State's exclusive rights to fishing in its EEZ, but, on the other hand, it reinforces a coastal State's responsibility to take proper conservation and management precautions to prevent living resources in the EEZ from becoming endangered by over-exploitation. Meanwhile, a coastal State may require foreign States to observe relevant laws and regulations while giving other States access to its EEZ.

With regard to means for the settlement of alleged illegal fishing disputes, the *Chaisiri Reefer 2* case was settled by negotiation. The remaining cases reached settlements on issues

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<sup>462</sup> *Id.* ¶ 99.

<sup>463</sup> These are the *Camouco* and *Monte Confurco* cases.

<sup>464</sup> These are the *Grand Prince* case, the *Chaisiri Reefer 2* case, the *Volga* case, and the *Juno Trader* case.

<sup>465</sup> These are the *Hoshinmaru* and *Tomimaru* cases.

concerning the release of vessels and crews, but the Tribunal did not decide the substantive issues of fisheries disputes. For instance, in the *Camouco* case, the applicant, Panama, argued that its fishing vessel intended to cross the French EEZ and that the fish on board were caught outside its EEZ.<sup>466</sup> The Tribunal in that case did not investigate the contravention but decided solely the bond issue. The Tribunal has no jurisdiction on any fisheries dispute concerning the sovereign rights of a coastal State; likewise, the coastal State is not obliged to accept the submission of a dispute to the Tribunal with respect to the living resources in the EEZ or the exercise of a coastal State's rights. Since Article 297(3) limits the applicability of compulsory jurisdiction procedures and the Tribunal respects coastal States' sovereign rights in their EEZs, the Tribunal has no jurisdiction to decide whether a foreign State violated a coastal State's laws and regulations, nor to investigate unreported or misreported fishing.<sup>467</sup>

Even though the Tribunal has no jurisdiction to decide the merits of allegations related to illegal fishing activities, it has independent jurisdiction to hear the question of prompt release of vessels and crews in accordance with Article 292 of UNCLOS. In the five cases regarding alleged illegal fishing disputes, States requested that the Tribunal determine the reasonableness of a bond or financial security. The Tribunal is not precluded from examining the facts and circumstances of the case so as to assess the overall balance of the amount, form, and nature of a bond or security. The criteria for evaluating reasonableness of a bond include, but are not limited to: (1) the gravity of the alleged offenses, (2) the penalties imposed or imposable under the laws of the detaining

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<sup>466</sup> *Camouco*, Judgment, *supra* note 37, ¶ 32.

<sup>467</sup> See Robin Churchill, *Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2007*, 23 INT'L J. MARINE & COASTAL L. 601, 610 (2008).

State, (3) the value of the detained vessel, its fuel, lubricants and fishing equipment, (4) the value of the cargo seized, (5) the amount of the bond imposed by the detaining State and its form, and (6) the fishery relationship between detaining and detainee States.

Finally, the Tribunal recognizes the concern for conservation;<sup>468</sup> however, it is unclear how the Tribunal weighs this factor in assessing the reasonableness of a bond.<sup>469</sup> The Tribunal is of the view that the amount of a bond should not be excessive and must not be unrelated to the gravity of the alleged offenses. It may evaluate the gravity of the alleged offenses by reference to penalties imposed by the detaining State.<sup>470</sup> Nevertheless, the final amounts reached by the Tribunal in the cases described seem asymmetric to the penalties of the contraventions.

In the *Monte Confurco* case, the *Volga* case, the *Juno Trader* case, and the *Hoshinmaru* case, the detaining States considered IUU fishing to be a serious offense. They expressively stated their concerns for marine living resources and argued that illegal fishing should be considered in assessing the reasonableness of a bond. For instance, in *Monte Confurco*, the French law imposed heavy penalties on illegal fishing as France is a member of CCAMLR and is concerned about the conservation of the Patagonian toothfish. France argued that the total bond should have been 56,400,000 FF including the payment of fines incurred and confiscation of the vessel for

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<sup>468</sup> *Monte Confurco*, Judgment, *supra* note 37, ¶ 80; *Volga*, Judgment, *supra* note 37, ¶ 68; *Juno Trader*, Judgment, *supra* note 37, ¶ 87; *Hoshinmaru*, Judgment, *supra* note 37, ¶ 99.

<sup>469</sup> See Franckx, *supra* note 395, at 335; Schwarte, *supra* note 395, at 426.

<sup>470</sup> *Volga*, Judgment, *supra* note 37, ¶ 69.

55,000,000 FF.<sup>471</sup> The Tribunal determined, without explanation, that the reasonable bond was 18,000,000 FF. Similarly, in the *Volga* case, Australia considered IUU fishing to be a grave offense and the maximum total of fines imposable on the three officers of the *Volga* was AU\$ 1,100,000. The Tribunal, in the end, fixed the amount to be AU\$ 1,920,000, whereas the amount was the same as the assessed value of the vessel, fuel, lubricants, and fishing equipment. The Tribunal failed to provide a rationale for not considering other factors. Accordingly, the analysis shows that the Tribunal merely noted that the gravity of the offenses related to the conservation of fishery resources in the EEZ, but, in fact, it is not deferential to the detaining State's decision. The detaining State has no discretionary power in determining the reasonableness of a bond.<sup>472</sup>

### **B. Conflicts Derived from Fishing-Related Activities**

The operations involved in fishing at sea usually accompany other activities that support fishing, such as bunkering<sup>473</sup> or transshipment at sea.<sup>474</sup> Such fishing-related activities raise questions as to whether a coastal State has jurisdiction to regulate such activities in its EEZ. The questions are related to marine sustainability as a coastal State can establish laws and regulations on the conservation measures within its jurisdiction. Three cases—No. 1&2 *M/V Saiga* and No. 19 *M/V Virginia G* cases—are discussed in this section as they involve the bunkering of fishing vessels in an EEZ. ITLOS considered bunkering of fishing vessels as fishing related activities.

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<sup>471</sup> The bond includes: the appearance of the captain of the arrested vessel (1,000,000 FF), the payment of damage caused by the contraventions found (400,000 FF), and the payment of fines incurred and confiscation of the vessel (55,000,000 FE). The total bond was thus fixed at 56,400,000 FF. *Monte Confurco*, Judgment, *supra* note 37, ¶ 39.

<sup>472</sup> Franckx, *supra* note 395, at 340.

<sup>473</sup> “Bunkering” means fueling ships by a bunker vessel.

<sup>474</sup> Transshipment is the offloading of catch from one fishing vessel to another vessel.

## 1. Salient Facts and Issues

### a. No. 1&2 *M/V Saiga* Cases

ITLOS cases Nos. 1&2 *M/V Saiga* have the same factual backgrounds but different proceedings. *M/V Saiga (No.1)* deals with prompt release issues pursuant to Article 292 of UNCLOS, in which a Tribunal shall deal only with the question of release;<sup>475</sup> whereas *M/V Saiga (No. 2)* reaches the merits of the arrest of the vessel *Saiga* in accordance with Article 287 of UNCLOS.

The *M/V Saiga* was an oil tanker flying the flag of Saint Vincent and the Grenadines. While supplying fuel oil to fishing vessels and other vessels operating in the EEZ of Guinea, the *M/V Saiga* was arrested by Guinean Customs patrol boats for smuggling and violating the Customs Code of Guinea. The vessel and its crews were detained but were later released without request of a bond or other financial security.<sup>476</sup>

This case discussed two issues regarding admissibility: (1) whether bunkering a fishing vessel within the EEZ of a State is an activity that falls within the scope of Article 73 of UNCLOS, and (2) whether a bond or other security must be posted to invoke Article 292 of UNCLOS. Regarding the first issue, the Tribunal emphasized the independent character of the proceedings for the prompt release of vessels and crews. According to the Tribunal, the prompt release requirement is fulfilled when the application is sufficient to note non-compliance with Article 73(2) of UNCLOS, i.e., the allegation is “arguable or sufficiently plausible.”<sup>477</sup> In this case, though the

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<sup>475</sup> UNCLOS art. 292(1).

<sup>476</sup> *M/V Saiga (No. 1)*, *supra* note 37, ¶ 31.

<sup>477</sup> *Id.* ¶ 59.

respondent alleged that *Saiga* violated its customs law, the Tribunal considered the bunkering of fishing vessels to be an ancillary activity to fishing.<sup>478</sup> Such a connection can also be found in the law of Guinea.<sup>479</sup> Because the Tribunal has authority to decide the legal classification and the applicant's claims were arguable, the Tribunal decided that the argument of Saint Vincent and the Grenadines based on Article 73 of UNCLOS was well-founded.

Next, the Tribunal held that Article 73(2) may be infringed even when no bond has been posted.<sup>480</sup> The infringement makes the procedures of UNCLOS Article 292 applicable, and the posting of a bond or security is a requirement under Article 292. In this case, since the respondent, Guinea, declined to respond, the Tribunal found that Saint Vincent and the Grenadines was not responsible for the fact that a bond was not posted.<sup>481</sup> As a result, the Tribunal found the application admissible. The Tribunal mentioned, in particular, the commercial value of gasoil discharged and the difficulties in restoring gasoil to the detaining States. After considering the overall balance of amount, form, and nature of the bond or financial security, the Tribunal determined that the security should consist of the amount of gasoil discharged from the vessel and a financial security of 400,000 USD.<sup>482</sup>

The Tribunal was asked to decide whether the arrest of the *M/V Saiga* was legitimate in the second case. The Tribunal began its review with procedural issues, including the admissibility of the case. To make this determination, it focused on the nationality of the vessel and the genuine

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<sup>478</sup> *Id.* ¶ 64.

<sup>479</sup> *Id.* ¶ 57.

<sup>480</sup> *Id.* ¶ 77.

<sup>481</sup> *Id.* ¶ 78.

<sup>482</sup> *Id.* ¶ 85.

link between the flag State and the vessel. *Saiga* was owned by a company in Cyprus, managed by a Scottish company, chartered by a company from Switzerland, and was provisionally registered in Saint Vincent and the Grenadines when the incident happened. With regard to substantive issues, the Tribunal examined the legality of the arrest of the *Saiga*, hot pursuit, and use of force by Guinea.

**b. No. 19 M/V Virginia G Case**

In the No. 19 *M/V Virginia G* case, *M/V Virginia G* was an oil tanker flying the flag of Panama and chartered to an Irish company. It was arrested by Guinea-Bissau in its EEZ for unauthorized refueling operations for fishing vessels. The vessel and all products on board were confiscated. Because long presence of a vessel at a port of Guinea-Bissau may cause danger to the maritime navigation, the Guinea-Bissau authority repealed the confiscation order and released the vessel.<sup>483</sup>

The case was initially submitted to Annex VII arbitration but was later transferred to ITLOS by a special agreement. The Tribunal adopted the “ship as a unit” principle, which is presented in the *M/V Saiga (No. 2)* case, and therefore treated the vessel, its crew, cargo on board, owner, and every person involved or interested in its operations as a single entity linked to the flag State.<sup>484</sup> Thus, as the vessel was registered and had a genuine link to Panama, Panama was entitled to bring claims alleging violations of its rights.

The Tribunal then examined whether Guinea-Bissau violated UNCLOS when it arrested, and later confiscated, the vessel. In this case, the Tribunal considered whether a coastal State has jurisdiction to regulate bunkering of foreign vessels fishing in its EEZ and the scope of fishing-

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<sup>483</sup> *M/V Virginia G*, Judgment, *supra* note 36, ¶ 82.

<sup>484</sup> *Id.* ¶ 127.

related activities. As to the issue of jurisdiction, the Tribunal interpreted Article 56 of UNCLOS together with Articles 61 to 68. In the Tribunal’s view, the term “sovereign rights” encompasses all rights necessary for and connected with the exploration, exploitation, conservation, and management of natural resources, including the right to take necessary enforcement measures.<sup>485</sup> Accordingly, the Tribunal affirmed that a coastal State has jurisdiction to regulate bunkering of foreign fishing vessels in its EEZ. To define the scope of fish-related activities, the Tribunal looked to Article 62(4). The Tribunal’s analysis pointed out that Article 62(4) is not an exhaustive list, and activities directly connected to fishing fall within a coastal States’ jurisdiction. Thus, the Tribunal reasoned, a connection exists between bunkering and foreign fishing vessels because refueling enables fishing vessels to continue their fishing activities in the EEZ without interruption at sea.<sup>486</sup> The Tribunal also referenced several international agreements to define “fishing-related” activities.<sup>487</sup> It concluded that fishing-related activities contain any operations in support of, or in preparation for, fishing, including the provisioning of personnel, fuel, gear, and other supplies at sea. As to the scope of the competence of coastal States to regulate bunkering of foreign vessels in their EEZs, the Tribunal held that the fee imposed cannot include an attempt to extend the coastal States’ tax and customs legislation.<sup>488</sup> Since the charging of fees by Guinea-Bissau was not guided by its fiscal interest but was rather a charge for services rendered in connection with the authorization of bunkering, the Tribunal considered the fee to be legitimate.

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<sup>485</sup> *Id.* ¶ 211.

<sup>486</sup> *Id.* ¶ 215.

<sup>487</sup> *Id.* ¶ 216.

<sup>488</sup> *Id.* ¶ 234.

## 2. Remarks

The three cases adjudicated by ITLOS confirm the scope of a coastal State's sovereign rights under Article 56 of UNCLOS. In the view of the Tribunal, "sovereign rights" contain all rights necessary for and connected with the exploration, exploitation, conservation, and management of natural resources, including the right to take necessary enforcement measures. Thus, fishing is certainly an activity that falls within a coastal State's jurisdiction. By the same token, bunkering of fishing vessels, which supports vessels fishing at sea without interruption, is also an activity that a coastal State can regulate in its EEZ.

Identifying the scope of a coastal State's jurisdiction helps to strengthen the conservation and management system and is consistent with the international fisheries law regime. In the *M/V Saiga (No. 1)* case, the Tribunal confirmed that a coastal State has jurisdiction to regulate fishing-related activity, including bunkering in its EEZ. In the *M/V Virginia G* case, the Tribunal mentioned that it "is also guided by the definitions of 'fishing' and 'fishing-related' activities in several of the international agreements."<sup>489</sup> This interpretation connects a coastal State's rights and obligations, international fisheries laws, and UNCLOS dispute settlement procedures. To be more specific, the Tribunal's interpretation fulfills the scope of a coastal State's sovereign rights by incorporating the definitions in international fisheries instruments. For instance, the PSMA defines "fishing related activities" as "any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear, and other supplies

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<sup>489</sup> *Id.* ¶ 216.

at sea.”<sup>490</sup> Accordingly, the coastal State, to some extent, is more competent in regulating these activities. The coastal State thus plays an important role in adopting effective measures to promote the sustainable use of living marine resources.

Like illegal fishing, fishing-related activities are subject to the sovereign rights of coastal States.<sup>491</sup> The coastal State enjoys sovereign rights and bears the obligation to maintain living resources in its EEZ from being endangered by over-exploitation. The coastal State, however, is not obliged to submit disputes over its sovereign rights with respect to the living resources in the EEZ to compulsory dispute settlement procedures. ITLOS has no jurisdiction over the merits of any allegation related to a coastal State’s sovereign rights over living resources in its EEZ, but it has independent jurisdiction to hear the question of prompt release of vessels and crews in accordance with Article 292 of UNCLOS.

### **C. Issues Related to Conservation and Management Measures**

Three disputes associated with conservation and management measures have been adjudicated under the UNCLOS framework. The *Swordfish* case was submitted to the Special Chamber of ITLOS at the request of Chile and the European Community (EC). In this case, the parties debated the obligation to cooperate between the coastal State (Chile) and the flag States (the EC) concerning the capture of swordfish stocks, one of the highly migratory species, in the Southeastern Pacific Ocean. The second of this type of dispute is the *Atlanto-Scandian Herring*

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<sup>490</sup> PSMA art. 1(d).

<sup>491</sup> See Chapter 3(II)(A) for a similar analysis.

*Arbitration* case.<sup>492</sup> This dispute arose between the Kingdom of Denmark in respect of the Faroe Islands and the European Union (EU) over Atlanto-Scandian Herring. The third is an arbitration case between Mauritius and the United Kingdom (UK). Mauritius challenged the entitlement and legality of the establishment of a Marine Protect Area (MPA) by the UK around the Chagos Archipelago.

## **1. Salient Facts and Issues**

### **a. No. 7 Swordfish Case**

ITLOS No. 7 *Swordfish* case began at the request of Chile and the EC. ITLOS formed a Special Chamber to resolve their dispute concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean.<sup>493</sup> Chile claimed that the EC violated its obligations under UNCLOS, specifically Articles 116 to 119, by failing to cooperate with the coastal State to ensure conservation of swordfish stocks. The EC, in contrast, argued that Chile's unilateral conservation measures on the high seas were in breach of the freedom of high seas and that its claims of sovereignty over the high seas were invalid. In this case, ITLOS considered

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<sup>492</sup> Atlanto-Scandian Herring Arbitration (Den. in respect of Faroe Is. v. E.U.), PCA Case Repository No. 2013-30, Termination Order of Sept. 23, 2014, <https://pcacases.com/web/sendAttach/781> [hereinafter *Herring Arbitration, Termination Order*].

<sup>493</sup> This case bypassed UNCLOS Article 287(3). The Government of Chile proposed that the dispute not be heard in accordance with the arbitral procedure instituted by Chile under Article 287(3) of UNCLOS, and that the said dispute be submitted to a special chamber of the Tribunal to be formed in accordance with Article 15(2) of the Statute of ITLOS on the issues. Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/E.U.), ITLOS Case No. 7, Order of Dec. 20, 2000, p. 148, ¶ 2, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_7/published/C7-O-20\\_dec\\_00.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_7/published/C7-O-20_dec_00.pdf).

whether the EC complied with its obligations under UNCLOS to ensure conservation of swordfish in fishing activities undertaken by vessels flying the flag of any of its Member States in the high seas adjacent to Chile's EEZ. As to Chile's unilateral conservation measures on the high seas, the Tribunal examined whether the Chilean Decree was in breach of UNCLOS. Lastly, the Tribunal reviewed whether the "Galapagos Agreement" of 2000 was negotiated in keeping with the provisions of UNCLOS.

This case continued for nine years, and the parties requested that the proceedings be discontinued after they negotiated a new Understanding in 2009. The new Understanding was formed between negotiators of the parties, and the terms of the settlement included the following elements: (1) establishing a more structured framework of fisheries cooperation for the long-term conservation and management of the swordfish stocks, (2) conducting their respective swordfish fisheries to catch levels commensurate with the objective of ensuring the sustainability of these resources as well as safeguarding the marine ecosystem, (3) freezing of the fishing effort by both parties at the 2008 level or at the maximum historical peak, (4) establishing a Bilateral Scientific and Technical Committee, (5) including all the relevant participants in the Southeastern Pacific Ocean swordfish fishery into the consultation, and (6) granting EC vessels access to designated Chilean ports for landings, transshipments, replenishing, or repairs.<sup>494</sup>

#### **b. The Atlanto-Scandian Herring Arbitration Case**

The next case relating to conservation and management is the *Atlanto-Scandian Herring Arbitration* case. The Kingdom of Denmark in respect of the Faroe Islands instituted arbitral proceedings against the EU under Annex VII to UNCLOS. This dispute arose over the

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<sup>494</sup> *Swordfish*, Order, *supra* note 36, ¶ 12.

interpretation and application of Article 63(1) of UNCLOS regarding the shared stock of Atlanto-Scandian herring. Coastal States to the Atlanto-Scandian herring jointly managed the herring stock.<sup>495</sup> However, the Faroe Islands argued that, given the distribution of herring stocks at the time, the 30,000 tons catch quota that they were offered under the management plan for 2013 was inequitable.<sup>496</sup> Its fishing vessels caught over 100,000 tons of herring that year. The EU, in response, imposed trade sanctions against the Faroe Islands, banning them from importing both herrings and mackerels to the EU and preventing their transport through EU ports.

In its application to ITLOS, Denmark argued that the EU failed to cooperate over the management of the herrings. After the first round of consultation, the parties jointly requested that the arbitral proceedings be terminated.<sup>497</sup> In the final settlement in August 2014, both parties reached an agreement that the EU would withdraw its trade sanctions in exchange for the Faroe Islands agreeing to terminate the arbitration proceedings and to cease further actions under the WTO Dispute Settlement Understanding.<sup>498</sup> Regarding the management of herring stocks, the

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<sup>495</sup> Besides the Faroe Islands and the EU, these coastal States are Iceland, Norway, and the Russian Federation.

<sup>496</sup> *The Faroe Islands Takes the EU to International Tribunal Over Intended Economic Measures*, THE GOVERNMENT OF THE FAROE ISLANDS, <https://www.government.fo/en/news/news/the-faroe-islands-takes-the-eu-to-international-tribunal-over-intended-economic-measures/> (last visited Jun. 15, 2020); *WTO to Hear Faroes Case on EU Herring Ban*, SEAFOODSOURCE, <https://www.seafoodsource.com/news/environment-sustainability/wto-to-hear-faroes-case-on-eu-herring-ban> (last visited Jun. 15, 2020) (last visited June 15, 2020).

<sup>497</sup> Atlanto-Scandian Herring Arbitration (Den. in respect of Faroe Is. v. E.U.), PCA Case Repository No. 2013-30, Termination Order of Sept. 23, 2014, <https://pcacases.com/web/sendAttach/781> [hereinafter *Herring Arbitration*, Termination Order].

<sup>498</sup> *Herring Dispute: EU Lifts Measures Against the Faroe Islands*, EC (Aug. 18, 2014), [https://europa.eu/rapid/press-release\\_IP-14-931\\_en.htm](https://europa.eu/rapid/press-release_IP-14-931_en.htm) (last visited June 15, 2020).

political agreement concluded that the Faroe Islands had a new 40,000-ton herring catch limit, which was considerably lower than the catch amount of the Faroe Islands in the previous year.<sup>499</sup> The result ameliorated concern over the unsustainable catch of herring stocks and established cordial relationships between the Faroe Islands and the coastal States to the Atlanto-Scandian herrings for future stock management.

**c. Mauritius v. U.K. Arbitration**

Pursuant to Article 287 and Annex VII, Article 1 of UNCLOS, the Republic of Mauritius instituted arbitral proceedings concerning a Marine Protected Area (MPA) established by the UK around the Chagos Archipelago. The PCA acted as Registry in this arbitration.

On April 1, 2010, the UK established an MPA around the Chagos Archipelago, which is administered by the UK as the British Indian Ocean Territory (BIOT). The MPA extends 200 nm from the baselines of the Chagos Archipelago and covers an area of more than half a million square kilometers.<sup>500</sup> The UK created an MPA for preserving the ocean habitat around the Chagos Archipelago. The UK planned to reserve this area as a giant marine park, where a “no-take” policy was enforced.<sup>501</sup> It prohibited commercial fishing and adopted strict control in the granting of

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<sup>499</sup> *Herring dispute: EU Lifts Measures Against the Faroe Islands*, EC Press Release (Aug. 18, 2014), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_14\\_931](https://ec.europa.eu/commission/presscorner/detail/en/IP_14_931) (last visited June 25, 2020).

<sup>500</sup> Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case Repository No. 2011-03, Award of Mar. 18, 2015, ¶ 5, <http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf> [hereinafter *Mauritius v. U.K.*, Award].

<sup>501</sup> *Id.* ¶ 128.

fishing permits.<sup>502</sup> Mauritius, in turn, claimed that the UK was not entitled as a coastal State to establish an MPA and argued that the MPA was inconsistent with UNCLOS.<sup>503</sup>

Regarding the authority of the UK to establish an MPA, the Arbitral Tribunal found that it lacked jurisdiction to decide the matter because the dispute concerned the question of sovereignty over the Chagos Archipelago; this was not a matter concerning the interpretation or application of the Convention.<sup>504</sup> As a result, the Arbitral Tribunal did not have jurisdiction to decide the case.

With respect to the legality of the MPA, the parties disagreed on the characteristics of the MPA. Mauritius defined the MPA as a measure “for the protection and preservation over the marine environment” and, accordingly, the Tribunal had jurisdiction based on Article 297(1)(c) of UNCLOS. The UK contended that the MPA was an exercise of its sovereign rights in its EEZ and the Tribunal’s jurisdiction was precluded by Article 297(3)(a).<sup>505</sup> The Tribunal favored Mauritius’ interpretation, determining that the MPA was not solely a measure relating to fisheries.<sup>506</sup> According to the Tribunal, the environmental concerns of the MPA went beyond the management of fisheries, so the Tribunal determined that the case was not subject to Article 297(3) limitations and it had jurisdiction to decide the merits of the case. The Tribunal then turned to examine whether the establishment of the MPA was incompatible with the United Kingdom’s obligations under Articles 2(3), 56 (2), 194, and 300 of UNCLOS. The Tribunal reasoned that the UK has an

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<sup>502</sup> Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case Repository No. 2011-03, Preliminary Objections to Jurisdiction Submitted by the U.K., Oct. 31, 2012, ¶ 2.20, <https://pcacases.com/web/sendAttach/1797>.

<sup>503</sup> *Mauritius v. U.K.*, Award, *supra* note 73, ¶ 158.

<sup>504</sup> *Id.* ¶ 221.

<sup>505</sup> *Id.* ¶ 284.

<sup>506</sup> *Id.* ¶ 286.

obligation to act in good faith and to have due regard to Mauritius' rights and interests based on the "Lancaster House Undertakings,"<sup>507</sup> in which Mauritius has historic fishing rights in the waters surrounding the Chagos Archipelago. According to the Tribunal, the UK failed to balance its own rights and interests with Mauritius' rights. Therefore, the establishment of the MPA was incompatible with UNCLOS.

## 2. Remarks

The *Swordfish* case and the *Atlanto-Scandian Herring Arbitration* case have some similarities. Importantly, the disputes both relate to the characteristics of specific fish stocks. Swordfish is one of the largest pelagic predators that distributes latitudinal from 50°N to 50°S. It is a highly migratory species listed under Annex I of UNCLOS.<sup>508</sup> During its life cycle, swordfish migrate across international boundaries as well as the high seas. Their spawning area spreads throughout the tropical ocean and, following spawning, swordfish move to foraging grounds at higher latitudes. Atlanto-Scandian herring, similarly, swim across coastal State's EEZ and high seas. Atlanto-Scandian herring is a schooling, coastal pelagic species that inhabit both sides of the

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<sup>507</sup> The Arbitral Tribunal referred to points (i) through (viii) of paragraph 22 of the record of the final record of the Lancaster House Meeting of September 23, 1965 as the "Lancaster House Undertakings." *Id.* ¶ 77.

<sup>508</sup> Heidi Dewar et al., *Movements and Behaviors of Swordfish in the Atlantic and Pacific Oceans Examined Using Pop-up Satellite Archival Tags: Swordfish Movements in the Atlantic and Pacific Oceans*, 20 FISHERIES OCEANOGRAPHY 219, 220 (May 2011).

North Atlantic Ocean.<sup>509</sup> Juveniles undergo inshore-offshore migrations while adults, age three and older, migrate south from summer and fall spawning grounds for overwintering.<sup>510</sup>

Because these species migrate across multiple maritime zones, the second similarity is that these controversies derive from the conservation and management of such fish stocks and the interests of coastal States. UNCLOS has particular provisions regarding conservation and management to achieve the objective of optimum utilization of such species. The provisions emphasize the responsibilities on coastal States and States whose nationals fish in the region for specific fish stocks or in the high Seas. The fundamental obligation is the duty to cooperate amongst coastal States and flag States. Article 64 and Articles 116 to 119 are important regulations that require States to cooperate directly or through appropriate international organizations with an eye toward ensuring conservation and promoting the objective of optimum utilization of these species.

Third, in these cases, the disputing States strategically submitted their disputes to different dispute settlement mechanisms. Not only did they resort to the tribunals under UNCLOS but also by recourse to the WTO Dispute Settlement Body. The arguments, of course, were constructed differently under the WTO legal regime. In the swordfish dispute, the EC submitted the conflict to the WTO in 2000, claiming that Chile violated GATT Articles V and XI by prohibiting the EC vessels unloading swordfish in Chilean ports. The case was discontinued when the parties reached an agreement outside of the judicial process. Likewise, the Kingdom of Denmark in respect of the

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<sup>509</sup> *Atlantic Herring Species Profile*, 27(5) ASMFC FISHERIES FOCUS (2018), [http://www.asmfc.org/uploads/file/5d66f407AtlHerring\\_OctNov2018.pdf](http://www.asmfc.org/uploads/file/5d66f407AtlHerring_OctNov2018.pdf) (last visited Dec. 16, 2019).

<sup>510</sup> *Id.*

Faroe Island filed the dispute against the EU, which prohibited imports of Atlanto-Scandian herring and associated species of mackerel caught under the control of the Faroe Island in the EU. Denmark in respect of the Faroe Island requested consultations on fisheries measures under the WTO on November 4, 2013.<sup>511</sup> As soon as the parties reached an agreement, they also informed the WTO Dispute Settlement Body that the matter raised in this dispute was settled.

Finally, the two cases demonstrate the importance of the dispute settlement mechanisms and the role of ITLOS even though the cases were terminated before the arbitral tribunals could reach decisions. In the No. 7 *Swordfish* case, the parties reached a settlement of the dispute with the assistance of the Tribunal and the Special Chamber. They formulated a new Understanding creating a consensus between the parties over managing swordfish. The negotiation process was conducted informally, and much of the information was not disclosed to the public.<sup>512</sup> Despite that, the entire process showed the importance of the Special Chamber in bridging the gap between the two sides. The Special Chamber played a positive role in not only settling the dispute but also in facilitating a constructive resolution to the proceeding. Significantly, the Special Chamber helped to establish a cooperation framework between the parties for the long-term conservation and management of the swordfish stocks. Hence, Chile reopened its ports to EC vessels for fisheries operations. For the long-term benefit of both parties, EC and Chile also agreed to establish a structured framework for fisheries cooperation and created a Bilateral Scientific and Technical Committee. Judge Chandrasekhara Rao approved the role of the Tribunal in facilitating direct

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<sup>511</sup> DS469: European Union — Measures on Atlanto-Scandian Herring, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds469\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds469_e.htm) (last visited Dec. 16, 2019).

<sup>512</sup> Robin Churchill, *Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2005*, 21 INT'L J. MARINE & COASTAL L. 377, 383 (2006).

settlement of the dispute between the parties. He commented that the *Swordfish* case “is a classic example of what the Tribunal may do to bring about settlement of disputes by peaceful means chosen by the parties.”<sup>513</sup>

In *Herring Arbitration*, the case was settled in less than a year when Denmark in respect of the Faroe Islands requested the institution of the Annex VII tribunal.<sup>514</sup> The parties differed on fish stock quotas and how to implement the sustainable marine management of herrings. Without waiting for the Tribunal to make an actual decision, filing disputes to adjudicatory mechanisms expedites consultation between parties in dispute. This pragmatically encourages both parties to resolve the dispute and reach a mutually agreed upon resolution. As the parties reached a political agreement—the Faroe Islands having a new 40,000-ton herring catch limit and the EU withdrawing its trade sanctions—the dispute was concluded expeditiously and smoothly.<sup>515</sup>

With regard to *Mauritius v. U.K.*, the Tribunal did not discuss the general legality of the establishment of the MPA at all.<sup>516</sup> It spent a number of pages dealing with procedural issues related to jurisdiction, but relatively few on the merits of the case. The Tribunal also explicitly

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<sup>513</sup> *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)*, ITLOS PRESS RELEASE (Dec. 17, 2009), [https://www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/PR.141-E.pdf](https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR.141-E.pdf) (last visited June 16, 2020).

<sup>514</sup> Denmark in respect of the Faroe Islands sent the Notification and Statement of Claim to the EU on August 16, 2013. The Tribunal was constituted by December 9, 2013. The parties had their first consultation on March 15, 2014.

<sup>515</sup> *Officials: EU, Faroes Reach Political Understanding in Fisheries Row*, INTERNATIONAL CENTER FOR TRADE AND SUSTAINABLE DEVELOPMENT (June 12, 2014), <http://www.ictsd.org/bridges-news/bridges/news/officials-eu-faroes-reach-political-understanding-in-fisheries-row> (last visited Dec. 24, 2019).

<sup>516</sup> See Robin Churchill, *Dispute Settlement in the Law of the Sea: Survey for 2015, Part II and 2016*, 32 INT’L J. MARINE & COASTAL L. 379, 393 (2017).

stated that it was concerned “with the manner in which the MPA was established, rather than its substance.”<sup>517</sup> Moreover, when considering substantial regulations, the Tribunal focused on examining whether the establishment of the MPA violated the UK’s obligations under Articles 2(3), 56 (2), 194, and 300 of UNCLOS. Since Mauritius and the UK reached commitments in the Lancaster House Undertakings, the Tribunal found out that the fishing rights committed by the UK were legally binding on the UK.<sup>518</sup> Thus, the UK had an obligation to take into consideration Mauritius’ fishing rights when establishing the MPA.

Despite the lack of discussion regarding the legality of the MPA, the Tribunal shed light on construing its jurisdiction concerning issues with MPAs. The Tribunal first clarified the relationship between Article 288 and Article 297 of UNCLOS. According to the Tribunal’s analysis, Article 288 is perceived as an Article that generally grants the Tribunal jurisdiction with respect to “any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.”<sup>519</sup> Article 297, comparatively, grants the Tribunal specific jurisdiction over certain categories of disputes related to sovereign rights, marine scientific research, and fisheries under certain circumstances.<sup>520</sup> Next, the Tribunal proceeded to define the characteristics of the dispute involving the MPA. The Tribunal, in the present case, unanimously rejected the UK’s arguments, which contended that the dispute concerned the interpretation of application of fisheries issues in the EEZ, so the Tribunal had no jurisdiction according to Article 297(3)(a). The Tribunal held that the MPA was not a measure solely relating to fisheries. Broadly

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<sup>517</sup> *Mauritius v. U.K.*, Award, *supra* note 73, ¶ 544.

<sup>518</sup> *Id.* ¶¶ 448-435.

<sup>519</sup> *Id.* ¶ 307.

<sup>520</sup> *Id.*

speaking, the primary purpose of the MPA was to preserve the marine environment, covering not only protection for fish stocks but also coral reefs and land areas.<sup>521</sup> Therefore, the MPA dispute between Mauritius and the UK falls within the scope of Article 297(1)(c), which expressly establishes jurisdiction over acts “in contravention of specified international rules and standards for the protection and preservation of the marine environment,” including those established “through a competent international organization or diplomatic conference.”<sup>522</sup> The Tribunal concluded that it had jurisdiction, pursuant to Article 288(1) and Article 297(1)(c), to consider the compatibility of the MPA under UNCLOS.

#### **D. Disputes Involving RFMOs**

Five fishing dispute cases have arisen under the UNCLOS framework related to RFMOs. Three are disputes concerning the conservation and management of southern bluefin tuna (SBT), in which the applicants, Australia and New Zealand, and the respondent, Japan, are members of the particular RFMO. Since Australia, Japan, and New Zealand have not, to date, chosen a means for the settlement of disputes in accordance with Article 287 of UNCLOS, an arbitral tribunal became the default mechanism for dispute settlement between the parties in accordance with Annex VII to UNCLOS. Pending the decision of the Arbitral Tribunal in their disputes, the parties requested that the Tribunal prescribe provisional measures in accordance with Article 290(5) of UNCLOS. Their requests were listed as Case Nos. 3 & 4 under ITLOS. An Annex VII Arbitral

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<sup>521</sup> *Id.* ¶¶ 286-291.

<sup>522</sup> UNCLOS art. 297(1)(c).

Tribunal subsequently rendered its Award on Jurisdiction and Admissibility on the Southern Bluefin Tuna Case.<sup>523</sup>

Next, a dispute arose between Australia and Japan involving the conservation of whales and the International Whaling Commission. Australia challenged the legality of Japan's large-scale program of whaling under its Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II). This case was instituted in accordance to the ICJ Statute, which is outside the UNCLOS framework.

The fifth case is an advisory opinion that was directly requested by a RFMO, the Sub-Regional Fisheries Commission (SRFC). The SRFC is an inter-governmental fisheries cooperation organization composed of seven west African member States.<sup>524</sup> It requested that ITLOS deliver an advisory opinion on four matters regarding IUU fishing activities.

## **1. Salient Facts and Issues**

### **a. Nos. 3&4 Southern Bluefin Tuna Cases**

Australia, New Zealand, and Japan are major States for commercial harvest of SBT and are members to the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), devoting to ensure, through appropriate management, the conservation and optimum utilization of

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<sup>523</sup> Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), Award on Jurisdiction and Admissibility Decision of Aug. 4, 2000, [https://legal.un.org/riaa/cases/vol\\_XXIII/1-57.pdf](https://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf) [hereinafter *SBT Arbitration*, Award on Jurisdiction and Admissibility Decision].

<sup>524</sup> The SRFC has seven member States: Cabo Verde, The Gambia, Guinea, Guinea-Bissau, Mauritania, Senegal and Sierra Leone. Its headquarters are located in Dakar, Senegal.

SBT.<sup>525</sup> The Commission established by the Convention for the Conservation of Southern Bluefin Tuna (CCSBT Convention) set a TAC on the member States in 1994. Since the Commission was unable to amend the TAC, the parties in practice maintained their TAC as set in 1994. However, Japan maintained its TAC for commercial SBT fishing but conducted a unilateral Experimental Fishing Program for SBT in 1998 and 1999. Australia and New Zealand disputed that program and alleged that Japan failed to comply with its obligations under Articles 64 and 116 to 119 of UNCLOS regarding conservation of SBT.

Pending a decision of the arbitral tribunal, they requested ITLOS to adopt the following provisional measures in accordance with Article 290(5) of UNCLOS: (1) cease Japan's unilateral experimental fishing for SBT, (2) restrict Japan's catch of SBT, (3) act with the precautionary principle in fishing for SBT, (4) ensure that no action of any kind is taken which might hinder the settlement of the dispute submitted to Annex VII Arbitral Tribunal, and (5) ensure that no action is taken which might prejudice the parties' respective rights in the merits rendered by the Arbitral Tribunal.<sup>526</sup> Japan argued that the Tribunal had no jurisdiction, and that the disputes were scientific rather than legal.

To invoke provisional measures, the Tribunal must have *prima facie* jurisdiction over the dispute and fulfill the requirements under Article 290(5) of UNCLOS. In this case, ITLOS issued an order finding that the Tribunal did have *prima facie* jurisdiction and prescribed certain provisional measures on August 27, 1999. To begin with, the Tribunal was of the view that the

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<sup>525</sup> Convention for the Conservation of Southern Bluefin Tuna art. 3, 1819 U.N.T.S. 360 (entered into force May 20, 1994) [hereinafter CCSBT Convention].

<sup>526</sup> *SBT*, Order, *supra* note 38, ¶ 34.

CCSBT Convention should be taken into consideration when examining States' obligations under UNCLOS as Australia, New Zealand, and Japan approved both conventions.<sup>527</sup> The CCSBT Convention does not preclude the parties from resorting to the UNCLOS compulsory procedures.<sup>528</sup> In addition, since the parties in dispute attempted negotiations and consultations, the Tribunal reasoned that the requirements for invoking compulsory procedures were met and it had prima facie jurisdiction over the disputes. The Tribunal then investigated whether provisional measures may be prescribed pending the constitution of the arbitral tribunal. Considering that SBT stock has encountered a conservation crisis, the Tribunal found that provisional measures are appropriate as a matter of urgency to preserve the rights of the parties and to avert further deterioration of SBT stock.<sup>529</sup>

As the prima facie jurisdiction and the requirements of Article 290(5) were met, ITLOS imposed six provisional measures, requiring that the parties: (1) not take actions that might aggravate or extend the disputes submitted to the arbitral tribunal, (2) not prejudice the arbitral tribunal for deciding on the merits, (3) ensure that their annual catches do not exceed their respective annual national allocations, (4) refrain from conducting an experimental fishing program unless consensus between the parties exists and the experimental catch was subtracted from national annual allocations, (5) resume negotiations, and (6) make further efforts to reach agreement with other states and fishing entities engaged in fishing for SBT.<sup>530</sup>

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<sup>527</sup> *Id.* ¶ 50.

<sup>528</sup> *Id.* ¶ 55.

<sup>529</sup> *Id.* ¶¶ 70-85.

<sup>530</sup> *Id.* ¶ 90.

## b. Southern Bluefin Tuna Arbitration

Nearly a year after the order, the Arbitral Tribunal delivered its Award on Jurisdiction and Admissibility on the Southern Bluefin Tuna Case on August 4, 2000. The Arbitral Tribunal declined jurisdiction of the case and reversed the provisional measures granted by ITLOS. In this case, the core issue was whether the dispute arose solely under the CCSBT Convention, or whether it also arose under UNCLOS.<sup>531</sup> The applicants maintained their arguments, stating that Japan failed to cooperate and to conserve SBT stock and violated its obligations under Articles 64 and 116 to 119 of UNCLOS.<sup>532</sup> In contrast, the respondent argued that the CCSBT Convention applies because of the principle of *lex specialis*—i.e., the Articles of UNCLOS are general and cannot apply to the particular dispute in this case. In the view of the Tribunal, the CCSBT Convention does not eclipse UNCLOS; rather, the framework convention supplements the implementing convention. The tribunal explained that it is not uncommon for more than one treaty to bear upon a particular dispute.<sup>533</sup> Based on these reasons, the SBT management dispute arose under both the CCSBT Convention and UNCLOS.<sup>534</sup>

Even though the dispute arose under both Conventions, the Tribunal did not consider this to be dispositive of the case.<sup>535</sup> It turned to examine dispute settlement provisions under both Conventions, particularly on the relationship between Article 16 of the CCSBT Convention and Article 281 of UNCLOS. Japan claimed that Article 16 precluded the application of Article 281 of

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<sup>531</sup> *SBT Arbitration*, Award on Jurisdiction and Admissibility Decision, *supra* note 73, ¶ 47.

<sup>532</sup> *Id.* ¶ 50.

<sup>533</sup> *Id.* ¶ 52.

<sup>534</sup> *Id.* ¶ 52.

<sup>535</sup> *Id.* ¶ 53.

UNCLOS, while Australia and New Zealand argued that Article 16 merely provided options for the settlement of disputes. In the Tribunal's view, under conditions where the parties to a dispute have agreed to seek settlement of the dispute by a peaceful means of their own choice, Part XV of UNCLOS comes into play as long as they meet the requirements of Article 281(1) of UNCLOS. Article 281(1) has two requirements: (1) no settlement has been reached by recourse to such means, and (2) the agreement between the parties does not exclude any further procedure.<sup>536</sup> Based on Article 16 of the CCSBT Convention,<sup>537</sup> the Tribunal interpreted Article 16 to reveal an agreement by the parties to seek settlement of the instant dispute by peaceful means of their own choice. Even though Article 16 provides more than one peaceful means to settle a dispute, none of those mechanisms were chosen and agreed upon by the parties. Hence, the Tribunal reasoned that the first requirement—that no settlement has been reached by recourse to such means—was satisfied.<sup>538</sup>

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<sup>536</sup> *Id.* ¶ 53 (emphasis added by author).

<sup>537</sup> CCSBT Convention art. 16:

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves in attempt to resolve the dispute by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, or other peaceful means of their own choice.
2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration. Failure to reach agreement on reference to the International Court of Justice or to arbitration will not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.
3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

<sup>538</sup> *SBT Arbitration*, Award on Jurisdiction and Admissibility Decision, *supra* note 73, ¶ 55.

As to the second requirement—that the agreement between the parties does not exclude any further procedure—both sides debated whether Article 16 meets the requirement. The Tribunal found in favor of Japan, holding that Article 16 of the CCSBT Convention “exclude[s] any further procedure” within the contemplation of Article 281(1) of UNCLOS.<sup>539</sup> Despite the various means listed in Article 16(1), Article 16(2) directs parties in dispute to the ICJ or to arbitration if they fail to reach an agreement on other means. If the referral of a dispute fails, Article 16(2) obligates parties to continue to seek to resolve it by any of the various peaceful means referred in Article 16(1).<sup>540</sup> Such requirement implicitly precludes the UNCLOS compulsory dispute settlement procedures from applying. Without jurisdiction, the Tribunal found that it was not necessary to proceed to the question of admissibility.<sup>541</sup> Due to the failure to settle the dispute by the Arbitral Tribunal, Australia, New Zealand, and Japan were responsible for resolving the dispute by any of the various peaceful means in accordance with Article 16(2) of the CCSBT Convention.<sup>542</sup>

Noticeably, the Tribunal’s decision contained an *obiter dictum*, observing that the FSA may help not only for resolving procedural problems but also substantive problems for States Parties if the agreement is faithfully and effectively implemented.<sup>543</sup> The FSA dispute settlement provisions set out in Part XV of UNCLOS apply *mutatis mutandis* to any dispute between States Parties to the FSA concerning the interpretation or application of the FSA.<sup>544</sup> Thus, the Tribunal

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<sup>539</sup> *Id.* ¶ 59.

<sup>540</sup> *Id.* ¶ 63.

<sup>541</sup> *Id.* ¶ 65.

<sup>542</sup> *Id.* ¶ 70.

<sup>543</sup> *Id.*

<sup>544</sup> FSA art. 30(1).

considered the substantive provisions of the FSA to be “more detailed and far-reaching than the pertinent provisions of the UNCLOS or even the CCSBT.”<sup>545</sup>

### c. Whaling in the Antarctic Case

In addition to the debates over the management measures of SBT stocks, Australia challenged Japan on the legality of its scientific research program of Whales.<sup>546</sup> New Zealand requested to intervene in the case as a non-party in the proceedings.<sup>547</sup> In the *Whaling* case, Australia alleged that the Japanese Whale Research Program under the Special Permit in the Antarctic (JARPA II) was not a program for purposes of scientific research within the meaning of Article VIII of the International Convention for the Regulation of Whaling (ICRW).<sup>548</sup> The ICRW was signed in 1946 and includes “the Schedule,” which forms an integral part of the Convention.<sup>549</sup> The International Whaling Commission (IWC), founded by ICRW, is the main body to decide on proper measures for conservation and utilization of whale resources.<sup>550</sup> Since the ICRW itself does

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<sup>545</sup> *Id.*

<sup>546</sup> *Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening)*, Judgment, 2014 I.C.J. 226 (Mar. 31) [hereinafter *Whaling*, Judgment].

<sup>547</sup> Pursuant to Article 62 of the Statute of ICJ, the Court may permit a State that has an interest of a legal nature in the decision of the case to intervene upon request. Art. 62: “1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request.”

<sup>548</sup> International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter ICRW].

<sup>549</sup> International Convention for the Regulation of Whaling art. I(1)

<sup>550</sup> ICRW art. III.

not contain substantive provisions, it relies on the IWC to amend the provisions of the Schedule from time to time.

JARPA II is the second phase of the Japanese Whale Research Program, in which Japan granted special permits to conduct whale research, including monitoring of the Antarctic ecosystem.<sup>551</sup> Australia claimed that JARPA II was in breach of the following obligations under the Schedule to the ICRW:<sup>552</sup> (1) the obligation of zero catch limits for the killing of whales from all stocks for commercial purposes,<sup>553</sup> (2) the obligation not to undertake commercial whaling,<sup>554</sup> and (3) the obligation to observe the moratorium on the taking, killing, or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships.<sup>555</sup> Japan denied all allegations and argued that the program was justified for purposes of scientific research.

As an initial matter, the ICJ unanimously held that it had jurisdiction over the dispute. As Australia and Japan are parties to the ICRW, the Court gained jurisdiction in accordance with Article 36(2) of the Statute of ICJ,<sup>556</sup> which both parties recognize as compulsory *ipso facto* and

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<sup>551</sup> The JARPA II Research Plan has four research objectives: (1) Monitoring of the Antarctic ecosystem, (2) Modelling competition among whale species and future management objectives, (3) Elucidation of temporal and spatial changes in stock structure, and (4) Improving the management procedure for Antarctic minke whale stocks. *Whaling*, Judgment, *supra* note 546, ¶ 113.

<sup>552</sup> *Id.* ¶ 48.

<sup>553</sup> Para. 10(e) of the Schedule to the ICRW.

<sup>554</sup> Para. 7(b) of the Schedule to the ICRW.

<sup>555</sup> Para. 10(d) of the Schedule to the ICRW.

<sup>556</sup> Statute of ICJ art. 36(2): The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

without special agreement. Japan contended that this dispute fell within Australia’s reservation (b).<sup>557</sup> The Court, however, took a contextual approach to interpreting the reservation and was of the view that “[t]he disputes to which the reservation refers must either concern maritime delimitation in an area where there are overlapping claims or the exploitation of such an area or of an area adjacent thereto.”<sup>558</sup> According to the Court, this dispute was irrelevant to maritime delimitation and did not involve sovereign rights claims.<sup>559</sup> Therefore, the Court denied Japan’s arguments.

The Court, then, proceeded to examine the relevant core issues concerning the interpretation and application of Article VIII of the ICRW. Article VIII is an exception provision which allows “any Contracting Government [to] grant to any of its nationals a special permit

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- a. the interpretation of a treaty;
  - b. any question of international law;
  - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
  - d. the nature or extent of the reparation to be made for the breach of an international obligation.

<sup>557</sup> Australia made a declaration on March 22, 2002. It declared that Australia “recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to the Secretary-General of the United Nations withdrawing this declaration. This declaration does not apply to: . . . (b) any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation.” *Whaling, Judgment*, *supra* note 546, ¶ 31.

<sup>558</sup> *Id.* ¶ 37.

<sup>559</sup> *Id.* ¶ 39.

authorizing that national to kill, take and treat whales for purposes of scientific research.”<sup>560</sup> The special permit is subject to certain restrictions, such as catch limit or any other conditions that the Contracting Government thinks fit. To interpret Article VIII, the Court first examined the relationship between Article VIII and the object and purpose of the Convention. The ICRW aims at ensuring the conservation of all species of whales while allowing for their sustainable exploitation.<sup>561</sup> However, the Court held that, since Article VIII is intended for the purpose of scientific research, this provision should foster scientific knowledge and may pursue an aim other than conservation or sustainable exploitation of whale stocks.<sup>562</sup> Next, the Court reviewed the issuance of special permits to determine whether the State had discretion in issuing special permits. According to Article VIII, the State has discretion to reject the request for a special permit or to attach conditions to the permit.<sup>563</sup> As to whether the granting of a special permit of killing, taking, and treating whales conforms with the purpose of scientific research, the Court held that this is not within a State’s discretion.<sup>564</sup>

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<sup>560</sup> ICRW art. VIII(1): Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.

<sup>561</sup> The Preamble of the ICRW.

<sup>562</sup> *Whaling*, Judgment, *supra* note 546, ¶ 58.

<sup>563</sup> ICRW art. VIII.

<sup>564</sup> *Id.* ¶ 61.

Next, the Court examined whether JARPA II conforms with Article VIII(1) of the ICRW. The Court used two objective criteria as the standard of review: (1) whether the program under which these activities occur involves “scientific research,” and (2) whether the program was designed and implemented “for the purpose of” scientific research.<sup>565</sup> The Court did not adopt Australia’s definition of “scientific research” as the Court was not persuaded that these criteria were sufficient,<sup>566</sup> nor did the Court consider it necessary to provide a general definition of “scientific research.” With respect to the meaning of “for the purpose of,” the Court observed that it is not uncommon for a State’s policy to pursue more than one goal. Hence, to review whether the program was for purposes of scientific research, the Court applied an objective test and examined the reasonableness of the program based on the design, implementation, and the relationship between the program and the stated research objectives.<sup>567</sup> In doing so, the Court examined the legality of JARPA II only in the present case, noting that States have divergent views on matters of scientific or whaling policy.<sup>568</sup>

The Court looked into Japan’s research objectives, research period and area, research methods and sample size, and effect on whale stocks to find out whether the design and

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<sup>565</sup> *Id.* ¶ 67.

<sup>566</sup> Australia stated that scientific research in the context of the ICRW has four essential characteristics: (1) defined and achievable objectives (questions or hypotheses) that aim to contribute to knowledge important to the conservation and management of stocks, (2) “appropriate methods” including the use of lethal methods only where the objectives of the research cannot be achieved by any other means, (3) peer review, and (4) and the avoidance of adverse effects on stock. *Id.* ¶ 74.

<sup>567</sup> *Id.* ¶ 97.

<sup>568</sup> *Id.* ¶ 69.

implementation were reasonable in relation to achieving the program’s stated research objectives. The Court observed that, while JARPA II corresponded to the stated research objectives, the target sample sizes were not reasonable in relation to achieving the program’s objectives.<sup>569</sup> The scale of lethal sampling in JARPA II is far more extensive with regard to Antarctic minke whales, and this program included the lethal sampling of two additional whale species. The Court concluded that the special permits granted by Japan in connection with JARPA II were not “for purposes of scientific research” and did not fall within the provisions of Article VIII(1) of the ICRW. The Court found that Japan did not act in accordance with its obligations under 10(e), 10(d) and 7(b) of the Schedule of the ICRW. Finally, the Court decided that Japan must revoke any extant authorization, permit, or license granted in relation to JARPA II, and refrain from granting any further permits in pursuance of that program.

**d. No. 21 SRFC Advisory Opinion**

The last case involving RFMOs is ITLOS Case No. 21 *SRFC Advisory Opinion*, an advisory opinion requested by the SRFC. The SRFC requested ITLOS’ opinion on four matters regarding IUU fishing activities: (1) the obligations of the flag State where IUU fishing activities are conducted within the EEZ of third party States, (2) the responsibility of the flag State on its vessels conducting IUU fishing activities, (3) the responsibility of the flag State or international agency for violations of fisheries legislation of the coastal States by vessels where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with

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<sup>569</sup> *Id.* ¶ 224.

an international agency, and (4) the rights and obligations of the coastal State in ensuring the sustainable management of shared stocks and stocks of common interest.<sup>570</sup>

The procedural issue before the Tribunal in this case was whether it had advisory jurisdiction. The Tribunal unanimously decided that it had jurisdiction to give the advisory opinion, but such opinion had to be limited to the EEZ of the SRFC member States. This issue arose because UNCLOS has no explicit provisions giving the Tribunal jurisdiction to deliver advisory opinions.<sup>571</sup> At the same time, Article 21 of UNCLOS Annex VI and Article 138 of the Rules of the Procedure have no explicit regulations providing advisory jurisdiction to the Tribunal.<sup>572</sup> Article 21 of the Statute of ITLOS expresses that “[t]he jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.” In addition, Article 138(1) of the Rules states that the Tribunal may give an advisory opinion on a legal question if an international agreement authorizes the request for submission. Such an international agreement must relate to the purposes of UNCLOS.<sup>573</sup> Since the Annexes form an

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<sup>570</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 2.

<sup>571</sup> *Id.* ¶ 40.

<sup>572</sup> *Id.* ¶ 53.

<sup>573</sup> Rules of the Tribunal art. 138:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
3. The Tribunal shall apply *mutatis mutandis* Articles 130 to 137.

integral part of UNCLOS,<sup>574</sup> Article 21 of the Statute of ITLOS also grants jurisdiction to the Tribunal. In this case, the SRFC confers jurisdiction on the Tribunal to decide four matters based on its Convention. The Tribunal, accordingly, found a substantive legal basis to exercise advisory jurisdiction.<sup>575</sup>

The Court first looked to the obligations of the flag State regarding IUU fishing activities conducted within the EEZ of third-party States. Based on the SRFC MCA Convention,<sup>576</sup> the Tribunal is required to determine the obligations of flag States not members of the SFRC if their vessels are engaged in IUU fishing in the EEZs of SRFC member States. Here, the Tribunal first considered States' general obligations regarding conservation and management and specific obligations of flag States in the EEZ of a coastal State. UNCLOS includes only general obligations concerning conservation and management of marine living resources for States. These general obligations are set out in UNCLOS Articles 91, 92, 94, 192, and 193. Flag States, additionally, have specific obligations in the EEZ of a coastal State, which are regulated by Articles 58(3) and 62(4). The Tribunal examined each article and found that “flag States are obliged to take the necessary measures to ensure that their nationals and vessels flying their flag are not engaged in IUU fishing activities” within the EEZs of SRFC member States.<sup>577</sup>

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<sup>574</sup> UNCLOS art. 318; *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 52.

<sup>575</sup> *Id.* ¶ 58.

<sup>576</sup> The full name of the MCA Convention is the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission.

<sup>577</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 124.

By referencing the Advisory Opinion handed down by the Seabed Disputes Chamber,<sup>578</sup> the Tribunal in this case noted that flag States also bear the “responsibility to ensure” compliance by vessels flying its flag with the laws and regulations concerning conservation measures adopted by a coastal State in accordance with Articles 58(3) and 62(4).<sup>579</sup> Accordingly, flag States shall ensure the compliance of vessels flying its flag with the laws and regulations concerning conservation measures adopted by the coastal State. Here, “to ensure” means an obligation “to deploy adequate means, to exercise best possible efforts, to do the utmost” so the flag States can prevent vessels flying its flag from conducting IUU fishing.<sup>580</sup> Similar to the Seabed Disputes Chamber in its Advisory Opinion, the Tribunal required “due diligence” in pursuing such an obligation rather than a guarantee of such result. The flag State bears the “due diligence obligation” to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.<sup>581</sup> On the other hand, flag States have no obligation to ensure their fishing vessels do not engage in IUU fishing in the EEZs of the SRFC Member States. The Tribunal separated the obligation to pursue the desired result and the obligation to take certain actions in dealing with IUU fishing activities.

Following the guidance of UNCLOS and the aforementioned standards, the Tribunal indicated that the flag State has certain obligations within the EEZ of third party States: (1) to take

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<sup>578</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), ITLOS Case No. 17, Advisory Opinion of Feb. 1, 2011, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/17\\_adv\\_op\\_010211\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf).

<sup>579</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 127.

<sup>580</sup> *Id.* ¶ 129.

<sup>581</sup> *Id.*

necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations adopted by the SRFC Member States,<sup>582</sup> (2) to adopt necessary measures prohibiting its vessels from fishing in the EEZ of the SRFC Member States, unless authorized,<sup>583</sup> (3) to take necessary measures to ensure compliance with the protection and preservation measures adopted by the SRFC Member States,<sup>584</sup> (4) to exercise effectively its jurisdiction and control in administrative matters,<sup>585</sup> (5) to monitor and secure compliance with their domestic laws and regulations,<sup>586</sup> and (6) to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action upon receiving the report from the other State.<sup>587</sup>

The second question examined by the Tribunal concerned the liability of flag States for IUU fishing activities conducted by vessels sailing under its flag. Since there was no express guidance on the issue of liability of the flag State for IUU fishing activities conducted by vessels under its flag, the Tribunal resorted to the relevant rules of international law dealing with the responsibility of States for international wrongful acts,<sup>588</sup> i.e., the Draft Article of the International Law Commission on Responsibility of States for Internationally Wrongful Acts.<sup>589</sup> The Draft

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<sup>582</sup> *Id.* ¶ 134.

<sup>583</sup> *Id.* ¶ 135.

<sup>584</sup> *Id.* ¶ 136.

<sup>585</sup> *Id.* ¶ 137.

<sup>586</sup> *Id.* ¶ 138.

<sup>587</sup> *Id.* ¶ 139.

<sup>588</sup> *Id.* ¶ 143.

<sup>589</sup> *Id.* ¶ 144.

Articles state that an internationally wrongful act of a State entails the international responsibility of that State.<sup>590</sup> The wrongful act exists when the conduct is attributable to the State under international law and constitutes a breach of an international obligation of the State.<sup>591</sup> Once the internationally wrongful act has been determined, the responsible State is under an obligation to make full reparation.<sup>592</sup> Following the rules, the Tribunal held that IUU fishing activities of the flag State's fishing vessel in the EEZs of the SRFC Member States may be attributed to the flag State if it has not taken all necessary measures in accordance with due diligence obligations. As analyzed in the first issue before the Tribunal, the flag State is only responsible for fulfilling its due diligence obligations. In other words, it is not liable for the IUU fishing activities by its vessels in the EEZs of the SRFC Member States if the flag State has taken all necessary measure to prevent IUU fishing.<sup>593</sup>

Shifting from the responsibility of the flag States, the third issue probes into the liability of the flag State or an international agency when the flag State's vessel violates the fisheries legislation of the coastal State. SRFC asked this question because such a vessel obtained a fishing license issued within the framework of an international agreement with the flag State or with an international agency. The Tribunal first limited the scope of the issue it would address to flag States or an international agency that have concluded a fisheries access agreement with a State Party to

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<sup>590</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 1, *available at* [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) [hereinafter *DARSIWA*].

<sup>591</sup> *DARSIWA* art. 2.

<sup>592</sup> *DARSIWA* art. 31.

<sup>593</sup> *Id.* ¶¶ 147-148.

the MCA Convention.<sup>594</sup> It then discussed the liability of flag States and international agencies individually. The Tribunal held that the flag State is liable when a fishing license is issued to a vessel, and the discussion is the same as the conclusion in question 2.<sup>595</sup> As to international agencies, the Tribunal considered the expression “international agency” to be synonymous with “international organization,”<sup>596</sup> and limited it to the organizations referenced in Articles 305(1)(f) and 306 of UNCLOS and Annex IX to UNCLOS.<sup>597</sup> At present, EU is the only international organization party to UNCLOS. Thus, the issue here is the liability of the EU, whose fishing vessels are operating in the EEZs of SRFC Member States under a fisheries access agreement.

The Tribunal held that only the international organization may be held liable for any breach of its obligations arising from the fisheries access agreement, and not its member States. The liability of the international organization, accordingly, is the same as that of the flag State. If the international organization does not meet its due diligence obligations while fishing in the EEZs of the SRFC Member States within the framework of a fisheries access agreement, the SRFC may hold the international organization liable for the violation of its fisheries laws and regulations by a vessel flying the flag of a member State of that organization.<sup>598</sup>

The Tribunal then considered the role of a coastal State in ensuring the sustainable management of shared stocks and stocks of common interest. The SRFC raised this question because the Commission was aware of the need for sustainable management of shared stocks and

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<sup>594</sup> *Id.* ¶ 154.

<sup>595</sup> *Id.* ¶ 155.

<sup>596</sup> *Id.* ¶ 152.

<sup>597</sup> *Id.* ¶ 157.

<sup>598</sup> *Id.* ¶¶ 172 & 173.

migratory species, especially small pelagic species and tuna species, but the Member States acted in isolation and lacked cooperation in managing the stocks.<sup>599</sup> Therefore, the Commission requested that the Tribunal elucidate the rights and obligations of coastal States. The Tribunal began its interpretation with Articles 61, 62, 73, 192, and 193 of UNCLOS, which form the general rights and obligations of a coastal State concerning the conservation and management of living resources in its EEZ.<sup>600</sup> The Tribunal, using contextual interpretation of Articles 61 and 63, construed “sustainable management” as specified in the question to mean “conservation and development.”<sup>601</sup> The ultimate goal of “sustainable management” is to “conserve and develop” fish stocks as a viable and sustainable resource.<sup>602</sup> Following the goal, the Tribunal reviewed relevant Articles under UNCLOS, reiterated the necessity of effective conservation and management measures, and confirmed that coastal states must exercise due diligence in consulting and cooperating with each other in the sustainable management of shared stocks and highly migratory species. It emphasized that the consultations “should be meaningful in the sense that substantial effort should be made by all States concerned.”<sup>603</sup>

## **2. Remarks**

These cases are important not only because they demonstrate how provisional measures mechanism can be applied to the protection and preservation of the marine environment prior to a final decision by the Tribunal; they also provide explanations of the relationship and procedural

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<sup>599</sup> *Id.* ¶¶ 176 & 177.

<sup>600</sup> *Id.* ¶ 180.

<sup>601</sup> *Id.* ¶ 191

<sup>602</sup> *Id.* ¶ 190.

<sup>603</sup> *Id.* ¶ 210.

applications of dispute settlement provisions between RFMOs and UNCLOS. Despite the Tribunal's interpretations, the adjudications give rise to critiques from both dissenting judges and scholars.

As shown in Case Nos. 3&4, the requirement to establish prima facie jurisdiction for provisional measures is relatively undemanding.<sup>604</sup> The Tribunal found it has jurisdiction mainly because the CCSBT Convention and UNCLOS are not mutually exclusive. In addition, both sides tried to negotiate, and, in the Tribunal's view, a State Party is not obliged to pursue procedures under UNCLOS Part XV Section 1 if the Tribunal believes it has tried all possible means to settle.<sup>605</sup> Though scientific uncertainty exists, the Tribunal decided that it had prima facie jurisdiction over the disputes without providing detailed reasoning.<sup>606</sup>

Case Nos. 3&4 proves that provisional measures, although such measures were subsequently revoked by the *SBT Arbitration*, contribute to early attempts to prevent serious harm to the marine environment before the establishment of an arbitral tribunal. The order of provisional measures does not prejudice the Arbitral Tribunal's decision on the merits. The Tribunal ordered that Japan refrain from conducting an experimental fishing program involving the taking of a catch of SBT. The suspension of the scientific research program reduces the risk of posing harm to the SBT stocks, as both parties agreed that the stock of SBT is severely depleted and is at its historically lowest levels. Despite a dissenting opinion, which did not consider the provisional

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<sup>604</sup> See Romano, *supra* note 77, at 324.

<sup>605</sup> *SBT*, Order, *supra* note 38, ¶ 60.

<sup>606</sup> Douglas M. Johnston, *Fishery Diplomacy and Science and the Judicial Function*, 10 Y.B. INT'L ENVTL. L. 33, 36 (1999).

measures to be urgent enough to invoke,<sup>607</sup> the majority held that such measures “should be taken as a matter of urgency” to preserve the rights of the parties and prevent further deterioration of the SBT stock.<sup>608</sup> The Arbitral Tribunal of the *SBT Arbitration* subsequently examined its jurisdiction without referencing the provisional measures. Since the Arbitral Tribunal found that it did not have jurisdiction to entertain the merits of the dispute, it determined that the order would cease to have effect as of the date of the signing of *SBT Arbitration Award* in accordance with UNCLOS Article 290(5).<sup>609</sup>

In addition, Case Nos. 3&4 reveal that the Tribunal has discretion in determining appropriate provisional measures for preventing serious harm to the marine environment. Such measures are not confined to the submissions made by the applicant. In Case Nos. 3&4, the Tribunal prescribed measures that were not at the applicant’s request and ordered that Australia, Japan, and New Zealand resume negotiations without delay with an eye toward reaching an agreement on measures for the conservation and management of SBT stocks and that they make further efforts to reach agreements with other States and fishing entities as well.<sup>610</sup> Although the

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<sup>607</sup> Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), ITLOS Case Nos. 3&4, Provisional Measures, Order of Aug. 27, 1999, Dissenting Opinion of Judge Vukas, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_3\\_4/published/C34-O-27\\_aug\\_99-DO\\_V.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99-DO_V.pdf).

<sup>608</sup> *SBT*, Order, *supra* note 38, ¶ 80.

<sup>609</sup> *SBT Arbitration*, Award on Jurisdiction and Admissibility Decision, *supra* note 73, ¶ 66.

<sup>610</sup> *SBT*, Order, *supra* note 38, ¶ 90.

Tribunal did not explain the concept of “precautionary principle,”<sup>611</sup> which was raised by the applicants, it mentioned in its order that the parties “should in the circumstances act with prudence and caution” to ensure the effectiveness of conservation measures.<sup>612</sup> Moreover, the conservation measures of the SBT stocks should incorporate cooperation with other participants who also catch SBT so as to achieve and ensure optimum utilization of the stock.<sup>613</sup>

In *SBT Arbitration*, the Tribunal intended the award to provide a roadmap to the procedures of the settlement of dispute arising under both the RFMO Convention and UNCLOS. However, the Tribunal’s interpretation of the relationship between the CCSBT Convention and UNCLOS has given rise to considerable debate and criticism.<sup>614</sup> Moreover, the interpretation may cause additional challenges given the overlapping dispute settlement procedures between RFMOs and the UNCLOS compulsory dispute settlement procedure.<sup>615</sup>

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<sup>611</sup> See Romano, *supra* note 77, at 326; Tim Stephens, *The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case*, 19 INT’L J. MARINE & COASTAL L. 177, 182 (2004).

<sup>612</sup> *SBT*, Order, *supra* note 38, ¶ 77.

<sup>613</sup> *Id.* ¶ 78.

<sup>614</sup> See, e.g., Dean Bialek, *Australia & New Zealand v. Japan: Southern Bluefin Tuna Case*, 1 MELB. J. INT’L L. 153 (2000); Romano, *supra* note 77; Norio Tanaka, *Some Observations on the Southern Bluefin Tuna Arbitration Award*, 44 JAPANESE ANN. INT’L L. 9 (2001); Oxman, *supra* note 87; Jacqueline Peel, *A Paper Umbrella Which Dissolves in the Rain-The Future for Resolving Fisheries Disputes under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration*, 3 MELB. J. INT’L L. 53 (2002); Colson & Hoyle, *supra* note 77; Klein, *supra* note 77, at 138–42. *But see*, e.g., Barbara Kwiatkowska, *The Southern Bluefin Tuna Arbitral Tribunal Did Get It Right: A Commentary and Reply to the Article by David A. Colson and Dr. Peggy Hoyle*, 34 OCEAN DEV. & INT’L L. 369 (2003).

<sup>615</sup> See Bialek, *supra* note 614, at 161.

The Tribunal is of the view that a dispute may arise under both an RFMO Convention and UNCLOS. Because international obligations are sometimes cumulative, it is not uncommon for one convention to correlate with another. Hence, considering ordinary international law and state practices, the Tribunal held that the principle of *lex specialis* is not applicable in this situation.

Perhaps the most controversial holding in this case is the Tribunal's interpretation of the procedures of dispute settlement when a dispute arises under both an RFMO Convention and UNCLOS. The crux of this issue is the application of Article 281(1) of UNCLOS. Article 281(1) excludes the application of compulsory procedures under UNCLOS when two requirements of the Article 281(1) are met: the parties have an agreement to seek for peaceful means of their own choice but fail to reach a settlement of the dispute, and the agreement between the parties does not exclude any further procedure. Accordingly, if a treaty has its own dispute settlement provisions, a dispute arising under both the treaty and UNCLOS shall follow the treaty's process rather than compulsory jurisdiction under UNCLOS. In this case, the Tribunal accepted Article 16 of the CCSBT Convention as an agreement by the Parties to seek settlement of the dispute and that fell within the meaning of Article 281(1) of UNCLOS. Moreover, Article 16(2) obliges the parties to refer to Article 16(1) by seeking any of the various peaceful means for resolving the dispute when parties are not able to reach a consensus on submitting the dispute to the ICJ or arbitration. Consequently, the Tribunal deemed Article 16 of the CCSBT Convention to exclude compulsory procedures under Part XV of UNCLOS from applying.

The Tribunal suggests two reasons for its findings. First, the ability to enter into compulsory procedures is relatively confined. To apply compulsory procedures entailing binding decisions under Part XV of UNCLOS, a dispute must meet certain requirements such as the Article 286 requirement that no settlement has been reached, and the lack of exceptions under Article 297

and Article 298. The other rationale for the findings is that the Tribunal respected mutually agreed upon procedures that the parties made when assenting to other international agreements. The purpose of Article 281 is to protect States' interests and ensure States' ability to settle disputes by their chosen means. Since a significant number of international marine agreements contain dispute settlement provisions, the Tribunal tends to uphold Parties' choices. Thus, it is foreseeable that fewer disputes will enter compulsory procedures under UNCLOS if such dispute arises under both an RFMO and UNCLOS.

The finding, which excludes the UNCLOS compulsory dispute settlement procedure, received a number of critiques.<sup>616</sup> Justice Sir Kenneth Keith stated in his separate opinion that the CCSBT and UNCLOS are distinct in nature and have overlapping substantive obligations.<sup>617</sup> From its ordinary meaning and contextual analysis, Article 16 does not oblige parties to apply any particular method, so that is not an agreement for the settlement of a dispute. Furthermore, Article 16 does not exclude any further procedure, including UNCLOS procedures, because it only deals with disputes related to the interpretation and application of the CCSBT. As the Conventions are “two treaty regimes,”<sup>618</sup> they are not mutually exclusive. The object and purpose of UNCLOS and *travaux preparatoire* support the opinion that Article 16 of the CCSBT Convention does not fall

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<sup>616</sup> E.g., Bialek, *supra* note 614; Romano, *supra* note 77; Tanaka, *supra* note 614; Oxman, *supra* note 87; Peel, *supra* note 614; Colson & Hoyle, *supra* note 77; Klein, *supra* note 77, at 138–42; Alan Boyle, *The Southern Bluefin Tuna Arbitration*, 50 INT'L COMP. L.Q. 447 (2001).

<sup>617</sup> Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), Award on Jurisdiction and Admissibility Decision of Aug. 4, 2000, Separate opinion of Justice Sir Kenneth Keith, pp. 51-53, ¶¶ 11 & 16, [https://legal.un.org/riaa/cases/vol\\_XXIII/1-57.pdf](https://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf).

<sup>618</sup> *Id.* ¶ 16.

within the meaning of Article 281(1) nor exclude the jurisdiction of this Tribunal.<sup>619</sup> Some scholars are of the view that the finding contradicts the intent of the negotiations during the establishment of the compulsory dispute settlement regime of UNCLOS.<sup>620</sup> As such, the interpretation may cause a barrier to States Parties for resorting to judicial settlements under the UNCLOS regime and may undermine the effectiveness of UNCLOS for resolving environmental disputes.<sup>621</sup> Relevant critiques and analysis will be discussed in the next part.

Turning to the *SRFC Advisory Opinion*, the advisory opinion has two important impacts. The case demonstrates the Tribunal's jurisdiction over issuing advisory opinions when requested by a RFMO. The other is that the advisory opinion affirms the due diligence obligations of flag States concerning conservation and management measures. First, the Tribunal is able to give advisory opinions based on Article 21 of the Statute of ITLOS and Article 138 of its Rules of Procedure. In this case, the SRFC submitted the request for an advisory opinion by adopting a resolution of the Conference of Ministers. The resolution authorized the Permanent Secretary of the SRFC to seek an advisory opinion pursuant to Article 33 of the MAC Convention. With that authorization, the issue turned to whether the Tribunal has advisory jurisdiction. The Tribunal analyzed the contentious Article 21 of the Statute of ITLOS in Annex VI to UNCLOS. Unanimously, the Tribunal considered Annexes to UNCLOS to be an integral part of the Convention, and the Tribunal found that it had jurisdiction based on Article 21 of the Statute of

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<sup>619</sup> Bialek agreed with Justice Keith. *See generally* Bialek, *supra* note 614.

<sup>620</sup> Romano, *supra* note 77, at 331; Colson & Hoyle, *supra* note 77, at 67.

<sup>621</sup> *See* Stephens, *supra* note 611, at 187–88; Peel, *supra* note 614, at 66; Klein, *supra* note 77, at 141; Boyle, *supra* note 616, at 448–49.

ITLOS in Annex VI.<sup>622</sup> The Tribunal then examined whether this case conformed to one of the three elements—all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal—that comprise Article 21. The Tribunal found that the questions raised by the SRFC were of a legal nature and fell within the scope of the MCA Convention. Accordingly, the Tribunal has jurisdiction under Article 21.

The second impact of this advisory opinion is that the Tribunal confirmed the responsibility of flag States to implement conservation and management measures.<sup>623</sup> The Tribunal addressed such responsibility in dealing with IUU fishing problems, particularly. Although the Tribunal stated that its Advisory Opinion was to the SRFC member States, it cannot be denied that the adjudication may form the liability of flag States related to IUU fishing in future cases.<sup>624</sup> The Tribunal recognized that a flag State has an obligation to exercise due diligence in taking necessary measures to deal with IUU fishing activities. Failing to do so constitutes a breach of international obligations and may lead to accountability for internationally wrongful acts. The coastal State, in

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<sup>622</sup> Some scholars, however, commented that the Tribunal’s interpretation on the Article 21 of the Statute of ITLOS is not fully explained and “is regrettably succinct.” Tom Ruys & Anemoon Soete, “*Creeping*” *Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea*, 29 LEIDEN J. INT’L L. 155, 173 (2016); *see also* Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), ITLOS Case No. 21, Advisory Opinion of Apr. 2, 2015, Separate Opinion of Judge Lucky, ¶¶ 1-3, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.21/advisory\\_opinion\\_published/2015\\_21\\_SO\\_Luck-E.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21_SO_Luck-E.pdf).

<sup>623</sup> *See generally* Ruys & Soete, *supra* note 616, at 171-173.

<sup>624</sup> *See e.g.*, Tullio Treves, *Coastal States’ Rights in the Maritime Areas under UNCLOS*, 12 REVISTA DE DIREITO INTERNACIONAL, BRASILIA 39, 43 (2015); Michael A. Becker, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, 109 AM. J. INT’L L. 851, 856–57 (2015).

turn, may seek cessation or reparation pursuant to the Draft Article of the International Law Commission on Responsibility of States for Internationally Wrongful Acts. However, in conditions where a flag State's vessel fails to comply with the laws and regulations of a coastal State, the Tribunal has expressed that it is not per se attributable to the flag State.

### **III. Marine Sustainability in the Settlement of Fishing Disputes**

The analysis indicates that nineteen cases have entered into dispute settlement proceedings, but only five cases—including one advisory opinion—have reached the substantive merits of those fishing disputes. The remaining cases include ten cases concerning interim measures,<sup>625</sup> three cases that were removed,<sup>626</sup> and one case that announced a lack of jurisdiction.<sup>627</sup> Among the five cases decided on the merits,<sup>628</sup> only two cases—the Whaling Case and No. 21 Advisory Opinion—touch substantively upon a fishing dispute and the protection of the marine environment. As to the three remaining cases, the *Saiga* case and the *M/V Virginia G* case dealt with the scope of coastal States' legislative jurisdiction on regulating refueling fishing in the EEZ, but the substantive decisions and analysis in these cases revolved around the legitimacy of the arrest and confiscation by a coastal State. Finally, *Mauritius v. U.K. Arbitration* failed to provide legal analysis on the general legality of the establishment of the MPA.

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<sup>625</sup> These are *M/V Saiga (No. 1)* case, *SBT* case, *Camouco* case, *Monte Confurco* case, *Grand Prince* case, *Volga* case, *Juno Trader* case, *Hoshinmaru* case, and *Tomimaru* case.

<sup>626</sup> These are *Swordfish* case, *Chaisiri Reefer 2* case, and the *Herring Arbitration*.

<sup>627</sup> It is the *SBT Arbitration*.

<sup>628</sup> These are *M/V Saiga (No. 2)* case, *M/V Virginia G* case, *Mauritius v. U.K. Arbitration*, and the *Whaling* case.

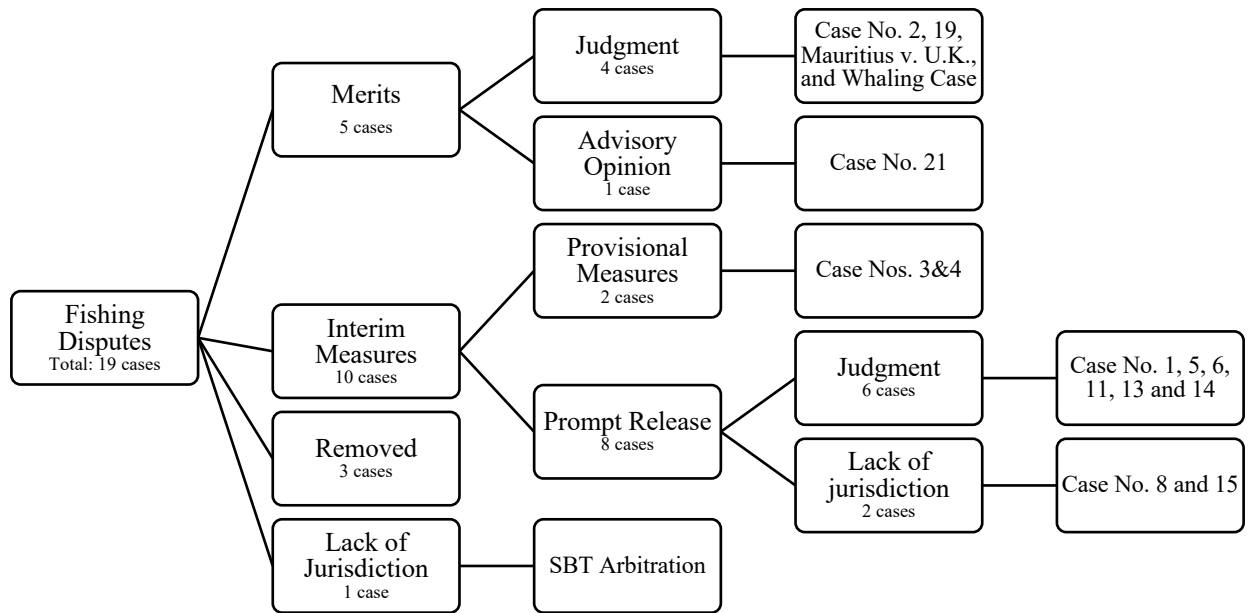


Figure 6 *The Proceeding Results of Fisheries Disputes*<sup>629</sup>

Surprisingly, only two out of several international judicial decisions have reconciled the merits of a fishing dispute with environmental concerns. In a broader sense, prompt release cases also indirectly relate to environmental considerations as some coastal States have argued that IUU fishing accounts for serious offenses and courts and tribunals should impose higher bonds. Still, these adjudications tell us little about how the judicial body addresses marine environmental problems, and do not answer substantive questions relating to the international law of the sea.<sup>630</sup> The dispute settlement mechanisms under the UNCLOS framework serve an essential role in the implementation of the marine environmental provisions.<sup>631</sup> Despite the role in ocean governance,

<sup>629</sup> Figure compiled by author.

<sup>630</sup> See Klein, *supra* note 77, at 153.

<sup>631</sup> Thomas A. Mensah, *The International Tribunal for the Law of the Sea and the Protection and Preservation of the Marine Environment*, 8 REV. EUR. COMP. & INT'L ENVTL. L. 1, 1 (1999).

the adjudications by courts and tribunals have a more significant role in the progressive development of international law and contribute to the evolvement of the UNCLOS system.<sup>632</sup>

With emerging fisheries problems, this section explores how ocean conservation and preservation can be implemented through the settlement of fishing disputes besides peaceful resolutions and the rights of States. Through the lens of sustainability, this research traces the jurisprudence of dispute settlement mechanisms, explores a possible silver lining for developing marine sustainability, and suggests appropriate means for the settlement of fishing disputes.

## **A. Implications of Existing Cases Regarding the Settlement of Fishing Disputes**

### **1. The Rules of the Settlement of Fishing Disputes**

The case law discussed above adheres to the rules under UNCLOS. The four types of disputes are illustrated below in Figure 7 categorized by jurisdiction. As reflected in the below figure, cases regarding alleged illegal fishing and fishing-related activities arose within a coastal State's EEZ. Conflicts about conservation and management measures are often associated with specific fish species conservation and, therefore, reflect migration patterns between EEZs and the high seas. Finally, disputes involving RFMOs arose within region-wide convention areas.

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<sup>632</sup> See Alan Boyle, *Further Development of the Law of the Sea Convention: Mechanisms for Change*, 54 INT'L & COMP. L.Q. 563, 564 (2005); Donald R. Rothwell, *The Contribution of ITLOS to Oceans Governance through Marine Environmental Dispute Resolution*, in LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTE: LIBER AMICORUM JUDGE THOMAS A. MENSAH 1007, 1022 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007); Gwenaele Rashbrooke, *The International Tribunal for the Law of the Sea: A Forum for the Development of Principles of International Environmental Law?*, 19 INT'L J. MARINE & COASTAL L. 515, 516 (2004).

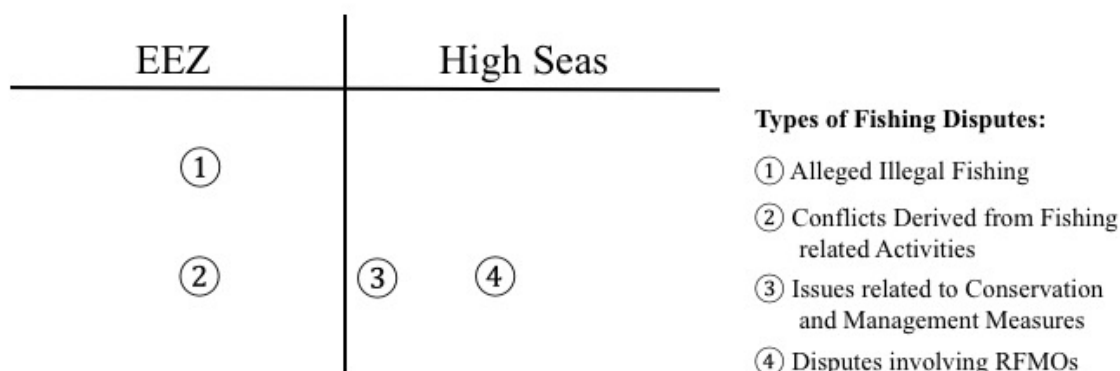


Figure 7 *Types of Fishing Disputes Illustrated by Maritime Zones*

For disputes occurring in a coastal State’s EEZ, the Tribunal has limited discretion and must respect the coastal State’s sovereign rights and its national regulations. UNCLOS Article 56 grants the coastal State exclusive jurisdiction to manage conservation matters, and Article 297(3), which precludes the Tribunal’s compulsory jurisdiction from applying. As a consequence, disputes relating to a coastal State’s sovereign rights with respect to fisheries in its EEZ, such as unlawful fishing, unpermitted access to the EEZ, or even unauthorized refueling of fishing vessels, are subject to the coastal State’s exclusive jurisdiction. Case law has broadened the coastal State’s scope of jurisdiction by interpreting sovereign rights to encompass all rights necessary for, and connected with, fish-related activities. In the *Saiga* and *M/V Virginia G* cases, refueling fishing vessels is considered an ancillary fishing activity and, accordingly, is subject to the national laws of the coastal State. Additionally, the decision in the *M/V Virginia G* stated that activities directly related to fishing and activities that support it, including personnel, fuel, gear, and other supplies at sea, fall within the scope of ancillary fishing activity. The interpretation implies the supremacy of a coastal State’s competence in solving fisheries disputes rather than the Tribunal or any intervening third-party.

Accordingly, the Tribunal may intervene only in a few instances, specifically cases regarding provisional measures and prompt release of vessels and crews. These interim measures stem from the residual jurisdiction vested in the Tribunal in accordance with UNCLOS Articles 290 and 292. The Tribunal prescribed provisional measures in Case Nos. 3&4 for reducing the decline of SBT stock. As long as the Tribunal has *prima facie* jurisdiction, it has relatively broad discretion to determine whether such measures are appropriate under the circumstances to prevent serious harm to the marine environment. The case also revealed that scientific uncertainty is unlikely to become a barrier for the Tribunal to determine the level of potentially serious harm. In Case Nos. 3&4, ensuring effective conservation measures requires the parties to act with prudence and caution to prevent serious harm to the stock of SBT.<sup>633</sup> The Tribunal has a relatively proactive attitude toward the conservation of fish stocks, and it may be inclined to prescribe provisional measures to prevent serious harm to fish stocks that are overfished.

The other interim measure is the prompt release of vessels and crews. In deciding such cases, the Tribunal identifies the purpose of a prompt release proceeding by balancing two conflicting interests—the interest of the coastal State in implementing its laws and regulations and the interest of the flag State in securing vessels and their crews from prolonged detention. When a flag State has an objection to releasing a vessel and crew from detention upon the posting of a bond or financial security, the flag State may seek a resolution pursuant to Article 292 of UNCLOS. Of the nine prompt release cases, one was settled by negotiation, two were dismissed for lack of jurisdiction, and six proceeded to the substantive issues of prompt release. The reasonableness of the bond or financial security is often the core issue in prompt release cases because the posting of

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<sup>633</sup> *SBT*, Order, *supra* note 38, ¶ 77.

a bond or financial security is the requirement for prompt release. The adjudications have established a standard of review on the reasonableness of a bond or financial security. The general standard for determining reasonableness involves assessing the overall balance of the amount, form, and nature of the bond. Case law has developed from the general standard to enumerated, but not exhaustive, factors to examine reasonableness. These include the gravity of the alleged offenses, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and the cargo seized, and the amount and form of the bond imposed by the detaining State. According to case law, non-financial requirements, e.g., necessitating the use of a vessel monitoring device, cannot be considered a bond. A Tribunal evaluates the relevant factors based on the facts of a case. The pertinent judicial opinions suggest that a Tribunal is likely to refer to the penalties imposed or imposable under the law of the detaining State. Although the Tribunal considers decisions made by the detaining State, it is not obliged to follow domestic decisions.

With respect to issues of managing specific fish stocks, especially migratory species, the Tribunal has been unable to rule on the substantive issue as the parties in dispute terminated the sole case dealing with such an issue. The lack of judicial ruling is due, in part, to the Tribunal's inability to intervene in the exclusive jurisdiction of a coastal State's EEZ. Nevertheless, the foundation for the management of migratory species is cooperation between flag States and coastal States through whose EEZs the species migrate. This cooperation obligation is embedded in UNCLOS Articles 63, 64, and 116 to 119. These Articles cover conditions where stocks occur within the EEZs of two or more coastal States, within an EEZ and the high seas, and the conservation and management of the living resources of the high seas. The obligation to cooperate is analyzed in both the *Swordfish* case and the *Herring* case. As discussed earlier, the former case is one in which the coastal State, Chile, claimed that the flag States failed to cooperate to ensure

the conservation and management of swordfish stocks in accordance with Articles 116 to 119. The latter concerns the Faroe Islands' disagreement on the distribution of catch quota against the EU under a joint management of the herring stock and Article 63(1) of UNCLOS. The two cases, respectively, reached settlements by reaching a new understanding to establish a structured framework of fisheries cooperation and by initiating negotiations to set new quotas.

As to the legality of the establishment of MPA, which is a measure set for the purpose of preserving the ocean habitat and banning fisheries capture, the analysis in the *Mauritius v. U.K. Arbitration* cannot be applied to the examination of other MPAs because the UK has a special obligation to Mauritius under the Lancaster House Undertaking. Despite the fact that the Tribunal decided the UK's establishment of the MPA was incompatible with UNCLOS, the Tribunal confirmed that it had jurisdiction over this case as the measure was not solely related to fisheries. As a result, the Tribunal will likely find jurisdiction over similar cases in the future.

With respect to disputes involving RFMOs, *SBT Arbitration* provides interpretational guidance for overlapped treaty obligations under the UNCLOS framework. This case is important since there are a number of treaties built on the UNCLOS framework to deal with marine environmental issues. The Tribunal confirmed that a dispute deriving from one treaty may also arise under UNCLOS. In other words, a specific treaty does not eclipse the application of UNCLOS. Recognizing that a dispute may arise under both Conventions at the same time, the Tribunal then proceeded to decide which dispute settlement provisions should apply. The key provision is UNCLOS Article 281 regarding the procedure to be followed when no settlement has been reached by the parties. Pursuant to Article 281, if parties in a dispute agree to seek settlement of the dispute by a peaceful means of their own choice, two requirements must be met for the UNCLOS Part XV's settlement dispute procedures to apply. The two requirements are that no

settlement has been reached by recourse to such means, and the agreement between the parties does not exclude the application of any further procedures. The question then lies in whether Article 16 of the CCSBT Convention, a dispute settlement provision of a RFMO agreement where both sides are parties, excludes the application of Article 281 of UNCLOS. The Tribunal confirmed that the parties had not reached a settlement by recourse to means listed in Article 16(1). However, Article 16(2) obligates both parties to continue to seek to resolve the dispute by any of the various peaceful means listed in Article 16(1). The Tribunal determined that this provision excludes the application of UNCLOS Part XV and requires the parties in dispute to resume settlement procedures in Article 16. Since Part XV of the UNCLOS procedure is excluded and the parties in dispute agreed to seek settlement of the dispute by a peaceful means of their own choice, the Tribunal found that it had no jurisdiction to decide the case.

Lastly, the Tribunal delivered an advisory opinion requested by a RFMO to determine the obligations of a flag State and coastal State regarding IUU fishing activities. The Tribunal established jurisdiction by construing Article 21 of the Statute of ITLOS, which “stands on its own footing” and is not subordinate to Article 288 of UNCLOS.<sup>634</sup> As stated in Article 21, the jurisdiction of the Tribunal comprises “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.” The MCA Convention which confers jurisdiction interconnects Article 21 on the jurisdiction, and both constitute the substantive legal basis of the Tribunal’s advisory jurisdiction. Based on the analysis in *SRFC Advisory Opinion*, one can infer that the Tribunal may deliver advisory opinions on legal questions when the agreement confers jurisdiction on the Tribunal and its role will become more essential in addressing legal issues.

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<sup>634</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 52.

There are certainly some prerequisites to the agreement. The agreement must relate to the purposes of UNCLOS and authorizes the submission of a request for an advisory opinion to the Tribunal.

The advisory opinion also affirms the “due diligence obligations” of flag States concerning the conservation and management of marine living resources. The Tribunal recognized that the flag State has due diligence obligations in taking necessary measures in dealing with IUU fishing activities, but such obligations do not extend to assure compliance to the laws and regulations of a coastal State by the flag State’s vessels. In other words, the Tribunal attributes the liability of taking necessary measures in combatting IUU fishing activities to the flag State rather than merely punishing the illegal behavior of the fishing vessels. The Tribunal adopts a more proactive approach, requiring the flag State to take all necessary and appropriate measures to ensure that vessels flying its flag do not conduct IUU fishing activities. Defining the scope of liability helps to identify the legality of the act and determine the attribution of violations. Should the flag State fail to implement necessary measures, the coastal State may seek reparation pursuant to the Draft Article of the International Law Commission on Responsibility of States for Internationally Wrongful Acts.

## **2. Unresolved and Unrecognized Issues regarding Fishing Disputes**

### **a. Underestimated Conservation Concern in Bond Assessment**

Even though the Tribunal refers to the penalties imposed by the coastal State to evaluate the gravity of the alleged offenses,<sup>635</sup> the amount of the bond decided by the Tribunal is often disproportionate to the gravity of the alleged offenses. As mentioned above, the Tribunal has provided a non-exhaustive enumeration of factors to assess the reasonableness of a bond. It also

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<sup>635</sup> *E.g., Monte Confurco*, Judgment, *supra* note 37, ¶ 69; *Juno Trader*, Judgment, *supra* note 37, ¶ 89.

emphasized that reasonableness cannot be determined in isolation from facts. Provided that the reasonableness of a bond depends on its overall balance of the amount, form, and nature of a bond, the Tribunal consistently fails to appropriately consider sustainability and conservation in its assessment. The Tribunal has refused to impose non-financial conditions for the release of a detained vessel, finding in *Volga* that the requirements exceed the scope of “bond or other financial security” by contextual and object and purpose analysis.<sup>636</sup> However, the analysis of the *Volga* case indicates that the Tribunal takes little account of the coastal States’ efforts to deter IUU fishing. Instead, the Tribunal seems inclined to consider primarily the interest of the flag State in prompt release.<sup>637</sup> The evidence can be found in four of eight prompt release cases.<sup>638</sup>

In the *Monte Confurco* case, the *Volga* case, the *Juno Trader* case and the *Hoshinmaru* case, each of the coastal States involved called for conservation of marine resources. For example, due to the decline in Patagonian toothfish stocks, the French government imposes heavy fines on illegal fishing.<sup>639</sup> Such concern is also emphasized by the Australian government in the *Volga* case. These States have promulgated domestic fisheries regulations on IUU fishing and imposed relevant penalties. In *Monte Confurco*, France required a total of 56,400,000 FF as bond for releasing the vessel and crews, including incurred fines of 55,000,000 FF. Even so, the Tribunal set the bond at 18,000,000 FF to include the value of the fish on board and a general bond amount

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<sup>636</sup> Cf. Klein, *supra* note 77, at 152. (stating that the Tribunal’s rejection of imposing non-financial conditions in releasing the vessel certainly represses the efforts to deter IUU fishing by the coastal States).

<sup>637</sup> *Id.* at 151; see also Donald R Rothwell & Tim Stephens, *Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests*, 53 INT’L & COMP. L.Q. 171, 183–84 (2004).

<sup>638</sup> These cases are *Monte Confurco* case, *Volga* case, *Juno Trader* case, and *Hoshinmaru* case.

<sup>639</sup> *Monte Confurco*, Judgment, *supra* note 37, ¶¶ 78-80.

without a detailed discussion of its calculation. The amount set by the Tribunal then is significantly lower than that imposed by the French court. In *Volga*, Australia imposed a bond of AU\$3,332,500, including the value of the vessel, fuel, lubricants, fishing equipment (worth AU\$ 1,920,000), and potential fines of AU\$ 412,500. However, the Tribunal only endorsed the assessed value of the vessel, fuel, lubricants, and fishing equipment, which were not disputed by the parties, but rejected the potential fines and other assessments. In *Juno Trader*, the Tribunal determined the final amount of the bond to be 300,000 euros including the value of the vessel and cargo and the gravity of the alleged offenses. However, the Tribunal's final amount in this case was lower than the value of the vessel estimated by the Applicant and excluded the value of the approximately 1,200 tons of frozen fish illegally caught on board and the penalties imposed. Lastly, in *Hoshinmaru*, Russia, the coastal State, argued that the gravity of the offense justified a bond of 22,000,000 roubles, but the Tribunal fixed the bond instead at 10,000,000 roubles without providing any explanation.

	<b>The amount set by the coastal State</b>	<b>The amount determined by the Tribunal</b>
<b>Case No. 6, <i>Monte Confurco</i> case</b>	<ul style="list-style-type: none"> <li>• To secure the appearance of the captain of the arrested vessel: 1,000,000 FF;</li> <li>• To secure payment of damage caused by the contraventions found: 400,000 FF;</li> <li>• To secure payment of fines incurred and confiscation of the vessel: 55,000,000 FF</li> </ul> <b>Total: 56,400,000 FF</b>	<ul style="list-style-type: none"> <li>• The value of the 158 tons of fish seized by the French authorities and francs: 9,000,000 FF;</li> <li>• A bond of 9,000,000 FF</li> </ul> <b>Total: 18,000,000FF</b>
<b>Case No. 11, <i>Volga</i> case</b>	<ul style="list-style-type: none"> <li>• The assessed value of the vessel, fuel, lubricants and fishing equipment: AU\$ 1,920,000;</li> <li>• Potential fines: AU\$ 412,500;</li> <li>• A security related to the carriage of a fully operational VMS and observance of CCAMLR conservation measures: AU\$ 1,000,000</li> </ul> <b>Total: AU\$3,332,500</b>	<ul style="list-style-type: none"> <li>• The assessed value of the vessel, fuel, lubricants and fishing equipment: AU\$ 1,920,000</li> </ul> <b>Total: AU\$ 1,920,000</b>

<p><b>Case No. 13,</b> <i>Juno Trader case</i></p>	<ul style="list-style-type: none"> <li>• Fine on the captain for lack of cooperation with the inspectors: 8,770 euros</li> <li>• Infractions to the fishing legislation: 175,398 euros</li> <li>• Other</li> </ul> <p><b>Total: 1,227,214 euros</b></p>	<ul style="list-style-type: none"> <li>• 8,770 euros already paid to the coastal State;</li> <li>• A bond of 300,000 euros, including the value of the vessel, cargo, and gravity of the alleged offenses.</li> </ul> <p><b>Total: 300,000 euros.</b></p>
<p><b>Case No. 14,</b> <i>Hoshinmaru case</i></p>	<ul style="list-style-type: none"> <li>• The gravity of the offense justifies the bond: 22,000,000 roubles</li> </ul> <p><b>Total: 22,000,000 roubles</b></p>	<ul style="list-style-type: none"> <li>• (No explanation available)</li> </ul> <p><b>Total: 10,000,000 roubles</b></p>

Table 5 *The Comparison of the Amount of a Bond Set by the Coastal State and the Tribunal*<sup>640</sup>

Throughout these cases, the Tribunal agrees that the conservation of the fishery resources in an EEZ is relevant to the gravity of the offenses, but, in terms of the assessment of a bond, the conservation concern does not manifest on the Tribunal's reasonableness analysis. In fact, the Tribunal merely takes note of the range of penalties under the domestic laws rather than including such discussions in its calculation of bonds. As a general matter, bond assessments by the Tribunal do not reflect coastal States' efforts on conservation and management of marine living resources.

#### **b. The Maze of Dispute Settlement Mechanisms**

In *SBT Arbitration*, the Tribunal held that the dispute settlement provisions of the CCSBT Convention eclipse those in UNCLOS even though Article 16 of the CCSBT Convention does not designate a final method of settling disputes. Thus, in turn, the decision leaves parties without a final solution for dispute settlement mechanisms between the RFMO and the UNCLOS system. The interpretation betrays the purpose of the establishment of the compulsory procedures entailing binding decisions, which is to guarantee the integrity of UNCLOS.<sup>641</sup>

<sup>640</sup> Table made by author.

<sup>641</sup> Alan Boyle, *Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks*, 14 INT'L J. MARINE & COASTAL L. 1, 6 (1999); Oxman, *supra* note 87, at 282.

***(1) Crippling Result for UNCLOS Compulsory Jurisdiction***

The Tribunal examined the relationship of dispute settlement provisions between the CCSBT Convention and UNCLOS Article 281 in *SBT Arbitration*. Indeed, the Tribunal respects the parties' choice of a peaceful means to settle their dispute. If the parties have agreed to seek settlement of the dispute by a peaceful means of their own choice, the agreement then replaces the Part XV dispute settlement procedures under UNCLOS. However, according to Article 281 of UNCLOS, two requirements must be met to reject UNCLOS Part XV: (1) no settlement has been reached by recourse to such means, and (2) the agreement between the parties does not exclude any further procedure. Apparently, Article 281 contains multiple restrictions on excluding compulsory dispute settlement by agreement.

In *SBT Arbitration*, the Tribunal found that Article 16 of the CCSBT Convention excludes any further procedure because Article 16(2) states that the parties have the responsibility of "continuing to seek to resolve the dispute by any of the various peaceful means referred to in paragraph 1 above" if no settlement has been reached.<sup>642</sup> Thus, UNCLOS Part XV dispute settlement procedures are excluded. Parties in dispute shall continue to consult among themselves with an eye toward resolving the dispute by an agreed-upon method. However, the language in Article 16 does not clearly articulate any intention to exclude a compulsory dispute settlement under UNCLOS.<sup>643</sup> The Article does not point to a final means to settle the dispute but merely obliges parties to carry out their obligation to settle disputes by peaceful means. The Tribunal's interpretation encloses the parties in a loop of seeking peaceful settlement of disputes without

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<sup>642</sup> CCSBT Convention art. 16(2).

<sup>643</sup> Boyle, *supra* note 616, at 449.

providing a genuine solution. If this decision is followed in the future, as it may well be in every dispute arising under both CCSBT and the UNCLOS, the Tribunal runs the risk that UNCLOS compulsory procedures will be barred from application and parties in dispute will fall into endless cycles of negotiation.<sup>644</sup>

Moreover, the Tribunal's interpretation in *SBT Arbitration* is in opposition to the purpose of the establishment of the compulsory dispute settlement provisions. Such interpretation may undermine the comprehensiveness of the compulsory jurisdiction under UNCLOS.<sup>645</sup> Based on the drafting history, the compulsory dispute settlement provisions were considered an integral part of the law of the sea regime.<sup>646</sup> The aim is to settle the dispute and facilitate the stability of the UNCLOS system. Thus, UNCLOS gives parties the right to settle the dispute by their preferred and consensual means but, meanwhile, if no settlement has been reached, it obliges parties to submit their dispute to compulsory procedures entailing binding decisions. The limitations and exceptions to compulsory jurisdiction are limited. But in *SBT Arbitration*, the Tribunal favored a consensual basis for dispute settlement instead of compulsory jurisdiction that would entail binding decisions on all States parties.<sup>647</sup> The Tribunal erred in broadly interpreting Article 16 of

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<sup>644</sup> See *Id.* at 451; Peel, *supra* note 614, at 66.

<sup>645</sup> Peel, *supra* note 614, at 66.

<sup>646</sup> See generally Alexander Yankov, *The International Tribunal for the Law of the Sea and the Comprehensive Dispute Settlement System of the Law of the Sea*, in *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE* 33, 33 (P. Chandrasekhara Rao & Rahmatullah Khan eds., 2001); Boyle, *supra* note 641, at 6–15.

<sup>647</sup> Nisuke Ando, *The Southern Bluefin Tuna Case and Dispute Settlement under the United Nations Convention on the Law of the Sea: A Japanese Perspective*, in *LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTE: LIBER AMICORUM JUDGE THOMAS A. MENSAH* 867, 876 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007).

the CCSBT Convention to exclude further procedures. The interpretation may derogate from the compulsory dispute settlement procedures and have a negative impact on the UNCLOS dispute settlement system.<sup>648</sup>

After all, UNCLOS is regarded as the Constitution of the ocean, and it was signed as a package deal with no reservations allowed. Part XV section 2 regarding compulsory procedures entailing binding decisions should not be an exception. The exclusion of compulsory procedures by an agreement between the parties should be examined under stricter scrutiny.

## ***(2) Spillover Effect on other RFMOs***

The *SBT Arbitration Award* may have adverse effects when it comes to overlapped procedures of the settlement of dispute where a dispute arises under both the RFMO and UNCLOS. As the Tribunal found that Article 16 of the CCSBT Convention applies in lieu of the compulsory jurisdiction, the deadlocked loop of dispute settlement may occur in other RFMOs. The situation will be more problematic for RFMOs adopted prior to UNCLOS because these agreements have no dispute settlement provisions and do not require a specific means of compulsory dispute settlement as a final resort.<sup>649</sup>

This dispute settlement challenge is particularly salient in tuna-specific RFMOs. There are currently five major RFMOs dealing with the conservation and management of tuna species. The situation in the Inter-American Tropical Tuna Commission (IATTC) may present challenges similar to those seen under the CCSBT. Article XXV of the Convention of the IATTC requires

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<sup>648</sup> Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 394, 401–2 (Donald R. Rothwell et al. eds., 2015).

<sup>649</sup> Peel, *supra* note 614, at 66.

parties in dispute to settle disputes through consultation as a first step. If consultations fail, the parties in dispute “shall consult among themselves as soon as possible in order to settle the dispute through any peaceful means they may agree upon, in accordance with international law” pursuant to Article XXV (2). This, again, causes parties to fall into the loop of seeking dispute settlement by continuous consultation.

Another example that may be regarded as an exclusion of further procedure is the dispute settlement provision under the Indian Ocean Tuna Commission (IOTC). Article XXIII of the IOTC expresses that any dispute, if not settled by the Commission, shall be referred for settlement to a conciliation procedure to be adopted by the Commission. Unless the parties to the dispute have agreed on a method of settlement, conciliation becomes a mechanism to which the parties should resort, even though such a mechanism results in non-binding resolutions. Once a dispute arises under the IOTC and UNCLOS, the Tribunal is likely to conclude the same result as the *SBT Arbitration*. As to ICCAT and WCPFC, these RFMOs do not exclude UNCLOS Part XV of compulsory jurisdiction but for different reasons. The former has no dispute settlement provisions so ICCAT does not meet the requirements of the Article 281 of UNCLOS; the later *mutatis mutandis* applies the dispute settlement provisions under the FSA, and that Agreement also resorts to UNCLOS Part XV.

<b>Dispute Settlement Provisions</b>	
<b>Inter-American Tuna Commission (IATTC)</b>	<p><b>Article XXV. Settlement of Disputes</b></p> <p>1. The members of the Commission shall cooperate in order to prevent disputes. Any member may consult with one or more members about any dispute related to the interpretation or application of the provisions of this Convention to reach a solution satisfactory to all as quickly as possible.</p> <p>2. If a dispute is not settled through such consultation within a reasonable period, the members in question shall consult among themselves as soon as possible in order to settle the dispute through any peaceful means they may agree upon, in accordance with international law.</p>

	<p>3. In cases when two or more members of the Commission agree that they have a dispute of a technical nature, and they are unable to resolve the dispute among themselves, they may refer the dispute, by mutual consent, to a non-binding <i>ad hoc</i> expert panel constituted within the framework of the Commission in accordance with the procedures adopted for this purpose by the Commission. The panel shall confer with the members concerned and shall endeavor to resolve the dispute expeditiously without recourse to binding procedures for the settlement of disputes.</p>
<p><b>International Commission for the Conservation of Atlantic Tunas (ICCAT)</b></p>	<p>There are no dispute settlement procedures in the ICCAT Convention.</p>
<p><b>Commission for the Conservation of Southern Bluefin Tuna (CCSBT)</b></p>	<p><b>Article 16</b></p> <p>1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.</p> <p>2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.</p> <p>3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.</p>
<p><b>Indian Ocean Tuna Commission (IOTC)</b></p>	<p><b>Article XXIII. Interpretation and Settlement of Disputes</b></p> <p>Any dispute regarding the interpretation or application of this Agreement, if not settled by the Commission, shall be referred for settlement to a conciliation procedure to be adopted by the Commission. The results of such conciliation procedure, while not binding in character, shall become the basis for renewed consideration by the parties concerned of the matter out of which the disagreement arose. If as the result of this procedure the dispute is not settled, it may be referred to the International Court of Justice in accordance with the Statute of the International Court of Justice, unless the parties to the dispute agree to another method of settlement.</p>

<b>Western and Central Pacific Fisheries (WCPFC)</b>	<b>Commission</b>	<b>Article 31</b> The provisions relating to the settlement of disputes set out in Part VIII of the Agreement apply, <i>mutatis mutandis</i> , to any dispute between members of the Commission, whether or not they are also Parties to the Agreement.
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Table 6 *Dispute Settlement Provisions of Five Major Tuna-Specific RFMOs*<sup>650</sup>

Essentially, the RFMOs exist for the purpose of accomplishing the goals of UNCLOS and strengthening the legal order of the seas. These RFMOs may not prejudice the rights, jurisdiction, and duties of States under UNCLOS. Recognizing the supremacy of UNCLOS, these RFMOs establish measures related to the principles of conservation and cooperation articulated in UNCLOS and develop measures for the conservation and sustainable use of the living resources under their management, especially in the high seas where cooperation is fundamental. By the same token, the dispute settlement mechanisms, including compulsory jurisdiction, play significant roles in ensuring the compliance and efficacy of the UNCLOS system.<sup>651</sup> If the provisions of the RFMOs vacate the significant function of the UNCLOS, States without compulsory jurisdiction are likely to fall into the deadlocks of regional organizations.<sup>652</sup> This poses critical challenges to the comprehensiveness of the UNCLOS system.

### c. Unenforceable Obligations to Cooperate

Cooperation is the key to ensure conservation, management, and sustainable use of marine living resources between coastal States and States fishing in the region. However, the existing case law does little to provide context to the duty to cooperate. More pointedly, the opinions handed

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<sup>650</sup> Order in sequence by the time of establishment.

<sup>651</sup> TANAKA, *supra* note 193, at 417; *see also* Oxman, *supra* note 87, at 279.

<sup>652</sup> *See* Peel, *supra* note 614, at 55; Oxman, *supra* note 87, at 289.

down by the Tribunal involving States' duty to cooperate in conservation and management have been ineffective examples of judicial settlement at best.

In the *Swordfish* case discussed earlier, Chile, as a coastal State, argued that the EC failed to cooperate concerning the conservation of swordfish stocks in the South-Eastern Pacific. Chile made its legal arguments based on Articles 116 to 119 of UNCLOS regarding conservation and management of living resources of the high seas. The parties instituted a Special Chamber to deal with the dispute, but they ultimately reached a new Understanding to conclude the case. In the *Atlanto-Scandian Herring Arbitration* case, the Faroe Islands and the EU had a dispute concerning the catch of a shared stock, herrings. The parties had agreed to manage the conservation and utilization of the herring stock pursuant to Article 63(1) of UNCLOS; however, they disagreed on the distribution of catch quota. As a result, a series of trade sanctions were implemented, and the case was ultimately removed after the parties reached a consensus through negotiation. Besides these two cases that were settled by negotiation, other adjudications have barely discussed the duty to cooperate or recognized its significance. The Tribunal's failure to reach the merits of such a discussion is due, in part, to lack of jurisdiction, such as the *SBT Arbitration*. Additionally, even the minimal substantive discussion that the Tribunal has raised cannot be applied generally because the parties in these cases, like *Mauritius v. U.K.*, had bilateral agreements and, therefore, the discussions are case-specific.

Disputes inevitably occur when States disagree on the content of their obligations or the failure to carry out those obligations. Dispute settlement mechanisms are expected to contribute to the development of international fisheries law, but the adjudications to date tell us little about the cooperation issue. UNCLOS has imposed duties to cooperate on coastal States and flag States,

respectively.<sup>653</sup> The duty to cooperate applies across different maritime zones so that all States share the responsibility of conservation of marine living resources. Many important matters rely on cooperation between States, for instance: sharing scientific data and research plans, submitting relevant information to enhance transparency, and adopting technical and compliance measures to monitor and surveil vessels. In addition to individual duties, RFMOs have adopted a collective duty to cooperate in specific regions articulated in UNCLOS Article 118. The interconnected umbrella system of UNCLOS is comprised of many elements, none of which may come to fruition without the cooperation of States. If the Tribunal is not able to draw the fault line on the duty to cooperate, it is difficult, if not impossible, for States to carry out conservation and management measures cohesively.

### **B. Making Better Use of Dispute Settlement Mechanisms: Sustainability as an Indispensable Factor**

Given the rules surrounding settlement of fishing disputes and the underlying problems, this research proposes solutions for the peaceful settlement of fisheries disputes with particular and increased focus on sustainability in such dispute settlement mechanisms. Because fish resources are global common goods, increased acknowledgement by States of the environmental problems faced by fisheries and compliance to regulations will enhance confidence in peaceful resolution of disputes and further, increase States' willingness to accept the rule of law under the UNCLOS system.<sup>654</sup> Such acknowledgment would also enhance the viability of UNCLOS dispute

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<sup>653</sup> See Chapter 2.

<sup>654</sup> See Thomas A. Mensah, *The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 81, 82 (Davor Vidas & Østreng Willy eds., 1999); James Crawford, *Responsibility, Fraternity, and Sustainability in International Law*, 52 CAN. Y.B. INT'L L. 1, 24 (2015).

settlement mechanisms, characterized by their flexibility, effectiveness, and acceptability.<sup>655</sup> With this standard in mind, this research analyzes both the interim and substantial merits of fisheries disputes.

## **1. Interim Measures**

### **a. Balancing a Coastal State's Efforts on Ocean Conservation**

The case analysis above demonstrates how the Tribunal is evolving in its treatment of prompt release cases and has struggled with defining a standard to determine the reasonableness of a bond.<sup>656</sup> Since there is no definition of the term “reasonable bond,” the Tribunal’s analysis and assessment has substantially contributed to the interpretation and application of UNCLOS.<sup>657</sup> Moreover, the methodology developed by the Tribunal reveals the core of the legal order and is expected to have impacts on the substantive rules of UNCLOS.

As discussed above, the purpose of the mechanism of prompt release of vessels and crews is to release the vessels and crews from prolonged detention while safeguarding the legal process in the detaining States by posting a reasonable bond or other financial security. This mechanism concerns not only the human rights of the crews and the interests of the flag State but also the interests of the coastal State. The role of the Tribunal is generally to deal with disputes concerning

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<sup>655</sup> See GURDIP SINGH, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: DISPUTE SETTLEMENT MECHANISMS 213 (1985); MERRILLS, *supra* note 87, at 202.

<sup>656</sup> See Franckx, *supra* note 395, at 332–33.

<sup>657</sup> See KLEIN, *supra* note 87, at 119; Peter Tomka, *The Contribution of the International Tribunal for the Law of the Sea to the Progressive Development of International Law*, in THE CONTRIBUTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA TO THE RULE OF LAW: 1996-2016, 179, 188 (2016).

release from detention. Looking to existing case law, disputes commonly relate to the reasonableness of the amount of the bond.

As coastal States become aware of ocean conservation, they tend to consider marine living resources not only as an interest but also their responsibility to conserve. The responsibility derives from both duties of coastal States and treaty obligations. These States take seriously the problem of IUU fishing. They have prescribed and implemented domestic regulations rigorously. States also impose heavy penalties for violations of IUU fishing. As Judge Cot emphasized in his separate opinion in the *Volga* case, “[i]f the parties to the Convention do not manage put an end to these practices, stocks of Patagonian toothfish will be completely wiped out within about ten years.”<sup>658</sup>

However, the adjudications fall short in considering coastal States’ efforts on conservation.<sup>659</sup> The Tribunal recognizes that conservation is a concern, but this factor does not affect the amount of the bonds imposed. In its opinions, the Tribunal is deferential to domestic laws in deciding the gravity of the alleged offenses and thus determines the reasonableness of the penalties imposed by the detaining State. Given the standard of reasonableness of bonds developed by existing cases, the amount of the bond ultimately set should, at least, be proportionate to the coastal State’s discretion on penalties and fines. Moreover, from the perspective of international fisheries law, coastal States often implement stringent regulations to conform to their treaty obligations and sustainability needs. If the Tribunal downplayed the efforts of coastal States, its rulings would not be consistent with the international fisheries law regime.

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<sup>658</sup> *Volga* (Russ. v. Austl.), ITLOS Case No. 11, Prompt Release, Judgment of Dec. 23, 2002, Separate Opinion of Judge Cot, ¶ 6, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_11/11\\_judgment\\_231202\\_sep\\_op\\_Cot\\_en.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_11/11_judgment_231202_sep_op_Cot_en.pdf).

<sup>659</sup> See Rothwell & Stephens, *supra* note 637, at 184.

All in all, the Tribunal should reconsider its balancing of flag States' interest in securing vessels and its crews from prolonged detention and coastal States' interest in implementing their laws and regulations.<sup>660</sup> In doing so, the Tribunal should recognize the efforts of coastal States in maintaining ocean sustainability. Conservation efforts should constitute one of the factors to be taken into account in assessing the reasonableness of a bond.

#### **b. Provisional Measures as First Aid to Oceans**

Although only one case examines provisional measures in fishing disputes to date,<sup>661</sup> the case sheds light on the application of precautionary measures to prevent serious harm to the marine environment.<sup>662</sup> The UNCLOS requirement to initiate provisional measures is relatively vague. A court or tribunal with *prima facie* jurisdiction may prescribe provisional measures when a dispute has been duly submitted to it. If there is no evidence that “obviously exclude[s]” a court or tribunal’s jurisdiction, it is considered to have *prima facie* jurisdiction.<sup>663</sup> In addition, the Tribunal is lenient in determining whether it is urgent to prescribe provisional measures.<sup>664</sup> For example, the problem of fish stock depletion has persisted for a long period of time, but the Tribunal identified urgency at the time when Japan’s experimental fishing program for SBT would certainly endanger the existence of the stock. A Tribunal’s ordering of provisional measures does not prejudice the Tribunal’s decision on its merits. This mechanism grants the competent court or

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<sup>660</sup> See also Rothwell, *supra* note 81, at 139–40.

<sup>661</sup> As of June 17, 2020, the ITLOS docket has three provisional measures cases, Case Nos. 3&4 *SBT* Order and Case No. 10 (the *MOX Plant Case* (Ireland v. United Kingdom)).

<sup>662</sup> See Stephens, *supra* note 611, at 191–92; Tuerk, *supra* note 362, at 195.

<sup>663</sup> Mensah, *supra* note 382, at 50.

<sup>664</sup> See Tomka, *supra* note 657, at 172–74.

tribunal flexibility and effectiveness so that it can prescribe appropriate measures to urgently prevent serious harm to the marine environment, pending its final decision in a case.

Therefore, in Cases 3&4 *Southern Bluefin Tuna*, the Tribunal prescribed provisional measures that were not requested by the applicant and ordered that both parties resume negotiations without delay with a view toward reaching agreement on measures for the conservation and management of SBT stocks.<sup>665</sup> It also limited catches of SBT and halted Japan's experimental fishing program. Moreover, scientific uncertainty does not hinder the Tribunal from prescribing provisional measures as conservation is an element in the protection and preservation of the marine environment. Accordingly, the "prudence and caution" discussed in the *Southern Bluefin Tuna* case may become a tool that the Tribunal uses to examine the circumstances for deciding conservation measures to prevent serious harm to the marine environment.

## **2. The Substance of Fishing Disputes**

The judicial practices in the third and fourth category of fishing disputes analyzed above suggest the weakness of judicial mechanisms and limitations in applying them to deal with environmental problems. Five cases reach the substantive issues involved in the underlying fishing disputes: the *Swordfish* case, the *Herring* case, *Mauritius v. U.K. Arbitration*, *SBT Arbitration*, and the *Whaling* case. The Tribunal in *SBT Arbitration* declined to find jurisdiction, and *Mauritius v. U.K. Arbitration* determines the legality of the MPA based on the bilateral agreement between the two parties while the legality of MPA itself remains unknown. The *Whaling* case becomes the only third-party adjudication that responds to the substance of the fishing dispute, i.e., the legality of

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<sup>665</sup> *SBT*, Order, *supra* note 38, ¶ 90.

the special permits to whale for the scientific purpose. Conversely, the parties in *Swordfish* and *Herring* ended up settling through negotiations after submitting the disputes to the Tribunal.

The *Swordfish* and *Herring* cases shed light on improving the peaceful settlement of disputes. Although these cases were removed from judicial proceedings, the adjudications of the disputes are not without importance. Instead, the Tribunal lays the foundation for parties to reach consensual settlements and assists them with greater flexibility. As the President of the Chamber in the *Swordfish* case, Judge Chandrasekhara Rao said that the adjudication of disputes was the main function of ITLOS, but it could, where appropriate, assist parties in settling a dispute directly.<sup>666</sup> The *Swordfish* and *Herring* cases discuss the nuanced settlement of fisheries disputes by peaceful means chosen by the parties but, meanwhile, permit taking advantage of ITLOS.

Fish migrate regardless of borders, but conservation and management measures are limited by the delineation of maritime zones. The coastal State enjoys exclusive rights within its EEZ while the flag State exercises freedom of fishing on the high seas. The contradictory rights trigger disputes when it comes to implementing RFMO resolutions under UNCLOS and cooperation on managing specific fish stocks that migrate between different EEZs, or between an EEZ and the high seas. Furthermore, fisheries disputes relating to a coastal State's sovereign rights are excluded from compulsory procedures pursuant to Article 297(3) of UNCLOS. The design of the dispute settlement framework makes fisheries disputes more difficult to be settled.

Since the common ground between parties in such disputes is disagreement on the cooperation measures regarding the conservation and development of marine living resources,

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<sup>666</sup> *Case Removed from Tribunal's List*, ITLOS PRESS RELEASE (Dec. 17, 2009), [https://www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/PR.141-E.pdf](https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR.141-E.pdf) (last visited Mar. 25, 2020).

facilitating cooperation among both parties in dispute is necessary to improve the peaceful settlement of fisheries dispute. This research argues that conciliation is an important yet underestimated third-party settlement mechanism.<sup>667</sup> The mechanism can be suitable to achieve the settlement of fishing disputes.

Conciliation is one of the peaceful dispute settlement mechanisms that parties in dispute may freely choose to settle their disputes. The only circumstance where conciliation becomes compulsory is when fisheries disputes fall within the limitations of Article 297 (3) of UNCLOS. The provision precludes fisheries disputes relating to a coastal State's sovereign rights from compulsory procedures entailing binding decisions. However, if the coastal State has manifestly failed to comply or arbitrarily refused to carry out its conservation obligations and no settlement can be reached by disputing parties, such dispute will be submitted to the compulsory conciliation procedure at the request of any party to the dispute. Compared to compulsory procedures entailing binding decisions, the submission to conciliation is obligatory, but the results of conciliation are non-binding upon the parties unless they have agreed to accept the report by the Conciliation Commission.<sup>668</sup>

The operation of conciliation conforms to Annex V of UNCLOS. Section 1 of Annex V applies to voluntary conciliation procedures, and Section 2 applies to compulsory conciliation procedures. The core of the conciliation procedure relies on the conciliation commission. The

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<sup>667</sup> Roberto Lavallo observed that conciliation has been given a significant role under UNCLOS but received scant attention in academic literature and practice. He provided an in-depth analysis on the conciliation mechanism under UNCLOS and recommended the utilization of conciliation; see Roberto Lavallo, *Conciliation under the United Nations Convention on the Law of the Sea: A Critical Overview*, 2 AUSTRIAN REV. INT'L. & EUR. L. 25, 25–48 (1997).

<sup>668</sup> ADEDE, *supra* note 90, at 210.

conciliation commission consists of five conciliators; each side of parties appoint two conciliators, and they determine a fifth conciliator as the chairman.<sup>669</sup> The conciliators are chosen from a list nominated by every State Party and maintained by the Secretary-General of the United Nations.<sup>670</sup> The conciliation commission shall determine its own procedure and issue a final report within twelve months of its constitution.<sup>671</sup> The procedure remains flexible, allowing the parties to agree on the composition of conciliators and conciliation procedure. The difference between voluntary and compulsory procedures is the institution of proceedings. Parties in dispute institute a voluntary proceeding by consent in accordance with Article 284,<sup>672</sup> while the compulsory proceeding is instituted at the request of any party to the dispute in accordance with Part XV section 3.<sup>673</sup> Under the compulsory procedure, if parties in dispute fail to reply to a notification of the institution of proceedings or to submit to such proceedings, it will not constitute a bar to the proceedings.<sup>674</sup>

Conciliation has certain characteristics that adapt to the settlement of fisheries dispute. First, the report of the conciliation commission is non-binding upon the parties.<sup>675</sup> States are disinclined to submit maritime disputes to binding international adjudication, especially environmental disputes that trigger political sensitivity.<sup>676</sup> There are a number of reasons why States seek to avoid

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<sup>669</sup> UNCLOS Annex V, art. 3.

<sup>670</sup> UNCLOS Annex V, art. 2.

<sup>671</sup> UNCLOS Annex V, art. 4 & 7.

<sup>672</sup> UNCLOS Annex V, art. 1.

<sup>673</sup> UNCLOS Annex V, art. 11.

<sup>674</sup> UNCLOS Annex V, art. 12.

<sup>675</sup> UNCLOS Annex V, art. 7(2).

<sup>676</sup> Tuerk, *supra* note 362, at 204.

litigation in such disputes,<sup>677</sup> such as prolonged procedure, high cost, and various uncertainties. Perhaps the most pivotal reason for avoiding litigation, though, is that States are unwilling to take on the risks of an adverse result that increases their constraints.<sup>678</sup> Non-binding conciliation, in turn, reduces such concern and contributes to the settlement of sensitive disputes.<sup>679</sup> Second, the conciliation mechanism allows for greater flexibility. Parties in dispute may agree on logistical issues such as the number of conciliation commission members and procedural matters. Such procedural flexibility is similar to arbitration but, crucially, conciliation is non-binding to parties in dispute. Third, the flexibility of the mechanism induces parties in dispute to utilize the third-party dispute settlement procedure, which increases the likelihood that the parties will adopt the recommendation made by conciliation commission. As parties in dispute have more control in the decision-making process, they are more likely to use and accept this mechanism.<sup>680</sup> Additionally, due to third-party input, parties in dispute may feel pressure on them and be more willing to conform to the recommendations by the commission even though the recommendations are non-binding.<sup>681</sup> Lastly, compulsory conciliation forces the coastal State to join the flag State in

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<sup>677</sup> See generally James Harrison, *Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation*, 48 OCEAN DEV. & INT'L L. 269 (2017); Klein, *supra* note 77; Stephens, *supra* note 611, at 194–95.

<sup>678</sup> John E. Noyes, *Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea*, 4 CONN. J. INT'L L. 475, 683 (1989).

<sup>679</sup> Noyes, *supra* note 111, at 219.

<sup>680</sup> *Id.* at 218–19; see also Ted McDorman, *The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention*, 35 CAN. Y.B. INT'L L. 57, 78 (1997); MERRILLS, *supra* note 87, at 186.

<sup>681</sup> KLEIN, *supra* note 87, at 121.

resolving fisheries disputes that are excluded from adjudication in Part XV Section 3 of UNCLOS. Although the mechanism only requires parties to submit the dispute to a conciliation proceeding, it creates an amicable means to induce parties in dispute to use third-party settlement while the result remains non-compulsory.<sup>682</sup> Conciliation can play a significant role in the promotion of peaceful dispute settlement, especially in the resolution of fishery disputes.<sup>683</sup>

This dissertation does not intend to suggest that binding adjudication mechanisms are no longer significant. Compulsory procedures still have essential roles under the UNCLOS dispute settlement system. Non-binding mechanisms, similarly, account for the peaceful settlement of fisheries disputes. To date, there is only one case resorting to conciliation pursuant to UNCLOS and the case involves maritime boundary delimitation.<sup>684</sup> The analysis illustrates that conciliation allows for an acceptable structure for settling disputes despite the fact that conciliation receives little emphasis. With the compulsory institution of certain type of disputes and the assistance of ITLOS, the mechanism has seen promising and positive developments.<sup>685</sup>

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<sup>682</sup> *Id.* at 122.

<sup>683</sup> See e.g., Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 73 (1996); McDorman, *supra* note 680, at 78.

<sup>684</sup> The first and only conciliation case is Timor-Leste initiating compulsory conciliation proceedings against Australia. But the case was initiated under Article 298 and Annex V of the UNCLOS. See generally Robin Churchill, *Dispute Settlement in the Law of the Sea: Survey for 2018*, 34 INT'L J. MARINE & COASTAL L. 539 (Nov. 2019); Peter Tzeng, *The Peaceful Non-Settlement of Disputes: Article 4 of CMATS in Timor-Leste v Australia*, 18 MELB. J. INT'L L. 349 (2017).

<sup>685</sup> See MERRILLS, *supra* note 87, at 186.

### 3. Advisory Opinions and Judicial Activism

A remarkable result of the Case No. 21 *SRFC Advisory Opinion* is that the case confirmed the advisory jurisdiction of ITLOS on “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.” The interpretation opens the way for the Tribunal to render advisory opinions despite the fact that UNCLOS and the Statute of ITLOS have no express regulations on jurisdiction.<sup>686</sup> The interpretation corresponds to the Rules of the Tribunal, which gives the Tribunal competence in giving an advisory opinion on a legal question if an international agreement related to the purposes of UNCLOS specifically provides for the submission to the Tribunal. With more international agreements emerging to fill the gap of UNCLOS, the conferral provision embedded in the international agreement provides a channel for the Tribunal to settle any disputes concerning the interpretation or application of the agreement.

The expansion of the Tribunal’s discretion underlines its role in interpreting regulations and settling disputes. As Article 21 of the Statute of ITLOS stands parallel to Article 288 of UNCLOS, which grants the Tribunal jurisdiction, the Tribunal may, in its discretion, provide advisory opinions on issues requested by the parties based on Article 21. Besides, the Tribunal also encompasses broad subject matter jurisdiction. Article 21 of the Statute of ITLOS grants jurisdiction for “all matters,” rather than all disputes, specifically provided for in any other agreement. The wording choice reveals that the scope of subject matter jurisdiction is broader than merely disputes.<sup>687</sup> The Tribunal in *SRFC Advisory Opinion* held the same view and found that the

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<sup>686</sup> José Luís Jesus, *The Tribunal’s Jurisprudence and Its Contribution to the Rule of Law*, in *THE CONTRIBUTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA TO THE RULE OF LAW: 1996-2016*, 29, 43 (2016).

<sup>687</sup> P. CHANDRASEKHARA RAO & PHILIPPE GAUTIER, *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW, PRACTICE AND PROCEDURE* ¶ 3.210 (2018).

“matters” depend substantially on the content conferred by the agreement.<sup>688</sup> In addition to the wide range of jurisdiction, another characteristic of advisory opinions is that the decisions have no legal binding force. Without mandatory adjudication, parties in dispute have more incentive to seek legal opinion by seeking an advisory opinion jointly.

The reasoning in the *SRFC Advisory Opinion* suggests that the advisory function may be utilized as a mechanism to provide guidance and ease conflicts between States since the mechanism has greater flexibility and the Tribunal obtains reliance from States. Some scholars maintain that requesting an advisory opinion from ITLOS on a specific legal question may become “a bargaining chip in a negotiation.”<sup>689</sup> Such opinion seems to exaggerate the advisory function. Instead, advisory opinions can serve as an alternative method for States seeking reliable but non-binding third-party input on particular legal issues.<sup>690</sup> This mechanism avoids onerous procedures and resorts to ITLOS, which is composed of a full court and follows its rules of procedures, such as public hearings and accepting other States and international organizations to submit their statements.

Advisory opinions can be a useful mechanism to solve complex and novel environmental problems in circumstances where States are unwilling to risk binding adjudication but fall into gridlock in negotiation. For example, proposing an MPA in the convention area under a RFMO framework may cause legal issues that involve multilevel controversies. In situations involving disputes between RFMOs and UNCLOS, for example, an advisory opinion from ITLOS may be

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<sup>688</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 58.

<sup>689</sup> Becker, *supra* note 624, at 858.

<sup>690</sup> See Rüdiger Wolfrum, *The Tenth Anniversary of the International Tribunal for the Law of the Sea*, 3 ROMANIAN J. INT’L L. 72, 76–77 (2006); Tuerk, *supra* note 362, at 206–7; RAO & GAUTIER, *supra* note 687, ¶ 5.019.

an appropriate resort for guidance. When parties are unable to escape the loop of unending negotiations, they may seek resolution from ITLOS without incurring a binding judicial settlement. The mechanism may also be promising in addressing novel environmental issues. For instance, the Tribunal may issue an advisory opinion on a legal question leading States to mitigate challenges from climate change to fisheries if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion. Climate change has a negative impact on marine environments, and the phenomenon is associated with the depletion of fish resources. As each marine environment connects as a whole, it is foreseeable that more problems will occur if a single State adopts newer technology or a new scientific approach to address the impacts of climate change on fisheries. Advisory opinions present an amicable dispute settlement mechanism that promote the development of international law for the future.

## Chapter 4. The Missing Subject in the Settlement of Disputes: Fishing Entities

Substantial norms, stringent compliance, and effective dispute settlement mechanisms lay the foundation for achieving marine sustainability. Judicial practices and legal analysis explained in the previous chapter show that third-party mechanisms perform a leading role in achieving marine sustainability and contribute more generally to the development of international law. Also, the compliance of parties in disputes—their acceptance on the settlement of the dispute and willingness for further cooperation on fisheries conservation and management—determines the effectiveness of the dispute settlement mechanism. However, this research finds that marine sustainability cannot be achieved without incorporating fishing entities into the UNCLOS system, especially those who have large fishing capacities on the high seas. The continued uncertainty regarding the status of fishing entities in connection with dispute settlement systems may lead to a lack of accountability and the ineffective settlement of disputes.

As discussed in the introduction, the concept of “fishing entities” is known for accommodating Taiwan in the normative regimes on fishing.<sup>691</sup> The concept has been used to bypass political strains over the international legal status of Taiwan and integrate Taiwan in the international community to tackle marine environmental problems even though it cannot be a State Party to UNCLOS. At the time when international environmental laws were increasing, the concept became an alternative but viable option to subject Taiwan to international fisheries laws. As previously discussed, the term initially appeared in the FSA in 1995 and was soon adopted by

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<sup>691</sup> See David H. Anderson, *The Straddling Stocks Agreement of 1995: An Initial Assessment*, 45 INT’L & COMP. L.Q. 463, 468 (1996); Djalal, *supra* note 52, at 119; VICUÑA, *supra* note 184, at 212–13.

several RFMOs. By participating under the status of fishing entities, Taiwan is able to make commitments to conduct responsible fishing activities and cooperate with other States to combat IUU fishing. Over twenty years of practice have demonstrated that States take on various responsibilities to comply with conservation and management measures, depending on a State's role as either a coastal State, flag State, or port State. Fishing entities are no different. However, in conditions where any dispute arises concerning the interpretation or application of an international agreement or breach of responsibilities, States are entitled to institute legal proceedings to protect their interests and seek an explanation. In contrast, it is unclear whether fishing entities are eligible to seek legal judgment on any dispute concerning the interpretation or application of an international agreement. Provisions are further silent on legal remedies of contraventions that involves fishing entities. Unable to evaluate the accountability of fishing entities, the role of dispute settlement mechanisms in promoting marine sustainability remains doubtful. Since excluding fishing entities from the dispute settlement system may lead to underlying problems, this research studies the standing of fishing entities in the settlement of fishing disputes.

This chapter begins by reviewing normative rules which oblige fishing entities to comply with conservation and management measures. Fishing entities whose vessels fish on the high seas were given access to participate in the normative system during the blooming of international instruments in the 1990s.<sup>692</sup> However, these norms provide ambiguous rules on the attributions of fishing entities and their access to dispute settlement mechanisms. Next, this chapter points out underlying challenges presented when fishing entities become involved in fishery disputes. In the

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<sup>692</sup> See generally Djalal, *supra* note 52, at 117–21.

following section, the research analyzes dispute settlement provisions regarding fishing entities by comparing procedures applicable to States with distinct dispute categories to fishing entities and explores suitable means for resolving disputes. Finally, this research proposes solutions on the settlement of disputes that are suitable for fishing entities from the perspective of promoting marine sustainability.

## **I. The Compliance of Conservation and Management Measures by Fishing Entities**

### **A. Domestic Laws in Taiwan**

Taiwan claims 200 nm EEZ outwardly from the baseline of the territorial sea under the Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China.<sup>693</sup> This Law responds to UNCLOS and requires that any undertaking of exploration, exploitation, conservation, or management of living or non-living resources in the EEZ or on the continental shelf of Taiwan shall observe its related laws and regulations.<sup>694</sup> In addition, this law grants enforcement jurisdiction to national defense, police, customs, or other authorized agencies, which may implement hot pursuit, boarding, and inspection against vessels that are suspected of engaging

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<sup>693</sup> Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China, *available at* <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000010>.

<sup>694</sup> Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China art. 6: For the undertaking of exploration, exploitation, conservation, or management of living or non-living resources in the exclusive economic zone or on the continental shelf of the Republic of China, an application for permissions shall be made in accordance with related laws and regulations of the Republic of China.

in any activity violating laws and regulations in the EEZ of Taiwan.<sup>695</sup> The authorized agencies may arrest the suspected person and detain the vessel and equipment thus instituting legal proceedings.

The primary legal source for the conservation and management of marine living resources is the Fisheries Act.<sup>696</sup> The Act covers all fishing and fisheries-related activities, including catching, cultivating aquatic organisms, fish processing, transportation, and marketing.<sup>697</sup> The law authorizes competent authorities to promulgate regulations on the restriction or prohibition of fishery matters for resources management and sets out penalties for violations. For distant water fishing, the Act for Distant Water Fisheries supplements the Fisheries Act and is the primary source that governs any Taiwanese fishing vessels fishing in the high seas or waters under the national jurisdiction of other countries.<sup>698</sup> The Act for Distant Water Fisheries was enacted to ensure the conservation of marine fisheries resources and promote sustainable fishing, and it therefore establishes certain measures to deter IUU fishing and improve traceability of catches and fisheries

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<sup>695</sup> Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China art. 16: Where the authorities of national defense, police, customs or other authorized agencies of the Republic of China consider that a person or an object, which is in its exclusive economic zone or on its continental shelf, is engaged in any activity violating laws and regulations of the Republic of China, such authorities may engage in hot pursuit, boarding, and inspection. When necessary, the aforementioned authorities may expel or arrest the suspected person, or detain the vessels, aircraft, equipment, or other articles belonging to the suspected person, and institute legal proceedings.

<sup>696</sup> Fisheries Act, available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=M0050001>.

<sup>697</sup> Fisheries Act art. 3.

<sup>698</sup> Act for Distant Water Fisheries art. 2, available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=M0050051>. Art. 2: Matters related to distant water fisheries shall be governed by this Act. Matters not stipulated in this Act shall be governed by the Fisheries Act.

products.<sup>699</sup> This Act encompasses the issuing of distant water fisheries permits, the management of distant water fisheries, and the implementation of development plans and penalty provisions. Among these, the permit and management regulations are the core of the Act.<sup>700</sup> These provisions establish qualifications for fishing vessels and requirements for conducting monitor, control, and surveillance measures such as vessel monitoring systems and electronic logbook systems. In addition, the Act transforms international agreements into domestic laws. For example, Article 10(1) of the Act obliges Taiwanese fishing vessels to comply with internationally accepted conservation and management measures and international standards for fishing on the high seas.<sup>701</sup> The competent authority shall, following Article 10(2), prescribe regulations on fisheries matters to conform to obligations from international agreements.<sup>702</sup>

The Act for Distant Water Fisheries authorized the enactment of relevant laws and regulations on a wide range of fisheries matters, including fish stocks, fish grounds, and other issues. Most of the regulations were promulgated in response to measures adopted by RFMOs; for

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<sup>699</sup> *Id.* art. 1.

<sup>700</sup> *Id.* arts. 6-29.

<sup>701</sup> *Id.* art. 10(1).

<sup>702</sup> *Id.* art. 10(2): Fisheries matters with respect to the conservation and management measures and international standards for fishing on the high seas include: (1) Fishing areas and periods; and prohibited fishing areas and periods; (2) Fishing gears, methods, and mitigation measures for bycatch; (3) Restriction(s) or prohibition(s) on catch species; (4) Limit on or quota of catch quantities; (5) Filling in and submission of logbooks and catch reports; (6) Marking of fishing vessels and fishing gears, and reporting of vessels positions; (7) Disposal of catches; (8) Designation and management of ports for landing or transshipping; (9) Observation or inspection of fishing vessels operation; (10) Issuance of catch certificate documents; (11) Open and transparent management of data related to fishing vessels and fishing; and (12) Other matters concerning the management of fishing vessels operation.

instance, the Regulations for Fishing Vessels Conducting Southern Bluefin Tuna Fishery are codified in response to the conservation and management measures of CCSBT.<sup>703</sup> In accordance with the Regulations for Fishing Vessels Conducting Southern Bluefin Tuna Fishery, the competent authority can issue ordinances and determine catch limit for each vessel based on the total quota of Southern Bluefin Tuna distributed annually by the CCSBT.<sup>704</sup>

## **B. Obligations from International Agreements**

Empirically, there are three ways for an RFMO to have a fishing entity participate in an international agreement.<sup>705</sup> WCPFC, SPRFMO, and NPFC attached an annex specifically for fishing entities, allowing any fishing entity whose vessels fish for highly migratory fish stocks in the convention area to agree to be bound by the Agreement by submitting a written instrument delivered to the depositary.<sup>706</sup> IATTC and SIOFA adopted an Article within their agreement,

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<sup>703</sup> Regulations for Fishing Vessels Conducting Southern Bluefin Tuna Fishery, *available at* <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=M0050058>.

<sup>704</sup> *Gonggao Yi Bai Ling Jiu Niandu Nanfang Heiwei Niandu Zong Yuhuo Pei E, Ge Zuoye Zunie Chuanshu, Dan Chuan Pei E Ji Yuhuo Fan Guo Xiaoshou Zu Yuchuan Yun Fan Guonei Xiaoshou Shuliang* (公告一百零九年度南方黑鮪年度總漁獲配額、各作業組別船數、單船配額及漁獲返國銷售組漁船運返國內銷售數量), FISHERIES AGENCY, COUNCIL OF AGRICULTURE, EXECUTIVE YUAN, (TAIWAN, ROC), <https://www.fa.gov.tw/cht/Announce/content.aspx?id=708&chk=1806fc37-db4e-43b6-92db-a551bd18c40d&param=pn%3D1> (last visited Apr. 20, 2020).

<sup>705</sup> *See generally* Ho, *supra* note 122, at 133–48 (providing detailed narratives and analysis of Taiwan’s participation in several RFMOs).

<sup>706</sup> WCPFC Annex I; SPRFMO Annex IV; NPFC Annex.

providing that any fishing entity may express its firm commitment to abide by the Convention.<sup>707</sup> CCSBT, unlike others, adopted a resolution to establish an Extended Committee and an Extended Scientific Committee so that fishing entities may participate in the Commission.<sup>708</sup> Accordingly, Taiwan is unable to participate as a Contracting Party, but it may become a member of the commission indirectly. As to ICCAT and IOTC, in which Taiwan is not able to participate under a fishing entity status, ICCAT adopted a recommendation for Taiwan to join as a cooperating non-contracting party,<sup>709</sup> and IOTC invites Taiwan to join as an invited expert.<sup>710</sup>

The rights and obligations of Taiwan as a fishing entity vary with each RFMO.<sup>711</sup> Except for administrative matters, Taiwan has the same obligations as other Member States regarding

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<sup>707</sup> IATTC art. XXVIII; SIOFA art. 15. However, the participation process of Taiwan in IATTC is slightly different from that in SIOFA. IATTC art. XXVIII requires both steps by submitting a written commitment and signing an instrument in accordance with a resolution adopted by the commission. Therefore, according to Resolution on the Participation of a Fishing Entity in the IATTC Antigua Convention, Taiwan participated in IATTC under the name Chinese Taipei. IATTC, *Resolution on the Participation of a Fishing Entity in the Antigua Convention*, available at [https://www.iattc.org/PDFFiles/IATTC-Instruments/\\_English/IATTC\\_Participation%20of%20fishing%20entity.pdf](https://www.iattc.org/PDFFiles/IATTC-Instruments/_English/IATTC_Participation%20of%20fishing%20entity.pdf).

<sup>708</sup> CCSBT, *Resolution to Establish an Extended Commission and an Extended Scientific Committee and Rules of Procedure of the Extended Commission for the observation of southern Bluefin Tuna*, available at [https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs\\_english/basic\\_documents/the%20Extended%20Commission.pdf](https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs_english/basic_documents/the%20Extended%20Commission.pdf).

<sup>709</sup> [03-20] Recommendation by ICCAT on Criteria for Attaining the Status of Cooperating Non-Contracting Party, Entity or Fishing Entity in ICCAT, available at <https://www.iccat.int/Documents/Recs/compendiopdf-e/2003-20-e.pdf>.

<sup>710</sup> Ho, *supra* note 122, at 144.

<sup>711</sup> RFMOs have adopted different ways to incorporate Taiwan into the organization. The process of Taiwan's participation and its rights and obligations within the commission depends on the legal structure, the negotiation

conservation and management of marine living resources since it agreed to be bound by the relevant agreements. Recognizing UNCLOS and the FSA as their paramount instruments, RFMOs have developed conservation and management measures based on the framework established by the FSA. These RFMOs have the same ultimate goal—to ensure the long-term and sustainable use of fish stocks through effective implementation of the agreements.<sup>712</sup> The RFMOs succeeded in implementing the general principles of the FSA, including determining measures based on the best scientific evidence available, applying the precautionary approach, protecting biodiversity in the marine environment, and taking measures to prevent IUU fishing.<sup>713</sup> Although Taiwan is unable to become a party to the FSA, these RFMOs—and, by extension, Taiwan—have essentially embodied the principles and measures set forth in the FSA.<sup>714</sup>

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process, and, most importantly, the members within the negotiating groups of that agreement. *See* Scanlon, *supra* note 48, at 38.

<sup>712</sup> WCPFC art. 2; IATTC art. II; SPRFMO art. 2; NPFC art. 2; CCSBT art. 3; and SIOFA art. 2.

<sup>713</sup> FSA art. 5; WCPFC art. 5; IATTC arts. IV & VII; SPRFMO art. 3; NPFC art. 3; and SIOFA art. 4.

<sup>714</sup> CCSBT came into force on May 20, 1994, which predated the adoption of the FSA in 1995. Therefore, the general principles enumerated in the FSA may not be seen in the CCSBT Convention. Nevertheless, CCSBT has adopted several conservation and management measures in accordance with Article 8(3)(b) of CCSBT Convention to respond to the FSA. CCSBT Convention Article 8(3)(b) states that “the Commission may, if necessary, decide upon other additional measures.” The Commission of CCSBT also considered incorporating principles and standards of the FSA into its Convention and discussed this issue in its strategic plan. *See Strategic Plan for the Commission for the Conservation of Southern Bluefin Tuna 2015-2020*, [https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs\\_english/operational\\_resolutions/CCSBT\\_Strategic\\_Plan.pdf](https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/docs_english/operational_resolutions/CCSBT_Strategic_Plan.pdf) (last visited Apr. 28, 2020).

In general, the obligations of Taiwan under these RFMOs contain duties to cooperate, obligations of members of the commission, compliance and enforcement duties, flag State duties, and port State duties. The duty to cooperate is the overarching obligations necessary to carry out conservation and management measures as a member of these RFMOs. Such obligation extends to various matters. For instance, members must adopt compatible measures with respect to specific stocks within their national jurisdictions.<sup>715</sup> They are also obliged to cooperate regarding scientific research, such as data collection, compilation, and exchange.<sup>716</sup> Next, the obligations of members of the commission require each member to implement provisions and measures pursuant to the agreements and keep the commission informed by, for example, providing annual data and information.<sup>717</sup> Additionally, compliance and enforcement duties are critical to the effectiveness of conservation and management measures.<sup>718</sup> Each member of the commission must enforce the provisions of the agreement; if a member notices violations of the measures, the member has a duty to notify both the flag State and the commission promptly and take appropriate actions in accordance with its laws and regulations. The compliance and enforcement measures may include monitoring, using a control and surveillance system, boarding and inspection, investigating, and initiating judicial proceedings. Fourth, duties of the flag State imply that each member whose

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<sup>715</sup> WCPFC art. 8; IATTC art. V; SPRFMO art. 4; NPFC art. 3(j); and CCSBT art. 15(4).

<sup>716</sup> WCPFC art. 13; IATTC art. VII; SPRFMO art. 23; NPFC art. 16; CCSBT art. 8; and SIOFA art. 10.

<sup>717</sup> WCPFC art. 23; IATTC art. XVIII; SPRFMO art. 24; NPFC art. 7; CCSBT art. 5; and SIOFA art. 10.

<sup>718</sup> WCPFC arts. 25-27; IATTC arts. XVIII & XIX; SPRFMO art. 27; NPFC art. 17; CCSBT art. 5(1); and SIOFA art. 10; *see also* TORE HENRIKSEN ET AL., *LAW AND POLITICS IN OCEAN GOVERNANCE: THE UN FISH STOCKS AGREEMENT AND REGIONAL FISHERIES MANAGEMENT REGIMES* 45–57 (2006).

vessels fish in the convention area must ensure these vessels do not engage in IUU fishing.<sup>719</sup> The flag State must ensure the vessels conform to license, permit, or authorization rules by the competent authorities. Lastly, port State duties require a port State to conduct effective measures in its ports or offshore terminals when fishing vessels dock.<sup>720</sup> The measures may include document inspections, fishing gear, and catch quantity inspections. Although some RFMOs have specified certain exceptions regarding initiating port State measures,<sup>721</sup> Taiwan is still able to implement port-related conservation and management measures according to the agreement.

## II. Conflicts involving Fishing Entities

In the fisheries arena, a dispute means a “disagreement on a point of law or fact, a conflict of legal views or of interests.”<sup>722</sup> To date, a fishery dispute involving a fishing entity has never been submitted to an international court or tribunal for resolution, likely due in part to Taiwan’s uncertain legal status. However, this does not mean that Taiwan is not likely to be involved in fisheries disputes. Conversely, as Taiwan exercises sovereign rights in its EEZ and acts as an active

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<sup>719</sup> WCPFC arts.24; IATTC arts. XX & XXI; SPRFMO art. 25; NPFC art. 13; and SIOFA art. 11.

<sup>720</sup> WCPFC arts. 27; SPRFMO art. 26; NPFC art. 15; and SIOFA art. 15.

<sup>721</sup> NPFC art. 15 states that “Article 13 and Article 14, paragraphs 2 and 3 apply *mutatis mutandis* to any fishing entity that has expressed its firm commitment in accordance with the Annex.” In addition, the wording of Article 26 of SPRFMO differentiates “Contracting Party” and “member of the Commission” regarding port State duties. As a fishing entity is not a Contracting Party to the Convention, only provisions that refer to members of the Commission are applicable.

<sup>722</sup> *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30); *SBT*, Order, *supra* note 38, ¶ 44.

flag State, disputes inevitably occur. This section collects incidences as evidence to manifest the importance of accountability of fishing entities.

### A. Alleged Illegal Fishing

The IUU Fishing Index, created by the Global Initiative Against Transnational Organized Crime, ranks Taiwan as the second-worst IUU fishing State.<sup>723</sup> The EU also placed the yellow card warning on Taiwan, indicating that it considers Taiwan to be uncooperative in combating IUU fishing and thereby forcing Taiwan to take active actions, including law reformation and enforcement. Despite the recent rescindment of the yellow card warning from the EU,<sup>724</sup> the Taiwanese government continues to strive to eliminate its notorious reputation for IUU fishing.

According to the list of penalties for violations of the Act for Distant Water Fisheries compiled by Fisheries Agency in Taiwan, 101 violations occurred in 2018,<sup>725</sup> and 93 violations

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<sup>723</sup> *IUU Fishing Index*, GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANIZED CRIME, <https://globalinitiative.net/iuu-fishing-index/> (last visited Apr. 28, 2020).

<sup>724</sup> *Illegal Fishing: EU Lifts Taiwan's Yellow Card*, EC, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_3397](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3397) (last visited Apr. 28, 2020) (last visited Apr. 28, 2020).

<sup>725</sup> *Daji IUU Yuye, 107 Nian Yuanyang Yuye Tiaoli Weigui Chufen Mingdan* (打擊 IUU 漁業，107 年遠洋漁業條例違規處分名單，行政院農業委員會漁業署), FISHERIES AGENCY, COUNCIL OF AGRICULTURE, EXECUTIVE YUAN, (TAIWAN, ROC), <https://www.fa.gov.tw/cht/PolicyIUU/content.aspx?id=23&chk=c7505057-78c3-4186-91fd-5d0fd70d8e5d&param=pn%3d1> (last visited Apr. 28, 2020).

occurred in 2019.<sup>726</sup> The majority of these violations were unauthorized employment of foreign crews.<sup>727</sup> Thirty infractions were regarded as severe infringements, which may include entering other States' EEZs and fishing without authorization; landing catches in-port without authorization of the competent authority; misreporting on the E-logbook system; leaving ports without installing Vessel Monitoring System (VMS), and avoiding boarding and inspection on the high seas.<sup>728</sup> The most common serious infringements are misreporting on the E-Logbook system, and in some cases possessing banned shark species on board.<sup>729</sup> The most significant penalty resulting from a serious infringement was for conducting distant water fishing without authorization, which was fined up to NT\$16.89 million in accordance with the Act for Distant Water Fisheries.<sup>730</sup>

Foreign fishing vessels, on the other hand, also engage in illegal fishing within Taiwan's EEZ. According to the statistics of illegal trespass fishing reported by Coast Guard Administration,<sup>731</sup> more than 1,000 cases committed illegal trespass fishing annually before 2014.

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<sup>726</sup> *Daji IUU Yuye, 108 Nian Yuanyang Yuye Tiaoli Weigui Chufen Mingdan* (打擊 IUU 漁業，108 年遠洋漁業條例違規處分名單), FISHERIES AGENCY, COUNCIL OF AGRICULTURE, EXECUTIVE YUAN, (TAIWAN, ROC), <https://www.fa.gov.tw/cht/PolicyIUU/content.aspx?id=24&chk=7a738fd3-7dd8-4c9b-a342-d132f2071b96&param=pn%3d1> (last visited Apr. 28, 2020).

<sup>727</sup> *Id.*

<sup>728</sup> *Id.*

<sup>729</sup> *Id.*

<sup>730</sup> The fishing vessel, Da Man Fa (CT4-2614), flying the flag of Taiwan and registered in Kaohsiung City, Taiwan, was fined for NT\$16.89 million for conducting distant water fishing without authorization. *See id.*

<sup>731</sup> *The Statistics of Banning about Illegal Trespass Fishing*, <https://www.cga.gov.tw/GipOpen/wSite/public/Attachment/f1586769567461.pdf> (last visited Apr. 28, 2020).

In 2019, there were 429 cases of illegal trespass fishing, involving 1,192 foreign vessels.<sup>732</sup> Among these vessels, 1,084 are flying the flag of China, and 108 are foreign vessels other than China. The local Taiwanese news reported one of the incidents.<sup>733</sup> A fishing vessel flying the flag of Vietnam was followed in hot pursuit by the Coast Guard of Taiwan as the vessel was witnessed conducting illegal fishing within Taiwan's EEZ. These fishing vessels entering the national jurisdiction zone and fishing without approval were subject to detention or expulsion.

## **B. Issues Related to Conservation and Management**

Taiwan and States opposite have overlapping EEZs and, therefore, often experiences issues related to the conservation and management of marine living resources between the States. Additionally, Taiwan is located near the convergence of the Kuroshio current, a warm ocean current flowing along the eastern side of Taiwan, and the Oyashio current, a cold subarctic ocean

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<sup>732</sup> The Coast Guard Administration defines illegal trespass fishing as foreign vessels violate certain domestic laws and enter national waters without approval to catch aquatic animals and plants or fishing. The domestic laws include the Act Governing Relations between the People of the Taiwan Area and the Mainland Area, the Law on the Territorial Sea and the Contiguous Zone of the Republic of China, the Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of China, and the Fisheries Act. *See Explanation of Terminologies in Business Performance*, [https://www.cga.gov.tw/GipOpen/wSite/public/Data/f1467181506960.pdf?ab=b&idPath=600\\_604\\_664](https://www.cga.gov.tw/GipOpen/wSite/public/Data/f1467181506960.pdf?ab=b&idPath=600_604_664) (last visited Apr. 28, 2020).

<sup>733</sup> Yuenan Yuchuan Touzhua Taiwan Jingji Haiyu 40 Zhi Weiyu Haixun 26 Xiaoshi Zhui 150 Li Tuohui Gang (越南漁船偷抓台灣經濟海域 40 隻鮪魚 海巡 26 小時追 150 哩拖回港), ETTODAY XIN WEN YUN (ETODAY 新聞雲) (Oct. 4, 2019), *available at* <https://www.ettoday.net/news/20191004/1549718.htm#ixzz6L3vjC4YA> (last visited Apr. 29, 2020).

current that flows south.<sup>734</sup> Taiwan's location, at a spot where two currents meet, is nutrient rich and therefore a productive and essential fishing ground in the Western Pacific.<sup>735</sup> Figure 8 shows the distribution and frequency of Taiwanese fishing vessels having conflicts with Japanese authorities before the Taiwan-Japan Fisheries Agreement was concluded in 2013. The conflicts took place more frequently in areas where high commercial value stocks, such as bluefin tuna and yellowfin tuna, can be caught. Since Japan, PRC, and Taiwan all claim 200 nm EEZ, competition for fisheries resources remains one of the most frequent controversies among them.<sup>736</sup>

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<sup>734</sup> Akihiko Yatsu et al., *Climate Forcing and the Kuroshio/Oyashio Ecosystem*, 70 ICES J. MARINE SCI. 922, 924 (2013).

<sup>735</sup> See generally *Id.* at 922–33; Louis S. L. Teh et. al., *Status, Trends, and the Future of Fisheries in the East and South China Seas*, 27(1) FISHERIES CENTRE RESEARCH REPORTS, <https://open.library.ubc.ca/cIRcle/collections/facultyresearchandpublications/52383/items/1.0379884>.

<sup>736</sup> Japan adjusted its domestic regulations with respect to maritime zones after the ratification of the LOS Convention in 1994. It enacted the Law on the Exclusive Economic Zone and the Continental Shelf in 1996 and proclaimed 200 nm EEZ. PRC also proclaimed 200 nm EEZ in accordance with the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, adopted on June 26, 1998; see Yann-Huei Song & Zou Keyuan, *Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States*, 31 OCEAN DEV. & INT'L L. 303, 311 (2000).

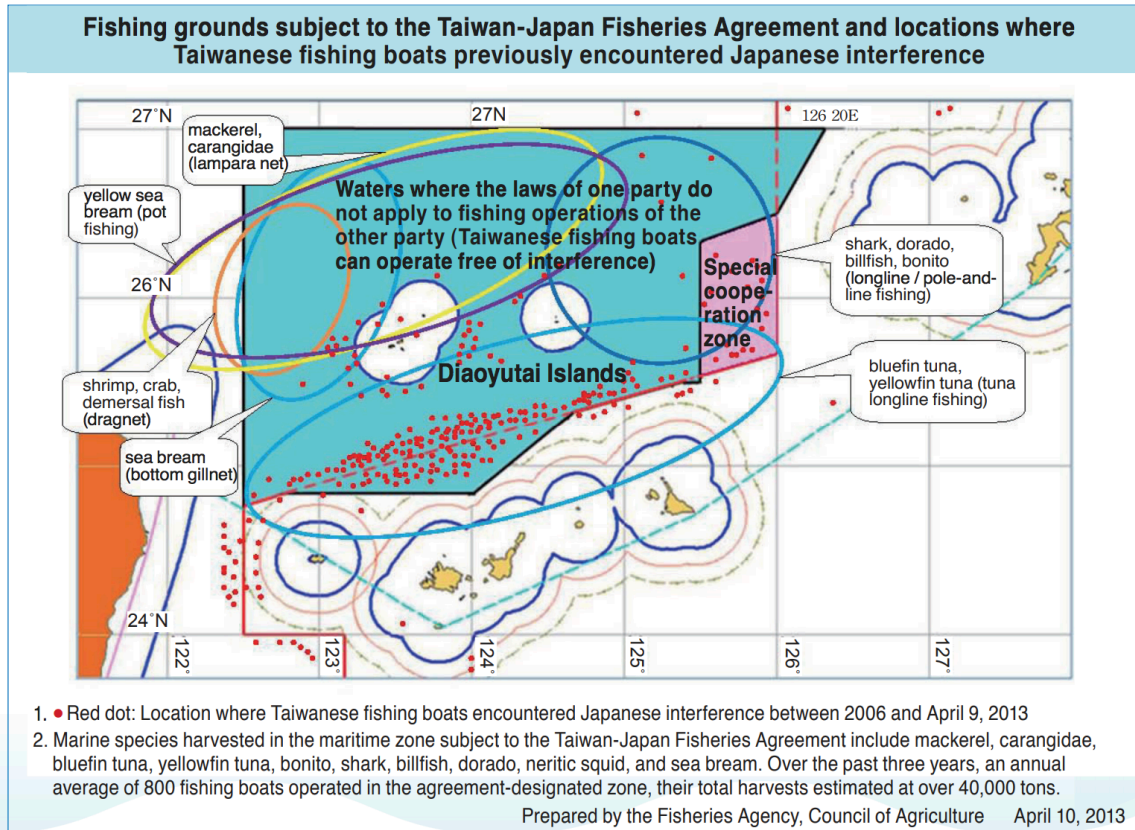


Figure 8 *Fishing Grounds subject to the Taiwan-Japan Fisheries Agreement and Locations where Taiwanese Fishing Boats Previously Encountered Japanese Interference*<sup>737</sup>

### C. Disputes Involving RFMOs

Per public documents from the RFMOs that Taiwan has joined, there are no recorded disputes between fishing entities and an RFMO.<sup>738</sup> Such information is not widely available to the public, but some published reports on conservation and management measures give insight into

<sup>737</sup> *The Taiwan-Japan Fisheries Agreement—Embodying the Ideals and Spirit of the East China Sea Peace Initiative*, [https://www.mofa.gov.tw/Upload/WebArchive/979/The%20Taiwan-Japan%20Fisheries%20Agreement%20\(illustrated%20pamphlet\).PDF](https://www.mofa.gov.tw/Upload/WebArchive/979/The%20Taiwan-Japan%20Fisheries%20Agreement%20(illustrated%20pamphlet).PDF) (last visited, Apr. 29, 2020).

<sup>738</sup> Documents not published on the official websites of RFMO are considered confidential.

the interactions between Taiwan as a fishing entity and RFMOs. For example, WCPFC compiles an IUU vessel list every year in accordance with CMM 2010-06 paragraph 19 and WCPFC13 decisions.<sup>739</sup> The IUU list for 2019 reported three vessels engaging in IUU fishing, and one of the vessel, registered in Chinese Taipei, violated the law of the Republic of the Marshall by fishing in the EEZ without permission.<sup>740</sup> Receiving the notification, Chinese Taipei clarified that the fishing license of the vessel had already been revoked in 2009 and presented information to trace the vessels. WCPFC finally confirmed that the fishing vessel had been deregistered by Chinese Taipei.<sup>741</sup>

Disputes concerning interpretation and application are also likely to take place in the process of identifying infractions. For example, according to IOTC Resolution 19/06, IOTC reports possible infractions against IOTC Resolutions by Large Scale Tuna Longline Vessels

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<sup>739</sup> The Conservation and Management Measures 2010-06 (CMM2010-16) is adopted by the Commission of WCPFC in accordance with Article 10 of the Convention. CMM2010-16 determined that, for the purpose of deterring IUU fishing, the Commission will identify vessels that engage in IUU fishing at each annual meeting by disclosing the vessels' information, such as name, flag State, etc. These identified vessels are subject to certain banning and restrictions, for instance, no authorization to land or transship, or prohibitions from commercial transactions. See *Conservation and Management Measure to Establish A List of Vessels Presumed to Have Carried out Illegal, Unreported and Unregulated Fishing Activities in the WCPO*, <https://www.wcpfc.int/doc/cmm-2010-06/conservation-and-management-measure-establish-list-vessels-presumed-have-carried-out> (last visited Apr. 30, 2020).

<sup>740</sup> *WCPFC IUU Vessel List for 2019*, WCPFC, <https://www.wcpfc.int/node/32676> (last visited Apr. 30, 2020).

<sup>741</sup> *Id.*

(LSTLVs) and carrier vessels.<sup>742</sup> These possible infractions, observed under the regional observer program, have seven categories.<sup>743</sup> In the report of 2019,<sup>744</sup> the comments, made by the observers, regarding possible infractions contain a variety of occasions. One of the occasions reported as infractions relating to authorization to fish (ATF) was that the observer was not able to determine whether the ATF was valid. The fishing vessel master showed the ATF both in Taiwanese and English. However, the English ATF was expired, and the Taiwanese ATF showed the date in Taiwanese format. The comments in the 2019 report all received replies from the competent agency in Taiwan. This instance reveals possible disagreements while implementing conservation and management measures adopted by RFMOs.

### **III. Analysis of Dispute Settlement Provisions regarding Fishing Entities**

#### **A. The Accountability of Fishing Entities**

The FSA opens the door for the inclusion of fishing entities in cooperative fisheries management systems. It strategically applies *mutatis mutandis* to other fishing entities whose

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<sup>742</sup> *Resolution 19/06 on Establishing A Programme for Transshipment by Large-Scale Fishing Vessels*, IOTC, <https://www.iotc.org/cmm/resolution-1906-establishing-programme-transshipment-large-scale-fishing-vessels> (last visited Apr. 30, 2020).

<sup>743</sup> These are (1) possible infractions relating to authorization to fish (ATF), (2) possible infractions relating to Vessel Monitoring System (VMS), (3) possible infractions relating to fishing logbooks, (4) possible infractions relating to marking of fishing vessels, (5) possible infractions relating to National Registration Number (NRN), (6) possible infractions relating to individual vessel quota, (7) possible infractions relating to misdeclaration Southern Bluefin Tuna.

<sup>744</sup> *Summary Report on Possible Infractions Observed under the Regional Observer Programme in 2018*, <https://www.iotc.org/IOTC-2019-CoC16-08bRev1en> (last visited Apr. 30, 2020).

vessels fish on the high seas so that the conservation measures can be applied de facto as extensively as possible to fishing activities in the relevant area.<sup>745</sup> The RFMOs, accordingly, incorporate fishing entities as members to cooperate fully with the organization and other members. The practices have successfully brought Taiwan into the regulatory system. Given the commitments made to the RFMOs, Taiwan, on the other hand, has obligations to abide by duties as a coastal State, a port State, and a flag State.

The legal order for the oceans has become more sophisticated and comprehensive as more substantial norms have been established, and adjudications continue to fill in the gaps. The opinion delivered in *SRFC Advisory Opinion* articulates that a flag State has a due diligence obligation “to deploy adequate means, to exercise best possible efforts, to do the utmost” to prevent IUU fishing by ships flying its flag.<sup>746</sup> In other words, a flag State is obliged to exercise effective jurisdiction and control in administrative, technical, and social matters on its vessels. Commonly seen measures include equipping vessel monitoring systems onboard, checking the validity of authorization or fishing license, and requiring precise reporting. From preventive measures to law enforcement procedures, a flag State has the responsibility to take proactive measures to ensure the long-term sustainability of marine living resources. As a flag State, Taiwan correspondingly has the same due diligence obligation.

The advisory opinion places liability on a flag State in cases where vessels flying its flag conduct IUU fishing. Failure to exercise effective control over fishing vessels may thus be

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<sup>745</sup> FSA arts. 1(3) & 17(3); *see also* VICUÑA, *supra* note 184, at 213.

<sup>746</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 129.

attributed to the flag State which will incur an internationally wrongful act.<sup>747</sup> The Tribunal clarifies that the violation by the vessels is not per se attributable to the flag State.<sup>748</sup> The liability is derived from that the flag State's failure to comply with its due diligence obligations concerning IUU fishing activities conducted by its vessels.

In addition, the due diligence obligation not only exists for flag States but also for coastal States.<sup>749</sup> The Tribunal is of the view that coastal States have a due diligence obligation to ensure the sustainable management of shared stocks.<sup>750</sup> Such an obligation requires the States concerned to consult with one another in good faith to adopt effective measures necessary to ensure the conservation and development of shared stocks.

Since a fishing entity shares the same responsibility for the management of fish stocks as coastal States and flag States, this research further studies the accountability for a fishing entity when it fails to comply with the law. Conversely, a fishing entity is entitled to initiate legal procedures to protect its interests when other States fail to meet their responsibilities. This section analyzes the personal jurisdiction of a fishing entity in dispute settlement mechanisms under UNCLOS.

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<sup>747</sup> *Id.* ¶¶ 141-150; see also Richard Barnes, *Flag States*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 304, 323 (Donald R. Rothwell et al. eds., 2015).

<sup>748</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 146.

<sup>749</sup> *Id.* ¶210.

<sup>750</sup> In *SRFC Advisory Opinion*, the Tribunal only consider it has jurisdiction to entertain the Request relates to the EEZs of the SRFC Member States. Since Article 63(2) of UNCLOS, which covers both EEZs and in an area beyond and adjacent to the zone, exceeds the jurisdiction of the Tribunal, the Tribunal only provides its advisory opinion in relates to the EEZs of the Member States.

## **B. Fishing Entities' Access to Dispute Settlement Mechanisms Under UNCLOS**

### **1. Dispute Settlement through ICJ**

Pursuant to Article 34(1) of the Statute of International Court of Justice, “[o]nly States may be parties in cases before the Court.”<sup>751</sup> This Article expressively excludes entities other than States from the application of the ICJ. Therefore, without statehood, Taiwan is unable to submit any dispute to the ICJ.

### **2. Dispute Settlement through ITLOS**

Whether fishing entities are entitled to submit disputes to ITLOS relates to jurisdiction *ratione personae* of ITLOS. This issue revolves around whether fishing entities may be classified as “entities other than States Parties” as Article 291(2) of UNCLOS<sup>752</sup> and Article 20(2) of the Statute of ITLOS in Annex VII provide access to “entities other than States Parties.”<sup>753</sup>

#### *Article 291 Access*

- 1. All the dispute settlement procedures specified in this Part shall be open to States Parties.*
- 2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties only as specifically provided for in this Convention.*

#### *Article 20 Access to the Tribunal*

- 1. The Tribunal shall be open to States Parties.*
- 2. The Tribunal shall be open to entities other than States Parties in any case*

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<sup>751</sup> Statute of ICJ art. 34(1).

<sup>752</sup> UNCLOS art. 291.

<sup>753</sup> Statute of ITLOS art. 20.

*expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.*

There are two categories of “entities other than States Parties” that may submit their disputes to the ITLOS:<sup>754</sup> (1) entities in Part XI that are specifically provided for in UNCLOS;<sup>755</sup> and (2) entities in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal.<sup>756</sup> The first category refers to “entities other than States Parties” but “specifically provided for in this Convention.” According to Article 291(2) of UNCLOS and Article 20(2) of the Statute of ITLOS, the entities here refer to the International Seabed Authority and other entities as mentioned in Part XI, section 5.<sup>757</sup> Such entities are decided by the Seabed Disputes Chamber and may include the International Seabed Authority, the Enterprise, state Enterprises, and natural

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<sup>754</sup> Some scholars have identified three categories of cases in which the Tribunal is open to entities other than States Parties, adding entities enumerated in UNCLOS Article 305(1)(c) to (f), i.e., self-governing associated States, territories with full internal self-governance, and international organizations in accordance with Annex IX. However, according to Article 1(2)(2) of UNCLOS, entities enumerated in UNCLOS Article 305(1)(b) to (f) are regarded as “States Parties.” Accordingly, these entities shall apply Article 291(1) rather than Article 291(2). Compare Rao, *supra* note 132, at 6–7, with Boyle, *supra* note 87, at 51–54, and Susanne Wasum-Rainer & Daniela Schlegel, *The UNCLOS Dispute Settlement System-Between Hamburg and the Hague*, 48 GERMAN Y.B. INT’L L. 187, 207–8 (2005).

<sup>755</sup> UNCLOS art. 291(2) & Statute of ITLOS art. 20(2).

<sup>756</sup> *Id.*

<sup>757</sup> Rüdiger Wolfrum, *The Settlement of Disputes Before the International Tribunal for the Law of the Sea*, 51 JAPANESE Y.B. INT’L L. 140, 144 (2008); MIGUEL GARCÍA GARCÍA-REVILLO, THE CONTENTIOUS AND ADVISORY JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 288 (2015).

or juridical personal.<sup>758</sup> The rationale behind the provision is that UNCLOS deals with a wide range of issues involving the oceans and the seas. For example, in resource exploitation, States Parties may have contractual arrangements with State enterprises and non-State entities.<sup>759</sup> Having enormous economic implications and the need to include non-States Parties, UNCLOS, as a compromised convention, creates the provision which provides access to the Tribunal and its Seabed Dispute Chamber to deal with related conflicts.<sup>760</sup> Therefore, UNCLOS Part XV establishes a distinguishing regime, and the Tribunal has expanded jurisdiction in dealing with the disputes. Dispute involving fishing entities, undoubtedly, do not conform to “cases expressly provided for in part XI.”

The other category in Article 20(2) of the Statute of ITLOS is “cases submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all Parties to that case.” The only limit set on the non-State entities’ access is that the agreement must confer jurisdiction on the Tribunal to hear the case.<sup>761</sup> Nevertheless, there are diverse interpretations concerning the meaning of “any other agreement” and the scope of the concept regarding entities other than States Parties. First, scholars disagree about whether there are any restrictions on the meaning of “any other agreement.” They question if the agreement should be limited to international agreements or whether private agreements may also qualify.<sup>762</sup> Some presume that the wording has no further qualification, so the meaning of “any other agreement” may be broad

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<sup>758</sup> UNCLOS art. 187.

<sup>759</sup> Rao, *supra* note 132, at 6; *see also* ADEDE, *supra* note 90, at 189–94; Nelson, *supra* note 89, at 57.

<sup>760</sup> *Id.*

<sup>761</sup> Wasum-Rainer & Schlegel, *supra* note 754, at 207–8; *see also* Wolfrum, *supra* note 757, at 144–45.

<sup>762</sup> *See generally* GARCÍA-REVILLO, *supra* note 757, at 289.

enough to encompass any agreements.<sup>763</sup> Others argue that the agreement must be an international agreement and related to the purpose of UNCLOS to be consistent with the preamble and Article 288 of UNCLOS.<sup>764</sup> This research examines the intended scope of “any other agreement” by applying the treaty interpretation approach codified in the Vienna Convention on the Law of Treaties (VCLT),<sup>765</sup> which reflects customary international law binding on all States.<sup>766</sup> VCLT Article 31 provides three primary means of treaty interpretation: ordinary meaning, context, and object and purpose.<sup>767</sup> The interpretative means are not hierarchical. Article 32, on the other hand, gives supplementary interpretation where the recourse to Article 31 “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.”<sup>768</sup> In ordinary meaning analysis, Article 20(2) of the Statute of ITLOS sets no qualification on its text. Compared to Article 288(2) of UNCLOS,<sup>769</sup> the Article expressly restricts the agreement that confers jurisdiction to a court or tribunal to “international agreement[s].” The contextual analysis also demonstrates that there is no intent to set restrictions on “any other agreement.” The wording

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<sup>763</sup> Boyle, *supra* note 87, at 53 (holding that “any other agreement” may even refer to a treaty that the parties to it do not have the capacity to conclude treaties.)

<sup>764</sup> See Mensah, *supra* note 133, at 321; Rao, *supra* note 132, at 7; GARCÍA-REVILLO, *supra* note 757, at 291.

<sup>765</sup> 1969 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

<sup>766</sup> MALCOLM N. SHAW, INTERNATIONAL LAW 933 (6th ed. 2008).

<sup>767</sup> VCLT art. 31(1): A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

<sup>768</sup> VCLT art. 32.

<sup>769</sup> UNCLOS art. 288(2): A court or tribunal referred to in Article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

the “any other agreement” appears in both Articles 20(2) and 21 of Statute of ITLOS. Article 21 of the Statute of ITLOS grants jurisdiction to the Tribunal, and it sets no qualification for the agreement that confers jurisdiction on the Tribunal.<sup>770</sup> The wording in Article 20(2) and 21 of Statute seems to intentionally leave the language ambiguous. Moreover, the Tribunal has expansive jurisdiction to deal with any dispute concerning the interpretation or application of UNCLOS,<sup>771</sup> any dispute submitted in accordance with an international agreement related to the purposes of UNCLOS,<sup>772</sup> and even all disputes and all applications submitted to it in accordance with UNCLOS.<sup>773</sup> Given the extensive jurisdiction and its flexibility, the Tribunal should apply less strict scrutiny in interpreting “any other agreement” when determining a case submitted to it pursuant to any other agreement conferring jurisdiction on the Tribunal.<sup>774</sup>

The second and the most crucial debate concerns how broadly to interpret the concept regarding “entities other than States Parties.” ITLOS has not yet dealt with a case submitted by entities other than States Parties except for the Council of the International Seabed Authority. Since

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<sup>770</sup> Statute of ITLOS art. 21: The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

<sup>771</sup> UNCLOS art. 288(1).

<sup>772</sup> UNCLOS art. 288(2):

<sup>773</sup> Statute of ITLOS art. 21.

<sup>774</sup> See John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT’L L.J. 109, 133 (1999); Thomas A Mensah, *The Competence of the International Tribunal for the Law of the Sea Outside the Framework of the Convention on the Law of the Sea*, 51 ZBORNIK PFZ 887, 882 (2001); Bernard H. Oxman, *Does the International Tribunal for the Law of the Sea Have Jurisdiction over Disputes with Taiwan?*, 2 TAIWAN INT’L L. Q. 205, 217–20 (2005).

there is no restriction on *ratione personae*, scholars have been inclined to provide a broader interpretation of “entities other than States Parties.” However, the object covered by the interpretation varies. Some argue that the Tribunal is open to a wide range of non-State entities, including international organizations and even non-governmental organizations.<sup>775</sup> Some consider the Tribunal to be open to international organizations only in certain circumstances, and States which are not parties to UNCLOS may fall within the scope.<sup>776</sup> Some scholars also hold that private commercial corporations may be included when the private corporation meets specific requirements.<sup>777</sup> Despite diverse views, scholars agree that the non-State entity must be a party to the agreement, and the agreement must confer jurisdiction on the Tribunal.

Undoubtedly, ITLOS is competent in dealing with both disputes regarding interpretation and application of UNCLOS and any dispute which confers jurisdiction by an international agreement related to the purposes of UNCLOS.<sup>778</sup> The drafting history also demonstrates that the drafter intended to give the Tribunal comprehensive competence, enabling the Tribunal to deal with disputes arising outside the UNCLOS or involving States which are not parties to UNCLOS.<sup>779</sup> The extensiveness of the Tribunal’s jurisdiction reflects on the regulations of jurisdiction *ratione personae* and *ratione materiae*.<sup>780</sup> The Statute in Annex VI enjoys the same

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<sup>775</sup> See Boyle, *supra* note 87, at 53; Nelson, *supra* note 89, at 57; Vukas, *supra* note 143, at 66.

<sup>776</sup> MERRILLS, *supra* note 87, at 193.

<sup>777</sup> See Mensah, *supra* note 134, at 321; Sicco Rah & Tilo Wallrabenstein, *The International Tribunal for the Law of the Sea and Its Future*, 21 OCEAN Y.B. 41, 64 (2007); Oxman, *supra* note 758, at 216.

<sup>778</sup> UNCLOS art. 288; Statute of ITLOS art. 21; *see also* Rah & Wallrabenstein, *supra* note 777, at 64.

<sup>779</sup> Mensah, *supra* note 774, at 878.

<sup>780</sup> See Vukas, *supra* note 143, at 68.

status as UNCLOS as the Annexes form an integral part of UNCLOS in accordance with the advisory opinion given by the Tribunal in *SRFC Advisory Opinion*.<sup>781</sup> Article 20(2) of Statute provides an independent legal source for granting non-State entities access to the Tribunal, so does Article 21 of Statute, which gives jurisdiction to the Tribunal.<sup>782</sup> Comparing Article 20(2) of Statute with Article 288(2) of UNCLOS, Article 288(2) states that a court or tribunal has jurisdiction over any dispute concerning the interpretation or application of an “international agreement” related to the purposes of UNCLOS. In contrast, Article 21 merely refers to “any other agreement.”<sup>783</sup> This wording suggests that the Tribunal’s jurisdiction should not be limited to international agreements, which confers jurisdiction to it to settle the dispute. If the case meets two specific requirements—an agreement conferring jurisdiction on the Tribunal and parties that have accepted the agreement—the parties are able to take advantage of the expertise of the Tribunal to settle their dispute.

A fishing entity may conform to the description of “entities other than States Parties.”<sup>784</sup> First, the Statute of ITLOS does not expressly exclude fishing entities from access to the Tribunal. Second, the Tribunal was created to deal with a wide range of disputes relating to the law of the sea, and one of its primary goals is to promote the peaceful settlement of disputes. The FSA applies the norms *mutatis mutandis* to other fishing entities whose vessels fish on the high seas because fishing entities, impliedly referring to Taiwan, have a large number of fishing vessels capturing on the high seas. Besides, Taiwan, under the status of the fishing entity, is also an active member of

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<sup>781</sup> UNCLOS art. 318; *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 52.

<sup>782</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 52.

<sup>783</sup> Statute of ITLOS art. 21.

<sup>784</sup> See Boyle, *supra* note 87, at 53; Rah & Wallrabenstein, *supra* note 777, at 65; Oxman, *supra* note 774, at 224–25.

RFMOs and engages in distant water fishing. As an active entity at sea, there is no reason to exclude Taiwan from recourse to the Tribunal. Finally, as for fishing entities, the debate over the entities' capacity to sign an international agreement may be less contradictory since Taiwan has participated in several RFMOs under the status of the fishing entity. Therefore, provided that an agreement confers jurisdiction on the Tribunal, a fishing entity is entitled to access to the Tribunal pursuant to Article 20(2) of the Statute.

### **3. Dispute Settlement through Annex VII Arbitral Tribunal or Annex VIII Special Arbitral Tribunal**

UNCLOS Annex VII does not set any restrictions on jurisdiction *ratione personae* regarding the access to an arbitral tribunal. Article 1 of Annex VII states that “[s]ubject to the provisions of Part XV, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute.”<sup>785</sup> Similarly, the special arbitral procedure provided in Annex VIII of UNCLOS only sets restrictions on subject matter jurisdiction, while there are no restrictions on parties' eligibility.<sup>786</sup> Scholars tend to adopt a narrow interpretation of the access to both the arbitral tribunal and the special arbitral tribunal.<sup>787</sup> Given the prerequisite—“subject to the provisions of Part XV” of UNCLOS—set forth in Article 1 of both Annexes, this research agrees with the scholars that instituting an arbitral tribunal and a special arbitral tribunal is limited to States Parties of UNCLOS.

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<sup>785</sup> Article 1 of Annex VII of UNCLOS.

<sup>786</sup> Article 1 of Annex VIII of UNCLOS. The subject-matter jurisdiction of Annex VIII special arbitration limits to four kinds of dispute (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping.

<sup>787</sup> See Vukas, *supra* note 143, at 66; CHURCHILL & LOWE, *supra* note 28, at 457.

Annex VII arbitral tribunals and Annex VIII special arbitral tribunals are one of the four means under compulsory procedures where States may choose to settle their disputes if they cannot reach a consensual settlement. Thus, the use of Annex VII arbitral tribunals and Annex VIII special arbitral tribunals are arguably confined to States Parties.

### **C. The Dispute Settlement Provisions within RFMOs**

Almost every RFMO in which Taiwan participates has adopted particular provisions for settling disputes involving fishing entities, except for IATTC. The procedures for the settlement of disputes involving fishing entities follow the same approach as UNCLOS Part XV, allowing parties in a dispute to choose a consensual means for dispute settlement. Parties in dispute, accordingly, should act in good faith to try to settle the disputes through the selected means. However, if parties in the dispute are unable to resolve the dispute through amicable means, a controversy may arise as to whether a judicial means is available to a fishing entity to resolve the lingering dispute.

Four RFMOs—WCPFC, SPRFMO, NPFC, and SIOFA—direct the dispute to be submitted to final and binding arbitration in accordance with the relevant rules of the Permanent Court of Arbitration (PCA) at the request of either party to the dispute.<sup>788</sup> PCA is an international organization established to facilitate arbitration that allows non-State entities to access arbitration. Since PCA emphasizes flexibility and party autonomy, the parties to a dispute may tailor procedural matters by consent, such as the selection of arbitrators and rules of procedures.<sup>789</sup> The

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<sup>788</sup> See generally Alexandre-Charles Kiss, *Environmental Disputes and the Permanent Court of Arbitration*, 16 HAGUE Y.B. INT'L L. 41 (2003).

<sup>789</sup> See generally *Permanent Court of Arbitration Arbitration Rules 2012*, available at <https://pca-cpa.org/wp-content/uploads/sites/6/2015/11/PCA-Arbitration-Rules-2012.pdf> (last visited May 2, 2020).

four RFMOs take advantage of the adaptability of PCA to settle fishing disputes between States and fishing entities. As regulated in the provisions,<sup>790</sup> the arbitration award is final and binding on parties in dispute.

CCSBT establishes an Extended Commission for accommodating fishing entities whose vessels flying its flag catch SBT in the convention area.<sup>791</sup> According to the Resolution on CCSBT Extended Commission, the member should resolve any dispute concerning interpretation or implementation of the Resolution on CCSBT Extended Commission by negotiation, inquiry, mediation, conciliation, arbitration, or other peaceful means agreed on by the parties to the dispute.<sup>792</sup> Unlike the RFMOs mentioned above, with recourse to final and binding arbitration, the Resolution on CCSBT Extended Commission does not provide any mandatory settlement procedures. As a result, parties in dispute should continue to seek an agreed upon means to resolve the dispute. Like disputes involving fishing entities' access to international courts or tribunals

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<sup>790</sup> WCPFC Annex I; SPRFMO Annex IV; NPFC Annex; and SIOFA art. 20(2).

<sup>791</sup> The Members of the Extended Commission are not necessarily Members of the CCSBT Commission.

<sup>792</sup> Resolution on CCSBT Extended Commission para. 2: The Extended Commission and the Extended Scientific Committee shall perform the same tasks as the Commission and the Scientific Committee including, but not limited to, deciding upon a total allowable catch and its allocation among the Members. All Members shall have equal voting rights. A regional economic integration organisation that is a Member shall have one vote and its member States shall have no right to vote in the Extended Commission<sup>2</sup>. The provisions of the Convention relating to the Commission and the Scientific Committee (Articles 6 to 9, except for 6.9 and 6.10) shall apply *mutatis mutandis* with regard to the Extended Commission and the Extended Scientific Committee. Any dispute concerning the interpretation or implementation of this Resolution, including the articles of the Convention specified in the Resolution, or the Exchange of Letters referred to in paragraph 6, shall be resolved by negotiation, inquiry, mediation, conciliation, arbitration or other peaceful means agreed by the parties to the dispute.

under UNCLOS system, this voluntary negotiation procedure lends itself to parties becoming stuck in an unending loop. The analysis suggests that a dispute should be submitted to ITLOS if the case meets specific requirements and an agreement confers jurisdiction on the Tribunal.

IATTC, unlike the other five RFMOs, has adopted a dispute settlement procedure that applies to all members of the Commission without distinguishing Parties and fishing entities under the Antigua Convention of IATTC.<sup>793</sup> Thus, fishing entities apply the same procedure as other Parties. According to Article XXV, “[t]he members of the Commission shall cooperate in order to prevent disputes.”<sup>794</sup> The settlement of disputes under IATTC requires members to consult with one or more members about any dispute related to the interpretation or application of the provisions of the Antigua Convention. Where the consultation fails to reach a solution, the members in question must consult among themselves and seek to settle their dispute through any peaceful means by consent.

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<sup>793</sup> According to the IATTC Antigua Convention, “parties” and “members of the Commission” have different meanings. The former means the States and the EU according to Article I(6), and the later, according to Article I(7), refers to the Parties and any fishing entity which has made a formal commitment to abide by the Convention.

<sup>794</sup> IATTC Antigua Convention art. XXV:

1. The members of the Commission shall cooperate in order to prevent disputes. Any member may consult with one or more members about any dispute related to the interpretation or application of the provisions of this Convention to reach a solution satisfactory to all as quickly as possible.
2. If a dispute is not settled through such consultation within a reasonable period, the members in question shall consult among themselves as soon as possible in order to settle the dispute through any peaceful means they may agree upon, in accordance with international law.

IATTC has established a mechanism for resolving technical disputes when members fail to resolve the dispute among themselves. If members of the Commission consider the dispute to be of a technical nature, Article XXV(3) suggests that the members may refer the dispute to a non-binding ad hoc expert panel constituted within the framework of the Commission.

	<i>Dispute Settlement Provisions Applicable to Parties</i>	<i>Dispute Settlement Provisions applicable to Fishing Entities</i>
<i>WCPFC</i>	<p><u>Article 31</u> The provisions relating to the settlement of disputes set out in Part VIII of the Agreement apply, mutatis mutandis, to any dispute between members of the Commission, whether or not they are also Parties to the Agreement.</p>	<p><u>Annex I</u> 3. If a dispute concerning the interpretation or application of this Convention involving a fishing entity cannot be settled by agreement between the parties to the dispute, the dispute shall, at the request of either party to the dispute, be submitted to final and binding arbitration in accordance with the relevant rules of the Permanent Court of Arbitration.</p>
<i>IATTC</i>	<p><u>Article XXV Settlement of Disputes</u> 1. The members of the Commission shall cooperate in order to prevent disputes. Any member may consult with one or more members about any dispute related to the interpretation or application of the provisions of this Convention to reach a solution satisfactory to all as quickly as possible. 2. If a dispute is not settled through such consultation within a reasonable period, the members in question shall consult among themselves as soon as possible in order to settle the dispute through any peaceful means they may agree upon, in accordance with international law. 3. In cases when two or more members of the Commission agree that they have a dispute of a technical nature, and they are unable to resolve the dispute among themselves, they may refer the dispute, by mutual consent, to a non-binding <i>ad hoc</i> expert panel constituted within the framework of the Commission in</p>	<p>(Same as <u>Article XXV Settlement of Disputes</u>)</p>

accordance with the procedures adopted for this purpose by the Commission. The panel shall confer with the members concerned and shall endeavor to resolve the dispute expeditiously without recourse to binding procedures for the settlement of disputes.

*CCSBT*

Article 16

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

*SPRFMO*

Article 34 SETTLEMENT OF DISPUTES

1 Contracting Parties shall cooperate in order to prevent disputes and shall use their best endeavours to resolve any disputes by amicable means which may include, where a dispute is of a technical nature, referring the dispute to an ad hoc expert panel.

2 In any case where a dispute is not resolved through the means set out in paragraph 1, the provisions relating to the settlement of disputes set out in Part VIII of the 1995 Agreement shall apply, mutatis mutandis, to any dispute between the Contracting Parties.

3 Paragraph 2 shall not affect the status of any Contracting Party in relation to the 1995 Agreement or the 1982 Convention.

(CCSBT Extended Commission)

2. Any dispute concerning the interpretation or implementation of this Resolution, including the Articles of the Convention specified in the Resolution, or the Exchange of Letters referred to in paragraph 6, shall be resolved by negotiation, inquiry, mediation, conciliation, arbitration or other peaceful means agreed by the parties to the dispute.

Annex IV

4 If a dispute involves a fishing entity which has expressed its commitment to be bound by the terms of this Convention in accordance with this Annex and cannot be settled by amicable means, the dispute shall, at the request of any party to the dispute, be submitted to final and binding arbitration in accordance with the relevant rules of the Permanent Court of Arbitration.

<i>NPFC</i>	<p><u>Article 19 Settlement of Disputes</u> The provisions relating to the settlement of disputes set out in Part VIII of the 1995 Agreement apply, <i>mutatis mutandis</i>, to any dispute between Contracting Parties, whether or not they are also Parties to the 1995 Agreement.</p>	<p><u>Annex</u> 4. If a dispute involves a fishing entity that has expressed its commitment to be bound by the terms of this Convention in accordance with this Annex and cannot be settled by amicable means, the dispute shall, at the request of any party to the dispute, be submitted to final and binding arbitration in accordance with the relevant rules of the Permanent Court of Arbitration.</p>
<i>SIOFA</i>	<p><u>Article 20 Interpretation and Settlement of Disputes</u> 1. Contracting Parties shall use their best endeavours to resolve their disputes by amicable means. At the request of any Contracting Party a dispute may be submitted for binding decision in accordance with the procedures for the settlement of disputes provided in Section II of Part XV of the 1982 Convention or, where the dispute concerns one or more straddling stocks, the procedures set out in Part VIII of the 1995 Agreement. The relevant part of the 1982 Convention and the 1995 Agreement shall apply whether or not the parties to the dispute are also parties to either of these instruments.</p>	<p><u>Article 20 Interpretation and Settlement of Disputes</u> 2. If a dispute involves a fishing entities which has expressed its commitment to be bound by the terms of this Agreement and cannot be settled by amicable means, the dispute shall, at the request of any party to the dispute, be submitted to final and binding arbitration in accordance with the relevant rules of the Permanent Court of Arbitration.</p>

Table 7 *Comparison of Dispute Settlement Provisions between Parties and Fishing Entities*

#### **IV. Solutions to Puzzles: Fishing Entities in the Dispute Settlement System**

Some RFMO international agreements have adopted dispute settlement provisions particularly for fishing entities but some RFMOs remain unclear on how fishing entities may access legally binding mechanisms. Parties in an RFMO may seek UNCLOS dispute settlement mechanisms for resolutions as UNCLOS “establishes a residual framework for treating such

disputes seriously.”<sup>795</sup> In contrast, those disputes involving fishing disputes within RFMOs are overlooked. Furthermore, outside the RFMO regime, Taiwan remains in a grey area within the international dispute settlement system. The lack of any analysis regarding the practices of fishing entities may cause underlying problems for fishing entities involved in a fishery dispute, especially in the case of Taiwan as a major fisheries producer. Moreover, if the UNCLOS framework does not adopt a consistent and effective regime, the international community may not be capable of tackling environmental issues in an integrated way.

This section focuses on four categories of fishing disputes and analyzes issues include whether fishing entities may apply to interim measures, how fishing disputes may be settled if fishing entities is one of the parties in dispute, and whether fishing entities are entitled to apply for advisory opinions.

#### **A. The Applicability of Interim Measures**

As discussed earlier, prompt release procedures and provisional measures are interim measures established in Article 292 and Article 290 of UNCLOS. A court or tribunal obtains jurisdiction, per Articles 292 and 290, to deal with the specific, yet urgent issues, submitted by States Parties prior to the final judgment. However, as expressly stated in the provisions, only States Parties of UNCLOS are entitled to request the procedures; non-States Parties and fishing entities are not included. Authoritative scholars argue that “the Tribunal would also have jurisdiction to entertain an application for prompt release in a dispute between two State which are not Parties to the Convention if they agreed to submit the dispute to the Tribunal, pursuant to

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<sup>795</sup> MERRILLS, *supra* note 87, at 204.

Article 21 of the Statute.”<sup>796</sup> This research then further inquiries into whether a court or tribunal has jurisdiction to hear the case submitted by a fishing entity.<sup>797</sup>

As analyzed, the ICJ has no personal jurisdiction over fishing entities as the Court only accepts cases submitted by States. For ITLOS, it may obtain jurisdiction in accordance with Article 20 and Article 21 of the Statute of ITLOS. The Tribunal is open to entities other than States Parties under certain conditions pursuant to Article 20 of Statute of ITLOS. If a case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal and the conferment is accepted by all the parties to that case, the Tribunal may have personal jurisdiction.

Next, Article 21 of Statute of ITLOS regulates jurisdiction *ratione materiae* of the Tribunal, which enables the Tribunal to adjudicate the case. Article 21 states that the Tribunal has jurisdiction on “all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”<sup>798</sup> Namely, the Tribunal is competent in dealing with three elements of subject-matters: (1) all disputes submitted to the Tribunal in accordance with the Convention, (2) all applications submitted to the Tribunal in accordance with the Convention, and (3) all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. Since categories one and two are applied in accordance with UNCLOS, the core issue of fishing entities’ applicability of interim measures lies in the third element.

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<sup>796</sup> P. CHANDRASEKHARA RAO & PHILIPPE GAUTIER, THE RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: A COMMENTARY 307 (2006).

<sup>797</sup> Cf Oxman, *supra* note 774, at 208 (holding that Article 292 of UNCLOS does not appear to provide a promising basis for jurisdiction over disputes to which Taiwan is a party.)

<sup>798</sup> Statute of ITLOS art. 21.

The Tribunal has provided some interpretation of the third element—all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal—in *SRFC Advisory Opinion*. Unlike other elements referring to “disputes,” the third element uses the language “all matters,” which is presumably intended to cover a broader scope of issues than merely “disputes.”<sup>799</sup> As a result, the Tribunal held that “all matters” includes providing advisory opinions. Assuming that the use of “all matters” was intentional and aimed at expanding the Tribunal’s competence, the element arguably includes disputes involving fishing entities and the prompt release procedure of vessels and crews and the application of provisional measures.

A vital requirement to establish the Tribunal’s jurisdiction is an agreement which confers jurisdiction on the Tribunal. Such an agreement is interconnected with Article 21 of the Statute and constitutes the substantive legal basis of the jurisdiction of the Tribunal.<sup>800</sup> The Statute alone does not confer jurisdiction on the Tribunal. Accordingly, an agreement that confers jurisdiction on the Tribunal would enable the Tribunal to deal with applications of prompt release and provisional measures that involve fishing entities. For cases involving fishing entities, submitting the applications should be deferential to the requirements respectively, as regulated in Article 292 and Article 290 of UNCLOS.

In terms of policy considerations, interim measures are significant mechanisms that reconcile humanitarian protection with the execution of domestic legal proceedings and preserve the marine environment. Prompt release procedure protects the flag State from excessive detentions by releasing its vessels and crews while securing the coastal State’s interest by posting

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<sup>799</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 56.

<sup>800</sup> *See Id.* ¶ 58.

a bond; provisional measures guard the respective rights of the parties to the dispute or prevent serious harm to the marine environment. The vessels flying the flag of a fishing entity conduct the same fishing activities at sea as other States. For example, vessels flying the flag of Taiwan and its crews have been detained and arrested by other States for violating their domestic laws. Foreign States' vessels, contrarily, may be detained by the authorities of Taiwan if they breach the laws and regulations of Taiwan, as is the case of the Vietnamese vessel. The practices demonstrate that these mechanisms are essential to fishing entities as well. As UNCLOS aims to underline the comprehensive scope of the dispute settlement procedure, the Tribunal may have jurisdiction in cases involving fishing entities.<sup>801</sup> Therefore, the measures ought to apply to fishing entities indiscriminately.

#### **B. The Substance of Fishing Disputes**

Resolutions to solve fisheries disputes involving fishing entities are distinct from those involving States. The foremost challenge in bringing a suit involving a fishing entity is determining the status of fishing entities before a court or tribunal. Beyond that, the challenge becomes how to interweave fishing entities into the legal web of world marine sustainability in terms of law compliances and legal dispute settlement. The method proposed should be more flexible and adaptable so that the international community, along with fishing entities, can achieve sustainable development of marine resources without discrepancy. Per the dispute categories observed in international fisheries cases, this research concerns marine sustainability and provides recommendations to solve the substance of fishing disputes involving fishing entities. As Taiwan

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<sup>801</sup> See Mensah, *supra* note 132, at 321.

is the only fishing entity under the international fisheries law regime, the proposed solutions to substantial fisheries disputes may adapt to Taiwan's situation.

### **1. Solutions to Alleged Illegal Fishing**

A coastal State has prescription and enforcement jurisdiction on alleged IUU fishing violations within its national zones. The coastal States' exclusive jurisdiction precludes the Tribunal's jurisdiction. The Tribunal may, however, order the prompt release of vessels and their crews as well as enforcing provisional measures. As a consequence, instead of considering the legality of fishing activities, the Tribunal deals with the allegation that the detaining State has not complied with the provisions of UNCLOS for the prompt release of the vessel and its crew upon the posting of a reasonable bond or other financial security. Besides, the Tribunal, in *M/V Saiga Case* and *M/V Virginia G Case*, held that bunkering of fishing vessels in the EEZ of a coastal State is also subject to that coastal State's jurisdiction. The Tribunal's decision confirms that a coastal State has the right to regulate all activities having a direct connection to fishing.

Taiwan has promulgated its laws on its maritime zones and established a 200nm EEZ. It may become a detaining State and detain and arrest a foreign vessel and its crew if the vessel violates Taiwanese laws or regulations. On the other hand, it may become subject to a detainee State if vessels flying its flag are detained by other States. If Taiwan is involved in disputes regarding the prompt release of a vessel or its crew upon the posting of a bond, Taiwan may resort to prompt release procedures. As discussed in the applicability of interim measures, Taiwan may submit the case in accordance with Article 21 of the Statute of ITLOS if an agreement between the parties confers jurisdiction on the Tribunal.

## 2. Issues Related to Conservation and Management Measures

Fishing entities may submit disputes related to conservation and management measures to judicial settlement. The analysis of jurisdiction *ratione personae* and *ratione materiae* explains that ITLOS provides a potential judicial mechanism to settle disputes involving fishing entities. Such jurisdiction is, however, subject to three conditions.<sup>802</sup> First, there must be an agreement between parties to the dispute. Debates exist among scholars over whether the agreement must be an international agreement, but a broader interpretation of the “any other agreement” is a tenable argument as the wording itself has no restrictions. Second, the agreement must confer jurisdiction on the Tribunal. Finally, the agreement conferring jurisdiction on the Tribunal must be accepted by all parties to that case. For fishing entities, resorting to the Tribunal may be a viable means to resolve the dispute, but the requirements to submit the case to ITLOS may make this method impracticable.

Arbitration presents an alternative means for parties in dispute to reach a final and binding adjudication if they fail to agree to submit the case to ITLOS. The PCA is a long-standing organization that provides services and relevant procedures for the parties. Additionally, parties in dispute may choose their preferred rules of procedure including the composition of the arbitrator, the proceedings of hearings, and the burden of cost. However, the case study analysis in Chapter 3 shows that States are hesitant to submit their disputes to adjudication that has a binding effect. Therefore, similar to the conclusion on fishing disputes between States, the most feasible means to settle conflicts between fishing entities and other States is conciliation. In conciliation, parties

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<sup>802</sup> See Chapter 4 (III)(B)(2).

have greater control over the procedure, and the report made by the Conciliation Commission is non-binding to the parties in dispute.

In practice, the establishment of the Taiwan-Japan Fisheries Agreement shows that the bilateral agreements are also a practicable method to resolve fishing disputes and reaching consensus on conservation and management measures.<sup>803</sup> Taiwan and Japan signed a fisheries agreement after seventeen fisheries talks over seventeen years.<sup>804</sup> According to the Agreement, the parties reached a consensus to improve conservation and management measures in the agreed area, which excludes disputed areas around Diaoyutai Islands.<sup>805</sup> Further, the parties agreed to establish an institutionalized mechanism—Taiwan-Japan Fisheries Committee—to conduct consultations on other issues regarding fishing grounds, bilateral fishery cooperation and the like.<sup>806</sup> The case study analysis in Chapter 3 also indicates that bilateral agreements are useful in settling disputes and reaching arrangements on fish stock management measures. In the *Swordfish Case*, Chile and the EC concluded a new Understanding and established a framework for further cooperation matters. The case is one of the two cases in which the Tribunal decided substantive fishing issues.

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<sup>803</sup> Kawashima Shin, *The Implications of the Japan-Taiwan Fisheries Agreement*, NIPPON.COM (June 05, 2013), <http://www.nippon.com/en/currents/d00081/> (last visited Aug. 11, 2020).

<sup>804</sup> *Republic of China (Taiwan) Signs Fisheries Agreement with Japan*, MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF CHINA (TAIWAN) (Apr. 15, 2013), [http://www.mofa.gov.tw/en/News\\_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=E80C25D078D837BB](http://www.mofa.gov.tw/en/News_Content.aspx?n=539A9A50A5F8AF9E&sms=37B41539382B84BA&s=E80C25D078D837BB) (last visited May 9, 2020).

<sup>805</sup> *Id.*

<sup>806</sup> Taiwan-Japan Fisheries Agreement art. 3, available at <https://www.mofa.gov.tw/cp.aspx?n=90BEE1D6497E4C58>.

### 3. Disputes involving RFMOs

According to the dispute settlement provisions adopted in each RFMO, any peaceful means agreed by the parties to the dispute must be the first and foremost means for the settlement of disputes.<sup>807</sup> The Parties in dispute must consult among themselves and submit the dispute to the means of their own choice. If the parties are unable to reach a settlement, WCPFC, SPRFMO, NPFC, and SIOFA designate that the dispute, at the request of either party, should be submitted to final and binding arbitration in accordance with the relevant rules of the PCA.

Under Resolution of CCSBT Extended Commission, the parties to a dispute should resolve their disagreement by an agreed upon means, and a compulsory procedure is not designated. Similarly, provisions in IATTC require parties in dispute to conduct consultation first and, where no settlement has been reached in a reasonable period, they are obliged to continue to seek an agreed means to settle the dispute. Accordingly, the situation of disputes involving fishing entities under RFMOs may resemble that in *SBT Arbitration*—parties in dispute are likely to fall into a loop of seeking peaceful means. Although this procedure seems convoluted and problematic, parties in dispute may agree to final and binding arbitration using dispute settlement provisions in WCPFC, SPRFMO, NPFC, and SIOFA. Recourse to such arbitration avoids the ongoing requirement to continue seeking an agreed means to settle.

#### C. Advisory Opinions

The Tribunal's interpretation regarding *SRFC Advisory Opinion* seems to open the door to the possibility of the Tribunal to resolve legal matters regarding fishing entities. The *SRFC*

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<sup>807</sup> WCPFC art. 31 & Annex I; IATTC art. XXV; CCSBT art. 16; Resolution on CCSBT Extended Commission para 2; SPRFMO art. 34 & Annex IV; NPFC art. 19 & Annex; SIOFA art. 20.

*Advisory Opinion* confirmed that ITLOS has advisory jurisdiction on “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”<sup>808</sup> The Tribunal’s jurisdiction is not solely based on Article 21 of the Statute of ITLOS. The critical element for establishing advisory jurisdiction is the conferment of jurisdiction by “other agreement.”<sup>809</sup> The request for the advisory opinion must also meet the prerequisites stated in Article 138 of Rules of the Tribunal, including: (1) the agreement should be an international agreement related to the purposes UNCLOS specifically enumerates for submission to the Tribunal for an advisory opinion, (2) the question presented for an advisory opinion must be a legal one, and (3) the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above.<sup>810</sup>

In *SRFC Advisory Opinion*, an RFMO sought to ask questions regarding the obligations and liability of its member States on conducting IUU fishing and sustainable management of specific stocks. The Convention of the RFMO authorized the Tribunal to give an advisory opinion, and the Tribunal, under its discretionary power, considered the questions to be clear enough to enable it to deliver such an opinion. The opinion, then, provided clarifications sought by the RFMO.

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<sup>808</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 58.

<sup>809</sup> *Id.*

<sup>810</sup> Rules of the Tribunal art. 138:

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.
3. The Tribunal shall apply *mutatis mutandis* Articles 130 to 137.

By the same token, if an RFMO encounters legal questions that involve fishing entities, seeking an advisory opinion by the Tribunal may be a proper solution. The questions need not necessarily be confined to the interpretation or application of any specific provision of the Convention of an RFMO. The Tribunal may issue opinions on these questions if these questions have a sufficient connection with the purposes and principles of the Convention of the RFMO.<sup>811</sup>

The issuance of advisory opinions is merely a non-binding mechanism for the Tribunal to interpret and explain legal matters requested by the parties. However, advisory opinions are significant because the judicial institution, ITLOS, is introduced to give an explanatory opinion on a legal issue that has not yet developed into a legal conflict.<sup>812</sup> Thus, the Tribunal may *de jure* have jurisdiction on legal matters regarding fishing entities provided that an agreement confers jurisdiction on the Tribunal.

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<sup>811</sup> *SRFC Advisory Opinion*, Advisory Opinion, *supra* note 39, ¶ 68.

<sup>812</sup> Wolfrum, *supra* note 757, at 162.

## **Chapter 5. Conclusion: The Role of Dispute Settlement Mechanisms towards Sustainable Oceans**

UNCLOS has achieved remarkable success in devising a complex yet comprehensive system of dispute settlement mechanisms since its adoption in 1982. The stability of this system relies not only on its impartiality and justice but also on its evolving character so that it is able to respond to the changing world and consider future generations. Now that the scarcity of fishery resources is a foregone conclusion, it is essential for courts and tribunals to consider sustainability in the peaceful settlement of disputes and determining the rights and obligations of States in dispute.

This dissertation is devoted to analyzing how the UNCLOS dispute settlement system meets the challenges associated with depletion of fisheries resources while maintaining a peaceful order for the oceans. The research examines the function of the UNCLOS dispute settlement regime for the purpose of marine sustainability from two facets: studying the fisheries-related adjudications and inspecting the inclusiveness of the UNCLOS dispute settlement system in terms of fishing entities. The former reveals to what extent the law of the sea regime has been able to incorporate sustainability in fisheries disputes and its contribution to the development of the law of the sea. The latter clarifies the position of fishing entities and prevents underlying conflicts within the UNCLOS system. This research attempts to reach three goals that contribute to the legal order of the oceans: (1) upholding marine sustainability within UNCLOS dispute settlement mechanisms, (2) positioning fishing entities within the UNCLOS dispute settlement regime, and (3) enforcing compliance with the rule of law by strengthening the function of UNCLOS dispute settlement mechanisms.

## **A. Upholding Marine Sustainability within UNCLOS Dispute Settlement Mechanisms**

The research begins with an inquiry into whether existing dispute settlement mechanisms have resolved fishing disputes by analyzing nineteen cases that have been submitted to adjudicatory institutions under the UNCLOS framework. Among these cases, four categories of fisheries disputes have arisen: (1) alleged illegal fishing, (2) conflicts derived from fishing-related activities, (3) issues related to conservation and management measures, and (4) disputes involving RFMOs. Statistics show that, among the nineteen cases, the majority are applications to ITLOS for interim measures, accounting for ten cases. Apart from interim measures, three cases were removed before the Tribunal could hear the case, and one case lacked jurisdiction. As a result, the Tribunal only reached the substance of the fishing dispute in five cases.

One of the reasons that very few adjudications are submitted to a court or tribunal is the limitations on compulsory jurisdiction pursuant to UNCLOS Article 297(3). This Article precludes the applicability of compulsory jurisdiction procedures. A coastal State has exclusive jurisdiction in its EEZ and is not obliged to accept the submission to any dispute relating to its sovereign rights with respect to the living resources. Hence, the residual jurisdiction for the Tribunal is the interim measures vested in Article 292 and Article 290 of UNCLOS. A court or tribunal may decide the question regarding the prompt release of vessels and crews upon the posting of a reasonable bond or prescribing any provisional measures which it considers appropriate.

In the ten cases regarding interim measures, eight cases concerned prompt release procedures, and the remaining two involved provisional measures. The Tribunal made great use of provisional measures, vested in Article 290 of UNCLOS. In response to the application by Australia and New Zealand, the Tribunal in Case Nos. 3&4 considered it urgent and appropriate

to order provisional measures to cease Japan's unilateral experimental fishing for SBT. The Tribunal exercised its discretion in determining appropriate provisional measures by further restricting the catch of SBT and requiring both parties to resume negotiation. The Tribunal expressed its opinion in that case that parties should "act with prudence and caution" to ensure the effectiveness of the conservation measures. This case is a remarkable example of the Tribunal's ability to have a proactive affect in preventing serious harm to the marine environment without prejudicing the arbitral tribunal's decision on the merits. Provisional measures can be a suitable mechanism to be applied to the protection and preservation of the marine environment.

With regard to prompt release of vessels and crews, the Tribunal has developed criteria in determining the reasonableness of a bond posted upon the detainee State for the release of vessels and crews. However, the final amount fixed by the Tribunal is asymmetric to the penalties of the contraventions. The Tribunal underestimates the efforts of coastal States on conservation. In considering the reasonableness of such a bond, the Tribunal assesses the overall balance of the amount, form, and nature of a bond or security. The case law has further enumerated factors for evaluating the reasonableness of a bond, including: (1) the gravity of the alleged offenses, (2) the penalties imposed or imposable under the laws of the detaining State, (3) the value of the detained vessel, its fuel, lubricants, and fishing equipment, (4) the value of the cargo seized, (5) the amount of the bond imposed by the detaining State and its form, and (6) the fishery relationship between detaining and detainee States. Although this is a non-exhaustive list, the Tribunal merely notes, without seriously considering, coastal States' concerns for conservation. The comparison of the amounts set by coastal States and the Tribunal shows the distinct differences the two entities use to evaluate reasonableness. It is unclear how the Tribunal weighs these factors in assessing the reasonableness of a bond, but it is evident that the coastal States' efforts on conservation and

management of fish stocks are not reflected in the Tribunal's assessment of the gravity of alleged offenses and the amount of bonds imposed.

This study argues that the efforts of coastal States on fish stocks conservation should be reflected in the determination of the reasonableness of bonds. The Tribunal has acknowledged that IUU fishing constitutes a grave offense, which is deferential to the coastal State. Furthermore, the purpose of prompt release procedures is to balance the interests between the detaining State and the detainee State. If the coastal State detains the vessel and its crew for violating illegal fishing, the Tribunal should approve the coastal State's contribution to combating IUU fishing rather than downplay the amount of a bond set by the coastal State and decide that the amount is unreasonable. Hence, the amount of a bond set for prompt release of a vessel and its crew should be proportionate to the gravity of the alleged offenses. Ultimately, the Tribunal should consider sustainability and conservation in the assessment of a bond.

Regarding conflicts derived from fishing-related activities, the Tribunal in the *Saiga* and *M/V Virginia G* cases has confirmed that any activities in support of, or in preparation of, fishing is subject to a coastal States exclusive jurisdiction. Those fishing-related activities include any indirect fishing operations, such as bunkering of fishing vessels, provisioning of personnel, and transshipping. The interpretation clarifies a coastal State's exclusive jurisdiction and make the meaning of fishing-related activities consistent with other international fisheries agreements. The coastal State must then observe its obligations for the conservation and management of fish stocks. On the other hand, since a coastal State has exclusive jurisdiction on fishing-related activities in its EEZ, the Tribunal has residual jurisdiction to implement interim measures, similar to the Tribunal's role in alleged illegal fishing disputes.

The research endeavors to identify appropriate dispute settlement mechanisms, which will help to settle fishing disputes and contribute to sustainable development under the UNCLOS regime. Among the five cases that have proceeded to the merits, two cases deal with bunkering, which falls under the fishing-related discussion above, one case concerns the application of the advisory opinion, and only two fishing disputes have settled substantial issues regarding the interpretation and application of conservation rules and measures. In *Mauritius v. U.K.*, the Tribunal held that it has jurisdiction on the legality of the MPA because the establishment of the MPA was not solely a measure related to fisheries. However, since both parties signed the Undertakings, the Tribunal had to consider the commitment by the Undertakings and ruled that the UK's establishment of the MPA was incompatible with the UNCLOS. The *Whaling* case concerns the conservation and utilization of whale resources, and the ICJ examined the legality of Japan's Whale Research Program under Article VIII of ICRW. The Court scrutinized the details of the whaling permit including the research objectives, period, and area, and found that the target sample sizes were not reasonable to achieve the program's objectives. The Court then concluded that the research program was not permissible under Article VIII of the ICRW.

Inferring appropriate means for the settlement of fishing disputes from the two cases may be a stretch; however, for fish stocks conservation and management, cooperation is critical to achieving the sustainable use of marine living resources. The duty to cooperate forms the foundation for the conservation and management of specific fish stocks as well as the establishment of RFMOs. The obligation to cooperate usually becomes the core of fishing disputes. For instance, the *Atlanto-Scandian Herring Arbitration* case is related to the obligation to agree upon measures to coordinate and ensure the conservation and development of herring stocks. The Faroe Islands disagreed on the catch quota set by the EU. The other example is the *Swordfish* case,

in which Chile argued according to Articles 116 to 119 of UNCLOS that the EC failed to cooperate concerning the conservation of swordfish stocks in the Southeastern Pacific.

The *Atlanto-Scandian Herring Arbitration* and the *Swordfish* cases were settled by negotiation in the end, but, at the time of their submission, the Tribunal assisted and provided a forum for consultation following its rules of procedure. Additionally, submitting the case to ITLOS adds pressure on the parties and facilitates communication between them. Although judicial mechanisms provide judgments on the merits of the disputes, the submitted cases show that parties in dispute are more likely to reach a consensus on issues regarding conservation and management matters and promote long-term practices with the assistance of a court or tribunal.

This research argues that conciliation can be a viable alternative for the settlement of fishing disputes under the UNCLOS system. First, the function of conciliation is underestimated, but it is given a mandatory role in UNCLOS under certain conditions. Article 297(3) of UNCLOS excludes the application of compulsory procedures on fisheries disputes related to a coastal State's sovereign rights. However, if the coastal State has manifestly failed to comply or arbitrarily refused to carry out its conservation obligations, any party to the dispute may request compulsory conciliation if no settlement has been reached by their chosen means. The coastal State, thus, is obliged to join the conciliation procedure. The conciliation results are non-binding upon the parties unless they have agreed to accept the report by the conciliation commission. Second, UNCLOS Annex V provides a framework for the conciliation procedure. Parties in dispute may agree to submit their dispute concerning the interpretation or application of UNCLOS to voluntary conciliation procedure. Pursuant to Annex V of UNCLOS, the parties to a dispute may select conciliators to form a Conciliation Commission. The list of conciliators is drawn up and maintained by an authoritative organ, the Secretary-General of the United Nations. Similar to

arbitration, the Conciliation Committee conducts independent decision-making by hearing the parties and examining their claims and objections. The only difference is that the Conciliation Committee makes a non-binding report to the parties to reach an amicable settlement. Since the conciliation procedure adapts to the needs of the parties, the recommendations may consider multiple aspects, including both parties' interests, duties to cooperate, and environmental concerns. Accordingly, the conciliation mechanism, with more flexibility and less adverse risk, may attract parties in disputes to reach settlements with consideration of environmental issues.

Lastly, since ITLOS has advisory jurisdiction, advisory opinions can be a useful mechanism in dealing with complex and novel environmental problems. Pursuant to Article 21 of the Statute of ITLOS, ITLOS obtains jurisdiction to deliver advisory opinions if an agreement confers jurisdiction on the Tribunal. In *SRFC Advisory Opinion*, the Tribunal explained that the flag State has due diligence obligations to carry out conservation and management measures. If the flag State fails to take necessary measures in combating IUU fishing activities, it constitutes a breach of its due diligence obligation and may be attributed to an international wrongful act. Comparably, the flag State does not necessarily violate the due diligence obligations if vessels flying its flag conduct IUU fishing. This advisory opinion is advantageous in addressing IUU fishing problems. Broadly speaking, utilizing advisory opinion has some advantages. The mechanism has greater flexibility in terms of the institution of the proceeding and the legal questions requested. Moreover, the opinions are delivered by law of the sea experts. These opinions are non-binding but serve to clarify contentions. This research argues that the flexible character of advisory opinions can be used effectively in addressing complicated issues with an eye toward sustainable development.

## **B. Positioning Fishing Entities within the UNCLOS Dispute Settlement System**

The FSA introduces Taiwan into the international regulatory regime under a uniquely coined concept, “fishing entity.” The concept was created to bypass intricate political issues regarding the international legal status of Taiwan. Since the international community agreed that Taiwan cannot be left outside the international fisheries law regime, “fishing entity” has become a term used for Taiwan’s ability to participate in several international organizations. Currently, Taiwan has become a member of six RFMOs, and a Cooperating non-Contracting Party and an invited expert to other RFMOs under the status of a fishing entity.

The legal obligations of Taiwan concerning the sustainable development of marine living resources derive from two primary sources, the domestic laws of Taiwan and the treaty obligations of international organizations. The compliance obligation for Taiwan is relatively clear: it has responsibilities, the same as other States, to ensure the long-term and sustainable use of fish stocks. It also abides by several principles, such as duties to cooperate and the adoption of the precautionary approach, to preserve the marine environment and combat IUU fishing. The measures expand to every segment related to fishing, for example, the authorization of fishing license and the fishing logbook report.

In contrast to compliance measures, there remain uncertainties regarding the settlement of fishing disputes involving fishing entities. Four RFMOs—WCPFC, SPRFMO, NPFC, and SIOFA—direct arbitration as the final and binding mechanism if a dispute concerning the interpretation or application of the convention involving a fishing entity cannot be settled by consensual means. However, CCSBT and IATTC require parties in dispute to continue seeking a consensual means to settle their dispute. It remains unclear whether such cases may be submitted to a court or tribunal for binding resolutions. Without effective dispute settlement mechanisms to

resolve fishing disputes, it is likely that parties in dispute will not reach any consensus through third-party intervention. Rather, the parties are likely to remain in gridlock thus hindering the implementation of conservation and management measures.

To build a robust and comprehensive UNCLOS framework, this research explores possible dispute resolution options for Taiwan as a fishing entity to settle disputes with other States. The ICJ has no personal jurisdiction over fishing entities as the Court limits its access to States Parties. UNCLOS Annex VII arbitral tribunal and Annex VIII special arbitral tribunal are arguably confined to States Parties as well. With respect to ITLOS, ITLOS grants access to “entities other than States Parties.” Few scholars have analyzed whether a fishing entity conforms to the meaning of “entities other than States Parties” and may submit the case pursuant to any other agreement conferring jurisdiction on the Tribunal according to Article 20(2) of the Statute of ITLOS. Thus, the Tribunal’s interpretation in *SRFC Advisory Opinion* and the scholarly analysis on the jurisdiction of ITLOS serve as the references for this research’s propositions.

This research argues that ITLOS should open to fishing entities if a case is submitted pursuant to an agreement conferring jurisdiction on the Tribunal. The purpose of ITLOS is to deal with a wide variety of issues related to oceans. The ordinary meaning of “entities other than States Parties” does not contain any express limitations. The contextual analysis also supports the idea that the Statute of ITLOS is intended to grant broader jurisdiction on ITLOS to hear a wide array of matters. Moreover, ITLOS accepted SRFO, a regional fisheries organization, to submit its legal questions to the Tribunal, which reflects the flexible function of ITLOS. As a result, there is leeway for interpretation regarding the fishing entities’ access to ITLOS.

Incorporating fishing entities into the UNCLOS dispute settlement system is critical to maintain the legal order of the oceans. The means for fishing entities to settle fishing disputes are

almost identical to States Parties, but fishing entities should apply the mechanisms in a more resourceful way. A fishing entity may submit an application for interim measures but only under circumstances where the case is submitted pursuant to any other agreement conferring jurisdiction on the Tribunal. The request for an ITLOS advisory opinion has a similar restriction, in which an agreement confers jurisdiction on the Tribunal to deal with disputes involving a fishing entity. As to controversies regarding the substance of fishing disputes, ITLOS may have competence in dealing with cases involving fishing entities. Nevertheless, the reasons that prevent States Parties from submitting the dispute to judicial mechanisms may become aggravated in disputes involving a fishing entity as such disputes are politically sensitive. Therefore, non-binding conciliation or seeking a bilateral agreement to settle the disagreements may be a feasible mechanism.

### **C. Enhancing Compliance by Strengthening the UNCLOS Dispute Settlement System**

In analyzing the four categories of fishing disputes, this research found that these disputes are associated with lack of compliance with domestic and international laws. In cases of alleged illegal fishing, the detainee States were accused of vessels flying the flag violating the coastal States' laws by unauthorized fishing or misreporting. Regarding fishing-related activities, the arrested vessels conducted smuggling and unauthorized refueling in the coastal States' EEZs. For issues related to conservation and management measures, the parties in dispute disagreed on the measures to conserve or manage specific fish stocks and accused the other party of failing to cooperate. As to disputes involving RFMOs, the parties in dispute bring the case to the third-party mechanisms to interpret measures adopted by regional fisheries organizations. By submitting disputes to dispute settlement mechanisms, the States seek enforcement to safeguard their rights and the commitments made to conserve the ocean.

Compliance and dispute settlement mechanisms are interconnected. Non-compliance leads to the institution of dispute settlement procedures; conversely, dispute settlement mechanisms ensure the compliance of obligations and measures established by international or regional agreements. The purpose of dispute settlement mechanisms is not only the resolution of disputes regarding the interpretation and application of UNCLOS and relevant agreements, but also to stabilize the normative regime, enhance compliance, ensure parties' responsibilities, and contribute to the sustainable ocean governance system. The legal order relies on both compliance with established laws and dispute settlement mechanisms to construct a stable and predictable system. Therefore, under the aim of achieving marine sustainability, studying the role of dispute settlement mechanisms helps to enhance compliance to conservation and management measures of marine living resources and peaceful uses of oceans and seas.

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