UNREGULATED FISHING ON THE HIGH SEAS AND THE FORMATION OF CUSTOMARY INTERNATIONAL LAW

BY

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To Carolina, with love and gratitude
Abstract

Unregulated fishing on the high seas and the formation of customary international law

Custom is an essential source of international law. Yet the process of customary law formation has received much less attention than its identification. This thesis studies the rise of an obligation on third states to cooperate with regional fisheries management organisations (RFMOs) to manage high seas fishery resources and examines the evolution of this duty to contribute to understanding the formation of customary law.

The thesis examines whether the duty to cooperate is leading to the formation of a customary rule. It concludes that global practice through RFMOs, and their actions against unregulated fishing, suggests this obligation is emerging as custom, performing normative effects beyond treaty commitments. The interactions based on claim and acceptance, acquiescence or protest explain the legal consequences of emerging custom. The dynamics of the formation process challenge common criticisms of customary international law and demonstrate that developing states play a crucial role in custom development.

The success of RFMOs in confronting uncooperative non-member states illustrates the interplay of treaties, international organisations and non-binding instruments in custom formation. Customary law can indeed form around multilateral treaties and in a legal environment defined primarily by treaty obligations. The rise of the duty to cooperate through RFMOs suggests that international organisations contribute to custom formation both as catalysts and legal actors creating relevant practice. It also reveals the decisive role of non-binding instruments in sparking customary law development.
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2 European Council

3 Food and Agriculture Organization

4 International Law Commission

5 United Nations Conferences

6 United Nations General Assembly

D MULTILATERAL REGIONAL ORGANISATIONS REPORTS AND DECISIONS

1 CCAMLR

2 CCSBT

3 GFCM

4 IATTC

5 ICCAT

6 IOTC

7 NAFO

8 NEAFC
### List of Abbreviations

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<th>Description</th>
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<tr>
<td>CAOF</td>
<td>Central Arctic Ocean Fisheries (Agreement)</td>
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<td>CCAMLR</td>
<td>Commission for the Conservation of Antarctic Marine Living Resources</td>
</tr>
<tr>
<td>CCSBT</td>
<td>Commission for the Conservation of Southern Bluefin Tuna</td>
</tr>
<tr>
<td>CMMs</td>
<td>Conservation and management measures</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
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<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<tr>
<td>GFCM</td>
<td>General Fisheries Commission of the Mediterranean</td>
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<tr>
<td>IATTC</td>
<td>Inter-American Tropical Tuna Commission</td>
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<tr>
<td>ICCAT</td>
<td>International Commission for the Conservation of Atlantic Tunas</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICNAF</td>
<td>International Commission for the Northwest Atlantic</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>ILC draft conclusions</td>
<td>International Law Commission’s draft conclusions on identification of customary international law and commentaries thereto (2018)</td>
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<tr>
<td>IOTC</td>
<td>Indian Ocean Tuna Commission</td>
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<tr>
<td>IPOA-IUU</td>
<td>International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing</td>
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<td>IUU</td>
<td>Illegal, Unreported and Unregulated Fishing</td>
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<tr>
<td>JNRFC</td>
<td>Joint Norwegian-Russian Fisheries Commission</td>
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<tr>
<td>NAFO</td>
<td>Northwest Atlantic Fisheries Organization</td>
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<tr>
<td>NEAFC</td>
<td>North-East Atlantic Fisheries Commission</td>
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<tr>
<td>NPFC</td>
<td>North Pacific Fisheries Commission</td>
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<tr>
<td>PECCOE</td>
<td>NEAFC’s Permanent Committee on Control and Enforcement</td>
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<td>PWG</td>
<td>Permanent Working Group</td>
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<tr>
<td>RFMOs</td>
<td>Regional Fisheries Management Organisations</td>
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<td>SEAFO</td>
<td>South East Atlantic Fisheries Organisation</td>
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<td>SIOFA</td>
<td>Southern Indian Ocean Fisheries Agreement</td>
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<tr>
<td>SPRFMO</td>
<td>South Pacific Regional Fisheries Management Organisation</td>
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<tr>
<td>STACFAC</td>
<td>NAFO’s Standing Committee on Fishing Activities of Non-Contracting Parties</td>
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<tr>
<td>STACTIC</td>
<td>NAFO’s Standing Committee on International Control</td>
</tr>
<tr>
<td>TCC</td>
<td>WCPFC’s Technical and Compliance Committee</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNCLOS I</td>
<td>First United Nations Conference on the Law of the Sea</td>
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<td>UNCLOS III</td>
<td>Third United Nations Conference on the Law of the Sea</td>
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<tr>
<td>UNFSA</td>
<td>United Nations Fish Stocks Agreement</td>
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<tr>
<td>WCPFC</td>
<td>Western and Central Pacific Fisheries Commission</td>
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Chapter One: Outline and Context

Although we live in a sea of customs, like the fish, we are not aware of the sea around us. (…) Customs are the by-product of individual actions but not the project of individual design. Like life itself, customs are what happen when we were making other plans.1

James Bernard Murphy The Philosophy of Customary Law (2014)

I The Thesis

This thesis concerns the obligation to cooperate to manage high seas fishery resources, as defined in the 1995 United Nations Fish Stocks Agreement (UNFSA), and its development as customary international law.2 It claims an obligation to cooperate through regional fisheries management organisations (RFMOs) is emerging as a customary rule. This finding offers instructive lessons to understand the custom formation process, providing insight to explain three central relationships in the field: how treaties, international organisations and non-binding instruments contribute to developing customary law.

A The Argument

Custom is the backbone of international law. It does something very few treaties can do: it binds all states. Custom serves the international community’s fundamental interests by securing baseline structural norms that cannot be guaranteed through the optional and individualised commitments provided by treaty law alone.3 It is the force that ties the system together in a world increasingly regulated by treaties.

Custom is also the most challenging source of international law. Beyond its basic premise – law based on the practice of states performed with a sense of legal obligation – there is plenty of disagreement and uncertainty. Custom is often accused of being ambiguous, having no

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1James Bernard Murphy The Philosophy of Customary Law (OUP, New York, 2014) at ix.
method and lacking legitimacy as the imposition of developed states. Several interactions between customary law and other sources and subjects of the international system remain unexplored or insufficiently understood.

There are two fundamental approaches to understanding custom: identification and formation. The identification question concerns the test to ascertain the existence of a specific rule; the formation enquiry analyses the process potentially leading to that outcome. Traditionally, scholars and practitioners mostly pay attention to the identification question. But the fundamental shortcoming of the identification test is that it presents a momentary and incomplete picture, unable to explain how a customary norm emerges and becomes binding. Because this test cannot explain how custom changes, it struggles to describe how other elements of the international system interact or contribute to custom development. The identification question cannot answer which states engage in developing custom and the consequences of such participation in building customary law.

Instead, this thesis argues that focusing on the formation process is essential to understanding customary international law. The importance of the formation process extends beyond assisting in the identification test. It explains how emerging custom progressively performs a normative effect, offering a sensible account of customary law’s most problematic element, namely the subjective opinio juris. The focus on the formation process also counters long-standing criticisms of this source of law, including its ambiguity, contested legitimacy and lack of method. Observing this process makes it possible to appreciate how other elements of the international system contribute to custom development.

Yet the formation of customary law receives far less attention than the question of custom identification. The most telling example of this sidelining is the recent work of the International Law Commission (ILC) on customary law. The ILC first included custom formation in its study, only to reverse this decision later. As a result, the ILC’s work only confirms general views about the criteria to identify customary law but offers little insight into how custom emerges, interacts or performs a normative role.

These gaps are not new. Bederman observes that, after centuries of debate, we are no closer to a conclusive answer as to what makes a binding custom among nations, the relation between customary law and treaties, or the process by which customary international law changes. Against this background, this thesis confronts these gaps by focusing on an in-depth assessment of the rise of one specific rule: the obligation to cooperate to manage high seas fishery resources through RFMOs, as defined in Articles 8(3)-(4) and 17(1)-(2) UNFSA. By arguing and demonstrating that this duty is an emerging rule of customary law, the thesis also offers new insight into how custom develops and interacts with other central elements of the international system.

The general duty for states to cooperate to manage high seas resources has been recognised in international fisheries law since the late 1950s. In response to the challenge of catches by non-members to RFMOs or unregulated fishing on the high seas, UNFSA radically changed the legal meaning and content of this duty. Under UNFSA, states must discharge the obligation to cooperate through RFMOs by becoming members of the relevant organisation or arrangement, applying their management measures or refraining from fishing. But because treaties only bind states that ratify them (pacta tertiiis), this version of the duty to cooperate only applies to UNFSA parties. In the absence of this specific treaty commitment, the freedom of fishing on the high seas recognised in the 1982 United Nations Law of the Sea Convention (LOSC) and existing custom was still applicable.

Over the years following UNFSA, RFMOs challenged the legal framework that allowed unregulated fishing to thrive. They claimed a specific legal content of the duty to cooperate on the high seas, demanding that non-party states discharge such duty by becoming members of the relevant RFMO, agreeing to apply its rules, refraining from fishing or otherwise facing punitive consequences. As a result of the successful developments in regional state practice since the late 1990s, the distinctive elements defining the formation of customary law are visible in every region except the polar oceans. Over nearly two decades, state practice has run in parallel and separately to treaty law, overcoming the limitations of the pacta tertiiis. This trajectory, most noticeable since the mid-2000s, demonstrates that non-members have

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5David Bederman Custom as a Source of Law (CUP, New York, 2010) at 155.
progressively changed their behaviour, accepting RFMOs’ claims as unregulated fishing decreased. The current picture is radically different from the mid-1990s and early 2000s, where the non-member problem on the high seas was rife. As a result, the freedom of fishing, as understood for most of the past century, is now over. A restrained version based on the duty to cooperate, as reflected in UNFSA, is replacing it.

The rise of the duty to cooperate based on UNFSA provisions offers general lessons to understand the formation of custom and the normative effects of this source of law as it develops. At the core of custom formation lies a dialectical process driven by states asserting a position with legal content or consequences and the reactions by other states. As RFMOs claimed a specific duty to cooperate and expected non-members to comply, these states responded by expressing acceptance, acquiescence or protest. The progressive accumulation of state practice over these dialectical exchanges reaches objective results based on the subjective reactions of those states engaging in the process. Equally, the logic of opposability arising from the acts of acceptance and acquiescence, supported by the ideas of legitimate expectations and good faith, justify the legal effects of the emerging rule between some states, including potential enforcement.

The focus on custom formation also offers the prospect of countering long-standing critiques against customary law, including its ambiguity, legitimacy deficit and lack of method. It shows, for example, that developing states have been involved closely in the development of the duty to cooperate through RFMOs, contradicting the critique that the Global South does not participate in custom formation.

The case against unregulated fishing presents fresh insight into how treaties, international organisations and non-binding instruments contribute to developing customary law. The duty to cooperate represents a situation where custom gravitates towards treaty law, inspired by UNFSA provisions on cooperation. Despite the difficulties in finding relevant state practice for customary law formation amid an international fisheries regime increasingly dominated by treaties, custom can still rise in such a legal environment. Significantly, and against the arguments underlining radical differences between the LOSC and UNFSA, a reconciliation based on the possibility of normative balance between the emerging customary duty to cooperate and the LOSC is possible.
The development of a general obligation to cooperate through RFMOs also unveils the contribution of international organisations to customary law formation. RFMOs have played a dual function as catalysts or agents of state practice and legal subjects, offering a mixed picture of the role of international organisations in custom development. Equally, RFMOs’ role in developing a customary duty to cooperate reveals how non-binding instruments influence custom formation. The FAO 2001 International Plan of Action against Illegal, Unreported and Unregulated Fishing (IPOA-IUU) has been central in supporting RFMOs’ claims against non-members by assimilating illegal and unregulated fishing, two concepts historically referring to different ideas.7 This assimilation legitimised RFMOs’ expanding practice to treat non-members as deserving the same treatment as illegal fishing, significantly impacting custom development.

This thesis does not argue that the duty to cooperate through RFMOs is a mature rule of customary law – meaning by this that it is ripe to fulfil the identification test in its entirety. The high standard of states sharing a general belief that this norm is customary and recognised accordingly has not yet materialised. Nevertheless, as this duty emerges as custom over the dialectical process of claim and reaction, it still performs a normative role and creates legal consequences for many states beyond treaty commitments.

**B Contribution, Structure and Method**

This thesis makes a substantive contribution to the field in two ways. It is the first study to use an inductive methodology to assess more than three decades of state practice against unregulated fishing to assess whether the duty to cooperate as defined in UNFSA has evolved or is evolving into customary law. Previous research has addressed similar enquires, but its scope has been limited or focused on different obligations. As Chapter Two section V discusses, some scholars have asked whether this duty has become customary but have offered contradicting responses. Equally, those who have addressed this question did not necessarily assess all the available evidence or have looked at it from different perspectives. Moreover,

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7Food and Agriculture Organization (FAO) *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2 March 2001).
they have not reflected on the rise of the obligation to cooperate through RFMOs as a source of normativity, which is one of the central issues this thesis explores.

The second contribution involves the understanding of the custom formation process. This thesis is the first to assess the evolution of the obligation to cooperate through RFMOs as a case study to produce general knowledge on the topic of customary law formation, including the meaning and practical application of custom’s subjective element. Specifically, the thesis address three questions to deliver this second goal.

The first one concerns how treaties can contribute to generating customary law. The general understanding of this relationship has been traditionally limited to suggesting a case-by-case approach and adopting no presumptions that treaties generate custom. Based on the interactions between the LOSC, UNFSA, dozens of regional treaties and the emergence of the duty to cooperate through RFMOs, the thesis queries, through the lens of the formation process, whether and how customary law can still evolve and be influenced by a legal ecosystem dominated by treaties.

The second issue relates to the role of international organisations in custom development, an interaction that the ILC draft conclusions did not clarify. Despite the modern relevance of international organisations as vehicles for inter-state cooperation and norm-creation, their role in custom development still needs more attention. The rise of the obligation to cooperate through RFMOs offers a fitting case to explore this question, as these decentralised organisations exhibit regulatory powers and abundant practice, suggesting a distinctive account from the often-quoted examples based on United Nations global bodies and their decisions.

The third question asks about the influence of non-binding instruments on customary law development. By discussing the impact of the 2001 IPOA-IUU on the practice and opinio of states and RFMOs, the thesis examines whether and how a soft-law approach can shape a commonly accepted standard to discharge the obligation to cooperate for the management of high seas stocks.

This study is organised into eight chapters. In addition to outlining the thesis and its argument, Chapter One explains the non-member problem as a context to understand the challenge that RFMOs confronted by developing subsequent regional practice. Chapter Two presents a
theoretical framework to examine custom formation, an indispensable methodological step before assessing the meaning of state practice and *opinio*.

Chapters Three to Six develop the core of the inductive task of this thesis, discussing state practice regarding the obligation to cooperate as defined in UNFSA by examining all the RFMOs with competence to manage high seas fishery stocks.\(^8\) Chapter Three deals with RFMOs in the Atlantic Ocean and the Mediterranean Sea, Chapter Four with those in the Pacific, Chapter Five with the ones in the Indian Ocean and Chapter Six with the polar regions. By offering a geographical perspective and avoiding a purely chronological narrative, this analysis facilitates a comparative assessment and provides a lively account of how state practice has evolved. A regional perspective also enables a more realistic examination of the degree of consistency in state practice across areas and states engaged, paying attention to regional nuances.

The last two chapters extract the broader lessons of the case against unregulated fishing for understanding the formation of customary law. Chapter Seven provides a systematic, comparative global evaluation of how the duty to cooperate as framed in UNFSA is emerging as a rule of custom. Finally, Chapter Eight discusses normativity and participation in the rise of the customary duty to cooperate through RFMOs and how treaties, international organisations and non-binding instruments have contributed to this development.

As anticipated, the thesis uses an inductive approach to the first legal question of whether the duty to cooperate as recognised in UNFSA has become or is becoming a customary obligation. The study searched and collected all the possible evidence of state and RFMOs’ practice contributing to answering this question, including global and regional approaches and processes.

Specifically, this task considered researching the work and practice of all the existing RFMOs, arrangements and one other international organisation with competence to regulate high seas

\(^8\)Except those with competence over anadromous stocks, as Chapter One explains. For a map illustrating each RFMO’s area of competence, see the Appendix to this thesis.
fishery stocks, mostly straddling and highly migratory ones. Specific evidence in this context includes RFMOs acts and decisions, their background discussions in annual meetings and reports, diplomatic exchanges between RFMOs and uncooperative non-member states, and reactions by non-member states, including actions and omissions, among other sources. Some of these materials are in the public domain, while others are not. In such cases, it was necessary to formally request access to documents belonging to a particular state or RFMOs.

The thesis then reviews and critically assesses such materials and evidence in a broader context, seeking patterns of evolution, consistency and other relevant elements according to the methodology for conceiving the formation of customary international law presented in Chapter Two.

II The Non-member Problem: Unregulated Fishing on the High Seas

The first step into assessing the customary evolution of the obligation to cooperate through RFMOs involves understanding the problem this rule seeks to tackle. For this purpose, the present section has three parts. The first describes how two central norms of international law, the freedom of fishing and the *pacta tertiis*, create the legal gap that allowed unregulated fishing to thrive. It discusses how states sought to address this gap by resorting to treaty law, particularly UNFSA, and the limits of this approach. The second part offers some estimations of the environmental impacts of unregulated fishing. Understanding why non-members’ operations undermine regional cooperation contextualises the evolution in state practice in reaction to this problem.

The third part introduces two sets of terms used throughout this thesis. The first is the contemporary illegal, unreported and unregulated (IUU) fishing notion, now pervasive in the jargon of international fisheries since its recognition in the IPOA-IUU in 2001. Illegal and unregulated fishing are two different concepts, but the IUU notion treats them together and encourages states to confront them under a similar set of countermeasures. The second set concerns states’ different motivations within the non-member problem, explaining what flags

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9This study also includes the Commission for the Conservation of Antarctic Marine Living Resources, even though it is not an RFMO, as Chapter Six concludes.
of convenience and new entrant states mean and the shortcomings and limits of these categories.

A The Legal Problem: the Gap behind Unregulated Fishing

Fishing is one of the traditional freedoms of the high seas. For the Romans, marine fishing was an activity available to anyone.\(^\text{10}\) The sea and the seashore were considered things common to humankind and, consequently, “no one could be forbidden to approach the seashore, nor could any easement be placed on the sea.”\(^\text{11}\) The freedom of fishing was an established principle in European practice as early as the 14\(^{th}\) century, to the extent that England recognised it as “a part of her international custom”\(^\text{12}\).

The debate in the 17\(^{th}\) century between *mare liberum* and *mare clausum* signalled a long period of conflicting views on the extension of coastal sovereignty over the sea, including exclusive fishing rights. In his *Mare Liberum*, Hugo Grotius argued that the Dutch had the right to trade with the East Indies, even by force if needed, and that free navigation was pivotal for this purpose.\(^\text{13}\) Fishing may not have been at the core of Grotius’ argument, but he occasionally referenced it. Grotius recognised fishing as a freedom of the seas but accepted that fish could be exhausted, implying that this activity could be limited or prohibited.\(^\text{14}\) It is thus unclear whether Grotius believed in an unqualified right to fish. Nevertheless, states came to view unrestricted access to marine living resources beyond areas under national sovereignty as a starting point, a right vested in all states.\(^\text{15}\)

In those areas not subject to coastal states’ authority, the flag state is the essential jurisdictional link to regulate and control ships. Therefore, any order based on the freedom of the high seas requires flag states to impose restraints on their vessels. Since governments rarely impose unilateral restrictions on their fleets, international cooperation resulting in multilateral and

\(^\text{10}\)Annalisa Marzano *Harvesting the Sea: The Exploitation of Marine Resources in the Roman Mediterranean* (OUP, Oxford, 2013) at 236.

\(^\text{11}\)At 266.

\(^\text{12}\)Thomas W Fulton *The Sovereignty of the Sea* (Blackwood, Edinburgh, 1911), (Kraus Reprint, Millwood (New York), 1976) at 67-69 and 72.


\(^\text{14}\)At 43.

mandatory management measures is essential to regulating high seas fishing. However, when these measures are adopted, their effectiveness is compromised by the *pacta tertiiis* rule: a fundamental principle of international law whereby treaties do not create obligations or rights for third states without their consent.\textsuperscript{16} Because treaties only bind the states that ratify them, vessels flagged to non-contracting parties have no obligations to the management measures adopted according to such treaties. This legal vacuum creates the non-member problem, or unregulated fishing on the high seas, where vessels flagged to third states that stay out of multilateral agreements can continue fishing, undermining the collective effort made by others.

The consensual nature of international law made non-members of fisheries agreements a long-standing problem. Freedom of access over time became synonymous with unlimited exploitation of marine living resources, echoing the tragedy of the commons.\textsuperscript{17} The international community has been slow to accept that a 400-year-old notion, suitable to justify free navigation and which emerged along with the supposedly endless bounty of the open seas, is unfit to exploit common goods sustainably.

**I First efforts to cooperate and the non-member problem**

Managing high seas resources did not receive much attention until the end of the Second World War. As one of the liberties of the high seas, the freedom of fishing was the applicable rule to those seeking to exploit fishery resources. In the few cases when states agreed to regional measures, the non-member problem disrupted those early agreements.

Three examples illustrate the point. The 1839 Convention between France and Great Britain, probably the first attempt to regulate high seas fisheries anywhere, did not prevent further disputes between the two parties.\textsuperscript{18} One reason was that vessels flagged to a non-member –

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\textsuperscript{16} *German Interests in Polish Upper Silesia (Germany v Poland)* (1926) PCIJ (series A) No 7. Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) [VCLT], art 34. There is broad agreement about the customary character of the *pacta tertiiis nec nocent nec prosunt* rule.

\textsuperscript{17} Stephanie McWhinnie “The Tragedy of the Commons in International Fisheries: an Empirical Examination” (2009) 57 J Environ Econ Manage 321 at 331.

\textsuperscript{18} Convention between Her Majesty and the King of the French, defining and regulating the Limits of Exclusive Right of the Oyster and Other Fishery on the Coast of Great Britain and of France (signed 2 August 1839). Nicola Ferri *Conflicts over the Conservation of Marine Living Resources. Third States, Governance, Fragmentation and Other Recurring Issues in International Law* (Giappichelli Editore, Torino, 2015) at 88.
Belgium – did not respect a three-mile exclusion zone imposed under the Convention. In the case of marine mammals, non-members undermined the regulation of fur seals in the Bering Sea imposed by the 1893 Arbitration award. As a third party to the arbitration, Japan returned to sealing in 1901, disregarding the existing management measures. For the Canadian fleet that originally restrained its operations, “the temptation to carry on equal terms with the Japanese proved too strong to be resisted.”

The 1923 Halibut Convention established a permanent body in the Northeast Pacific, the International Fisheries Commission, whose powers expanded in 1930 and 1937. Concerns over unregulated fishing appeared shortly after. One commentator observed:

> But the very success of the Commission now brings an unforeseen threat. Tempted by the increased abundance of halibut built up solely as a result of this cooperation between Canada and the United States and the enforced sacrifices of their nationals, British and Norwegian fishing interests which have in no way contributed to the rehabilitation of these fisheries, are now threatening to invade this field with their floating cold storage plants, carrying their own fishery flotilla and alien fishermen. A few seasons of unregulated fishing (...)

> will deplete these Pacific Coast banks.

British and Norwegian vessels were not alone in legally threatening the efforts made by others. Discussing the expansion of Japanese fishing into the Northeast Pacific, a scholar observed that Japan was “in a perfectly legal position in undertaking fishing in non-territorial waters”. The United States and Canada had to accept it as part of the freedom of the high seas, as international law had no proper remedies to halt this fishing other than extending invitations to cooperate voluntarily. The law was built on the principle that outside territorial waters, “the fisheries are free to all and subject to the control of no one save each nation may enact

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19Fulton, above n 12, at 615.
20Bering Fur Seals Arbitration (Great Britain v United States) (Award) (1893) 1 Moore’s International Arbitrations 755.
21The Fur Seal Question (1907) 1(3) AJIL 742 at 743.
22Convention between the United States of America and His Britannic Majesty for the Preservation of the Halibut Fishery of the Northern Pacific Ocean including Bering Sea US Treaty Series 701 (signed 2 March 1923, ratifications exchanged 21 October 1924), art III.
legislation concerning its fishermen.” When international cooperation happened, unregulated fishing promptly appeared, undermining other states’ management efforts.

2 The early obligation to cooperate

High seas fishing was transformed after the Second World War. New technologies increased the ability of boats to find, catch and process fish, making long-distance water activities profitable, often supported by government subsidies. As fishing fleets ventured seawards, international cooperation increased in the late 1940s, with early RFMOs taking shape in the Northeast Atlantic, Northwest Atlantic, the Mediterranean and the Eastern Pacific.

The establishment of these early RFMOs was a positive development. Still, because absolute freedom of fishing was the rule of the day, they had no means to control states unwilling to cooperate. Mindful of the shortcomings of this rule, the International Law Commission (ILC) attempted in the early and mid-1950s to change this picture. It proposed that measures adopted on the high seas by states concerned “shall be applicable” to nationals of other states engaging in fishing for the same stock in the same area. If they did not accept such measures and no agreement was possible within a reasonable period, any interested parties could initiate arbitration.

The First United Nations Conference on the Law of the Sea (UNCLOS I), held in 1958, discussed the ILC proposals. Unregulated fishing was not a priority at UNCLOS I, but the outcome was still significant for a new high seas regime. For the first time, a multilateral instrument with global aspirations established a duty to cooperate for managing high seas resources. The 1958 Fisheries Convention on the High Seas set out the general obligation of states to adopt “or cooperate with others in adopting such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas”.

Furthermore, Article 5 stated that if two or more states adopted conservation measures, vessels

25AP Daggett “The Regulation of Maritime Fisheries by Treaty” (1934) 28 AJIL 693 at 704.
27See Chapter Three sections II, III and V, and Chapter Five-II.
29At [289].
flagged to a third flag had to apply such measures to their nationals, “which shall not be
discriminatory”. If other states did not accept the adopted rules and reached no agreement
within 12 months, any interested parties might initiate an adjudication procedure before a
special commission under Article 9. Although the obligation to cooperate entailed only a duty
to enter negotiations, the binding dispute settlement mechanism was an incentive to reach an
agreement. Freedom of fishing was, for the first time, no longer absolute.

However, the 1958 Fisheries Convention proved incapable of curtailing the excesses of this
high seas freedom. It recognised a general duty to cooperate for flag states but did not mention
the role of regional bodies. UNCLOS I adopted a weak resolution only encouraging the use of
international organisations “so far as practicable” to agree upon conservation measures.31 The
legal gap endured because declaring a duty to cooperate in treaty law was insufficient: the 1958
Convention never gained much support, and states did not resort to its provisions on dispute
settlement.32

The reality was that many states, not least developed ones, still regarded unrestrained freedom
of fishing as a central rule. The Belgian delegate at UNCLOS I claimed that “the riches at the
disposal of humanity should be exploited by all in complete liberty and on a basis of equality.”33
European delegations thought that any ground for excluding newcomers wishing to fish on the
high seas was unacceptable.34 Writing in the early 1970s, one scholar summarised the existing
law:35

[U]nder the principle of the freedom of fishing on the high seas, participation in international
fisheries agreements is entirely voluntary. No State is obliged to become a member of an
international fisheries organisation in order to have the right to engage in the fisheries for
which such organisation is responsible.

April 1958) vol 2.
32The 1958 Fisheries Convention has 39 state parties.
33Summary Records of the United Nations Conference on the Law of the Sea, Third Committee (High Seas:
34Summary Records, above n 33. See eg interventions by Greece and Federal Republic of Germany (Eighth
Meeting) at 16 and Yugoslavia (Eighteenth Meeting) at 43.
35Albert Koers International Regulation of Marine Fisheries: a Study of Regional Fisheries Organizations
The 1958 Fisheries Convention had limited participation, but it did not mean it had no influence. Absolute freedom of fishing was slowly beginning to be seen as undesirable. A decade after the 1958 Fisheries Convention entered into force, developments in the early 1970s hinted that such freedom was not entirely unconstrained in general international law. In the 1974 Fisheries Jurisdiction Case, the ICJ asserted that:  

[T]he 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.

The ICJ did not say much but implied that the notion of freedom of fishing in customary international law was changing. This general duty “to have due regard” aligned with existing treaty law, as recognised in the 1958 High Seas and Fisheries Conventions. It was still a weak reflection, coinciding with the onset of UNCLOS III negotiations from 1973 to 1982.

3 The LOSC and its shortcomings

Unregulated fishing was not an issue at UNCLOS III. After little or no debate, several of the LOSC provisions on high seas fisheries replicated the outcomes of UNCLOS I. They recognise a general duty to cooperate, adapting it to the circumstances imposed by the recognition of the Exclusive Economic Zone (EEZ).

The result was that the LOSC’s duty to cooperate is a feeble constraint on the traditional freedom of fishing. Article 117 LOSC provides that all states must cooperate with other states in taking measures for their nationals as may be necessary for the conservation of the living resources of the high seas. Article 118 develops this general obligation into a slightly more specific duty to enter negotiations “with a view to taking the measures necessary for the conservation of the living resources concerned”. These negotiations may establish regional

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36Fisheries Jurisdiction (United Kingdom v Iceland) (Merits) [1974] ICJ Rep 3 at 31.
37Convention on the High Seas 450 UNTS 82 (opened for signature 29 April 1958, entered into force 30 September 1962), art 2: “These freedoms (…) shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.”
organisations, but there is no specific way to discharge this obligation. A broad range of actions arguably may satisfy it, including some that would be insufficient to provide an appropriate framework for sustainable fisheries management, such as exchanging information and scientific staff or undertaking collective scientific undertakings. In short, cooperation does not require an agreement. It is an obligation of conduct: a commitment to negotiate in good faith. Crucially, the LOSC says nothing about how states should cooperate when an existing RFMO already has management measures in place.

These weaknesses impact the treatment of unregulated fishing. When a state enters negotiations in good faith, it presumably has discharged the duty to cooperate and may continue fishing on the high seas without interruption or infringement of its international obligations. Furthermore, Article 119(3) LOSC provides that “States concerned shall ensure that conservation measures and their implementation do not discriminate in form or fact against the fishermen of any State.” It is uncontested that Article 119(3) does not compel cooperation exclusively through existing RFMOs. Therefore, “any attempt to use conservation measures as a means of excluding new entrants” would be “enjoined by the non-discrimination provision of Article 119(3)”. As one scholar emphasised, Article 119(3) has “the potential to defeat any serious conservation regime for high seas fishing” as new entrants might utterly deprive other fishing states of their benefits.

In short, the mainstream understanding of this duty in the LOSC means “to cooperate to establish regional fisheries organisations, and not to establish and participate in them”.

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43DOALOS, above n 40, at 28.
44Burke, above n 39, at 131.
migratory stocks, central to high seas management. These provisions are, again, “due diligence” obligations that involve consultations in good faith. Article 63(2) requires coastal and high seas fishing states to seek agreement to regulate straddling stocks in the high seas. Such cooperation may occur directly or through “appropriate subregional or regional organisations”. Article 64 on highly migratory stocks commands that coastal states and states whose nationals fish in the region “cooperate directly or through appropriate international organisations” to ensure conservation. Under Article 64, cooperation must extend to the high seas and within the EEZ. Apart from its geographical scope, there is no significant difference between this provision and Articles 63 and 118 LOSC.

The problems with these rules are familiar. The expressions used are all legal obligations but lack “a considerable degree of precision”. They are phrased in a hortatory language, and none of the relevant provisions “provides a remedy if an agreement is not forthcoming”. Admittedly, Article 64 offers the option to cooperate through “appropriate international organisations”, but this language falls short of demanding engagement with existing RFMOs.

Overall, the LOSC did not progress much from the structure of the 1958 Fisheries Convention. The LOSC recognises the freedom of fishing for the nationals of all states subject to an imprecise duty to cooperate to adopt conservation measures. The LOSC did not contemplate anything similar to Articles 5 and 9 adopted in 1958, which forced new entrants to accept existing, non-discriminatory multilateral measures subject to a dispute settlement mechanism review.

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46 The LOSC set out regimes for other resources occurring on the high seas: marine mammals, and anadromous and catadromous species (arts 65-67). They are not relevant to this thesis. Marine mammals are regulated under particular regimes. International management of catadromous fisheries is in practice non-existent, as harvesting is prohibited except in waters landward of the outer limit of the EEZ. Article 66 LOSC prohibits the harvesting of anadromous species outward the outer limit of the EEZs, a rule that is highly likely part of customary international law. Therefore, unregulated fishing of anadromous species is illegal because fishing for salmon in the high seas by vessels flagged to non-members to the regional organisations managing salmon is a breach of both the LOSC and customary international law.


49 At 347.
Since the relevant LOSC provisions are weak, its near-universal participation or customary status could not solve the non-member problem.\textsuperscript{50} It was no surprise when further problems involving unregulated fishing arose after the conclusion of the LOSC. The Alaskan Pollock fishery collapse in the Bering Sea in the late 1980s and the Sea of Okhotsk in the 1990s exemplified the LOSC limitations.\textsuperscript{51} In the Grand Banks of the Northwest Atlantic, NAFO acknowledged in 1990 that “the problem of fishing by [n]on-member countries was serious and continued to develop”.\textsuperscript{52} The following year, NAFO estimated that catches by non-parties increased to approximately 35% of those taken by contracting parties.\textsuperscript{53} Similarly, ICCAT expressed its “serious concern” about bluefin tuna catches by non-members.\textsuperscript{54} In subsequent years, the challenge only worsened and expanded to other areas, including the Eastern Pacific regulated by IATTC, the North East Atlantic by NEAFC and Antarctic waters by CCAMLR. For some commentators, the rise of unregulated fishing was evidence of the inadequacy of the LOSC high seas provisions.\textsuperscript{55} The LOSC “left too much of the freedom of fishing intact”.\textsuperscript{56}

4 The 1995 UNFSA and the prohibition of unregulated fishing

Increasing non-member activities in the early 1990s led to dissatisfaction with the existing legal framework. The first efforts to change the high seas regime emerged in the preparations for the UN 1992 Conference on Environment and Development. A formal proposal to discuss unregulated fishing at the 1992 Conference came from 13 coastal states, mainly developing

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\textsuperscript{50}Treves has suggested: “[a]t present it can be said there is a presumption that the provisions [of the LOSC] correspond to customary law. It is, however, a rebuttable presumption (...).” Tullio Treves “UNCLOS at Thirty: Open Challenges” (2013) 27 Ocean Yearbook 49 at 51. Several authors concur in considering the LOSC’s duty to cooperate as part of customary law. See eg David Anderson “Straddling and Highly Migratory Fish Stocks” in R Wolfrum (ed) The Max Planck Encyclopedia of Public International Law (OUP, Oxford and New York, 2012) vol IX, 613 at 617; Rosemary Rayfuse “Article 117” in Alexander Proelss (ed) United Nations Convention on the Law of the Sea: A Commentary (Nomos Verlagsgesellschaft, Munich, 2017) 803 at 817.


\textsuperscript{52}NAFO 12th General Council Annual Meeting Report (September 1990) at 1.

\textsuperscript{53}STACFAC First Meeting Report (January 1991) 21 at 34.

\textsuperscript{54}ICCAT Twelfth Regular Commission Meeting Proceedings (November 1991) at 26.


\textsuperscript{56}Hey, above n 55, at 28.
It identified non-members as one among several challenges to the governance of the high seas. The text also included proposals about what a future agreement on high seas stocks should address; three out of nine concerned unregulated fishing. Conspicuously, it specified that:

In areas of the high seas where a management regime has been agreed within the framework of a competent international organisation (…) States must ensure that high seas fishing is undertaken only in accordance with the conservation and management rules adopted under that organisation or arrangement.

The 1992 Conference was receptive. Its Agenda 21 recognised unregulated fishing as part of a long list of challenges to the existing high seas regime. It also called on states to convene “as soon as possible” an intergovernmental conference under United Nations auspices to promote “effective implementation of the provisions of the [LOSC] on straddling fish stocks and highly migratory fish stocks”. The UN Conference on Straddling and Highly Migratory Stocks started in April 1993 with the objective of “promoting effective implementation” of the LOSC.

Notably, the Conference quickly agreed on the provisions for the obligation of non-members to cooperate with RFMOs. With minor amendments, the Chairman’s first Negotiating Text became the basis of Article 8(3)-(4) UNFSA, the cornerstone of the treaty’s provisions to address unregulated fishing. Equally, the same text put forward what, with barely any

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58 At 42.
59 At 43-44.
60 At 44.
62 Para 49(e).
63 United Nations Conference on straddling fish stocks and highly migratory fish stocks GA Res 47/192 (29 January 1993) at 2. Since negotiations took place in informal meetings, the documents presented by delegations and the Chairman of the Conference are essential sources to understand the process. Anderson, above n 50, at 467.
65 Negotiating Text (Prepared by the Chairman of the Conference) UN Doc A/CONF.164/13 (23 November 1993). Reproduced in Levy and Schram, above n 64, at 76 para 9 and 12.
changes, would become Articles 17(1)-(2) and 33 UNFSA. There were no objections against these provisions of the Negotiating Text. More than a year before the Conference’s closing, participants had fully agreed on the rules to deal with unregulated fishing.

(a) The new duty to cooperate

The fundamental change that UNFSA introduced was a new meaning for the duty to cooperate to manage high seas fishery resources. Article 8(1) recognises that states can pursue cooperation directly or through appropriate organisations or arrangements. Significantly, when a regional organisation has been established, and such organisation has the competence to adopt management measures for fishery stocks, Article 8(3) provides:

Where a subregional or regional fisheries management organisation or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, 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 organisation or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organisation or arrangement (…).

If a state does not become a member or does not otherwise agree to apply the measures established by the competent RFMO, Article 17(1) asserts that such state “is not discharged from its obligation to cooperate in accordance with the Convention and this Agreement”. Hence, Article 17(2) declares that:

Such State shall not authorise vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks which are subject to the conservation and management measures established by such organisation or arrangement.

Therefore, when there is a competent RFMO or arrangement, states fishing for straddling and highly migratory stocks on the high seas and coastal states must discharge their duty to cooperate by undertaking one of three specific actions. They shall either become a member of the regional organisation or a participant in the arrangement, agree to apply the measures

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66 Paragraphs 35-36, ss 18(i), 37 and 38.
established by such organisations, or refrain from authorising their vessels to fish in the regulated area and for the regulated resources.

Article 8(4) states a significant legal consequence of this set of obligations:

Only those States which are members of such an organisation or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organisation or arrangement, shall have access to the fishery resources to which those measures apply.

UNFSA thus added new legal requirements to the regime envisaged by the LOSC, with two distinctive effects. First, to fish legally on the high seas for straddling and highly migratory species, a vessel must be flagged to a member state to the competent RFMO. If a state chooses not to join, its vessels still could fish, but only if that state applies the regional rules to them.67 The consequence is that Articles 17(1)-(2) and 8(3)-(4) entail a prohibition of unregulated fishing on the high seas.

Second, UNFSA granted RFMOs a privileged status. When there is an RFMO in place, cooperation must occur through it. The obligation to cooperate is not about making RFMOs’ measures directly binding to non-members but rather to set strict engagement standards with existing RFMOs.68 The outcome for recalcitrant states unwilling to cooperate under UNFSA terms is clear: no fishing.

UNFSA limits membership to RFMOs to those states with a “real interest”, and terms of participation must not discriminate or preclude new members with such an interest.69 The exact meaning of this expression remains unclear.70 The Chairman of the Conference later wrote that it aims at ensuring that “UNFSA could not be used to protect the position of states currently

67 David Balton “Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks” (1996) 27 ODIL 125 at 139.
68 Although framed for the significantly different context of adopting port state measures against IUU fishing, article 4(2) of the FAO 2009 Port State Measures Agreement [PSMA] made this explicit: “In applying this Agreement, a Party does not thereby become bound by measures or decisions of, or recognize, any regional fisheries management organization of which it is not a member.” Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 55 ILM 1157 (signed 22 November 2009, entered into force 5 June 2016).
69 Article 8(3) UNFSA.
70 Tore Henriksen, Geir Honneland and Are Sydnes Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes (Martinus Nijhoff, Leiden, 2006) at 19-21.
fishing on the high seas by freezing out potential new participants.” At the same time, “RFMOs should not be open to all states regardless of the extent of their interest.” In practice, as each RFMO defines its threshold for membership and participation, the “real interest” standard has lost importance.

(b) Obligation to take actions against non-party states

Two UNFSA provisions instruct states to take measures against non-members to RFMOs and non-parties to UNFSA. Article 17(4) provides that members to RFMOs “shall take measures” consistent with UNFSA and international law “to deter activities of such vessels which undermine the effectiveness of subregional or regional conservation and management measures”. Article 33(2) on non-parties to UNFSA is similar, applying between UNFSA parties and non-parties.73

These two provisions are closely related but do not target the same states. Under Article 17(4), UNFSA parties agree to impose punitive measures on other contracting parties where they violate UNFSA commitments by not participating in RFMOs. Article 33(2) targets UNFSA non-parties. This difference is relevant because a dispute arising from a violation of Article 17(4) could potentially engage Part VIII UNFSA on the Peaceful Settlement of Disputes.

Despite aiming at different situations, Articles 17(4) and 33(2) are very similar. Conspicuously, Article 33 resorts to the same language as Article 17(4) despite the limitations of treaty law regarding third parties and the freedom of fishing under the LOSC. At the time of UNFSA’s adoption, it was clear that non-UNFSA parties were under no obligation to comply with UNFSA provisions or cooperate with RFMOs if they did not participate in them. Subsequent chapters will explore how RFMOs have implemented Articles 17(4) and 33(2) UNFSA and how these provisions have influenced state practice against non-members.

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72At 355.
73Article 33(2) UNFSA: “States Parties shall take measures consistent with this Agreement and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this Agreement.”
The duty to cooperate as envisaged in Articles 8 and 17 UNFSA recognises RFMOs as decisive institutional actors, even if UNFSA does not define them.\(^{74}\) RFMOs share three distinctive features: an international organisation with legal personality and permanent organs, the competence to manage high seas stocks, and the power to adopt legally binding measures.\(^{75}\) Existing RFMOs are all established by treaty, and they are usually “stand-alone” and decentralised organisations, although there are exceptions.\(^{76}\) Organisations with competence over marine mammals but not fish and those with purely conservationist objectives are not RFMOs. Significantly, some RFMOs – those set up under Article 64 LOSC – would also have a role to play in waters subject to coastal states’ jurisdiction, in addition to the high seas.

UNFSA also talks about arrangements and defines them loosely.\(^{77}\) The distinction between RFMOs and arrangements is sometimes blurred but is not a concern because UNFSA and subsequent practice recognise the same duty to cooperate with RFMOs and arrangements.

5 The legal gap remains

UNFSA represented a ground-breaking achievement that, in many respects, went beyond “implementing” the LOSC. It represents a departure from the LOSC as it denies high seas freedom to fish to those states which are not members of RFMOs or do not agree to apply the conservation and management measures they adopt, something not spelt out in the LOSC.\(^{78}\) Unsurprisingly, some scholars questioned whether UNFSA provisions “are consistent with the

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\(^{74}\) Article 1(e) PSMA defined RFMOs in overly broad terms: “[A]n intergovernmental fisheries organization or arrangement, as appropriate, that has the competence to establish conservation and management measures.”

\(^{75}\) Also a secretariat that oversees the day-to-day operations. James Harrison “Key Challenges Relating to the Governance of Regional Fisheries” in Richard Caddell and Erik Molenaar (eds) *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart, Oxford, 2019) at 84.

\(^{76}\) For example, those organisations established under the umbrella of the FAO, a feature that in general does not affect their management competence.

\(^{77}\) Article 1(d): “[A]rrangement 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.” In practice, regional arrangements lack an international organisation with a legal personality.

freedom of fishing on the high seas.” Yet Article 4 UNFSA does everything to maintain consistency with the LOSC, aware of the limitations imposed in Article 311(2) LOSC.  

Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the [LOSC]. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.

Putting aside UNFSA’s progressive language beyond the LOSC and the possible tensions between the two treaties, the critical obstacle to tackling the non-member problem remains. UNFSA alone could not solve the problem because treaties only bind ratifying states. 

Despite the language in UNFSA, none of its obligations are applicable to non-parties, unless it can be argued that a provision, or the whole UNFSA, has become part of customary international law.

This explains why states did not stand still in the face of unregulated fishing, even after adopting UNFSA. It also explains why in 2001, the international community adopted the IPOA-IUU under FAO auspices, capturing the non-member problem within the IUU fishing notion and reinforcing the policy message behind Articles 8, 17 and 33 UNFSA. Before this is considered, however, it is relevant to briefly explain why the activities of non-members to RFMOs have been problematic for the sustainable management of high seas resources.

B The Negative Impacts of Unregulated Fishing

“High seas resources” are not limited to species occurring exclusively on the high seas or discrete stocks. Fish do not recognise national boundaries, and many commercially relevant species move across them. From 2000 to 2010, an average of 10 million tonnes of fish was caught annually in the high seas, representing 12% of the average annual marine fisheries

Peter Davies and Catherine Redgwell “The International Legal Regulation of Straddling Fish Stocks” (1996) 67 BYIL 199 at 265.

Article 311(2): The LOSC “shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”

global catch of roughly 80 million tonnes.\textsuperscript{82} 585 of the 1,406 taxa identified were caught in both the EEZs and the high seas, meaning that approximately 42\% of global taxa move across these marine spaces.\textsuperscript{83} In terms of value, catches of these species make up 15\% of the total global marine landed value of about US$ 109 billion.\textsuperscript{84} High seas resources are environmentally relevant in the marine ecosystem: tuna, swordfish and toothfish are top predators in complex trophic chains.

Overfishing has affected high seas resources deeply, and unregulated fishing has worsened the problem.\textsuperscript{85} It has two detrimental effects. First, vessels flagged to non-member states have historically disregarded the rules adopted by RFMOs, adding extra fishing effort and more pressure to high seas stocks. Second, since unregulated catches are often unreported, states and scientists cannot easily estimate them for stock assessment.\textsuperscript{86} A study has suggested estimations in the past, but updating is rare.\textsuperscript{87} Governments and RFMOs have made assessments by alternative means such as trade statistics, custom documents, vessel sighting, transshipment reports, port and at sea inspections, and fishing gear recovery.

Because non-member catches are often unreported, it is only possible to offer an approximate idea based on the estimations available in some regions. For example, ICCAT estimated that in the early 1990s, approximately 20\% of North-Atlantic Bluefin tuna landings came from non-members’ vessels.\textsuperscript{88} In the Indian Ocean, some reports suggested that unreported catches from non-members to IOTC were about 10\% of reported tuna catches in 2003, meaning they

\textsuperscript{82}Rashid Sumaila et al “Winners and Losers in a World Where the High Seas is closed to Fishing” (2015) 5 Scientific Reports at 2.
\textsuperscript{83}At 2. A 2018 study claims that the importance of high seas stocks has decreased, suggesting that between 2009 and 2014 an average of merely 4.2\% of total marine catches by volume were caught in the high seas. Laurenne Schiller et al “High Seas Fisheries Play a Negligible Role in Addressing Global Food Security” (2018) 4(8) Science Advances DOI: 10.1126/sciadv.aat8351. However, measuring the problem by volume does not say much about the ecosystemic importance of the resources in question. Besides, assuming the data is correct, it is difficult to account for the migratory fluctuations of these resources. Moreover, the calculations in this study include catches from aquaculture and freshwaters resources.
\textsuperscript{84}Sumaila, above n 82, at 2.
\textsuperscript{85}Approximately 43\% of the stocks among seven tuna species are fished at biologically unsustainable levels. FAO The State of World Fisheries and Aquaculture 2018: Meeting the Sustainable Development Goals (2018) at 40-42.
amounted to about 130,000 tonnes annually.\textsuperscript{89} In 1996, in the high seas regulated by NAFO, a ship flagged to Honduras caught 4,150 tonnes of redfish from a total catch limit of 37,000 tonnes.\textsuperscript{90} In 2002, six Belize-flagged vessels harvested an estimated 6,000 tonnes of redfish in the same area.\textsuperscript{91} Unregulated catches decreased in 2003 to 2,600 tonnes and then increased again to 4,100 in 2004 and 3,500 tonnes in 2005.\textsuperscript{92} NEAFC estimated even higher numbers in some fisheries in the 2000s.\textsuperscript{93} In Antarctic waters, CCAMLR estimated that in the mid-2000s, the value of unregulated catches of toothfish was equivalent to that of legitimate operators.\textsuperscript{94} A recent analysis in the 2010s reached a similar conclusion, suggesting that the total catches from unregulated vessels using gillnets (prohibited in Antarctic waters) were higher than licensed ones using longlines.\textsuperscript{95}

Unregulated fishing has other harmful impacts on the marine environment. Vessels flagged to non-members often disregard the conservation and management measures designed to lessen the adverse effects of fishing in the marine ecosystem. The use of gillnets is a typical feature. Incidental taking of seabirds and other species, and the targeting of juvenile individuals, are recurrent impacts of gillnet fishing, and it is not surprising that many RFMOs prohibit them. Gillnetting also has adverse effects on scientific research. For example, between 2013 and 2015, CCAMLR reported four unregulated vessels that deployed these nets, whose activities contributed to the low recapture rate of tagged fish, undermining population research.\textsuperscript{96} Another illustration is the significant incidental catches of seabirds, mainly albatross and petrels, killed by unregulated longline vessels not deploying mitigation devices to avoid such killing.\textsuperscript{97}

\textsuperscript{89}MRAG \textit{Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries: Final Report} (July 2005) at 24.
\textsuperscript{90}STACFAC \textit{Intersessional Meeting Report} (February 1997) at 15 and 26.
\textsuperscript{93}NEAFC \textit{First Performance Review} (November 2006) Appendix VIII at 74-76 (on file with the author).
\textsuperscript{94}Denzil Miller “Patagonian Toothfish – The Storm Gathers” in OECD, above n 86, 105 at 111.
\textsuperscript{95}Delegation of Australia and CCAMLR Secretariat \textit{Analyses of illegal, unreported and unregulated (IUU) fishing activities in Division 58.4.1 during the 2013/14 season and 58.4.3b during the 2014/15 season} (Fish Stock Assessment Working Group Meeting, Working Paper 18-60, 23 September 2018) at 4 and 26 (on file with the author).
\textsuperscript{96}At 26.
Unregulated vessels are prone to discard and abandon fishing gear, often made of non-degradable monofilament nylon that can cause substantial ecological damage. One of the most harmful effects is “ghost fishing”, resulting in abandoned nets catching and killing marine animals and triggering habitat degradation. Australia reported in 2009 the sightings of abandoned nets in Antarctic waters likely belonging to two vessels flagged to Cambodia and Togo, both non-parties to CCAMLR. They were six sets of gillnets estimated to be 130 kilometres in length.

The impacts of unregulated fishing extend beyond environmental considerations. RFMO members usually engage in complex negotiations to decide catch limitations and allocate fishing rights. A vessel operator or owner unsatisfied with their flag’s allotment would be tempted to reflag to a non-member state to participate in the fishery. It is easy to appreciate the pressure on those who abide by the rules, who question why they should continue to do so when others do not. Equally, RFMOs resent that non-members sidestep all the financial and administrative burdens of managing an international organisation while enjoying the benefits. Unregulated fishing also disrupts markets because it lowers the compliance costs of fishing activities to the detriment of law-abiding operators.

C The Non-member Problem as part of IUU Fishing

Illegal and unregulated fishing are two different concepts and were traditionally addressed as separate problems. However, as this section explains, the international community’s rising concerns with the non-member problem in the 1990s led to its assimilation with illegal fishing in the 2001 IPOA-IUU. Understanding the reasons behind this approach contextualises the role

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99 CCAMLR Secretariat. Sightings of Trosky (ex Paloma V) and Typhoon 1 (ex Rubin). Information received from Australia (CCAMLR COMM CIRC 09/78, 6 July 2009) at 3-4 (on file with the author).
100 At 3-4.
of the IUU notion in supporting RFMOs’ efforts against non-members. In a sense, the IPOA-IUU assimilation continued UNFSA’s success in strengthening the duty to cooperate.

The concept of unregulated fishing in the IPOA-IUU also needs some clarification. Flags of convenience and new entrant states are recurrent terms in international fisheries associated with the non-member problem, and this part explains what they mean. It also cautions that, although the IPOA-IUU includes stateless vessels as part of unregulated fishing, this is genuinely a different problem that is not within the scope of this thesis.

1 The non-member problem as a catalyst of the IUU notion

Just as the non-member problem is older than the IPOA-IUU, the IUU acronym did not emerge with the adoption of the FAO instrument. This context matters because it points to a close linkage between the anxieties with non-member operations in regulated areas during the 1990s and early 2000s, the adoption of UNFSA and the initiative to negotiate the IPOA-IUU. It also explains why states grouped in RFMOs embraced the IUU notion eagerly and how the IPOA-IUU approach influenced changes to the existing legal framework in high seas fisheries cooperation, as this thesis will show.

CCAMLR was the first organisation to address the illegal activities of its member states together with those by non-parties. Back in the 1990s, there was no mention of the word “unregulated” in CCAMLR; these activities were called “catches from non-members” or matter-of-factually as “unreported”. In 1997, CCAMLR added a specific agenda item entitled “[i]llegal, unreported and unregulated fishing in the Convention Area.” CCAMLR emphasised the “urgent need to bring non-Contracting Parties into compliance with CCAMLR conservation measures” as fishing by non-members and illegal fishing were “the most serious challenge in [CCAMLR’s] existence”. CCAMLR treated contracting parties and non-contracting parties’ operations together, simply as “illegal and unregulated fishing” and

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102 In recent years, the pervasive illegal, unreported and unregulated fishing notion summarised in the IUU acronym has come to epitomise all the challenges associated with non-compliance with fisheries regulations. See eg Oceans and the Law of the Sea: Sustainable Fisheries GA Res 76/71 (2021), paras 79 to 107; Our Ocean, Our Future: Call for Action GA Res 71/312 (2017), para 13(m).

103 CCAMLR Sixteenth Meeting Commission Report (1997) at 8-13, 24-28 and 125-130. It appears that the suggestion to add the agenda item came from the delegation of the United Kingdom, but it is not clear on what terms.

104 At 8-9.
sometimes as “illegal, unregulated and unreported”.\textsuperscript{105} The word “unregulated” alongside illegal fishing expanded. ICCAT and IOTC soon targeted non-members the same way.\textsuperscript{106}

Referring to these activities in one acronym began when the FAO followed up on CCAMLR and ICCAT developments. Non-members to RFMOs were at the core of the FAO Ministerial Declaration adopted in 1999, stressing concerns “at the growing amount of illegal, unregulated and unreported fishing activities” including “flags of convenience”, text that also instructed the development of a plan of action accordingly.\textsuperscript{107} The FAO Council endorsed the Ministerial Declaration, using the IUU acronym for the first time. It noted that “illegal, unauthorised and unreported fishing (IUU), including fishing by vessels flying ‘flags of convenience’, undermined conservation and management measures in fisheries.”\textsuperscript{108} The word “unauthorised” replaced “unregulated”, but it clearly targeted non-members.

The topic continued escalating in political relevance. In its preambular paragraphs, Resolution 54/32 of the United Nations General Assembly (UNGA) linked the exhortations to ratify UNFSA with the emerging IUU fishing notion. There is nothing extraordinary in this approach: UNFSA had already restricted the right of non-parties to RFMOs to fish on the high seas by setting up a more robust duty to cooperate. As several RFMOs were taking “significant measures to promote the recovery and long-term sustainable use of fish stocks”, for those efforts to succeed, it was important that all states, “including those which are not members” to these organisations, “cooperate and observe these conservation and management measures”.\textsuperscript{109} The UNGA noted that “illegal, unreported and unregulated fishing (…) threatens serious depletion of populations of certain fish species” and called upon “all States to ensure that their

\textsuperscript{105}At 4 and 13. See also CCAMLR Seventeenth Annual Meeting Commission Report (1998) at 15.
\textsuperscript{106}“Resolution Concerning the Unreported and Unregulated Catches of Tunas by Large Scale Longline Vessels in the Convention Area” (ICCAT 11\textsuperscript{th} Special Commission Meeting Proceedings, November 1998) Annex 5-18 at 83; “Resolution Calling for Further Actions Against Illegal, Unregulated, and Unreported Fishing Activities by Large-Scale Longline Vessels in the Convention Area and Other Areas” (ICCAT 16\textsuperscript{th} Regular Commission Meeting Proceedings, November 1999) Annex 5-11 at 80; “Resolution Calling for Actions against Fishing Activities by Large Scale Flag of Convenience Longline Vessels” (IOTC Fourth Session Report, Kyoto, December 1999) Appendix IX at 44.
vessels comply with the conservation and management measures” adopted by RFMOs. The logic was clear-cut: unregulated fishing was part of the IUU threat to the sustainability of stocks; therefore, non-members should cooperate with global efforts by observing RFMO measures. The UNGA thus “urged all States to participate” in the FAO efforts to develop the plan of action “to address illegal, unregulated and unreported fishing”.

The motivations and language first used by CCAMLR, ICCAT and IOTC, and then adopted by the FAO and UNGA confirm that the non-member challenge was central to the IUU notion. Assimilating unregulated and illegal fishing was not based on existing international law: UNFSA had not entered into force, and customary law was far from this standard. Instead, it was a policy call consistent with the duty to cooperate as defined in Articles 8 and 17 UNFSA.

The result is that paragraph 3.3.1 IPOA-IUU describes unregulated fishing with explicit reference to the non-member problem, as those activities occurring:

[I]n 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.

If UNFSA strengthened the duty to cooperate, the IPOA-IUU used a slightly different strategy for confronting non-members to RFMOs. The IPOA-IUU linked illegal and unregulated fishing by treating them together and encouraging punitive actions against both, even while accepting that they were essentially different activities.

Treating illegal fishing and the non-member problem under the IUU notion has been criticised as a “false assimilation”. Unregulated fishing “does not necessarily amount to an illegal

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110 Preamble, paras 13 and 6.
111 Paragraph 9.
112 Paragraph 3.1.2 IPOA-IUU: illegal fishing refers to activities “conducted by vessels flying the flag of States that are parties to a relevant RFMO but operate in contravention of the conservation and management measures adopted by that organisation and by which the States are bound”. Illegal fishing includes fishing in national waters against the regulation of the coastal state and on the high seas against RFMO’s management measures by vessels flagged to their members. Under paragraph 3.2.2 IPOA-IUU, unreported fishing on the high seas – misreporting or non-reporting of catches – may be illegal or not, depending on the context in which it occurs. It is unlawful if committed by a vessel flagged to a member of an RFMO against the applicable obligation to report catches. Conversely, it would overlap with unregulated fishing if done by a non-member state to the competent RFMO.
113 Andrew Serdy The New Entrants Problem in International Fisheries Law (CUP, Cambridge, 2016) at 151.
activity”, as “there is no general obligation under international law on States to become parties to RFMOs” or to prohibit their vessels “from fishing on the high seas without permission or a quota from an existing RFMO”. In this view, it is then questionable to hold that unregulated fishing “contravenes” the measures adopted by RFMOs, as the IPOA-IUU affirms. The problems with this assimilation seem exacerbated by the ambiguity of paragraph 3.4 IPOA-IUU:

Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the [IPOA-IUU].

The vagueness of this paragraph appears to validate the “false assimilation” critique. There is no clarity as to when “certain” fishing may occur in the manner described. As the freedom of fishing on the high seas and the pacta tertiis rule prevents the application of RFMOs’ measures to non-members, it follows that fishing by vessels flagged to non-parties to RFMOs is prima facie “not in violation of applicable international law”. Consequently, it seems unjustified to encourage states and RFMOs to take punitive action against unregulated fishing as part of the IUU notion.

This critique misses the central point. As discussed above, the assimilation of illegal and unregulated fishing was precisely the goal of the IUU fishing notion. The IPOA-IUU directly supports the duty to cooperate recognised in UNFSA because it encourages RFMOs and their member states to treat uncooperative non-members with similar measures as illegal fishing. As this thesis will show, RFMOs embraced this call and, in practice, they have contemplated no exceptions of the kind allowed in paragraph 3.4 IPOA-IUU.

Paragraph 3.3.2 IPOA-IUU adds a further and different meaning to unregulated fishing, covering fishing activities “in areas or for fish stocks in relation to which there are no applicable conservation or management measures”. On the high seas, this means fishing in areas with no

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established RFMO or fishing where there is an RFMO in place, but it has yet to adopt management measures for some of the stocks under its competence. In principle, neither concerns the non-member problem, as this fishing refers to the absence of rules rather than free-riding on existing ones. This second meaning of unregulated fishing has also lost importance over time, as RFMOs currently cover most ocean parts and commercially relevant high seas resources, with few exceptions.

2 The realities of unregulated fishing

Paragraph 3.3.1 IPOA-IUU talks of vessels flagged to states “not party to” an RFMO. But states may have different motivations to stay out of RFMOs and fisheries treaty commitments. Two traditional groups interested in high seas fishing are often pointed to explain why states do not cooperate or do so in limited terms with RFMOs: flags of convenience and new entrant states.

Flags of convenience have been regarded generally as the main actors behind unregulated fishing. This term is widespread in the law of the sea, yet there is no internationally agreed definition. Functionally, it refers to the flag of “any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune” for those registering the vessels.116 There is a long history of ship-owners flagging their vessels to states other than their country of origin for political, military and economic reasons.117

Flags of convenience exist because states have the sovereign discretion to grant their nationality to ships.118 In practice, the “genuine link” between flag state and vessel required by the LOSC has played a limited role in strengthening flag state responsibility.119 This gap has been particularly problematic in fishing fleets. One of the competitive advantages these flags have often offered is lowering costs on compliance with international regulations by, for example,

118Muscat Dhows (France v Britain) (Award) (1905) PCA XI RIAA 83. Article 91(1) LOSC.
not acceding to multilateral treaties that regulate high seas fishing. This logic benefits the flag state and the fishing operator at the expense of the common good – the former charges a fee, and the latter benefits from a flag’s protection while saving costs. The result is that fishing outside RFMOs’ rules has been a prominent feature of flags of convenience.

A possible second category of non-members to RFMOs is the so-called new entrants: flag states that wish to commence fishing in an RFMO’s regulatory area or resume activities after a period of inactivity. They are interested in the fishery and would join the RFMO if certain conditions are met, such as receiving an allocation that satisfies their aspirations. Accommodating these states is an old dilemma in international fisheries law. Based on the freedom of fishing on the high seas, the duty to cooperate as recognised in Articles 87 and 116 LOSC and the real interest notion under Article 8(3) UNFSA, outsiders may demand participatory rights in the stocks regulated by RFMOs. RFMOs should reciprocate based on Article 119(3) LOSC and not exclude newcomers from a share in the total allowable catch. In this context, labelling these states as unregulated fishing may seem simplistic or unfair.

However, these two categories are not meaningful or helpful at all times. First, the distinction between flags of convenience and new entrants is not always clear-cut, and states may behave differently in specific RFMO areas. Second, the categories themselves are not always accurate. For example, there are qualifications in the flags of convenience expression. The fact that a flag state permits registration of foreign-owned vessels for a fee is not in itself relevant to define whether it would take part in unregulated fishing. A recent study suggests that the defining feature of flags of convenience is the lack of compliance with fisheries regulations, regardless of their ratification of major international treaties. Because it has no legal definition, the term can have different interpretations.

Third, and significantly, flags of convenience and new entrant states have similarities that warrant their treatment together. As non-members, these states often engage in high seas fishing outside RFMOs’ rules.

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120 Alderton and Winchester, above n 117, at 42.
fishing before trying to accede to the relevant RFMOs or cooperating meaningfully. In this sense, their fishing outside RFMOs’ rules is “free-riding, pure and simple”.\textsuperscript{124} This is why the IPOA-IUU made no distinction based on the motivations of non-members, such as being a flag of convenience or a new entrant. Reading together Articles 8, 17 and 33 UNFSA and the IPOA-IUU, any non-party to the competent RFMO is an uncooperative flag state until complying with UNFSA standards, thus deserving the IUU treatment. Therefore, flags of convenience and new entrants are notions that might help understand state behaviour, but they do not warrant different treatment under UNFSA or the IPOA-IUU.

That said, flags of convenience and new entrants are terms used in this thesis to refer to a reality in the practice of RFMOs. The former are understood as states that, in general terms, offer their flag to foreign vessels for a fee, do not ratify fisheries conventions and have historically fished in RFMO-regulated areas without cooperating meaningfully. Equally, new entrants are regarded as non-members who want legal access to a regulated fishery, but that would often fish nonetheless before securing that access. This characterisation highlights that, at the time of UNFSA’s adoption and entry into force, unregulated fishing associated with flags of convenience and new entrants was a pervasive problem for high seas cooperation.

Finally, one category under the unregulated fishing notion in the IPOA-IUU deserves an entirely different consideration. Stateless vessels represent a more general challenge in international law. Because vessels without nationality register in no state, and therefore have no flag, the measures taken to control them raise other distinctive problems that are outside the scope of this study. Hence, every time this work refers to unregulated fishing, it does not include stateless vessels unless indicated explicitly.\textsuperscript{125}

\textbf{III Conclusions}

Two fundamental rules of international law, the traditional freedom of fishing on the high seas and the relativity of treaties, create the legal lacuna that allows unregulated fishing to occur.

\textsuperscript{124}Gordon Munro “Regional fisheries management organizations and the new member problem” in Ariel Dinar and Amnon Rapoport (eds) \textit{Analyzing global environmental issues: theoretical and experimental applications and their policy implications} (Routledge, New York, 2013) 105 at 114.

\textsuperscript{125}Whether stateless vessels are illegal \textit{per se} is disputed. See eg Deirdre Warner-Kramer and Krista Canty “Stateless Fishing Vessels: The current Regime and New Approach” (2000) 5 OCLJ 227 at 230.
As treaties cannot impose obligations on non-parties, the measures that RFMOs adopt to manage fishing are in principle not opposable to non-members. Historically, what is left is the freedom of access, unsuitable for constructing a sensible high seas management regime. Allowed by this legal gap, the conduct of non-members has often contributed to the overfishing of high seas stocks, affecting other elements of the marine ecosystem. The adverse outcomes extend beyond ecological harm, as parties to fisheries agreements resent that non-members free-ride on the costs of compliance with existing multilateral measures.

The freedom of fishing has not been a static notion. Even before the geographic shrinking of the high seas crystalised in the EEZ’s rise, states had recognised the obligation to cooperate in adopting management measures in areas beyond national jurisdiction. The first instrument of choice, multilateral treaties, addressed the non-member problem but could not solve it. The 1958 Fisheries Convention established a vague, general duty for states “to cooperate in adopting” management measures on the high seas. The LOSC’s similarly weak obligation in Articles 63(2)-64 and 117-118 meant this crucial treaty could not curtail unregulated fishing. Neither widespread LOSC participation nor its rules being regarded as customary international law have made any difference.

The duty to cooperate has not been a fixed notion either. UNFSA represented a fundamental change in the understanding of high seas cooperation. Its main provisions against unregulated fishing, namely Articles 8, 17 and 33, substantively departed from the LOSC vague content, setting up a clear-cut and robust obligation to cooperate through RFMOs. In effect, they established a prohibition on unregulated fishing on the high seas for UNFSA parties.

However, the limits to treaty law remain. While recalcitrant states refuse to accede to UNFSA or the relevant RFMO, unregulated fishing would still be legally possible, as far as treaty law is concerned. Until UNFSA achieves universal participation, the solution to unregulated fishing could not rest only upon UNFSA or the many regional agreements that set up RFMOs. Equally, for all its merits, the IPOA-IUU is a non-binding instrument, incapable by itself of imposing legal responsibilities on sovereign states.

Since UNFSA’s adoption and entry into force, much regional state practice against the non-member problem has occurred. Before presenting and assessing such practice and discussing its legal meaning in terms of customary international law formation, it is imperative to offer a
context and method to explain how custom develops in the first place. The following chapter fulfils this task.
Chapter Two: a Methodology to Customary Law Formation

I Introduction

This thesis tests and demonstrates how the duty to cooperate, as based on UNFSA provisions, is forming as a rule of customary law. Chapter Two prepares for this task by providing the methodological framework to analyse state practice and *opinio juris*. Part II first explains why the formation process is essential to understanding customary law, highlighting the gaps in custom development knowledge. This part aligns with the doctrinal view that at the core of custom formation lies a dialectical process driven by states asserting positions with legal content and other states’ reactions in the form of acceptance and acquiescence or objection and protest. The progressive accumulation of state practice and the subjective element represented in these interactions give rise to customary rules.

Part III summarises why the attention to the formation process helps counter three long-standing criticisms against custom: its ambiguity, legitimacy deficit and lack of method. This focus also justifies induction as the starting point for examining relevant materials in subsequent chapters.

Part IV sets a doctrinal framework for the role of treaties, international organisations and non-binding instruments in custom formation. It defines basic concepts and highlights the gaps in the theoretical understanding of these relationships, preparing the ground for examining the evolution of regional practice against unregulated fishing.

Part V presents existing doctrinal views on whether an UNFSA-like duty to cooperate is customary. It highlights that, by focusing exclusively on the identification question, previous research has overlooked the relevance of the formation process and the implications of the obligation to cooperate’s rise for understanding custom formation.
II The Meaning of the Formation Process

International custom is unwritten law derived from the practice of states accepted as binding. At its basis lies two constitutive elements: state practice and *opinio juris*. As the ICJ has expressed, the acts giving rise to custom:126

[M]ust amount to a settled practice, and they must also be such, or be carried out in such a way, as to be evidence of a belief that the practice is rendered obligatory by the existence of a rule of law requiring it.

It is therefore “axiomatic” that custom must be looked for “in the actual practice and *opinio juris* of States”.127 State behaviour is necessary to discern customary law from aspirational standards and *opinio* is needed to distinguish custom from other rules and routines based on motivations such as convenience, courtesy or tradition.128 The subjective *opinio* transforms objective facts into law.129

There are two central issues for understanding custom: identification and formation. The first concerns the law at a particular moment. Custom must satisfy the two-element test in its entirety, ie the existence of *opinio juris* concerning general state conduct, in the sense of being uniform or consistent (ratione materiae) and widespread or representative (ratione personae). In contrast, the formation question refers to the progressive generation and accumulation of state practice and *opinio* that may advance a general rule of international law (ratione temporis). In other words, identification concerns the status of the law at a specific instant, while custom formation refers to a “dynamic process that occurs over time”.130

126North Sea Continental Shelf (Federal Republic of Germany v Denmark and Federal Republic of Germany v Netherlands) (Merits) [1969] ICJ Rep 3 at 77. ILC draft conclusions, above n 4, at 125.
127Continental Shelf (Libyan Arab Jamahiriya/Malta) (Merits) [1985] ICJ Rep 13 at 29.
These are closely related but separate questions. It is often the identification test that receives the most attention, probably because the current status of the law is intrinsic to the legal adviser’s role. But the fixation with identification does not help understand development and change in customary law. Custom is more than pursuing the identification question because custom does not become binding in a day. What is not custom today might become so tomorrow, and existing customary law is subject to change. The identification test thus offers an incomplete perspective, judged primarily when a dispute arises. It cannot explain how custom appears or becomes binding, how other elements of the international system interact with custom development or account for state participation in the process, topics that remain understudied.

In contrast, custom formation is central to understanding this source of law. Identifying customary international law inevitably involves its assessment over time. Deciding on the lawfulness of an act or omission under custom entails considering all the materials relevant to its status, “including the international reactions to it and not just the material evidence of that day”, meaning examining “the process as a whole”. Attention to the formation process, meaning the context, dynamics and evolutionary account of the rule in question, also matters because specific features of custom only make sense in that context. For example, it is impossible to identify a persistent objector without observing the evolving nature of customary law. Significantly, understanding custom normativity and overcoming some of customary law’s long-standing criticisms can only be attempted by reflecting on this source as a process.

Yet international law scholars do not devote much attention to this subject. The recent ILC’s work represented a unique opportunity to address custom formation, but its members did not take it.

133 Jonathan Charney “The persistent objector rule and the development of customary international law” (1985) 56 BYIL 1 at 22; James Green The persistent objector rule in international law (OUP, Oxford, 2016) at 89.
The ILC decided in 2011 to include in its programme of work the topic of “formation and evidence of customary international law”.\textsuperscript{134} Initially, the ILC seemed committed to advancing both. The Special Rapporteur observed that “uncertainty about the process of formation of rules of customary international law was sometimes seen as a weakness in international law generally”.\textsuperscript{135} Many ILC members recognised the interconnection between the two issues, favouring their treatment together. One member said it was unclear how “customary international law could be ‘identified’ without gaining at least a general conception of its formation”.\textsuperscript{136} Others noted that identification and formation were “equally important and closely interrelated”.\textsuperscript{137} Another member put it in straightforward terms, suggesting that “it would be futile to attempt to study one without the other”.\textsuperscript{138}

Nevertheless, in 2013 the ILC decided to exclude the formation of customary law from its study. The UNGA Sixth Committee discussions in 2012 probably influenced this move. Consensus grew that the ILC should focus on the most practical aspects to assist national judges and practitioners unfamiliar with international law sources.\textsuperscript{139} The ILC later shared these apprehensions, suggesting that identification was the central issue and otherwise risked making the subject too broad or theoretical.\textsuperscript{140} Reactions at the UNGA Sixth Committee showed no opposition to the ILC’s decision, and many states welcomed it as they thought it would make the study’s goals more practical.\textsuperscript{141}

\textsuperscript{135}3148th Meeting – Formation and evidence of customary international law [2012] vol 1 YILC 135 at [135].
\textsuperscript{136}3182nd Meeting – Formation and evidence of customary international law [2013] vol 1 YILC 85 at [88] (per Mr Tladi).
\textsuperscript{137}3183rd Meeting – Formation and evidence of customary international law [2013] vol 1 YILC 90 at [94] (per Mr Wisnumurti); 3184th Meeting – Formation and evidence of customary international law [2013] vol 1 YILC 95 at [96] (per Mr Gevorgian).
\textsuperscript{138}3183rd Meeting, above n 137, at [93] (per Mr Hmoud).
\textsuperscript{139}Summary record of the 21st meeting UN Doc A/C.6/67/SR.21 (5 November 2012) Agenda Item 79 at 2, para 4; Summary record of the 22nd meeting UN Doc A/C.6/67/SR.22 (6 November 2012) Agenda Item 79 at 6, para 35.
\textsuperscript{140}Sender and Wood, above n 131, at 156.
\textsuperscript{141}Summary record of the 26th meeting UN Doc A/C.6/68/SR.26 (5 November 2013) Agenda Item 81 at 3-4, para 13.
The ILC’s decision is debatable, but the outcome is clear. The draft conclusions do not address directly or systematically the processes by which customary international law develops.\(^{142}\) The ILC nevertheless accepted that custom identification cannot always be considered in isolation and claimed that the draft conclusions “inevitably refer in places to the formation of rules of customary international law”.\(^{143}\) Albeit tangentially, the ILC did recognise the evolving nature of custom as a gradual process. This can be seen in three parts of the draft conclusions. One realises that “some period of time must elapse for a general practice to emerge”, ruling out such a thing as “instant custom”.\(^{144}\) A second is the meaning of inaction as a “failure to react over time to a practice”, which may serve as evidence of *opinio*.\(^{145}\) A third recognises the persistent objector doctrine, stating that objections must have been made while the rule in question “was in the process of formation”.\(^{146}\) In all these passages, the ILC accepts that there must be a process whereby custom emerges before identification becomes possible.

However, the ILC did not directly address the formation process and its legal consequences. The ILC suggested a role for treaties, international organisations and non-binding instruments in contributing to the development of customary law but poorly explained such interactions. Overall the ILC opted for a “snapshot perspective” that “merely determines the evidence is necessary to identify customary law at a specific point in time”.\(^{147}\)

**B Custom Formation: a Dialectical Process**

The limited guidance from the ILCs’ work does not mean there is no general understanding of how custom develops. A dialectical and informal process driven by divergent or opposing forces is the essence of customary law formation. In general terms, it is established under a pattern of claim, protest or absence of objection by states particularly interested in the matter.\(^{148}\) Though not easy to categorise because it is an informal and decentralised process, the “gradual

\(^{142}\)ILC draft conclusions, above n 4, at 124.

\(^{143}\)At 124.


\(^{145}\)ILC draft conclusions, above n 4, at 140.

\(^{146}\)At 152-153.


hardening of practice into law” encompasses three general stages. First, “some States engage in a given practice, or make claims, for a wide variety of reasons.” Second, “States react with further conduct, claims and counter-claims”, including objection, protest, acceptance and acquiescence. In the third stage, these reactions grow, and they eventually harden into a general rule. As more states become aware of the conduct or engage in the practice, the conviction will gradually increase that a given behaviour is generally regarded as obligatory.

This understanding of the formation process also justifies custom normativity because it can explain the most challenging element of custom theory: opinio juris. The central anxiety with opinio is this idea of a sense of obligation because it leads to the impossibility of new custom. To postulate that states that initiate a given practice must believe themselves acting under a legal obligation or right “is to resort to fiction” and “to deny the possibility of developing such rules”. Opinio justifies the legal content of international custom instead of diplomatic courtesy or mere usage, but it cannot describe how customary law emerges.

These difficulties explain why scholars have argued that opinio is intrinsically closer to notions such as consent. Some commentators have even suggested that consent is needed by every state, either express or implicit. Danilenko, for example, suggests that opinio can be tacitly expressed through “active participation in practice or through abstention from protest”. But this is an exaggeration: custom is not tacit treaty law, and there is no need for all states to consent for a rule to become binding. There is a possible reconciliation between custom as belief and consent in the term “accepted as law” recognised in Article 38 of the ICJ Statute.

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150At 30.
151At 30.
152At 30.
153Dissenting Opinion of Judge Lachs North Sea Continental Shelf, above n 126, 219 at 231. This problem is often referred to as the chronological paradox or the circularity of custom.
156International Law Association, above n 134, at 31.
since acceptance “comfortably straddles the notions of consent and opinio” in the sense of
belief.\textsuperscript{157} The ILC also used “accepted as law” to describe the subjective element.\textsuperscript{158}

But these distinctions only expose the futility of seeing opinio through the rigid logic of the
identification test. Indeed, “the failure to distinguish between different stages in the life of a
customary rule” leads to confusion.\textsuperscript{159} While custom is forming, opinio cannot have the same
meaning as when consolidated. Thus, for example, there was no opinio as belief in the 1945
Truman Proclamation on the Continental Shelf.\textsuperscript{160} However, opinio existed “as to
the immediate future”, as the United States was ready to live by the rule it articulated, “for the
moment onwards, for itself and others”.\textsuperscript{161} The idea that custom formation is a process
emphasises why there can be no static version of opinio: custom emerges over time because opinio grows gradually.

State interactions manifested as acceptance, acquiescence or protest are central to developing
such opinio and recognising the custom formation process. From a different perspective, they
explain that there is nothing inherent in the concept of opinio that would require it to be spoken
of only for the community of states as a whole and not concerning some states or even a single
state.\textsuperscript{162} There could be an individual opinio where a state accepts the emerging norm without
a general recognition of it as custom. The aggregation of the particular manifestations of opinio
over time (acceptance and acquiescence) advances the formation process, potentially leading
to widespread opinio and a general belief. In this gradual process, a rule is “still gaining
expression, definition (a uniform content) and normative force” because of state interactions in
its early development.\textsuperscript{163} As customary law rise in this progression, it is then possible to accept
that “a legal conviction, i.e., a conception that a practice is first legally useful, then legally
emerging, finally legally binding, matures gradually”\textsuperscript{164}

\textsuperscript{157} Olufemi Elias “The nature of the subjective element in customary international law” (1995) 44 ICLQ 501 at
\textsuperscript{158} ILC draft conclusions, above n 4, at 124-125.
\textsuperscript{159} International Law Association, above n 134, at 7. Wolfke, above n 155, at 61-62.
\textsuperscript{160} James Crawford and Thomas Viles “International Law on a Given Day”, reproduced in Crawford International
\textsuperscript{161} At 92.
\textsuperscript{162} Elias, above n 157, at 519.
\textsuperscript{163} IM Lobo de Souza “The role of State Consent in the Customary Process” (1995) 44(3) ICLQ 521 at 527.
\textsuperscript{164} Robert Kolb Selected problems, above n 129, at 139
I Starting the process: claim and assertion

State practice that is an essential ingredient in the formation of customary law is to be found in the conduct of states which, by their acts and omissions, expressly or tacitly assert, acknowledge, or deny claims.\(^\text{165}\) The “mere performance of an act, unaccompanied by any statement at all, implicitly makes a positive or negative assertion” about the rights of the state behind the claim and “at least one other State”.\(^\text{166}\) Thus, behind the first state moving, there is a previous assumption or a “practical judgment” that “some determinate, common and stable pattern of conduct and corresponding authoritative rule” is desirable.\(^\text{167}\) Crawford calls such steps “proto-legal moves”.\(^\text{168}\)

There is no specific required content for such a claim, but there must be an aspect of legality about the behaviour in question.\(^\text{169}\) The essence is that states assert what “ought to be” the law to others.\(^\text{170}\) At the very least, a state clarifies that it is “willing to live by the rule” it is claiming.\(^\text{171}\) The law of the sea offers good examples of these proto-legal moves. The 1945 Truman Proclamation is hailed as one.\(^\text{172}\) The declarations by Chile and Peru in 1947 on the outer limits of a 200 nautical mile economic zone for the sovereign management of marine living resources are also illustrative.\(^\text{173}\) These states did not believe they were changing the law but asserted to the international community that they were “willing to live” by what they were declaring.

However, assertions need not be so spectacular or formal. There is no need to be too prescriptive when assessing the legal content of a claim. States rarely put forward a correct view of the law when making them, and they inflate or deflate arguments as perceived to be in

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\(^{166}\)At 373.


\(^{168}\)Crawford, above n 132, at 75.

\(^{169}\)Shaw, above n 148, at 74.


\(^{171}\)Crawford, above n 132, at 80

\(^{172}\)Crawford and Viles, above n 160, at 92.

\(^{173}\)Declaración Oficial del Presidente de Chile, Gabriel González Videla (23 de junio de 1947); Decreto Supremo 781, Government of Peru (1 August 1947) <https://repositorio.uchile.cl/bitstream/handle/2250/123725/Espaliat_Cave_esp.pdf?sequence=1&isAllowed=y>
their best interests. Equally, they need not say they claim a new customary rule. In fact, “the law-creating intentions are not, as a rule, declared”. States “seldom have as the primary purpose of their behaviour in international relations the formation of rules of customary international law”. Generating these claims and potentially a custom formation process might have elements of spontaneity, yet it is not unconscious. States “contributing to custom generation may not declare their law-creating intentions”, but in general, “they are well aware of possible broad law-making implications of their conduct.”

2 Acceptance, acquiescence and protest: the legal effects of the formation process

States may react to the unilateral claims put forward by others through statements or conduct. They would appraise “primarily of their own” and ultimately accept them, either expressly but mostly by tacit tolerance, or reject them above all by protests. Reactions to states’ claims aggregated over time matter for two reasons. They develop the custom formation process and have significant legal effects for states participating in it.

(a) Acceptance and opposability

Opinio juris need not be general to generate legal effects upon some states. Individual opinio, meaning a state’s acceptance of a claim, can do so before an emerging rule is recognised as custom. Acceptance also includes tacit consent, meaning those acts that unequivocally demonstrate conformity with the claimed rule. Indeed, custom law-making is dominated by implicit forms defined by supportive conduct or the absence of protests.

The relevance of acceptance in custom formation is such that some scholars hold that when a state accepts a claim, the customary rule already exists for that state. Others have asserted

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177At 164.
178Danilenko Law-making in the international community, above n 154, at 79.
179Wolfke, above n 155, at 56.
180Danilenko Law-making in the international community, above n 154, at 108.
that acceptance is a “sufficient condition” to create an obligation based on the still alleged rule. These views seem exaggerated: after all, an emerging rule is not yet a general rule.

Instead, the significance of acceptance lies in a different effect: the potential opposability of the emerging rule. While change between old and new law occurs, observing the bilateral relations between states becomes paramount. Consent to a still-emerging rule can create a situation whereby the accepting state’s conduct would be opposable, meaning that other states could make a case based on legitimate or reasonable expectations to see that conduct repeated in the future. As Kolb argues, the regularity of states’ claims and assertions and the acceptance by others provoke, at some point, “the normative expectation in the subjects of the legal order that future behaviour will conform to the standards thus established”.

This reliance on state conduct transforms a regularity of facts into law. In other words, the more inward-oriented opinio is translated into an “outward-reaching legitimate reliance”. It means that “the unilateral and subjective acceptance of the rule by each subject individually” gives way to the “collective reliance and expectation of a plurality of subjects”. Following this logic, “good faith has the function to displace the centre of legal interest from a subjective inner fact (a will) to an external objective fact (the normatively reasonable expectations of the others).” The borders between the individual acceptance and the general rule thus “remain in constant shift and flux”.

In the transition between old and new law, opposability is instrumental in bringing together two forms of consent – claim and assertion, on the one hand, and acceptance on the other – when there is not yet a formal rule of general application. While custom is still emerging, opposability describes the “interplay between relativism and objectivity, between self-appreciation and authoritative determination”. These ideas of opposability, reasonable expectations and good faith are consistent with the views of opinio as emerging progressively.

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184At 83.
185At 83.
186At 83.
187At 83-84.
188At 84.
from the individual to the general and from consent to belief. Although they cannot justify the formation of all customary rules, they provide a doctrine offering “a quite realistic explanation of the progressive emergence” of most of them.  

This logic also explains why the ICJ has paid attention to disputing parties’ specific relations rather than deciding whether a general customary rule exists. Thus, for example, in *Fisheries*, the ICJ supported Norway’s use of straight baselines to measure the breadth of territorial waters, emphasising that the United Kingdom had never contested its legality.  

The consequences of this tacit acceptance were significant. The ICJ stated that the several circumstances of the case, including “the general toleration of the international community” and the United Kingdom’s prolonged silence, “warrant Norway’s enforcement of her system against the United Kingdom”. As the ICJ assessed Norway’s method, it concluded that “the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law”.  

States’ positions were particularly relevant in *Nicaragua*, where the ICJ found that the non-use of force and non-intervention rules were part of customary law. The Court offered weak evidence of actual practice, but it assessed the specific attitudes of the contending parties towards the norm at stake. The ICJ did point to the parties’ positions: “[A]part from the treaty commitments binding the Parties to the rules in question”, there were “various instances of their having expressed recognition of the validity thereof as customary international law in other ways”. As the ICJ considers and searches for at least some degree of opposability, one commentator suggested that customary international law “is not always so general after all”.

In sum, emerging custom can have legal effects because its acceptance would create reasonable expectations of future compliance between some states. Whether a single fact or action entailing acceptance can always make a rule opposable will depend on the context and

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190 Kolb, *Good Faith in International Law*, above n 183, at 84.
192 *Fisheries* at 139.
193 *Fisheries* at 139.
195 At 98.
196 Mullerson, above n 176, at 169.
circumstances. If a state repeats similar conduct over time, this may increase the legal effects of its acceptance. States could backtrack on their positions on the emerging rule, but this is unusual once they settle on a long-term policy or make a decision public. On the other hand, the consequences of opposability would not necessarily entail international responsibility: the rule is still emerging after all. But the standard in *Fisheries* suggests that the legal effects are relevant. For example, the behaviour accepted in the claim may be deemed consistent with international law and potentially enforceable. Opposability’s specific consequences would need to be assessed according to the circumstances of the case.

*(b) Acquiescence*

At a basic level, acquiescence means simply a form of acceptance or consent,197 or, more precisely, implied consent.198 However, it is not accurate that acquiescence involves consent. Acquiescence is a principle of law attributing specific effects to silence under certain conditions.199 It is a doctrine of “qualified silence”, meaning that legal consequences follow from inaction. The distinction is relevant because it means that a state’s will or consent to accept the facts at stake is not required.

Instead, acquiescence is a legal effect occurring when a state confronts specific facts (states’ claims) but remains silent when it has a legal burden to react.200 Acquiescence’s normativity also flows from the principle of good faith, and the need for stability in legal relations and protecting legitimate expectations.201 Kolb argues that this “qualified silence” operates through the conjunction of three legal elements: time (prolonged silence), knowledge of the facts, and duty to speak.202 The ILC endorsed this approach to acquiescence and recognised these three elements.203 The lack of protest must fulfil two requirements to have a probative value. First, “it is essential that a reaction to the practice in question would have been called for”, which

198IC MacGibbon “Customary International Law and Acquiescence” (1957) 33 BYIL 115 at 130. Also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) [1984]* ICJ Rep 246 at 305; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) [2008]* ICJ Rep 12 at 50-51.
199Kolb *Good Faith in International Law*, above n 183, at 91.
200At 91.
201At 91-92.
202At 91-92.
203ILC draft conclusions, above n 4, at 142.
happens, for example, where the practice adversely affects “the interests or rights of the State failing or refusing to act”. Second, “the reference to a State being ‘in a position to react’ means that the State concerned must have had knowledge of the practice” and that it had “sufficient time and ability to act”. Such expectations include the “circumstances where, because of the publicity given to the practice, it must be assumed that the State had such knowledge.” The longer the silence, the more settled the legal consequences of acquiescence.

The key to identifying acquiescence rests upon the context. It can emerge only when a degree of engagement is called for or expected. Consequently, where states “are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be made that such behaviour is accepted as legitimate”. Given the importance of acquiescence understood as qualified silence, there is no exaggeration that custom is mainly silence and inaction, not action. Acquiescence will be relevant to assess reactions to RFMOs’ requests for cooperation to non-members, including responses such as stopping granting licences or deregistering fishing vessels.

The legal consequences attached to the express or tacit acceptance of a claim also apply to acquiescence. As Crawford explains, “if neither the new rule nor the old has an overwhelming majority of adherents”, what we may have in the meantime is “a network of bilateral relations based on opposability and acquiescence as between specific states”. A state may place itself in a legal position of opposability through tacit consent or acquiescence, therefore accepting a situation or being bound by a particular legal act.

(c) Protest and other forms of objections

Equally important are acts of protest and other forms of opposition to the practice in question. In general, protest can be defined as “any act by which a state expresses its will not to accept

\[204\text{At 142.}\]
\[205\text{At 142.}\]
\[206\text{At 142.}\]
\[207\text{Shaw, above n 148, at 75.}\]
\[208\text{Kolb “Selected problems”, above n 129, at 136.}\]
\[209\text{Crawford, above n 132, at 81.}\]
\[210\text{Bjorge, above n 189, at 21-22.}\]
or not to recognise a given fact or act”. Protest is not the only way a state can oppose the claims of others. The denial of claims can be made implicitly by a state simply executing the activities that a putative rule intends to prohibit. For example, a flag state that, confronted with requests to stop fishing in an RFMO-regulated area unless cooperating, decides instead to continue authorising its vessels to operate.

Protests and other acts asserting lack of approval or acquiescence may not thwart the custom formation process, and a customary rule could nonetheless develop. In such cases, they are still important because, depending on the circumstances, a state might become a persistent objector. This means that, notwithstanding that a customary rule would be binding on the international community, it would not be opposable to the state concerned. The ILC has indicated that the objection must be clearly expressed, made known to other States, and maintained persistently. In practice, however, ambiguous objection to the norm’s existence rather than its applicability “is the political reality of the operation of the persistent objector rule”.214

The informal nature of the custom formation process and the importance of states’ reactions mean that they “are obliged to protest loud and often if they wish to avoid being bound by a norm of emerging global custom”. Absolute consensus on the new rule is not needed. Customary law can emerge in multilateral, cooperative frameworks, as it has been claimed to occur regarding outer celestial bodies. Sometimes it follows a logic of reciprocity, as with state immunities. However, the emergence of customary law often means “conditions of

211 Przemysław Saganek Unilateral acts of states in public international law (Brill Nijhoff, Leiden, 2015) at 603 and 606.
212 ILC draft conclusions, above n 4, at 152. In Fisheries, the ICJ observed that even if the alleged rule invoked by the United Kingdom (straight baselines closing bays could not exceed 10 nm) had acquired the status of international customary law, it would be “inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast”. Fisheries, above n 191, at 131.
213 ILC draft conclusions, above n 4, at 152.
214 Green, above n 133, at 68.
216 Bederman, Custom as a Source of Law, above n 5 at 150.
217 Shaw, above n 148, at 465.
conflict and competition”. The recognition of the EEZ in the law of the sea is one example. Normative change is “rarely smooth but rather spasmodic” in this unstructured process.

**III Countering Custom’s Critiques through its Formation Process**

Customary law is often under attack. In his excellent argument against American New Realists’ influence in devaluing global rules, JD Ohlin reminded us of the perils in thinking that there “isn’t anything especially normative about international law”. If international law has been under assault, custom is a favourite target in this offensive. The scepticism comes from a broader audience in the international legal community, showing that the disbelief in custom is very much alive and well. Some of the most substantive critiques are its ambiguity or indeterminacy, lack of legitimacy and absence of a standard identification method. They often assume that customary law can be seized in a momentary and isolated picture, ignoring that its normativity results from a process that has developed over time.

**A Ambiguity**

Some believe that custom is so malleable, undefined and indeterminate that it cannot perform its assigned function as an objective source of international norms based on social fact. This inherent ambiguity mostly follows custom’s lack of formalism. Determining custom means engaging with unwritten law that has emerged informally, triggering challenging questions about the quantity and quality of state practice, how opinio arises, and the circularity of custom. From a practical perspective, gathering evidence sustaining the formation of general customary law in an international community of more than 200 states seems an impossible task, while the

\[\text{\underline{219} Bederman Custom as a Source of Law, above n 5, at 151.}\]
\[\text{\underline{220} Shaw, above n 148, at 73.}\]
\[\text{\underline{221} Jens David Ohlin The Assault on International Law (OUP, New York, 2015) at 13.}\]
\[\text{\underline{222} At 15-35.}\]
\[\text{\underline{224} Kelly, above n 223, at 452-453. Similarly, Daniel Joyner concludes that “the black magic that stands in” for identifying customary law “in practice undermines the credibility of every assertion” about this source, and by extension, “undermines the credibility of the international legal system itself”. Joyner, above n 224, at 45.}\]
system’s decentralisation and lack of compulsory dispute settlement exacerbate custom’s inherent informality. This indeterminacy undermines critical values that the law usually aims to achieve: certainty, security and the fulfilment of legitimate expectations.

However, considering ambiguity and indeterminacy through the lens of custom formation offers a different perspective. As Richard Falk observes:225

In a social system without effective central institutions of government, it is almost always difficult in the absence of formal agreement, to determine that a rule of law exists. Normativity is a matter of degree, expressive of expectations by national governments toward what is permissible and impermissible.

Because custom cannot emerge instantaneously, normative change entails a time of legal penumbra between old and new law. Ambiguity is thus inevitable, part of the process of change in international custom, accommodating competing interests as a rule develops. The emergence of the duty to cooperate through RFMOs offers a case to test whether this inherent ambiguity can be contextualised and to what extent it is genuinely undesirable.

**B Lack of Legitimacy**

A second critique is that the formation of customary law lacks procedural legitimacy: few nations participate, and less powerful ones are ignored.226 Scholars from the Global South share concerns about customary law’s colonial, power-oriented roots and denounce that a “deep democratic deficit characterises” custom formation.227 In this view, the “current framework of [customary law] is based on an undemocratic law-making process” shaped “by powerful states to the disadvantage of the interests of developing countries”.228

The democratic deficit flows from, among other things, the lack of available state practice of developing states and the inadequate weight given to resolutions of international

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226Kelly, above n 223, at 453.
organisations. This vision seems supported by the fact that recently independent states must often comply with a normative system mostly fashioned by colonial powers, where they had little say in the first place. As customary law develops from general practice, this source “crystallises past realities and not proposed reforms”.

These views hold that the whole doctrine of customary international law is based upon 19th- and early 20th-century philosophical and legal conceptions rooted in Eurocentric values and methods. The law of the sea is no exception, a field grounded in an existential Eurocentrism that incorporated a broader apology and justification for European colonialism and imperialism. Thus, for example, the notion of the freedom of the seas, “critical to the colonial project”, is the direct product of customary international law.

The case against unregulated fishing is a suitable scenario to test this critique. Many states whose vessels have historically benefitted from the freedom to fish are developing countries. Likewise, other developing states, especially in the Pacific, have strategic interests in the high seas and have pushed in the opposite direction – acting to close the high seas to uncooperative states. The assessment of regional practice through the lens of custom formation will test whether developing states have participated by either pushing for changes or opposing them, or have stayed outside the process for other reasons. In other words, the formation process would eventually show whether the critique that a specific rule lacks legitimacy is true or false.

C Lack of Method

The lack of a standard method to identify customary rules is one of the main critiques of this source, as it exacerbates ambiguity. Based on Article 38(1)(b) of the ICJ Statute, there is reasonable consensus that assessing general state practice and opinio is the basic methodology to determine custom. However, how much weight should be given to each has never been resolved. The two elements must be separately determined, but as the ILC has concluded, “the
same material may be used to ascertain” practice and opinio.\textsuperscript{236} In practice, it is “often difficult or even impossible to disentangle the two elements”\textsuperscript{237}

Legal thinking has avoided these and other challenges by favouring a “modern” approach focusing on deducing custom from preconceived ideas.\textsuperscript{238} It takes state practice as evidence of opinio, usually found in “proclamation, exhortation, repetition” and non-binding instruments such as UN General Assembly Resolutions.\textsuperscript{239} It has been frequently used to find or advocate for custom involving “highly normative commitments” where the international community has “strong interests in these norms existing and having a particular content” regardless of certain states’ interests.\textsuperscript{240} The difficulties in justifying conceptions of natural justice in modern society explain the tendency to relegate some crucial norms that treaties cannot support to this version of custom.\textsuperscript{241} It seemed inevitable that such a “modern” approach has become commonplace in some fields of international law. As one scholar observes, highly normative rules “form by necessity or by projection, as for axiological first principles” and “relying on legal opinion rather than by scrutinising all too closely” state practice.\textsuperscript{242}

But the problems with detaching custom from state practice are all too obvious – aspirational claims with dubious legitimacy or detached from reality. Since deduction “reflects ideal, rather than existing conduct standards”,\textsuperscript{243} it departs from the very notion of customary law as a source essentially based on material facts. International courts and tribunals bear considerable responsibility for the lack of uniformity in custom methodology, often endorsing deduction, and the ICJ is no exception.\textsuperscript{244} Still, the limited jurisdiction of international courts means there

\textsuperscript{236}At 129.
\textsuperscript{238}The references to “modern” customary law is relatively new, but “the tendency to infuse customary international law with moral values is no recent development”. Niels Petersen “The International Court of Justice and the Judicial Politics of Identifying Customary International Law” (2017) 28(2) EJIL 357 at 363.
\textsuperscript{240}Roberts, above n 3, at 181.
\textsuperscript{242}Robert Kolb Theory of International Law (Hart, Oxford, 2019) at 128.
\textsuperscript{244}David Bederman Custom as a Source of Law, above n 5, at 149. See also Alberto Alvarez-Jimenez “Methods for the identification of customary international law in the International Court of Justice’s Jurisprudence 2000–
are “large areas of customary international law” that are “developed without the [ICJ’s] pronouncements”. International fisheries law is one of them.

It is then unsurprising that custom is criticised for lacking a consistent method. Countering this critique is possible by bringing the idea of custom formation to the forefront. The fundamental notion that customary law evolves progressively means that its method must be first based on induction: looking for the relevant conduct of states and how they behave gradually towards accepting or rejecting a new rule. There is little room for a deductive approach when customary law is understood as a bottom-up process without projecting preconceived ideas.

This argument is especially relevant concerning those rules that do not recognise highly normative values but instead attempt to facilitate coordination among states: those that “minimise friction by balancing competing interests”. The duty to cooperate to manage high seas fishery resources is one of them. Unless axiological reasons warrant resort to some degree of deduction, an approach that pays close attention to state practice should be the method of choice because it brings about legitimate, normative results based on realistic behaviour. As Kolb has emphasised, “[i]ntellectual honesty commands to stick to the classical formulation in all contexts where the practice of states is and must remain the touchstone of normativity.”

IV Customary Law Formation: Three Gaps

There is a general understanding of how customary law arises, but several gaps persist. The roles of treaties, international organisations and non-binding instruments in custom development have been discussed in legal doctrine. Still, these central relationships remain unexplored and poorly understood, particularly from a practical viewpoint. The ILC did not fill these gaps as the draft conclusions barely addressed them, did so only partially or in vague terms. Assessing the development of the duty to cooperate will help define and clarify the

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245 Alvarez-Jimenez, above n 244 at 685.
246 Eg Kelly, above n 223, at 469-479.
247 Roberts “Who killed article 38(1)(B)?”, above n 3, at 181.
248 Kolb Theory of International Law, above n 242, at 128.
interactions between these three central elements of the international system and custom formation. As a preliminary and methodological step, it is necessary to introduce these topics, present and contextualise the current knowledge and outline the gaps.

**A Treaties and the Formation of Customary Law**

The *North Sea Continental Shelf* cases defined the mainstream understanding of the relationship between treaties and custom. A treaty can declare or codify (reflecting existing custom), crystallise (recognising an emerging rule) or contribute to the development of subsequent customary law (generate a new custom).\(^{249}\) This thesis is concerned with the last possibility, as recognised in international law.\(^{250}\) The ICJ has confirmed that nothing prevents a treaty rule “from eventually passing into the general corpus of customary international law”.\(^{251}\) The ILC has no doubt that treaty provisions “can give rise” to a general practice accepted as law.\(^{252}\) The LOSC does not lack examples of such rules, including Article 76(1) on the definition of the continental shelf,\(^{253}\) Articles 74(1) and 83(1) on maritime delimitation\(^ {254}\) and Article 121 on the regime of islands.\(^ {255}\)

However, when and how treaty law can give rise to custom is not straightforward. International tribunals in some fields have often deduced that treaty provisions “reflect” custom without offering much evidence of state practice.\(^ {256}\) The ILC’s recent work is weak on the subject. The draft conclusions add little to the traditional understanding, urging caution in assuming that specific provisions in widely ratified treaties are customary rules *per se*, an unsurprising assertion already confirmed in *Diallo*.\(^ {257}\) These distinct sources remain separate even if a state is bound by the treaty and the customary version of the same rule.\(^ {258}\)

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\(^{249}\) *North Sea Continental Shelf*, above n 126, at 41-45. See also ILC draft conclusions, above n 4, at 143-146.

\(^{250}\) VCLT, art 38.

\(^{251}\) *North Sea Continental Shelf*, above n 126, at 39.

\(^{252}\) ILC draft conclusions, above n 4, at 143.

\(^{253}\) Territorial and Maritime Dispute (*Nicaragua v Colombia*) (Merits) [2012] ICJ Rep 624 at 666.

\(^{254}\) Maritime Dispute (*Peru v Chile*) [2014] ICJ Rep 3 at 65.

\(^{255}\) Territorial and Maritime Dispute, above n 253, at 674-675.

\(^{256}\) See eg Harmen van der Wilt “State Practice as Element of Customary International Law: A White Knight in International Criminal Law” (2019) 20 International Criminal LR 784 at 786.


\(^{258}\) *Nicaragua*, above n 194, at 95.
Apart from general statements, there is not much in the ILC’s work to understand this relationship. Treaty provisions can become customary rules, but this is “not lightly to be regarded as having occurred”. The general understanding is limited to suggesting a case-by-case approach and adopting no presumptions. This is why this thesis, based on the case against unregulated fishing and the rise of a specific duty to cooperate, will examine how treaty provisions give rise to custom through the lens of the formation process, contributing to clarifying the nature of this relationship. Before undertaking this task, the following subsections address two methodological issues. First, to separate treaty from custom-creating practice. Second, to clarify what “norm-creating character” and “specially affected states” mean for this study.

1 Separating treaty from custom-creating practice

Treaty-generated custom consolidates when general state practice echoes the standards laid down in the treaty, and there is a common opinio. Identifying types of relevant state practice seems unproblematic. These include physical and verbal acts and inaction and will vary depending on the field of international law concerned. State practice concerning the duty to cooperate for high seas fisheries management includes diplomatic correspondence, conduct in connection with decisions adopted by RFMOs, statements and actions against non-cooperating flag states and their responses.

The specifications of custom-creating conduct might vary, but one condition must hold to distinguish the relevant from irrelevant. State practice among treaty parties inter se cannot generate custom since the conventional obligation explains state behaviour. It is indispensable that state conduct stays outside the confines of commitments to treaty partners. Observing, as the ILC does, that conduct between contracting parties and non-parties to a treaty, and among non-parties themselves, will have “particular value” is an understatement, as this is the only practice capable of forming custom. The ILC concluded that when states apply conventional

259ILC draft conclusions, above n 4, at 146. North Sea Continental Shelf, above n 126, at 41.
260ILC draft conclusions, above n 4, at 146
262ILC draft conclusions, above n 4, at 132-133. Michael Wood “What Is Public International Law? The Need for Clarity about Sources” (2011) 1 Asian JIL 205 at 213.
263Dinstein, above n 261, at 377.
264ILC draft conclusions, above n 4 at 146.

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provisions in their relations with non-parties or when states act in conformity with a treaty provision they are not bound to, “this may evidence the existence of acceptance as law (opinio juris) in the absence of any explanation to the contrary.”

This requirement makes it difficult to find custom-generating behaviour in legal ecosystems dominated by treaties, such as the regulation of high seas fishing. The duty to cooperate is recognised in UNFSA as a global agreement and implemented by several regional treaties establishing RFMOs. Increasing participation in these regimes leads to the so-called Baxter paradox: as the number of parties increases, it becomes more challenging to demonstrate the status of customary law dehors the treaty. If non-parties generate little or no international practice, it becomes virtually impossible to determine whether a treaty norm has indeed passed into customary law. It is a paradox because it leads to a counter-intuitive result: more support for a treaty proposition does not lead to general acceptance as custom. Yet the paradox must hold because “custom is more than treaty, more even than a generally accepted treaty.”

The difficulties in disentangling relevant state conduct from treaty commitments are exacerbated in the present case for the following reason. Most RFMOs have set up a formal relationship with non-members in the so-called cooperating non-contracting party status, whereby non-members agree to comply with the obligations of the relevant regional treaty through a formal declaration. They remain non-parties to the RFMO concerned and must renew their applications every year to maintain the status. It is a mechanism whereby non-members cooperate by submitting to the competent RFMO’s rules, which could reveal individual opinio with the obligation to cooperate. The question is whether the non-member states’ formal declaration to obtain cooperating non-party status may fall under Article 35 VCLT, an extension of treaty obligations to non-parties. If the answer is positive, state practice in this regard would not be relevant to developing custom.

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265 At 139.
266 Richard Baxter “Treaties and Custom” (1970) 129 Recueil Des Cours 27 at 64.
267 At 64.
268 Crawford, above n 132, at 117.
269 At 139.
270 Article 35 VCLT: “An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.”
There are arguments to support this conclusion. RFMOs intend the cooperating status to create obligations for non-members accepting such commitment in writing, as provided in Article 35 VCLT. The IPOA-IUU seems to support this link when it says that contravening the obligations formalised through non-party status is not unregulated but illegal fishing, precisely as with treaty violations.\(^{271}\) Accepting the non-party application would be the critical “collateral” treaty that “provides the legal basis for the obligation”.\(^{272}\) The difference between “establishing” consent through this mechanism and becoming a party to the RFMO treaty is thus “very slight”.\(^{273}\) If states cooperate because of treaty commitments, then state practice linked to applications for this status is irrelevant for custom formation.

But this is not necessarily the case for two reasons. First, Article 35 VCLT does not accurately describe this mechanism. Cooperating non-parties do not commit indefinitely, and renewing the status is not part of their commitments. It means non-members must reassess and make public their decision to cooperate every year independent of any effect under Article 35 and decide whether they want to abide by the RFMO’s rules again. Cooperating non-parties can also renounce the status at any time. Moreover, when non-members apply, their written statement entails no intention to celebrate a “collateral treaty” with the RFMO.

Second, and more significantly, even accepting that Article 35 VCLT may prevent considering non-party status exchanges as relevant practice once the status has been granted, there is one caveat. There can be no such objections to the first application a non-party submits before the cooperating status is approved. Before RFMOs accept an application, there is yet to be a “collateral” agreement under Article 35 VCLT. Therefore, state conduct performed before obtaining this status can still be relevant for custom formation. The following chapters will assess non-parties’ requests paying attention to this limitation, observing an individual opinio extrinsic to treaty logic.

\(^{271}\)Under paragraph 3.3.1 IPOA-IUU, illegal fishing includes behaviour in violation of “international obligations, including those undertaken by cooperating States to a relevant [RFMO]”.


\(^{273}\)Andrew Serdy The New Entrants Problem, above n 113, at 45.
2 Norm-creating character and specially affected states

These two issues on the relationship between treaty and custom deserve early clarification because the ILC said little on them. In *North Sea*, the ICJ held that for a treaty provision to develop into custom it should “be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law”.\(^{274}\) The meaning of the expression remains elusive, and commentators often describe it as unconvincing or having little value.\(^{275}\) The draft conclusions said nothing on the matter except quoting the ICJ’s dictum.\(^{276}\)

However, the present case cannot disregard the notion entirely. In *Nicaragua*, the ICJ reasoned that the prohibition on the use of force was a principle of customary law “not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter”.\(^{277}\) Therefore, this rule has to be “treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter”.\(^{278}\) Perhaps the Court, based on its previous doctrine in *North Sea*, thought that provisions of an “institutional kind” could not be of a “fundamentally norm-creating character”.

The point above is relevant for the present case because Articles 8(3)-(4) and 17(1)-(2) UNFSA are, to some extent, of an “institutional kind”. They rely on the specific institutional setup of RFMOs as the vehicle to operationalise UNFSA’s cooperation policy. However, these rules have a fundamental norm-creating character. This is because their primary regulatory aspect concerns the content of a specific obligation – the duty to cooperate – in prescriptive terms: a state must cooperate with RFMOs through membership and agree to apply its rules or refrain from fishing. In other words, they are the core of a novel content of a more abstract obligation to cooperate, demanding specific behaviour from non-party states outside an RFMO’s operational setup. This duty does not define administrative or procedural aspects of these organisations. It simply says that, when they exist, RFMOs are the means to comply with this

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\(^{274}\) *North Sea Continental Shelf*, above n 126, at 42.

\(^{275}\) Kolb “Selected problems”, above [n 129]; International Law Association, above n 134, at 52.

\(^{276}\) ILC draft conclusions, above n 4, at 146.

\(^{277}\) *Nicaragua*, above n 194, at 99-100.

\(^{278}\) At 99-100.
obligation. Therefore, these UNFSA provisions meet the *North Sea Continental Shelf* dictum threshold.279

More problematic is the ICJ assertion that despite the passage of any considerable time, a “very widespread and representative participation in the convention at stake might suffice in itself, provided it included that of States whose interest were specially affected”.280 This notion of specially affected states has not been of much help either. The idea could include those states engaged in an emerging practice – because not all states engage in certain conduct – and those with no involvement yet affected by the potential hardening of behaviour into custom.281 The notion suggests a privilege in custom formation, contrary to essential non-discrimination and state sovereignty principles. Still, it seems to hold some sway.282 However, its ambiguity and disagreements about its meaning explain why it received objections at the ILC discussions to the extent that there was no consensus to include anything substantive in the draft conclusions.283 Perhaps, as one commentator concluded, this doctrine has just “become less and less relevant”.284

It is tempting to ignore this notion entirely by resorting to a simple argument. If all states are affected by changes in the legal regime of the global commons, it means no one should be “specially affected”.285 This argument has merit, but methodological reasons suggest not disregarding the notion entirely. Because it is highly challenging to collect all states’ positions concerning an emerging customary rule, the idea of specially affected states provides a framework or bottom line. It means that, as a starting point, it would not be possible to assess any change in custom status without observing the practice and *opinio* of specially affected states.

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280*North Sea Continental Shelf*, above n 126, at 42.


283ILC Provisional summary record of the 3397th meeting UN Doc A/CONF.4/SR.3397 (8 May 2018) at 6-7.


In the present context, two groups of states have a particular claim to be specially affected. The first is represented by a core cluster that gathers through RFMOs and demands from other states either membership, fishing by their rules or abstaining from fishing. These states have a particular responsibility for, and benefit from, the sustainable management of fish stocks on the high seas in their region. They have a specific vested interest in changing the vague notion of cooperation under the LOSC and existing customary law.

The second group concerns states whose flagged vessels operate on the high seas claiming a broad version of the freedom of fishing. These states would be particularly affected if the meaning of cooperation changed to UNFSA-like standards because they would have to cooperate with existing RFMOs, raising the cost of their free-riding activities or making them illegal. Although applying this logic appears to privilege free-riders and flags of convenience in developing custom on high seas cooperation, this does not mean that states with a specially affected interest have veto influence over the evolution of new customary law. Instead, it means that a potential rule cannot pass into custom unless supported (or accepted) by a majority of specially affected states. The notion thus entails a privilege and a burden: these states must voice their opposition because otherwise their silence should be regarded as acquiescence.

**B Role of International Organisations**

International organisations (IOs) are key actors in modern international relations, yet the law that regulates them is still immature. The relationship between IOs and the formation of customary law is also unclear. At the centre of this topic lie old questions that have lingered in academic literature and practice. Does the term “practice” in Article 38 of the ICJ statute include IOs, and how? Are they simply a vehicle for states’ will, or can they create practice and opinio on their own? Despite their importance, these questions focus nearly exclusively on

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286 Dinstein, above n 261, at 289.
287 Heller, above n 281, at 235.
288 At 233.
the UN General Assembly resolutions as possible examples of multilateral acts giving rise to custom.\textsuperscript{291}

Unsurprisingly, this issue became a contested debate in the ILC’s work. Some view IOs as independent actors capable of contributing to custom formation autonomously, while others see them “as little more than the collective will of their member States, whose contribution to international law ‘as such’ is negligible at most”.\textsuperscript{292} As IOs have legal personality, capacity to conclude treaties and may be held internationally accountable for their acts, it seems reasonable to consider that their behaviour impacts custom formation.\textsuperscript{293} In contrast, some states are cautious about recognising an open-ended law-creating character to them.\textsuperscript{294} Others, more radically, distrust any autonomy of IOs for this purpose.\textsuperscript{295}

There was no consensus among states and ILC members on this issue. The ILC draft conclusions echoed this by offering limited and somehow convoluted guidelines on this relationship. They recognised the distinction between the practice of IOs that reflects their member states’ positions and the practice “as such”, taking a different approach to each. The ILC adopted the standard, general view whereby IOs’ practice is a form of action by its member states.\textsuperscript{296} The ILC agreed that, while resolutions of IOs emanate from them, “what is relevant is that they may reflect the collective expression of the views” of member states.\textsuperscript{297} As the ILC put it, they “often serve as arenas or catalysts” for state practice.\textsuperscript{298}

The ILC adopted a conservative approach to the effects of IOS’ practice “as such”. It concluded that only “[i]n certain cases, the practice of international organisations also contribute[s] to the

\textsuperscript{291}See eg Hugh Thirlway \textit{The Sources of International Law} (OUP, Oxford, 2014) at 79-81.
\textsuperscript{294}See eg interventions by Australia and Vietnam at the UNGA Sixth Committee: \textit{Summary record of the 21st meeting} UN Doc A/C.6/71/SR.21 (25 October 2016) Agenda Item 78 at 3, para 16; \textit{Summary record of the 22nd meeting} UN Doc A/C.6/71/SR.22 (26 October 2016) Agenda Item 78 at 9, para 50.
\textsuperscript{295}See eg interventions by Russia and the United States at the UNGA Sixth Committee: \textit{Summary record of the 21st meeting}, above n 182, at 7-8, paras 49-50; \textit{Summary record of the 20th meeting} UN Doc A/C.6/71/SR.20 (24 October 2016) Agenda Item 78 at 12, para 57.
\textsuperscript{296}ILC draft conclusions, above n 4, at 147.
\textsuperscript{297}At 147.
\textsuperscript{298}At 130.
formation, or expression, of rules of customary international law”. What precisely these terms mean is debatable and the ILC did not offer much guidance. Presumably, they refer to practice emanating from decisions of the IO formally independent from member states. Those “certain cases” where IOs’ practice counts “as such” are those concerning rules “whose subject matter falls within the mandate of the organizations” or those that “are addressed specifically to them”. But these categories admit different interpretations. For example, under the ILC’s criterion, the practice of some RFMOs would not count “as such” for custom development because addressing non-members is not explicitly in their founding treaty. Conversely, it could also be argued that IOs may exert a competence not always conferred explicitly by treaty mandate under “implied powers”. The bottom line, however, is that the ILC distrusted IOs’ autonomy:

[T]he practice of international organizations will not be relevant to the identification of all rules of customary international law, and further that it may be the practice of only some, not all, international organizations that is relevant.

Even accepting this restrictive approach, the core of the matter still concerns reconciling IOs’ distinct legal personality with the role states perform in their decision-making. It is challenging to consider how general practice and opinio arise from this tension through the snapshot picture of the identification test. IOs may develop specific competence over time, not contemplated in the constitutive treaty, but later accepted by their members.

Therefore the gap remains. Without assessing the acts that give rise to consistent conduct and how they are created, achieving a realistic picture of how custom emerges from the practice of IOs seems unlikely. The case against unregulated fishing is suitable for offering guidance on the topic: RFMOs are active, decentralised organisations with common aims but different membership and dynamics. They are far from representing universal participation, yet they boast clear regulatory powers under treaty law. They enjoy legal competence and routinely adopt legally binding acts, providing a separate account from the often-quoted examples based on UN organs and their resolutions.

299 At 130.
300 At 131.
301 At 131.
C Role of Non-binding Instruments

Non-binding instruments play a significant part in modern international law development. When widely accepted, they tend to legitimise behaviour and make it harder to sustain opposing views. They shape values and create expectations regarding states’ restraints upon their behaviour. They have received recognition in international litigation in the sense that, in some instances, they must be “taken into consideration” and be “given proper weight”.

Non-binding instruments may serve the development of other formal sources and potentially “harden” into law. Yet the interplay between soft law and the traditional sources, including custom, is less appreciated. The starting point is still the same: the two-element test must always be satisfied. Beyond this basic observation, there is no single answer to how a non-binding instrument can harden into customary law. Some opine, rather vaguely, that soft law can serve as “elements of state practice” contributing to custom formation. Others see a form of state practice in the drafting and voting for non-binding instruments. For some scholars, soft-law mechanisms and the conferences that create them “have an important normative role as catalysts of new international norms”.

So far, most of the attention in the relation between non-binding instruments and the formation of customary international law has focused on the role of the UNGA resolutions. They have been a recurrent choice to achieve commonly accepted standards and have proven influential in several cases. Perhaps because of the argument that its decisions might create “instant” custom, the ILC cautiously referred to international organisations resolutions stating they could not make a customary rule. They “may provide evidence for determining the existence and

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305Gabcikovo-Nagymaros Project (Hungary v Slovakia) [1997] ICJ Rep 7, para 140.
306Boyle and Chinkin, above n 303, at 211-212.
308Shelton, above n 302, at 320.
310ILC draft conclusions, above n 4, at 147.
content” of such a rule, “or contribute to its development”. How this may occur, the ILC did not address.

But UNGA resolutions are not the only non-binding texts potentially playing a role in developing customary law. The ILC did not address whether and how other multilateral soft-law instruments may influence developments in state practice leading to custom formation. In the present context, the IPOA-IUU is a non-binding text that calls for this examination. The following chapters will review the relation between UNFSA and the IPOA-IUU, assessing how the latter has contributed to state practice on non-members and potentially the emergence of customary law. They will also explore how the IPOA-IUU and UNFSA have reinforced each other, overlapped or competed, and the consequences of this relationship in developing state practice against unregulated fishing.

**V UNFSA’s Duty to Cooperate and Customary Law: the Gaps in the Field**

The custom formation process has also been overlooked in international fisheries law regarding the duty to cooperate. Discussions have focused on the identification test, omitting the evidence and relevance of emerging custom as a source of normativity. Scholars in this field agree on the baseline point that UNFSA provisions on cooperation neither codified nor crystallised existing or emerging custom due to their novel character. For example, slightly before UNFSA entered into force, it was observed that Article 8 UNFSA could “hardly be considered as forming part of contemporary customary international law”. UNFSA tackled problems “that had not yet been adequately addressed by treaty or customary international law”, including the position of non-members. In 1999, “unregulated fishing by non-members to [RFMOs] has continued in virtually all regulatory areas since the adoption of [UNFSA]”, so “clearly, many states do not believe they are obliged to acquiesce in the regime”. Still, scholars asserted that

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311 At 147.
314 At 271.
some UNFSA provisions, including the duty to cooperate as framed in Articles 8 and 17, could evolve into that status.\(^{315}\)

In subsequent years, those who addressed the identification question did not necessarily assess all the available evidence or the implications of custom formation. For example, in the mid-2000s, Rosemary Rayfuse was emphatic about concluding that state practice indicated “both the assertion and acceptance of a customary duty to cooperate through the medium of [RFMOs]”.\(^{316}\) However, she admitted that “[a] complete analysis of practice” concerning all the measures adopted by RFMOs was beyond her study.\(^{317}\) Equally, the lack of emphasis on the formation process probably explains why she was less sure about her initial conclusions in the late 2000s.\(^{318}\) More recently, Rayfuse used less prescriptive language, stating that a “reasonable view would advise that” under Articles 118 LOSC and 8 UNFSA, “new entrants should exercise their right to fish on the high seas through the relevant RFMO”\(^{319}\).

Other scholars also prioritised the identification question without discussing the implications of the formation process. For example, Erik Molenaar asserted in the mid-2000s that the legitimacy of RFMOs to take measures against non-cooperating non-members “was no longer challenged”, which suggested that “the strengthened duty to cooperate with RFMOs pursuant to Article 8(3) of the UNFSA has already evolved into [customary international law]”.\(^{320}\) However, he did not assess the practice he observed from the perspective of custom formation, including the question of emerging opinio and its implications. This could explain why Molenaar, too, recently agreed that the acceptance of the role of RFMOs vis-à-vis non-parties

\(^{315}\)David Balton “Strengthening the Law of the Sea”, above n 67, at 140; Serdy The New Entrants Problem, above n 113, at 45-46; Andrew Serdy “Postmodern International Fisheries Law, Or We are All Coastal States Now” (2011) 60 ICLQ 387 at 389.


\(^{317}\)At 43. Because the primary purpose of her research at the time examined non-flag state enforcement jurisdiction of RFMOs’s measures, the duty to cooperate was a secondary aspect. Rosemary Rayfuse Non-flag State Enforcement in High Seas Fisheries (Martinus Nijhoff, Leiden, 2004) at 7.


was “not necessarily based on the position” that some UNFSA provisions had achieved the status of customary law.\textsuperscript{321}

These two examples emphasise that prioritising custom identification without adequately assessing the evidence and implications of custom formation leads to contradicting results. Because these authors tried to conclude on custom identification without thoroughly considering the formation process, it was difficult to assess this rule’s normativity and its legal effects as it develops.

Similarly, because finding conclusive evidence sustaining the demanding standard of the identification test is always challenging, it is unsurprising that most scholars have rejected the view that a UNFSA-like duty to cooperate is a customary obligation. For example, in the mid-2000s, Hayashi opined that the evidence and materials presented by Rayfuse’s work “do not appear to be sufficiently convincing” to show that this obligation “is now part of [customary law] and binding on all States”.\textsuperscript{322} Hayashi recognised a “\textit{de facto} acceptance” of many of the demands from RFMOs, but he saw no signs it was “done in a belief that it was their legal obligation to do so”.\textsuperscript{323} This view illustrates why isolating the identification question without paying full attention to the formation process is mistaken, as it ignores that custom cannot be understood as a belief except when fully consolidated. More recently, other authors have also looked at the customary status of the duty to cooperate with RFMOs purely from an identification perspective but without assessing all the evidence.\textsuperscript{324}

\textbf{VI Conclusions}

The widespread priority given to customary law identification has precluded authoritative voices from appreciating the central importance of the custom formation process. The 2018 ILC’s draft conclusions confirm that the meaning and implications of the formation process

\textsuperscript{321}Erik Molenaar “Regional Fisheries Management Organisations” in Marta Chantal Ribeiro, Fernando Loureiro Bastos and Tore Henriksen (eds) \textit{Global Challenges and the Law of the Sea} (Springer, Cham, 2020) 81 at 101.
\textsuperscript{322}Moritaka Hayashi “Regional Fisheries Management Organisations and Non-Members”, above n 45, at 761.
\textsuperscript{323}At 761.
\textsuperscript{324}Douglas Guilfoyle “Shipping interdiction and the Law of the Sea (CUP, Cambridge, 2019) at 162; Eva R van der Marel “Problems and Progress in combating IUU Fishing” in Richard Caddell and Erik Molenaar (eds) \textit{Strengthening International Fisheries Law in an Era of Changing Oceans} (Hart, Oxford, 2019) 291 at 295; Yoshinobu Takei \textit{Filling Regulatory Gaps in High Seas Fisheries} (Brill Nijhoff, Leiden, 2013) at 67. See also Simone Vezzani \textit{Jurisdiction in International Fisheries Law} (Wolters Kluwer, Milano, 2020) at 254-255. However, he posits the question differently, in terms of whether RFMOs can exert prescriptive jurisdiction.
have stayed outside the mainstream debates, mainly focused on “what the law is” at a given moment. This “snapshot” approach, favoured by many states at the UNGA Sixth Committee, Nevertheless works against a proper sense of how custom develops.

It is only an understanding of custom as a process that gives a sensible account of its normativity and the meaning of *opinio*. This process rests on a dialectical exchange where states assert a position with legal content or consequences and the reactions by others, including acceptance and acquiescence or objection and protest. As the informal dialogue evolves, the volitive element justifies an emerging custom that creates legal consequences for some states even when it is not mature or consolidated enough to sustain the identification test. In this way, the custom formation process validates legal effects based on either multilateral or individual *opinio* and the logic of opposability, legitimate expectations and good faith.

The focus on custom formation also offers a chance to counter long-standing critiques against custom, specifically, its ambiguity and lack of legitimacy, which subsequent chapters address. It also justifies the inductive method as the starting point for examining custom formation. Significantly, this account of custom formation serves as the framework to collect and observe state practice and assess whether the duty to cooperate is emerging as customary. This assessment will provide the materials to offer insight into three specific topics the ILC did not suitably address and where several gaps remain: how treaties, non-binding instruments and international organisations interact to develop customary law.

The following four chapters will then address a central question in this study: whether and how the obligation to cooperate through RFMOs is developing as customary law. Once this task is accomplished, this thesis will discuss the consequences of these findings, answering the questions and filling the gaps this chapter introduced.
Chapter Three: Regional Practice in the Atlantic Ocean

I Introduction

This chapter assesses regional practice under the five RFMOs that regulate high seas fishery resources in the Atlantic Ocean and the Mediterranean Sea. It unfolds following a loose geographical order by examining the Northwest Atlantic Fisheries Organization (NAFO), the Northeast Atlantic Fisheries Commission (NEAFC) and the South East Atlantic Fisheries Organisation (SEAFO) as the three RFMOs that manage straddling stocks in the North and South Atlantic. It then addresses the General Fisheries Commission of the Mediterranean (GFCM), closing with the International Commission for the Conservation of Atlantic Tunas (ICCAT) as the only RFMO exclusively focusing on highly migratory stocks.

Parts II–VI each focuses on one specific RFMO, following a similar structure. They first present how each organisation progressively asserted a duty to cooperate on the high seas against non-party states based on UNFSA provisions, resorting to the threat of punitive measures under the IUU fishing notion to support their demands. Each part then discusses non-members’ reactions in terms of acceptance, acquiescence or objection. Although many states first ignored requests for cooperation, RFMOs maintained their claims, intensifying the dialectical process at the core of customary law formation. Over time, RFMOs’ claims developed and consolidated as non-parties changed their positions. Very few objected or still behave ambiguously to the standard of cooperation claimed by RFMOs.

This chapter demonstrates how the defining elements of the custom formation process are visible in the practice of the Atlantic RFMOs. A key feature is how the emerging obligation to cooperate to manage high seas stocks through existing RFMOs is performing a normative role among many states, defining the relationship between members and non-members.
II The Northwest Atlantic Fisheries Organization (NAFO)

Non-member activities were one of the most persistent problems for NAFO.\(^\text{325}\) After two decades of little progress and conflict among its members, NAFO moved from soft diplomatic exchanges to an increasingly assertive stance against uncooperative third states. UNFSA and the IPOA-IUU played an instrumental role in this progression, justifying NAFO’s claims and compelling non-parties to cooperate.

This part has two sections. The first defines the scope of NAFO’s claim to cooperation, since NAFO regards membership the primary channel to discharge this duty. The second section shows how NAFO demanded non-parties stop fishing while deterring them by resorting to mechanisms influenced by the IPOA-IUU. NAFO’s practice settled by the mid-2000s when its position experienced increasing acceptance and a sharp decline in unregulated fishing occurred. Notably, NAFO members always acted on matters concerning non-members by consensus.\(^\text{326}\)

A Cooperation through Membership

NAFO was an open organisation under its 1978 Convention, and it continues to be so under the amendments adopted in 2007.\(^\text{327}\) Accordingly, NAFO considers membership the primary mechanism to discharge the duty to cooperate to manage high seas resources. Probably for the same reason, and unlike other RFMOs, it has not implemented a scheme to allow non-members to fish “by agreeing to apply” the conservation measures it adopts, as Articles 8(3)-(4) UNFSA 1135 UNTS 369 (signed 24 October 1978, entered into force 1 January 1979) [NAFO Convention]. NAFO competence is limited to regulate fishery resources in the high seas of the Northwest Atlantic, known as the Regulatory Area (here the NAFO area). NAFO has 13 Contracting Parties: Canada, Cuba, Denmark in respect of Greenland and the Faroe Islands, the European Union, France in respect of St Pierre et Miquelon, Iceland, Japan, Norway, the Republic of Korea, Russia, Ukraine, the United Kingdom and the United States. Under the 1978 Convention NAFO had a unique structure. The organisation had two relevant political bodies, the General Council and the Fisheries Commission. The Council was responsible for coordinating the external relations of the organisation, including dealing with non-members and determining membership of the Fisheries Commission. The Commission was responsible for fisheries management, including fishing rights.

\(^{325}\) Convention on Cooperation in the Northwest Atlantic Fisheries 1135 UNTS 369 (signed 24 October 1978, entered into force 1 January 1979) [NAFO Convention]. NAFO competence is limited to regulate fishery resources in the high seas of the Northwest Atlantic, known as the Regulatory Area (here the NAFO area). NAFO has 13 Contracting Parties: Canada, Cuba, Denmark in respect of Greenland and the Faroe Islands, the European Union, France in respect of St Pierre et Miquelon, Iceland, Japan, Norway, the Republic of Korea, Russia, Ukraine, the United Kingdom and the United States. Under the 1978 Convention NAFO had a unique structure. The organisation had two relevant political bodies, the General Council and the Fisheries Commission. The Council was responsible for coordinating the external relations of the organisation, including dealing with non-members and determining membership of the Fisheries Commission. The Commission was responsible for fisheries management, including fishing rights.

\(^{326}\) The decision-making processes relied on a simple majority rule for the Commission and the Council. Articles V and XIV 1978 NAFO Convention.

\(^{327}\) Under art XXII(4) of the original 1978 Convention, “[a]ny party which has not signed this Convention may accede thereto by a notification in writing to the Depositary”. Accession meant direct participation in the work of all the NAFO bodies except the Commission. Membership to the latter was determined by the Council and consisted of member states participating or expecting to participate in fishing in the NAFO area. Practice confirms, however, that all new members were accepted to the Commission. Under arts VI(1) and XXIII(4) adopted in 2007, the NAFO Convention remains open for accession and all contracting parties are members of the Commission.
provide. There is no cooperating non-party status in NAFO, a policy maintained despite some critics portraying it as not consistent with UNFSA.328

The possibility of acceding to NAFO has not necessarily entailed being allocated fishing rights. Non-parties seeking a part of such allocation could have objected to the lack of alternative means to cooperate, but they did not. One example is Belize, generally regarded as a flag of convenience, which operated in NAFO waters in the 1990s and early 2000s. In 2004, Belize approached NAFO about becoming a cooperating non-party. NAFO replied that no such mechanism existed, adding that whether flagged to a contracting party or non-contracting party, all vessels fishing for NAFO species “are expected to observe” NAFO rules.329 Belize did not accede to the NAFO Convention, nor did it challenge NAFO’s position. More importantly, Belize subsequently refrained from fishing in NAFO waters.

Both the silence of Belize and the fact that it stopped fishing as demanded suggest a degree of acquiescence in NAFO’s claim. Belize could not have been unaware that its vessels’ expectations to operate on the high seas would be affected by NAFO’s demands. Its silence fits well with the kind of practice that constitutes acquiescence when a state’s reaction “would have been called for”.330 Belize ratified UNFSA on 14 July 2005, nearly a year after its exchanges with NAFO. This domestic step confirmed a policy enacting legislation in 2003 to adhere to international agreements, including UNFSA.331

**B Deterring Unregulated Fishing in NAFO Waters**

As an open organisation that regards membership as the main conduit to discharge the duty to cooperate, NAFO focused on deterring uncooperative flag states. In the late 1990s, general international law recognised few limitations on the high seas freedom of fishing. Still, NAFO moved to demand non-members comply with a strengthened duty to cooperate.

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328Henriksen, Honneland and Sydnes, above n 70, at 69.
330ILC draft conclusions, above n 4, at 142.
I Early practice

The International Commission for the Northwest Atlantic Fisheries (ICNAF), the predecessor of NAFO, was the first regional organisation to address the non-member problem. Evidence of diplomatic exchanges with non-parties fishing in the NAFO area begins as early as 1973, based on the provisions of the ICNAF Convention.\footnote{International Convention for the Northwest Atlantic Fisheries Commission 157 UNTS 157 (opened for signature 8 February 1949, entered into force 3 July 1950). Article XIII requested parties to “invite the attention of non-members” to the fishing activities of their nationals or vessels “which appear to affect adversely the operations of the Commission or the carrying out of the objectives of this Convention”.} ICNAF contacted two non-party states, Venezuela and Panama, to remind them “of the importance of ensuring” that fishing be conducted “in conformity with the Commission’s management regime in order to avoid affecting adversely the operations of the Commission and the carrying out of the objectives of the ICNAF Convention.”\footnote{“Resolution Relating to Vessels of Non-Member Countries Operating in the ICNAF Area Beyond National Fisheries Jurisdiction” (ICNAF, 28th Annual Meeting, June 1978) at 43.} There is no evidence of any official reply, and vessels flagged to these states returned to the area in subsequent years.

The situation did not change much under the 1978 NAFO Convention. At the first meeting of the NAFO Commission in 1979, the Council adopted a resolution whereby NAFO would “inform” non-parties of “the difficulties created” by their vessels “with regard to the conservation of the stock”.\footnote{“Resolution Relating to Vessels of Non-Member Countries Operating in the Regulatory Area” (NAFO, 1st Annual Meeting Report, 1979) at 107. Article XIX of the 1978 Convention was a similar provision to Article XIII ICNAF.} This early decision was rather hortatory and there was no actual legal content in it, let alone punitive consequences.

Diplomatic exchanges were similar and did not have encouraging results more than a decade later. About 40 unregulated vessels were sighted in the NAFO area between 1988 and 1991, with catches estimated at 48,880 tonnes in 1990.\footnote{“Non-Contracting Parties Fishing Activity in the NAFO Regulatory Area by the Delegation of Canada”. STACFAC First Meeting Report (January 1991) Annex 4, 43 at 43-46.} Requests to uncooperative states appealed primarily to the harmful effects of unregulated fishing and the general provisions of the LOSC, including Article 117.\footnote{“Draft Aide Memoire (for Joint Diplomatic Demarches)”. STACFAC First Meeting Report (January 1991) Annex 9, 63 at 63-65.} They succinctly asked non-members “to take all necessary measures to prevent any fishing contrary” to NAFO regulations.\footnote{At 65.} These demands had little impact.
In reaction to the shortcomings of the existing legal framework, Canada soon took a unilateral response. In 1994, it extended its enforcement jurisdiction into the NAFO area, including boarding, inspection and seizure of any fishing vessel that was found to be contravening NAFO measures. Although these actions initially only targeted flags of convenience, most members wanted a multilateral response. Canada escalated and extended its domestic regulations to any fishing vessel on the high seas. The Estai incident in 1995, a ship flagged to a NAFO member, and the subsequent case before the ICJ would force NAFO to agree on different means to tackle the non-member problem through multilateralism and consensus instead.

2 The influence of UNFSA

UNFSA quickly influenced the dynamics of NAFO when it adopted its first set of rules against unregulated fishing in 1997. In wording very much resembling Articles 17(4)-33 UNFSA, NAFO presumed that any non-party vessel sighted in fishing activities in the NAFO area undermined its management measures. Although the 1997 Scheme contemplated limited sanctions against uncooperative states or their vessels, it meant that NAFO had started to build a claim on the duty to cooperate on the high seas. These first steps are also worth noting because UNFSA had just been adopted, was still four years ahead of entering into force and only four NAFO members had ratified it by 1997. Importantly, NAFO made no distinction between actions under Articles 17(4) and 33(2) UNFSA, which meant that it did not discriminate in the treatment of non-members depending on whether they were UNFSA parties.

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344Paragraph 5, at 265.
345See Chapter One-II.A.4(b).
UNFSA also influenced NAFO’s diplomatic demarches, supporting its members’ early claims. A letter sent in 1997 to Sierra Leone asserted that “[n]on-Contracting Parties which allow vessels flying their flags to fish in the NAFO Regulatory Area do not comply with their obligations to cooperate with international conservation and management measures.” Although it only “urged” Sierra Leone to withdraw its vessels, this language was more robust than that used before 1995. Conspicuously, there was no reference to the LOSC. Instead, and emphasising a more assertive stance, NAFO members drew the attention of Sierra Leone to UNFSA, stating that this treaty establishes “the general principles for the regulation of high seas fishing by flag-states”. Subsequent demarches used similar wording, including to Honduras and Belize.

These exchanges resulted in mixed reactions. Some states, such as Sierra Leone, deregistered the vessels sighted in the NAFO area, while others, such as Honduras, reported they did not have the ships under their registry. In contrast, Panama and others did not reply to NAFO and continued fishing in the area in subsequent years. Some flag states, such as Belize, authorised or tolerated its vessels returning to the NAFO area, and new flags arrived. Although there were no open acts of objection or protests, the fact that flag states allowed or tolerated their vessels returning to fish implied that they rejected NAFO’s initial claims.

3 The impact of the IUU concept

Unregulated fishing resurfaced in 2002, sponsored by Belize and Dominica. As some NAFO parties expressed “frustration at only sending letters”, it became apparent that relying only on diplomatic exchanges was not sufficient. The recently adopted IPOA-IUU came to play a central role in advancing NAFO’s incipient practice against non-members, influencing the revised scheme of measures NAFO adopted in 2005. Three areas illustrate how NAFO

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347At 270.
reinforced its claim: the content of its demarches, the threat and application of punitive measures and the implications of the IUU cross-listing.

(a) Demarches based on the IUU concept

NAFO demarches became more emphatic than previous ones. Although not invoking UNFSA directly, their drafting followed Articles 8 and 17 UNFSA and paragraph 79 IPOA-IUU almost verbatim.352 It became apparent that the IUU notion reinforced the provisions of UNFSA, as this 2003 NAFO communication addressing one non-member state highlights:353

[T]he international community has recognized that global cooperation is needed to prevent, deter and eliminate IUU fishing and has committed that states not party to regional fisheries management organizations are not discharged from their obligation to cooperate with those organizations.

To discharge this obligation to cooperate, states have agreed to apply the conservation and management measures adopted by the organization or adopt measures consistent with those conservation and management measures and should in any case ensure that vessels entitled to fly their flag do not undermine such measures.

An additional communication sent in 2004 to Dominica, another non-member and non-UNFSA party, expressed concerns that its vessels “were continuing their illegal fishing activities in the NAFO Regulatory Area”, “undermining the effectiveness of conservation and management measures established by NAFO”.354 It was the first time that diplomatic demarches used (twice) the word “illegal” to refer to unregulated fishing. The letter did not mention the LOSC. Although it did not explicitly mention UNFSA, it also linked the obligations established in Articles 8 and 17 with the IUU concept. NAFO demanded that Dominica “ensure that these

352Paragraph 79 IPOA-IUU follows closely arts 8 and 17 UNFSA.
353“Letter to the Dominican Republic”, STACFAC Report 2003, above n 350, at 73. This letter was sent mistakenly to the Dominican Republic. Later, additional letters were sent to Dominica in February 2004. Dominica did not reply. STACFAC Report (NAFO, 26th Annual Meeting Proceedings, September 2004) 68 at 69 and 74.
354Letter from David Bevan (NAFO President) to Mr Osbourne Riviere (Minister of Foreign Affairs, Commonwealth of Dominica) regarding Dominican IUU fishing activities (27 September 2004) (on file with the author) at 1.
vessels cease and desist from fishing activities that undermine the effectiveness” of NAFO Measures.\textsuperscript{355}

\textit{(b) Deterrence}

Following the frustration expressed in 2002 and 2003, the amendments to the NAFO Scheme adopted in 2005 established a process to adopt a list of vessels engaged in IUU fishing. Once a ship is on the IUU list, NAFO parties commit to taking specific actions against it and potentially the flag state. They would not assist IUU vessels, including fuel and other services, and would not allow entry into their ports except in situations of \textit{force majeure}.\textsuperscript{356} They also agreed to refuse authorisation to fish in waters under their jurisdiction or grant their flag, prohibited the landing and imports of fish from such ships, and limited transshipments of fish to or from them.\textsuperscript{357} Significantly, all these measures were aimed only at vessels flagged to non-members, in another step toward strengthening NAFO’s claim that these flags must either join the organisation or refrain from fishing.

\textit{(c) The cross-listing of IUU vessels}

The IUU cross-listing is another meaningful step. Under this mechanism, a non-contracting party vessel placed on the IUU list of one RFMO is presumed to have engaged in IUU fishing in another RFMO, extending the negative consequences of the IUU listing notwithstanding membership or participation in the other RFMO or UNFSA. The cross-listing from NEAFC to NAFO was agreed upon in 2006.\textsuperscript{358}

An example illustrates the implications of this measure. In 2007, neighbouring NEAFC added a Cuban vessel to its draft IUU list.\textsuperscript{359} At the NAFO meeting in 2007, Cuba learnt that it would be necessary to make the appropriate representation to remove the ship from the NEAFC-IUU draft list before fishing in NAFO-regulated waters.\textsuperscript{360} Due to the cross-listing, the consequence

\textsuperscript{355} At 2.
\textsuperscript{356}“Scheme to Promote Compliance”, above n 351, arts 9-10.
\textsuperscript{357}Articles 9-10.
\textsuperscript{358}NAFO 28th General Council Annual Meeting Report (September 2006) at 84.
\textsuperscript{359}STACTIC Report (NAFO, 29th Annual Meeting Proceedings, September 2007) 163 at 164-165.
\textsuperscript{360}At 164.
was that the Cuban vessel “would not be authorized to fish in the NAFO Regulatory Area until it was removed from NEAFC’s/NAFO IUU lists”. 361

The case is telling because Cuba is not a NEAFC member, and it has not acceded to UNFSA. The IUU listing limited the possibilities of Cuba fishing on the high seas of NEAFC and NAFO. There is no evidence that Cuba objected to this outcome, arguably an implicit recognition or acceptance of the obligation to cooperate through the RFMOs engaged in such cross-listing. It reflects how the formation of custom unfolds: NAFO’s claim and the Cuban omission imply a degree of acceptance or at least acquiescence in the emerging rule.

4 Unregulated fishing decreases

NAFO continued to treat non-party vessels under the notion of IUU fishing, threatening them with punitive consequences. Several states reacted by accepting or acquiescing to NAFO’s demands for cooperation. For example, Dominica deregistered its vessels accused of IUU fishing, and no ship flagged to this state returned to the Northwest Atlantic. 362 NAFO adopted its first IUU list in 2006, including five vessels previously flagged to Dominica and later registered to Georgia. 363 Georgia did not reply, but there is no evidence of its ships returning to the NAFO area. Neither Dominica nor Georgia challenged NAFO’s requests.

Incidents with unregulated vessels decreased substantially after 2006. One commentator observed that the measures adopted by NAFO, combined with reduced fishing opportunities, “have lessened the fishing activities of Non-Contracting Parties in recent years”. 364 The NAFO Performance Review Panel reported in 2011 that unregulated fishing was a non-issue in the area. 365

Recent exchanges seem to confirm the general acceptance of NAFO’s claim on the obligation to cooperate. They demonstrate how the threat of inclusion on the IUU list has played a crucial role to advance this position. For example, NAFO blacklisted a vessel flagged to Ghana in

361 At 165.
364 Henriksen, Honneland and Sydnes, above n 70, at 92.
365 NAFO Performance Review Panel Report (5 August 2011) at 44.
2015, and Ghana did not challenge the inclusion on the list. Instead, it replied to NAFO, stating that it had deleted the ship from its register “on account of its previous IUU fishing history.”

A similar event occurred in 2016 when Guinea informed NAFO of the deletion from its records of a vessel accused of IUU fishing, confirming it was not authorised to flag the Guinean flag. No Ghanaian or Guinean ships have appeared in NAFO waters ever since. Ghana and Guinea are contracting parties of neither NAFO nor UNFSA.

Most of the examples presented above can be labelled as tacit acceptance or acquiescence to NAFO’s claims. There is no question that the interests of Sierra Leone, Dominica, Georgia, Ghana, Guinea and Belize were affected when NAFO requested that their vessels join the organisation or refrain from fishing. Moreover, several of these states reacted in positive ways, including delisting the suspect vessels from their registries.

Another recent exchange also suggests acceptance of the obligation to cooperate as claimed by NAFO parties. Cambodia, generally considered a flag of convenience, sent a formal communication to NAFO in 2017 expressing concerns about reports and sightings of “Cambodia-flagged vessels fishing or operating in the NAFO area of competence, and these fishing vessels were suspected of undermining NAFO’s conservation measures.”

Cambodia advised that after 31 August 2016, no fishing vessels or reefers transshipping at sea were “entitled to flag the Cambodian flag” to operate “in areas beyond national jurisdiction”. This communication meant that Cambodia explicitly cooperated with NAFO by refraining from fishing on the high seas, conduct that amounts to an acceptance of NAFO’s claims. Cambodia is not a NAFO member and ratified UNFSA much later, on 6 March 2020.

5 The 2007 amendments to the NAFO Convention

The 2007 amendments to the NAFO Convention – which entered into force in 2017 – are consistent with UNFSA on the treatment of non-members. Article XVI(1) provides that NAFO

366Letter from Samuel Quaatey (Fisheries Commission Director, Republic of Ghana) to NAFO Executive Secretary concerning the delisting of the vessel Trinity (21 May 2015) (on file with the author).
367Letter from Andre Loua (Ministry of Fisheries of the Republic of Guinea) to NAFO Executive Secretary concerning the delisting of the vessel Labiko, 0366/MPAEM/CAB (26 April 2016) (on file with the author).
368Letter from Veng Sakhon (Minister of Agriculture, Forestry and Fisheries of Cambodia) to the NAFO Secretariat concerning Cambodia’s decision not to authorise vessels under its flag to fish on the high seas, 3178 MAFF (11 April 2017) (on file with the author).
369Above n 368.
shall request that non-members cooperate either by becoming a party “or by agreeing to apply the conservation and management measures adopted by the Commission”. In practice, NAFO has maintained its previous approach: a vessel must be registered in the NAFO record to fish legally, which is only open to contracting party ships. Non-parties have not objected to this understanding of cooperation.

Notably, the 2007 amendments made the NAFO Convention the first treaty ever to include the IUU fishing notion defined in the IPOA-IUU. Article VI (9)(d) provides that one of the functions of the NAFO Commission is to adopt “measures for the prevention, deterrence and elimination of IUU fishing”. Such general competence finds a correlation in Article XVI(2)(b), which mandates NAFO contracting parties to “take measures consistent with this Convention and international law to deter fishing activities” of any non-Contracting Party vessel that “undermine the effectiveness” of NAFO measures. This language is almost verbatim from UNFSA and NAFO’s existing practice.

The NAFO Performance Review Panel affirmed in 2011 that the measures adopted “also affect Non-Contracting Parties fishing in the NAFO Regulatory Area by virtue of the customary international law codified in [the LOSC] and UNFSA”. It concluded that “Non-Contracting Parties are subject to a duty to cooperate and are also required to comply with and apply any conservation and management measure adopted by the Organization”. However, this statement does not capture the content of this duty as asserted by NAFO practice. Cooperation does not mean a direct submission of non-members to NAFO’s management measures but engaging through membership or refraining from fishing. Still, the Panel’s underlying conclusion is correct in the sense that the meaning of this obligation has substantively changed in the NAFO area, limiting the traditional freedom to fish.

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370 Article I(j).
371 NAFO Performance Review, above n 365, at 34.
372 At 34.
III The North-East Atlantic Fisheries Commission (NEAFC)

Unregulated fishing was also a problem in the waters under the competence of NEAFC.\textsuperscript{373} Flags of convenience and other non-party states regularly operated in the 1990s and 2000s, particularly in the Norwegian and Irminger Seas.\textsuperscript{374} NEAFC seemed poorly placed to face the challenge: historical disagreements among its members compromised its performance on key management issues, were the source of bitter disputes and affected the conservation status of several fisheries.\textsuperscript{375} Its decision-making process did not help, as the binding measures adopted by NEAFC, called (confusingly) recommendations, must be taken by a qualified majority of two-thirds of the contracting parties.\textsuperscript{376} Even if approved, they are subject to potential objections whereby contracting parties can depart from them.\textsuperscript{377}

However, over time, NEAFC achieved notable results in deterring unregulated fishing adopting decisions by consensus. At the outset of this process lie two sets of measures from the early 2000s, illustrating how NEAFC asserted its version of the obligation to cooperate. By expanding room for cooperation with non-parties while adopting punitive measures against uncooperative flag states, NEAFC progressively transformed the meaning of high seas cooperation in the area under its competence.

A NEAFC’s Claim on the Duty to Cooperate

Third states may accede to the NEAFC Convention “with the approval of three-fourths of all the Contracting Parties”.\textsuperscript{378} The reality is that NEAFC has not displayed much interest in

\textsuperscript{373}Pursuant to art 3 of the Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries 1285 UNTS 129 (opened for signature 18 November 1980, entered into force 17 March 1982), contracting parties “establish and maintain” the North East Atlantic Fisheries Commission (NEAF). The current members to NEAF are Iceland, Norway, Denmark in respect of the Faroe Islands and Greenland, Russia, the EU and the United Kingdom. Under arts 1(2), 6 and 8, NEAF competence is limited to regulating straddling and discrete stocks in the high sea part of the Convention, or the Regulatory Area (hereinafter NEAF area). NEAF does not adopt measures for one part of the high sea area under its competence: the Barents Sea is regulated by a specific arrangement between Norway and Russia, presented briefly in Chapter Six.


\textsuperscript{376}Articles 3(9) and 5(1) NEAF Convention.

\textsuperscript{377}Article 12 NEAF Convention.

\textsuperscript{378}Article 20(4).
broadening its membership. Only three countries have applied in the past. NEAFC did not accept Ukraine’s application in the mid-1990s and Lithuania’s in 2002–2003 but did welcome Estonia before it became a European Union member.\(^{379}\)

This point is relevant because not having alternative means to discharge the duty to cooperate with a relatively closed organisation risks inconsistency with UNFSA and exacerbates unregulated fishing in the long term. Likewise, it would have likely prevented the acceptance of NEAFC’s claim against uncooperative states. NEAFC needed to facilitate cooperation by other means and adapt its practices to UNFSA standards to tackle non-members effectively.

NEAFC did not change immediately. In 1998, NEAFC adopted a Scheme with its first rules on the treatment of non-members, but it fell short of clarifying what cooperation meant and how to formalise it.\(^{380}\) The situation started to shift in the early 2000s, triggered by NEAFC’s increasing frustration with non-members, as exemplified by Japan’s assertion in 1999 that although it was not a member, it intended to continue fishing in NEAFC waters while adopting only domestic measures to cooperate with the organisation.\(^{381}\) Equally, the “cooperative quotas” failure probably pushed NEAFC to harden its approach. Small allocations were offered to states showing some cooperation, but this failed to curb non-members’ conduct. For instance, Lithuania did not show much regret for its high catches in 2001–2002, indicating that its previous application for membership “had shown its willingness to cooperate”.\(^{382}\) Members were not impressed by Lithuania catching 15 times the assigned quota, giving a “new meaning to the word cooperation”.\(^{383}\)

It came as no surprise that NEAFC advanced a more robust claim against non-members, adopting two sets of measures or a “two-tier approach” to non-members.\(^{384}\) It amended its 1998 Scheme in 2003 and 2004, establishing the status of cooperating non-party.\(^{385}\) In parallel, and

\(^{379}\)NEAFC 21st Annual Meeting Report (November 2002) vol 1; Main Report at 33-34. In addition, the United Kingdom acceded in 2020.

\(^{380}\)“Scheme to Promote Compliance by Non-Contracting Party Vessels with Recommendations established by NEAFC” (NEAFC, 17th Annual Meeting Report, November 1998) Annex F.


\(^{382}\)NEAFC Report 2002, above n 379, at 33.

\(^{383}\)At 33.

\(^{384}\)Erik Molenaar “Participation, Allocation and Unregulated Fishing”, above n 121, at 473–474.

encouraged by the IPOA-IUU, it set up punitive measures against uncooperative states. The following sections discuss the meaning of these measures.

1 Accepting the duty to cooperate with NEAFC

By 2005, NEAFC clarified its rules on cooperating non-party states. To apply for this status, non-members must state their commitment and assurance of compliance with NEAFC recommendations. Cooperating non-parties could potentially request that NEAFC adopt cooperative quotas on regulated resources. The application entails an acceptance of the duty to cooperate with NEAFC as the competent RFMO. These requirements remain essentially unchanged.

NEAFC received several applications in the following years, including from UNFSA contracting parties like Canada and New Zealand. These states’ commitment to cooperation with NEAFC was a matter of treaty obligation. Yet NEAFC did not hesitate to demand and enforce the same approach against states that were not contracting parties of UNFSA.

The 2013 application of Serbia, a non-member of NEAFC and non-party to UNFSA, demonstrates the point. In its application for cooperating non-party status, Serbia invoked the “rights of States for their nationals to engage in fishing on the high seas guaranteed by the [LOSC]”. NEAFC replied by indicating that “the rights that are granted to non-Contracting Parties come with clear obligations”, including requirements to ensure compliance with NEAFC measures, like those applicable to contracting parties. Serbia explained it could not fulfil some of them, so NEAFC decided to deny the status. Either Serbia had to comply

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387 “NEAFC Scheme of Control and Enforcement” as amended at the 23rd Annual Meeting, Article 10 (on file with the author).
388 Paragraph 3.
389 At the 2020 meeting, NEAFC agreed to distinguish two categories of cooperating non-parties: The “general”, more similar to observers, and the “active”, the latter for states that want to operate fishing vessels, which must submit specific information, NEAFC 39th Annual Meeting Report (November 2020) at 15.
390 Letter from Ivica Dačić (Prime Minister of Serbia) to Stefán Ásmundsson (NEAFC’s Secretary) submitting Serbia’s application for cooperating non-party status to NEAFC (30 September 2013) (on file with the author).
391 Letter from Stefán Ásmundsson (NEAFC’s Secretary) to Ivica Dačić (Prime Minister of Serbia) regarding Serbia’s submission to become a cooperating non-party to NEAFC (4 October 2013) (on file with the author).
392 Letter from Ivica Dačić (Prime Minister of Serbia) to Stefán Ásmundsson (NEAFC’s Secretary) submitting an addendum to Serbia’s application for cooperating non-party status to NEAFC (8 November 2013) (on file with the author).
with the UNFSA cooperation standard, agreeing to apply all the conservation and management measures established by NEAFC, or refrain from fishing.

At first sight, it seemed as if NEAFC justified its claim on the LOSC. NEAFC told Serbia:394

It should be noted that, under the applicable international law (as codified e.g. by the UN Convention on the Law of the Sea) the right of States for their nationals to engage in fishing on the high seas is subject to several conditions, including exercising the duty to cooperate with other relevant States. Fishing for fish stocks regulated by NEAFC without appropriately engaging with the organisation would therefore be considered as illegal fishing.

NEAFC quoted the LOSC, but it demanded that Serbia act in a way not contemplated in any of its provisions. Arguably, Serbia fulfilled the cooperation requirements of Articles 117-118 LOSC, as it did engage with the relevant states fishing on the high seas by addressing them through NEAFC. But NEAFC requested something different: giving effect to the duty to cooperate by agreeing to apply its rules. No LOSC provision supports that the consequence of fishing without “appropriate engagement” results in such activities becoming illegal. NEAFC did not directly invoke UNFSA as codifying “applicable international law”, but the use of the expression “e.g.” before the reference to the LOSC suggests international law is codified in more than one instrument, potentially UNFSA. The same letter announced that non-observance of such requests carried consequences: 395

Any non-Contracting Party to NEAFC wishing to deploy vessels in the NEAFC Regulatory Area needs to be granted the status of cooperating non-Contracting Party. Otherwise, the activities of the vessels are likely to result in them being added to the NEAFC list of IUU-vessels, resulting in countermeasures.

Serbia did not protest and, importantly, did not attempt to engage in fishing activities in the NEAFC area. The consequence was that Serbia could not gain access to fishing resources on the high seas based on rules grounded on treaties it had not ratified. As an exchange based on

394 Letter from Stefán Ásmundsson (NEAFC’s Secretary) to Branko Lazic (Prime Minister’s Office of Serbia) concerning the application for cooperating non-party status (16 July 2013) (on file with the author).
395 Above, n 394.
claim and response, this case illustrates the essence of custom formation. Serbia’s lack of protest indicates a tacit acceptance of NEAFC’s position equivalent to consent.

2 Deterring unregulated fishing

In addition to demanding that non-members engage as cooperating non-parties, NEAFC clarified that fishing without such status would be subject to punitive consequences. In 2003 and 2004, it introduced a robust set of rules to reflect the objectives of the recently adopted IPOA-IUU. One development was the adoption of the NEAFC IUU List.\[396] Any non-member vessel fishing in NEAFC waters, unless flagged to a cooperating non-party state, would be blacklisted, and punitive measures would follow.\[397] As only vessels flagged to non-members are subject to inclusion on the NEAFC list, IUU fishing became synonymous with non-members. In essence, NEAFC treated them as equivalent to illegal fishing. NEAFC also adopted a scheme contemplating trade measures against flag states involved in IUU fishing, which has not yet been used.\[398]

B Reactions to NEAFC’s Claim

The IUU notion strengthened NEAFC’s claim that non-members must abide by a duty to cooperate based on UNFSA or face the consequences. The following subsections discuss how, from the mid-2000s, NEAFC deployed more emphatic language to engage with non-members and their reactions to such assertions.

1 Non-members’ responses

NEAFC contacted Panama, a flag of convenience state that for decades did not participate in several RFMOs when the country was not yet a party to UNFSA. NEAFC claimed openly that the international community “has committed that states not party” to RFMOs:\[399]

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\[396\]23rd Annual Meeting Report, above n 386, at 34. NEAFC distinguishes between a provisional (A-list) and the confirmed (B-list) lists.

\[397\]“NEAFC Scheme of Control and Enforcement” as amended (NEAFC, 25th Annual Meeting Report, November 2006) art 46 (on file with the author).

\[398\]Article 47 (current Article 46).

[A]re not discharged from their obligation to cooperate with those organizations. To discharge this obligation to cooperate, states have agreed to apply the conservation and management measures adopted by the organization or adopt measures consistent with those conservation and management measures and should in any case ensure that vessels entitled to fly their flag do not undermine such measures.

NEAFC asked Panama to ensure that its vessels desist from any activity undermining the effectiveness of NEAFC recommendations under the threat of inclusion in the IUU list.400 However, despite NEAFC’s letters in 2004, 2005 and 2006, engagement by Panama was weak or non-existent. Instead, Panama’s only response was a formal letter to NEAFC in 2005, where it briefly requested the removal of its vessel *Fonte Nova* from the IUU list, stating that it “complies with all national and international laws”. 401

Panama changed its position between 2006 and 2007. NEAFC members took several actions, including additional diplomatic demarches from 2004 to 2007 and the detention of a Panama-flagged vessel in Portugal, which pushed Panama to express in late 2006 an intention to cooperate in return for releasing its ship.402 Panama subsequently informed NEAFC that it was in the process of cancelling registration.403 Panama also decided to apply for the status of cooperating non-party in 2007, asserting its intention to:404

> [F]ulfill the aims of the Commission and its Conservation and Management Measures, with the intention to take all the necessary measures so that the activities of vessels under the Panamanian flag do not undermine the effectiveness of such measures, and to comply with any other decision adopted in accordance with the NEAFC Convention.

NEAFC reacted by inviting Panama to participate at its 2007 annual meeting. Panama then stated that its “Maritime Authority has the policy to comply with international regulations and

400 Above, n 399.
401 Letter from David Silva (Dirección General de Recursos Marinos y Costeros de Panamá) to NEAFC concerning the registration of the vessel *Fonte Nova*, DGRMC/3121/05 (29 September 2005) (on file with the author).
402 Letter from Liliana Fernandez (Panama’s Ambassador to the United Kingdom) to NEAFC Secretary, concerning the situation of the vessel *Iannis* (1 December 2006) (on file with the author).
403 Letter from Reynaldo Perez-Guardia (General Administrator Autoridad de los Recursos Acuaticos de Panama) to Kjartan Hoydal (NEAFC Secretary) concerning deregistration of vessel *Fonte Nova* (28 September 2007) (on file with the author).
404 Letter from Ricardo Duran (Panama’s Ministro Encargado) to Kjartan Hoydal (NEAFC Secretary) concerning Panama’s interest in becoming a cooperating non-contracting party to NEAFC (25 September 2007) (on file with the author, translated by the author from the original in Spanish).
especially those aimed to the sustainable management of our oceans”, stressing that such policy explains why “Panama cooperates and is a member in several organisations”.405 Simultaneously, the Panamanian Ministry of Foreign Affairs was informed of a fine and a notification to the owners of the Polestar, another vessel suspected of unregulated fishing, that they must comply with all the applicable rules for the NEAFC Area.406

NEAFC still rejected Panama’s application for cooperating non-party and refused to grant the status as long as there were Panama-flagged vessels on the IUU list.407 Panama did not protest, and its ships did not return to the area in 2007–2008. Panama acceded to UNFSA in December 2008.

Exchanges with Saint Kitts and Nevis, another state generally recognised as a flag of convenience, shows how the rule in question continued to develop. In March 2008, its vessels White Enterprise appeared in NEAFC waters. Again, NEAFC claimed that “the international community has committed” that non-party states to RFMOs “are not discharged from their obligation to cooperate with those organizations”.408 NEAFC asked the flag state to take appropriate actions or face punitive consequences as laid down in NEAFC rules.409

The response from St Kitts and Nevis began with an apology for “any difficulties the ship has caused”.410 It offered assurances that the vessel had been de-registered,411 and subsequently applied for cooperating non-party status. In its first application in 2011, Saint Kitts and Nevis declared its intention to respect NEAFC rules, which was its “policy and commitment not only in NEAFC but also in respect to other international conventions and bodies”.412 In 2016, it also

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405Letter from Panama’s Maritime Authority (Directorate of Merchant Marine) to NEAFC Secretary communicating measures taken against the vessel Polestar (15 November 2007) (on file with the author).
406Letter from the Panama’s Foreign Relations Vice-Ministry to NEAFC Secretary concerning the vessel Polestar (19 November 2007) (on file with the author). Original in Spanish: Panama “sancionó a la nave (…) advirtiendo a los representantes legales de la nave que deberán cumplir con las normas establecidas en las áreas señaladas”.
408Letter from Stefán Ásmundsson (NEAFC’s Secretary) to the High Commission for St Kitts and Nevis (in London) concerning possible IUU fishing activities by a vessel on its registry (dated 25 March 2008) (on file with the author).
409Above n 408.
410Letter from Nigel Smith (St Kitts and Nevis International Ship Registry) to NEAFC concerning the vessel White Enterprise (2 May 2008) (on file with the author).
411Above n 410.
412Letter from Captain Talha Qureshi (St Kitts and Nevis International Ship Registry’ Compliance Officer) to NEAFC Secretary concerning a statement for application of cooperating non-contracting party (4 April 2011) (on file with the author).
submitted a copy of its newly enacted High Seas Fishing Fleet Policy, which underscored the goal to implement UNFSA. Saint Kitts and Nevis acceded to UNFSA later, in February 2018.

In 2015, NEAFC received information from neighbouring SEAFO concerning the vessel *Trinity*, seen many times in NEAFC waters. Ghana had notified SEAFO that the ship had been “deleted from the Ghanaian Registry of Ships since 28 August 2013 because of its previous IUU fishing history”. As it did when replying to NAFO’s demands, Ghana’s letter did not contest the right of SEAFO or any other RFMO to demand exclusive cooperation for the management of high seas fishery resources. On the contrary, Ghana recognised that a previous record of unregulated fishing was a reason to delist the vessel from its registry, implicitly accepting the illegitimacy of non-member activities in RFMO-regulated waters. Ghana was not a contracting party to UNFSA, acceding two years later, in January 2017.

Similarly, NEAFC contacted Georgia in 2005 and 2006 under the same terms as the letters mentioned above. Georgia replied that its ship in question had been “taken off the books” in October 2006. The response provided by Georgia did not challenge NEAFC’s claim or offer any protest or objection.

There are also cases where NEAFC could not engage due to the lack of responses from non-members such as Dominica, Honduras and Togo, states whose vessels operated in the Atlantic in the late 1990s and early 2000s. None of them was at the time a contracting party to UNFSA. Although it is impossible to establish with certainty these countries’ position in the NEAFC context, there is no evidence that their ships returned to NEAFC waters after 2009. There was no protest at any time against NEAFC actions either.

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413 Letter from Debasis Mazumdar (St Kitts and Nevis’ International Registrar of Shipping and Seamen) to NEAFC Secretary concerning the renewal of its cooperating non-party status (29 June 2016) (on file with the author).
414 Letter from Samuel Quaatey (Director of the Fisheries Commission, Ministry of Fisheries and Aquaculture and Development of Ghana) to SEAFO’s Secretary (21 May 2015) (on file with the author). The letter was forwarded to NEAFC.
415 Letter from Einar Lemche (NEAFC President) to Georgia’s Minister of Foreign Affairs concerning IUU activities of Georgian-flagged vessels (18 October 2005) (on file with the author).
2 Further developments and outcome

Another significant step in closing the gap against unregulated activities was the adoption, in 2007, of the IUU cross-listing with neighbouring NAFO and later SEAFO. 417 As the NEAFC President put it in 2008, it was a “common Atlantic IUU list whereby vessels on the lists of one party are placed on the lists of the others”. 418 Members of the RFMO with a shared cross-listing commit to adopting the same punitive consequences as if the vessels had operated in their area of competence. Cross-listing thus amplifies the harmful effects of the inclusion in one IUU list to another RFMO where the flag state may or may not participate, “augmenting the potency” of the regional listing scheme. 419

Although unregulated fishing in NEAFC waters between 2006 and 2009 was still high, the steps taken between 2005 and 2007 started to prove their value. Out of the 20 vessels on the NEAFC list in 2007, six were in the process of being scrapped, nine detained in NEAFC ports, and the remaining five were operating outside the region. 420 There have been no reports of unregulated fishing activities in NEAFC waters since 2009. 421

This outcome resulted from the actions against non-members that NEAFC developed based on core UNFSA provisions and supported by the IPOA-IUU. NEAFC pursued consistent practice on two fronts: tight requirements for membership and flexibility to accommodate non-members through cooperating non-party status, coupled with the adoption of increasingly bold measures against those unwilling to cooperate. By enforcing this approach against non-parties, NEAFC pushed for what it intended to be the content of the duty to cooperate. As the examples in this section showed, practice confirms the acceptance of NEAFC demands.

417 “NEAFC Scheme of Control and Enforcement”, above n 397, art 45(6).
420 At 348.
421 At 390.
**IV The South East Atlantic Fisheries Organisation (SEAFO)**

The SEAFO Convention was signed in 2001 and benefitted from the influence of UNFSA and the ongoing negotiations for the IPOA-IUU.\(^{422}\) As a result, SEAFO had specific provisions to deal with unregulated fishing since its inception.\(^{423}\) Such a starting point explains why, despite SEAFO’s shorter history, it exhibits commonalities with NAFO and NEAFC on the standard of cooperation demanded from non-members.

Unlike in the North Atlantic, unregulated fishing in the Southeast Atlantic has occurred intermittently. By the end of the 2000s, non-members’ presence was limited, except for Japanese and South Korean vessels.\(^{424}\) These states ratified the SEAFO Convention and UNFSA later. After 2011, when South Korea acceded, only two specific incidents involving vessels flagged to non-members were reported in the SEAFO Area.

To minimise unregulated fishing, SEAFO aimed at securing participation from the flag states operating in the area while deterring those unwilling to engage. The following sections discuss how SEAFO claimed a duty to cooperate on the high seas and reactions from uncooperative states. Overall, they reveal very similar patterns of state conduct to those presented in NAFO and NEAFC.

**A Cooperation in the SEAFO Convention**

SEAFO provisions on non-members follow UNFSA closely.\(^{425}\) Its influence is most apparent in Article 22 of the SEAFO Convention, which implements Article 8(3) UNFSA. The SEAFO Convention also empowers the Commission to adopt rules to govern engagement with non-parties, pointing that they may cooperate “by agreeing to apply” SEAFO measures. However,

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\(^{422}\) Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean 2001 UNTS 189 (opened for signature 20 April 2001, entered into force 13 April 2003). The SEAFO Convention applies to straddling, discrete and sedentary species on the high seas off the southwest coast of Africa. Since 2011 SEAFO has seven contracting parties and members of the SEAFO Commission: Angola, European Union, Namibia, Norway, South Africa, South Korea and Japan, all of them UNFSA contracting parties except Angola. The SEAFO Commission takes its decisions by consensus, including on the treatment of non-members.

\(^{423}\) For example, art 22(3) SEAFO Convention implements art 17(4)-33 UNFSA in similar terms.

\(^{424}\) SEAFO 4th Annual Meeting Report (October 2007) at 3.

like NAFO – but unlike most RFMOs – SEAFO has not recognised the status of cooperating non-party. When SEAFO members demand cooperation, non-members have only two options: either join or stop fishing. The Second SEAFO Performance Review Panel described this approach as consistent with UNFSA, a view that seems appropriate assuming SEAFO is open to new members.

There are examples of acceptance of SEAFO’s claim. Japan sought to become a cooperating non-party in 2005, but SEAFO responded that it “did not envisage the introduction of such a mechanism”. Instead of protesting, Japan answered by stating its commitment to cooperate with SEAFO “by implementing conservation and management measures adopted by the Commission”. This exchange between SEAFO and Japan is telling because it indicates a change in Japan’s previous position in other RFMOs. Japan did not object to the lack of channels to discharge cooperation by other means, a year before it acceded to UNFSA in August 2006.

**B Reactions from Non-members: the Case of the Cape Flower**

SEAFO’s practice evolved by replicating other RFMOs in the Atlantic. In 2006, SEAFO adopted a procedure to establish its annual IUU list. It asserted that IUU activities undermine the effectiveness of its measures and that vessels undertaking activities “in a manner that diminish the effectiveness of SEAFO measures in force” shall be included on the IUU list. SEAFO also warned that any harvest of SEAFO regulated resources by vessels not included on its record are presumed to have been IUU fishing activities. As the SEAFO record is only available for its contracting parties, fishing vessels flagged to a non-member are by definition

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427Articles 25-26 SEAFO Convention are not conclusive, and all newcomers have joined based on historical catches. However, that SEAFO is an open organisation seems very likely. See SEAFO’s letter to Bolivia, below n 444-445.
428SEAFO 2nd Annual Commission Meeting Report (October 2005) at 5.
429At 5.
430Compare to Japan’s 1999 intervention in NEAFC, above n 381.
431“Conservation Measure 08/06 Establishing a List of Vessels Presumed to have carried out Illegal, Unreported and Unregulated Fishing Activities in the SEAFO Convention Area” (SEAFO, 3rd Annual Commission Meeting Report, October 2006) Annex 12 at 57.
432Above n 431, Preamble.
433Paragraph 3.
subject to inclusion on the IUU list. Punitive measures against them would follow, and potentially against the flag state.\textsuperscript{434}

SEAFO tested its claim in the face of strong protests by a non-member state. Bolivia, a state party to neither UNFSA nor the SEAFO Convention, objected to SEAFO’s threats to include its vessel \textit{Cape Flower} on the IUU list because it was not on the SEAFO record. In September 2017, Bolivia invoked Articles 87, 91, 94 and 118 LOSC and reminded SEAFO of its right to fish “on the seas respecting the 200 miles of the coastal countries”, as long as this fishing was consistent with Article 118 LOSC.\textsuperscript{435} Bolivia contended it was “surprised as a Sovereign State” at the inclusion of its vessel in SEAFO’s draft IUU list, given that the \textit{Cape Flower} “complies with all laws, regulations, sea fishing license, registration and respective legal permits for the relevant activities”.\textsuperscript{436} As a party to the LOSC, Bolivia demanded that the \textit{Cape Flower} be excluded from SEAFO’s draft IUU list since the vessel “did not commit any offence or contravention to [LOSC] rules”.\textsuperscript{437}

After SEAFO listed the vessel in 2017, Bolivia sent another letter requesting the removal of the \textit{Cape Flower}, claiming its right to fish on the high seas.\textsuperscript{438} The ship had an “authorization to sail and carry out fishing activities with [a] license legally issued by this Sovereign State” under the LOSC.\textsuperscript{439} The Bolivian vessel “did not commit any illegal fishing because it did not violate any rule”, as “Bolivia has the same rights and obligations” under the LOSC.\textsuperscript{440}

In this second letter, Bolivia again questioned SEAFO’s competence. The IUU listing “means that our Fishing License (…) is not valid”.\textsuperscript{441} For Bolivia, such interpretation would denote that SEAFO is the only body “competent to legislate” in the area, “which is not legal according to

\textsuperscript{434} Paragraph 17.
\textsuperscript{435} Letter from Almte Omar Yañez Montoya (Bolivia’s Maritime Authority) to Elizabeth Voges (SEAFO Executive Secretary) objecting to the vessel \textit{Cape Flower}’s provisional inclusion on SEAFOs’ IUU list (21 September 2017) (on file with the author).
\textsuperscript{436} Above n 435.
\textsuperscript{437} Above n 435.
\textsuperscript{438} Letter from Admiral Omar Yañez Montoya (Bolivia’s Maritime Authority) to Elizabeth Voges (SEAFO Executive Secretary) protesting to SEAFOs’ decision at its 14\textsuperscript{th} Meeting to include the \textit{Cape Flower} on the IUU List (5 January 2018) (on file with the author).
\textsuperscript{439} Above n 438.
\textsuperscript{440} Above n 438.
\textsuperscript{441} Above n 438.
Bolivia called SEAFO’s actions “arbitrary” while it “protests energetically against this abuse”.

SEAFO maintained its position. It replied that because Bolivia is not a party to the SEAFO Convention and the Cape Flower is not on the organisation’s record, the vessel “fished in contravention with the SEAFO Convention and with the relevant SEAFO regulations.”

SEAFO referred to paragraph 3.3.1 of the IPOA-IUU, quoting the definition of unregulated fishing. After warning that it will continue “deterring unregulated activities in order to ensure the sustainability of fisheries under its management”, SEAFO encouraged Bolivia to collaborate in such efforts by becoming a contracting party.

At the 2018 meeting, the delegation of Bolivia attended as an observer and insisted on removing the Cape Flower from the IUU list. SEAFO again rejected the request. This time, Bolivia did not escalate or present further protests. Instead, it decided to delist the ship from its national registry in 2019.

The exchanges between SEAFO and Bolivia aptly illustrate the custom formation process. Bolivia protested against SEAFOs’ claim concerning the duty to cooperate and associated consequences. As the flag state, it offered an argument based entirely on the traditional freedoms of the LOSC. SEAFO’s reply was careful: it avoided mentioning UNFSA or emerging customary law as the direct source of obligations applicable to Bolivia. But, equally, there was no doubt its claim was based on UNFSA and similar rules in the SEAFO Convention. Despite Bolivian opposition, SEAFO insisted that the duty to cooperate on the high seas implies either membership of the competent RFMO or the obligation to refrain from fishing. Bolivia initially objected to SEAFO’s claim, but it eventually acquiesced by deregistering the Cape Flower.
V The General Fisheries Commission of the Mediterranean (GFCM)

Normative developments and relevant state practice concerning non-members have been less visible in the area regulated by GFCM.\textsuperscript{448} There are two reasons for this. First, the Mediterranean is a unique semi-enclosed sea where coastal states have primarily refrained from claiming EEZs.\textsuperscript{449} Cooperation beyond the narrower jurisdictional waters becomes essential to manage regional stocks, likely explaining high coastal state participation in GFCM. Unregulated fishing has therefore not been a persistent problem in the Mediterranean and the few incidents involving non-members concerned states from outside the region.\textsuperscript{450} Second, GFCM had only advisory functions for most of its existence. It acquired the competence to adopt binding measures when the amendments adopted in 1997 entered into force in 2004, starting the “relevant timeline” for the organisation.\textsuperscript{451}

That said, GFCM has replicated the claims advanced by other RFMOs on the meaning of cooperation, benefitting from other RFMOs’ experience. In dealing with non-members, GFCM has always adopted decisions by consensus.\textsuperscript{452} Equally, reactions by non-parties have generally been consistent with the evidence presented so far in other areas of the Atlantic. They point to a general acceptance of non-members to the duty to cooperate as demanded by GFCM.

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\textsuperscript{448} Agreement on the establishment of the General Fisheries Council for the Mediterranean 126 UNTS 237 (adopted 1 November 1949, entered into force 20 February 1952). There are currently 24 contracting parties: Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Japan, Lebanon, Libya, Malta, Monaco, Montenegro, Morocco, Rumania, Slovenia, Spain, Syria, Tunisia, Turkey and the EU. The GFCM Agreement has been amended four times, including significant changes in 1997, which entered into force in 2004.
\textsuperscript{450} Illegal activities do exist, primarily involving contracting parties’ vessels. See Nicola Ferri “Current Legal Developments: General Fisheries Commission for the Mediterranean” (2009) 24 IJMCL 163 at 165.
\textsuperscript{452} GFCM’s decisions are taken by a majority under art 6(2). Pursuant to article 18, decisions on cooperating non-contracting parties are adopted by consensus, but voting is possible when consensus fails. In practice, GFCM has adopted decisions concerning unregulated fishing and non-parties by consensus.
\end{flushleft}
A Cooperation with Non-members

The GFCM Agreement provides that contracting parties may admit new members by a two-thirds majority. The GFCM has been in practice an open organisation. GFCM has also enlarged options for non-members to cooperate. In 2006, it recognised cooperating non-party status, whereby applicants must commit to comply with all GFCM recommendations. The 2014 amendments to the GFCM Agreement incorporated the existing rules on non-party status in Article 18.

Several non-parties cooperate in this capacity. None of them undertook fishing activities in the high seas of the Mediterranean before applying for the cooperating status. In some cases, such behaviour could be interpreted as a state accepting the need to cooperate with the relevant RFMO. But drawing such an inference is not always straightforward. Take Moldova, a current cooperating non-party generally regarded as a flag of convenience. It requested the status for “honouring its commitment to fulfil relevant obligations” arising from a treaty with the European Union on maritime issues. Moldova stated that “it enjoyed the rights vested [in] landlocked countries by the [LOSC], to which it is a contracting party”. Moldova’s decision to apply did not seem to recognise an obligation to cooperate as demanded by GFCM based on UNFSA standards, accepting restrictions on its rights to fish on the high seas. Nevertheless, within GFCM, a duty to cooperate applicable to members and non-members alike still developed.

B Deterring Unregulated Fishing

The amendments to the GFCM Agreement introduced in 1997 did not include provisions to tackle unregulated fishing. Even so, GFCM members decided a decade later to echo what

453 GFCM is open to all Members and Associate Members of the FAO and non-FAO States that are United Nations members or of any of its specialised agencies. Articles 4 and 23 GFCM Agreement.
455 “They are at present Georgia (accepted in 2015), Ukraine (2015), Bosnia and Herzegovina (2016), Moldova (2017), Jordan (2018) and Saudi Arabia (2021). Since the mandate of GFCM also covers aquaculture, countries such as Jordan and Saudi Arabia have applied for this reason.
457 At 10.
neighbouring RFMOs had done on the matter, setting up an IUU listing mechanism. Members committed to applying corrective measures prohibiting their vessels from supporting or engaging with those on the IUU list, limiting commercial transactions of fish coming from such vessels and forbidding entry into ports, landing or transhipments. Unsurprisingly, the listing procedure is very similar to other RFMOs. Any activity by vessels flagged to non-members justifies inclusion on the IUU list. GFCM also endorsed a broad IUU cross-listing unless any member or cooperating non-party objects.

These decisions and those on cooperating non-party states show how GFCM claimed a specific meaning of the duty to cooperate. In line with practice in the Atlantic, non-parties must cooperate by becoming members, obtaining cooperating status or refraining from fishing. Otherwise, their vessels risk being subject to punitive measures under the IUU listing. The amendments introduced in 2014 to Article 19(2)-(3) of the GFCM Agreement recognised UNFSA standards explicitly and went further by allowing for sanctions, including “non-discriminatory market-related measures” against GFCM non-parties.

Reactions by non-members to GFCM have accepted the need to refrain from fishing on the high seas. When three ships flagged to Mongolia, a non-member and non-UNFSA party, were sighted in the Mediterranean in 2016, the response was cooperative. Mongolia advised GFCM that its vessels had “a regular single voyage certificate without permission to engage in fishing operations”, confirming that no fishing activities had taken place as they were in transit. There was no challenge to the legality of GFCM’s requests.

Another similar exchange occurred with China, also a non-member of GFCM and a non-contracting party to UNFSA. In 2017, China clarified alleged unregulated activities of its

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458 Recommendation GFCM/2006/4 on the establishment of a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the GCFM area”, GFCM above n 454, at 34; “Recommendation GFCM/33/2009/8 on the establishment of a list of vessels presumed to have carried out IUU fishing in the GCFM area amending the Recommendation GFCM/2006/4” (GFCM 33rd Session Report, March 2009) Appendix O at 59.
460 Unlike NEAFC and NAFO, the listing mechanism in the GFCM allows for the inclusion of vessels flagged to both members and non-members.
461 “Recommendation 33/2009/8”, above n 459, para 1a(vi).
462 Paragraph 16.
463 GFCM Compliance Committee Intersessional Meeting, above n 456, at 10. Mongolia attended the Committee’s sessions.
vessels, confirming they had not operated in the Mediterranean and were “en route to West African countries.”\textsuperscript{464} Moreover, China also informed that “fishing in the Mediterranean Sea was prohibited for Chinese vessels”.\textsuperscript{465} This is a remarkable statement because China is a prominent distant-water fishing state which has recognised no such duty under treaty law. China opted to cooperate fully with GFCM: it refrained from authorising its vessels to fish in the area and informed GFCM of its vessels’ activities.

A third example concerns Cambodia. Three years before acceding to UNFSA, Cambodia warned GFCM of the potential presence of some of its vessels in the Mediterranean Sea. Cambodia advised that they should be considered stateless vessels if any of them claimed to have the Cambodian flag.\textsuperscript{466} This was not an isolated communication from Cambodia, as practice in NAFO and NEAFC demonstrated.

The examples presented above show how GFCM revitalised in the mid-2000s to develop a set of consistent decisions to address the non-member problem. GFCM adopted mechanisms to demand and facilitate cooperation and established a scheme to impose sanctions against uncooperative states. This position has explicit normative content, consistent with Articles 8, 17 and 33 UNFSA, enforced through the notion of IUU fishing. Since 2014, GFCM has regularly applied such rules against non-members. Although situations involving unregulated vessels in the Mediterranean are few, they confirm that no flag state has challenged GFCM’s assertions requiring mandatory cooperation under UNFSA terms.

\textsuperscript{464} At 9.
\textsuperscript{465} At 9.
\textsuperscript{466} GFCM Compliance Committee Eleventh Session Report (June 2017) at 12.
The International Commission for the Conservation of Atlantic Tunas (ICCAT)

Since the late 1980s, unregulated fishing was a persistent problem for ICCAT, and at times the most serious. Like all RFMOs at the time, ICCAT did not have legal options other than inviting non-members to join. As France warned in 1993, “all the work should be done within the framework of the [LOSC]”, which “does not oblige non-Contracting Parties to comply” with ICCAT regulations, “but only oblige cooperation”. ICCAT needed to overcome the LOSC ambiguities and develop a more robust version of the duty to cooperate to contain unregulated fishing.

For ICCAT, developing a claim to force non-members to cooperate under UNFSA rules was not a straightforward task for two reasons. The first rested on the permanent tensions between coastal states’ rights and ICCAT’s demands. Because ICCAT manages highly migratory species, the sovereign rights of coastal states may clash with ICCAT decisions. Article 64 LOSC calls for cooperation “both within and beyond” the EEZ, involving a degree of limitation on coastal sovereign rights. ICCAT became more assertive in giving non-member coastal states fewer options, forcing them to cooperate throughout the whole range of tuna stocks or face punitive consequences. These tensions impacted the treatment of non-members, as some coastal states felt disenchanted with ICCAT’s intrusion on their EEZs and the perceived

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467 Established by art III of the International Convention for the Conservation of Atlantic Tunas 37 UNTS 63 (signed on 14 May 1966, entered into force 21 March 1969). The ICCAT Commission has competence over tuna and tuna-like resources in the Convention Area, which covers the Atlantic Ocean and adjacent waters. It is the largest RFMO with 53 Contracting Parties: Albania, Algeria, Angola, Barbados, Belize, Brazil, Canada, Cape Verde, China, Côte d’Ivoire, Croatia, Curacao, Egypt, El Salvador, Equatorial Guinea, European Community, France, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea Bissau, Honduras, Iceland, Japan, South Korea, Liberia, Libya, Mauritania, Mexico, Morocco, Namibia, Nicaragua, Nigeria, Norway, Panama, Philippines, Russia, Senegal, Sierra Leone, South Africa, St Tome and Principe, St Vincent and the Grenadines, Syria, Trinidad and Tobago, Tunisia, Turkey, United Kingdom, United States, Uruguay, Vanuatu and Venezuela. Mindful that ICCAT manages tuna resources, this section pays attention to state practice regarding the high seas, not waters under national jurisdiction.


unfairness of its allocation criteria. They stayed out of the regime, impacting the effectiveness of ICCAT measures for the high seas.

The second issue was ICCAT’s failure to adopt and enforce effective management measures for the resources under its competence. ICCAT members often seemed more concerned with deterring unregulated fishing than abiding by sustainability standards themselves. ICCAT’s poor performance in managing the resources under its competence for more than two decades did not help promote cooperation with non-members or add legitimacy to what it was claiming, which members and non-members recognised as a problem. Unsurprisingly, outsiders regard IUU fishing in ICCAT as resting less on the result of non-party activities than on the responsibility of member states. Against this background, it seemed unlikely that UNFSA’s standard for cooperation would gain much acceptance by non-members to ICCAT.

Yet ICCAT eventually accommodated or pressured non-members to accept its approach to cooperation. In the early and mid-1990s, and influenced by the adoption of UNFSA, ICCAT expanded options for cooperation and adopted punitive measures against uncooperative non-members. Progressively, several non-parties joined ICCAT, others requested cooperating status and many stopped fishing, including by de-registering their vessels.

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471See eg exchanges between ICCAT and Iceland and Norway, exemplifying these tensions. Since the mid-1990s, Iceland attended ICCAT meetings and showed a disposition to cooperate. Iceland could catch Bluefin tuna inside its EEZ, but as a non-member, it did not have quota allocation. Acceding to ICCAT with no quota meant no right to fish. As Iceland put it, “our way to cooperate might be different” as it seems “pointless” to apply for the status of cooperating non-party “if that would mean that Iceland would have to fish in conformity with the decisions of ICCAT”, which in the case of Bluefin tuna “is to fish nothing at all”. “Statement by the Observer from Iceland on the Status of the Bluefin Tuna Stock”, ICCAT Proceedings 1998, above n 106, Annex 6-E at 89.


473See eg “Statement by Canada to the Compliance Committee” and “Statement by South Africa to the Compliance Committee” (10th Special Commission Meeting Proceedings, 1996) Appendix 3 to Annex 7-4, 179 at 185, and Appendix 2 to Annex 7-4, 179 at 184; “Statement by Mexico on Cooperation with ICCAT” (ICCAT, 15th Regular Commission Meeting Proceedings, November 1997) Annex 6-5, at 87.


475In building up this framework, its members always worked by consensus. ICCAT adopts two types of measures: recommendations and resolutions. Counterintuitively, under art VIII ICCAT Convention, recommendations are binding on all contracting parties, whereas resolutions are not. ICCAT’s members adopt all decisions concerning non-members by consensus, binding or not.
A Developing a Claim against Non-members: the Influence of UNFSA

ICCAT had extensive practice in implementing decisions to tackle non-party activities before the adoption of UNFSA, including trade sanctions. The objective of the first schemes adopted in the mid-1990s was “to ensure the effectiveness” of ICCAT regulations against non-contracting parties whose vessels were fishing for Bluefin tuna and swordfish “in a manner which diminishes the effectiveness” of ICCAT measures. ICCAT also adopted a Resolution designed to target “unreported and unregulated” fishing more generally, potentially extending the imposition of trade measures against uncooperative states fishing for other tuna resources.

The adoption of UNFSA influenced what ICCAT members soon claimed as the duty to cooperate. ICCAT requested “cooperation for the effective implementation” of its measures by non-members whose vessels were sighted in the Atlantic so that they “promptly take appropriate action to ensure that the effectiveness of ICCAT measures are not undermined”.

In 1995, the United States summarised ICCAT’s policy, noting that “requesting non-Contracting Parties to either join ICCAT or become a Cooperating Party” was consistent with UNFSA. It added that “since ICCAT has not been overwhelmed with new applications for membership or by countries wanting to become [a party]”, therefore, it was “critical to begin to apply” ICCAT’s trade sanctions. Its members agreed to notify countries “operating in defiance of ICCAT measures” that they are “undermining ICCAT conservation efforts, and that if they do not rectify their behaviour, they risk trade sanctions.”

The standard of cooperation recognised in UNFSA is visible in the language of some decisions relating to non-members. ICCAT mentioned “the need for all non-contracting parties fishing

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476 “Resolution Concerning an Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic Bluefin Tuna”, Proceedings 1994, above n 468, Annex 7 at 91;
480 At 193-194.
for Bluefin tuna in the Atlantic Ocean” to “join ICCAT or cooperate with ICCAT’s conservation and management measures”. Based on Article 17(4) UNFSA, ICCAT also presumed that non-contracting party vessels sighted in its area of competence undermined ICCAT conservation measures.

The assertion of a duty to cooperate based on UNFSA provisions progressively became the rule to apply against uncooperative non-members. ICCAT chose its actions carefully, aware of not pushing its claims disproportionately. Before closing the debate at the 1995 annual meeting, the United States suggested that ICCAT consider “going a step further” by adopting a resolution banning fishing by flags of convenience in ICCAT waters. Several states rejected the suggestion, as it would not be compatible with the LOSC, pointing out that the key was cooperation. ICCAT agreed that the meaning of cooperation was not about imposing a direct obligation on non-members to abide by ICCAT rules but about developing a duty to cooperate to be discharged through ICCAT.

ICCAT addressed non-members repeatedly. In 1996, it contacted Panama, Belize and Honduras to express its wish for them to cooperate “to ensure [the] establishment of binding requirements” on their vessels, including fishing consistently with ICCAT’s catch limitations and area closures for Bluefin tuna. Sanctions were to be applied unless these countries brought their fishing practices “into consistency with ICCAT conservation and management measures for Atlantic Bluefin tuna”. The same year, ICCAT dispatched a similar letter to Trinidad and Tobago, then a party to neither ICCAT nor UNFSA.

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485At 195-196.
486At 195-196.
488At 174.
489At 174. “Model Letter from the ICCAT Chairman to Trinidad & Tobago”, Proceedings 1996, above n 473, Appendix 4 to Annex 7-3 at 174-175.
In parallel to the threat of punitive measures for the lack of cooperation, ICCAT was one of the first RFMOs to adopt a flexible approach to participation by granting cooperating non-party status in 1997. Because ICCAT is an open organisation, the status added another option to cooperate. The applicant “shall inform ICCAT of its firm commitment to respect the Commission’s conservation and management measures”. As in many other RFMOs, accession to the ICCAT Convention or the application for the cooperating status did not mean allocating fishing rights, but cooperation with ICCAT was often linked to such negotiations.

**B Emerging Acceptance of ICCAT’s Claim**

ICCAT’s assertive claim triggered non-members’ reactions. Several states became ICCAT members or applied for cooperating non-party status. After years of diplomatic exchanges and punitive trade measures, Honduras, a non-party state to UNFSA, decided to engage with ICCAT. At the 2000 meeting, it affirmed that “to strictly comply with the ICCAT Convention, even though Honduras is not yet a Party”, its authorities took the “irrevocable decisions of cancelling or suspending all international fishing vessels included in our registry”. Honduras also vowed not to flag them until ensuring that they “comply with the ICCAT Convention”. Honduras joined ICCAT the following year.

Saint Vincent and the Grenadines (SVG), generally regarded as a flag of convenience, reversed years of disengagement with ICCAT after trade sanctions were imposed in 2000. At the 2001 meeting, SVG offered a lengthy account of its measures “towards achieving full compliance

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491 Under art XIV ICCAT Convention, any state that is a member of the United Nations or to any of its specialised agencies can join the ICCAT Commission. To become a contracting party, a state needs only to deposit the instrument with the FAO Director-General.
492 At 79, para 2.
495 At 268.
with ICCAT management measures”. They included passing domestic legislation to manage its high seas fishing fleet to keep it within “accepted international agreements, particularly ICCAT requirements”. SVG stated that it was “fully committed to its obligations under international law and ICCAT as the competent body for the management of Atlantic tuna and tuna-like species”. Such statements suggest SVG’s acceptance of the obligation to cooperate with ICCAT as part of general duty towards competent RFMOs. SVG acceded to ICCAT in 2006 and UNFSA in 2010.

Belize also decided to engage with ICCAT, likely under the pressure of trade sanctions. Belize reported in 2002 that it had de-registered all the vessels identified as operating in the ICCAT area. It advised that it was in the process of passing domestic law that would conform to UNFSA. It added that “vessels that were fishing illegally were not only de-registered but also fined” under its domestic law, including “violations of fishing regulations” set in place by other RFMOs, to which Belize was not a member. Notably, Belize’s language builds upon notions of illegality, lack of compliance and violations of multilateral conventions to which it was not a contracting party, a sign of accepting the duty to cooperate claimed by ICCAT. Belize acceded to the ICCAT Convention and UNFSA some years later, in July 2005.

Cuba offers another perspective of how a state can implicitly recognise its obligation to cooperate with the relevant RFMO. In 2002, Cuba admitted a domestic tuna fishery in its waters but advised it did not pursue high seas activities in ICCAT waters. It requested an allocation for such ends, as it intended to “slowly increase” its fishery. Notwithstanding being neither a contracting party nor a cooperating one, Cuba confirmed its “willingness to comply” with ICCAT decisions. Rather than directly resorting to unregulated high seas fishing or

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498 At 99.
499 At 99.
501 At 84.
504 At 84.
505 At 84.
proposing alternative cooperation means with ICCAT, Cuba decided to cooperate by agreeing to apply ICCAT rules. Cuba’s position in ICCAT has not changed.⁵⁰⁶

These examples display how states developed a position on ICCAT’s demands for cooperation. Belize and SVG probably reacted after pondering the possible consequences of trade sanctions, yet none of them objected or protested. Cuba might have had different short-term reasons to accept the requests for cooperation, including securing access to fishing rights. The exact reasons that justify or explain why these states decided not to object to ICCAT’s members’ claims are irrelevant. Honduras, Belize, SVG and Cuba did not need to believe in the legality of ICCAT’s position for their replies to develop the custom formation process. The significance of their behaviour lies in external acts carrying legal consequences. The states in question had the chance to accept, acquiesce or object to ICCAT’s claim. They accepted and maintained the same understanding of cooperation over time, confirmed by the later accession of Belize and SVG to the ICCAT Convention and UNFSA.⁵⁰⁷

C Reception of the IUU Concept

Unregulated fishing in the Atlantic still continued when the IPOA-IUU was adopted, and ICCAT quickly welcomed this instrument. Two further steps strengthened ICCAT’s demands for cooperation: adopting a positive list of vessels authorised to operate in ICCAT waters⁵⁰⁸ and a multilateral process to establish an IUU list.⁵⁰⁹

Under the ICCAT Record of Vessels, only contracting parties and cooperating non-parties may submit their vessels for registration. Vessels not on the record are deemed “not to be authorised to fish” for ICCAT species.⁵¹⁰ The first ICCAT rules to establish its IUU list provided that “fishing vessels flying the flag of a non-contracting Party are presumed to have carried out [IUU] fishing activities” when such vessels “are not registered on the ICCAT list of vessels

⁵⁰⁷Belize acceded to ICCAT and UNFSA in July 2005. Saint Vincent and the Grenadines joined ICCAT in October 2006 and acceded to UNFSA in October 2010.
⁵⁰⁹“Recommendation to Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the ICCAT Convention Area (02-23)”, Proceedings 2002, above n 493, Annex 8 at 189.
⁵¹⁰“Recommendation 02-22”, above n 508, para 1 at 186.
authorised to fish”.\textsuperscript{511} Since non-members cannot register their ships on the record, they are by definition subject to inclusion on the IUU list.\textsuperscript{512} This legal design, common to RFMOs, confirms that ICCAT deemed the activities carried out by vessels flagged to uncooperative states as deserving the same negative consequences as illegal fishing, further underpinning ICCAT’s claim.\textsuperscript{513}

ICCAT reinforced these measures by setting up a cross-listing scheme in 2009.\textsuperscript{514} It also amended its trade measures scheme, stating that non-members “that have failed to discharge their obligations under international law to cooperate with ICCAT” would face trade sanctions.\textsuperscript{515} A commentator hailed this step as giving “binding effect to non-members’ duty to cooperate”, as enunciated in UNFSA and the LOSC before it.\textsuperscript{516}

In parallel, the reception of the IUU notion in ICCAT contributed to the closing of fishing opportunities for non-members outside the cooperating status. In the 1990s, ICCAT still granted quotas for “other non-members”, benefitting states that did not cooperate formally or did not have cooperating non-party status. After the reception of the IUU notion in the early 2000s, ICCAT’s policy changed so that only cooperating non-parties might have access to the so-called “basket quotas” or apply for an allocation of fishing rights.\textsuperscript{517} ICCAT stopped granting quotas to non-members, except those with cooperating status. Equally, the basket quotas for “others” were left to members and cooperating non-members only. By creating this status and later reserving quota distribution to members and cooperating non-parties, ICCAT

\begin{itemize}
\item \textsuperscript{511}“Recommendation 02-23”, above n 509, para 1(a) at 189.
\item \textsuperscript{512}In subsequent years, ICCAT amended the process to allow for the inclusion of vessels flagged to Contracting Parties.
\item \textsuperscript{513}Some practice suggests that the listing of individual vessels flagged to coastal non-member states is avoided when they operate in domestic waters, even though such activities are in principle not exempt from the IUU measure. One example is Grenada, a coastal state that was not a contracting party in 2003 when its vessels caught tuna within national waters. ICCAT 18\textsuperscript{th} Regular Commission Meeting Proceedings, November 2003, Appendix 17 to Annex 8 at 214-215.
\item \textsuperscript{514}“Resolution Establishing Guidelines for the Cross-Listing of Vessels Contained on IUU Vessel Lists of Other Tuna RFMOs on the ICCAT IUU Vessel List in Accordance with Recommendation 11-18” (ICCAT, 19\textsuperscript{th} Special Commission Meeting Proceedings, November 2014) at 389.
\item \textsuperscript{515}“Resolution by ICCAT Concerning Trade Measures”, Proceedings 2003, above n 513, at 172, paragraph 2(a)(i). It has been later amended and replaced.
\item \textsuperscript{516}Deirdre Warner-Kramer “Control Begins at Home: Tackling Flags of Convenience and IUU Fishing” (2004) 34 Golden Gate U L Rev 497 at 517.
\item \textsuperscript{517}“ICCAT Criteria for the Allocation of Fishing Possibilities”, Proceedings 2001, above n 497, Annex 8 at 211.
\end{itemize}
confirmed that granting fishing rights must occur within ICCAT, not outside. Non-members did not protest and eventually acquiesced in this approach.

**D Unregulated Fishing Decreases**

After the mid-2000s, non-contracting parties with a previous uncooperative behaviour record engaged with ICCAT under UNFSA-like terms. El Salvador, a non-party to UNFSA and ICCAT, requested cooperating non-party status in 2011, advising that its vessels had never fished in the ICCAT area. It wanted to develop “a responsible fishery” and, for this purpose, it guaranteed compliance with ICCAT measures as it had done recently in other RFMOs, including IATTC and WCPFC. However, ICCAT did not grant the status. In the face of this rejection, and instead of pursuing fishing activities directly, El Salvador acceded to the ICCAT Convention in 2014. This example shows how the duty to cooperate that ICCAT claimed performed a normative role: El Salvador knew the content of the obligation it had to comply with if it wanted to participate legally in the fishery, changing its position accordingly.

Another example is the Philippines. When this country was not a contracting party to either ICCAT or UNFSA, ICCAT identified its vessels operating in the Atlantic and sent warnings demanding cooperation. The Philippines replied by offering a total commitment to cooperate, and ICCAT members granted it cooperating non-party status in 2000. In 2003, the Philippines stated that from 1998, long before obtaining non-party status in ICCAT, it “has endeavoured to comply with all the requirements of ICCAT”. At the 2004 meeting, the year it acceded to ICCAT, the Philippines declared that it was “deeply committed to the principles and obligations embodied in the [LOSC] and [UNFSA]” demonstrated not only in ICCAT but also in “other oceans where Philippine-flagged fishing vessels are operating”.

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518 ICCAT 22nd Regular Commission Meeting Proceedings (November 2011) at 57.
519 At 57.
Philippines acceded to UNFSA in 2014. These statements show the Philippines’ acceptance of ICCAT’s standard of cooperation and UNFSA’s more generally.

Cambodia, a country that had for a long time no intention to cooperate with ICCAT, is another example of the acceptance of ICCAT’s approach to cooperation. In response to a letter from ICCAT in 2003, Cambodia asserted its right to fish on the high seas, despite having several vessels included on the ICCAT IUU List. Nearly a decade and a half later, ICCAT welcomed Cambodia’s advice in 2017 that no vessel entitled to fly its flag was authorised to operate in the ICCAT area of competence. Cambodia decided to cooperate by refraining from fishing, consistent with UNFSA. The last step in Cambodia’s progression to accept the obligation to cooperate with RFMOs was its ratification of UNFSA in March 2020.

The late 2000s and the following decade saw more non-member states withdrawing from the high seas regulated by ICCAT. After being threatened with trade sanctions, Togo indicated that it had delisted several vessels accused of IUU fishing. No sighting of Togolese ships has occurred since then. Examples like Togo’s matter because they reflect acquiescence and individual opinio in the process of custom formation. Togo had interests at stake as a flag state benefitting from the freedom of fishing on the high seas, and its rights would be affected if ICCAT’s claims became customary law. Yet, there is no evidence of Togo protesting or objecting to ICCAT’s claims. Equally relevant is Togo’s response to ICCAT: legal action in the form of delisting the accused vessels. By remaining silent and later withdrawing its authorisation, Togo at least acquiesced in ICCAT’s claim.

All the examples in this section confirm that ICCAT demands cooperation in the form of full membership, the attainment of cooperating non-party status or refraining from fishing. This claim entails applying relevant UNFSA provisions to non-parties to ICCAT and UNFSA. By the early 2010s, there were no cases of non-member states openly undertaking unregulated

\[524\text{Letter from Derek Campbell (ICCAT Compliance Committee Chair) to the Hon Minister of Foreign Affairs and International Cooperation of the Kingdom of Cambodia (6 June 2018). Correspondence with cooperating non-contracting parties, entities or fishing entities and third countries ICCAT Doc COC-310/2018, Annex I.}\]  
\[525\text{Report of the Meeting of the PWG for the Improvement of ICCAT Statistics and Conservation Measures (16th Special Commission Meeting Proceedings, November 2008) 344 at 346.}\]
activities in ICCAT waters, certainly not on the high seas. The 2009 ICCAT First Performance Review recognised this achievement:526

The ICCAT measures against non-Parties have generally been regarded as effective as evidenced by the facts that the number of IUU fishing vessels flying their flag [has] considerably been reduced over the last several years, and that a number of non-Parties which had previously been non-cooperating [have] become Parties to the Convention.

In the language of custom formation, the facts presented strongly suggest that ICCAT’s claim concerning a duty to cooperate in UNFSA-like terms has met with extensive acceptance or acquiescence by non-members.

VII Conclusions

The five RFMOs in the Atlantic and the Mediterranean have made the same claim. Non-members must discharge their duty to cooperate on the high seas by either becoming a member of the existing RFMO, fishing by agreeing to apply the relevant RFMO’s rules or refraining from fishing. Neither the LOSC nor existing customary law sustained this interpretation when this claim progressively arose in the late 1990s and early 2000s, primarily in NAFO, ICCAT and NEAFC. These RFMOs’ assertions triggered the formation process that would see a customary rule emerge or fail.

Non-member states reacted to RFMOs’ claims. Three groups of responses are visible. The first is represented by those showing acceptance, either express or tacit, or acquiescence to these claims. Examples include Belize in NAFO and ICCAT, the Philippines in ICCAT, Cambodia in NAFO, NEAFC, GFCM and ICCAT, Ghana in NEAFC and Guinea in NAFO. Their responses or actions also suggest conformity with the duty to cooperate as an obligation. The case of Saint Kitts and Nevis in NEAFC and Cuba with NEAFC and ICCAT should also be interpreted as acceptance, like Honduras, El Salvador and Saint Vincent and the Grenadines responding to ICCAT. The same applies to China’s and Mongolia’s responses to GFCM.

Other reactions fall within the meaning of tacit acceptance, such as Ghana to NAFO and Serbia to NEAFC. The exchanges between ICCAT and Togo are closer to acquiescence. They all

denote states that were or should have been aware of the legal implications at stake and could have objected to claims limiting their rights to fish on the high seas. Information concerning other flag states such as Sierra Leone is almost non-existent, but their vessels did not return to fish after demarches took place, amounting to acquiescence.

In the second group, some states began by rejecting RFMO’s claims. Many ignored these calls in the late 1990s and early 2000s and returned to fishing. Another small group opposed RFMO’s demands more openly, exemplified by Japan’s statement in 1999 or Panama’s position until 2005 in NEAFC. Yet a change of behaviour was observable, as Panama demonstrated in NEAFC and Japan in SEAFO. These two states’ accession to UNFSA in 2008 and 2006 confirmed their new position.

A third group does not yet allow a clear-cut assessment. ICCAT included two Bolivian-flagged vessels on its IUU list, and this country reacted positively to demands for cooperation, eventually obtaining the status of cooperating non-party in 2013.\(^{527}\) This position is inconsistent with Bolivia’s reactions to SEAFO’s requests concerning the *Cape Flower*. Georgia recently showed some change in its behaviour when it applied to obtain cooperating non-party status to ICCAT. However, Georgia’s application does not suggest recognising a commitment to cooperate with RFMOs more generally.\(^{528}\) But Georgia has not challenged ICCAT or any RFMOs’ demands, and there have been no recent cases of fishing vessels under its flag operating in other RFMOs.

From a different angle, the practice presented in this chapter illustrates the dynamics and meaning of *opinio* in custom formation. The subjective element cannot play a realistic role in this process when understood as a belief that a customary rule exists. Instead, states expressed their position towards RFMOs’ assertions as acceptance, qualified silence or opposition. Unquestionably, there was no recognition of an UNFSA-like duty to cooperate in the early and mid-2000s as a general rule of international law. Yet, several states were conducting themselves as if they were “willing to live” by an obligation to cooperate modelled on UNFSA

\(^{527}\)ICCAT *Compliance Committee Meeting Report* (23\(^{rd}\) Special Meeting Commission Proceedings, November 2013) Annex 10, 359 at 367.

\(^{528}\)Letter from the Minister of Environmental Protection and Agriculture of Georgia to the Executive Secretary of ICCAT (1 August 2019). ICCAT <https://www.iccat.int/com2019/index.htm#en>.
provisions.\textsuperscript{529} As the new rule develops, it also performs a normative role: many states knew the content of the claims they had to comply with if they wanted to participate in the fisheries regulated by the Atlantic RFMOs. Non-members understood it was not possible to fish unless by cooperating under the standards RFMOs demanded. In this sense, these states were aware of the emerging rule and chose to accept it or remain silent, allowing claims to advance and settle.

The reviewed examples confirm that a new custom emerges “organically, through an unstructured process”.\textsuperscript{530} But the Atlantic experience also underlines that state practice does not evolve in a vacuum. Treaty provisions have both influenced and received the influence of state practice. UNFSA has defined and supported RFMOs’ actions, providing legitimacy and offering a starting point for RFMO members to demand cooperation in specific terms. NAFO, NEAFC and ICCAT regulations adopted in the late 1990s and their diplomatic demarches demonstrate this point, as they borrowed language from UNFSA when addressing non-UNFSA parties.

Treaty law is not the only element in the framework that supports custom development against unregulated fishing. The IPOA-IUU has been a catalyst in boosting the practice of RFMOs in the Atlantic Ocean. By assimilating unregulated to illegal fishing, states have justified applying the same punitive measures to legally distinct activities. The IPOA-IUU reinforced confidence in parties to the Atlantic RFMOs that suppressing unregulated fishing was a legitimate goal. Equally, implementing corrective measures as envisaged in the IPOA-IUU forced several non-members to reconsider the relationship with existing RFMOs, as suggested by examples such as Panama in NEAFC, Ghana in NAFO and Belize in ICCAT.

\textsuperscript{529}James Crawford, above n 132, at 75.
\textsuperscript{530}Monica Hakimi “Making Sense of Customary International Law” (2020) 118 Michigan Law R 1487 at 1519.
Chapter Four: Regional Practice in the Pacific Ocean

I Introduction

The present chapter focuses on the four regional organisations with competence to regulate high seas fishery stocks in the Pacific: IATTC, WCPFC, SPRFMO and NPFC. Following the same method as Chapter Three, each part describes how these organisations developed a common claim asserting a specific content for the obligation to cooperate from two perspectives. First, by explaining their approach to membership and the mechanisms to cooperate with non-party states. Second, by examining RFMOs’ decisions to deter or punish uncooperative vessels or flags.

This chapter shows that RFMOs in the Pacific exhibit remarkable uniformity in addressing the non-member problem, albeit with variations in timing and performance. Though IATTC was at first hesitant, the Pacific RFMOs were, in general, able to quickly espouse a consistent position on what they regarded as the duty to cooperate applicable to non-members. Taking advantage of the experience in other RFMOs, they backed their demands with the threat of punitive measures by assimilating illegal with unregulated fishing resorting to the IUU notion. Each part also discusses reactions from third-party states, putting forward the evidence for acceptance and acquiescence or objection and protest. These reactions suggest that the obligation to cooperate modelled on UNFSA provisions is emerging as a customary rule in the practice of the Pacific RFMOs.

531The Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea 34 ILM 67 (signed on 16 June 1994, entered into force 8 December 1995) is another treaty that must be briefly mentioned. After the collapse of the Alaskan pollock fishery in the early 1990s, states with interests in the fishery agreed in 1992 on a moratorium in the “Doughnut Hole”, the small pocket in the central part of the Bering Sea between and beyond the EEZs of Russia and the United States. The Pollock Convention emerged as the framework that would regulate the fishery if resumed in the future. The moratorium is still in place, and there have been no fishing activities by non-members since its adoption. Therefore, there is no discernible state practice for the purposes of this study. David Balton “The Bering Sea Doughnut Hole Convention: Regional Solution, Global Implications” in Olav Schram Stokke (ed) Governing High Seas Fisheries: The Interplay of Global and Regional Regimes (OUP, New York, 2001) 143; Evelyne Meltzer “Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries” (1994) 25 ODIL 255 at 283-290.
II The Inter-American Tropical Tuna Commission (IATTC)

The provisions of the 1949 Convention – a bilateral agreement between Costa Rica and the United States – provided an unfit framework to develop cooperation with non-parties or prevent unregulated fishing. For example, several states could not obtain IATTC membership because it required a unanimous decision of contracting parties, and members offered no alternatives for cooperation. Although fishing by non-parties was not as significant as in other RFMOs, by the early 2000s, IATTC members still recognised that “it does occur and could increase in the future.” Yet subsequent practice to address the problem was slow to evolve.

A Building a Claim on the Meaning of Cooperation

One reason for IATTC’s slow evolution to tackle the non-members’ problem concerned its members’ initial objections to UNFSA. These concerns did not focus on the provisions on cooperation but rather on high seas boarding and inspection procedures and the meaning of compatibility. These apprehensions explain why IATTC was slow to welcome UNFSA’s policy approaches on other matters such as the relationship with non-members. The evolution of a joint claim against unregulated fishing took longer than in other RFMOs, as IATTC only started to address it more assertively once the IPOA-IUU was adopted. Eventually, IATTC would also put forward demands for cooperation based on UNFSA that engaged with non-member responses.

I First steps

IATTC adopted its first measures to confront unregulated activities while the IPOA-IUU was being discussed. IATTC agreed in 2000 on a vessel register and a Resolution on Fishing by

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532 Convention for the Establishment of the Inter-American Tropical Tuna Commission 80 UNTS 3 (signed 31 May 1949, entered into force 3 March 1950) [IATTC Convention]. As of 2021, the members of the IATTC are Belize, Canada, China, Colombia, Costa Rica, Ecuador, El Salvador, European Union, France, Guatemala, Japan, Kiribati, Korea, Mexico, Nicaragua, Panama, Peru, Chinese Taipei, United States, Vanuatu and Venezuela.

533 IATTC Convention, art V(3).

534 IATTC 1st PWG on Compliance Meeting Minutes (June 2000) at 4.

Vessels of Non-Parties, setting the first requirements to engage non-parties.\textsuperscript{536} However, these decisions did not entail a substantive change to the existing assumptions of a broad high seas freedom of fishing. IATTC’s register remained open to vessels flagged to non-parties as long as they provided the same information as member states.\textsuperscript{537} The Non-Parties Vessel Resolution only aimed to gather information and did not foresee any specific actions.\textsuperscript{538} It stated that IATTC members were “concerned” that non-members “could undermine” the agreed measures.\textsuperscript{539}

These resolutions still represented IATTC’s first meaningful attempts to change its relationship with third-party states. IATTC urged them to comply with its management measures and reminded them “of their obligation, in accordance with international law, to cooperate in the implementation of agreed regional conservation and management measures”.\textsuperscript{540} The wording of “cooperate in the implementation” of existing regulations is perhaps too broad to fall squarely within UNFSA standards, but it went beyond the LOSC’s requirements. These decisions matter because they were an embryonic construction of what IATTC would soon regard as the obligation to cooperate regarding non-members.

\textit{2 Developing IATTC’s claim}

The adoption of the IPOA-IUU prompted IATTC to adopt further measures against unregulated fishing. However, achieving a consistent, uniform claim on the obligation to cooperate proved more challenging than in other RFMOs.

IATTC agreed in 2001 on a new Resolution on Fishing by Vessels of Non-Parties, more aligned with what other RFMOs were doing at the time.\textsuperscript{541} Uncooperative non-members disregarding IATTC’s conservation and management measures would be asked whether they were “prepared and able to apply” them.\textsuperscript{542} Unless a positive answer from the flag state was received, its vessels would not be included in IATTC’s register, thus closing the door to fishing by

\textsuperscript{536}“Resolution on a Regional Vessel Register” and “Resolution on Fishing by Vessels of Non-Parties” (IATTC, 66\textsuperscript{th} Meeting Minutes, June 2000) Appendices 12-13 at 33-34.
\textsuperscript{537}“Resolution on a Regional Vessel Register”, above n 536, para 6.
\textsuperscript{538}“Resolution on Fishing by Vessels of Non-Parties”, above n 536, paras 1 and 4.
\textsuperscript{539}Paragraph 4 and preamble para 4.
\textsuperscript{540}Paragraph 3.
\textsuperscript{541}IATTC 68\textsuperscript{th} Meeting Minutes (June 2001) Appendix 5 at 15.
\textsuperscript{542}At 15.
uncooperative non-members.\textsuperscript{543} Yet these decisions were not enough to set a consistent framework in line with UNFSA. IATTC’s vessel register remained open to non-member states as long as they said they were “prepared” to apply IATTC’s rules. Non-parties were not expected to make any formal commitment, such as cooperating non-party status other RFMOs were implementing. In other words, IATTC did not yet convey a coherent sense of legal duty behind its first demands for cooperation.

Unregulated fishing subsequently increased.\textsuperscript{544} Members reacted by building up a more systematic response akin to what RFMOs had pioneered elsewhere. IATTC established rules on cooperating non-contracting parties in 2003, offering the status to those states willing to “respect all conservation measures in force” in the Eastern Pacific.\textsuperscript{545} Enhancing its measures to pressure non-parties, IATTC adopted a resolution to establish the IUU list the following year.\textsuperscript{546} It targeted non-parties only and presumed that a vessel had carried out IUU fishing if not on the IATTC record.\textsuperscript{547}

Still, a remaining gap prevented IATTC from adopting an entirely consistent claim. Non-members without cooperating status could still include some of their vessels on the registry, which legally established a right to fish. IATTC partially addressed this gap in 2003 by setting up a positive list of one type of vessel – longliners – allowed to operate in the Eastern Pacific flagged to members or cooperating non-members only. When flagged to uncooperative non-members, these vessels were “deemed not authorised to fish”.\textsuperscript{548} But ships that were not of this kind – notably purse-seiners – were still accepted on the registry even if flagged to uncooperative third-states.

IATTC struggled for several years to solve this inconsistency, which is essential to addressing non-members coherently. Due to fishing capacity concerns, it eventually closed the register for

\textsuperscript{543}At 15.
\textsuperscript{544}IATTC Minutes of the 2\textsuperscript{nd} Joint Working Group on Fishing by non-Parties Meeting (June 2003) at 1.
\textsuperscript{545}“Resolution on Criteria for Attaining the Status of Cooperating Non-Party or Cooperating Fishing Entity to AIDCP and IATTC” (IATTC, 70\textsuperscript{th} Meeting Minutes, June 2003) Appendix 9 at 35.
\textsuperscript{546}“Resolution to establish a List of Vessels Presume to Have Carried out Illegal, Unreported and Unregulated Fishing Activities in the Eastern Pacific Ocean” (IATTC, 72\textsuperscript{nd} Meeting Minutes, June 2004) Appendix 2d at 17-19.
\textsuperscript{547}At 17, para 1.
\textsuperscript{548}“Resolution on the Establishment of a List of Longline Fishing Vessels Over 24 Meters (LSTLFVS) Authorized to Operate in the Eastern Pacific Ocean” (70\textsuperscript{th} Meeting Minutes, above n 545) Appendix 8 at 32, para 2.
purse-seiners while agreeing to an exception benefitting non-party states with no cooperating status.\(^{549}\) IATTC created the notion of “participants” and allowed non-members such as Colombia, Bolivia and Honduras to register some vessels as long as they fell within the term “participant”.\(^{550}\) “Participants” were defined as those contracting parties and other states (ie, non-members) “that have applied for membership of the Commission or that cooperate with the management and conservation measures adopted by the Commission”.\(^{551}\) To obtain this benefit, IATTC would determine which states “are considered to be cooperating”.\(^{552}\) It was an exception to IATTC rules because specific vessels flagged to non-parties with no formal cooperating status were still allowed to fish. However, it was set up consistently with UNFSA core principles, as non-members still had to show meaningful cooperation as “participants” to IATTC’s satisfaction.

IATTC finally closed this gap entirely in 2011, deciding that “the record shall contain only vessels that fly the flags” of parties and cooperating non-parties.\(^{553}\) IATTC’s assertion then became clear: vessels cannot legally fish in IATTC waters unless flagged to members or cooperating non-parties, as outlined by UNFSA and the IPOA-IUU. This example emphasises that the process to build up a joint claim on the duty to cooperate, a critical step in custom formation, does not develop effortlessly.

3 Consolidating the meaning of cooperation

In the mid-2000s, IATTC continued moving forward its claim on the meaning of cooperation. In 2005 it adopted a scheme for trade measures as a tool to promote compliance, including language that closely resembled Articles 17(4) and 33 UNFSA.\(^{554}\) IATTC would identify non-parties that did not exercise “effective control to ensure that vessels flying [their] flags do not engage in any activity that undermines the effectiveness of IATTC conservation and

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\(^{549}\)“Resolution on the Capacity of the Tuna Fleet Operating in the Eastern Pacific Ocean” (IATTC, 69th Meeting Minutes, June 2002) Appendix 5 at 24, para 2.

\(^{550}\)Above n 549.

\(^{551}\)Above n 549.

\(^{552}\)Above n 549.

\(^{553}\)“Resolution (Amended) on a Regional Vessel Register” (IATTC, 82nd Meeting Minutes, July 2011) Appendix 2f at 38, para 1. The current measure is Resolution C-18-06.

\(^{554}\)“Resolution Concerning the Adoption of Trade Measures to Promote Compliance” (IATTC, 73rd Meeting Minutes, June 2005) Appendix 2.e., at 17. The measure ceased to be in effect in 2008 for reasons unrelated to non-members.
management measures”. IATTC affirmed that such non-parties have “failed to discharge their obligation under international law to cooperate with IATTC”. They would need to “rectify the act or omission that led to identification” or potentially face “non-discriminatory trade-restrictive measures”.

The closure of the vessel registry to non-members, the adoption of an IUU listing process in 2004 and the possibility of additional punitive trade measures in 2005 were the main building blocks of what IATTC claimed as the duty to cooperate applicable to non-members. At that time, IATTC members adopted the Antigua Convention, setting up the current framework for the work of IATTC. Its approach to cooperation closely follows UNFSA in some parts, such as requesting non-parties to refrain “from carrying out activities that undermine the effectiveness of this Convention”. In other aspects, the Antigua Convention differs slightly. For example, it urges non-parties “to become members or to adopt laws and regulations consistent with this Convention” rather than demanding cooperation “by agreeing to apply” IATTC rules. These minor differences did not alter IATTC’s practice regarding non-parties.

B Reactions from Non-members

IATTC progressively requested non-parties to cooperate under UNFSA-like terms, though communications met with mixed results. Belize, China and South Korea replied, stating their intention to “fully cooperate” and that their vessels “will fish in a manner consistent with the Commission’s management program”. In contrast, the Secretariat reported that Colombia and Indonesia did not reply to requests for cooperation. The following sections discuss some of these exchanges and their meaning.

555 At 18, para 2(a)(ii).
556 At 18, para 2(a)(ii).
557 At 18-19, paras 4 and 6(c).
559 Article XXVI(1) and (3).
560 Article XXVI(1).
561 IATTC Joint Working Group on Fishing by Non-Parties 2nd Meeting Minutes (June 2003) at 3.
562 At 3.
Non-parties’ responses

Responses by non-parties varied. Several states showed acceptance of IATTC’s demands for cooperation, but legal commitments in treaty law often explained their behaviour. Indonesia, for example, did not engage with IATTC while its vessels were on the IUU list between 2005 and 2009. It reacted to requests for cooperation only after 2009, the same year it acceded to UNFSA.\textsuperscript{563} It is difficult to trace any specific change in Indonesia’s position with IATTC before ratifying UNFSA. Indonesia’s changes in its domestic legislation in 2009 suggest that international pressure catalysed accession to UNFSA, shifting its practice.\textsuperscript{564}

Chile also followed treaty provisions when it decided to engage with IATTC. Attending as an observer in 2015, Chile communicated it had recently acceded to UNFSA and underlined its intention to increase cooperation with IATTC, which appeared to be the reason justifying its attendance in the first place.\textsuperscript{565} As Chile has no direct interest in high seas tuna, it seems that its formal commitment to UNFSA prompted its decision to apply for cooperating non-party status in 2017. Chile saw this step as part of “the need to cooperate in accordance with the regulations of international law resulting from the instruments in force of which Chile is part”.\textsuperscript{566} Treaty commitments thus justified Chile’s decision to formalise cooperation with IATTC.

The cases of Belize and South Korea are slightly different. They illustrate how states can change their positions towards recognising the obligation to cooperate through the competent RFMO absent any treaty commitments. After requests from the IATTC Secretariat, Belize and South Korea reported in early 2003 their intention to “fully cooperate with [IATTC] and that their vessels will fish in a manner consistent with IATTC measures [and] cooperate with IATTC”.\textsuperscript{567} Belize ratified UNFSA in 2005 and the Antigua Convention in 2007. Although

\textsuperscript{563}IATTC 81\textsuperscript{st} Meeting Minutes (September–October 2010) at 10. Also IATTC 82\textsuperscript{nd} Meeting Minutes (July 2011) at 147-148.
\textsuperscript{565}“Statement by Chile” (IATTC, 90\textsuperscript{th} Meeting Minutes, June–July 2016) Appendix 5a at 96.
\textsuperscript{566}“Chile’s Statement at the 92\textsuperscript{nd} Annual Meeting of the IATTC” (IATTC, 92\textsuperscript{nd} Meeting Minutes, July 2017) Attachment 5a at 88.
\textsuperscript{567}IATTC Joint Working Group 2\textsuperscript{nd} Meeting Minutes, above n 561, at 2.
treaty commitments can explain Belize’s actions after 2005, they cannot explain its acceptance of IATTC demands in 2003.

Although not a flag of convenience, South Korea did not always cooperate with RFMOs.\textsuperscript{568} IATTC advised in 2002 that Korean vessels were operating on the high seas of the Eastern Pacific without reporting catches.\textsuperscript{569} Once requested by IATTC, South Korea quickly reacted by obtaining cooperating non-party status in 2003. Treaty law cannot explain South Korea’s decision to cooperate after IATTC’s demand, as it acceded to the Antigua Convention only in 2005 and UNFSA in 2008.

Another illustrative case is Colombia, still a non-UNFSA party. A recalcitrant state despite several requests for cooperation, Colombia opposed any decision affecting what it regarded as its rights in IATTC waters. In 2005, IATTC members discussed the inclusion of Colombian vessels on the IUU list. Asked to comply with the organisation’s rules, Colombia replied that “it was not a party to the IATTC” and not involved in adopting its measures.\textsuperscript{570} It advised it was in the process of becoming an IATTC member and that “when it did, it would implement all IATTC decisions”.\textsuperscript{571} IATTC reacted, noting that “under existing international standards, Colombia had a clear obligation to cooperate with the IATTC” and that being a non-party “did not exempt it from complying with IATTC resolutions”.\textsuperscript{572} IATTC decided to include the vessel on the IUU list, despite Colombia’s opposition.\textsuperscript{573} Colombia moved to accede to the 1949 Convention and started attending as a full member in 2007.

The evolution in Colombia’s position illustrates the normative role that IATTC’s claim performed. The pressure exerted by the IUU listing process catalysed Colombia’s acceptance to cooperate with IATTC as the competent RFMO in the absence of any treaty commitments. Colombia made no distinctions in its original position between high seas or domestic waters, a

\textsuperscript{568}See discussion in Chapter Five-II.A.
\textsuperscript{569}“List of Non-Cooperating Vessels” (IATTC, Joint Working Group on Fishing by Non-Parties 1st Meeting Minutes, June 2002) Document JWG-1-05 at 2.
\textsuperscript{570}IATTC Joint Working Group on Fishing by Non-Parties 4th Meeting Minutes (June 2005) at 2.
\textsuperscript{571}At 2.
\textsuperscript{572}At 2.
\textsuperscript{573}IATTC 73rd Meeting Minutes (June 2005) at 6.
relevant point considering that IATTC has competence over highly migratory stocks throughout their range.

Bolivia is another non-UNFSA party that has ratified neither the 1949 treaty nor the Antigua Convention. After 2000, Bolivia sought to engage with IATTC, and it benefitted as a “participant”. It did not protest in 2011 when IATTC added a Bolivian vessel to the IUU list. In 2012, Bolivia reported sanctions against the ship while applying for cooperating non-party status, the IUU listing likely being a reason for the application itself. Unlike in SEAFO, Bolivia’s conduct here suggests its acceptance that fishing can only occur under the cooperative framework defined by IATTC.

2 Progress and outcomes

The entry into force of the Antigua Convention in 2010 had positive consequences for deterring unregulated fishing for two reasons. First, the requirements for accession to the Antigua Convention are more flexible than under the 1949 Convention, thus facilitating cooperation. Second, parties to the 1949 Convention remain IATTC members even if they have not ratified the Antigua Convention. Only when all the parties to the former have approved the latter will the 1949 Convention be considered terminated. The most tangible outcome of these rules has been an increased membership of IATTC.

These circumstances underline one complex aspect of the dialectical process developing the custom formation process: finding relevant practice in a legal ecosystem dominated by treaties. Most states that participated in IATTC under the 1949 Convention have ratified the Antigua Convention, including Costa Rica, Mexico and the United States. Others joined IATTC as contracting parties to the 1949 or the Antigua Convention but are not UNFSA parties, such as China, Peru or Venezuela. Others have acceded to UNFSA and only later to the Antigua Convention or applied for cooperating non-party status, such as Canada, Chile, and Indonesia. Because most states operating in IATTC waters are parties to the 1949 Convention, the Antigua

574 “Chair’s report of the 3rd Committee Meeting for the Review of Implementation of Measures Adopted by the Commission” (IATTC, 83rd Meeting Minutes, June 2012) Appendix 5e, 124 at 126.
575 Articles XXIX and XXX.
576 Article XXXI(5).
577 Article XXXI(3), (5) and (6).
Convention or UNFSA, relevant state practice for customary change is increasingly scarce, as the Baxter paradox suggests.\(^{578}\)

None of that, however, should obscure the general picture. IATTC eventually demanded a specific duty to cooperate against uncooperative non-members, resembling other RFMOs. IATTC also backed it with the threat of punitive measures. A distinctive feature in IATTC has been that, although quite a few Latin-American states have not been keen UNFSA supporters, IATTC still relied on its provisions to build up a consistent position against unregulated fishing. The few but still indicative instances of relevant non-members’ reactions confirm how the formation of custom moves through a dialectical logic of assertion on the one hand and acceptance or acquiescence on the other. Significantly, it reveals that custom formation can still occur amid treaty provisions.

**III The Western and Central Pacific Fisheries Commission (WCPFC)**

The WCPF Convention of 2000, establishing WCPFC,\(^ {579}\) has a level of detail not found in RFMO conventions before, reflecting the aspirations of UNFSA.\(^ {580}\) As Article 32 WCPF Convention echoes Articles 17 and 33 UNFSA, the WCPFC starting point to develop its version of the duty to cooperate was not far from UNFSA.\(^ {581}\) WCPFC’s practice demanded from non-members a behaviour consistent with the understanding of cooperation under the

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\(^{578}\)See Chapter Two-IV.A.1.

\(^{579}\)Convention on the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean 2275 UNTS 40532 (opened for signature 5 September 2000, entered into force 19 June 2004). WCPFC’s area of competence extends eastwards as far as Hawaii and French Polynesia. Like most RFMOs that regulate tuna-like resources, WCPFC applies to the high seas and waters under national jurisdiction, raising permanent tensions between coastal states and distant water fishing nations. See eg Martin Tsamenyi and Quentin Hanich “Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States” (2012) 27 IJMCL 783; Michel Morin “Creeping Jurisdiction” by the Small Islands of the Pacific Ocean in the Context of Management of the Tuna Fisheries” (2015) 30 IJMCL 477 at 495-500.

\(^{580}\)Henriksen, Honneland and Sydnes, above n 70, at 189-190.

\(^{581}\)Article 32(1): “Each member of the Commission shall take measures consistent with this Convention, the Agreement and international law to deter the activities of vessels flying the flags of non-parties to this Convention which undermine the effectiveness of conservation and management measures adopted by the Commission.” Article 32 (4): “The members of the Commission shall, individually or jointly, request non-parties to this Convention whose vessels fish in the Convention Area to cooperate fully in the implementation of conservation and management measures adopted by the Commission with a view to ensuring that such measures are applied to all fishing activities in the Convention Area.”
WPFC Convention. Non-party reactions, especially after 2008, indicate an apparent acceptance of the need to cooperate with WCPFC before participating in high seas fishing in the area. ⁵⁸²

A Acceptance of WCPFC’s Claim

WCPFC has a large membership, but it is a closed organisation. ⁵⁸³ The contracting parties may invite, by consensus, non-members whose fishing vessels wish to conduct fishing for highly migratory stocks to accede to the WCPFC Convention. ⁵⁸⁴ It is not a secret that some WCPFC members, particularly the Pacific islands countries, do not favour increasing membership. ⁵⁸⁵ They have pushed for a restrictive approach to participation as their priority is to strengthen their sovereign rights over their EEZs and maximise economic benefits from their marine resources. ⁵⁸⁶ They regard WCPFC as an opportunity to adopt compatible measures between their EEZs and the high seas. ⁵⁸⁷ Unsurprisingly, developing coastal states in the area have strongly supported efforts against unregulated fishing.

Although a closed organisation, WCPFC offers participation to prospective newcomers through the status of cooperating non-party or “cooperating non-members”. Applications for this status are subject to intense scrutiny, and its requirements are more restrictive than in other

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⁵⁸³ The WCPFC members are Australia, China, Canada, the Cook Islands, the European Union, the Federated States of Micronesia, Fiji, France, Indonesia, Japan, Kiribati, Republic of Korea, Republic of Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Samoa, Solomon Islands, Chinese Taipei, Tonga, Tuvalu, United States and Vanuatu. The WCPFC Convention also provides for the participation of territories.

⁵⁸⁴ Articles 35 and 20(1)-(2) WCPF Convention. WCPFC adopts its decisions essentially by consensus.

⁵⁸⁵ See eg Nauru’s intervention in 2019, on behalf of several Pacific states (the so-called Parties to the Nauru Agreement). Pacific states “did not support the expansion of the Commission to include new members”. They had joined with the “understanding that the WCPFC is a closed Commission”, reflected in the WCPF Convention due to the “nature of the Commission, where over 85% of the catch was made in the waters of developing countries, which are highly dependent on those resources”. WCPFC Sixteenth Regular Commission Session Report (December 2019) at 11.


organisations. Non-members must guarantee that their vessels fishing in the WCPFC area will comply with the Convention’s provisions and existing regulations. By these demands, WCPFC ensures that non-members seeking the status discharge their duty to cooperate by “agreeing to apply” the management measures adopted by WCPFC as the relevant RFMO, consistent with Articles 8(3) and 17 UNFSA.

Some non-member states’ applications for this status are telling about their positions towards the obligation to cooperate. El Salvador first applied for cooperating non-party status in 2007. Its statement invoked Articles 87(e), 116 and 118 LOSC and the right to fish on the high seas, along with its historical presence in the region before the WCPF Convention. WCPFC members rejected the application based on El Salvador’s failure to demonstrate compliance with existing rules and an implicit accusation of being a flag of convenience. Instead of authorising its vessels to fish on the high seas of the WCPFC area, El Salvador applied again in 2008, this time on different terms. It recognised its intention to develop a high seas fishery and did not mention the LOSC provisions. Its statement to the WCPFC Commission in 2008 revealed this new position:

It is our view that the right to fish must only be done in complete compliance with all international laws. In that sense, for the last year we have worked hard to try to fulfil all of WCPFC’s dispositions, in order to demonstrate to the member countries El Salvador’s willingness and continued desire to cooperate in this organisation, providing as much information as possible to demonstrate our compliance.

El Salvador emphasised that the right to fish on the high seas must be exercised “in complete compliance” with international law. El Salvador is not a contracting party to UNFSA and has

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589 Paragraphs 2(b) and 11(a). These paragraphs have barely changed since the adoption of the first version in 2004.
590 Not all the examples are equally relevant. Some states have no interest in the high seas, but they seek the status because fishing rights in coastal states’ domestic waters would only be granted to WCPFC contracting parties or cooperating non-members. One example is Nicaragua, applying and obtaining cooperating non-member status since 2018.
594 At 90.
not ratified the LOSC. Therefore, treaty law obligations cannot explain El Salvador’s decision to cooperate by agreeing to apply the WCPFC conservation measures. Nor can they explain why El Salvador has continued to seek, albeit unsuccessfully, full membership in WCPFC since 2010. It is also significant that El Salvador applied for the cooperating status before commencing fishing activities in the WCPFC Area. Moreover, after WCPFC rejected its first application in 2007, El Salvador complied by refraining from authorising its vessels to fish on the high seas of the WCPFC Area.

The explanation is that El Salvador has accepted an obligation to cooperate with WCPFC. This duty is to be discharged by becoming a member, complying with its rules, or refraining from fishing. Significantly, although El Salvador has unsuccessfully sought membership, this denial has not meant a departure from this obligation. WCPFC’s claim performed a normative role for El Salvador, manifested in this state’s swift position change from 2007 to 2008. Moreover, El Salvador’s reply suggests that it regards this duty as a general obligation beyond the WCPFC context.

The case of Ecuador has elements in common with El Salvador. Ecuador was neither a LOSC nor UNFSA contracting party when it first sought cooperating status in 2007. WCPFC refused, arguing Ecuador’s lack of compliance with WCPFC existing rules and insufficient data. Unlike El Salvador, Ecuador afterwards admitted that its vessels had continued to fish in the high seas of the WCPFC. At the time, Ecuador’s interventions did not suggest accepting the specific duty to cooperate as WCPFC claimed.

Ecuador reapplied the following year. At the 2008 meeting, WCPFC granted cooperating non-party status but on the condition that Ecuador refrained from fishing on the high seas and instead sought bilateral access to national EEZs. Ecuador accepted these terms. Like El

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595 El Salvador’s vessels had fished in the Western and Central Pacific before WCPFC entered into force. Quentin Hanich “Control, Cooperation and ‘Participatory Rights’ in the Western and Central Pacific Ocean Tuna Fisheries” in Hanich and Tsamenyi above n 586, 221 at 243.
596 “Statement by El Salvador”, above n 593, at 91. WCPFC granted an exception whereby El Salvador could celebrate bilateral agreements with coastal states to operate within their EEZs.
597 WCPFC 4th Regular Session Report (December 2007) at 8.
598 Hanich, above n 595, at 242.
599 WCPFC 5th Regular Session Report, above n 593, at 6.
600 The only part of the WCPFC’s high seas where Ecuador has operated is the overlapping zone with neighbouring IATTC, managed mostly as part of IATTC under an understanding between the two organisations.
Salvador, Ecuador has unsuccessfully sought full membership since 2011, yet it has continued applying for cooperating non-party status in subsequent years. Treaty law cannot explain this acceptance, certainly not in 2008, because Ecuador did not accede to UNFSA until 2016. Instead, these requests confirm that WCPFC’s claim had a normative role in defining Ecuador’s behaviour.

Vietnam applied for cooperating non-party status in 2009, underscoring its wish to allocate fishing opportunities as a developing coastal state. In its opening statement, it announced its intention “to become a party” to UNFSA “in the near future” and regarded its request to WCPFC “as a critical step in that regard”. Vietnam also assured WCPFC that “building experience and confidence within the WCPFC will remove obstacles to participation in [UNFSA]”. In return, Vietnam hoped “to receive assistance and a fair and equitable allocation of fishing opportunities”. Vietnam did not undertake fishing activities on the high seas regulated by WCPFC before submitting its application.

WCPFC granted the cooperating status but did not allow Vietnam to include its vessels on the record. Therefore, its vessels could not fish. Vietnam accepted these conditions, assuring members that it would not operate in WCPFC waters in 2010. This application was Vietnam’s first to any RFMO, yet Vietnam promptly aligned itself with WCPFC’s demands to non-members despite not being a contracting party to UNFSA. At the closing of the 2009 meeting, Vietnam emphasised that it “regards its [cooperating status] as further evidence of Vietnam’s preparedness to comply with its obligations under international fisheries law”. In short, its position entails accepting the duty to cooperate with WCPFC by abiding by its rules and refraining from fishing. Vietnam formalised these obligations by treaty law nearly a decade later, when it acceded to UNFSA in December 2018.

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601 “Statement of Ecuador” (WCPFC, TCC Seventh Regular Session Report, September–October 2011) Attachment L.
604 Above n 603.
605 Above n 603.
607 Above n 606.
B Deterring Unregulated Fishing

Article 32 of the WCPF Convention encourages its parties to take punitive measures against uncooperative non-members. The sequence WCPFC deployed to tackle unregulated fishing is similar to that of other RFMOs. First, it established its own IUU listing process. Second, it required its members and cooperating non-parties to authorise their vessels and notify them for inclusion on the WCPFC Record of Vessels before initiating fishing operations. The activities of ships not included in such record, ie all those flagged to uncooperative non-members, are categorised as IUU fishing and subject to punitive actions accordingly. Under WCPFC’s framework, fishing by non-members by definition undermines its conservation measures, something not explicit in Article 32 WCPF Convention. It is apparent that UNFSA and the IPOA-IUU standards strongly influenced WCPFC’s decisions.

Two examples serve to compare how WCPFC members develop their claim on the duty to cooperate against non-members. At the 2007 meeting of its Technical Compliance Committee, WCPFC discussed the IUU-listing of a vessel flagged to Senegal, a non-member of WCPFC but a contracting party to UNFSA. The WCPFC legal adviser had no doubts about the consequences of non-compliance with the organisations’ measures for such a flag. He recalled that UNFSA parties “are obligated to ensure that the activities of their vessels in the Convention Area do not undermine the [conservation measures] adopted by the Commission”. Their activities “may be considered contrary to [UNFSA] and possibly illegal” and WCPFC “has a right to request such flag States to withdraw their vessels from the Convention Area, and failure to do so may justify IUU listing.” As a party to UNFSA, Senegal must cooperate with WCPFC.

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608(CMM) 2006-09 to Establish a List of Vessels Presumed to Have Carried Out Illegal Unreported and Unregulated Fishing Activities in the Western and Central Pacific Ocean” (WCPFC, 3rd Regular Session Report, December 2006) Attachment P at 100. The WCPFC has amended the original version several times. The current text is CMM 2019-07.

609(CMM) 2009-01 on a WCPFC Record of Fishing Vessels and Authorization to Fish (Revised)” (WCPFC, 6th Regular Session, December 2009) Attachment W at 142. The 2009 Measure expanded the first version of the Record of Vessels adopted in 2004 to cooperating non-parties. The current text is CMM 2018-06.

610Paragraph 3(a). A vessel is presumed to have carried out IUU fishing, as defined in the IPOA-IUU, when it is not on the WCPFC record of authorised vessels and harvests species covered by the WCPFC Convention in the Convention Area.

611WCPFC TCC Third Regular Session (September–October 2007) at 22.

612At 22.
In contrast, the legal counsel’s views about vessels flagged to non-party states to WCPFC and UNFSA were not conclusive. He conceded they “have the freedom to fish on the high seas, subject to their obligation under the [LOSC]” 613 He opined that, although it was unclear what enforcement may apply against such states, the IUU listing was probably justified. 614

An incident in 2010 tested these views when the Georgia-flagged vessel *Neptune* was proposed for the IUU list. Georgia, a non-UNFSA party, did not respond. 615 Again, the WCPFC legal adviser questioned whether Georgia, not being a member or cooperating non-party of WCPFC, “has any duties with respect to its vessels, and whether the vessel had violated” WCPFC rules. 616 Georgia was not eligible to place its ships on the WCPFC record, but the counsel suggested that such fact “might not be a valid cause for IUU fishing”. 617

Initial positions among WCPFC members were divided. Some WCPFC members indicated that they would not support the IUU listing of the Georgian vessel unless there was evidence of activities undermining WCPFC measures other than absence from the record. 618 In contrast, others were firm that *Neptune* undermined WCPFC measures and that the IUU-listing was appropriate. Eventually, WCPFC asserted its claim: it agreed by consensus to list the vessel, despite the initial minority views and the organisation’s legal adviser’s position. 619 There was no response or reaction by Georgia.

This discussion illustrates how the dialectical process underpinning custom formation unfolds. State practice and *opinio* here developed within the underlying tensions of enforcing the status quo or advancing change. Some WCPFC members held legitimate doubts about the legal justification for their measures against non-party vessels. Nonetheless, WCPFC eventually asserted a stricter standard of cooperation for all non-parties, notwithstanding such states’ lack of adherence to UNFSA.

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613 At 22.
614 At 22.
615 WCPFC TCC Sixth Regular Session (September–October 2010) at 23-24.
616 At 23.
617 WCPFC 7th Regular Session Report (December 2010) at 29.
619 At 24.
**IV South Pacific Regional Fisheries Management Organisation (SPRFMO)**

SPRFMO is one of the most recently established RFMOs with competence on the high seas. Its founding treaty benefitted from more than a decade of progress in state practice against unregulated fishing, exemplified by the recognition of the IUU fishing notion in the SPRFMO Convention. The brief SPRFMO experience confirms that its members have endorsed the obligation to cooperate in UNFSA-like terms and that non-parties have accepted this duty with SPRFMO.

**A SPRFMO’s Claim on the Obligation to Cooperate**

States that participated in the negotiations for the SPRFMO Convention and those with jurisdiction over waters adjacent to the Convention Area may accede to this treaty. Those that cannot are required “to agree to cooperate fully in the implementation of conservation and management measures adopted by the Commission”. For this purpose, SPRFMO offers cooperating non-party status. Confirming that cooperation must occur within the framework of the competent RFMO, non-members commit to abide by SPRFMO rules when applying for it. In parallel, SPRFMO members, individually or collectively, will take measures to deter fishing by non-members “which undermine the effectiveness of conservation and management measures applicable in the Convention Area”.

Exchanges between SPRFMO and non-members have been consistent with these rules. Most current and former cooperating non-parties are also parties to UNFSA, but some exceptions provide relevant state practice beyond treaty commitments. Applying for cooperating status in

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620 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean 2899 UNTS 211 (opened for signature 1 February 2010, entered into force 24 August 2012). The SPRFMO Commission has competence to adopt binding measures on the high seas parts of the South Pacific over straddling and discrete fishery resources. SPRFMO adopts its decision by consensus, but when all efforts to reach a decision have been exhausted, the Commission can make decisions by a vote of a three-fourth majority on issues of substance. The Commission has currently 15 members: Australia, Republic of Chile, People’s Republic of China, Cook Islands, Republic of Cuba, Republic of Ecuador, European Union, Kingdom of Denmark in respect of the Faroe Islands, Republic of Korea, New Zealand, Republic of Peru, Russian Federation, Chinese Taipei, the United States of America and the Republic of Vanuatu. The author served as Chair of the SPRFMO Compliance Committee (2014–2017) and Commission (2018–2021). All the documents discussed here are in the public domain or were accessed following a formal request to the SPRFMO Secretariat.

621 Articles 36–37.

622 Article 32(2).


624 Article 32(1) SPRFMO Convention.
2018, Colombia, a non-UNFSA party, communicated its “interest in the fisheries managed by SPRFMO”, advising it “may have vessels” entering such fisheries in the future.\textsuperscript{625} Colombia made clear it was “fully committed to cooperate in the implementation of all applicable measures” adopted by SPRFMO.\textsuperscript{626} It added that if its vessels became involved in fishing activities in the area, “they will comply with the provisions of the Convention” and SPRFMO rules.\textsuperscript{627} Colombia did not renew its status in subsequent years, but no Colombian vessels fishing for SPRFMO resources have appeared in the South Pacific.

\textbf{B Deterring Uncooperative Non-members}

The SPRFMO Convention recognises the notion of IUU fishing by reference to the IPOA-IUU.\textsuperscript{628} SPRFMO must adopt measures to ensure compliance with its Convention, including by “identifying vessels engaging in IUU fishing activities” and “adopting appropriate measures to prevent, deter and eliminate IUU fishing, such as the development of an IUU vessels list”.\textsuperscript{629} Only vessels included on the SPRFMO Record of Vessels can fish, and only those flagged to SPRFMO members or cooperating non-members may be included on such a Record. Therefore, vessels flagged to uncooperative non-members are immediately subject to IUU listing.

There is not much state practice to observe outside treaty commitments in SPRFMO. Yet it is telling that China, Cuba and Peru, three non-UNFSA parties, acceded to the SPRFMO Convention knowing that one obligation they accepted is deterring non-members from fishing in the SPRFMO area. It seems reasonable to conclude that they could not radically oppose conceiving the duty to cooperate, as framed in UNFSA and SPRFMO, as applicable to themselves. Relevant practice from Peru is scarce, but plenty of evidence confirms such acceptance by China and Cuba in other RFMOs.\textsuperscript{630}

\textsuperscript{625}Letter from the Autoridad Nacional de Acuicultura y Pesca de Colombia to the SPRFMO Executive Secretary concerning Colombia’s application to renew Cooperating non-contracting Party status with SPRFMO (21 November 2018) at 3 (on file with the author).
\textsuperscript{626}At 4.
\textsuperscript{627}At 4.
\textsuperscript{628}Article 1(j).
\textsuperscript{629}Article 27(1)(f).
\textsuperscript{630}See discussions in Chapter Three sections III and VI and Chapter Five sections II and IV.
Unregulated fishing has not been a significant issue in the SPRFMO area. Still, two examples confirm that non-members have accepted SPRFMO’s claims. At the 2019 meeting, SPRFMO deliberated on delisting the Vladivostok 2000, a vessel flagged to Moldova, from its IUU list. Australia warned that Moldova “is not currently participating in the international fisheries legal framework as it is not a Party to UNFSA nor any RFMO, but yet expressed an intention to fish”.631 It added that removing this vessel from the list would “facilitate the continuation of IUU fishing.”632 SPRFMO agreed and rejected Moldova’s request, limiting its alleged right to fish on the high seas. Moldova did not insist or protest.

At the 2020 meeting, SPRFMO agreed to keep the Angola-flagged vessel Bellator on the IUU list due to the lack of information. Again, Australia underlined that “Angola is neither an SPRFMO Member nor a contracting party to UNFSA”, suggesting that “if this vessel continues to fish in an area managed by an RFMO”, this will “undermine the international fisheries legal framework”.633 Chile echoed this view and suggested contacting Angola to “guarantee that the vessel will only fish within the Angolan EEZ”.634 SPRFMO agreed to engage with Angola to clarify that “in case the flag State has any future intention to allow the vessel to operate in SPRFMO”, then “it would need to do so” under SPRFMO rules.635 After the meeting, SPRFMO contacted Angola with the following terms:636

[A] flag state that has any future intentions to allow a vessel to operate in SPRFMO would need to do so in accordance with SPRFMO Conservation and Management Measures and regulations. Any activities undertaken otherwise would not be consistent with the international fisheries legal framework and would seriously undermine SPRFMO rules.

There is no evidence of Angola opposing SPRFMO’s position. The silence of Moldova and Angola is revealing. As their alleged rights on the high seas were affected by the IUU listing, they had the burden to object to SPRFMO’s claims and had repeated opportunities to do so. It

632At 11.
633SPRFMO 7th Compliance and Technical Committee Meeting Report (February 2020) at 12.
634At 12.
635At 13.
636Letter from the SPRFMO Executive Secretary to Ms Maria Antonieta Baptista (Ministry of Fisheries and the Sea of Angola) concerning the delisting of the vessel Bellator from the SPRFMO IUU list (7 May 2020) (on file with the author).
is, therefore, plausible to see their silence as an example of acquiescence in SPRFMO’s demands for cooperation.

V The North Pacific Fisheries Commission (NPFC)

As the youngest RFMO with high seas competence, the NPFC constituent treaty takes advantage of decades of evolving practice in the treatment of non-members.\textsuperscript{637} The NPFC Convention requests that non-parties “cooperate fully with the Commission either by becoming a Contracting Party or by agreeing to apply” its measures.\textsuperscript{638} Based on Articles 8 and 17 UNFSA, this provision is explicit in that non-members must discharge their duty to cooperate by either becoming full members of NPFC or agreeing to apply its rules. Again, only fishing vessels included in the NPFC Vessel Registry can legally operate, and only those flagged to NPFC members or cooperating non-parties can be included on the Registry.\textsuperscript{639}

NPFC is not an open organisation. The accession of non-parties that were not signatories to the NPFC Convention can only proceed by a consensus-based invitation.\textsuperscript{640} In balancing this restriction, NPFC provides a channel for non-members to cooperate through cooperating non-party status.\textsuperscript{641} Practice suggests that, whereas full membership has not been easy to obtain, this status is accessible to non-members. Admittedly, the only observable practice concerns states or regional organisations that are also contracting parties to UNFSA; therefore, they are

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{637}Convention on the Conservation and Management of the High Seas Fisheries Resources in the North Pacific Ocean (adopted 24 February 2012, entered into force 19 July 2015). The NPFC has the following members: Canada, China, European Union, Japan, Republic of Korea, the Russian Federation, Chinese Taipei, the USA and Vanuatu. This Convention applies to the waters of the high seas area of the North Pacific Ocean, excluding the Bering Sea and other high seas areas surrounded by the EEZ of a single State (such as the so-called “Peanut hole”). The NPFC regulates all high seas fishing resources, with some exceptions, notably those species already covered by pre-existing international instruments such as IATTC and WCPFC. Currently the fish species targeted by the NPFC Members are pelagic and bottom fish stocks.
\item \textsuperscript{638}Article 20 NPFC Convention.
\item \textsuperscript{639}Article 13, para 10 NPFC Convention; “Conservation and Management Measure 2021-01 on Information Requirements for Vessel Registration” (NPFC, 6th Meeting Report, February 2021) Annex N at 354. These requirements have not changed substantially since 2015.
\item \textsuperscript{640}Article 24(2).
\item \textsuperscript{641}Article 20(3) recognises it, when it says that “[s]ubject to such terms and conditions as the Commission may establish, such a cooperating non-Contracting Party to this Convention may enjoy benefits from participation in the fisheries (…)”).
\end{itemize}
\end{footnotesize}
irrelevant for custom formation since treaty commitments explain their requests for cooperation.642

NPFC has developed rules to deter uncooperative non-members from fishing in the North-Pacific. Article 20(4) NPFC Convention follows Article 33 UNFSA closely:

Each member of the Commission shall take measures consistent with this Convention, the 1982 Convention, the 1995 Agreement and other relevant international law to deter the activities of fishing vessels entitled to fly the flags of non-Contracting Parties to this Convention that undermine the effectiveness of conservation and management measures adopted by the Commission.

Like RFMOs elsewhere, NPFC members have implemented this provision through the notion of IUU fishing, expressly recognised in Article 1(k) NPFC Convention. It is no coincidence that one of NPFC’s first decisions was to establish a vessel registry and adopt an IUU list.643

NPFC members’ position on what the duty to cooperate entails to non-members follows UNFSA provisions closely. The meaning of this obligation applies to non-parties without distinction of participation in UNFSA. However, interactions with non-members that sustain relevant state practice for custom formation are non-existent. That said, there is no evidence of non-party states challenging NPFC’s claim or their vessels fishing in the area.644

VI Conclusions

IATTC, WCPFC, SPRFMO and NPFC have all made a normative claim in similar terms. They may show differences in timing and context, but essentially they do not differ. Non-members must discharge their duty to cooperate on the high seas by either becoming a member of the relevant RFMO or fishing by agreeing to apply its management measures. Alternatively, they

642Eg the European Union, when applied for full membership, and Panama when applying for cooperating non-party status.
644“IUU Vessel List for 2021” (NPFC, 6th Meeting Report, above n 639, Annex I at 278. Instead, all the cases the NPFC has dealt with concern vessels without nationality, an issue beyond the scope of this thesis. See Chapter One-II.C.2.
must refrain from fishing. In these four RFMOs, “agreeing to apply” means obtaining cooperating non-party status with the organisation.

Likewise, RFMOs in the Pacific have effectively backed up their claims with the threat or application of punitive measures against uncooperative non-parties, such as the closing of ports and the prohibition of landings catches, resorting to the IUU notion. They have all, in practical terms, assimilated illegal with unregulated fishing by providing for the same consequences against these two types of conduct. Importantly, they have not made distinctions depending on whether a non-member is a contracting party to UNFSA, as the discussion on the Georgian-flagged Neptune in WCPFC illustrated. Equally, they have made no distinction in the treatment of non-parties resorting to paragraph 3.4 IPOA-IUU. They have all applied or threatened to use punitive measures against any vessel flagged to an uncooperative non-member.

RFMOs advancing such claims have adopted their decisions by consensus. This observation is relevant because not every RFMO member is a contracting party to UNFSA. Some states have endorsed decisions addressing non-parties that could potentially affect them in other RFMOs where they are not members. By adopting decisions on non-members by consensus, RFMOs ensure the legitimacy of their actions, including on member states that are not UNFSA parties.

The available evidence in the Pacific area shows consistent responses pointing to non-members’ acceptance of or acquiescence in RFMOs claims. Exchanges between WCPFC and El Salvador, Ecuador and Vietnam, as they applied for cooperating non-party status, leave little doubt about these states’ acceptance of WCPFC’s demands. The discussions on adopting IUU lists have also revealed relevant state practice and individual opinio. One example is Colombia, first objecting to the IUU listing but later acceding to the IATTC Convention. The evidence concerning Bolivia in IATTC might not be conclusive, but it confirms that Bolivia did not oppose IATTC’s claims. The lack of protest from Angola and Moldova falls within the understanding of tacit acceptance or at least acquiescence: as non-UNFSA parties, these states were in a position to oppose SPRFMO’s claims, potentially insisting on the right to fish on the high seas. Instead, they remained silent.

645See discussion in Chapter One-II.C.1
Practice and opinio have not emerged in a vacuum. UNFSA provisions have defined the content of RFMOs’ demands and have provided legitimacy to their claims. WCPFC often borrowed from UNFSA language to draft their decisions or address non-UNFSA parties. SPRFMO and NPFC benefitted from constitutive treaties recognising a straightforward, UNFSA-like approach to non-members. Due to specific regional circumstances, IATTC did not resort to UNFSA more openly. Yet, eventually, its decisions and actions also became entirely consistent with UNFSA and the IPOA-IUU.

The IPOA-IUU has played a critical role in the Pacific. It has strengthened the position of RFMOs and added legitimacy to their earlier claims, as underscored by the IATTC and WCPFC experiences. It has influenced the drafting of more recent fisheries conventions, as in SPRFMO and NPFC. Equally, by assimilating unregulated to illegal fishing, all the RFMOs examined have applied similar punitive measures to activities that, in principle, are legally different. The threat of blacklisting has forced several non-members to reconsider their positions with existing RFMOs, as the examples of Ecuador and El Salvador show with WCPFC and Colombia in IATTC.

Finally, from a fisheries management perspective, examining the RFMOs in the Pacific highlights a positive outcome. Their adopted approach delivered results: unregulated fishing decreased and became close to non-existent.
Chapter Five: Regional Practice in the Indian Ocean

I Introduction

This chapter addresses the two RFMOs and one arrangement that regulates high seas fishery resources in the Indian Ocean: the Commission for the Conservation of Southern Bluefin Tuna (CCSBT); the Indian Ocean Tuna Commission (IOTC); and the South Indian Ocean Fisheries Agreement (SIOFA) respectively. Like the RFMOs in the Atlantic and the Pacific areas, these three regimes have different backgrounds, membership and priorities. CCSBT has a long and convoluted past in dealing with non-parties, and some of its decisions in the late 1990s were the first to tackle them directly. In contrast, IOTC is a much larger and more diverse organisation. Since fishing by non-parties in the IOTC area has not existed with the same intensity as elsewhere, evidence of relevant state conduct is scarce. The SIOFA is a relatively small and less experienced regime, but its parties have recently replicated the same normative approach against unregulated fishing as other RFMOs.

Despite their differences, CCSBT, IOTC and SIOFA exhibit considerable consistency in confronting the non-member problem. They have all asserted an obligation to cooperate based on UNFSA provisions and have established channels for non-members to discharge their duty to cooperate based on relatively open constitutive treaties and cooperating non-party status. They have supported their claims by punitive measures inspired by the IPOA-IUU.

This chapter’s three parts, each referring to one regime, discuss how states acting under these two RFMOs and one arrangement have built these claims. They also present and analyse non-members’ reactions and how interactions with these organisations developed into a dialectical process where the duty to cooperate as articulated in UNFSA-like terms emerges as a customary rule.
II The Commission for the Conservation of Southern Bluefin Tuna (CCSBT)

Australia, Japan and New Zealand adopted the CCSBT Convention in 1993, formalising self-imposed catch restrictions for Southern Bluefin tuna agreed in the previous decade. Since its inception, the non-member problem was at the core of CCSBT. The original signatories negotiated the CCSBT Convention prompted by South Korean, Indonesian and Taiwanese catches, whose governments were not included in the initial consultations.

CCSBT had little choice but to engage with those flags seeking access to the fishery. Yet the original signatories’ desire to maintain their historical participation in the fishery prevented them from offering suitable incentives for non-parties to join. Meanwhile, pressure mounted on an already overfished stock. Although this was not a new issue in the work of RFMOs, the problem was particularly acute in the CCSBT. Disagreements among its members, aggravated by the unanimity rule in decision-making, prevented the adoption of much-needed catch limits. They led to disputes before international tribunals, while the Southern Bluefin tuna stock declined. These tensions likely discouraged potential members from exploring whether CCSBT was worth joining in the 1990s and early 2000s.

A Developing a Claim on the Meaning of Cooperation: UNFSA’s Influence

In addition to the tensions associated with non-members seeking access to a fishery under pressure, CCSBT has not always consistently applied the requirements for membership in the 1993 Convention. If conditions for new membership are uncertain, a central mechanism to discharge the duty to cooperate as demanded by UNFSA provisions would be compromised, undermining any claim on what cooperation entails for non-members.

646 Convention for the Conservation and Management of Southern Bluefin Tuna 1819 UNTS 359 (adopted 10 May 1993, entered into force 20 May 1994). CCSBT is an unusual RFMO: it manages only one resource, considered as one stock based on its spatial distribution and not defined in terms of a spatial area. To accommodate Taiwan/Chinese Taipei and its special status, contracting parties to the 1993 Convention set up the Extended Commission in 2001. When this section refers to CCSBT, it must be understood as including decisions taken by the Extended Commission, when applicable. CCSBT Extended Commission members are Australia, the European Union, Indonesia, Japan, Republic of Korea, New Zealand, South Africa and Taiwan (Fishing Entity).

647 Serdy The New Entrants Problem, above n 113, at 213-214.

648 According to art 7 of the 1993 Convention, CCSBT decisions shall be taken by unanimous vote of the parties present at the meetings.

649 See eg Southern Bluefin Tuna (Australia v Japan) (Jurisdiction and Admissibility) (2000) 39 ILM 1530.

Under Article 18 of the CCSBT Convention, any state whose vessels fish for Southern Bluefin tuna and any coastal state through whose waters this resource migrates may accede to the Convention. Yet South Africa’s accession request in 2002 failed, despite being a coastal state where Southern Bluefin tuna migrates. CCSBT treated South Africa’s as an application that entailed approval of the Commission and linked it to granting fishing rights. CCSBT refused both, a decision rightly criticised as “completely erroneous” and contrary to UNFSA.

However, South Africa’s case seems the exception rather than the rule. The accession of South Korea the year before, though linked to quota allocation, rested solely on its sovereign unilateral decision, and there seemed to be no “approval” role for CCSBT. Similarly, Indonesia – another coastal state through whose waters Southern Bluefin tuna migrates – joined in 2008 in a process suggesting that this decision did not rest on any express or tacit acceptance by CCSBT members but only on Indonesia’s decision. As accession to CCSBT seems allowed, it provides one mechanism to discharge its members’ demands for cooperation. That said, expectations regarding future allocation for new members have led to disagreements and weakened engagement by non-parties. CCSBT needed more than negotiating fishing rights and accommodating new members to tackle unregulated fishing.

In the late 1990s and early 2000s, CCSBT began to address non-parties’ catches more decisively. The CCSBT Convention was among the first treaties to insert a provision calling to “deter fishing activities” by non-parties where they “could affect adversely the attainment of the objective of this Convention”. In 1997, after UNFSA was adopted, CCSBT noted the

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652 Serdy The New Entrants Problem, above n 113, at 220.
655 Article 15(4): “The Parties shall cooperate in taking appropriate action, consistent with international law and their respective domestic laws, to deter fishing activities for southern bluefin tuna by nationals, residents or vessels of any State or entity not party to this Convention where such activity could affect adversely the attainment of the objective of this Convention.” The 1978 NAFO Convention had a similar provision in art XIX, but limited to “inviting the attention” of such flag states.
need to secure third parties’ participation, underlining that UNFSA requires states to either accede or agree to apply the measures “of the relevant fisheries regime”.

Non-members’ first reactions opposed CCSBT endorsing the UNFSA standard. For example, South Korea, a non-UNFSA party at the time, stated that it was considering joining CCSBT, but the proposed quota it was offered was unsatisfactory. South Korea also indicated that it would cooperate with CCSBT by having “one of its scientists attend” the meetings as an observer. This offer cannot be reconciled with the duty to cooperate as recognised in Articles 8 and 17 UNFSA.

As unregulated fishing by South Korea and others increased, CCSBT adopted an Action Plan in 1998 concerning cooperation with non-members. CCSBT invoked Articles 8 and 17 UNFSA as part of the basis for its measures, even though UNFSA was not yet in force. The Action Plan called on non-parties to “honour their international obligations to cooperate in the conservation and management of [Southern Bluefin tuna]”, to “respect the competence of the Commission” and “accede to the Convention or decide to apply the conservation and management measures currently adopted by the Commission with regard to [Southern Bluefin tuna]”. The Action Plan also noted “the strong obligation for Non-members to accede immediately” to the 1993 Convention, warning that if the effectiveness of CCSBT measures “is being undermined by the fishing activities of particular [n]on-members, the Commission will immediately take appropriate further measures”.

One commentator questioned where the members thought the sources of the “strong obligation for non-members to accede immediately” to CCSBT could lie unless Article 8 UNFSA had acquired the force of customary international law. But this critique misses the point. It was apparent that there was no such rule of customary law at the time. CCSBT members were instead performing something essential from the perspective of custom formation: asserting the meaning of the obligation to cooperate to manage Southern Bluefin tuna. These acts are central

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657At 9.
659Preambular paras 2-3.
660Paragraph 1.
661Paragraphs 2 and 4.
662Serdy The New Entrants Problem, above n 113, at 231.
for custom development because they embody the claim a group of states want others to accept. In 1999, CCSBT renewed its call to South Korea “to recognise the obligation of states under international law, including [the LOSC] and [UNFSA], to cooperate through [RFMOs] and to apply the conservation and management measures imposed by such organisations.” Again, these terms followed Articles 8 and 17 UNFSA closely.

Several non-parties continued avoiding accession to CCSBT for several reasons, including unsatisfactory quotas or membership’s financial and administrative burdens. But the bottom line was that most of them showed no belief in an obligation to accept a duty to cooperate exclusively through CCSBT or apply its measures while not UNFSA contracting parties. For example, South Korea complained that the CCSBT Action Plan “attempted to impose requirements on non-members beyond [the LOSC] provisions.” Neither South Korea nor other flag states stopped fishing at the time. The claim from CCSBT parties and the reactions by non-members, exemplified by South Korea, illustrate the tensions at the core of customary law formation, providing the terrain where international custom might emerge or fail.

**B Deterring Non-members**

The 1998 Action Plan defined the content of the duty to cooperate as based on UNFSA, but the consequences for the lack of engagement by non-parties needed further development. The Action Plan stated that CCSBT parties would adopt “appropriate measures”, including those “to discourage their nationals from engaging in or cooperating with Non-member fishing activities for [Southern Bluefin tuna]”. CCSBT then approved a new plan in 2000, agreeing to identify non-members whose vessels “have been catching [Southern Bluefin tuna] in a manner which diminishes the effectiveness” of its measures, requesting them “to rectify their fishing activities” under the threat of imposing trade-restrictive measures.

663Discussion in Chapter Two-II.B.
666CCSBT Fifth Meeting Report, above n 664, Part II, Agenda Item 6.
667CCSBT Fourth Meeting Report, above n 658, Attachment F, para 5.
These decisions against uncooperative non-members went even beyond the text of the CCSBT Convention. Article 15(1) points out that its parties “agree to invite the attention” of non-parties whose activities “could affect the attainment of the objective of this Convention”. The 1998 and 2000 Action Plans went further by requesting full cooperation in implementing CCSBT measures and asking non-members to rectify behaviour inconsistent with such demands. The Action Plans were in line with Articles 17 and 33 UNFSA, compelling members to take deterrent measures against non-members where their activities could affect the objectives of the Convention.

In 2001, CCSBT identified Belize, Cambodia, Equatorial Guinea and Honduras under its Action Plan. CCSBT warned these states that further measures would follow if they failed to rectify their uncooperative behaviour. Two years later, at the 2003 meeting, CCSBT agreed that no other actions were required, as the catches of vessels flagged to these states had dropped to zero.

C Cooperating Non-party Status

To improve engagement with non-members and facilitate the success of its claims, CCSBT developed a cooperating non-party status. Although actions to deter non-members began in 1998, CCSBT only formalised the status in 2003. Applicants must give a formal written statement of their commitment to carry out the objective of the 1993 Convention and abide by CCSBT conservation and management measures. Non-members requesting the status accept the obligation to fish by agreeing to apply CCSBT rules as the competent RFMO, consistent with UNFSA standards.

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669 Paragraph 5.
673 “Resolution to establish the status of Co-operating Non-Member of the Extended Commission and the Extended Scientific Committee”. CCSBT Extended Commission Meeting Report (CCSBT, Tenth Annual Meeting Commission Report, October 2003, Appendix 3) Attachment 7. To maintain consistency with other chapters, this section refers to cooperating non-members as cooperating non-contracting parties.
674 Paragraph 4(b).
Some non-members responded by cooperating under CCSBT terms. In 2002, after proof of Philippine vessels fishing for Southern Bluefin tuna, CCSBT demanded cooperation. The country replied by supplying requested catch data and notifying CCSBT that the ships concerned would be de-registered shortly.\(^{675}\) Between 2003 and 2004, the Philippines obtained cooperating non-party status, advising of its intention to develop a high seas fleet and comply with all CCSBT measures.\(^{676}\) Although it also took the opportunity to chastise the original signatories of the CCSBT Convention for considering outsiders wishing to join as “villains”, it nevertheless expressed its acceptance of CCSBT demands.\(^{677}\) The Philippines continued to apply for cooperating non-party status over the following years, acceding to UNFSA a decade later.\(^{678}\)

Not every non-party state was eager to engage under CCSBT’s terms. Indonesia made sporadic attempts to cooperate with CCSBT from the early 2000s but lacked commitment.\(^{679}\) CCSBT members discussed in 2001 the possibility of identifying Indonesia as a “non-member the vessels of which have been catching [Southern Bluefin tuna] in a manner which diminishes the effectiveness” of CCSBT’s measures.\(^{680}\) Indonesia replied in 2002 by stating that it wished to “act against IUU fishing” and that “it would be willing to become a cooperating non-member to the CCSBT”.\(^{681}\) Over the following years, friction and attempts at cooperation alternated. CCSBT authorised quota for Indonesia and, despite the threats, did not take punitive actions to compel it to engage.\(^{682}\) Indonesia continued fishing outside CCSBT rules, potentially on the high seas and did not cooperate as requested. Indonesia’s practice was still unclear when it formally acceded to CCSBT in April 2008 and UNFSA in September 2009.

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\(^{675}\) CCSBT Ninth Extended Commission Meeting, above n 651, at 4-5.

\(^{676}\) CCSBT Eleventh Extended Commission Meeting, above n 672, at 3-4.

\(^{677}\) “Opening statement by the Philippines”, Tenth Extended Commission Meeting, above n 673, Attachment 5-2.

\(^{678}\) The Philippines ceased to be a cooperating non-party in 2017.


\(^{680}\) “Draft decision regarding Indonesia pursuant to the 2000 Action Plan”, Eighth Meeting Report, above n 671, Attachment I.

\(^{681}\) CCSBT Ninth Extended Commission Meeting, above n 651, at 3.

\(^{682}\) CCSBT Tenth Extended Commission Meeting, above n 673, at 10.
CCSBT also followed the practice of blacklisting vessels engaged in IUU fishing to target uncooperative non-members. First, it adopted an approach resembling ICCAT’s original design, based on a list unilaterally identified by Japan and submitted for members’ approval. This approach, as in ICCAT, did not last long.

CCSBT changed course and passed another resolution in 2003, establishing a multilaterally driven process for adopting its IUU list. This time, the new decision set up a record of vessels authorised to fish for Southern Bluefin tuna, open exclusively to those flagged to members and cooperating non-members. Following the same approach as other RFMOs, CCSBT confirmed that vessels of uncooperative non-members would not be authorised and potentially could be the target of future punitive measures. However, unlike in other RFMOs, CCSBT did not develop a list of specific corrective actions for IUU fishing. Eventually, in 2013, CCSBT adopted a resolution setting up a process to draft an IUU list based on the standards followed in other RFMOs, including a catalogue of sanctions against listed vessels.

CCSBT tested its claim on the obligation to cooperate a few years afterwards, in a situation concerning China. CCSBT is the only one of the five RFMOs regulating tuna resources in which China is not a member. CCSBT’s parties were aware of the presence of Chinese vessels in areas where they had probably been taking Southern Bluefin tuna since 2004, but there was no evidence of actual fishing. The contracting parties contacted China to advise it on the IUU resolution implications and, in 2005, agreed to invoke the Action Plan but did not take further actions. For several years, CCSBT did not have information involving specific Chinese vessels targeting Southern Bluefin tuna. In response to bilateral talks with Japan on this issue, China contended that “it would investigate this matter if specific information could be

683CCSBT Eighth Meeting Report, above n 671, at 4-5.
684“Resolution on Illegal, Unregulated and Unreported Fishing (IUU) and Establishment of a CCSBT Record of Vessels over 24 meters Authorized to Fish for Southern Bluefin Tuna”, Tenth Annual Meeting Report, above n 673, Attachment 10.
685Paragraphs 2 and 3.
686“Resolution on Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities For Southern Bluefin Tuna (SBT)” (Compliance Committee, Eighth Meeting Report, October 2013) Attachment 6 at para 18. This resolution has been amended several times.
provided”. At the 2016 meeting, members discussed “how to seek China’s cooperation with the CCSBT given its involvement with Southern Bluefin tuna”.

An incident the next year tested China’s position and its degree of cooperation with CCSBT. The organisation contacted China in 2017 after evidence confirmed that three Chinese vessels were catching Southern Bluefin tuna. CCSBT indicated that it was seeking “the cooperation of China” to assist with the management of this resource, adding that this request was “consistent with the obligation to cooperate in the conservation and management of living resources on the high seas contained in the [LOSC]”.

Later the same year, CCSBT decided to include the Chinese vessels on the Draft IUU list and continued requesting that China join as a member or cooperating non-party or attend the meetings as an observer. Even though CCSBT formally based its request on the LOSC, it was apparent that it was requesting a higher standard of cooperation.

China’s response was revealing. Instead of questioning the legality of CCSBT’s actions against its vessels based on any belief of pacta tertiiis, China informed the Commission that it had conducted an investigation, ordering its ships to return to port and later inspecting them. In addition, China cancelled the vessels’ licences, imposed high monetary penalties on the owners and applied personal sanctions to the managers. Despite not being a contracting party to CCSBT or UNFSA, China stated that “it is always committed to comply with international fisheries law and conservation and management measures adopted by [tuna] RFMOs and make

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690“Letter from the Executive Secretary of the CCSBT to Mr Jiang Bo, Director of the Division of Fisheries Resources and Environmental Conservation, Bureau of Fisheries and Fisheries Law Enforcement, Ministry of Agriculture of China, concerning the presence of Chinese vessels in areas where Southern Bluefin tuna is caught (8 March 2017)” (CCSBT, Twenty-Fourth Annual Commission Meeting, October 2017) Attachment A, Document CCSBT-EC/1710/14.
691Above n 690.
694“Letter from Mr Chen Wan, Deputy Director of the Division of Deep Sea Fishing, Bureau of Fisheries, Ministry of Agriculture of China, concerning the investigation report on the vessels Da Yang 15/16 and Yuan Da 19 (22 June 2017)” (CCSBT, Twelfth Compliance Committee Meeting, October 2017) Attachment A, Appendix 2, Document CC/1710/07.
695Above n 694.
great efforts [sic] to deter IUU fishing activities”.

A second, subsequent letter from China further detailed the actions taken against its vessels, requesting CCSBT not to list them. China affirmed its will to cooperate with all parties, “including CCSBT to fight against all forms of IUU fishing activities, [and] comply with the conservation and management measures adopted by [tuna] RFMOs”. 697

CCSBT members reacted positively to China’s response, and CCSBT agreed not to include the Chinese vessels on the final IUU list. 698 However, CCSBT warned that “China should consider becoming a member or [cooperating non-member] of the CCSBT, otherwise its vessels that bycatch [Southern Bluefin tuna] would be considered to be IUU vessels”. 699 The message addressing China was clear: cooperate under CCSBT rules and refrain from fishing, or retaliation would follow under the IUU fishing notion.

China also reacted domestically. In 2013, it enacted rules for its high seas fleet to implement the management measures adopted by the RFMOs in which it participates as a member, ie ICCAT, IOTC, WCPFC and IATTC. 700 CCSBT is not among the RFMOs whose regulations Chinese vessels had to comply with by treaty law since China is not a contracting party. Yet, on 7 January 2019 – after the incident mentioned above – China passed new domestic fisheries regulations addressing Southern Bluefin tuna. 701 These rules have the purpose of “enhancing capability of compliance by China’s tuna industry”. 702 One specific measure aims only at Southern Bluefin tuna: a fishing prohibition for Chinese vessels. 703 The decree’s chapeau acknowledges that China is not a member of CCSBT and that it does not obtain a fishing quota of Southern Bluefin tuna. Yet it holds that “in order to avoid illegal fishing for or incidents catching [Southern Bluefin tuna], the fishing vessels of China shall observe” certain

696 Above n 694.
697 “Letter from Mr Liu Xinzhong, Deputy General-Director of the Bureau of Fisheries, Ministry of Agriculture of China, to Mr Robert Kennedy, CCSBT Executive-Secretary, concerning the inclusion of three Chinese vessels on CCSBT’s Draft IUU List (4 August 2017)” (CCSBT, Twelfth Compliance Committee Meeting, October 2017) Attachment C, Document CCSBT-CC/1710/07.
699 CCSBT Twelfth Compliance Committee Meeting, above n 697, at 7-8.
697 At 8.
700 At 18.
702 At 18.
703 Part XIII at 24.
obligations. Chief among these obligations is the prohibition on Chinese vessels of fishing, retaining, transshipping or landing Southern Bluefin tuna, extending to several parts of the Indian, Pacific and Atlantic Oceans as defined by coordinates overlapping with the spatial areas where Southern Bluefin tuna occurs and migrates.

A final and recent example of acceptance of CCSBT’s claim on cooperation concerns Cambodia. In 2017, Cambodia wrote to CCSBT, recognising the sighting of its vessels in the past and communicating its decision not to authorise fishing vessels to fish on the high seas for Southern Bluefin tuna under its flag. As it has done in ICCAT and NAFO, Cambodia accepted the need to abide by the duty to cooperate on the high seas by refraining from fishing. CCSBT today shows no sign of unregulated activities targeting Southern Bluefin tuna.

**III The Indian Ocean Tuna Commission (IOTC)**

Since its first meeting in 1996, several difficulties have challenged IOTC’s performance and fulfilling its objectives. As an organisation with a relatively large, diverse membership and competence over tuna-like resources grounded in Article 64 LOSC, accommodating coastal states’ rights and high seas interests throughout the region has been a complex task. The lack of data and a poor record of enacting conservation measures over its first decades of existence did not contribute to the fulfilment of IOTC’s responsibilities. Unfortunately, illegal fishing has endured in waters subject to coastal state jurisdiction.

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704 At 18.
705 At 24. A question that remains then is why China has not acceded to CCSBT or sought cooperating status. It is possible to speculate that the reasons concern the status of Taiwan/Chinese Taipei in CCSBT, something to which China surely objects.
706 “Letter from Veng Sakhon, Cambodia’s Minister of Agriculture, Forestry and Fisheries to Robert Kennedy, CCSBT Executive-Secretary, concerning sightings of Cambodian-flagged vessels suspected of undermining CCSBT’s conservation measures (11 April 2017)” (CCSBT, Twelfth Compliance Committee Meeting, October 2017) Attachment B, Document CCSBT-EC/1710/14.
707 Agreement for the Establishment of the Indian Ocean Tuna Commission 1927 UNTS 329 (adopted 25 November 1993, entered into force 17 March 1996). The IOTC Agreement was adopted under art XIV of FAO Constitution. IOTC has the competence to manage tuna and tuna-related species in the area defined in art II of the IOTC Agreement. The current members are Australia, Bangladesh, China, Comoros, Eritrea, European Union, France, India, Indonesia, Iran, Japan, Kenya, Korea, Madagascar, Malaysia, Maldives, Mauritius, Mozambique, Oman, Pakistan, Philippines, Seychelles, Sierra Leone, Somalia, South Africa, Sri Lanka, Sudan, Tanzania, Thailand, United Kingdom and Yemen.
An array of challenges beyond the scope of fisheries management has exacerbated these difficulties. Piracy in the West-Indian Ocean has targeted fishing vessels.\textsuperscript{709} Tensions between developing countries and former European colonial powers have impacted IOTC’s management decisions.\textsuperscript{710} The strong links with FAO, chiefly exposed in the inability to deal with Chinese Taipei/Taiwan’s status as an important fishing actor, have also played against IOTC performance.\textsuperscript{711}

Unregulated fishing has been one of these challenges. IOTC agreed as early as 1998 to liaise with non-parties, but IOTC’s initial position was notoriously lax and inconsistent with UNFSA. IOTC sent communications in the late 1990s, merely “inviting” non-parties to accede to the IOTC Agreement “or at least to cooperate with the Commission through the exchanges of information and statistical data on fishing activities on the stocks falling with the remit of the Commission”.\textsuperscript{712} These letters had no impact: in 1999, IOTC sent requests to 21 non-member states operating in the area, and only one replied.\textsuperscript{713} Adopting decisions by consensus, IOTC began to change this approach the same year.\textsuperscript{714}

\textit{A The Meaning of Cooperation}

IOTC is on paper a closed RFMO. Under Article IV IOTC Agreement, only members and associate members of FAO that are riparian to the IOTC area and those whose vessels engage in fishing for the stocks covered by the IOTC Agreement in the same area may accede to the

\textsuperscript{709}See eg IOTC Fourteenth Session Report (March 2010) at 14.\textsuperscript{710} See eg, Media Statement on the Special Session of the Indian Ocean Tuna Commission and the failure to adopt a revised yellowfin tuna rebuilding plan (Ministry of Fisheries, Marine Resources, and Agriculture, Republic of Maldives, 15 March 2021).\textsuperscript{711} Hussain Sinan and Megan Bailey “Understanding Barriers in Indian Ocean Tuna Commission Allocation Negotiations on Fishing Opportunities” (2020) 12(16) Sustainability 1 at 5. On the consequences of the relationship with FAO, see IOTC Performance Review Panel Report (Document IOTC-2008-PRP-R) submitted for the IOTC Thirteenth Session (2009) at 14. Most recently, Letter from Riley Jung-re Kim (IOTC Vice-Chairperson) to IOTC members and cooperating non-contracting parties, on preparations for deciding whether IOTC should remain within the FAO framework or become a separate legal entity (27 February 2018) IOTC Circular 2018-10.\textsuperscript{712} “Resolution 98/05 On Cooperation With Non-Contracting Parties” (IOTC, Third Session Report, December 1998) Appendix M at 42.\textsuperscript{713} IOTC Fourth Session Report (December 1999) at 3.\textsuperscript{714} Under art IX(1) and (5), IOTC may adopt conservation and management measures by a two-third majority of members present and voting. In practice, IOTC adopts its decisions by consensus, including those concerning non-members.
treaty. In practice, IOTC has never been asked to consider a membership application, and new members need only deposit an accession instrument with FAO.\textsuperscript{715}

In addition, IOTC pioneered in 1999 the status of cooperating non-party as an option for non-members to discharge the obligation to cooperate. Applicants would have to “confirm to IOTC its firm commitment with respect to the conservation and management measures adopted by the Commission”.\textsuperscript{716} In a direct reference to Articles 17(4) and 33 UNFSA, those who did not become cooperating non-parties would be “informed that pursuing their fishing activities in contravention” of IOTC measures “undermines the effect” of them.\textsuperscript{717} Amendments to the original rules on the cooperating status introduced in 2003 added that an applicant state would also need to “inform IOTC of the measures it takes to ensure compliance by its vessels” with IOTC rules.\textsuperscript{718} Non-parties seeking the status thus accept the commitment to fish by agreeing to apply IOTC measures, as instructed in Article 8(3) UNFSA.

IOTC also built up its claim on the meaning of cooperation by adopting punitive measures against uncooperative states. A difficulty was that, apart from the reference to Article 17 UNFSA, the IOTC Agreement “does not contain any guidance on how to deter activities by non-members that undermine the effectiveness of applicable conservation and management measures”.\textsuperscript{719} IOTC enacted in 1999 the first steps to tackle flags of convenience, the most visible aspect of unregulated fishing. Parties and cooperating non-members agreed to refuse landings and transshipments from vessels flagged to these states that were “diminishing the effectiveness” of IOTC measures.\textsuperscript{720} However, the language was still soft as IOTC members merely “urge[d]” non-parties to act in conformity with such requirements.\textsuperscript{721}

\begin{itemize}
\item \textsuperscript{715}This observation has seen a recent exception, but it seems an isolated one. In 2017, and after the FAO advised that North Korea “did not currently fulfil the conditions for eligibility to become an IOTC member, as set forth by the IOTC agreement in its Article 4”, IOTC concurred “with the non-eligibility of North Korea to become a member”, and requested the FAO as the depositary to act accordingly. IOTC 21\textsuperscript{st} Session Report (May 2017) at 9.
\item \textsuperscript{716}“Resolution 99/04 on the Status of Cooperating Non-contracting Parties” (IOTC, Fourth Session Report, 1999) Appendix XI at 47.
\item \textsuperscript{717}At 47.
\item \textsuperscript{718}“Resolution 03/02 On criteria for attaining the status of Co-operating Non-Contracting Party” (IOTC, Eighth Session Report, December 2003) Appendix IX, 43 at 44, para 4. This resolution has been amended several times.
\item \textsuperscript{719}IOTC 2\textsuperscript{nd} Performance Review Panel Report 2015 at 22.
\item \textsuperscript{720}“Resolution 99/02 Calling for Actions Against Fishing Activities by Large Scale Flag of Convenience Longline Vessels”, IOTC Fourth Session, above n 713, Appendix IX at 44.
\item \textsuperscript{721}At 44.
\end{itemize}
As with other RFMOs, the adoption of the IUU-IPOA influenced IOTC practice to strengthen its measures against non-members. In the early 2000s, IOTC set up a record of vessels where only members and cooperating non-parties could register. Simultaneously, it agreed that any ship not registered would be subject to the measures under the IUU listing process. Since uncooperative non-members could not include their vessels on the record, they would be subject to corrective actions as part of the IUU fishing notion. The sanctions list includes, to date, restrictions on transshipments, chartering, flagging, landing, refuelling and other commercial transactions.

IOTC continued to address fishing by members and non-members in the same fashion if they acted contrary to its rules, resorting to UNFSA language to reinforce its claims. In 2010, IOTC members decided to set up a framework to impose trade-related sanctions not only against vessels but also non-cooperative non-party states that:

Have failed to discharge their obligations under international law to cooperate with IOTC in the conservation and management of tuna and tuna-like species, in particular, by not taking measures or exercising effective control to ensure that their vessels do not engage in any activity that undermines the effectiveness of IOTC Conservation and Management Measures.

The expression “failed to discharge their obligations under international law”, as applicable to non-parties, endorses again the conclusion that IOTC regards fishing by uncooperative non-members as unlawful, inspired by UNFSA’s standards. In setting up a framework to adopt punitive measures against vessels and potentially uncooperative states, IOTC joined RFMOs such as ICCAT.

IOTC members expanded the effects of its measures against unregulated fishing with the cross-listing process. Vessels on other RFMOs’ IUU lists, including CCSBT, ICCAT, SEAFO,

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722“Resolution 02/05 Concerning the Establishment of an IOTC Record of Vessels over 24 metres authorised to operate in the IOTC area” (IOTC, Seventh Session Report, December 2002) Appendix X at 83, paras 1-2. This resolution has been amended several times.

723“Resolution 02/04 on establishing a list of vessels presumed to have carried out illegal, unregulated and unreported fishing in the IOTC Area”, IOTC Seventh Session, above n 722, Appendix X at 79, para 1(a).

724“Resolution 18/03 on Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing in the IOTC Area of Competence” (IOTC, 22nd Session Report, 2018) Appendix 13, 82 at paras 4(a) and 21.

725“Resolution 10/10 Concerning Market Related Measures”, IOTC Fourteenth Session, above n 709, Appendix VIII, 63 at 89, para 2(a)ii.
SPRFMO, SIOFA and WCPFC, “shall be included in the IOTC” list. By endorsing the cross-listing, IOTC members that are non-UNFSA parties have accepted possibly significant consequences. Their vessels could be listed in other RFMOs where they are not members, limiting their alleged right to fish on the high seas. In this sense, the cross-listing reflects these states’ acquiescence in the obligation to cooperate with those RFMOs.

B The Challenge of Custom among Treaties

There is little doubt that IOTC members have asserted a duty to cooperate framed in UNFSA in their relation with non-members. However, in IOTC, as in some RFMOs, one difficulty in observing custom development concerns the limited practice outside treaty commitments. The applications for cooperating non-party status illustrate the point. For example, Uruguay applied in 2007 but has been a contracting party to UNFSA since 1999. South Africa ratified UNFSA in 2003 and operated under the cooperating status in 2006 before it acceded to the IOTC Agreement in 2016. Senegal has also been a cooperating non-party since 2006, having ratified UNFSA in 1997. The Maldives applied in 2010, being a UNFSA party since 1998. Equally, Mozambique did so in 2011, after acceding to UNFSA in 2008. Bangladesh ratified UNFSA in 2012 and applied for the cooperating status afterwards. In all these examples, treaty obligations account for engagement with IOTC.

Something similar happens with new members of IOTC. Contracting parties increased from 17 in 1999 (when only four of them were also parties to UNFSA) to 28 and four cooperating non-parties in 2010 (of which 24 had acceded to UNFSA); by then, IOTC already had “a good geographical coverage of its membership”. The numbers remained similar in 2020, with 31 contracting parties and two cooperating non-members (23 were also UNFSA parties). It is tempting to suggest that these treaty ratifications indicate a progressive acceptance of the duty to cooperate through RFMOs as customary, but this cannot be assumed unless specific

726“Resolution 18/03”, IOTC 22nd Session, above n 724, paras 31, 35 and 36.
728IOTC Tenth Session Report (May 2006) at 7.
729At 7.
730IOTC Fourteenth Session, above n 709, at 10.
731IOTC Compliance Committee Eighth Session Report (March 2011) at 11.
732IOTC Compliance Committee Eleventh Session Report (May 2014) at 18.
733William Edeson “Overview of Institutional Arrangements for Fisheries and Marine Biodiversity in the Indian Ocean” in Rumley, Chaturvedi and Sakhuja (eds), above n 708, 40 at 44.
evidence exists, which in IOTC is scarce. For example, IOTC members that do not participate in other RFMOs, such as Eritrea, Sudan, Madagascar, Somalia and Yemen, do not exhibit any discernible cooperation pattern before acceding to IOTC.

Other states whose applications could have been relevant do not say much. For example, Indonesia obtained non-party status from 2002 before acceding to the IOTC Agreement in 2007. Exchanges with IOTC do not suggest much on its position more generally. IOTC accepted Djibouti as a cooperating non-party in 2015 and rejected North Korea. There is not much in their statements indicating an acceptance of the duty to cooperate as modelled in UNFSA. In any case, they are peripheral actors in high seas fishing.

One state showing a meaningful acceptance beyond treaty obligations is the Philippines. In 2000, it was one of the first non-parties to apply for and obtain cooperating status. Its supporting statement affirmed that it was “strongly committed to the principles and obligations embodied in [the LOSC] and the associated [UNFSA]”. These actions are consistent with the Philippines’ practice in other RFMOs, such as CCSBT. The Philippines ratified UNFSA in 2014.

C Unregulated Fishing Decreases

As non-members acceding to the IOTC Agreement or obtaining cooperating non-party status increased, unregulated fishing declined. These catches were “reduced markedly over the years, particularly since 2001 when those catches amounted to around 50% of the totals”. Catches from vessels flying the flags of uncooperating non-members were “about 3.3% of the totals of tuna and billfish over the period 2011–13 (2.4% in 2013)”. The numbers are consistent with the observed trajectory since the mid-2000s.

Members and cooperating non-parties to IOTC now include nearly all the relevant fishing players in the Indian Ocean. As a result, incidents with vessels flagged to uncooperative non-members on the high seas of the IOTC area are now the exception rather than the rule, being

736IOTC 2nd Performance Review, above n 719, at 41.
737At 41.
more likely that flags of convenience commit illegal fishing in coastal states’ waters.\textsuperscript{738} One of these exceptions occurred in 2007 with a vessel flagged to Equatorial Guinea. Still, this state merely replied that the suspect vessel was no longer in its registry.\textsuperscript{739}

The decline of the non-member problem is a positive finding. However, IOTC’s practice has only a limited impact on custom development. IOTC developed a consistent claim similar to other RFMOs, but relevant responses have been scarce. Increasing IOTC membership and UNFSA ratifications mean that treaty commitments justify state conduct.

\textbf{IV The Southern Indian Ocean Fisheries Agreement (SIOFA)}

The Southern Indian Ocean Fisheries Agreement (SIOFA) did not establish an international organisation with a legal personality.\textsuperscript{740} Instead, SIOFA relies on the meeting of the contracting parties to manage the stocks under its competence. It is thus a regional arrangement, but in many respects it acts like an RFMO.

Following RFMOs, SIOFA parties have also asserted a claim on the duty to cooperate based on UNFSA. They have charted a similar pattern of offering cooperation through open membership and cooperating non-party status, and uncooperative non-members are subject to punitive actions through the IUU listing process. Because of SIOFA’s relatively short history, relevant practice in response to SIOFA parties’ claims is not abundant, but the existing evidence points out non-members’ acceptance of the need to cooperate under UNFSA-like terms.

\textsuperscript{738}Eg incident involving a vessel flagged to Honduras in Somalian waters. IOTC \textit{Compliance Committee 15th Session Report} (May 2018) at 4-7.

\textsuperscript{739}"Concerning the IOTC IUU Vessel List. Prepared by the Secretariat" (IOTC, Twelfth Session of the Compliance Committee, June 2008) Document IOTC-2008-CoC13[E]. It is worth noting that the number of vessels without nationality seen in the IOTC area has vastly outnumbered unregulated fishing carried out by non-members. One likely explanation behind this pattern relates to the increasing acceptance of the measures taken against non-party states.

\textsuperscript{740}2835 UNTS 409 (opened for signature 7 July 2006, entered into force 21 June 2012). Contracting parties to SIOFA are Australia, China, the Cook Islands, the European Union, France, Japan, Republic of Korea, Mauritius, the Seychelles and Thailand, and Chinese Taipei participates as a fishing entity. Under SIOFA art 8, the contracting parties adopt binding decisions on matters of substance by consensus.
A The Meaning of Cooperation

From the outset, SIOFA parties have offered two options for non-members to cooperate: accede or obtain cooperating status as means to accept the obligation to fish “by agreeing to apply” SIOFA’s measures. SIOFA is an open treaty: Article 23 acknowledges that accession is available to any state interested in fishing for its regulated stocks. In addition, SIOFA’s Rules of Procedure set up the conditions for obtaining cooperating non-party status. Applicants must offer a statement abiding by the conservation and management measures and decisions adopted under SIOFA.741 They must also pledge to “take appropriate action to ensure that its fishing activities do not diminish the effectiveness of conservation and management measures and all other decisions adopted” under SIOFA.742

SIOFA’s text embraced several developments in international fisheries law since the adoption of UNFSA, including the treatment of non-members. UNFSA’s influence can be seen in Article 17(1) and (4) SIOFA. SIOFA parties shall take measures consistent with UNFSA and international law “to deter the activities of vessels flying the flag of non-Contracting Parties which undermine the effectiveness” of the measures adopted by the Meeting of the Parties or the objectives of SIOFA.743 SIOFA parties “shall draw the attention” of non-parties to such activities and request them to “cooperate fully in the implementation” of the measures they have adopted “with a view to ensuring that such measures are applied to all fishing activities in the SIOFA Area”.744

SIOFA parties have implemented these treaty provisions along the same lines as RFMOs. Firstly, they set up a Record of Vessels, where only contracting parties and cooperating non-parties may register.745 Second, the IUU-listing process presumes any vessel not on such record is carrying out IUU activities.746 A ship flagged to a non-contracting party that has not obtained the cooperating status is not authorised to fish and becomes an IUU listing target. Once listed, the vessel would face the standard punitive actions, including prohibiting access to ports,

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741SIOFA Rules of Procedure, r17(4)(b). The drafting has not changed much since the 2015 version.
742Rule 17(4)(c).
743Article 17(1).
744Article 17(4).
landings, commercial transactions and transshipments with SIOFA parties and cooperating non-parties. The IUU list can include vessels flagged to contracting and non-contracting parties, confirming that participants to SIOFA assimilate non-member activities on the high seas to illegal fishing. Unlike other RFMOs, SIOFA parties have not agreed on possible trade sanctions against uncooperative flag states themselves.

**B Non-members’ Responses**

SIOFA parties’ claim on the meaning of cooperation has been tested only a few times. Incidents involving unregulated fishing seem limited in scope, perhaps due to SIOFAS’s short history and relatively low fishing levels. Nevertheless, the two available examples illustrate how SIOFA parties have demanded cooperation as expected in UNFSA and the IPOA-IUU. They also show that non-parties have accepted the meaning of cooperation as claimed.

SIOFA parties gathered evidence in 2018 of two Comorian vessels operating in the treaty area and asked for explanations. The Meeting of the Parties recognised that Comoros took “swift actions to begin to address the IUU listing, shown goodwill to cooperate and a clear commitment to fighting IUU by becoming a [cooperating non-party] of SIOFA”. Still, they included the vessels on the IUU list. SIOFA parties noted that Comoros’ ships “engaged in fishing in the Agreement Area and that, as they were flagged to a [non-Contracting Party], this constituted IUU fishing”. Not only did Comoros accept the outcome, but it also decided to apply for cooperating status the same year, which was granted. In other words, Comoros opted to cooperate under the terms demanded by SIOFA parties, despite being a contracting party to neither SIOFA nor UNFSA. The absence of protest and the subsequent application for the cooperating status suggest Comoros accepted the duty to cooperate with the competent regional regime.

The second example concerns China’s degree of engagement and its increasing acceptance of, or at least acquiescence in, the duty to cooperate as defined in UNFSA as demanded by SIOFA parties. Between 2015 and 2018, the relationship between SIOFA and China was unclear. As SIOFA parties gathered more information about the involvement of Chinese vessels in the  

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747 Paragraph 18.  
748 *Fifth SIOFA Parties Meeting Report* (June 2018) at 12.  
749 At 12.
SIOFA area, China also expressed its intention to cooperate. China attended as an observer to a SIOFA meeting for the first time in 2016, but it did not intervene. It did not appear in 2017, but it attended again in 2018. By 2017, it was apparent that operations of Chinese vessels had occurred, but there was no specific evidence to trigger the IUU listing process.

China intervened before SIOFA parties in 2018 for the first time. It made a constructive statement, emphasising that it “respects” the conservation and management measures adopted under SIOFA.\textsuperscript{750} China recognised that “for better managing our fleet and fulfilling international obligations, we are now exploring the possibility of becoming a Contracting Party” of SIOFA “as soon as possible”.\textsuperscript{751} It indicated a will “to make [a] concrete contribution from now on” in terms of cooperation.\textsuperscript{752} Although it is unclear what China understood by “fulfilling international obligations”, its statement did not constrain such commitments to the LOSC. This declaration might explain why SIOFA contracting parties decided not to insist on any potential allegations of IUU fishing by Chinese vessels, considering China’s language and hoping its commitment would soon materialise. China eventually acceded to SIOFA in September 2019.

\textit{V Conclusions}

CCSBT, IOTC and SIOFA have all made similar claims concerning the obligation to cooperate on the high seas, demanding a specific standard upon non-parties. These multilateral regimes have based their claims primarily on UNFSA, later supported by particular aspects of the IPOA-IUU. They have asked non-parties to discharge the duty to cooperate to manage high seas stocks by becoming a member of the RFMO or regional arrangement, agreeing to apply the management measures they have adopted, or refraining from fishing. CCSBT, IOTC and SIOFA have all demanded this degree of engagement notwithstanding non-party participation in the regional regime or UNFSA. They have backed these demands by the threat of punitive actions under the IUU notion.

\textsuperscript{750}“Statement of China as Observer to the Fifth Meeting of the Parties to SIOFA”, Fifth SIOFA Meeting, above n 748, Annex D at 30.
\textsuperscript{751}At 30.
\textsuperscript{752}At 30.
The three regimes examined in this chapter provide flexibility to discharge the duty to cooperate even though they have different requirements for new members to join. CCSBT, IOTC and SIOFA require non-parties to obtain cooperating non-party status when they do not join as full members. It involves a formal step committing by “agreeing to apply” the rules of these regimes, meaning essentially the same obligations as members. In all three regimes, obtaining the status has proven reasonably straightforward. This practice has had implications for existing treaty provisions, as Article 18 CCSBT Convention exemplifies. Under this provision, a non-party that “engages” in fishing for Southern Bluefin tuna may join CCSBT. However, in practice, a non-party would not be allowed to fish unless first granted cooperating status. Otherwise, punitive measures would follow. Something similar occurs in IOTC.

In addition to membership and offering non-cooperating status, another element defining the content of cooperation relates to how RFMOs have enforced their claims. Practice examined in this chapter shows that the IPOA-IUU and the IUU listing process, in particular, have had a decisive impact in achieving behavioural change by non-parties, persuading them to desist from fishing outside these regimes. Comoros’ reaction in SIOFA confirms that the threat of sanctions can trigger immediate cooperation in applying for cooperating non-party status. Equally, China’s response in CCSBT, including by adopting domestic legislation, highlights the effects of the IUU notion in forcing states to cooperate by refraining from fishing.\(^\text{753}\)

The iterative process that is the hallmark of custom formation is observable in the CCSBT and SIOFA contexts, though it is less noticeable in IOTC. In CCSBT and SIOFA, reactions from non-parties confirm that \textit{opinio} does not behave as a belief but rather as an expression of explicit or implicit consent by engaging states. No state applied for cooperating non-party status, delisted its vessels or stopped fishing out of an express acceptance of a belief that the cooperation demanded was a rule of customary law. Here lies the core of custom normativity: the rule claimed as such by some states performs a normative role between a state or groups of states \textit{vis-à-vis} another state. As this rule is emerging, some states know that others have complied with the standard RFMOs demanded and decide to act accordingly. Once a state

\(^{753}\)Domestic legislation can strongly indicate such conformity. Dinstein, above n 261, at 378-379.
accepts to cooperate as requested, it is unlikely to backtrack. Progressively, the manifestation of a growing acceptance or acquiescence gradually converts these facts into law.
Chapter Six: Regional Practice in the Polar Oceans

I Introduction

The extreme of the polar oceans conceals distinct maritime areas under different legal regimes. More than one regional treaty regulates high seas fishing in the Arctic, beyond waters subject to coastal state jurisdiction. This chapter briefly addresses two of them: the Joint Norwegian-Russian Fisheries Commission (JNRFC) and the Central Arctic Ocean Fisheries Agreement (CAOF). Under these regimes, there is no state practice concerning the rise of a UNFSA-like customary obligation to cooperate on the high seas. This chapter’s first part explains the reasons.

In contrast, Antarctica is a continent surrounded by water where sovereignty is disputed and claims are “frozen” by the unique legal system built upon the 1959 Antarctic Treaty. In practice, there is no exercise of coastal state jurisdiction in the maritime zones recognised by the LOSC, and Antarctic waters are treated factually as high seas. The competent organisation to regulate marine fisheries in the area is the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). Despite the pervasiveness of unregulated fishing in Antarctica for decades, CCAMLR has not asserted a UNFSA-like duty to cooperate against non-parties. The reason is that CCAMLR members have decided that the organisation is not an RFMO and that UNFSA rules do not apply in the Antarctic context. While it requests that non-members refrain from fishing by resorting to the IUU notion, it has not demanded cooperation under UNFSA standards as a legal burden against non-parties. This chapter shows how this came to happen under the influence of one member, Argentina, which eventually led to UNFSA’s rejection as a relevant treaty for CCAMLR.

754 Another RFMO regulating high seas fishing in part of the Arctic Ocean is NEAFC.
756 Established by the Convention on the Conservation of Antarctic Marine Living Resources 1329 UNTS 47 (signed 20 May 1980, entered into force 7 April 1982), referred to in this section as the 1980 Convention. CCAMLR has currently 26 members: Argentina, Australia, Belgium, Brazil, Chile, China, European Union, France, Germany, India, Italy, Japan, Republic of Korea, Namibia, Kingdom of the Netherlands, New Zealand, Norway, Poland, Russian Federation, South Africa, Spain, Sweden, Ukraine, United Kingdom, United States of America and Uruguay. Ten other states have also acceded to the 1980 Convention but are not Commission members. CCAMLR adopts all its decisions by consensus. The author was the chairperson of CCAMLR Standing Committee of Implementation and Compliance 2013–2016. All the materials cited concerning CCAMLR are in the public domain or were acceded under the permission of CCAMLR.
II The Joint Norwegian-Russian Fisheries Commission (JNRFC) and the Central Arctic Ocean Fisheries Agreement (CAOF)

Unregulated fishing was a temporary problem for the JNRFC. In the early 1990s, vessels flagged to Greenland, Faroe Islands, Iceland, Panama and other European states arrived to fish in the Barents Sea. Rather than demanding non-parties cooperate through membership or refraining from fishing, Norway and Russia negotiated directly with the flag states concerned and reached specific agreements offering access to coastal grounds provided they abstained from high seas fishing. The tactic succeeded, and Norway and Russia have not opened the JNRFC to further membership. However, this state conduct is not relevant for customary law formation because treaty commitments justify it. Besides, some of these states were also UNFSA parties. Assuming the JNRFC is an arrangement, they were bound to cooperate with the JNRFC.

The background to the CAOF Agreement is different, but the conclusion is the same. The area subject to this treaty is the high seas of the Central Arctic Ocean. Given its extreme environment and the fact that it has been ice-covered for centuries, there has never been commercial fishing in the area. The CAOF Agreement assumes that climate change would alter these conditions and prevents future commercial fishing without appropriate conservation and management measures. Hence, the word “unregulated” utilised in the CAOF Agreement’s title refers to the “other meaning” of the notion, explained in the first chapter of this work: activities

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757 Agreement between the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on Co-Operation in the Fishing Industry 983 UNTS 7 (signed 11 April 1975, entered into force 11 April 1975). Neither the 1975 bilateral treaty nor subsequent agreements set a specific area of competence, but in practice it regulates the high seas part of the Barents Sea (“the Loophole”).


759 At 276-277.


761 Irene Dahl “Maritime Delimitation in the Arctic: Implications for Fisheries Jurisdiction and Cooperation in the Barents Sea” (2015) 30 IJMCL 120 at 136. The JNRFC is not an RFMO, but whether it is an arrangement is a contested issue.

762 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (signed 3 October 2018, not yet in force). The 10 signatories are the five Arctic states, ie Canada, Denmark in respect of Greenland, Norway, Russia and the United States, plus China, Iceland, Japan, South Korea and the European Union.
that take place under no conservation and management measures, rather than fishing by non-members to an existing RFMO.\textsuperscript{763}

Accordingly, the primary outcome of the CAOF Agreement is the adoption of self-imposed limitations before authorising future commercial fisheries in the Central Arctic Ocean. Only when the parties have decided to establish a new RFMO or regional arrangement in the area and pending its entry into force may they authorise commercial fishing under interim measures, provided they also agreed on “mechanisms to ensure the sustainability of fish stocks”.\textsuperscript{764} As the CAOF Agreement is not in force and no fishing activities have occurred in the area, there is no relevant state conduct on the obligation to cooperate and non-members.

\textit{III Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)}

For over two decades, unregulated fishing was pervasive in the waters managed by CCAMLR. As a part of the discussions to confront this problem in the late 1990s, an increasingly pressing issue was whether CCAMLR should resort to or implement UNFSA provisions, including those defining the duty to cooperate for non-members. Inevitably, whether CCAMLR was an RFMO and the potential application of UNFSA became relevant questions. The majority of CCAMLR members seemed supportive of bringing UNFSA into the CCAMLR context, as other RFMOs were doing elsewhere.

However, one CCAMLR member, Argentina, opposed this view. Because CCAMLR adopts its decisions by consensus, Argentina’s position influenced CCAMLR to reject the idea that it is an RFMO. Equally, because there was no consensus in considering CCAMLR as an RFMO, there was no agreement to apply UNFSA provisions, including those concerning the duty to cooperate as among CCAMLR parties or as between CCAMLR and non-members.

As CCAMLR rejected the application of UNFSA to guide its practice, there could be no claim against non-members based on UNFSA’s duty to cooperate and thus no practice to this end.

\textsuperscript{763}As defined in para 3.3.2 IPOA-IUU.
\textsuperscript{764}Article 5(1)(c)(ii) CAOF Agreement. There are other exceptions, including the authorisation of exploratory and scientific fishing.
CCAMLR experience shows the importance of being an RFMO to eventually develop a customary obligation on the obligation to cooperate as modelled in UNFSA provisions.

**A Is CCAMLR an RFMO?**

CCAMLR has often been highlighted as an organisation like no other among those having competence over high seas stocks.\(^ {765}\) Unlike RFMOs, CCAMLR’s objective is not to manage fish stocks for their economic exploitation, except that conservation includes “rational use”.\(^ {766}\) Equally, the political and legal context under the Antarctic Treaty regime, in which CCAMLR emerges, makes it a unique organisation. It is then easy to concur with the observation that CCAMLR is “more than an RFMO”.\(^ {767}\) Yet this label does not clarify the central question of whether CCAMLR is an RFMO and its relationship with UNFSA. If CCAMLR is an RFMO, UNFSA provisions must apply among UNFSA parties to CCAMLR. If not, then UNFSA might have at best a hortatory effect, but not a legal one. Either solution would impact how states address non-members in the area and potentially develop customary law on the obligation to cooperate.

Given its competence in managing fish stocks, several scholars assume CCAMLR is an RFMO, albeit recognising some of its unique features.\(^ {768}\) Other voices dismiss the topic as a semantic discussion, arguing that CCAMLR performs equal tasks as RFMOs.\(^ {769}\) Others deny its RFMO status but avoid the implications concerning UNFSA.\(^ {770}\) As a result, it is not unusual that commentators presuppose that UNFSA applies in CCAMLR waters.\(^ {771}\)

However, CCAMLR practice has answered this question in the negative. Its members disagree on CCAMLR status as RFMO and have treated it as a multilateral organisation with

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\(^ {765}\) For similar arguments see Erik Molenaar “CCAMLR and Southern Ocean Fisheries” (2000) 16(3) IJMCL 465 at 495.

\(^ {766}\) Article II 1980 Convention.

\(^ {767}\) Molenaar “Regional Fisheries Management Organizations”, above n 321, at 92-96.

\(^ {768}\) See eg Dean Bialek “Sink or Swim: Measures under International Law for the Conservation of the Patagonian Toothfish in the Southern Ocean” (2003) 34(2) ODIL 105 at 115-116; Rachel Baird *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (Springer, Dordrecht, 2006) at 142-150.


competence over fisheries. This approach has had consequences in the development of relevant practice and *opinio* concerning the obligation to cooperate in the CCAMLR context.

**1 Initial debate on UNFSA’s application to CCAMLR**

Since its adoption in 1995, there has been no agreement about UNFSA’s role in the Antarctic context. Australia took the lead to argue that this treaty “was of direct relevance to CCAMLR”. Not everybody agreed. Without questioning UNFSA directly, Argentina declared:

> It was often forgotten that CCAMLR was agreed upon as a conservation instrument within the framework of the Antarctic Treaty System. Its membership, nature and content were clearly different from those of a fisheries commission or organisation.

Australia insisted on UNFSA’s importance for CCAMLR. In 1996, it submitted a document for discussion, putting forward the view that under Article 8(3) UNFSA, CCAMLR “is regarded as [an RFMO]”. Australia highlighted its regional focus, that its area of competence includes straddling stocks, and that many UNFSA provisions “reflected practices being implemented by CCAMLR”. There were no reactions to these interventions, and CCAMLR encouraged its members to “examine the implications” of UNFSA for CCAMLR and themselves. The Australian views seemed accepted or tolerated to the extent that, in 1998, CCAMLR encouraged members to “promote and ratify” the entry into force of UNFSA. Only Argentina recalled that “the objective of CCAMLR was [the] conservation of Antarctic marine living resources” and that “CCAMLR was not a fisheries organisation”.

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774 *Delegation of Australia “The Relevance to CCAMLR of the UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks” (Document CCAMLR-XV/12 Rev.1, 21 October 1996)* submitted to CCAMLR Fifteenth Commission Meeting (October–November 1996) at 2-3 (on file with the author).
775 At 2-3.
777 At 30.
778 At 28.
The annual meeting in 2002 saw CCAMLR moving a step further towards recognising CCAMLR as an RFMO and therefore UNFSA’s relevance. Australia submitted a paper for discussion concerning the interpretation of Article II on the objectives of the 1980 Convention. It suggested that CCAMLR is primarily “a conservation organisation” but concluded that CCAMLR’s “responsibilities for managing fisheries in the Southern Ocean give it the attributes of an RFMO within the meaning of UNFSA.”

Chile noted the “wide acceptance of Australia’s paper on the role of CCAMLR as an RFMO”. Argentina replied that not all states fishing for toothfish were parties to UNFSA and that cooperation for high seas fishing did not necessarily occur under RFMOs. However, despite this intervention, CCAMLR agreed that:

[It]s role as a conservation organisation with responsibility for managing fisheries in the Southern Ocean gives it the attributes of an RFMO within the context of the [United Nations] and its subsidiary bodies. This management role is clearly envisaged in the formulation of the Convention, and CCAMLR’s competence as an RFMO is particularly evident in relation to management of [Patagonian and Antarctic toothfish].

CCAMLR voicing that “it has the attributes” of an RFMO was still a surprising declaration, considering Argentina’s position. It seemed apparent that in the early 2000s, UNFSA was gaining traction as a relevant treaty in CCAMLR’s regime.

In the early 2000s, most members probably did not have strong views on the matter. They seemed comfortable with accepting Australia’s position and the idea of giving CCAMLR special status without departing dramatically from the RFMO notion. For example, South Korea stated in 2004 that CCAMLR is an RFMO of a “very special nature”. Considering the impacts of unregulated fishing in Antarctic waters, CCAMLR members seemed ready to develop an UNFSA-like duty to cooperate against non-parties, as RFMOs everywhere were beginning to do.

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781 CCAMLR Twenty-First Commission Meeting Report (October–November 2002) at 90.
782 At 43.
783 At 88.
784 CCAMLR Twenty-Third Commission Meeting Report (October–November 2004) at 73.
The language adopted in 2002 likely prompted Argentina to ponder the convenience of such developments for its long-term position. Argentina successfully made CCAMLR change course and prevented further recognition of UNFSA.

(a) Inapplicability of UNFSA provisions

Argentina contended that CCAMLR “substantially differs from an RFMO as defined in UNFSA, in its objectives, its membership and its functions.” RFMOs are restricted to states with a “real interest” in fishing and allocation rights, unlike CCAMLR. Argentina opposed attempts to advance cooperation with other RFMOs in neighbouring areas, arguing that their “purposes and memberships” are different from CCAMLR’s.

Argentina also argued that UNFSA rules did not apply to CCAMLR. When members discussed the possibility of assessing CCAMLR’s performance, it asked for caution when making any reference to “international instruments that are non-binding to all members of CCAMLR such as UNFSA.” Argentina added that “none of the provisions of [UNFSA] may be deemed to be binding on the States that have not expressly manifested their consent to be bound by that Agreement.” It explicitly denied any customary character to UNFSA provisions and rejected the view that they could have an exhortatory role.

Argentina elaborated on its position during the discussions held from 2006 to 2012 on the European Union’s proposal to set up a framework for trade sanctions against IUU fishing, which Argentina adamantly opposed. Argentina took advantage to question RFMOs more

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785 Argentina is one of the seven claimant states in Antarctica and a member of CCAMLR as a component of the Antarctic Treaty System. However, Argentina does not participate in the work of any RFMOs, and it has no interest in negotiating one for the waters adjacent to its Atlantic coast, one of the few areas where there is no such organisation. This position is likely linked to the long-standing dispute over the Malvinas/Falklands islands. Any negotiation for an RFMO in the South Atlantic would need to consider this territory, and the possibility of recognising “another coastal state” is anathema for Argentina. Maintaining the uniqueness of CCAMLR within the Antarctic regime, detached from any qualification as an RFMO, plays to the consistency of this position.

786 CCAMLR Twenty-Fifth Commission Meeting Report (October–November 2006) at 72-73.

787 At 73.

788 CCAMLR Twenty-Sixth Commission Meeting Report (October–November 2007) at 88, para 16.29.

789 At 92, para 17.5.

790 At 93.

791 CCAMLR Twenty-Eighth Commission Meeting Report (October–November 2009) at 63. Argentina made similar declarations in 2010 and 2011.
generally, stating they were only one means to cooperate. This view is consistent with the LOSC, but it openly undermines Articles 8 and 17 UNFSA when an RFMO is in place. Argentina also rejected the possibility of UNFSA rules applying to non-parties, expressing its "serious difficulties in accepting the imposition of sanctions" against non-party states to CCAMLR “when those States have not given their consent to abide by the provisions of the [1980] Convention”. Such an outcome would “give rise to a serious breach” of the pacta tertii, as CCAMLR has “no powers to make a legal determination of a violation of CCAMLR obligations” by a non-contracting party. Argentina insisted that RFMOs:

[D]o not have the power to prescribe regulations in relation to third-party States, nor can they assume representation of the rest of the international community nor aspire to establish measures to be applied erga omnes.

In short, for Argentina, “cooperation should not be based on [UNFSA] but on the Law of the Sea”. As CCAMLR adopts all its decisions by consensus, these objections prevented the organisation from advancing any claim based on UNFSA standards. With no common claim against non-members, there could be no custom formation process in the CCAMLR context.

(b) Argentina’s frustration with the IUU fishing notion

It was then predictable that Argentina would not feel comfortable with the IUU fishing notion either, lamenting the treatment of illegal alongside unregulated fishing:

[T]he somewhat hasty assimilation of the concepts of IUU fishing which places these three situations on an equal footing, has generated not only confusion, but also contradictory consequences. Even though FAO’s own International Plan of Action (IPOA) against IUU

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792CCAMLR Twenty-Seventh Commission Meeting Report (October–November 2008) at 94.
793At 67 and 94.
794At 68 and 70.
795CCAMLR Twenty-Eighth Commission Meeting, above n 791, at 63.
796CCAMLR Thirty-first Commission Meeting Report (October–November 2011) at 48.
798CCAMLR Twenty-Sixth Commission Meeting, above n 788, at 41. Argentina was referring to para 3.4 of the IPOA-IUU.
fishing has definitions that are partially ambiguous, a phrase at the end of its text makes it clear that not all unregulated fishing is illegal fishing.

Contrary to what many states were pursuing in other RFMOs, Argentina did not regard the IUU notion as an opportunity to treat unregulated as illegal fishing through states’ evolving practice. On the contrary, it deemed this assimilation as fundamentally erroneous. Argentina clearly understood the links between UNFSA provisions on cooperation and the inclusion of unregulated alongside illegal fishing, opposing both.

Part of this position gained sympathy from other CCAMLR members in the late 2000s. Russia, one of the states behind the efforts leading to UNFSA, highlighted “the indisputable fact that CCAMLR is not a [RFMO]”, arguing against transferring practices of such organisations as “not acceptable” in the CCAMLR context. The European Union became less belligerent on this issue, suggesting that CCAMLR was “more than an RFMO and an organisation with the main objective of conservation of marine living resources”. Recently, one CCAMLR subsidiary body affirmed that “CCAMLR is not a [RFMO]”.

The most tangible outcome of the debates presented above is the general confirmation that CCAMLR members do not consider the organisation an RFMO. More accurately: there is no consensus among them to consider CCAMLR as such. By extension, CCAMLR members that are contracting parties to UNFSA – all except Argentina and China – do not have an obligation to apply its cooperation standards as a matter of treaty law inter se or vis-à-vis non-parties. In this context, it was unlikely that CCAMLR would develop a joint claim on the duty to cooperate based on UNFSA rules, and no custom formation process could follow.

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799 At 43. Argentina “regretted” that CCAMLR “had assimilated the concept of unregulated fishing with illegal fishing”.
800 CCAMLR Twenty-Seventh Commission Meeting, above n 792, at 71.
802 Standing Committee on Administration and Finance Report (CCAMLR, Thirty-Sixth Commission Meeting Report, October 2017) at 182.
B CCAMLR’s Practice on the Obligation to Cooperate and Non-members

Assessing practice against unregulated fishing also means looking at how CCAMLR approaches membership and demands conduct from non-members. There are some differences from other RFMOs on the first issue, but none are significant. The 1980 Convention invites any state “interested in research or harvesting activities” on the marine living resources under CCAMLR competence to accede. Unlike most RFMOs, contracting parties do not automatically become Commission members. CCAMLR accepts or rejects requests for membership by consensus; so far, it has been generally open.

In contrast to many RFMOs, CCAMLR has not recognised a general cooperating non-party status. It instead allows non-parties to engage with specific conservations measures, notably the catch documentation scheme for toothfish. In practice, there is no way to fish “by agreeing to apply” CCAMLR’s rules except through membership or acceding the 1980 Convention.

CCAMLR practice against unregulated fishing is often similar to what RFMOs have done. CCAMLR has resorted extensively to the IUU notion to deal with non-party vessels. However, there is a subtle difference: no legal claim behind this conduct based on UNFSA exists, consistent with the findings that its provisions do not apply to CCAMLR because it is not an RFMO. The following subsections explain how this approach developed and why this is relevant.

1 Early approach

CCAMLR started to address unregulated catches in the mid-1990s as evidence mounted that both illegal fishing by members and non-party activities were rising in the area. CCAMLR contacted Belize, Latvia, Panama and others, conveying that their actions “undermine the effectiveness of the CCAMLR conservation approach”. Letters sent to non-parties, referring

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803 Article XIX.
804 Article VII(2)(b). The only acceding state denied membership was the Cook Islands in 2007. The reasons are not clear. As far as actions against non-parties are concerned, CCAMLR does not make distinctions between members and acceding states. All contracting parties have the same obligations.
805 CCAMLR Fifteenth Commission Meeting, above n 774, at 25. Article X(1) provides that CCAMLR “shall draw the attention” of any non-party whose nationals or vessels “affects the implementation of the objective of this Convention”.
806 At 26.
to these activities as “irregular fishing”, invited them “to take steps to ensure” that their vessels do not continue to act “in a manner inconsistent” with the 1980 Convention.  

In 1997, CCAMLR first used “unregulated” to refer to non-party activities. CCAMLR addressed them alongside “illegal” and “unreported” fishing, which later developed into the worldwide IUU acronym, and adopted its first measures against them.  

It chose straightforward language to engage non-members, not too far from Articles 8 and 17 UNFSA. Demarches emphasised that fishing “must be conducted in accordance with the provisions of the [1980] Convention”. The presence of these vessels “without any regard for CCAMLR conservation measures and providing no reports of their catches totally undermines the efforts to provide responsible conservation and fisheries management”. Again, these words followed Articles 17(4) and 33 UNFSA.

CCAMLR practice against non-party vessels continued as the problem escalated. By 2002, unregulated fishing had increased with signs of being “a highly organised form of transnational crime”, with vessels flagged to Bolivia, Equatorial Guinea, Ghana and Togo. Despite constant demarches, there were few responses. The same year CCAMLR formalised its IUU listing process targeting vessels flagged to non-parties, asking members to take specific measures against them, similar to those set up in RFMOs.

It is unsurprising that, during the early 2000s, the practice of CCAMLR against unregulated fishing moved forward similarly to RFMOs. The timing was consistent with the status of CCAMLR’s debate on the role of UNFSA generally and the IPOA-IUU specifically. CCAMLR

807“Communication Policy to non-Member States Related to Irregular Fishing with regard to CCAMLR Rules”, CCAMLR Fifteenth Commission Meeting, above n 774 at 163.
810At 151.
811CCAMLR Twenty-First Commission Meeting, above n 781, at 162.
812CCAMLR Twenty-Second Commission Meeting Report (October–November 2003) at 39. Some of them might have operated in Antarctic waters subject to national jurisdiction.
814“Conservation Measure 10-07 (2002) Scheme to Promote Compliance by non-Contracting Party Vessels with CCAMLR Conservation Measures”, CCAMLR Twenty-First Commission Meeting, above n 781, at 59. This conservation measure continued to change over the following years.
agreed in 2005 on a new standard letter to serve as the basis for diplomatic demarches against non-parties.\textsuperscript{815} It was not too different from those drafted by RFMOs at the time:\textsuperscript{816}

The international community has recognised that global cooperation is needed to prevent, deter and eliminate IUU fishing and is committed to the principle that States not party to regional fisheries management organisations are not discharged from their obligation to cooperate with those organisations. States have agreed to apply the conservation and management measures adopted by the organisation and to ensure that vessels entitled to fly their flag do not undermine such measures. [CCAMLR] would be grateful if you would ensure that in future vessels flagged to [Flag State] will not fish in the [1980] Convention Area unless they fully apply CCAMLR conservation measures. [CCAMLR] also invites [Flag State] to consider acceding to the CAMLR Convention.

CCAMLR was moving, in practice, towards an understanding of cooperation based on UNFSA and the logic underpinning the IPOA-IUU.

\textit{2 Departing from UNFSA, endorsing the IPOA-IUU}

CCAMLR slowly stalled its enthusiasm to replicate UNFSA as the primary basis for its engagement with non-parties, coinciding with Argentina’s objections. Some decisions and diplomatic demarches became ambiguous and later departed from a UNFSA.

For example, Australia refrained from pushing further on the topic. A text proposing a draft Resolution against unregulated fishing in 2005 did not mention UNFSA or anything on cooperation based on its Article 8, not even in the text’s preamble, but invoked Article 118 LOSC and the IPOA-IUU.\textsuperscript{817} This change suggests that UNFSA was becoming a source of conflict among some CCAMLR members rather than a shared, legitimate legal tool to demand cooperation. In the end, CCAMLR adopted a weaker text than previous decisions. Non-members had merely to recognise that CCAMLR conservation measures constitute “relevant standards” needed to achieve conservation and rational use of Antarctic marine living

\textsuperscript{815}“Text of a standard letter to be used in the course of diplomatic actions in respect of Non-Contracting Parties” (CCAMLR, Twentieth-Fourth Commission Meeting Report, October–November 2005) Annex 8 at 179.

\textsuperscript{816}At 181-182.

resources”. Still, CCAMLR’s demarches with non-parties did not depart dramatically from UNFSA’s core principles. CCAMLR sent formal demarches asking Togo, as the flag State of two ships sighted fishing in the CCAMLR area, to “ensure that the vessels desist from any activity which undermines the effectiveness of CCAMLR conservation measures”.

By 2012 CCAMLR’s legal claim against non-parties became less clear. CCAMLR requested that Tanzania, a non-party, “take all necessary measures to avoid diminishing the effectiveness of CCAMLR’s conservation measures resulting from this vessel’s activities”. In 2016, CCAMLR’s diplomatic demarches still focused on the IUU nature of the activities in question but showed a different approach. CCAMLR contacted Cambodia concerning the possible IUU-listing of one of its vessels and requested “any information regarding the ownership and/or activities of the vessel”. There were no demands about the need to refrain from fishing in CCAMLR waters and no specific cooperation requests similar to UNFSA. Instead, the letter vaguely “welcome[d] the cooperation of Cambodia in addressing the matter”.

A more recent example confirms this trend. In 2019, CCAMLR again contacted Togo about a vessel repeatedly involved in unregulated fishing. The letter, expressing CCAMLR’s “concern” with IUU fishing, advised that it was “seek[ing] the cooperation of states that may flag IUU-listed vessels”. CCAMLR asked Togo to “confirm or otherwise the registration of this vessel and provide any additional information” on the ship. There were no calls for cooperation under any specific terms, not least any resembling UNFSA’s standards.

CCAMLR’s regression in its assertiveness to demand cooperation under UNFSA-like terms is evident when compared, for example, with its pioneering demarches two decades earlier. For

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818 “Resolution 25/XXV Combating illegal, unreported and unregulated fishing in the Convention Area by the flag vessels of non-Contracting Parties” (CCAMLR, Twenty-Fifth Meeting Report, October–November 2006 at 28, para 1(i)).
819 Letter from Denzil Miller (CCAMLR’s Executive Secretary) to Togo’s Directeur Elevage et Peche, concerning IUU fishing activities of vessels flagged to Togo (29 June 2007) (on file with the author).
820 Letter from Andrew Wright (CCAMLR’s Executive Secretary) to Mr Didier Murcia (Tanzania’s Honorary Consul in Perth) concerning IUU fishing activities of vessels flagged to Tanzania (28 February 2012) (on file with the author).
821 Letter from Andrew Wright (CCAMLR’s Executive Secretary) to HE Sun Chanthol (Cambodia’s Minister of Public Work and Transport) concerning IUU fishing activities of vessels flagged to Cambodia (28 February 2012) (on file with the author).
822 At 2.
823 Letter from David Agnew (CCAMLR’s Executive Secretary) to Mr Alfa Lebgaza (Togo’s Direction des Affaires Maritimes) concerning IUU fishing activities of vessels flagged to Togo (14 August 2019) (on file with the author).
instance, in 1997, CCAMLR contacted non-members firmly asserting that “any harvesting and associated activities in its area of application must be conducted in accordance with the provisions of the [1980] Convention”.

In the end, CCAMLR did not base its exchanges with non-parties on UNFSA. When CCAMLR appeals to non-parties to stop fishing in Antarctic waters, it does not link this request to a legal duty. As the content of CCAMLR’s demarches changed, its practice became less consistent. That said, the difference may appear subtle at first sight. Since CCAMLR maintains and applies several measures under the IUU fishing notion, its actions deterring non-parties are not incompatible with UNFSA’s provisions.

Fishing by non-parties continued to be a problem in CCAMLR in the 2010s. Most of the flags involved provided no answer or indicated that the vessels had left their registries, only for them to come back in subsequent years. CCAMLR’s lack of success explains why some of its members resorted to direct engagement with non-parties beyond the work of CCAMLR, as the following subsection discusses. In 2019, for the first time, CCAMLR reported that “the number of IUU vessel sightings in the Convention Area had shown a steady decline over time with the last reported sighting in 2016.”

### 3 Unilateral approaches: The European Union against IUU fishing

The European Union (EU) established in the late 2000s a system against IUU fishing that includes a ban of fishery products into the EU market and other trade sanctions to uncooperative states. It works on a traffic light scheme: yellow (pre-identification warning), red (identification, listing and sanctions) and green lights (lifting of warnings or sanctions).

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825 CCAMLR Thirtieth Commission Meeting Report, above n 796, at 21.


827 Regulation 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing [2008] OJ L286/1, art 38.

827 Articles 31-33 and 35.

828 Articles 31-33 and 35.
The EU defines unregulated fishing in the same terms as the 2001 IPOA-IUU, except it does not qualify the definition by including anything akin to paragraph 3.4 of the IPOA-IUU.\(^{829}\)

Most identified states have infringed relevant RFMOs treaty provisions or their management measures. But the EU has also identified states that have violated no regional treaty provisions directly, as they are not contracting parties to any relevant fisheries agreement or UNFSA. Decision 354/01 adopted in 2012 identified several states, including Togo and Cambodia, two visible flags of convenience whose vessels often operated in Antarctic waters regulated by CCAMLR.\(^{830}\) Despite the EU being an actor supportive of RFMOs decisions against non-members based on UNFSA terms, the EU justified possible punitive measures against these states due to alleged violations of general duties imposed by the LOSC or those customary obligations recognised in the LOSC. The EU did not mention or invoke UNFSA provisions on cooperation as customary, even though the core of these uncooperative states’ conduct was disregarding the management measures adopted by RFMOs and CCAMLR.

Decision 354/01 presented ample evidence of nearly a dozen vessels flagged to Togo included in IUU lists, not only in CCAMLR but several RFMOs.\(^{831}\) Togo is not a contracting party or cooperative non-member of any RFMO and is not a party to UNFSA. The LOSC is the only relevant agreement Togo has ratified. To accuse Togo of international infringements on the high seas and lack of cooperation, Decision 354/01 attempted a broad interpretation of the LOSC provisions, including Articles 94 (flag state responsibilities), 217 (marine pollution) and the general obligation to cooperate under Articles 117-118. On this last point, the EU noted that the number of IUU vessels carrying the Togo flag highlights its “failure to fulfil its obligations under the [LOSC]”.\(^{832}\) The EU did not elaborate on how Togo infringed its duty to adopt measures for its nationals and cooperate on the high seas.

The EU also targeted Cambodia, a state that, at the time, had not ratified the LOSC, UNFSA or any RFMO treaty and whose unregulated activities included vessels operating in Antarctic waters. However, as Cambodia was not a contracting party to the LOSC, the EU resorted to

\(^{829}\)Article 2 para 4.
\(^{831}\)Paragraphs 347-349.
\(^{832}\)Paragraph 351.
international customary law obligations, considering Articles 117-118 LOSC as such.\textsuperscript{833} Again, the EU did not elaborate on how Cambodia infringed this general duty.

The reasons why the EU did not link the obligation to cooperate with UNFSA standards are unclear. Perhaps the EU did not want to put forward an argument that could have risked legal challenge or doubts, as the emerging duty to cooperate through RFMOs was not openly recognised as customary in the early 2010s. It is also conceivable that the EU avoided resorting to a standard of cooperation modelled on UNFSA to target states whose vessels were fishing in Antarctic waters, aware of the debates that rejected CCAMLR as an RFMO. Chapter Eight further discusses this point.

\textbf{IV Conclusions}

The polar regions offer disparate realities in treating unregulated fishing compared with the RFMO’s assessed in previous chapters. The situation in the Arctic is relatively simple. Under the JNRFC and the CAOF Agreement, there is no discernible state practice to observe the development of an UNFSA-like duty to cooperate into customary law.

The situation in Antarctic waters is different. CCAMLR members do not agree to regard the organisation as an RFMO and do not see themselves subject to UNFSA, which influenced subsequent state practice. On the one hand, there is nothing to object to in this outcome. As Molenaar correctly observes, the power to declare what qualifies as RFMO lies within states, whether individually or collectively.\textsuperscript{834}

However, on the other hand, there have been negative consequences in this approach. The decision on the status of CCAMLR as something different from an RFMO explains why its members have not developed a shared, consistent claim on the duty to cooperate against non-parties. In the late 1990s, CCAMLR requested non-members to join the organisation or abstain from fishing, using language resembling UNFSA. Similar language evolved until the mid-2000s when tensions with Argentina became evident. As CCAMLR moved away from UNFSA, it also seemed to have abandoned the idea that cooperation had a specific meaning.

\textsuperscript{833}Paragraph 72.
\textsuperscript{834}Molenaar “International Regulation of Central Arctic Ocean Fisheries”, above n 760, at 452.
that every state must accept. Although CCAMLR still asks non-parties to abstain from fishing and refers to them under the IUU notion, it does not seem to do it with the conviction that it is the law. No proper claim on the content of this duty, as defined in UNFSA, exists in CCAMLR practice, a conclusion consistent with the finding that its members do not regard CCAMLR as an RFMO.

It is not possible to establish a cause-effect relationship, but it is a fact that CCAMLR was, until very recently, still coping with non-member activities while the problem had decreased in all other RFMOs. The decision of the member states to treat CCAMLR as outside the RFMO network likely reduced its ability to control fishing by third states in one of the world’s last great global commons.
Chapter Seven: the Rise of a Customary Duty to Cooperate through RFMOs

I Introduction

Chapter Seven systematises the materials discussed in Chapters Three to Six to assess how the duty to cooperate is emerging as customary law. It follows the custom formation process structure by charting practice and opinio from states asserting a claim modelled on UNFSA standards and non-parties facing their requests for cooperation. Although the material evidence often overlaps and the same act, statement or omission can act as relevant practice and be indicative of opinio, each element is assessed separately.835

These materials and evidence show that the obligation to cooperate through RFMOs is emerging as custom because state conduct is general – uniform and widespread – and states are increasingly accepting or acquiescing to the putative rule in their relationships with other states. This is not to claim that the duty to cooperate as defined in UNFSA is a mature customary rule, ready to fulfil the standard of the identification test in its entirety. Because custom formation is essentially a process in constant change, certainty on the identification question is never guaranteed unless the process benefits from ample proof sustaining a general belief or an authoritative pronouncement. Nevertheless, the evidence presented confirms that the duty to cooperate as modelled in UNFSA already performs a normative role among many states.

II Asserting a New Duty to Cooperate

RFMOs transitioned in two decades from having barely any measures to facilitate cooperation with non-members or deter their activities to a robust set of rules to achieve both goals. In this evolution, RFMOs all made a similar claim concerning the obligation to cooperate on the high seas, demanding a specific standard of conduct of non-parties, replicating the content of UNFSA provisions. Neither the LOSC nor existing customary law justified this approach when RFMOs progressively asserted this meaning of cooperation starting in the late 1990s and early

835 ILC draft conclusions, above n 4, at 129.
2000s. In fact, the *pacta tertii* rule prevents this obligation from applying to non-UNFSA parties as a treaty commitment.

**A How RFMOs Developed and Consolidated their Claims**

RFMOs took essentially three generic measures to tackle uncooperative non-parties. First, they closed the record of vessels authorised to operate to non-members. Second, they facilitated cooperation by keeping the RFMO open to new members or setting up a special status to offer non-parties participation in their work. Third, by resorting to the IUU fishing notion, they adopted punitive actions targeting vessels flagged to uncooperative states and sometimes states themselves. Although there were differences in timing and effectiveness, all RFMOs achieved these at some point, with similar outcomes.

These three categories have been fundamental to closing the gap in international fisheries allowing unregulated fishing to exist. More significantly for this thesis, they represent state conduct that reconfigured the meaning of cooperation to manage high seas fish stocks.

**I Excluding uncooperative non-parties from the record of authorised vessels**

A first step in developing a general obligation to cooperate along UNFSA was the definition of the vessels authorised to fish in a regulated high seas area. As the pressure against non-members mounted in the early 2000s, most RFMOs restricted their records of vessels authorised to fish. They only allowed participation of those flagged to member states, as IOTC and ICCAT implemented in 2002 and CCSBT in 2003, while others permitted vessels flagged to cooperating non-parties to join their registries. More recently established RFMOs, such as SPRFMO in 2014 and SIOFA in 2016, immediately adopted the same policy.

These changes did not always come easily. In some cases, the members could only change long-standing rules favouring the freedom to fish gradually. IATTC demonstrates the point. When it first reformed its record of vessels in 2001, it left gaps benefitting vessels flagged to uncooperative non-members based on ad-hoc exceptions.\(^{836}\) IATTC eventually transitioned to

\(^{836}\)See Chapter Five-II.A.2.
fully closing its registry in 2011, limiting access to members and cooperating non-members’ vessels only.

Overall, closing the vessels’ records sent a solid message to non-parties: only ships flagged to members or cooperating non-members can operate on the high seas. This claim curbed the traditional freedom of fishing and aligned with UNFSA’s policy against flag states refusing to cooperate with RFMOs.

2 Facilitating cooperation

Closing the record of vessels to non-parties without providing the means to cooperate with the organisation would have been a counterproductive move. It would have risked losing legitimacy and encouraging unregulated fishing. Instead, RFMOs tried to balance the need to tackle non-members with offering options to cooperate. They materialised this goal by keeping the organisation open or setting up a special status to provide non-parties with the chance to participate in their work, thus “agreeing to apply” RFMO’s rules, as provided in UNFSA. Some RFMOs did both. Cooperating non-parties became an established feature of most RFMOs, allowing them to simultaneously demand and offer non-members the chance to abide by their terms.

On this point, two specific findings emerge. They illustrate how RFMOs and their member states progressively found a common rationale to steer their actions despite the vast differences across their constitutive treaties, membership and regional goals. First, RFMOs produced consistent claims despite differences in their approaches to facilitating cooperation. Second, RFMOs do not allow for exceptions where non-members may obtain an allocation of fishing rights without cooperating under the terms demanded by the RFMO.

(a) Assessing RFMO’s approaches to facilitate cooperation

Not all RFMOs adopted the same approach to cooperation by “agreeing to apply” their management measures. RFMOs can be grouped into three categories, showing how they have enabled cooperation and why these options are consistent with UNFSA.

One group is exemplified by NAFO, which is open to new members, as its founding treaty admits accession without specific requirements or approval by incumbents. However, NAFO
has implemented a narrower interpretation of cooperation whereby non-parties must either seek membership or refrain from fishing. This group understands that fishing “by agreeing to apply” the measures established by the competent RFMO, as provided in Article 8(3) UNFSA, means that only membership satisfies this requirement. But because they remain open organisations where new members do not need formal acceptance by the incumbents, there are no legal barriers to joining and cooperating as a member. ICCAT and GFCM are also open RFMOs, but the difference lies in that they also recognise the cooperating non-party status, further extending the possibilities for non-members to engage.

On a second group, RFMOs such as NPFC, NEAFC and WCPFC are essentially closed clubs because they reserve the prerogative of inviting new members or accepting their applications. But, equally, they recognise the non-party status, offering the choice to cooperate as long as they commit to “agreeing to apply” the RFMO’s management measures.

There is perhaps a third, intermediate category whereby the RFMO’s founding treaty establishes specific requirements for membership, such as a particular interest, participation in FAO or being coastal states. In practice, most have adopted a relatively open stance on new members, including IOTC, SPRFMO and GFCM, and to a certain extent CCSBT. RFMOs in this group, except SEAFO, also offer non-party status as an alternative means to discharge the obligation to cooperate.

In sum, RFMOs have evolved to allow non-members to cooperate either by full membership or non-party status, or both. This approach is broadly consistent with UNFSA since non-members would at least have one option to engage meaningfully, in addition to simply refraining from fishing.

(b) Decoupling cooperation from aspirations to quota allocation

In demanding cooperation under UNFSA standards, RFMOs progressively separated the issue of the meaning of the duty to cooperate from non-members’ demands for fishing rights to RFMOs.
Traditionally, RFMOs often dealt with the pressure from non-members by negotiating fishing rights allocations as an incentive to cooperate. However, as the notion of IUU fishing became accepted and RFMOs turned more assertive, RFMOs no longer considered granting fishing rights before demanding UNFSA-like cooperation. Meaningfully, state practice evolved in the opposite way: non-parties aspiring to obtain fishing rights in an RFMO-regulated area first need to cooperate by joining or “agreeing to apply” the existing rules through cooperating non-party status. The examples of El Salvador and Ecuador in WCPFC demonstrate the point as it does the Philippines’s engagement with CCSBT in 2003. RFMOs also stopped granting general “basket quotas” to non-members unless they formally cooperated in the first place. ICCAT, NAFO and NEAFC, for example, stopped this mechanism by the early 2000s.

RFMOs have moved to address fishing rights as a separate issue from fulfilling the obligation to cooperate. An allocation may occur at the time of accession or later, but compliance with the cooperation standard demanded by the RFMO is a condition to apply for it. The result is that, in dealing with non-members, RFMOs make no distinctions: non-members, whether they are recalcitrant flags of convenience or possible new entrants, must abide by the same duty to cooperate. This outcome reinforces the idea that RFMOs have consolidated their claims on the meaning of cooperation against non-parties without accepting caveats or exceptions.

3 Punitive actions

Deterrence has been fundamental in RFMOs’ design to tackle unregulated fishing and consolidate their claims. Punitive measures against non-party states had existed before UNFSA, as ICCAT’s trade scheme in the early 1990s demonstrated. Articles 17 and 33 UNFSA prompted some RFMOs to act in the late 1990s, such as CCSBT and NAFO, but targeting uncooperative flags or their vessels took time to become a widespread practice in RFMOs.

The game-changer was the IPOA-IUU. It subsumed unregulated fishing into the IUU acronym, allowing RFMOs to assimilate the non-member problem with other forms of illegal fishing.

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837 See eg Chapter Five-II.C; Serdy The New Entrants Problem, above n 113, at 89, 238–240.
838 Chapter Four-II.A and Chapter Five-II.C.
839 See eg Chapter Three-VI.C.
840 Chapter One-II.C.2.
The progressive reception and regional implementation of the IUU notion and its associated consequences were instrumental in supporting RFMOs’ claims against uncooperative flag states, defining the meaning of the duty to cooperate as asserted by RFMOs.

Equally, the widespread use of the IUU notion as the basis to engage with non-parties gave consistency and uniformity to RFMOs’ practice. As this acronym gained recognition, more states supported the treatment of non-members by reference to it. In less than a decade after the IPOA-IUU’s adoption, nearly every RFMO had resorted to listing unregulated vessels and applying specific negative consequences against them. In some cases, like NAFO and NEAFC IUU schemes, these measures aim at uncooperative non-party vessels only, as did the first ICCAT version.\textsuperscript{841}

The cross-fertilisation of state practice has noticeably supported deterrence against non-parties. For example, the list of potential actions at RFMOs’ disposal gained remarkable similarities. They included the prohibition of landings and transshipments, flagging and reflagging and trading non-member catches, and the closing of ports. As one RFMO amended its IUU listing scheme, others would replicate it and add new improvements. Not every RFMO was at first equally receptive to the IUU concept and the standard listing process. CCSBT took a decade to transition from recognising the IUU notion in 2003 to having a scheme contemplating punitive actions in 2013. Other developments have been adopted by only some RFMOs, as the IUU vessel cross-listing exemplifies. However, eventually, every single RFMO identified and targeted unregulated ships as part of their legal weaponry against non-members. In some cases, they also targeted uncooperative flag states themselves. ICCAT is a prominent example, and other RFMOs contemplate or have contemplated the possibility, including CCSBT, IOTC, IATTC and NEAFC.\textsuperscript{842}

These changes were an essential building block of RFMOs’ claims against non-members and significant steps in developing custom formation. It does not matter whether they targeted vessels, flag states, or both. RFMOs’ material actions, including diplomatic demarches and multilateral decisions and their implementation at a national level, pointed to the same meaning. They conveyed one specific message to non-parties: fishing on the high seas was no

\textsuperscript{841}Chapter Three at II.B.3(b), III.A.2 and VI.C.
\textsuperscript{842}Chapter Three-III.A.2, Chapter Four-II.A.3 and Chapter Five-III.A.
longer a free-for-all activity but must be carried out only after fulfilling a particular duty to cooperate. Uncooperative states are exposed to punitive actions, targeting their vessels and sometimes the state itself.

B Opinio among State Members to RFMOs

Opinio rarely becomes a belief in a customary rule until it has fully matured or been recognised by authoritative declarations. While custom is forming, opinio is first seen in those states asserting the rule and its legal consequences to others, present “as to the immediate future” because these states are “prepared to live” by the standard they claim.843

From the viewpoint of RFMOs and their member states, this common, initial opinio emerged when they demanded a specific meaning of cooperation acting under the explicit or implicit conviction that such duty must be the applicable law between them. As more states joined them, they faced the choice of adding to the emerging opinio or opposing RFMOs’ decisions by blocking the consensual view addressing non-members. Invariably, newcomers chose the former.

The practice against unregulated fishing highlights how this version of opinio performs among those states asserting what they believe the law should be. Three observations emerge in this regard. First, opinio has gradually developed because RFMOs have been careful: they were aware of the risks of stretching their emerging position too far. Second, although opinio is challenging to observe, it does not mean it is absent. RFMOs have avoided open discussions on their claims’ status or exact meaning in the custom formation process. Instead, the priority has been to solve the problem at hand – not to stand up for custom. Third, opinio as the broad expression of a joint claim grows when new members endorse past RFMO decisions. The following subsections discuss these findings.

1 Crafting opinio: a balance

RFMOs’ member states defined the rule they were prepared to live by following UNFSA standards. Although it now seems apparent, it did not have to be this way back in the 1990s.

843Crawford, above, n 132, at 80.
RFMOs carefully decided to redefine the meaning of cooperation instead of pursuing more aggressive pathways that would have collided with other states’ legitimate interests on the high seas. At the same time, it meant a careful balance with how RFMOs decided to depart from or align with the LOSC.

ICCAT’s discussions in 1995 illustrate the point in reaction to the United States suggesting “going a step further” by adopting a resolution prohibiting flags of convenience from fishing.\footnote{ICCAT Meeting Proceedings 1995, above n 479, at 193-194.} Several states opposed this proposal, stressing the need to focus on cooperation rather than prohibition, recognising there could be no direct imposition of ICCAT’s measures against non-parties. They were mindful of the limits of their emerging position and did not stretch it unnecessarily, avoiding exposure to legal challenges.

But, equally, RFMOs gradually rejected views that cooperation could be satisfied with anything less than membership or “agreeing to apply” their rules. Thus, for example, CCSBT refused to accept South Korea’s view that the attendance of its scientists at an annual Commission meeting could meet that standard.\footnote{Chapter Five - II.A.} Likewise, NEAFC demanded compliance with all its technical rules when considering Serbia’s application for cooperating non-party status.\footnote{Chapter Three - III.A.1.}

Shaping opinio also meant using careful language to balance the claim of new conduct as mandatory and the LOSC rights and obligations. NEAFC, for example, quoted “applicable law” codified “e.g. in the [LOSC]”, even though it was demanding a different standard.\footnote{Chapter Three - III.A.1.} The aspirations for a stricter duty to cooperate that the LOSC did not provide was not a reason to challenge the LOSC openly. Instead, crafting opinio meant using a language weighing the existing and the possible.

**2 Asserting opinio: doing more than saying**

States rarely aim at openly creating a customary rule,\footnote{Chapter Two - II.B.1.} and the case against unregulated fishing is no exception. This observation seems to counter the argument that custom is forming

\footnote{ICCAT Meeting Proceedings 1995, above n 479, at 193-194.}
in the first place. If states demanding compliance with a new obligation were sure about its legal relevance, they would demand compliance as a matter of custom. Admittedly, the conclusion that no customary rule is forming could follow, for example, from the European Union’s arguments in its 2012 unilateral decision against Togo and Cambodia, discussed in Chapter Six.\textsuperscript{849}

RFMOs have at no point explicitly claimed that they were developing or applying customary international law against non-members. There are two reasons for this. The first is strategy. Approaching non-party states by demanding compliance with a settled rule of custom would have likely failed. The \textit{Cape Flower} case suggests that even in the late 2010s, it would have risked a protracted legal argument.\textsuperscript{850} Equally, by contending that customary law was emerging, it ventured a dispute about the identification status that was unlikely to be solved within the context of RFMOs’ mechanisms. Instead, RFMOs found it more productive to deal with non-members by resorting to a tool that bypassed these risks: subsuming the non-member problem in the IUU notion. By focusing on it as part of the broader issue of illegal fishing, RFMOs minimised the chances of facing opposition.

The second reason is that RFMO members were achieving what they wanted – there was no need to raise an argument about custom identification. In the early 2010s, their position was firmly consistent: cooperate with us as we say, or punitive actions would follow. State practice began to settle as unregulated fishing decreased. The risk of a legal challenge to RFMOs’ claims still existed (Bolivia proved this in 2017), though it was likely reduced. Because non-party states were increasingly responding according to what RFMOs wanted, there was no need to risk this progress by openly claiming a customary obligation, raising the identification question. In the meantime, state practice evolved and consolidated and individual \textit{opinio} accumulated.

\textbf{3 Strengthening \textit{opinio}: endorsement by new members}

The third observation concerns the importance of consistency and validation in boosting the development of a joint claim. Chapter Two explained why, while a customary rule emerges,
*opinio* can be assessed in individual terms.\textsuperscript{851} But as Crawford stresses, *opinio* should not be seen as a purely individualised expression of will but as a collective judgment that incrementally builds as states engage in dialogue about its development.\textsuperscript{852} This iteration between those claiming the rule and those expected to comply is central to custom formation.

These interactions can also be seen in RFMOs’ internal dynamics and their joint decisions. Not every RFMO newcomer is a contracting party to UNFSA, and not every RFMO treaty provides for the treatment of non-members under UNFSA or the IPOA-IUU standards. When states join an RFMO, they also take a position on its existing measures and rules, including questioning or endorsing current practices dealing with unregulated fishing. They could block consensus on future decisions or submit proposals to amend current ones, but they often chose to support the existing framework addressing non-parties.

This accommodation is subtle but relevant because non-UNFSA parties that cooperate with one RFMO progressively do so in other RFMOs in which they want to partake. Take Ecuador, a long-standing member of IATTC. In the mid-2000s, some of its vessels appeared in the neighbouring area regulated by the WCPFC. Ecuador at first did not agree to cooperate as demanded by WCPFC members, but it soon changed its position. It eventually applied for the cooperating status despite WCPFC denying them membership, and its vessels ceased to operate on the high seas, as WCPFC requested. Later, it decided to cooperate with SPRFMO. There, Ecuador first applied for cooperating non-party status in 2014 and then acceded as a full member in 2015. As a cooperating non-party to WCPFC and a full member of IATTC and SPRFMO, Ecuador never opposed taking punitive measures against uncooperative non-parties. On the contrary, it joined the consensus. Treaty commitments do not explain this position in WCPFC or SPRFMO because Ecuador only acceded to UNFSA in 2016.

Similarly, as a founding member, Japan endorsed CCSBT and ICCAT actions concerning non-parties, including sanctions targeting uncooperative states and their vessels in the 1990s. Yet it still opposed UNFSA’s cooperation standards in other RFMOs, as illustrated by its response to NEAFC in 1999, stating that it intended to continue fishing while only adopting domestic

\textsuperscript{851}Chapter Two-II.B.
\textsuperscript{852}Crawford, above n 132, at 85.
measures to cooperate with this organisation. After ICCAT and CCSBT intensified their efforts against non-parties in the early 2000s, Japan could not maintain an inconsistent position for too long. When in 2005 SEAFO demanded that it cooperate by joining the organisation, Japan did not oppose the request, even though it was not yet a party to UNFSA, to which it acceded in 2006.

Another case confirming this finding concerns China. China has joined most RFMOs and cooperates with those where it is not a party. It has concurred with decisions against non-members in IOTC, WCPFC and SPRFMO, sometimes as a founding member. When China acceded to the Antigua Convention in 2004, its delegation in IATTC endorsed the existing measures dealing with non-members. It has done the same after ratifying SIOFA in 2019. If consistency counts, China could hardly oppose an UNFSA-like standard of cooperation in those RFMOs where it does not participate. Indeed, China is mindful of maintaining such consistency, as the exchanges with CCSBT and SIOFA in 2017 demonstrated.

Finally, opinio can also be seen in RFMOs’ practice concerning the cross-listing of IUU vessels. This mechanism implies the recognition of decisions made by other RFMOs, irrespective of ratification of UNFSA or regional agreements. The example of Cuba in the cross-listing between NAFO and NEAFC illustrated the point. Cuba, a party to the former but not the latter, did not object to the possibility of NAFO cross-listing one of its vessels from NEAFC, including the negative consequences that would carry in NAFO. Cuba endorsed NAFO decisions that could affect its potential participation in another RFMO where it is not a member or cooperating non-party.

**III Reacting to RFMOs’ Claims**

Responses by states confronted with claims asserting new rules are central for assessing custom formation. The first RFMOs’ attempts to control non-members did not meet favourable responses. In the 1990s and 2000s, many if not most flag states rejected RFMOs’ appeals. Vessels flagged to states such as Cambodia, Honduras, Georgia, Panama and Belize continued fishing on the high seas in areas regulated by RFMOs, often returning to fish despite diplomatic
demarches. They were not the only ones rejecting RFMOs’ pleas. South Korea hesitated in CCSBT, Japan refused NEAFC’s early letters asking to engage, Colombia resisted IATTC’s calls and Ecuador first ignored WCPFC’s appeals by returning to fish and offering no explanations about its actions.

However, most states – and indeed most of those just mentioned – progressively changed their position. Over three decades, their reactions moved from rejection and indifferent refusal to straightforward acceptance, increasingly conforming to the UNFSA-like standards RFMOs have demanded. These reactions are indispensable for assessing custom formation because they demonstrate the development of a “sufficiently widespread and representative, as well as consistent” practice into custom.855 The following three sections systematise states’ responses to following the requirements of the duty to cooperate as claimed by RFMOs: joining the competent RFMO, agreeing to apply its rules or refraining from fishing.

A Accepting by Joining the Organisation

The option to cooperate by joining the relevant RFMO or acceding to UNFSA is perhaps the main formalisation of the duty to cooperate, as stated in Article 8(3)-(4) UNFSA. However, ratifying a treaty does not mean much for custom formation unless specific circumstances coincide. States join RFMOs and accede to treaties for various reasons, not necessarily accepting an obligation to cooperate exclusively through these organisations. As the ICJ said in Diallo, “it could equally show the contrary”.856

Admitting this point of departure, acceding to a treaty is not entirely irrelevant for custom development. Observing treaty accession as part of a broader progression in a state’s position can suggest conformity with an emerging rule. For example, as explained earlier, a new RFMO member will have the chance to express its views by concurring or blocking consensus on annually adopted measures addressing non-members. Many countries that opposed or were reluctant to conform with the obligation to cooperate as RFMOs claimed ended up ratifying UNFSA or joining the competent RFMO and later asserting the same duty against other non-

855ILC draft conclusions, above n 4, at 135.
856Diallo, above n 257, para 90.
parties. From this perspective, an assessment that considers this background provides a more consistent view on the rise of an UNFSA-like obligation to cooperate.

Some states show a consistent path that ended in UNFSA ratification, which sometimes confirms a change of position regarding past behaviour. For example, Japan’s active involvement in CCSBT and ICCAT measures, its lack of protests against SEAFO’s request for membership and later accession to UNFSA suggest it had accepted the possibility of “living by the rule” of UNFSA provisions before ratifying this treaty. Similarly, Cambodia moved from long-standing behaviour as an uncooperative flag to engage with several RFMOs, recently notifying its decision to stop fishing on the high seas. Cambodia acceded to UNFSA in 2020, likely confirmation of this change. Ecuador also ratified UNFSA in 2016 after cooperating with WCPFC as demanded, adhering to the SPRFMO Convention and endorsing IATTC’s measures against non-parties. South Korea moved from an uncooperative and reluctant position in CCSBT to engage with IATTC in 2003–2004 before acceding to UNFSA in 2008. Vietnam’s accession to UNFSA in 2018 should not come as a surprise after its interventions at WCPFC meetings in 2009 and 2010.

**B Accepting by Agreeing to Apply RFMOs’ Rules**

Many states have responded to RFMOs’ requests and threats of punitive measures by committing to comply with their rules. The standard instrument for RFMOs to formalise this acceptance is cooperating non-party status. RFMOs contemplating this mechanism – all except NAFO and SEAFO – require applicants to make a statement accordingly.

Applications occur in a specific context and with a particular RFMO. They do not automatically mean recognising the duty to cooperate with that particular RFMO or RFMOs in general. However, practice suggests this *opinio* can exist in some states. One such example is the Philippines. It has applied for, obtained and renewed non-party status in several RFMOs since the early 2000s, including ICCAT, IOTC and CCSBT. In 2000, the Philippines told IOTC that it was “strongly committed to the principles and obligations embodied in [the LOSC] and the associated [UNFSA]”. In 2004, it made the same statement before ICCAT, extending its

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857 See eg Chapter Three at II.B.4 and VI.D.
858 “Opening statement of the Philippines”, IOTC Fifth Session, above 735, at 35.
understanding to “other oceans where Philippine-flagged fishing vessels are operating”. The Philippines acceded to UNFSA in 2014.

Putting aside examples like this one, applications for cooperating status typically confirm a state’s commitment with one specific RFMOs. The following subsections appraise such conducts, mindful of the limits imposed by Article 35 VCLT. It is essential to separate custom-generating practice from applications and statements made under treaty-like commitments under this provision, such as under the “collateral agreement” that involves the non-party status once granted. Therefore, the reviewed examples concern first applications or subsequent exchanges that imply acceptance beyond the specific RFMO.

I Cooperating non-party status

A large group of states reacted positively to RFMO pressure. They decided to cooperate by seeking non-party status after bearing punitive measures, or their threat, under the IUU fishing list or trade sanctions schemes. Some of them were flags of convenience that historically showed little or no engagement with RFMOs. Panama is one example, before acceding to UNFSA in 2008. When in 2006 NEAFC resorted to blacklisting and other pressure means, Panama acknowledged its will to “comply with all the decisions adopted” by NEAFC and applied sanctions against its vessels. Even though NEAFC rejected its application for cooperating non-party status, Panama still refrained from fishing. Similarly, Belize accepted appeals for cooperation from NAFO, ICCAT, CCSBT and IATTC, and engaged formally with them in the early and mid-2000s.

Likewise, Comoros applied for non-party status demanded by SIOFA parties after they blacklisted two of its vessels, despite Comoros being a contracting party to neither SIOFA nor UNFSA. Saint Kitts and Nevis first decided to deregister a vessel that NEAFC accused of being involved in unregulated activities in 2008 and later applied for non-party status in 2011. Saint

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859“Opening statement by the Philippines”, ICCAT 14th Special Meeting, above 522, at 81.
860See Chapter Two-IV.A.1.
861Chapter Three-III.B.1.
Kitts and Nevis stated that it respected NEAFC rules and those of other international bodies as its “policy and commitment”. 862 It acceded to UNFSA in 2018.

As the practice expanded and non-members progressively accepted the obligation to cooperate with RFMOs, other states new to high seas fishing acknowledged that the rules were changing. For example, El Salvador requested non-party status in WCPFC in 2007 and ICCAT in 2011, where its fleet was not operating, and both RFMOs initially rejected the applications. El Salvador later insisted on its application, meanwhile refraining from fishing, accepting WCPFC and ICCAT’s demands.863

The same example reveals how the non-party status application process triggers a change towards individual opinio. El Salvador based its first attempt to obtain WCPFC’s non-party status on Articles 87(e), 116 and 118 LOSC and the right to fish on the high seas. 864 Despite El Salvador’s protests, WCPFC denied the application. El Salvador applied again in 2008, but this time it did not mention the LOSC: instead, it stated that the right to fish must be exercised “in complete compliance” with international law.865 As a non-party to either UNFSA or WCPFC, such a statement suggests El Salvador assented to UNFSA-like standards beyond the specific RFMO.

Other examples point to similar conclusions. In 2008, Ecuador sought cooperating status in WCPFC and eventually consented to its conditions, including refraining from high seas fishing.866 Ecuador complied despite WCPFC rejecting its membership requests many times in the 2010s. Serbia is another case: it applied for non-party status to NEAFC in 2013, which the organisation denied. Still, Serbia did not protest and did not pursue fishing activities, accepting – or at least acquiescing in – NEAFC’s position.867 Vietnam requested non-party status to WCPFC, underscoring its application “as further evidence of Vietnam’s preparedness to comply with its obligations under international fisheries law”. 868

862 Letter from St Kitts and Nevis, above n 412.
863 Chapter Four-III.A.
865 “Statement by El Salvador”, WCPFC 5th Regular Session, above n 593, at 90.
866 See discussion in Chapter Four-III.A.
867 Chapter Three-III.A.1.
This increasing individual *opinio* materialised through the non-party status is not overshadowed by isolated applications with a different outcome. Moldova made clear to GFCM that it wanted the status to fulfil bilateral treaty commitments with the European Union. Moldova’s application also reminded GFCM members of its rights under the LOSC, and there was no hint at recognising a general duty to cooperate with RFMOs.\(^{869}\) However, this type of declaration is the exception, not the rule.

2 **Agreeing to apply RFMOs’ rules by other means**

Cooperating non-party status is not the only instrument to formalise acceptance with the obligation to cooperate in UNFSA-like terms. RFMOs have sometimes accepted other declarations as sufficient guarantee of this commitment. For example, in 2001, Saint Vincent and the Grenadines agreed to cooperate with ICCAT by ensuring “full compliance with ICCAT management measures” and passing domestic legislation to keep its fleet within “accepted international agreements, particularly ICCAT requirements”\(^{870}\). Saint Vincent and the Grenadines recognised it was “fully committed to its obligations under international law and ICCAT” as the competent RFMO in the area.\(^{871}\) It acceded to the ICCAT Convention later in 2006, and ICCAT seemed to have no objections in the meantime. Cuba has behaved similarly in ICCAT since 2002, accepting it must cooperate with this organisation if it wants to fish.\(^{872}\)

Other states moved from non-cooperation to hesitant engagement and then full participation. There is no formal cooperating status in SEAFO, but Japan in 2005 agreed to cooperate by “implementing” the conservation and management measures “agreed by the Commission”.\(^{873}\) Yet again, these situations are exceptional. RFMOs primarily formalise cooperation, other than membership, through cooperating non-party status.

C **Accepting by Refraining from Fishing**

The effectiveness of IUU schemes and other sanctions to compel non-parties to cooperate is apparent. Many states have reversed their initial, uncooperative positions, while others,

\(^{869}\)GFCM Intersessional Compliance Committee, above n 456, at 10.  
\(^{871}\)At 99.  
\(^{872}\)See Chapter Three—VI.B.  
\(^{873}\)SEAFO 2\(^{nd}\) Annual Commission Meeting, above n 428, at 5.
sometimes new to high seas fishing, ultimately engaged with RFMOs as requested. The following subsections discuss the meaning of these demonstrations of practice and *opinio*.

**1 Refraining from fishing and related acts**

Responses such as delisting vessels or applying domestic sanctions are significant for customary law formation because they indicate acceptance of the obligation to cooperate with RFMOs by refraining from fishing.

There are many illustrative cases. After receiving trade sanctions, Honduras decided to engage in 2000 by “strictly complying” with the ICCAT Convention and cancelling or suspending the authorisations it granted for fishing vessels.\(^{874}\) Similarly, once Belize cooperated with NAFO, CCSBT and ICCAT, including attending meetings and responding to diplomatic demarches, its ships stopped fishing for the resources and in the regions regulated by these organisations. From 2016 to 2018, Cambodia notified several RFMOs about its decision not to authorise its vessels to fish on the high seas, including NAFO, GFCM, CCSBT and ICCAT, stating Cambodia’s intention to refrain from fishing.

Several states immediately delisted their vessels when RFMOs included them in IUU lists or threatened to do so. After NAFO and NEAFC demanded a response, in 2013 Ghana removed a ship from its registry “on account of its previous IUU fishing history”.\(^{875}\) Guinea acted similarly in 2016.\(^{876}\) As these flags states did not authorise other vessels to return to the North Atlantic, the act of delisting reinforces the implicit acceptance of the obligation to cooperate by refraining from fishing. Other non-members accepted the outcome of the IUU listing process, including the prohibition to engage in unregulated activities as long as their vessels are listed, as the exchanges between Angola and SPRFMO in 2020 highlighted.

Other flag states reacted by applying domestic sanctions against their vessels involved in unregulated fishing. China, a non-member to CCSBT and a non-UNFSA party, nevertheless imposed fines and suspended licences against national operators in 2017 after CCSBT

\(^{874}\)“Statement by the Observer of Honduras Regarding Measures Taken to Comply with ICCAT Measures”, above n 494, at 268.

\(^{875}\)Letter from Ghana’s Fisheries Director to NAFO Executive Secretary, above n 366.

\(^{876}\)Letter from Guinea’s Ministry of Fisheries to NAFO Executive Secretary, above n 367.
requests.\(^{877}\) Moreover, in informing CCSBT that its legislation prohibits Chinese ships from catching Southern Bluefin tuna, China accepted that fishing outside RFMOs rules is impermissible. China’s responses in other RFMOs are consistent. In a similar example in 2017, China notified that its fleet was prohibited from fishing in the GFCM area of competence.\(^{878}\)

### 2 Qualified silence as a reaction: acquiescence

Examples of flag states remaining silent when requested to cooperate by RFMOs were common. When their vessels returned to fish on the high seas, this implied a rejection of the RFMOs’ demands, as Panama, Belize and many others frequently did in the early 2000s. Back then, this conduct indicated these states were committed to the freedom of high seas fishing beyond the LOSC.

By contrast, the practice of states reacting by saying nothing, but their vessels not returning to fish, does not amount to ignoring RFMOs’ demands. As Lauterpacht observed, “the duty to protest, and the relevance of the failure to protest, are especially conspicuous in the international sphere” because litigating disputed rights through compulsory jurisdiction is not always available.\(^{879}\) When state practice satisfies the requirements for acquiescence, the consequences are relevant to custom formation.

Tacit acceptance is different from silence, and acquiescence is not, strictly speaking, representative of consent.\(^{880}\) Instead, acquiescence gives a particular legal meaning to silence under certain conditions.\(^{881}\) Acquiescence operates through the conjunction of three legal elements: a prolonged silence, a knowledge of the facts and a duty to speak.\(^{882}\) The “duty to speak” arises from RFMOs’ exchanges with non-parties. Consider the example of Cuba and the cross-listing between NAFO and NEAFC; Georgia’s unresponsiveness to ICCAT; and Togo’s in NAFO and NEAFC.\(^{883}\) In these cases, RFMOs pressed non-members to accept

\(^{877}\) Chapter Five-II.D.
\(^{878}\) GFCM Compliance Committee Intersessional Meeting, above n 456, at 10.
\(^{879}\) Hersch Lauterpacht “Sovereignty over Submarine Areas” (1950) 27 BYIL 376 at 396.
\(^{880}\) Chapter Two-II.B.2(b).
\(^{881}\) ILC draft conclusions, above n 4, at 142.
\(^{882}\) Kolb Good Faith in International Law, above n 183, at 91-92.
\(^{883}\) Chapter Three at II.B.3(c), III.B.1 and VII.
conditions unfavourable to their interests.\textsuperscript{884} These states were in a position to react.\textsuperscript{885} Therefore, there are legal consequences in this deliberate inaction.\textsuperscript{886} The timing element is relative, but the longer the silence, the more settled the legal consequences of their acquiescence.

\textit{D Protest and Opposition: Are there Persistent Objectors?}

Protests and objections are critical in assessing custom development.\textsuperscript{887} Only by observing any objections in quantity, content and through time, can we judge increasing acceptance of an emerging rule. There is plenty of early evidence of states widely ignoring, opposing or expressing reluctance to calls for accepting an UNFSA-like obligation to cooperate. But equally, most of those states opposing in the past have reversed their positions. Overall – and this is a crucial point – objections and protests have decreased or have not been consistent enough to thwart the custom formation process.

Opposition continues to be relevant. Depending on the circumstances, a state might become a persistent objector once the obligation to cooperate through RFMOs achieves a consolidated or openly recognised customary status. The question to address now is whether any candidate may potentially opt out of such duty. The ILC has indicated that objection to the emerging rule must be clearly expressed during the formation process, be known to other states and be maintained persistently.\textsuperscript{888}

There seem to be four states whose behaviour does not suggest full acceptance or reliable acquiescence with RFMOs’ demands to cooperate exclusively through RFMOs. Three are generally regarded as flags of convenience: Moldova, Georgia and Bolivia. However, although they often opposed or openly ignored some RFMOs’ calls, they were also ambiguous at times. When requesting cooperating non-party status to GFCM in 2017, Moldova made it clear it was committed to the freedom to fish rather than the need to cooperate with RFMOs. Still, when

\textsuperscript{884}ILC draft conclusions, above n 4, at 142.
\textsuperscript{885}At 142.
\textsuperscript{886}At 133.
\textsuperscript{887}Chapter Two-II.B.2(C).
\textsuperscript{888}ILC draft conclusions, above n 4, at 152-154.
SPRFMO denied Moldova’s request to remove one of its vessels from the IUU list in 2019, Moldova did not protest.\(^{889}\)

Georgia often ignored RFMO’s diplomatic demarches. However, its acquiescence to NAFO’s calls, its exchanges with NEAFC in 2006 and its application for cooperating non-party in ICCAT are far from suggesting an objection “maintained persistently”. The Bolivian protest against SEAFO’s decision on the *Cape Flower* was upfront but inconsistent with its previous conduct, such as obtaining cooperating status in ICCAT and IATTC or imposing sanctions against one of its vessels accused of IUU fishing. The lack of consistency in these states’ conduct makes them unlikely candidates for persistent objector status.

Argentina is a different case. It has consistently seen RFMOs as only “one means” of high seas cooperation and objected to CCAMLR’s and RFMOs’ measures reaching non-parties in any way unless states “consent to abide”.\(^{890}\) Argentina has rejected UNFSA provisions applying to non-parties and denied they could become customary law.\(^{891}\) It recently intervened at the General Assembly’s adoption of its annual resolution on Sustainable Fisheries to affirm that:\(^{892}\)

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\text{[N]o recommendations in the resolution can be interpreted as signifying that the provisions contained in the [UNFSA] and related instruments can be considered to be obligatory by those States that have yet to explicitly express their consent to being bound under this Agreement.}
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Comparing its interventions in CCAMLR nearly 15 or 20 years ago with this one in 2019, there can be hardly any doubt about Argentina’s consistency. However, Argentina’s persistent objection has not prevented developments in state practice and the emergence of widespread acceptance or *opinio*. In reality, it would be difficult for one state to change the course of customary evolution, and it is more difficult for Argentina as it does not partake in the forums shaping relevant practice. Argentina is not involved with any RFMO, not even as an observer, and there is no evidence of its vessels operating in high seas RFMO-regulated areas either.

\(^{889}\)SPRFMO 6\(^\text{th}\) Compliance and Technical Committee Report, above n 631, at 11.
\(^{890}\)CCAMLR Twenty-Seventh Commission Meeting, above n 792, at 67 and 94.
\(^{891}\)See Chapter Six-III.A.2.
\(^{892}\)Official records of the 43\(^\text{rd}\) plenary meeting UN Doc A/74/PV.43 (10 December 2019) Agenda Item 74 at 25.
The consequences of the lack of participation are seen in Argentina’s disconnection from what RFMOs have achieved. In the same statement in 2019, it declared:

> Argentina reaffirms that existing international law does not empower [RFMOs] or their member States to adopt measures of any kind against vessels whose flag States are not members of those organizations or party to those arrangements, or have not explicitly consented to such measures being applicable to vessels flying their flags. Nothing in the General Assembly’s resolutions, including those we just adopted, can be interpreted as running contrary to this conclusion.

Argentina contradicts precisely what all RFMOs have achieved over the last three decades. Apart from some specific states protesting – like Bolivia against SEAFO – no state has opposed RFMOs’ actions complaining that “existing international law does not empower” them. Argentina would have had the chance to influence state practice from within had it decided to participate in the RFMOs where it has interests, presumably those in the Atlantic. However, with no fleet involved in high seas fishing in regulated areas and no participation in any RFMO, the chances of Argentina influencing the conduct of these organisations were very low.

### IV Conclusions

Before the mid-2000s, nearly all RFMOs were subject, to some extent, to the harmful effects of unregulated fishing. Today’s picture is drastically different: the problem has practically disappeared. There is no question that the practice of states through RFMOs and the performance of these organisations succeeded in eliminating the high seas fisheries problem this thesis set out to observe.

RFMOs and their member states developed and consolidated a common position by progressively adopting three sets of decisions. They restricted their record of vessels authorised to operate, meaning that only members or cooperating non-parties may have the chance to access fishery resources. They also facilitated cooperation through non-party status or keeping the organisations open to new members. RFMOs also took punitive measures against vessels flagged to uncooperative states and sometimes flag states themselves through the IUU fishing

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893 At 25-26.
894 Admittedly, the challenge has mutated in some places. Stateless vessels fishing in RFMO areas have always existed, but they are now common occurrences in, for example, NPFC and IOTC. However, as explained at the outset, this is a genuinely different problem whose causes and legal implications this thesis does not address.
notion. These decisions delineated the standard of cooperation RFMOs wanted others to conform with, an essential step in customary formation. From this point onwards, their claims moved gradually to reach consistency and uniformity and soon expanded to the generality of RFMOs.

*Opinio* developed among those states claiming a new content for the duty to cooperate on the high seas. This common *opinio* gradually emerged when states acted under the explicit or implicit conviction that such content is the applicable law to confront non-members. *Opinio* is embedded in those external acts showing this conviction, particularly RFMOs’ material decisions. As it expanded, the assertion that non-members must behave in a certain way to fulfil the cooperation standard expected grew in confidence. Equally, as more states joined the competent RFMO, they validated the calls against non-members, strengthening the notion that cooperation must occur through RFMOs when such an organisation exists.

Non-members’ reactions have changed from rejection and indifference to acknowledgement and compliance. After years of inconsistent results, primarily observed in recalcitrant flags of convenience, uncooperative non-members gradually began in the mid-2000s to participate in the competent RFMO or stopped fishing. The reasons for this changed behaviour varied. Many states cooperated out of diplomatic pressure and by no means because they believed there was a rule in place. Some did it because they shared the new obligation’s rationale or policy. The reasons are not necessarily relevant as the custom formation process gains traction. As the practice grew and expectations changed, many states joined as members or cooperating non-members, sometimes acknowledging or implicitly endorsing the binding status of the UNFSA-like duty to cooperate. Some decided to cease their free-riding conduct, while others at some point believed it was an obligation, as the Philippines’ declarations exemplified.895

After decades of state conduct evolution, consistency and uniformity in non-members’ reactions are apparent. The obligation to cooperate as modelled in UNFSA provisions is emerging as custom because state conduct is general – uniform and widespread – and the generality of states is increasingly accepting or acquiescing to it in their relationships with other

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895“Opening statement of the Philippines”, IOTC Fifth Session, above n 735, at 35.
states. Those observing the duty to cooperate through RFMOs include nearly all states engaged in high seas activities in the past two or three decades.

This finding does not mean that the evidence provided allows identifying this obligation as a mature or consolidated custom in the sense of a belief that it has become so. This step means judging the degree of acceptance of this rule *qua* custom, likely the last stage in the formation process, contributing to formalising its identification. There is abundant evidence that states behave according to this obligation and accept it, but no practice shows that states invoke it explicitly as customary. This type of evidence would sustain a general *belief* in the existence of the rule, a high standard which has not yet become clear – even though there is evidence of individual belief. But even if this is not the case, there is enough proof that the duty to cooperate as modelled in UNFSA performs a normative role among many states, determining state behaviour. At the same time, it continues to grow as custom, in parallel to treaty commitments. The following chapter discusses this point in the context of assessing the lessons from the case against unregulated fishing to understanding customary law formation.
Chapter Eight: Understanding the Custom Formation Process

I Introduction

Chapter Eight reviews the implications from the case against unregulated fishing to understanding the formation of customary international law. It does it in four thematic parts and one for conclusions. The first part discusses the justifications for emerging custom’s normativity and legal effects, assessing recurrent critiques against customary law from this perspective. It also reviews participation in the development of the obligation to cooperate, countering another criticism: the sidelining of developing states in constructing general rules that directly affect them.

The second part addresses the implications of the practice assessed in this study to explain how treaties influence custom development. It discusses the relationship between the emerging customary duty to cooperate and the LOSC, attempting a reconciliation based on the possibility of normative balance between the two different versions of the obligation to cooperate.

The third part applies the findings of previous chapters to discuss the dual contribution of RFMOs as international organisations to custom development as catalysts of state practice and legal subjects. The fourth part reviews the relationship between non-binding instruments and custom formation by focusing on the IPOA-IUU as a central instrument in the evolution of state practice. The chapter ends with a set of conclusions.

II The Formation Process: On normativity and Participation

Robert Jennings rightly observed that “customary law properly so-called is based upon the passage of a long period of time, and is accordingly both slow to develop and difficult to change”.896 The evolution of the obligation to cooperate to manage high seas fishery resources is no exception. From the early versions of this duty that limited the Grotian-like freedom of fishing through UNCLOS I and III, decades of subsequent developments show there is nothing here resembling “instant custom”.

The passage of time underpins the idea of a process where the iteration between states asserting a new rule and those responding to them can occur. The case against unregulated fishing reveals two defining features of customary evolution and the legal implications arising from this process. The first concerns how custom progressively binds, or more specifically, how emerging custom create legal effects when the obligation to cooperate has not fully matured. The second feature concerns the states that make customary law – in this case, those actively engaging in its development. The case against unregulated fishing disputes a long-standing critique against custom: the lack of participation of developing states in its formation.

A The Normativity of Emerging Customary Law

State practice, no matter how general, is not enough to generate custom. Without opinio, practice does not become law. But opinio only becomes the belief that a general rule exists – that conduct is required or permissible by law – at the very end of the formation process. Legal theory struggles to explain custom’s normativity from the moment a group of states assert that a new standard must be followed to the endpoint when opinio becomes that general belief. Mendelson observes: 897

The problem is not so much the initiation of a customary rule or the reasons for obeying it when it is mature. Rather, the difficulty is with the intermediate stage. After a limited number of important actors have initiated a practice (whether by originating it, imitating it, or ‘genuinely acquiescing’), what effects the transformation (which undoubtedly occurs) from particular law to general law binding even the passive bystander? (...) And yet, at this intermediate stage, it may well be premature to speak of an opinio juris.

But if we cannot understand custom when forming, “we cannot understand it at all”. 898 Customary law does not create legal effects only after being identified because its normativity cannot appear in a day. The reliance on opinio as a static element based on belief, typical of the logic of identification, is at the basis of the confusion surrounding custom as a source of rights and obligations.

898 Crawford, above n 132, at 82.
This gap is visible in the enquiries concerning the status of the obligation to cooperate through RFMOs. Scholars often deny the customary character of this duty because “there is no opinio”, as state practice has not been performed “in a belief” that it is a legal obligation.899 In 2009, for example, a scholar opined that “[w]hile broader state practice by non-RFMO members may show a willingness to cooperate with RFMOs, there is little evidence that this cooperation resulted from a sense of legal obligation.”900 The European Commission’s decision discussed in Chapter Six is probably an example of this view.901

1 How emerging custom creates legal effects

The case against unregulated fishing confirms the doctrinal approach introduced in Chapter Two, showing that the dynamics of the formation process justify custom’s normativity.902 As the dialectical exchanges of claim and response unfold, normativity surfaces from states’ individual opinio expressed through their acceptance or qualified silence to other states’ demands, coupled with the legitimate expectation that such opinio raises. The unilateral, subjective position through the lens of good faith gives way to “collective reliance and expectations of a plurality of subjects”.903 These ideas justify the putative rule’s opposability, even if it is not yet formally recognised as custom. Normativity, as custom itself, emerges gradually among states engaging with RFMOs.

The evidence presented in this study highlights how these relations take form. Recall, for example, the Philippines’ position in the decade after the early and mid-2000s. There is consistent evidence of the Philippines accepting the need to cooperate with ICCAT, IOTC and CCSBT, including a statement acknowledging its commitment “to the principles and obligations embodied in [the LOSC] and the associated [UNFSA]”.904 The expectations in good faith of these RFMOs’ members would have prevented the Philippines from backtracking to exercise an unfettered right to fish on the high seas. Had the question been raised, the duty to cooperate as modelled in UNFSA would have been opposable to the Philippines. But in general, RFMOs’ practice demonstrates that once states have accepted the obligation to

899See eg Hayashi “Regional Fisheries Management Organisations and Non-Members”, above n 45, at 761.
900Guilfoyle, above n 324, at 162.
901European Commission, above n 830.
902See discussion in Chapter Two-II.B.
903Kolb Good Faith in International Law, above n 183, at 83.
904“Opening statement of the Philippines”, IOTC Fifth Session, above n 735, at 35.
cooperate, they do not change this position. The Philippines acceded to UNFSA in 2014, confirming this observation.

A similar conclusion applies to other states that progressively developed consistent acceptance patterns, such as El Salvador, Ecuador, Cambodia, St Kitts and Nevis, Cuba and others. For example, in the mid-2010s, Ecuador would have found it difficult to claim that the freedom of the high seas allowed it to fish against WCPFC’s measures after it had lodged several applications for cooperating non-party status. On the contrary, Ecuador stopped operating in this area, despite being a non-member and a non-UNFSA party. These exchanges and Ecuador’s participation in IATTC and later SPRFMO would have made it implausible to claim a right to fish outside cooperation with other RFMOs. Again, Ecuador’s accession to UNFSA in 2016 seemed only to sanction its existing legal position.

Another example is China. Its participation in most RFMOs supporting measures against non-party states, the context of its recent accession to SIOFA and its diplomatic correspondence with GFCM emphasise its legal position to cooperate through RFMOs. Significantly, engagement with CCSBT by punishing its citizens and vessels for fishing CCSBT-regulated resources confirmed its commitments to the duty to cooperate with RFMOs beyond treaty obligations. Its consistent practice and individual opinio have raised reasonable expectations in those RFMOs where China cooperates as a non-member – GFCM and CCSBT – that it would maintain that conduct in the future. It is highly improbable that China would change course, but if that happens, it would be realistic to conclude that its previous behaviour has rendered the duty to cooperate opposable.

These cases are illustrative and perhaps uncomplicated because repeated or specific state behaviour indicates a solid position towards the obligation to cooperate through RFMOs. However, things are not always straightforward in ascertaining the legal effect of emerging custom. The question arises as to whether one instance of acceptance – or acquiescence, for that matter – is enough to project that consent to similar situations in other RFMOs. The International Law Association, for example, concluded that “acceptance is sufficient condition
to bind”. But it is unclear whether the decision to cooperate with one RFMO makes it always plausible that opposability arises, let alone direct binding effects.

These are the cases, for example, of Serbia’s position in NEAFC and Comoros’ in SIOFA. These two states accepted the requests for cooperation and behaved accordingly after that. Would any future fishing in NEAFC or SIOFA waters by Serbia or Comoros be denied by the opposability of its previous cooperative conduct vis-à-vis states members to these RFMOs? The answer is likely to be positive. But it is uncertain whether it would be the same if that dispute arose in other RFMOs. Such cases would warrant a fully fledged discussion on the status of the duty to cooperate under customary law, beyond the logic of opposability.

That said, this prospect is unlikely. States tend to maintain a consistent position across the RFMOs they participate in or get involved with. Georgia and Moldova are among the few exceptions, and the only state abruptly reversing previous cooperative behaviour with RFMOs has been Bolivia, in its exchanges with SEAFO in 2017–2018. States rarely change their established views on such matters unless good reasons exist to do so. Where time has passed without seeing any substantive motives for such change, it is plausible that those that have accepted RFMO’s demands once – such as Comoros or Serbia – will continue behaving accordingly. The relationship between states’ opinio and custom normativity is thus of interdependence. When individual opinio aggregates over time – the same state repeating the practice, more states also conforming to it – it builds legitimate expectations of future compliant behaviour. Thus, the process reaches objective results and justifies legal outcomes based on this accumulation and opposability in good faith.

2 Balancing indeterminacy

This account of normativity also counters the long-standing critique of custom’s indeterminacy. Because customary law emerges gradually, there is no exact tipping point at which it is possible to say that “custom exists”. Unless custom benefits from judicial identification or other authoritative confirmation, the “state of flux” will remain indefinitely. Ambiguity is exacerbated by the fact that, in the present case, no RFMO or state has openly

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906Chapter Four-B.
907Chapter Two-III.B.
argued that a particular behaviour is expected or justified because the obligation to cooperate through RFMOs is emerging or has become customary.

Yet, as the case against unregulated fishing demonstrates, the reality of custom formation is that states rarely pursue a custom development project. RFMOs wanted to solve the concrete problem of free-riders undermining their management measures. The push for normative change has been more pragmatic than based on legal principles. The currency has often been a weaker or convoluted argumentation by claiming states, as the diplomatic exchanges between NEAFC and Serbia in 2013 and SEAFO and Bolivia in 2017–2018 illustrate.908 NEAFC and SEAFO demanded that Serbia and Bolivia comply with a specific form of cooperation modelled in UNFSA as a matter of law, even though the supporting arguments were not entirely consistent, mixing references to the LOSC with the obligation to cooperate exclusively through RFMOs. The legal grounds behind their requests were not always clear-cut.

These observations may call for a critique on custom formation as a vague and somewhat undesirable process. But if we take the view that indeterminacy is, to a large extent, inevitable in customary law formation then we can observe custom’s progressive acceptance and see that it creates legal effects even in the absence of certainty or formality.

In the present case, one consideration looks at the objective element of customary law. The duty to cooperate is one of those “operational rules” that allocates jurisdiction in the international system, coordinates states and chooses one option among many to regulate state conduct.909 Unlike those imperatives with a highly accepted value-oriented content – eg the prohibitions of genocide and torture – operational rules’ indeterminacy should be measured mainly against whether states behave accordingly. Observance of the duty to cooperate through RFMOs has increased widely. Have all states acted following a belief that it has become customary? Not necessarily, so the rule is still emerging. Does this mean it cannot perform a normative role? No, it certainly can: the obligation to cooperate is emerging as custom precisely because it affects and influences the behaviour of many states. As practice hardens, the high

908 Chapter Four, sections III.A.1 and IV.B.
threshold requiring a general belief does not prevent the emerging rule from performing normative effects.

A second consideration looks at the subjective element. States might not be outspoken about the obligation to cooperate through RFMOs becoming customary, but it is worth watching whether they justify conduct against the emerging rule in other ways. Over the last decade, no flag state accused of unregulated activities under the IUU fishing notion except Bolivia has tried to explain itself by arguing it is not a party to the relevant treaty or that only the LOSC standards apply. No state has justified itself by offering an alternative meaning for cooperation either, as some states did in the past. Instead, they often add to the voices condemning IUU fishing, even if that implies accepting their non-party activities fall within this notion. From the late-2000s onwards, non-party flag states accused of IUU fishing increasingly responded by preventing their vessels from returning to fish, delisting them or applying punitive measures to them.

These observations matter because states do not need to be convinced about the customary status of the putative rule while engaged in the claim-and-response interaction of the formation process; they do not need to believe that such a rule applies to themselves as a matter of law either. States follow the path that may lead to general custom for various reasons. It matters that they show behaviour with legal content or consequences, such as responding positively to the threat of sanctions, as the many examples in this study confirm. This element of legality – or an emerging sense of legality – certainly plays a role, as it shows reasonableness or legitimacy in the putative rule. Some states cooperate with RFMOs because it is a good policy or because there might be adverse legal or factual consequences for not doing so, including the label of “IUU flag state” or trade sanctions. Some states engage because, otherwise, they could not aspire to participate in the fishery. Others think the rule has already become law and behave accordingly, even if they do not mention it. There are political reasons mixed with all the above.

But it is also relevant to pay attention to signs of retreating indeterminacy. The reasons for action coalesce with legal meaning when we see the “intersubjective phenomenon that the transgressor feels compelled to justify (or deny) the violation because of mutually shared

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910 See eg South Korea and its exchanges with CCSBT, Chapter Five-II.A.
expectations that such behaviour is normally unacceptable".\textsuperscript{911} This occurrence “marks the potential transition of a practice from being understood as residing solely in a domain of power politics (…) to a realm where communitarian expectations of obligation are increasingly accorded prominence”\textsuperscript{912} The present study has provided several instances suggesting such a transition. For example, China’s engagement with CCSBT leaves less room for ambiguity. It reveals an advanced stage in custom formation, as the “emerging international legal rule induces states to engage in practices [a state] would not otherwise perform”.\textsuperscript{913}

\textbf{B On the Participation of the Global South}

A standard and sometimes justified critique against customary international law attacks its Western and colonialist origins and “deep democratic deficit”.\textsuperscript{914} Historically, custom has been created by excluding “the overwhelming majority of humanity” under Western states’ colonial or semi-colonial rule.\textsuperscript{915} In this view, the legitimacy deficit of customary international law is so evident that it cannot possibly aspire to have universal validity.\textsuperscript{916}

One goal of this study has been to test whether the emergence of a general obligation to cooperate based on UNFSA standards has ignored or instead adequately considered developing states’ interests. Accepting the historical structural inequity in customary law creation, state conduct observed in this study offers a more nuanced narrative of the forces behind the contemporary process of custom formation. The implications are relevant for the legitimacy of the emerging rule and how the formation process unfolds.

Admittedly, the first RFMOs to act against unregulated fishing were those with developed states among their leading members, as ICCAT, NAFO, NEAFC and CCSBT illustrated in the late 1990s. Equally, most of the punitive measures these RFMOs adopted were aimed at flags of convenience that happened to be developing countries. This initial picture suggested another

\begin{flushright}
\textsuperscript{912}At 114.
\textsuperscript{913}At 114.
\textsuperscript{914}Anghie, above n 227, at 52-56; Chimni, above n 227, at 22.
\textsuperscript{915}Onuma Yasuaki \textit{A Transcivilizational Perspective on International Law} (Martinus Nijhoff, Leiden and The Hague, 2010) at 212-213.
\textsuperscript{916}At 213.
\end{flushright}
group of like-minded, wealthy states concerted to exclude developing ones from their legitimate aspirations, in this case, fishing on the high seas.

Yet state practice reveals a very different evolution. NAFO, NEAFC, CCSBT and ICCAT were the first organisations to act because they genuinely faced the harmful consequences of unregulated fishing. Back in the mid-1990s, there were not many RFMOs around in the first place. But as more RFMOs emerged, developing states joined, and their participation and interests became central in these organisations’ decisions. Developing countries have been pivotal actors in IATTC, IOTC, SEAFO, SIOFA, SPRFMO and especially WCPFC, transforming them into something far from developed-country clubs.

Understanding developing states’ positions on the obligation to cooperate with RFMOs demands analysis from two perspectives: states claiming this rule and those asked to behave according to it. These are not totally separate categories. In the dialectical nature of customary law formation, states that cooperate with an RFMO often become part of those supporting the emerging rule and claiming it upon others. Still, the distinction is helpful to appreciate the role of developing nations in progressing relevant practice and its acceptance by others.

\textit{I Developing states contributing to claims against non-members}

The first formal document proposing measures to tackle unregulated fishing through mandatory cooperation with RFMOs was prepared mainly by developing coastal states in 1991, two years before the UNFSA Conference.\footnote{Discussion in Chapter One-II.A.4.} It should then not come as a surprise that developing states have supported the UNFSA approach to cooperation. IOTC, where most members are developing countries, pioneered punitive measures by referring to the IPOA-IUU.\footnote{“Resolution 02/04 on establishing a list of vessels presumed to have carried out illegal, unregulated and unreported fishing in the IOTC Area”, above n 723.} WCPFC members, mainly Pacific Island states, quickly regarded their organisation as relatively closed but allowed non-parties to participate through cooperating non-party status. They had no hesitation in treating unregulated vessels under the IUU notion. Although its coastal members did not support UNFSA in many respects, IATTC eventually adopted the same set of measures to tackle unregulated fishing as other RFMOs. It sometimes meant targeting vessels flagged to
fellow Latin American states – exchanges with Colombia and Bolivia proved this – but IATTC’s position held. Similar examples exist in SIOFA and SPRFMO.

There are reasons why many developing nations supported, often enthusiastically, a more robust version of the obligation to cooperate. The explanation lies in two related factors. The first is strategic convenience: developing coastal states understood that it played in their interest. A strengthened multilateral regime to manage the adjacent high seas supports their own EEZ management measures for straddling and highly migratory resources. Equally, targeting unregulated fishing implied that uncooperative states would not access fishery resources on the high seas until they cooperate under RFMOs’ terms. Participating in such decision-making sits well with coastal states, as they already control who fish in their waters. For them, therefore, there was more to gain by cooperating in those regimes. There have been exceptions – the Philippines acceding to CCSBT in 2004 and some coastal states in ICCAT suggest reluctance – but generally developing coastal nations saw the long-term benefit in cooperating and steering RFMOs from within.

The second reason for developing states’ supporting measures against uncooperative non-members is the logic of consensus in decision-making. Developing nations wanted to achieve robust regimes while having a say in RFMOs’ choices. The fact that RFMOs have in practice adopted all decisions confronting uncooperative non-members by consensus proved crucial. Protected by this logic, developing coastal nations ensured that RFMOs did not move against their interests. They took the lead in WCPFC and have been pivotal in IOTC, IATTC and SPRFMO, to name a few, often from the outset.

An illustrative example was the 2010 IUU discussion on the Georgian-flagged vessel Neptune in WCPFC. The most robust interventions supporting the IUU-listing of this non-UNFSA and non-WCPFC party ship came from small Pacific Island states. In contrast, distant water nations doubted the step’s legality, concurring with the WCPFC legal adviser’s concerns. However, the Pacific Islands influenced the organisation to exclude uncooperative nations, including developing ones, irrespective of treaty participation. WCPFC’s later exchanges with

\[919\text{See discussion in Chapter Four-III.B.}\]
Ecuador and El Salvador on their cooperating status applications also confirmed this approach.\(^{920}\)

This observation is not trivial because it demonstrates how common *opinio* grows. Consensus-based decisions seem today taken for granted in RFMO practice, but it did not have to be this way. States had other options. Voting is not uncommon in some RFMOs to settle differences, even if members later object to decisions they dislike.\(^{921}\) Yet all RFMOs, without exception, have adopted their decisions regarding the duty to cooperate by consensus.

2 Developing states cooperate with RFMOs

Developing states’ support for a narrower version of the obligation to cooperate might seem counterintuitive. Historically, many developing nations have performed as flags of convenience that profited from the LOSC vague understanding of cooperation. Why would they abandon such benefits? Yet the evidence in this study overwhelmingly confirms that most developing states that have acted as flags of convenience have gradually accepted or at least acquiesced in RFMOs’ demands. The answer to this behavioural change is not apparent because, except in a few cases, they rarely expand on their reasons to engage with RFMOs or refrain from fishing.

The answer likely lies in a mixture of two factors. The first one was the growing legitimacy of the duty to cooperate among Global South nations. As explained above, developing countries led several RFMOs to adopt stricter measures against non-parties, making it harder for outsiders to question them on the grounds of unfairness or lack of means to comply with them. This was especially the case among states in the same region. It was awkward for Bolivia to question IATTC’s actions when most neighbours were part of the club or abided by its rules. Comoros was aware that SIOFA’s parties included Mauritius and Seychelles before engaging with them. Complaining that the need to cooperate with WCPFC was unfair or illegitimate was also an unlikely argument for Ecuador and El Salvador when such demands came from small Pacific Island states. Admittedly, Bolivia challenged SEAFO’s demands even though Angola, Namibia and South Africa are among its members. However, Bolivia argued many things but

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\(^{920}\) Chapter Four-III.A.  
\(^{921}\) See eg NEAFC Convention, arts 3(9), 12-13.
did not claim that the request to join the organisation or stop fishing was unfair or illegitimate. It simply asserted that it was against the LOSC.922

By the mid-2000s, cooperation with RFMOs was growing way beyond contracting parties to UNFSA. The IPOA-IUU, adopted by consensus under the umbrella of the FAO, changed the game in 2001. It brought in the second decisive factor: the threat of punitive measures and the “name and shame” effect of the IUU lists undoubtedly influenced state behaviour. Blacklisting and its multilateral consequences were boosted by unilateral schemes in prominent market destinations, such as the European Union.923 There is a strong correlation between the diplomatic pressure under these schemes and, for example, Cambodia’s decision to refrain from high seas fishing.

There has been no “democratic deficit” or imposition against the third world in the rise of the obligation to cooperate through RFMOs. Developing states have had a say in both directions to support and eventually oppose the emerging rule. Every diplomatic exchange from an RFMO and notification on the possible IUU listing of a non-party vessel meant a chance to reject the narrower meaning of the duty to cooperate that some states claimed. More importantly, developing states themselves have often pursued it as a legitimate goal to benefit themselves, as the practice of several RFMOs confirms.

**III Custom and Treaties**

For all its importance, the relationship between customary law and treaties and precisely how they give rise to custom is still unclear. The general understanding, including the recent ILC work, is somehow rudimentary: they are independent sources, and there is no presumption of treaty provisions becoming customary.924 The material causes, driving forces and interactions allowing treaties to become or influence custom development remain underexplored.

The case against unregulated fishing offers a complex picture of how treaties give rise to customary law. The following sections in this part discuss four issues arising from the practice addressed in previous chapters. The first contextualises the progression and convergence of

922Chapter Three-IV.B.
923Regulation 1005/2008, above n 827.
924ILC draft conclusions, above n 4, at 143-146.
custom towards treaties against the historical evolution of the obligation to cooperate. The second illustrates how treaty provisions can also serve or support the custom formation process. The third section discusses the relationship between the emerging customary rule and the LOSC. The fourth section explains why the “specially affected” states notion has proven unhelpful to assess custom development. Overall, they provide a meaningful case to grasp the customary evolution of the treaty-based duty to cooperate and project some of these findings to understand this relationship more generally.

**A Custom Gravitating towards Treaties**

Ever since the territorial sea became accepted among nations, customary law regulated the taking of high seas fishery resources under a simple rule: freedom of fishing. The idea that states must restrict themselves by cooperating to manage high seas living resources was generally alien to the international system until the ILC discussed the topic in the early 1950s. Partially influenced by the ILC’s work, Article 1(2) of the 1958 Fisheries Convention adopted a first version of the duty to cooperate and complex mechanisms to achieve multilaterally agreed measures on the high seas. This treaty did not enjoy broad participation, and even if potentially relevant, those mechanisms were never applied. Still, it was the first move to restrain a long-standing and radical rule, a struggle that would become central for the law of the sea in the decades to come.

The 1958 Fisheries Convention had limited impact, but it did have some pull. In the years that followed its adoption and entry into force, customary law gravitated towards Article 1(2). When the ICJ recognised in 1974 that the “due regard” obligation had replaced absolute freedom of fishing, it did not explicitly endorse a customary duty to cooperate. But the two standards were close. The due regard notion meant joint cooperative actions to “examine together (...) the measures required” for the “conservation and development” of high seas resources. The ICJ’s pronouncement meant that the belief that high seas freedom of fishing was no longer unfettered became accepted. As the 1958 Fisheries Convention has fewer than 40 states parties, custom provided a basic legal framework for high seas fisheries management.

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925 *Fisheries Jurisdiction*, para 72.
926 Paragraph 72.
Customary law seemed to lean to Article 1(2) of the 1958 Convention to provide what the treaty alone could not.

Neither treaty law nor custom progressed much during the UNCLOS III decade, as far as cooperation for managing high seas fishery resources is concerned. The LOSC added a few changes to the existing legal framework, endorsing a general duty to cooperate and expanding it to manage specific resources, taking the EEZ regime into account. Predictably, these provisions have been regarded as reflecting customary law. Custom soon again gravitated towards a general multilateral treaty, now in the form of the LOSC.

In short, when the LOSC entered into force, the relationship between treaty and customary law on the freedom of the high seas fishing and its limits seemed reasonably straightforward. Treaties led the way into defining those limits by recognising an ambiguous obligation to cooperate. Customary law, sooner or later, settled in line with those general treaties, endorsing their standards as the commonly accepted baseline to manage high seas fishery resources.

This relationship became complex after UNFSA. The reason was the rise of RFMOs in the late 1990s and early 2000s. When the LOSC entered into force and UNFSA was adopted, there were already several RFMOs in place, but their practice was undeveloped. States cooperating under them did not intend or have the means to further limit the freedom of fishing through demanding a more substantive obligation to cooperate against non-members. Freedom of fishing, vaguely limited, was still the general rule of the day. But as frustration with the LOSC provisions on high seas resources grew, UNFSA was the mechanism intended to revitalise regional cooperation and fill the LOSC’s gaps. States responded accordingly by establishing new RFMOs and invigorating existing ones.

The interactions between treaty and practice giving rise to custom changed because they were defined by the interdependence between UNFSA, regional treaties and state practice vis-à-vis non-members. In the process of custom formation, this relation became symbiotic. Treaty provisions and state conduct beyond treaty provisions – the one giving rise to customary law – needed and mutually benefitted each other. UNFSA influenced regional treaties, and the

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927To the extent there is “a presumption” in this regard. See eg Treves “UNCLOS at Thirty”, above n 50, at 51.
practice of some RFMOs motivated other organisations to the extent that eventually regional treaties changed too.

Notably, the signs were visible before 2001, when the IPOA-IUU was adopted and UNFSA entered into force. By then, CCSBT, IOTC, IATTC, NAFO and NEAFC had all developed measures attuned with UNFSA, even though most of their members had not signed this agreement and their constituent instruments often lacked UNFSA-like prerogatives. These organisations’ practice was not about implementing UNFSA as a matter of treaty commitments. Instead, UNFSA influenced and, to some extent, justified their expanding practice. Likewise, new regional treaties soon replicated UNFSA provisions, as the WCPFC and SEAFO Conventions demonstrate.928 As cross-fertilisation among RFMOs also grew, in return, their practice inspired new regional treaty commitments elsewhere. The reception of the IUU notion and specific provisions requesting RFMOs members to achieve certain outcomes illustrate the impact of previous regional practice in drafting RFMO’s treaties.929 The constitutive conventions of SPRFMO, NPFC and the SIOFA, and the amendments to the NAFO Convention in 2007 exemplify this virtuous cycle.

This narrative highlights how the relationship between UNFSA, regional treaties and emerging customary law has been a non-linear and symbiotic one of mutual assistance and influence. Significantly, it is not radically different from that before UNFSA. Since its early inception in the 1950s, the obligation to cooperate to manage high seas fishery resources has lived closely parallel lives in treaties and custom. Its content has changed from UNCLOS I and III to the hardened UNFSA. As treaties have transformed this duty’s content, customary law has followed. Custom now again gravitates towards a general treaty, this time UNFSA. The duty to cooperate as modelled in UNFSA has in this respect followed the same path of its less sophisticated versions in the 1958 Fisheries Convention and the LOSC.

B Influencing Custom: Treaty Drafting Matters

Treaty provisions may become or give rise to customary law. But they can also influence its development by driving state practice towards specific goals that reinforce or support the
custom formation process. The point does not relate to the “norm-creating character” of Articles 8(3)-(4) and 17(1)-(2) UNFSA, whose content is the rule emerging as customary, but the way in which specific treaty provisions trigger or steer state practice underpinning the transition of this rule into custom. It is here, again, that the focus on the formation process offers a richer and more accurate picture of how treaties and customary law interact than through the narrow lens of custom identification.

Articles 17(4) and 33(2) UNFSA illustrate the point. The legal design of these two provisions prompted states to seize their ambiguity and build a substantive practice that blurred the line between UNFSA parties and non-parties. In Article 17(4), lack of cooperation with RFMOs is a violation of UNFSA – an obligation that applies to UNFSA parties – whereas, under Article 33(2), UNFSA aims at tackling the conduct of non-parties even though its provisions are not opposable to them. Yet their language is remarkably similar. Both demand that states “shall take measures” to “deter the activities” of those that “undermine the effective implementation” or “undermine the effectiveness” of RFMOs’ rules.

States members to RFMOs saw the opportunity in the ambiguity of the expression “undermine”. Undermining RFMO measures is not necessarily the same as illegal fishing, but they are close. RFMOs quickly moved to assimilate them, thus justifying punitive actions against any uncooperative non-member, UNFSA party or not. As their extensive conduct showed, RFMOs merged and projected the content of Articles 17(4) and 33(2) against non-parties in one simple presumption: fishing by any uncooperative non-member, notwithstanding whether it had ratified UNFSA, “undermined” their measures.

The practice of NAFO demonstrates the point. Its 1997 Scheme was the first to adopt this presumption, even before UNFSA entered into force. After that, its diplomatic demarches to non-NAFO members did not distinguish whether they were UNFSA parties. The content of Articles 17(4) and 33(2) UNFSA replaced the references to the LOSC while not explicitly invoking UNFSA as the source of such drafting. Other RFMOs also took advantage of Articles 17(4) and 33(2) UNFSA, including NEAFC, IOTC and IATTC.

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930 See discussion in Chapter One-II.A.4.
931 “Scheme to Promote Compliance”, above n 343.
932 See Chapter Three-II.B.2–4.
Subsequent regional treaty provisions adopted the same presumption. For example, Article 32 WCPFC Convention and Article 22(3) SEAFO Convention demand actions against non-members undermining their Commissions’ management measures. The SIOFA text is similar.\textsuperscript{933} None of them mention whether they are targeting non-members that ratified UNFSA or not. They are carefully ambiguous, indirectly justifying future parties’ measures against any non-party state.

In the early stages, this presumption did not carry many consequences against non-members. NAFO and other RFMOs’ early schemes were not very sophisticated. But the mechanism remained and later served as a basis to apply punitive actions under the IUU notion. Again, NAFO exemplifies this practice. Its demarches in the mid-2000s maintained the original presumption and further linked it to the consequences under the IUU notion.\textsuperscript{934} It sometimes openly referred to unregulated fishing as illegal.\textsuperscript{935} As a result of this approach in NAFO and other RFMOs, it became clear that fishing by non-members undermines regional multilateral measures, and punitive actions would follow against “IUU fishing”.

These bottom-up mechanics illustrate how the drafting of specific treaty provisions supported custom development by strengthening RFMOs’ claims. They are intrinsic to the formation process and demonstrate the intention of states claiming a new rule and how and why non-members react or accept those actions influenced by such provisions. Significantly, they explain how customary international law can emerge in a legal ecosystem regulated by treaties, such as high seas fisheries. These dynamics are only appreciated by closely looking at states’ interactions over time, and therefore hardly visible to the “snapshot picture” of the identification test.

\textbf{C The Emerging Duty to Cooperate and the LOSC}

Since they involve different cooperation standards, there is a potential conflict between the emerging custom based on UNFSA and the LOSC, and between the same rule and the traditional customary law based on the LOSC. Because the two sources maintain a separate

\textsuperscript{933}See Chapter Five-IV.A.
\textsuperscript{934}See Chapter Three-II.B.3.
\textsuperscript{935}Letter from NAFO to Dominica, above n 354.
existence even if the content of the norm is the same, this relationship raises two different questions.

The first one is the tension between existing and emerging custom. There should be no significant qualms in holding that, if a conflict arises, subsequent customary law will prevail as it modifies the incumbent rule. New practices emerge replacing the old ones, as they are accepted or acquiesced by others. The rising obligation to cooperate through RFMOs is replacing the old meaning of cooperation as far as customary norms are concerned. Therefore, the new rule would eventually apply between non-parties to the LOSC and UNFSA. Potential conflicts must be solved based on the actual conduct of states, emerging *opinio* and all appropriate circumstances between the relevant parties.

The second question concerns the complex connection between treaty law and subsequent custom. The ILC accepted that “the relationship between a particular treaty and a particular customary norm will always remain to be decided on a case-by-case basis”. There is no simple answer to square Articles 63-64 and 118-119 LOSC against an emerging customary rule modelled on UNFSA standards. The following subsections postulate one based on conciliation rather than conflict.

1 Conflict-oriented approach?

The impulse to grant preeminence to treaties over customary law is understandable. But, although states often enter into treaty commitments precisely to alter existing custom, it does not follow that treaty law always prevails. There is no hierarchy between these primary sources, and it is wrong to assume one. Treaties can opt out of custom, and custom can emerge to modify existing treaties, interpret them differently or bring about the desuetude or *disapplication* of their provisions. This is no different with the LOSC, which “can be modified and

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936 *Nicaragua*, para 178.
supplemented through general international law processes such as treaty interpretation and subsequent rules of customary law."\(^{939}\)

Whether an UNFSA-like customary rule may amend or supplement the LOSC much depends on the interpreter’s views on the relationship between the two treaties.\(^{940}\) For some, UNFSA “blurs the line between interpretation and tacit modification”, but its provisions on cooperation point “more in the direction of a tacit modification”.\(^{941}\) If that is the case, then the emerging UNFSA-like customary duty to cooperate would conflict with Articles 63-64 and 118-119 LOSC. Typical legal techniques deploy “different relational links” to solve these conflicts: status, specificity and temporality.\(^{942}\) Indeed, some scholars believe that the best tool to solve disputes between treaty and custom is that of *lex posteriori*: when custom arises, it can modify treaties to the extent of the desuetude of the conventional norm.\(^{943}\) Another option would be to find guidance in Article 311 LOSC, which confers special status to the LOSC and limits subsequent treaties’ scope. If the LOSC prevails over inconsistent treaties, this may justify rejecting any following rule contradicting the LOSC, including customary ones.

However, it is not as simple. First, Article 311 LOSC is a rule for treaty interpretation, not solving issues with emerging customary law. It would be wrong to suggest that the LOSC has a higher position in a hierarchy than custom by invoking Article 311. Second, saying that the LOSC provisions on cooperation are in desuetude or superseded does not seem attuned to how states behave. Although they accept and now act according to a rule modelled in UNFSA standards, the practice presented in this thesis does not support the conclusion that the LOSC provisions are tacitly derogated or no longer invoked. States have behaved carefully to avoid undermining the LOSC, as illustrated by NEAFC’s demarches demanding cooperation from

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\(^{940}\) See also Chapter One.II.4.

\(^{941}\) Irina Buga *Modification of Treaties by Subsequent Practice* (OUP, Oxford, 2018) at 330.


\(^{943}\) Rebecca Crootof “Change without Consent: How Customary International Law Modifies Treaties” (2016) 41 Yale J Int L 237 at 284-288. See also Nancy Kontou *The Termination and Revision of Treaties in the Light of New Customary International Law* (Clarendon Press, Oxford, 1994) at 146-147. She argues this criterion can only apply to the extent that the two rules are incompatible.
Serbia still quoting the LOSC, even though the content of its requests was in UNFSA’s terms.  

2 Balancing the emerging duty to cooperate and the LOSC

There is a better way, and that is to avoid a frontal clash between treaty and emerging custom. Techniques presupposing conflicts of norms should be a last resort – instead, it is helpful to prioritise consistency in the system through approaches seeking to accommodate competing rules. Thirlway compellingly calls for an effort to achieve a dialogue attempting to find “convergences between rival norms” and “applying the traditional criteria of conflict-regulation only when absolutely necessary”. Such convergences “are defined by their objectives as being directed to coherence, co-ordination and adaptation, and complementarity”. This is a less comprehensive exercise than resorting to the principle of systemic integration, which aims to apply and interpret treaties as immersed in the international law system without resorting to the radical solutions of norm-confrontation techniques. Nevertheless, they share the overarching goal of harmonising seemingly conflicting rules to safeguard consistency in normative relations.

Seeking this balance seems, at first sight, a daunting task in the present case. There will always be inconsistencies between the emerging custom modelled in UNFSA and the LOSC because the former essentially goes further. But the central question is whether they are wholly incompatible to the extent that the only possible answer is applying the radical solutions of conflict-solving techniques based on time, speciality or hierarchy. The answer is no: as the practice of RFMOs and their members’ states repeatedly confirmed, the emerging customary rule modelled in UNFSA, like UNFSA itself, is not against the LOSC. Three reasons suggest that UNFSA, and the emerging custom reflecting its provisions, are not wholly incompatible with the LOSC but instead remarkably apt to engage in the balance Thirlway describes, as they fittingly align with the goals he proposes.

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944 See Chapter Three-III.A.1.
945 Thirlway, above n 291, at 135.
946 At 135.
947 McLachlan, above n 942, at 280.
First, the customary rule modelled in UNFSA has benefitted from UNFSA’s goals and aspirations. Its drafters wanted to balance the need to fill gaps in the LOSC without undermining its content. They tried to accommodate the “constitutional” importance of the LOSC and the need for long-term flexibility. They were aware of Article 311(2) and the unique character of the LOSC: this is why Article 4 UNFSA protects states’ rights under the LOSC and accepts that its provisions “shall be interpreted and applied” in a manner consistent with it. This consistency is a high standard for a subsequent treaty, and therefore for any practice against non-members modelled on it. Together, these provisions safeguard the integrity of the LOSC while allowing UNFSA to fulfil its role. Article 4 has operated, in practice, as a presumption that UNFSA is compatible with the LOSC. Bolivia’s contentions against SEAFO’s demands, and Argentina’s statements in CCAMLR, are perhaps the only recent allegations implicitly suggesting the opposite.\footnote{See Chapters Three-IV.B and Six-III.A.2.}

Critically, the two treaties have coexisted successfully for over two decades. As RFMOs’ practice confirms, the same applies to the emerging customary version of UNFSA’s duty to cooperate. There has been no open clash but rather a gradual acceptance of the new standard of cooperation. Since UNFSA aimed at solving issues that the LOSC could not, it is, therefore, “placed in the context of the broader development of international law, and thus rather seems to result in a greater degree of coherence”.\footnote{Buga \textit{Modification of Treaties}, above n 941, at 331.} State practice modelled in UNFSA, particularly concerning non-members to RFMOs, has been seen as part of this overarching goal.

Second, the emerging customary rule has benefitted from the legitimacy of UNFSA’s provisions on cooperation. The success of state practice against unregulated fishing may look unexpected at first sight: UNFSA is a complex treaty that addresses many substantive issues, of which some are still contentious. Its boarding and inspection procedures, for example, are still disliked by several states.\footnote{Molenaar “Non-Participation in the Fish Stocks Agreement”, above n 535, at 206.} Moreover, with 91 contracting parties, UNFSA is far from enjoying universal participation, and important actors in international fisheries have not ratified it. However, as demonstrated in this study, this view is deceptive. Again, the “snapshot picture” of the identification test cannot explain why UNFSA’s approach to high seas cooperation has succeeded in emerging as customary law. As Chapter One recalled, the roots of this success...
can be traced to its inception at the UNFSA Conference. UNFSA’s provisions on cooperation were among the first to be adopted, enjoying the consensus of all the participants, developed and developing states alike.\textsuperscript{951} Since then, they have enjoyed broad support and very little opposition.

Third, balance and reconciliation are possible because states have acknowledged that the differences between LOSC and UNFSA are not radical. In Thirlway’s proposition, it is conceivable to say there are convergences between these potentially rival norms. A duty to cooperate through RFMOs is a step beyond the LOSC (which is silent on the issue of RFMOs and non-members), while at the same time it means continuing the path of curbing the freedom of fishing, however imperfectly this was attempted in the LOSC. In this understanding, UNFSA rules do not oppose the LOSC but take its provisions further to achieve what they could not: ending unregulated fishing.

These two elements – UNFSA’s ratio legis and context – and the idea of UNFSA as a continuation of the LOSC explain why the transition from the old customary law based on the LOSC to the emerging one reflecting UNFSA standards has not been traumatic. There have been tensions as should be expected with any normative change within a horizontal and decentralised system like international law. However, RFMOs and their member states advanced change without openly denying the normative value of the LOSC. The process has been gradual and subtle, as Chapter Seven concluded, partly because the normative pull of the LOSC remains alive. There are no signs of the LOSC provisions falling into desuetude. Instead, there is an implicit understanding that the LOSC normative appeal must be conciliated with the emerging rule.

This accommodation with the LOSC materialises in the emerging custom’s influence in understanding the LOSC itself. Two decades ago, the means for cooperation did not have a unique understanding, as RFMO’s practice showed.\textsuperscript{952} Today, the international consensus on the need to cooperate through RFMOs means that no state claims that the LOSC allows or justifies a different interpretation. A general expectation is settling that if a non-member state

\textsuperscript{951}Chapter One.II.A.4.
\textsuperscript{952}See eg exchanges between South Korea and CCSBT. CCSBT Resumed Third Annual Meeting, above n 656, at 9.
has not engaged with other states grouped under an RFMO, they fail to cooperate under the LOSC standards themselves. Except for Bolivia and perhaps Argentina, each in different contexts, no other state has recently argued that the LOSC justifies free-riders.

This is not to say that the emerging custom has had the effect of authoritatively interpreting the LOSC in a particular manner. Accepting this point, the practice presented in this study suggests that expectations of what the LOSC entails today are nevertheless changing. Many RFMOs are relatively open, and nearly all have advanced avenues for cooperation other than membership. There is no reason to avoid cooperating through the competent RFMO to discharge obligations under Articles 63-64 and 118-119 LOSC. This conclusion is illustrated, for example, in that non-members seeking to satisfy fishing quota aspirations now invariably cooperate with RFMOs as demanded because they accept that refusing such cooperation is no longer justified.

The expectations’ effect has not transformed or interpreted the meaning of the LOSC, at least not yet. However, this should not be ruled out in the future. Mendelson suggests that “social pressure is exerted to make free-riders pay by inducing them to either accept the treaty or at least to conform their conduct to it.”\(^9\) This explains the “magnetic force of some normative treaties – their tendency to give rise to similar conduct even on the part of non-parties”.\(^10\) This is what UNFSA rules have brought about, supported by general practice and growing opinio. The pressure exerted by the emerging customary standard, precisely because of its widespread acceptance, is reaching the understanding of the LOSC itself. Whether the same “magnetic force” may be transposed to the point that the emerging customary rule can unquestionably interpret Articles 63-64 and 118-119 LOSC remains to be seen.

**D Specially Affected States**

Chapter Two introduced the notion of specially affected states in custom formation theory.\(^11\) While expressing doubts about the doctrine, it concluded that it was still relevant for methodological reasons. For these purposes, it defined two groups of specially affected states among those that fish or want to fish in the high seas. First, those grouped in RFMOs that demand cooperation from others, and second, those that benefitted from the historical gaps in

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\(^10\)At 314.
\(^11\)Chapter Two-IV.A.2.
the legal framework of the high seas, which were often flags of convenience states. These two groups share a central interest in the content of the duty to cooperate and the meaning of high seas freedom, but for opposing reasons.

The first group has been the one pushing to change the meaning of cooperation. Chapter Seven systematised how these states successfully asserted a consistent and widespread practice. They all have interests in high seas fisheries, either globally or regionally. By interacting through RFMOs, they put together their legal claims coherently. These specially affected states increased in numbers through the custom formation process: as more committed states cooperated within RFMOs, the group gained strength.

The second group is also heterogeneous, with at least three subgroups. The first concerns states such as Panama and Belize, which changed their conduct to partake in RFMO-regulated business. Dominica, Guinea and Cambodia exemplify another subgroup. They abandoned high seas fishing after receiving intense pressure. A third and smaller one includes states that remain ambiguous, like Georgia, Bolivia and Moldova.

Yet all these categories of potential specially affected states have proven unhelpful. The reason is that they aligned with those states behind the formation process dynamics: those claiming a new obligation to cooperate and those facing such claims. Over time, the original group of specially affected states with vital interests in high seas fisheries became indistinguishable from all the states asserting the obligation to cooperate through RFMOs. This group increased in numbers gradually as participation in RFMOs expanded, and there was no reason to tag these incomers as not being “specially affected”. Equally, the line between flags of convenience and other states that did not cooperate with RFMOs was often blurred. It was more accurate to describe them as states rejecting RFMOs’ calls for cooperation rather than “specially affected”.

Because each group became large and diverse, the notion of specially affected states did not add any valuable insight to understand the dynamics of the custom formation process or the interactions between treaty and custom. Instead, the distinction between states claiming and demanding a new practice and those facing those demands proved enough to assess the elements defining custom formation. Perhaps the only reassuring conclusion is that there is no evidence of any specially affected state, as doctrine understands them, regularly blocking the development of the duty to cooperate as modelled in UNFSA. In contrast, there is plenty of
evidence that all the states grouped through RFMOs in the late 1990s have remained participants. None have left or withdrawn from RFMOs to fish outside these regimes.

**IV The Role of International Organisations: RFMOs**

It is now possible to revert to an issue identified at the outset of this study: the extent to which the practice of RFMOs as international organisations (IOs) themselves – and distinct from their members – is relevant to custom formation. The ILC distinguished between “practice that is attributed to international organizations themselves” and “practice of States acting within or in relation to them”, which is “attributed to the States concerned”.\(^{956}\) On the one hand, it recognises IOs as subjects of international law in custom formation.\(^{957}\) On the other, it drastically limits that role to only “certain cases” where their practice “may count as practice that gives rise or attests to rules of customary international law”. No wonder a scholar has suggested that the ILC “seems to be of two minds” on this issue.\(^{958}\)

The distinction is far from straightforward in the ILC’s draft conclusions.\(^{959}\) For the ILC, such “certain cases” where IOs’ practice counts “as such” are those where it concerns rules “whose subject matter falls within the mandate of the organizations” or those that “are addressed specifically to them”.\(^{960}\) But these categories admit different interpretations. For example, RFMOs’ competence to adopt measures against non-members is not always explicitly “within the mandate” of their founding conventions, but RFMOs have exerted it nonetheless.\(^{961}\) Strictly speaking, under the ILC’s criterion, the practice of some RFMOs would not count “as such” for custom development.

The ILC added that IOs’ relevant practice for custom formation “may also arise” when states members have conferred competence upon the international organisation that is “functionally equivalent to powers exercised by States”.\(^{962}\) Barkholdt suggests that when an IO has the power to adopt decisions binding on its members or exercises powers that states cannot carry out

\(^{956}\) ILC draft conclusions, above n 4, at 130.

\(^{957}\) At 130.


\(^{959}\) ILC draft conclusions, above n 4, at 131.

\(^{960}\) At 131.

\(^{961}\) As has happened eg in NEAFC, whose text does not ask its members or the organisation to address non-parties.

\(^{962}\) ILC draft conclusion, above n 4, at 131.
unilaterally, these situations may outline IO practice “as such”. Under this benchmark, RFMOs’ decisions and other actions should now be considered IO practice for custom formation. For example, establishing a record of vessels for high seas fishing and closing it for non-members is an action that states cannot positively take unilaterally.

However, Barkholdt proposes that attribution and autonomy are the central elements to get the ILC’s distinction right. Only those acts performed by the IO under a procedure that allows it to form and express a separate will to fulfil its task is the practice “as such”. There is a limit to this proposition: there must be certain autonomy. States “need to have provided the agent/organ with a minimum of latitude” to exclude “purely executory acts”. Under this benchmark, RFMOs’ practice would not count for custom formation because they do not have proper autonomy. All aspects of decision-making – including sending diplomatic demarches – are tightly controlled by their member states.

All the abovementioned aspects suggest that the distinction between IOs and their members’ practice, and the ILC’s “in certain cases” criterion are not straightforward and might not be helpful. They suggest that the ILC draft conclusions do not offer well-defined conditions to judge when or how IOs contribute to customary law development.

The practice presented in this study provides a different account. Once again, the focus on the formation process allows us to obtain a more reliable and realistic version of the role of RFMOs and their actions as international actors in custom formation. The following subsection proposes a more flexible approach, accepting that IOs can perform a dual role in their external relations. They are often generators of legally relevant practice – not “in certain cases only” – and also “catalysts of the practice of states”. Equally, their practice can and sometimes must be regarded as two sides of the same coin: the practice of the IOs and the formalisation of their states members’ positions and preferences. The next subsection discusses how RFMOs have contributed to custom formation beyond the limitations imposed by the ILC’s categories,

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964At 27-29.
965At 29.
966At 29.
967ILC draft conclusions, above n 4, at 130.
illustrated primarily by serving as amplifying chambers for the cross-fertilisation of their practice regarding non-members.

**A RFMOs’ Dual Role**

As the experience of RFMOs against uncooperative non-members illustrates, IOs can have dual functions in custom formation. They have been catalysts or vehicles of state practice and also legal actors themselves. The starting point is a simple but sometimes forgotten categorisation. Jan Klabbers explains that IOs have three legal relationships or dynamics. The first concerns the IO and its members. The second or “internal” relationship refers to those within the IO, between its organs or staff. The third legal relationship “consists of relationships between the organization and the outside world”. The structure of the duty to cooperate as modelled in UNFSA means that states members to RFMOs have demanded cooperation from third states through engagement with these IOs. Therefore, the dialectical process steering custom development on the obligation to cooperate relates to RFMOs and the “outside world”.

This aspect matters because some basic legal features of RFMOs must not escape attention. RFMOs are subjects of international law with legal personality, which they undoubtedly assert when dealing with that “outside world”. As this study presented in Chapters Three to Six, all the relevant conduct regarding non-members formally emanates from RFMOs as distinct legal subjects. For example, the diplomatic exchanges serving states’ claims have been made on behalf of the competent RFMO, not their member states. Equally, decisions on the IUU listing on the cooperating status of non-parties are notified on behalf of the IO.

Technically, then, the actions that often define claims against non-members and thus contribute to custom formation stem from the RFMO, not states. Except for those measures that states adopt unilaterally to implement multilateral decisions – eg closing a port to unregulated vessels – or under their domestic legislation, the practice through this study is strictly the multilateral practice in the form of RFMOs’ legal acts. Their actions have contributed to developing the

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968 Jan Klabbers *An Introduction to International Organizations Law*, above n 289, at 3.
969 At 3.
970 At 3.
971 The only exception is SIOFA, regarded as an arrangement.
specific rule addressed in this work: states must discharge the obligation to cooperate through them or refrain from fishing.

However, at the same time, RFMOs have had no autonomous role in defining the claims underlying the custom formation process examined in this study. This is because states have kept tight control of RFMOs’ functions, with no room for any action decided independently by a secretariat or another body within the IO. RFMOs have executed what their members have agreed to do. Conspicuously, RFMOs have adopted all their decisions on non-members by consensus, including applications for cooperating non-parties, the content of diplomatic demarches and the IUU listing. Here, state conduct is the material source that explains and defines RFMOs’ decisions and actions.

RFMOs therefore offer a mixed picture of the role of IOs in custom development. They perform a dual role. First, as international subjects adopting legal acts that impact custom formation, and because only their member states’ preferences materialise such actions, they are also “arenas for the practice of states”.972 Any evidence of relevant practice presented in this study can be seen through this lens. An RFMO’s decision or diplomatic demarche is the act of the IO and, at the same time, the result of states’ aggregated positions. Unless it is clear that a state has acted in an individual capacity and stated a position accordingly under the umbrella of an IOs’ work, separating the IO decision and the will of states is artificial and detached from the reality of the custom formation process. In other words, the “practice that is attributed to [IOs] themselves” should be relevant as a general rule, not “in certain cases” only, as the ILC concludes.973

It is easy to see the influence of RFMOs’ formal acts against uncooperative non-members. Indeed, much of the dialectical process underpinning custom evolution has been grounded in non-parties reactions to RFMOs decisions, where the actions of individual member states only exceptionally have had influence on “the outside world”. What these findings suggest is the following. In assessing external relations of IOs and custom formation, the ILC’s expression “in certain cases” must be interpreted broadly to allow for a more liberal accommodation of IOs’ decisions and actions relevant to custom formation. It implies accepting that IOs’ actions

972 ILC draft conclusions, above n 4, at 130.
973 At 130.
can have a dual function as vehicles for state practice and, generally, as contributors to custom formation.

**B The Meaning of RFMOs Contribution to Custom Formation**

The fundamental contribution of RFMOs lies in unifying and supporting claims that states would have struggled to assert in bilateral relations, particularly in the decentralised legal system of high seas fisheries. Because custom emerges organically from a decentralised and informal process, states’ material claims have unfolded with different intensities across RFMOs, and non-members’ responses have not followed a predetermined design. However, a decentralised and informal process has not meant the total absence of structures steering custom formation. The dozen relatively small yet tightly controlled RFMOs scattered across different regions have shown that the emergence of custom is not necessarily an uncoordinated process. The institutional setup offered by RFMOs has been a pivotal factor in steering state practice, serving as the shared umbrella for states to agree and successfully project their common claims beyond membership “to the outside world”.

The attribute that perhaps best illustrates this conclusion is the continuous cross-fertilisation of state practice among RFMOs. Examples abound. RFMOs achieved virtually the same regime for cooperating non-party status as a mechanism to validate cooperation “by agreeing to apply” the competent organisation’s rules. First adopted in ICCAT and IOTC, other RFMOs soon welcomed it. Those pioneering RFMOs later amended their initial regulations on the subject, taking on board the lessons from others – eg, as NEAFC did in the early 2000s. Cross-fertilisation was also pivotal in building RFMOs’ shared approach to the IUU list as a mechanism to target non-party vessels. The cross-listing of IUU vessels is another example. In this sense, RFMOs as decentralised institutional structures have shaped and influenced consistent decisions among states, notwithstanding broad differences in membership.

The case against unregulated fishing underlines the success of the decentralised model built upon UNFSA and RFMOs as implementing subjects, developing practice to confront non-members beyond the limits of treaty law. A solution in treaties alone would always face the challenge of the *pacta tertiiis* and free-riders. Equally, a universal organisation with global

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974Chapter Three-III.A.
competence would have likely failed. Indeed, any centralised model would not have achieved what RFMOs and their member states accomplished: forcing uncooperative non-members to cooperate.

**V The Influence of Non-binding Instruments: the IPOA-IUU**

The role of non-binding instruments in custom formation is still underexplored. Scholars often address the question focusing on UN General Assembly resolutions; there is plenty of discussion about whether they can be evidence or catalyst in how custom develops or is identified. However, the UN is a unique body whose role and membership depart from ordinary organisations where states typically interact. It does not seem straightforward to transpose that experience to the world of hundreds of mid-size and small international organisations operating in very different circumstances and contexts.

Observing the role of the IPOA-IUU and its impact on RFMOs’ work has offered a compelling picture to understand this relationship as one of constant support and engagement. The IPOA-IUU has served custom formation by strengthening the normativity of states’ claims and by offering legitimacy and a material source for expanding state practice against uncooperative non-members.

**A The Scene for the IPOA-IUU**

Non-members and flags of convenience, in particular, were among the priorities at the negotiations for the IPOA-IUU. As a result, the IPOA-IUU captured the core of UNFSA’s obligation to cooperate. In line with Articles 8 and 17 of UNFSA, and as RFMOs’ incipient practice was doing, fishing by non-members was labelled as unregulated fishing and set together with illegal fishing under the IUU notion.

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975Chapter Two-IV.C.
977Paragraph 3.3. IPOA-IUU.
Nevertheless, the ambiguities in the IPOA-IUU’s treatment of non-members made its future uncertain. The tension between existing law and the need for change was apparent in paragraph 3.4., exempting “certain unregulated fishing” from punitive measures. This provision, vague enough to allow for multiple interpretations, would have ruled out any actions against non-members had states regarded them as falling in this exception. This ambiguity also invited criticism. However, as far as the high seas and the obligation to cooperate through RFMOs are concerned, the key to testing the IPOA-IUU’s success would be how states, acting through RFMOs, understood, implemented and reacted to it over time.

B Serving the Custom Formation Process

States seized the opportunity, and the IPOA-IUU definition’s ambiguities became its strength. Despite being “the ugliest acronym in the area of fisheries, and probably well beyond it”, the use of the IUU name expanded and soon turned part of the landscape of international fisheries. It soon became a central driver of relevant state practice for custom formation by doing two things. The assimilation strategy, intrinsic to the IUU notion, ultimately justified tackling uncooperative non-members with punitive measures, despite the limitations of the pacta tertii. The IPOA-IUU also provided legitimacy and has been an influential source for RFMOs and states to adopt innovative actions against non-members.

I Strengthening normativity: assimilation

Assimilating the non-members’ problem to illegal fishing was the real success of the IUU notion, including exhorting states to apply corrective measures against all aspects of IUU fishing. Assimilation, first suggested by CCAMLR and replicated in ICCAT and IOTC before 2001, cannot be underestimated. This clever legal technique indirectly captured a treaty

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978Para 3.4 IPOA-IUU; “Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged” under IPOA-IUU.
979Serdy The New Entrants Problem in Fisheries Law, above n 113, at 141-176; Serdy “Pacta Tertiis and Regional Fisheries Management Mechanisms”, above n 115; Van der Marel “Problems and Progress in combating IUU Fishing”, above n 324, at 297-298.
981See Chapter One-II.C.
obligation – the UNFSA duty to cooperate – in one notion and then presented it along with a commitment that all states could see as a desirable goal – combating illegal fishing.

After the IPOA-IUU sanctioned this technique, RFMOs and member states resorted to this assimilation to underpin their claims against uncooperative non-parties. In other words, they used it to reinforce the normativity of their actions. This effect can be seen extensively in the practice of all RFMOs, where types of legal acts are particularly illustrative. The IUU listing mechanism is the most visible one. By integrating unregulated with illegal fishing, all the RFMOs examined applied similar corrective measures to activities that, in principle, are legally different. The effect has been remarkable. The threat or exercise of the IUU listing measure forced many states to reconsider their legal relationship with RFMOs, often triggering applications for membership or cooperating non-party status. There are many examples: Panama in NEAFC, Ecuador in WCPFC, Colombia in IATTC or Comoros in SIOFA, to name a few. The IUU listing turned into a shameful label that states wanted to avoid, prompting behaviour change accordingly.

In addition, the IPOA-IUU reinforced the content of RFMOs’ demarches to non-parties. Instead of invoking UNFSA or the LOSC, they often resorted to the IPOA-IUU and thus indirectly to UNFSA. It became apparent that the IUU notion served to underpin the provisions of UNFSA, as some RFMO communications confirmed. Addressing one flag of convenience in 2003, NAFO claimed that “the international community has recognized” the need to “eliminate IUU fishing”, and therefore non-parties to RFMOs “are not discharged from their obligation to cooperate with those organizations”.

In this context, the standard critique against the assimilation strategy seems outdated. The IUU notion has been attacked as wrong and misleading, a tool allowing RFMOs to blame others for their failures. Even if desirable for “any lasting solution to overfishing”, it is “something that should be done openly and after proper debate, rather than unwittingly or by terminological sleight of hand”. This critique seems to overlook the reality of the non-members’ challenge in the first place, forcing RFMOs to resort to innovative means to deter free-riders from

984 At 174.
undermining their measures. Besides, high seas management is a challenge in itself, and many reasons influence RFMO’s outcomes. It is inaccurate to hold that these organisations use the IUU notion as a tool to deflect responsibility or that they have all failed. Some have recovered declined fish stocks, while others have improved their performance. In any case, it is the practice of states themselves that serves as the best rebuttal. There is no “sleight of hand” simply because non-members could have opposed RFMOs’ actions. Instead, it is impossible to deny the assimilation technique’s achievements at this stage of state practice evolution, which speaks for itself. Its success in contributing to the non-member problem’s decline and increased participation in RFMOs is hardly a “wrong turn”.

2 Legitimising new instruments against uncooperative non-members

Assimilation expanded into practical consequences. The IPOA-IUU served to advance practice that was controversial at the time or likely to be questioned. Specific measures deploying restrictions in the fish trade, like the closure of ports and prohibitions on landings and transhipments, were still embryonic.

In this context, criticism was again expected. Andrew Serdy points out that the IUU notion “obscures the policy responses required by treating as one what are really several distinct problems calling for as many distinct solutions”, warning that it made RFMOs’ deterrence measures unnecessarily vulnerable to legal attack. Indeed, the IPOA-IUU seemed to consider the chance that some of its measures may stretch the limits of the existing international framework for fisheries management, including on the high seas. This explains the routine use of the expression “as appropriate” to qualify what would otherwise be straightforward calls for action. Similar is the ample reference to the need to take specific measures “in accordance with” or “consistent with” international law. They underline the tensions at the negotiations between those seeking change and those reluctant to it.

986 Serdy The New Entrants Problem, above n 113, 141.
987 At 174 and 157-171.
988 See paras 80(1), 81(3) and 82(2).
989 See para 80.
More than two decades of state practice demonstrate how different the picture today is. The fears above never materialised; on the contrary, the IPOA-IUU measures began to expand rapidly in RFMOs’ practice, serving to clarify many of the ambiguities in the instrument’s scope. A critical finding concerns paragraph 3.4.: there have been no measures or decisions under any of the organisations assessed in this study where the distinction in paragraph 3.4. IPOA-IUU has been asserted. In RFMOs’ abundant practice, non-members are never exempted from the corrective measures the IPOA-IUU contemplates, and virtually all have accepted or acquiesced in this assertion.

The IPOA-IUU and its implementation by RFMOs highlight how influential non-binding instruments can be as critical drivers of state practice and opinio. The notion of “Grotian moments” is probably exaggerated, but it would fit well with the adoption of the IPOA-IUU.990 It was the crucial game-changer to promote the rise of an obligation to cooperate grounded in UNFSA standards, avoiding invoking treaty provisions directly against non-parties. States knew very well the implications when they agreed on the IPOA-IUU in 2001. As Edenson observes, despite being a non-binding instrument:991

[T]he IPOA-IUU was nonetheless negotiated in many ways as if there was a risk that it would become a binding legal text, or at the very least that it might have an impact on binding legal instruments, or even on the evolution of customary international law.

His prophecy proved correct. The IPOA-IUU has played a central role in developing the duty to cooperate as modelled in UNFSA into general international law. It bolstered confidence in the core “claimant states” within each RFMO, strengthening the legitimacy of their claims and positions. Inevitably, it forced several non-members to reconsider how they cooperated with RFMOs. The IPOA-IUU’s role in restraining unregulated fishing underlines how soft-law instruments can work as a catalyst for state practice and the international community’s acceptance of new standards of behaviour.

Conclusions

JD Ohlin’s warning against the perils of those thinking that there “isn’t anything especially normative about international law” deeply resonates when it comes to customary international law. The scepticism and critique against custom often result from the lack of attention and understanding of its formation process. Custom is essentially the aggregation of state practice over time, progressively building up normative effects. However, legal debates have been dominated primarily by the practical approach of the identification question or the “snapshot picture” of whether a rule has achieved customary status. The recent work of the ILC contributed to bringing customary law to the centre of the attention it deserves, but it left fundamental issues unresolved. The 2018 draft conclusions focused nearly exclusively on the identification question, offering no account of how customary law emerges and the legal effects of its formation process. The ILC only barely refers to the relationship of custom with treaties and non-binding instruments, and its account of the role of international organisations in custom formation is confusing and does not capture their reality.

Yet it is only by thoroughly learning from the formation process of a putative customary norm that we can genuinely understand this source. Testing the emergence of the obligation to cooperate through RFMOs to manage high seas fishery resources, as modelled in specific provisions of the 1995 UNFSA, has been used as a case study to understand how customary law develops. This thesis’ systematic assessment of state conduct and the practice of RFMOs against unregulated fishing offers three sets of findings at different levels. First, on the non-members’ problem itself; second, on the emerging customary status of the duty to cooperate through RFMOs; and third, on the lessons to understand the formation of customary law, its legal implications and consequences.

A The End of the Non-member Problem in High Seas Fishing

The duty to cooperate and the freedom of fishing are the two gravitational pulls of the high seas legal framework. Absolute freedom of fishing on the high seas was possible because there was no obligation to cooperate; as the latter emerges, the former decreases. By 1995, treaty law constrained the old freedom of fishing in the LOSC and attempted to move further with

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UNFSA. This freedom had never been a static rule in customary law either. It retreated to be replaced by a general obligation to cooperate, however vague, reflected in the LOSC. From Grotius’ days and the pervasive laissez-faire of most of the 20\textsuperscript{th} century to the obligation to cooperate as reflected in the LOSC, customary law also moved, albeit behind treaty law.

The evolution in these two gravitational pulls – the duty to cooperate and the freedom to fish – should not come as a surprise. As O’Connell rightly observed:\footnote{Daniel Patrick O’Connell \textit{The International Law of the Sea: Volume II} (OUP, Oxford, 1984) at 796-797.}

The freedom of the seas is neither absolute nor static: it embodies the balance of jurisdictional functions among states that at any time best serve the community of nations, and its content is subject to constant modifications as that community adjust[s] itself to the solutions of new problems.

Against the increasing pressure of unregulated fishing and the achievement that UNFSA represented, O’Connell’s balance began to move again in the late-1990s. States developed a more aggressive strategy against uncooperative non-members, even before UNFSA entered into force in 2001. As the number of RFMOs increased, unregulated fishing became a more pressing issue, and states confronted it.

The non-members’ problem is now over. To be sure, there are plenty of other issues affecting the management of high seas resources, including other forms of IUU fishing. But it is impossible to deny that the unambiguous decrease in non-members’ undermining of multilateral measures and the fact that all the relevant states in high seas fishing now cooperate with RFMOs represents a remarkable improvement compared to the global picture in the 1990s.

The demise of free-riders and other uncooperative states offers a telling lesson to those sceptical about the capacity of international law to solve global pressing problems. Multilateral decisions at a regional level reviewed by this study were pivotal for this progress. They included a bold and decentralised set of multilateral legal decisions and actions challenging the contours of the existing legal framework, adopted by consensus through international organisations and supported by specific provisions in UNFSA and the IPOA-IUU.
B The Emerging Customary Obligation to Cooperate through RFMOs

The second set of findings concerns a core functional objective of this study. In appraising the experience against unregulated fishing in each region, this thesis demonstrates how the duty to cooperate as modelled in UNFSA provisions is emerging as customary international law. It is doing so because state conduct asserting such standard is general – uniform and widespread – and the generality of states is increasingly accepting or acquiescing to the putative rule in their relationships with other states. It is confirmed by the evidence of extensive RFMOs decisions, diplomatic demarches, punitive actions through the IUU listing of non-members’ fishing vessels and other states’ exchanges, and reactions by uncooperative non-party states.

This work did not claim that this obligation is a mature customary rule. Custom formation is essentially a process in constant change, and the answer to the identification question is often subject to contested views unless the process benefits from extensive and authoritative pronouncements, either from states or judicial adjudication. Moreover, it means finding evidence sustaining a general belief in the existence of the rule, a high standard which has not yet become apparent – even though there is evidence pointing to individual belief in some cases. Even as this duty to cooperate is not necessarily fully mature or explicitly recognised, the central element to conclude that it is developing as custom is the normative role it performs among many states.

C Understanding Customary Law Formation

The global assessment of state practice through RFMOs made it possible to address the issues that led to the third set of findings in this thesis. They concern the elements defining how customary law develops, the legal consequences of such a process and how it performs in its relationship with treaties, international organisations and non-binding instruments.

The formation process is indispensable for understanding customary law and its central elements and interactions. Customary law emerges from dialectical exchanges of claim and assertion and reactions from other states confronting them by acceptance, acquiescence or objection. This observation did not mean demonstrating that all customary rules must develop under this structure. However, it confirmed that this approach is possible and desirable,
particularly regarding rights and obligations that aspire to coordinate international relations, such as the duty to cooperate to manage high seas resources.

The notion of legal change through permanent exchanges with normative contents or aspirations is not new, not least in the law of the sea. Although Myres McDougal’s work was contextualised in Great Power antagonism and the belief that international law was conceived in terms of “broader political processes that aimed towards policy-objectives”, and therefore “options”, he was correct in describing the process of normative change in the present context:

[T]he international law of the sea is not a mere static body of rules but is rather a whole decision making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world’s seas, and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them.

In this context, many acts become relevant in the dialectical process of customary law change. Decisions and actions shaping custom evolution are pervasive even if we cannot see or grasp them except in hindsight. States might not be aware that they are changing the law and are often oblivious of their actions contributing to such a process, but customary evolution occurs even when this specific purpose is lacking.

Opening his essay on the philosophy of customary law, JB Murphy observes that “[a]lthough we live in a sea of customs, like the fish, we are not aware of the sea around us.” The conduct that serves customary transformation often seems invisible, as states did not attempt customary change but to solve a specific management problem on the high seas. RFMOs did not claim

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996 James Murphy The Philosophy of Customary Law (OUP, New York, 2014) at ix.
that their actions asserted a new obligation applicable to those not bound by treaty law. They did not mention “customary law” when demanding non-members’ exclusive cooperation through the competent RFMO or stop fishing. Acceptance and acquiescence happened on different justifications, not all purely legal or following a “sense of obligation”.

Yet practice evolved along with an awareness of normativity that several states eventually shared, accepted or acquiesced. Customary law formation was set in motion when RFMOs adopted measures to push non-members to stop unregulated fishing or demanded a more robust standard of cooperation. It is what lay behind the closing of ports and threats of trade measures against vessels flagged to uncooperative non-parties and sometimes against states themselves. It is what ensued when Cuba did not speak up against NEAFC and NAFO’s decisions, when the Philippines’ statements addressed IOTC, CCSBT and ICCAT and when China punished its vessels and nationals, banning them from fishing in an RFMO’s waters where it is not a member. Custom, “like life itself”, is “what happens when we are making other plans”.997 States were indeed making other plans, and they succeeded in eliminating the non-members’ problem. Customary law developed along with the interactions these states pursued in between.

This iterative process fills some long-standing gaps and counter traditional criticism against customary law. It offers a realistic explanation of how custom normativity develops and the legal effects of this process even though the putative rule has not fully matured, refuting the critique that custom is circular, too ambiguous or impossible. It aligns with the account of custom’s normativity based on the gradual acceptance or qualified silence of non-party states to RFMOs. The notion of opposability, grounded in good faith and legitimate expectations from such acts, offers a sensible account of normativity as custom developed. Overall, it confirms the premise that the subjective element cannot be seen as a general belief at this stage but as a network of relationships founded initially and primarily in bilateral acceptance and acquiescence.998 None of these findings is possible by limiting the analysis to the “snapshot picture” of custom identification.

Attention to the formation process helps counter another persistent criticism against customary law. The case against unregulated fishing shows how developing states have positively and

997At ix.
998Crawford, above n 132, at 81-82.
actively shaped a rule that, at least for other states from the Global South, might have been seen as contrary to their interests. Far from representing developed states alone, the focus on the dialectical interactions between RFMOs and member states and non-parties highlights that the developing world can contribute to defining the trajectory of customary law, provided the institutional and procedural setups are in place.

The lessons from the custom formation process of the duty to cooperate on the high seas also cast valuable insight into three central relationships in customary international law. First, they show how treaty provisions give rise to custom. The case against unregulated fishing proves this to be a complex relationship. It has been non-linear and symbiotic, led by treaty law where custom has followed, later gravitating towards a treaty-based definition of the obligation to cooperate. Not only can treaties serve as the basis for states to follow a specific pattern of behaviour, but they also can influence state conduct by other means, as Articles 17(4) and 33 UNFSA highlight.

The formation process of the duty to cooperate also shows that customary law can evolve amid a legal ecosystem built primarily on treaty provisions. The gradual rise of a customary duty to cooperate can also explain why the relationship with the LOSC does not mean a traumatic clash between contesting rules. A partial reconciliation based on normative dialogue between these two versions of the obligation to cooperate is possible.

Second, the relationship between RFMOs and the formation of customary law offers insight into how international organisations contribute to custom formation. RFMOs have had dual functions as catalysts or vehicles of state practice and legal actors themselves. RFMOs have had no autonomous role in the custom formation process because states have kept tight control of their functions; in this sense, they are vehicles or “arenas” for state action. However, at the same time, custom could not have possibly developed without decisions or legal acts formally adopted by RFMOs. The dual function of the practice of international obligations, in their relationships with their members and third parties, provides a realistic account of their influence in customary law formation.

The third relationship this study reviewed concerned non-binding instruments and custom formation by focusing on the IPOA-IUU as a central instrument. Here again, the attention on the custom formation process rather than the “snapshot picture” of custom identification proves
essential. Non-binding instruments can have a decisive role in custom development, as the IPOA-IUU shows. It served custom formation by strengthening the normativity of states’ claims through the assimilation technique discussed in this work. The IPOA-IUU also legitimised RFMOs’ expanding state practice against non-members, with significant impacts on custom development.

Customary law is grounded in both the objective and subjective elements, but without the conduct of states, there would be no dialectical process and no action-reaction logic. Only once state practice is in motion, would it be possible to observe whether individual and later general opinio may follow. The tension between the existing law and the emerging new practice is intrinsic to normative change and custom development and a defining element of international law as a decentralised and informal system. Sandholtz observes:999

International rules are both static and changing. At any given moment, most rules appear fixed and this is what makes them provide a standard of conduct to choices of those subject to them. Yet at the same time, rules are constantly evolving: international law is a motion picture, where the image is constantly moving but at any instant is frozen in a specific frame.

The extent to which the existing and the new laws interact would eventually accommodate over time, even as the identification question would not necessarily become less challenging. The significance of the custom formation process rests in this element. The outcome of this interaction between the static and the motion picture only reveals itself gradually. As this study has exposed, the state conduct that forms the essence of customary change performs the normative functions of custom before generalising the belief that customary law has matured.

Nearly four decades ago, Prosper Weil warned against the phenomenon of relative normativity in international law. He observed that customary law also suffered from this pathology, where the “generality of practice has been reduced to a minimal requirement”.1000 This study has weighed Weil’s cautions, demonstrating how customary law can evolve based on the exact opposite. By relying on the acts that support the formation process, it has achieved an account of normative change that engages with reality, respecting state sovereignty while allowing a

1000Prosper Weil “Towards Relative Normativity in International Law” (1983) 77 AJIL 413 at 436.
new rule to develop, adjusting gradually to new challenges that seemed unsolvable. It has shown that customary law change is more pervasive than it seems, and the formation process provides the lens to appreciate it.
Appendix: Areas of Competence of Regional Organisations and Arrangements

Maps were retrieved from international organisations’ official websites, except when indicated.

IATTC, ICCAT, IOTC, CCSBT and WCPFC

Source: ISS-Foundation. The CCSBT area indicates the distribution of Southern Bluefin tuna

NAFO
NEAFC

Source: UN-FAO

SEAFO
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