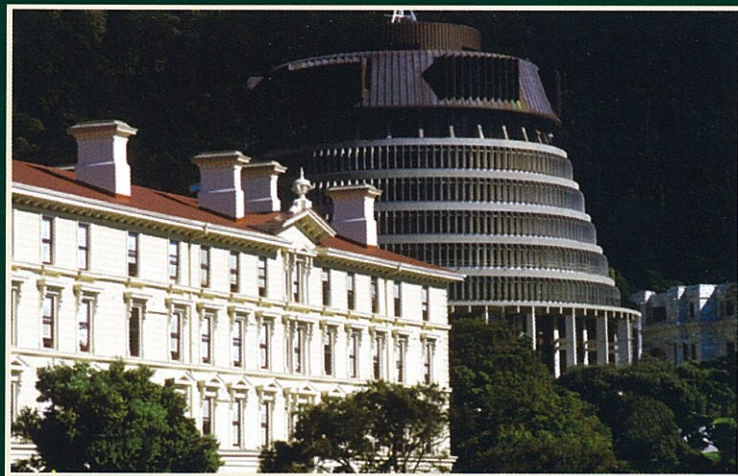


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*Te Whare Wānanga
o te Upoko o te Ika a Māui*



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STRENGTHENING REGIONAL FISHERIES MANAGEMENT – AN ANALYSIS OF THE DUTY TO COOPERATE

*Elise Anne Clark**

A network of regional fisheries management organisations exists on the high seas to provide for the long-term sustainability of global fish stocks. Today, these organisations face significant challenges to their ability to conserve and manage high seas resources as a result of insufficient political will to conserve global fish stocks. As the need for improved flag state compliance grows ever clearer, this article returns to the framework provisions of the United Nations Convention on the Law of the Sea to reconsider the application of one of its most important, but underexplored provisions: the duty of states to cooperate. This article analyses the interrelationship between the duty and regional fisheries management organisations and proposes that clarification of the duty to cooperate would in turn strengthen regional fisheries management. The article submits that clarification of the duty to cooperate, via a "model case" or advisory opinion before the International Tribunal for the Law of the Sea, could potentially improve compliance rates with the conservation measures of regional fisheries management organisations. This article raises some important questions concerning the scope and extent of the duty, to encourage continuing debate on the topic.

I INTRODUCTION

Regional fisheries management organisations¹ (RFMOs) are established via agreement between states with a common interest in fishing an area of the high seas or a particular species. These

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1 For the purposes of this article, the term "regional fisheries management organisations" (RFMO) should be read as also including regional fisheries management arrangements which have a similar role and ambit as RFMOs but differ in that they do not have a permanent Secretariat, operating via a "meeting of parties". For further clarification see Michael W Lodge, David Anderson, Terje Lobach *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an Independent Panel to Develop a Model for*

organisations have been defined by the Food and Agriculture Organisation of the United Nations (FAO) as, "intergovernmental fisheries organisations or arrangements, as appropriate, that have the competence to establish fisheries conservation and management measures".² The unique ability of these organisations to develop such measures sets RFMOs apart from another group of organisations which function to promote high seas fisheries regulation: regional fisheries bodies (RFBs).³ On an institutional level, RFMOs provide the basis for international cooperation in the global effort to conserve high seas fish stocks.

RFMOs first began to appear in the 1950s in response to the need for states to cooperate in balancing competing interests in a fishery.⁴ While many RFMOs operate in a specified area of the high seas,⁵ others have a more specific mandate to regulate certain species of fish stocks.⁶ To date, RFMOs have been established to regulate high seas fishing for species ranging from Antarctic krill in the Southern Ocean,⁷ to Atlantic tuna;⁸ with global coverage of the world's oceans a priority for the FAO.⁹ To this end, several new RFMOs have been adopted in recent years, including one to

Improved Governance by Regional Fisheries Management Organizations (Chatham House, London, 2007) at 111.

- 2 Defined in para 6(c) of the United Nations Food and Agriculture Organisation *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001) [IPOA-IUU].
- 3 Judith Swan "Decision-Making in Regional Fishery Bodies or Arrangements: the Evolving Role of RFBs and International Agreement on Decision-Making Processes" (2004) Food and Agriculture Association of the United Nations <www.fao.org>. For a complete list of regional fisheries bodies in existence see United Nations Division for Ocean Affairs and the Law of the Sea "Intergovernmental Organisations: Regional Fisheries Bodies" (2004) Oceans and Law of the Sea Division for Ocean Affairs and the Law of the Sea <www.un.org>.
- 4 Lodge, Anderson and Lobach, above n 1.
- 5 RFMOs such as the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) operate within an Area defined by the agreement. For CCAMLR's boundaries see CCAMLR "CCAMLR Convention Area" <www.ccamlr.org>.
- 6 The Commission for the Conservation of Southern Bluefin Tuna (CCSBT), for instance, was established to address the impact that overfishing was having on a particular species. See Commission for the Conservation of Southern Bluefin Tuna "About the Commission" <www.ccsbt.org>.
- 7 The conservation of Antarctic krill, or *Euphausia superba*, was one of the primary motivations for establishing the CAMLR Convention. See Australian Antarctic Division "Krill: magicians of the southern ocean" (2011) Australian Antarctic Division <www.antarctica.gov.au>.
- 8 The International Convention for the Conservation of Atlantic Tunas (ICCAT) entered into force in 1969.
- 9 Committee on Fisheries "Strengthening Regional Fisheries Management Organisations and their Performance Including the Outcome of the 2007 Tuna RFMOs Meeting" (paper presented at the Twenty Seventh Session of the Committee on Fisheries, Rome, March 2007) at 2.

regulate the deep-sea fisheries of the Southern Indian Ocean¹⁰ and another to span the numerous fisheries that exist in the South Pacific Ocean.¹¹

RFMOs operate under international principles established in the 1982 United Nations Convention on the Law of the Sea (the LOSC).¹² Flag state jurisdiction, as a fundamental principle of the LOSC, provides that fishing vessels sailing the high seas are subject only to the jurisdiction of the state whose flag they fly.¹³ In this way, RFMO effectiveness is limited by the individual interests of states and today, a lack of political will to conserve the world's fish stocks threatens the effectiveness of these organisations.¹⁴

Over the years, a plethora of high seas instruments have emerged to better implement the framework provisions of the LOSC, however none has succeeded in achieving the same degree of ratification or acceptance as the founding document.¹⁵ This article asks whether the provisions of the LOSC can be better implemented to address the problem of non-compliance with the conservation and management measures of RFMOs. It submits that a specific provision of the LOSC, the duty of states to cooperate in the conservation and management of the marine living resources of the high seas, holds great significance for the future effectiveness of the regional fisheries regime.¹⁶

10 The Southern Indian Ocean Fisheries Agreement entered into force in August 2010. Fish Information and Services "Southern Indian Ocean Fisheries Agreement comes into force" (2010) Fish Information and Services New Zealand <<http://fis.com>>.

11 The South Pacific Regional Fisheries Management Organisation (SPRFMO) has not yet entered into force but the agreement has been concluded. SPRFMO "Welcome to the South Pacific RFMO" (2010) <www.southpacificrfmo.org>.

12 *United Nations Convention on the Law of the Sea* (opened for signature 10 December 1982, entered into force 16 November 1994) [LOSC].

13 The principle of flag state jurisdiction provides that fishing vessels sailing the high seas are subject only to the jurisdiction of the state whose flag they fly. In effect, a flag state should not register a vessel without first being capable of regulating its fishing activities. See Fisheries and Oceans Canada *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action* (Fisheries and Oceans Canada, 2009) at 4.

14 Today it is estimated that 18 per cent of the world's marine fish stocks are currently overexploited and 52 per cent are fully exploited. In addition, 1 per cent of the world's fish stocks are fully depleted. See United Nations Food and Agriculture Organisation *The State of World Fisheries and Aquaculture* (2008) at 33.

15 See Division for Ocean Affairs and Law of the Sea "Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 1 March 2010" (2010) United Nations <www.un.org>.

16 Marie Jacobsson "Flag State Perspectives" in MH Nordquist, JN Moore and S Mahmoudi (eds) *The Stockholm Declaration and Law of the Marine Environment* (Kluwer Law International, The Hague, 2003) 299 at 303.

The first section of this article provides a practical glimpse into some of the challenges facing RFMOs to demonstrate the need for internationally enforceable standards of flag state responsibility. It will be shown that RFMOs depend heavily upon cooperation to address problems such as illegal, unreported and unregulated (IUU)¹⁷ fishing and that this reality has prevented many RFMOs from meeting global expectations of their regulatory capacity.¹⁸ Next, the article turns to address the international duty of states to cooperate and examines its current legal status. Finally, the article considers the potential for an advisory request or a "model case"¹⁹ to be put before the International Tribunal for the Law of the Sea (the Tribunal) on the scope and application of the duty to cooperate.

17 Article 3 of the IPOA-IUU states:

3.1 Illegal fishing refers to activities:

- 3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
- 3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organisation but operate in contravention of the conservation and management measures adopted by that organisation and by which States are bound, or relevant provisions of the applicable international law; or
- 3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organisation.

3.2 Unreported fishing refers to fishing activities:

- 3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
- 3.2.2 undertaken in the area of competence of a relevant regional fisheries management organisation which have not been reported or have been misreported, in contravention of the reporting procedures of that organisation.

3.3 Unregulated fishing refers to fishing activities:

- 3.3.1 in the area of application of a relevant regional fisheries management organisation that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organisation, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organisation; or
- 3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

18 Lodge, Anderson and Lobach, above n 1, at 6.

19 The term "model case" is adopted from a 2008 meeting convened by the United Nations Food and Agriculture Organisation (FAO) entitled *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action* where the need for ideal conditions to exist in order to bring a successful case was discussed. See Fisheries and Oceans Canada, above n 13.

There exists a great deal of literature focusing on the need to strengthen the performance of RFMOs from an institutional perspective.²⁰ This article takes a step back to survey the problem from an international perspective to demonstrate that unless the international obligation to conserve high seas fish stocks is made enforceable, the ability of RFMOs to effectively manage high seas fish stocks will remain in question.

II REGIONAL FISHERIES MANAGEMENT ORGANISATIONS

A Background

The table contained in Appendix A demonstrates that prior to the adoption of the LOSC a number of RFMOs were already well established. In an early example of states realising their competing interests in a fishery, the International Pacific Halibut Commission (IPHC) was created in 1923 by a Convention between the governments of Canada and the United States of America.²¹ Originally called the "International Fisheries Commission",²² the IPHC sought to manage stocks of Pacific Halibut (*Hippoglossus stenolepis*) which were being harvested by both Canada and the United States of America at the time.²³

Arguably, the next significant shift in the historical development of RFMOs occurred not upon the creation of the LOSC, but in the decade following its creation when a vast gap in the regulatory regime for the law of the sea emerged.²⁴ It became clear that the management of straddling and highly migratory fish stocks had not been adequately addressed in the legal framework and that these stocks had been subjected to heavy overexploitation by coastal states and distant water fishing nations (DWFNs) alike.²⁵ In areas where fishing nations had previously been free to exercise their freedom to fish, they were suddenly pushed to the outer limit of the coastal states' exclusive

20 In a recent example of a publication concerning the need for institutional change within RFMOs, the Organisation for Economic Cooperation and Development (OECD) published a report entitled *Strengthening Regional Fisheries Management Organisations* which considers internal developments within RFMOs. OECD *Strengthening Regional Fisheries Management Organisations* (OECD Publishing, 2009).

21 International Pacific Halibut Commission "About IPHC" (2009) <<http://www.iphc.washington.edu>>.

22 Ibid.

23 Ibid.

24 David Freestone "Problems of High Seas Governance" (2009) University of New South Wales Faculty of Law Research Series 42.

25 Ibid.

economic zones (EEZs).²⁶ As such, straddling and highly migratory fish stocks including tuna, marlin and swordfish were placed under immense fishing pressure.²⁷

In 1995, the "Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks"²⁸ (the UNFSA) was formulated to address the problem.²⁹ The fundamental purpose of the UNFSA is to implement the provisions of the LOSC relating to these specific stocks and to ensure that no area of the high seas remains unregulated.³⁰ The UNFSA relies heavily upon the duty of states to cooperate to achieve its objectives and provides that states shall give effect to this duty by becoming members to a RFMO, or by agreeing to apply the conservation and management measures established by such an organisation or arrangement.³¹

With the introduction of the UNFSA, RFMOs were placed at the heart of the international fisheries regime.³² This position was confirmed under an important "soft law"³³ instrument created in 2001: the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). The IPOA-IUU reiterates the provisions of the UNFSA by providing that states have a duty to cooperate with RFMOs and that this cooperation should occur directly through RFMOs to prevent, deter and eliminate IUU fishing.³⁴ If states refuse to participate in a RFMO, they should ensure their vessels do not undermine measures adopted by that organisation.³⁵ The IPOA-IUU also makes repeated reference to the manner in which the

26 Rachel Baird "Illegal, Unreported and Unregulated Fishing: an analysis of the legal, economic and historical factors relevant to its development and persistence" (2004) 5 Melbourne Journal of International Law 299.

27 Ibid.

28 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 (opened for signature 4 December 1995, entered into force 11 December 2001).

29 Earth Negotiations Bulletin *Summary of the Eighth Round of Informal Consultations of State Parties to the UN Fish Stocks Agreement* (2009).

30 Ibid.

31 United Nations Fish Stocks Agreement (opened for signature 4 December 1995, entered into force 11 November 2001) art 8(3).

32 Lodge, Anderson and Lobach, above n 1, at foreword.

33 "Soft law" refers to international norms that are deliberately non-binding in character but still have legal relevance. Jon Birger Skjærseth, Olav Schram Stokke and Jørgen Wætestad, "Soft law, hard law and the effective implementation of international environmental norms" (2006) 6 Global Environmental Politics 104.

34 IPOA-IUU, above n 2, art 28.

35 Ibid, art 79.

institutional mechanisms of RFMOs might be strengthened³⁶ to encourage and facilitate participation by states.³⁷

B Current Challenges

There is no doubt that the challenges facing RFMOs in the contemporary fisheries environment are extensive. This section provides examples of some of the main challenges to RFMO effectiveness, including IUU fishing, outdated mandates and a lack of compliance from both contracting parties (CPs) and non-contracting parties (NCPs). Expectations that RFMOs perform in accordance with the provisions of the UNFSA have grown at a steady rate over the last decade and a half,³⁸ however it will be demonstrated that the majority of RFMOs have not kept pace.

IUU fishing has been of international concern since the early 1990s³⁹ and is today one of the main threats to effective fisheries management.⁴⁰ IUU fishing manifests itself at many different stages of the fishing operation and is not restricted to the act of fishing itself.⁴¹ IUU operations rely upon a global network of business transactions and syndicates of ownership spread over many different countries to stay below the radar.⁴² Connections between the real beneficial owner of an IUU vessel and the vessel itself are often invisible,⁴³ maintaining an appearance of legitimacy and allowing owners to continue to operate IUU vessels undetected.

Faced with complex systems of ownership and unwillingness by states to eradicate IUU fishing, many RFMOs have failed to deter the activities of IUU fishers in their area or in respect of their

36 Ibid, arts 78–83.

37 Ibid, art 83.

38 Committee on Fisheries, above n 9, at 2.

39 David J Doulman "Illegal, Unreported and Unregulated Fishing: Mandate for an International Plan of Action" (2000) Document AUS:IUU/2000/4, Expert Consultation on Illegal, Unreported and Unregulated Fishing, Government of Australia in Cooperation with FAO at iv.

40 Michael W Lodge "Managing International Fisheries: Improving Fisheries Governance by Strengthening Regional Fisheries Management Organizations" (2007) Energy, Environment and Development Programme Briefing Paper 07/01 at 3.

41 Davor Vidas "IUU Fishing or IUU Operations? Some Observations on Diagnosis and Current Treatment" in DD Caron and HN Scheiber (eds) *Bringing New Law to Ocean Waters* (Martinus Nijhoff Publishers, Leiden, 2004) 3.

42 High Seas Task Force *Closing the net: Stopping illegal fishing on the high seas* (High Seas Task Force, 2006) at 16.

43 This is because both domestic and international law have retained a strict adherence to entity law that protects the identity of beneficial owners. The case of *Salomon v Salomon & Co Ltd* (1897) AC 22 provides authority for this. Refer Gail Lugten Legal Consultation for the Food and Agriculture Organisation of the United Nations - Development of a Comprehensive Global Record of Fishing Vessels, Refrigerated Carriers and Support Vessels (2008) UN Food and Agriculture Organisation 865 at 22.

target species.⁴⁴ The motivation behind IUU fishing, for both states and individuals, is the generation of net income⁴⁵ and without strict powers of enforcement, the ability of RFMOs to deter IUU fishing has been limited. While certain RFMOs have claimed some success in preventing the flow of profit leaking back to the hidden beneficial owners of IUU operations, others have been slow to implement similar measures.⁴⁶

RFMOs also face internal threats to their effectiveness. In 2007, the first joint meeting of the tuna RFMOs⁴⁷ (Kobe 1) encouraged performance reviews to be undertaken by the five RFMOs involved.⁴⁸ While the complete set of performance reviews has yet to emerge, the reports that have been published to date depict a stark reality for RFMOs; specifically in terms of the problems caused by outdated mandates. The 2009 performance review of the Indian Ocean Tuna Commission (IOTC), for instance, found that the RFMO should either be severely amended or replaced by a new instrument altogether.⁴⁹ It was stated that the founding text did not take account of modern principles of fisheries management or sufficiently explain flag state obligations in respect of the Commission. Similarly, the 2008 performance review of the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) stated that at its core the CCSBT is a convention for the management of a single fish stock: a scenario that does not reflect a modern scientific understanding of ecosystems based management or the precautionary approach.⁵⁰

III THE LEGAL STATUS OF THE DUTY TO COOPERATE

This section seeks to clarify the relationship between RFMOs and the duty to cooperate under the LOSC. It also examines the current legal status of the duty to determine how it relates to the work of RFMOs. It has been said that, "the fundamental legal basis for the work of RFMOs is the duty of states to cooperate over the conservation and management of living resources ...".⁵¹ As

44 Food and Agriculture Organization of the United Nations, "Report of the FAO Regional Workshop on the Elaboration of National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing" (2004) FAO Fisheries Report No 703.

45 The worldwide value of the IUU fishing industry is estimated at between US \$9 billion and US \$23 billion per year. See Vidas, above n 41, at 6.

46 Rachel Baird "CCAMLR Initiatives to Counter Flag State Non-enforcement in Southern Ocean Fisheries" (2005) 36 Victoria University of Wellington Law Review 733.

47 See Tuna-Org "Report of the Joint Meeting of Tuna RFMOs" (2007) <www.tuna-org.org>.

48 The tuna RFMOs include the CCSBT, the IOTC, the Inter-American Tropical Tuna Commission (IATTC), the International Convention for the Conservation of Atlantic Tunas (ICCAT) and the Western and Central Pacific Fisheries Commission (WCPFC). See Tuna-Org "Report of the Second Joint Meeting of Tuna RFMOs" (2009) <www.tuna-org.org>.

49 Indian Ocean Tuna Commission *Report of the IOTC Performance Review Panel* (2009).

50 CCSBT *Report of the Performance Review Working Group* (2008).

51 Lodge, Anderson and Lobach, above n 1, at 70–71.

such, the expectation that fisheries management on the high seas be undertaken by RFMOs has arisen as a result of the duty to cooperate.⁵² Cooperation at law, however, first requires that states demonstrate sufficient desire or political will to conserve marine living resources.

A International Agreements

Article 92(1) of the LOSC provides that ships shall sail under the flag of one state and shall be subject to its exclusive jurisdiction, "save in exceptional cases expressly provided for in international treaties or in this Convention ...". Furthermore, the freedom to fish is said to be subject to the conditions laid down in section 2 of Part VII of the LOSC:⁵³ the section dealing with the conservation and management of marine living resources of the high seas. Section 2 contains arts 117 and 118 which provide, inter alia, that states are under a duty to cooperate in the conservation and management of marine living resources on the high seas:

Article 117 – Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas

All States have *the duty to take, or to cooperate with other States in taking*, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Article 118 – Cooperation of States in the conservation and management of living resources

States *shall cooperate* with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, *cooperate to establish subregional or regional fisheries organizations* to this end (emphasis added).

The role of RFMOs and the duty to cooperate is also addressed in the LOSC in art 64(1):

Article 64 – Highly migratory species

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I *shall cooperate directly or through appropriate international organizations* with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work (emphasis added).

52 This point is clarified by the United Nations Fish Stocks Agreement.

53 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994), art 87(1)(e).

The above provisions, along associated provisions contained in art 63 of the LOSC, establish a clear duty to cooperate in the conservation and management of living resources of the high seas. However, the LOSC fails to provide detail on how states are to fulfil this obligation to cooperate. The UNFSA was established in response to these failings. It interprets the duty to cooperate, as it stands in the LOSC, to impose more extensive obligations on flag states.⁵⁴ The UNFSA develops the concept of cooperation to provide for strengthened regulatory capacity at global and regional levels.⁵⁵

The UNFSA contains extensive obligations which apply to all States Parties. It goes into significant detail on how the duty to cooperate is to be implemented and extends the ambit of RFMOs to regulate fisheries within areas of national jurisdiction as well as on the high seas.⁵⁶ To this end, Part III of the UNFSA contains detailed provisions on the duty to cooperate and elaborates the manner in which this duty is to be given effect. It provides that states are required to give effect to their duty to cooperate by becoming CPs to relevant RFMOs.⁵⁷ The UNFSA goes on to state that where no "subregional or regional fisheries management organization or arrangement" exists to conserve a straddling or highly migratory fish stock, states shall cooperate to establish such an organisation.⁵⁸

However the UNFSA provides that this duty cannot be discharged by flag states merely through the creation of a RFMO. It requires states to not only become CPs to relevant RFMOs, but that they also participate in and respect the conservation measures imposed by the RFMO concerned.⁵⁹ This requirement applies to RFMO CPs and NCPs alike and provides that where a state persistently fails to comply with the UNFSA, it will be in breach of the duty to cooperate.⁶⁰

54 Michael W Lodge "Background Paper" (Paper presented at the G20 Leader's Level: International Fisheries Governance, Victoria, British Colombia, October 2005).

55 Ibid.

56 Lodge, above n 40, at 3.

57 Article 8.3 of the UNFSA provides that: "States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement."

58 United Nations Fish Stocks Agreement (opened for signature 4 December 1995, entered into force 11 November 2001), art 8.5.

59 Ibid, art 8(6).

60 Ibid, arts 7 and 8(4).

B Customary International Law

Under the LOSC, the freedom to fish the high seas is conditional upon compliance with customary principles of international law.⁶¹ As such, if the duty to cooperate exists as a principle of customary international law, it might be used to compel states to better conserve and manage high seas fish stocks. John O'Brien argues there is a customary law duty to cooperate on environmental matters.⁶² While not discussing the specific application of the duty as it stands in the LOSC, he suggests that the customary obligation to cooperate arises as a result of principle 24 of the Stockholm Declaration⁶³ and art 1(3) of the United Nations Charter.⁶⁴

Other supporters⁶⁵ of the customary nature of the duty to cooperate also cite the decision of the International Court of Justice (ICJ) in the *Fisheries Jurisdiction Case*⁶⁶ which held: ⁶⁷

It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.

It appears that the duty of states to cooperate is widely accepted as a customary principle of international environmental law.⁶⁸ However the customary nature of this duty as it applies in a fisheries context remains unclear.

61 Rosemary Rayfuse "Countermeasures and High Seas Fisheries Enforcement" (2004) 51 *Netherlands International Law Review* 41 at 53.

62 John O'Brien *International Law* (Cavendish Publishing, London, 2001) at 625. This idea is supported by the basic principle of international law that states must cooperate in avoiding adverse effects on their neighbours; PW Birnie and Alan Boyle *International Law and the Environment* (Oxford University Press, Oxford, 2001) at 126.

63 Principle 24 of the Stockholm Declaration reads that: "International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries big or small or on an even footing."

64 Article 1(3) of the United Nations Charter provides that: "The purposes of the United Nations are ... (3) To achieve international cooperation in solving problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion ...".

65 Lodge, Anderson and Lobach, above n 1, at 6–7.

66 *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)* (1973) ICJ Rep 49.

67 *Ibid*, at [67]–[72].

68 Kerstin Mechlem "Water as a Vehicle for Inter-State Cooperation: a Legal Perspective" (2003) 32 *FAO Legal Papers Online*.

While it is not within the scope of this article to revisit the theoretical foundations of customary international law, it should be noted that any discussion concerning the customary nature of the duty to cooperate must consider two important elements: the element of state practice,⁶⁹ and the element of *opinio juris*.⁷⁰ These two elements are interrelated in that the practice of states must be undertaken in the belief that they are acting in compliance with a legal obligation. In regards to the first element, Rosemary Rayfuse argues that state practice appears to accept to the duty to cooperate as a principle of customary international law via membership to RFMOs.⁷¹ However, in regards to the element of *opinio juris*, former President of the Tribunal, Thomas A Mensah has argued that there is insufficient evidence to suggest that states are cooperating in the belief that they are under an obligation to do so.⁷² Despite this uncertainty, some critics remain adamant that the duty to cooperate clearly forms part of customary international law.⁷³

IV THE DUTY TO COOPERATE AND THE TRIBUNAL

This section examines how the duty to cooperate in the conservation of marine living resources has been shaped by international cases, literature and fora. Judge Tullio Treves of the Tribunal has noted that:⁷⁴

... cases against a flag State for non-compliance with its responsibilities are possible and may be more useful in clarifying the scope of such responsibilities, as well as the consequences of non-compliance.

The section submits that enforcing the duty to cooperate by bringing a case or advisory opinion before the Tribunal has the potential to strengthen the regional regime.

In 2000, Chile brought a case before the Tribunal on the basis of the conservation provisions contained in arts 116 to 119 of the LOSC.⁷⁵ Chile's complaint was in regard to the failure of the then European Commission (EC) to ensure that Spanish vessels were acting in compliance with their conservation obligations when fishing in the waters near the Chilean EEZ.⁷⁶ The case reached the

69 Rosemary Rayfuse *Non-Flag State Enforcement in High Seas Fisheries* (Brill Academic Publishers, Leiden, 2004) at 86.

70 Ibid, at 99.

71 Thomas A Mensah, Tafsir Malick Ndiaye, Rüdiger Wolfrum *Law of the Sea, Environmental Law and Settlement of Disputes* (Martinus Nijhoff Publishers, Leiden, 2007) at 761.

72 Ibid.

73 Lodge, Anderson and Lobach, above n 1 at 70–71.

74 Fisheries and Oceans Canada, above n 13.

75 *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)* WTO Doc WT/DS193/1 (2000).

76 Lodge, Anderson and Lobach, above n 1, at 79.

point whereby the Tribunal acceded to the request to form a special chamber.⁷⁷ However, by an order of 16 December 2009, the Tribunal ordered that it be removed from the List of Cases after the Parties committed to negotiating a new agreement.⁷⁸

In the *Southern Bluefin Tuna Cases*,⁷⁹ a request for provisional measures was sought by Australia and New Zealand before the Tribunal against Japan, which led to the duty to cooperate to conserve Southern Bluefin Tuna (SBT) stocks again being examined.⁸⁰ It was argued by Australia and New Zealand that the "Experimental Fishing Programme" (EFP) Japan wanted to undertake would threaten already depleted stocks of SBT.⁸¹ The applicants brought their claim on the cooperative provisions of the Convention for the Conservation for Southern Bluefin Tuna (SBT Treaty)⁸² and on the grounds of art 64(1) of the LOSC. In prescribing provisional measures, the Tribunal held that Japan should not conduct the planned EFP except with the agreement of the other parties and that all parties should continue negotiations.⁸³ However, a joint declaration of Vice-President Wolfrum and Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson held, *inter alia*:⁸⁴

In the circumstances, a reduction in the catches of all those concerned in the fishery in the immediate short term would assist the stock to recover over the medium to long term. Article 64 of the Convention lays down, as stated in the Order, a duty to cooperate to that end.

The potential for a "model case" on the duty to cooperate to be brought before the Tribunal was also discussed in two meetings convened by the FAO in 2008 and 2009. The first meeting, entitled

77 International Tribunal for the Law of the Sea "Case on Conservation of Swordfish Stocks Between Chile and the European Community in the South-Eastern Pacific Ocean: Provisional Agreement Reached Between the Parties" (press release, 21 March 2001).

78 International Tribunal for the Law of the Sea "Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union): Case Removed from Tribunal's List" (press release, 17 December 2009).

79 *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 117 ILR 148.

80 Howard S Schiffman "The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute" (1999) 2(3) *Journal of International Wildlife Law & Policy* 5.

81 *Ibid.*

82 The Convention for the Conservation of Southern Bluefin Tuna, which had been signed by the three countries, came into force in May 1993. See Commission for the Conservation of Southern Bluefin Tuna, above n 6.

83 *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures: Order)* (1999) ITLOS cases 3 and 4.

84 The Joint Declaration of Vice-President Wolfrum and Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson, *ibid.*

"Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action" (the 2008 FAO Expert Workshop), was convened in Vancouver, Canada.⁸⁵ This workshop suggested that a "model case" could be brought for the purposes of clarifying the legal status of the duty to cooperate and the conditions needed to avoid losing a case on this matter.⁸⁶ The potential case was discussed in detail, including the question of standing,⁸⁷ and it was commonly agreed that RFMOs would be well placed to bring such action.⁸⁸ Participants observed that developing international case law to take action against uncooperative flag states could achieve more, and proceed more quickly, than creating an entirely new legal instrument aimed at achieving cooperation.⁸⁹

The group of experts met again in June 2009 as the "Expert Consultation on Flag State Performance" (2009 FAO Expert Workshop).⁹⁰ The 2009 Expert Workshop considered the potential for an international dispute settlement mechanism, such as the Tribunal, to establish a legally enforceable duty to cooperate in the conservation and management of living resources.⁹¹ It was concluded that the use of existing dispute settlement mechanisms may provide ongoing contributions to the development of international law, "particularly as it relates to the obligations of effective flag state control, the duty to cooperate, and the duty to conserve and sustainably manage marine living resources."⁹²

The question of whether RFMOs could instigate a request for an advisory opinion was discussed at the sixth regional workshop of the Tribunal in South Africa.⁹³ Judge Tafsir Malick Ndiaye of the Tribunal suggested that the protection and preservation of the marine environment and "liability questions relating thereto" were relevant matters for advisory opinions.⁹⁴ As such, it is evident that there is growing anticipation that an advisory opinion on the duty to cooperate may come before the Tribunal in the future.

85 Fisheries and Oceans Canada, above n 13.

86 Ibid.

87 Ibid. The general consensus of the FAO Workshop was that a state would have to demonstrate its standing to bring the case, or alternately, a group of states could come together as joint claimants under a declaration of common interest.

88 Ibid, at 11.

89 Ibid.

90 FAO "Report of the Expert Consultation on Flag State Performance" (2009) Fisheries and Aquaculture Report No 918, FIEL/R198.

91 Ibid, at 38.

92 Ibid 39.

93 Tafsir Malick Ndiaye "The Advisory Function of the International Tribunal for the Law of the Sea" (2010) 9 Chinese Journal of International Law at [67].

94 Ibid, at [89].

A *Jurisdiction and Standing*

The Tribunal is open to States Parties to the LOSC⁹⁵ and to entities other than States Parties in any case expressly provided for in Part XI of the LOSC or pursuant to any other agreement conferring jurisdiction on the Tribunal.⁹⁶ The Tribunal has jurisdiction, "over any dispute concerning the interpretation or application of this Convention which is submitted to it"⁹⁷ and in the event of a dispute as to whether the Tribunal has such jurisdiction, the matter can be settled by a decision of the Tribunal.⁹⁸ Under art 33 of the Statute of the Tribunal⁹⁹ (the Statute), the decision of the Tribunal shall be complied with by all parties to the dispute and the decision will be final.¹⁰⁰

The question of the Tribunal's jurisdiction in respect of an advisory opinion is somewhat more complex. Advisory opinions are not legally binding¹⁰¹ and are generally utilised by states to seek clarification upon a point of law. In the first and only advisory opinion heard by the Tribunal,¹⁰² the International Seabed Authority submitted a request for an advisory opinion to the Seabed Disputes Chamber of the Tribunal.¹⁰³ The request was submitted under art 191 of the LOSC which provides that the Seabed Disputes Chamber shall give advisory opinions on legal questions arising within the scope of their activities.¹⁰⁴ However, with respect to the advisory jurisdiction of the Tribunal, there remain two unanswered questions:

- (1) Does the full Tribunal have advisory jurisdiction?
- (2) If so, can a RFMO submit a request for an advisory opinion?

These questions will be addressed in order. First, it would appear that the advisory function of the Tribunal can only be exercised before the Seabed Disputes Chamber as authorised under art 191

95 LOSC, above n 12, art 291(1). See also Statute of the International Tribunal for the Law of the Sea, Annex VI to the LOSC, above n 12, art 20(1).

96 LOSC, above n 12, art 291(2).

97 International Tribunal on the Law of the Sea "Proceedings and Judgments - Competence" (2008) <www.itlos.org>.

98 Ibid.

99 Statute of the International Tribunal for the Law of the Sea, Annex VI to the LOSC, above n 12.

100 Ibid, art 33.

101 Ndiaye, above n 93, at [62].

102 *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)* (2011) ITLOS case no 17.

103 International Tribunal for the Law of the Sea "The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea Receives a Request for an Advisory Opinion" (press release, 14 May 2010).

104 LOSC, above n 12, art 191.

of the LOSC and art 40 of the Statute. The advisory jurisdiction of the full Tribunal is not expressly provided for under either the LOSC or the Statute. However, at the same time, neither the LOSC nor the Statute expressly prohibits the advisory function of the Tribunal.¹⁰⁵ It should be noted that art 138, which relates to the jurisdiction of the Tribunal to provide an advisory opinion, was inserted into the Rules of the Tribunal in 1996. This provision reads as follows:

Article 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.

This suggests that the Tribunal may hear a request for an advisory opinion on a specific legal question if the international agreement related to the purposes of the Convention provides for such a request. Further, art 21 of the Statute provides that

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.

In this regard, it could be argued that if an international agreement provides for a request for an advisory opinion to be submitted, the Tribunal would have jurisdiction to hear such a case.¹⁰⁶

Doo-Young Kim, Deputy Registrar of the Tribunal, has submitted that this provision is sufficient to provide the Tribunal with advisory jurisdiction if certain requirements are met.¹⁰⁷ Furthermore, Judge Ndiaye has suggested that in the past the Tribunal has had the support of many states in asserting such jurisdiction.¹⁰⁸ However, it appears that it will be a matter of waiting until a request is submitted on behalf of a state before this question can truly be tested.

¹⁰⁵ P Chandrasekhara Rao and P Gautier *Rules of the International Tribunal for the Law of the Sea: A Commentary* (Koninklijke Brill NV, Leiden, 2006) at 393.

¹⁰⁶ *Ibid*, at 394.

¹⁰⁷ Doo-young Kim "Advisory Proceedings Before the International Tribunal for the Law of the Sea as an Alternative Procedure to Supplement the Dispute Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea" in Harry N Scheiber and Seokwoo Lee (eds) *Issues in Legal Scholarship: Frontier Issues in Ocean Law* (Berkeley Electronic Press, 2010) at 4.

¹⁰⁸ *Ibid*, at [65].

The second question is what kind of "body" or entity may submit a request to the Tribunal for an advisory opinion. Article 138 of the Statute as outlined above, contains certain requirements which must be met if an international agreement is to gain sufficient standing to submit their request. These requirements may be listed as follows:¹⁰⁹

- (a) there must be an international agreement;
- (b) international agreement must be related to the purposes of the LOSC;
- (c) there must be provision within the agreement for submitting a request for an advisory opinion to the Tribunal; and
- (d) the request must be of a legal nature.

It would appear that international organisations, such as RFMOs, may submit a request for an advisory opinion to be heard before the Tribunal if these requirements have been fulfilled. In 2007, a Chatham House report into best practices for RFMOs¹¹⁰ (the Chatham House Report) suggested that ideally, all RFMOs should have some standing arrangement for seeking advisory opinions from a suitable judicial body on legal questions arising in the course of its work.¹¹¹

B Potential Questions for Consideration

This article will briefly consider some potential questions that might arise if an advisory opinion or "model case" was to be brought before the Tribunal on the duty to cooperate. This discussion is not designed to provide a comprehensive account of the uncertainties surrounding the duty to cooperate. Instead, it is aimed at identifying aspects of the duty that remain uncertain and suggesting areas upon which clarification might be sought in the form of an advisory opinion. It is proposed that continuing debate on the topic will be critical to the success of any future action.¹¹²

1 What are the legal responsibilities and obligations of States Parties to the LOSC with respect to the cooperative provisions contained in arts 117 and 118?

While broad in scope, this question would require the Tribunal to provide clarification of the specific content of the duty to cooperate.¹¹³ The 2008 FAO Expert Workshop outlined some principles for defining what criteria might be used to determine whether a flag state has acted

¹⁰⁹ Ibid, at [77]–[80].

¹¹⁰ Lodge, Anderson and Lobach, above n 1.

¹¹¹ Ibid, at 81.

¹¹² Fisheries and Oceans Canada, above n 13, at 12.

¹¹³ Ibid, at 10.

responsibly,¹¹⁴ which, in turn, are useful in understanding what the duty to cooperate might entail. Such criteria include:¹¹⁵

- (a) participation in and compliance with relevant treaty regimes;
- (b) participation in and compliance with the conservation and management measures of RFMOs; and
- (c) the effective adoption and implementation of domestic legislation.

At the 2009 FAO Expert Workshop, it was suggested that the duty to cooperate might require flag states to effectively control their vessels and exercise jurisdiction over them in the interests of conservation.¹¹⁶ It was further noted that in the process of fulfilling their duty to cooperate, states should take action to close their markets to fish that has not been taken in a manner consistent with international conservation and management measures.¹¹⁷

Further to this, the Chatham House Report provides the following broad description of the duty:¹¹⁸

It has two aspects: positively, to seek to reach agreement with others concerned, and, negatively, to refrain from taking unilateral actions whether or not agreement has been reached. The positive element of seeking to reach agreement was explained by the International Court of Justice in the North Sea Continental Shelf cases: '[the parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it' (ICJ Reports 1969, paragraph 85(b) of the Court's judgment). The negative element has a bearing on the legal situation when a dispute arises between States or when a member of an organization votes against a proposal that nonetheless attracts the necessary support to be adopted as a decision. In both situations, the duty to cooperate described above still applies, and it imposes limits on the nature and scope of any unilateral action that a disputant or an objector may take.

Taken in a fisheries context, this definition may provide some useful guidance on the question of what the legal responsibilities of states might be in regards to the duty to cooperate. The Chatham House Report's consideration of the positive and negative elements of the duty has special application in regards to the work of RFMOs. For instance, it could be the case that states are under a positive duty to seek to reach agreement on the conservation of marine living resources of the high

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ FAO, above n 90, at 29.

¹¹⁷ Ibid, at 35.

¹¹⁸ Ibid.

seas via RFMOs. Similarly, an advisory opinion might be open to suggestion that states are under an obligation not to block the passing of conservation measures which have the support of the majority in annual meetings of RFMOs.

2 *What act or omission on the part of a flag state might constitute a breach of the duty to cooperate in the conservation of the living resources of the high seas under arts 117 and 118 of the LOSC?*

Rayfuse argues that a breach of the duty to cooperate might occur as a result of a serious or continuing failure by a flag state to ensure compliance with international fisheries obligations.¹¹⁹ She argues that failure by a state either to ensure compliance with conservation measures or to restrain its vessels from fishing in contravention of RFMO measures will constitute a breach of the customary law duty to cooperate.¹²⁰ Rayfuse goes on to argue that it is primarily the persistent nature of such actions should justify the intervention and that not every failure to ensure compliance will be serious enough to amount to a breach.¹²¹

The requirement that a systematic or continuing failure to comply should act as an indicator of a breach of flag state responsibilities was also raised at the 2008 FAO Expert Workshop. Here participants debated the idea that "systematic patterns of failure" should indicate a serious level of non-compliance.¹²² In addition to this, it was noted that a "model case" on the duty to cooperate might involve a flag state who had a systematic track record of irresponsibility.¹²³ Participants agreed on the need for better definition of effective flag state control to assist in identifying patterns of failure.¹²⁴

A failure to participate in or to become a member to a relevant RFMO might also constitute a breach of the duty to cooperate.¹²⁵ The report of the Ministerially-Led Task Force on IUU Fishing on the High Seas¹²⁶ suggested that a number of criteria should be considered when determining whether a flag state had met its fisheries related obligations.¹²⁷ It found that a responsible flag state

119 Rosemary Rayfuse "To our children's children's children: from promoting to achieving compliance in high seas fisheries" (2005) 20 *The International Journal of Marine and Coastal Law* 509.

120 Ibid.

121 Ibid.

122 Fisheries and Oceans Canada, above n 13, at 8.

123 Ibid.

124 Ibid.

125 Rayfuse, above n 119.

126 High Seas Task Force, above n 42.

127 Rayfuse, above n 61.

will be expected to implement the obligation to cooperate by ratifying and participating in the work of RFMOs.¹²⁸

3 *What possible action might be taken against a flag state found to be in breach of "the duty to cooperate" contained in arts 117 and 118 of the LOSC?*

At the second joint meeting of tuna RFMOs (Kobe 2), it was recognised that uncooperative flag states should be held liable for their actions through the imposition of non-discriminatory sanctions. These sanctions should be applied to CPs and NCPs alike and could ultimately lead to the suspension of vessel and flag state fishing rights in the convention area of a RFMO. This notion is consistent with the idea that where a state fails in its duty to cooperate with the conservation measures of a RFMO, it forfeits the right for its nationals to participate in the freedom to fish.¹²⁹

Most RFMOs have legal standing to take such measures, or at least to enable governing bodies to take trade-related measures, against uncooperative flag states.¹³⁰ At Kobe 2, participants noted that trade-related measures represent a valid tool to address the actions of uncooperative flag states. Representatives from the IOTC recognised the need to take action by ensuring that trade-related measures are applied to any entity whose actions are considered to undermine RFMO conservation measures.¹³¹ The trade-related measures contemplated by the IOTC included limiting access to port facilities, preventing transshipment of IUU caught fish at sea and restricting imports.¹³²

Another option that has been raised as an incentive to encourage flag states to cooperate with the conservation and management measures of RFMOs is that of compensation. The costs associated with fishing responsibly, such as lost revenue as a result of lower quotas, are great.¹³³ As a result, CPs that act in compliance with conservation measures may be considered "injured" by the actions of a non-compliant flag state allowing IUU vessels to fish. If there is a failure by a flag state to meet

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Richard Tarasofsky "Enhancing the Effectiveness of Regional Fisheries Management Organizations through Trade and Market Measures" (2007) Energy, Environment and Development Programme Briefing Paper 07/04.

¹³¹ Kobe 2 "Progress of the Indian Ocean Tuna Commission Concerning the Course of Action Adopted in the First Meeting of Tuna RFMOs" (2009) ITOC Secretariat, Doc No TRFMO2-018/2009 at 3.

¹³² Ibid.

¹³³ Matthew Gianni and Walt Simpson "The Changing Nature of High Seas Fishing: how flags of convenience provide cover for illegal, unreported and unregulated fishing" (2005) joint report of the Australian Department of Agriculture, Fisheries and Forestry, the International Transport Workers' Federation, and WWF International at 61.

the duty to cooperate, compensation for the consequences of this failure might be payable to the relevant RFMO.¹³⁴

C The Implications of the Duty to Cooperate as a Rule of Customary International Law

Finally, this article will make some concluding remarks on how the regional regime may be impacted if the duty to cooperate exists as a customary principle of international law. As noted earlier in this article, the impact of international treaties can be severely limited by factors such as low ratification rates and lack of specificity. As such, customary international law remains the primary source for the creation of universal international law and should continue to be fluid and flexible in order to adapt to changes in state practice.¹³⁵

It is on this basis that James Harrison argues that, "international institutions present new opportunities for creating customary international law by offering a single forum in which states can exchange views on emerging norms".¹³⁶ He notes that relying on the proceedings of international institutions, such as the Tribunal, to identify rules of customary international law will be much simpler and quicker than piecing together individual elements of state practice and *opinio juris*.¹³⁷

As a customary principle of international law, the duty to cooperate could potentially compel states to better implement the provisions of RFMOs. The above discussion concerning some potential questions the Tribunal may be asked in an advisory opinion on the duty to cooperate can be summarised to gain an appreciation of the current application of the duty. It is submitted that a customary duty to cooperate may require that states:

- (a) participate in and comply with relevant treaty regimes;
- (b) participate in and comply with the conservation and management measures of RFMOs;
- (c) adopt and implement domestic legislation to give effect to these measures;
- (d) take action to close their markets to fish that has not been taken in a manner consistent with these measures;
- (e) seek to reach agreement with other States on fisheries matters; and
- (f) ensure that delegations do not vote against proposals within RFMOs that attract necessary support from other States.

¹³⁴ Ibid.

¹³⁵ James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, Cambridge, 2011) 13.

¹³⁶ Ibid, at 16.

¹³⁷ Ibid, at 19.

If such a duty applied to all states as a general principle of customary international law, the implications for the effectiveness of regional fisheries management would be great. An enforceable obligation to comply and cooperate in the conservation and management measures of RFMOs might help minimise the problems caused by NCPs and could also improve levels of compliance by CPs. Further, the provisions of the UNFSA might achieve greater ratification and the UNFSA vision of placing RFMOs at the heart of international fisheries governance could be fully realised.

V CONCLUSIONS

The very existence of the network of RFMOs on the high seas is premised on the notion of flag state cooperation; an ideal which has been shown to be just that when the depth of the problems currently facing RFMOs is considered in full. It has been submitted that one of the primary avenues for improved flag state compliance with the regional regime has been under-utilised, despite the threat posed by IUU fishing and non-compliant flag states. This article has sought to reignite discussions on an essential duty contained in the LOSC to clarify the responsibilities of flag states on the high seas: the duty to cooperate. While international discussions have begun to examine this duty and its application, it is submitted that there is still a long way to go before we can fully understand the potential of this duty.

This article has demonstrated that the duty of flag states to cooperate, as embodied in the LOSC and, it is argued, under customary international law, must be recognised and upheld if the regional system of high seas management is to effectively challenge the actions of uncooperative flag states. Insufficient political will on the part of flag states to give effect to their obligation to cooperate and participate in RFMOs remains a significant threat. It is often suggested that RFMOs have failed to prevent the overexploitation of high seas living marine resources,¹³⁸ however such claims ignore the reality that RFMOs are the product of state action and that it is predominately state action or inaction that has failed to sustainably manage global fisheries. An enforceable duty to cooperate has the potential to help bring about a fisheries future in which all states would have a clear incentive to cooperate on a global level.

¹³⁸ Lodge, Anderson and Lobach, above n 1, at ix.

Appendix A: Table of regional fisheries management organisations currently in force¹³⁹

<i>Year of Entry Into Force</i>	<i>Regional Fisheries Management Organisation</i>	<i>Acronym</i>
1923	International Pacific Halibut Commission	IPHC
1946	International Whaling Commission	IWC
1950	Inter-American Tropical Tuna Commission	IATTC
1952	General Fisheries Council for the Mediterranean	GFCM
1969	International Convention for the Conservation of Atlantic Tunas	ICCAT
1979	Northwest Atlantic Fisheries Organization	NAFO
1982	Convention on the Conservation of Antarctic Marine Living Resources	CCAMLR
1982	North-East Atlantic Fisheries Commission	NEAFC
1983	North Atlantic Salmon Conservation Organization	NASCO
1985	Pacific Salmon Commission	PSC
1993	North Pacific Anadromous Fish Commission	NPAFC
1994	Commission for the Conservation of Southern Bluefin Tuna	CCSBT
1996	Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea	CCBSP
1996	Indian Ocean Tuna Commission	IOTC
2003	South East Atlantic Fisheries Organization	SEAFO
2004	Western and Central Pacific Fisheries Commission	WCPFC
2010 ¹⁴⁰	South Indian Ocean Fisheries Agreement	SIOFA
Not yet in force ¹⁴¹	South Pacific Regional Fisheries Management Organisation	SPRFMO

¹³⁹ This table is adapted from one contained in a briefing article by Michael Lodge. For the purposes of this article, however, the International Baltic Sea Fishery Commission has not been included in the table as it has been defunct since January 2006. See Lodge, above n 40.

¹⁴⁰ The SIOFA, rather than establishing a fully fledged RFMO, functions via the creation of a Meeting of Parties which presides over the fisheries Agreement. In this regard it may be classified as a "regional fisheries management arrangement" but is included under the broader term RFMO for the purpose of this article.

¹⁴¹ The SPRFMO was concluded on 14 November 2009 and will enter into force 30 days after the date of receipt of the eighth instrument of ratification, accession, acceptance, or approval by at least three coastal states adjacent to the Convention Area and at least three states that are not coastal states adjacent to the Convention Area. For further information on the current status of the Convention visit the SPRFMO website at <www.southpacificrfmo.org>.

