CHAPTER 16

Ocean Governance for Sustainable Fisheries

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Abstract

At the occasion of this conference on the Legal Order in the Worlds' Oceans, it is worth analysing whether the existing tools of Ocean Governance are appropriate to ensure sustainable fisheries. We argue that the existing institutions and processes are capable to deliver good results. This has been shown in practice. Hence, the best way forward is to work with the existing institutions and to improve their performance.

1 The Existing Toolbox

When considering the existing tools, we refer to the multilateral legal framework, the organisations and the actors that work within the organisations with the legal instruments:

– the existing framework consists of the basic legal instruments for Ocean Governance namely "The Law Of the Sea" as agreed by the United Nations Convention on the Law of the Sea (UNCLOS)[2] and its implementing agreements, the Agreement relating to the Area[3] and the UN Fish Stocks Agreement (UNFSA) as its main derived agreement covering straddling

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2 Adopted in 1982.

3 Agreement relating to the implementation of Part XI of UNCLOS, adopted in 1994.

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and highly migratory fish stocks.[4] UNCLOS puts its trust in coastal States that have a right to exploit but also the duty to conserve and manage the living natural resources[5] in their Exclusive Economic Zone (EEZ). When, however, the fish stocks are not limited to the EEZ of the coastal State, then the coastal State must cooperate with other coastal States and with states fishing on the high seas directly or through sub-regional or regional organisations. UNCLOS further relies on flag States to control their vessels and ensure that they respect applicable conservation and management measures;[6]

– the basic organisations entrusted with ensuring sustainable fishing on straddling or migrating stocks are the Regional Fishery Management Organisations (RFMOs). In a number of cases the RFMOs pre-date UNCLOS and were created to solve a particular problem, for instance because a particular fish stock was about to collapse.[7] Some were set up as independent organisations,[8] some were created within the context of FAO.[9] Most have decision powers, some do not.[10] They have developed practical legal tools within their organisations in the form of recommendations and procedures to act in cases of non-compliance. They have also developed tools of scientific analysis and statistical reporting to support their objectives; and
– the basic actors within the RFMOs are the contracting parties and the various stakeholders (fishing fleets, NGOs, market operators and consumers).

4 Agreement for the implementation of the provisions of the UNCLOS relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, adopted in 1995. Worth mentioning as well are two agreements within the framework of the Food and Agriculture Organisation of the United Nations (FAO), viz. the agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas of 1993 related to fishing on the High Seas and laying down Flag State responsibilities and the (voluntary) Code of Conduct for responsible Fisheries of 1995.

5 And non living resources, by the way. Art. 56 UNCLOS.

6 See for instance, in this regard, International Tribunal for the Law of the Sea (ITLOS) in its case 21 on the request for an Advisory Opinion submitted by the Sub-regional Fisheries Commission issued on 2 April 2015.

7 The International Commission for the Conservation of Atlantic Tunas (ICCAT) convention, for instance, was adopted in 1966. The Inter-American Tropical Tuna Commission (IATTC) convention is even older and was adopted in 1949 (tuna and other marine resources in the Eastern Pacific Ocean).

8 E.g. ICCAT, IATTC, North Atlantic Fisheries Organization (NAFO), etc.

9 E.g. General Fisheries Commission for the Mediterranean (GFCM) or Indian Ocean Tuna Commission (IOTC).

10 So called Art 6 of the FAO Constitution organisations.

The basic organisational tools and processes used by the RFMOs consist of relatively small administrations (secretariats) and regular annuals meetings of the parties, combined with "inter-sessional" meetings. The functioning of RFMOs is defined within their convention texts. They are financed by contributions by their members, but in most cases resources are also made available on an *ad-hoc* basis by the contracting parties who send their scientists to the scientific committees or who finance specific projects and studies. The management of RFMOs is entrusted to an executive director (who is a full time professional). In certain cases, the chair of the RFMO plays a role, in cooperation with the executive director in the governance of the RFMO.[11]

Typically, the RFMOs also feature "subsidiary bodies" like "species panels" or scientific or compliance committees. In certain cases the chairs of such subsidiary bodies make important contributions to the effectiveness of the organisation.

As indicated, costal States and flag States are important actors under UNCLOS. On the other hand two other types of actors, *viz*. states where products are processed or consumed, have no real role in the governance system set up by UNCLOS. Nevertheless, all legal and operational tools introduced by these actors are also contributing to the proper governance system. In this context, it is worth mentioning, for instance, the Regulation to combat Illegal, Unreported and Unregulated (IUU) fishing and the Common Market Organisation Regulation adopted by the European Union.[12]

2 Does It Work? Is the Set-up Sufficient?

Over the last couple of years, in various fora, questions have been raised as to the adequacy of the system and general proposals have been floated to create new institutions.[13] Admittedly, these proposals cover a wider ambition

11 The role of the chairs is of variable importance, depending on the RFMO.

12 Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. Regulation (EU) No 1379/2013 of the European Parliament and the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products.

13 For instance comments by the Global Ocean Commission at the "World Ocean Summit" organised by "The Economist" in San Francisco, February 24–26 2014 and comments in its Report 2014 attached to a Letter from the Co-chairs dated 24/06/2014. The Global Ocean Commission pleads, *inter alia*, in favour of concluding an implementing agreement on BBNJ and for the creation of Regional Ocean Management Organisations (ROMO) with a wider mandate than the RFMO. It is not entirely clear whether the intention was to

than merely sustainable fisheries. They also refer to maintaining biodiversity, general environment protection and wider issues such as research, security or spatial planning. The general thrust of the comments is that the legal framework is not adequate to govern the ocean properly.[14] This covers a wider topic but it raises the question whether the present general framework is efficient or can be made to work efficiently at least to foster sustainable fishing and what are the conditions to make it work.

The contribution to better Ocean Governance of the ongoing preparation of a new implementing agreement covering Biological diversity Beyond National Jurisdiction (BBNJ) falls outside of the scope of the present analysis.

3 Results "on the ground" (or rather "in the water"): General Considerations

A first obvious question is about the biological sustainability of the fishing activity and hence whether the fish stocks have been improving. For this we can use analysis undertaken by various research institutes but it probably suffices to consult the FAO publication SOFIA.[15] Generally speaking the picture is not very positive. Wild marine capture reached a level of around 90 million tonnes by 1990 and has stabilised around that level ever since. In its study "The Sunken Billions," the World Bank (WB) estimates the maximum sustainable yield from world's fisheries at 95 million tonnes.[16] According to SOFIA, the number of stocks that are overfished has reached 30 per cent also by 1990. The number has fluctuated around that percentage ever since and is now estimated at 31 per cent. It is somehow hopeful that the situation has not continued to deteriorate despite greatly increased demand for protein, in line with the increasing world population. Furthermore, in its most recent report,[17] the FAO offers a glimmer of hope as it mentions "… a slight improvement in the state of certain fish stocks due to improved fisheries management." This is interesting

let RFMO evolve into ROMO or to create a wider coverage of the so-called Regional Sea Conventions.

14 For this reason, Commissioner Vella decided to launch a consultation on Ocean Governance and is expected to communicate his views on the way forward later in 2016.

15 "The State of World Fisheries and Aquaculture." The publication is bi-annual and is made available in due time for the meetings of the FAO Committee on Fisheries.

16 And the WB makes recommendations to reform so as to draw more from this precious resource (The World Bank, FAO, *The Sunken Billions: The Economic Justification for Fisheries Reform*, (The World Bank, Washington, DC, 2009).

■ Please check the open parenthesis mark in the sentence "The World Bank, fao…".

17 SOFIA 2016. Foreword by Director General of the FAO Graziano da Silva.

because not much has changed structurally within the fishery management system recently, so the existing system apparently is capable of delivering some results.

A second question is whether the situation has improved in terms of regulation, reporting and legality. There is no doubt that there has been an increase of regulation and reporting. At every meeting the RFMOs formulate recommendations and the reporting requirements have increased considerably. It is still another matter whether this is sufficient and whether all these rules and regulations are respected. This leads us to the problem of IUU.[18] It is difficult to make any precise statements on the occurrence of IUU. Most probably, unregulated fishing has gone down (as many more fisheries are now regulated). As to the unreported fishing, it is hard to evaluate and the fact that we now dispose of many more reports is not a reliable indicator that the unreported has decreased (because there are many more reporting requirements than before, due to increased regulation). As to the illegal fishing, the same applies: fishing that was legal before may have become illegal pursuant to new regulation and for obvious reasons there are no statistics on such activity. On the other hand, the fact that more cases are brought to the attention may be an indicator of successful monitoring rather than of a greater occurrence. However, whether it is increasing or not, there is agreement that Illegal fishing should not exist and that it must be eradicated. Illegal fishing must be considered to be unsustainable "per se" (even in cases where it does not immediately threaten the biological sustainability of a particular stock). So the Governance system must be capable of eliminating IUU fishing if it wants to foster sustainability.

A third question which is often raised relates to managing the overcapacity. The Sustainable Development Goal (SDG) 14 on Oceans[19] even refers to it directly when inviting the World Trade Organisation (WTO) to eliminate subsidies that lead to overcapacity. This question falls outside of the scope of the present analysis,[20] even though it is commonly acknowledged that overcapacity in the fisheries sector can be a driver towards IUU and unsustainable fishing practices.

18 Illegal Unreported and Unregulated Fishing.

19 SDG 14: "Conserve and sustainably use the oceans, seas and marine resources for sustainable development."

20 In terms of sustainability, it is not the existence of overcapacity that necessarily leads to overfishing. It often does, for sure, but then the problem can be tackled as an IUU problem. Of course, it would be better to eliminate overcapacity so as to reduce the risks of overfishing.

4 Results: A Case Study

As the FAO has indicated, there are instances where better management led to improving the stock situation and arguably the Eastern Atlantic Bluefin Tuna (EBFT) offers a case in point. EBFT falls under the remit of ICCAT, the RFMO entrusted with the management of Atlantic tunas. Arguably EBFT progressively got into a dire situation at the beginning of the 21st century. Some observers feared a total collapse of the stock. In 1998 a first measure with a Total Allowable Catches (TACs) (of 32 000 tonnes) was introduced but this did not prevent the situation from further deteriorating and so, in 2006, a recovery plan was adopted and it was adjusted several times in the subsequent years. The TACs which still stood at 32 000 tonnes in 2006 was reduced in further stages to a minimum of 12,900 tonnes in 2011 and 2012. Apart from TACs, the plan contained draconian measures of capacity reduction, limitation of minimum harvesting size, limitation of the fishing season as well as control and compliance. By 2013, the scientists saw the first evidence of a recovery of the stock and the following years, these indications remained positive allowing for a sequence of modest and measured increases of the TAC, whilst maintaining all the other aspects of the recovery plan.

All this was negotiated and accepted by the Contracting Parties (with a lot of blood, sweat and tears). The success was based on the actual implementation of the agreed measures and strict compliance with them.

This case shows that the RFMOs can work and produce results. No other organisation could have produced that and could have produced a result that could be adapted rather flexibly to the new stock situation.

This of course does not imply that such a fortunate outcome happens automatically. On the contrary, there is a wide domain of effort to be made to make the RFMOs as efficient as they should be. My only point at this juncture is that the world community does not necessarily need to create new institutions to foster sustainable fishing. Investing effort in making the existing institutions work, might do the job. This will be even more pertinent if and when the WTO tackles the subsidies issue.

Hence we face a question of performance by the RFMOs. How can we make sure that they perform optimally and do we have any structural processes that monitor this performance?

5 Drivers for Better Performance

There are presently three structural drivers for better performance of the RFMOs.

First and foremost, the UNFSA review process, which itself represents an effort by the parties to evaluate the governance process critically, has identified performance assessments as an objective to be pursued by all RFMOs. The UNFSA's recommendation is to undertake these reviews systematically and to create a continuous cycle of evaluation and improvement. This is reminiscent of the quality management practice that has been so fundamental to improve the performance of many industries.

Secondly, within the group of the tuna RFMOs (t-RFMOs), the so-called Kobe process[21] aims at seeking efficiency gains through better cooperation. Three large meetings took place, bringing together contracting parties and stakeholders. A long list of recommendations was made. t-RFMOs are invited to make a self evaluation and to report on the progress towards meeting these recommendations. The Annual meetings of the t-RFMOs should have a standing agenda point to discuss the process and the progress. Provisionally no further all-inclusive meetings are scheduled, taking into account the cost of organising such meetings. But, a reduced group composed of the chairs of the successive Kobe meetings, the chairs of the t-RFMOs and their executive secretaries meet at least once a year to review progress and decide on the way forward.[22]

Thirdly, most of the RFMOs—not only the t-RFMOs—have undertaken at least one performance review by independent evaluators and have built into their organisation a schedule to follow the recommendations. This leads to a continuous improvement process. These performance reviews aim at evaluating how good the RFMOs are at fulfilling the objective of managing the stocks in a sustainable manner. Basically the following questions are raised (non-exhaustive list):

– is the research good enough?
– is there a capacity to take decisions?
– are the decisions good enough, to make sure that the fish stocks are harvested sustainably, that decisions are precautionary and that an ecosystem approach is followed, for instance including an attention to bycatch?

21 Referring to the city of Kobe where the first meeting took place. The idea was to streamline operations in the group of tuna RFMO and to create economies of scale and higher efficiencies through exchange of best practice, pooling of effort and exchange of data and more general information.

22 Various formats for these reduced meetings are being tried. There have been physical meetings on the occasion of the COFI at FAO or at the occasion of another large conference where all involved happened to be (e.g., the Bluefin futures conference organised in Monterey in January 2016) or video conference meetings.

– can these decisions be taken quickly enough and for the appropriate length of time?
– is there compliance?
– can the institution avoid free riding? and
– are the organisations sufficiently inclusive? Are all contracting parties effectively participating and do the cooperating but non contracting parties and fishing entities sufficiently comply with the decisions?

Pursuant to recommendations under a performance review or on top of them, RFMOs may undertake evaluations of their internal efficiency.[23]

RFMOs are member driven organisations, so decision making is not always easy. Some are working on a consensus basis so any party can block a decision and even those RFMOs that do allow voting try to use this option as a last resort. Basically consensus is the preferred option. Consensus of course has the big advantage of increasing the likelihood of later compliance but it requires major effort to make it happen and may result in less ambitious measures. Furthermore, at least in theory but also occasionally in practice, consensus creates the problem of parties having a say but no real stake. Such parties may be tempted to arbitrate their approval against concessions in unrelated areas, which does very little for the efficiency and coherence of the decisions.

Another governance issue in a number of RFMOs relates to the interaction of the chairs and the members on the one hand and the administrations (the secretariats) and their executive directors on the other hand. Ideally there are checks and balances but in practice finding the appropriate equilibrium can be an intricate exercise.

6 Final Comments and Conclusion

In practice the RFMOs are fairly efficient providers of good decisions. "Warts and all" they deliver. Of course there is a need for constant attention to guarantee that the performance improves continuously. Fortunately the basic drivers are in place to make this happen.

23 Taking the example of ICCAT, one can refer to processes such as the convention amendment (recommended by the first Performance Review), a working group studying the future of ICCAT and internal efforts by the chairs of panels and efforts by the Chair and the executive secretary to enhance internal efficiency. Sometimes such efforts are also contained in recommendations or resolutions (e.g., the best science resolution of 2011, formally introducing a Total Quality Management process).

Rather than discussing yet new structures the world community should invest in the existing institutions. This requires effort and commitment. Some supplementary processes might be useful: regular performance audits and systematic follow up, using peer pressure and more systematic capacity building, and creating conditions for all participants to fully engage in existing process.

Some light additions could be made. One could imagine creating a performance evaluation board or transforming an existing process (*casu quo* the Kobe process) into such a performance evaluation board.

For the rest, the existing set-up can function if there is enough willingness and effort by the contracting parties to make it work. Those who care about sustainable fishing, be it contracting parties, fleet operators, think tanks or civil society can play a useful role by maintaining enough pressure on the managers.