



Changes in the migration routes of shared fish stocks and the case of the Mackerel War: confronting the cooperation maze

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Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.) of the European University Institute

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THESIS SUMMARY

The aim of this thesis was to examine the effects of changes in the migration routes (CMRs) of shared (transboundary and straddling) fish stocks on the cooperative conservation and management efforts of States. The CMR phenomenon, while not completely novel, appears to be intensifying in recent years with climate change playing an important role. Examining it is important because CMRs represent changes in factual circumstances with considerable legal effects that are largely unexplored in the legal literature.

The thesis examined how States must cooperate in a CMR situation and what are the consequences should they fail to do so. In doing this, the thesis used the Mackerel dispute as case study because it is a recent and comprehensive CMR dispute, fittingly exemplifying a wide range of the legal issues that CMRs can create. The analysis focused, first, on the application of the duty to cooperate in CMR cases and, second, on the consequences of unsuccessful cooperation.

In the application discussion, three common threads of CMRs were discerned, involving changes in the (1) nature of the stock, (2) States involved in the fishery, or (3) zonal attachment of the stock. The impact of these changes was found to range from distorting legitimate fishing interests and equitable arrangements to changing the applicable law. Furthermore, two perspectives were identified, under which States must cooperatively address CMRs. Under the voluntarist perspective, States may ignore a CMR if they so agree. Under the conservationist perspective, however, such discretion was found to be lacking when the viability of a stock is threatened. In analysing the consequences of unsuccessful cooperation, the thesis focused on three issues – pre-CMR agreements, dispute settlement and self-help measures. It was found that CMRs can be a basis for the termination of international agreements and that, while existing dispute settlement mechanisms may provide some answers for CMR-related issues, the sweeping jurisdictional limitations for fisheries cases can provoke retaliation and counter-measures instead of further cooperation.

These findings show that CMRs can have tremendous legal implications and, due to their specificities, need to be examined in detail and separately from other conservation and management issues. Furthermore, States and scholars alike must be very attentive to CMRs in the future for the issues they can create.

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I. Introduction

1. Background and aims of the discussion

Fish is one of the fundamental natural resources that the human civilization has been utilising in one way or another for thousands of years and on which the mankind is dependent for its survival. It was only a few hundred years ago that Grotius viewed this resource as inexhaustible.¹ Today such views are only reminiscences of the past.² Fisheries disputes, sometimes even called “wars”, are breaking out as there is not as much fish in the sea to satisfy the desires of the fishing nations. Instances of such disputes, to name a few, are the Cod Wars between Iceland and the United Kingdom, the Turbot War between Canada and the European Union (EU), the Swordfish War between Chile and the EU and most recently the Mackerel War between *inter alia* the Faroe Islands and the EU.

A few decades ago, the United Nations Convention on the Law of the Sea³ (UNCLOS) – the most comprehensive treaty in the area of the law of the sea (LOS) to date – was concluded and today it has one hundred sixty-seven parties.⁴ This comprehensive instrument also covers fisheries. In order to provide, or at least attempt at providing, a comprehensive regime for the fisheries in the world oceans the drafters had to face the reality that others have faced before them – the fish do not respect the manmade jurisdictional boundaries in the seas and the oceans around the world.⁵ The fish move and migrate, some more than others. These migratory movements posed problems for finding a way to regulate them to the liking of all parties involved. Eventually, a consensus was reached and a few provisions appeared in the

¹ R Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Nijhoff, Leiden 2004) 3.

² *Ibid.*

³ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

⁴ Chronological lists of ratifications, accessions and successions to the Convention and the related Agreements, Last updated: 07 January 2015

<http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 1 October 2015.

⁵ B Kunoy, ‘Conservation and Management of Shared Fish Stocks and the Applicable International Trade Regime’ [2011] 54 GYIL 421, 423.

UNCLOS with respect to fish stocks migrating across certain maritime zones, underpinned by the duty to cooperate. Accordingly, the drafters considered that the migration routes of the fish stocks, although crossing zones and boundaries, have shown to be stable enough as to allow to be subjected to legal regulation.

The solution of cooperation was seen as a step in the right direction but it was left counterproductively vague in the UNCLOS and needed further elaboration. This further elaboration was eventually provided in a treaty, separate from (and yet closely related to) the UNCLOS – the Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA).⁶ The UNFSA currently enjoys a serious but still not as wide support as the UNCLOS, with only eighty-two parties.⁷ At the moment of its adoption, the UNFSA was praised by Ambassador Nandan for being “far-sighted, far-reaching, bold and revolutionary”⁸ and it was undoubtedly so. The ‘disorder’ that Mother Nature created for the mankind with the migratory nature of the fish stocks was more or less ‘ordered’ through the legislative endeavour of many States.

Be that as it may, in today’s time of constant changes, a question comes up that is neither abstract nor futuristic: how are we to address the changes in the migration routes of shared fish stocks? Some of the non-legal literature has started considering this question,⁹ while the legal literature is slowly catching up.¹⁰ While this question may receive different answers from the different disciplines that will seek to answer it,¹¹ it is important that these answers

⁶ The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3.

⁷ Chronological lists, *supra*, n 4.

⁸ Statement of the Chairman, Ambassador Satya N Nandan, on 4 August 1995, upon the Adoption of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, A/CONF.164/35.

⁹ E Sissener and T Bjørndal, ‘Climate change and the migratory pattern for Norwegian spring-spawning herring—implications for management’ (2005) 29 MP 299; R Hannesson, ‘Individual Rationality and the “Zonal Attachment” Principle: Three Stock Migration Models’ (2006) 34 ERE 229; A McIlgorm *et al*, ‘How will climate change alter fishery governance? Insights from seven international case studies’ (2010) 34 MP 170; OECD, *The Economics of Adapting Fisheries to Climate Change* (OECD, 2010) 255 *et seq*.

¹⁰ B Kunoy, ‘The Ambit of Pactum de Negotiatum in the Management of Shared Fish Stocks: A Rumble in the Jungle’ (2012) 11 CJIL 689; P Örebech, ‘The “Lost Mackerel” of the North East Atlantic— The Flawed System of Trilateral and Bilateral Decision-making’ (2013) 28 IJMCL 343.

¹¹ In his keynote speech at the 2015 MARE Conference, Prof O Young outlined the very divergent approaches/solutions that economists, social scientists, lawyers and ecologists propose for the future

are, nevertheless, provided. Only then, can a comprehensive and consistent strategy be devised for responding in an adequate manner – a crucial element for the future operation of the international fisheries regimes.

Today, mankind is facing the consequences of the climate change and volatile environmental variations (irrespective of whether they are manmade or not) that are affecting the living conditions both on land and in the world ocean. Affecting the conditions in the world ocean has direct repercussions for the fisheries management and conservation efforts. These repercussions have been observed for some time now and are intensifying. A study prepared for the European Parliament in 2007 stated that:

“As several relevant industrial key fish species (such as herring and probably other small pelagic species) respond highly to varying hydrographic conditions, future fish stock management should be continuous, but flexible and adjustable according to the responses of fish stocks to future environmental conditions. Especially highly migrative species that alter their migration routes due to a changing environment will influence the management needs.”¹²

Not long after this study, the Mackerel dispute materialised from exactly the circumstances that the study warned about. The Faroe Islands – one of the parties to the dispute – argued that, due to the increased temperatures of the North Atlantic waters, the herring and mackerel changed their migration routes resulting in increased abundance in Faroese waters which in turn gave it the right to a bigger quota. The dispute went as far as the EU – the other party – adopting an import ban against the Faroe Islands, on the one hand, and the initiation of proceedings against the EU before the WTO tribunal and an UNCLOS Annex VII tribunal by the Faroe Islands, on the other hand. The import ban was an implementation of Regulation 1026/2012,¹³ which was itself adopted in response to the Mackerel dispute. After one year of intensive negotiations, while the measures were in force and at the pains of heavy legal battles, the EU and the Faroe Islands reached an out-of-court agreement, ending the dispute in August 2014.

development of the public order of the oceans. It would be unsurprising if such divergences are also present for the issue at hand.

¹² C Clemmesen, A Potrykus and J Schmidt, *Climate Change and European Fisheries* (Study, European Parliament, Brussels 2007) ix.

¹³ European Parliament and Council Regulation (EU) No 1026/2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing [2012] OJ L316/34.

Notwithstanding the agreement, the issues that were raised remain open and cannot be ignored because they are bound to resurface.¹⁴ From the legal perspective, there is a multitude of such issues. This thesis will focus on legal issues relating to the application of the duty to cooperate in situations of changes in migration routes (CMRs) of shared stocks. It will aim to answer, on the one hand, how States must cooperate in a CMR situation and, on the other hand, what are the consequences should they fail.

With respect to discharging the duty to cooperate, the thesis will examine to what extent a CMR affects the rights and duties of States and whether or not States are obliged to address every CMR of shared stocks. In that regard it will be examined how the different factual modalities of the CMRs can create different legal consequences. A special attention will also be paid to the role of the duty to negotiate as the main gateway to cooperation. With respect to the instances of unsuccessful cooperation, the thesis will discuss, first, the question of the status of the pre-CMR agreements and to what extent they are also affected, including whether a CMR can cause the termination of such pre-existing agreement. Secondly, the discussion will examine to what extent the existing regime provides solutions for settling disputes arising out of the specifics of the CMRs. Finally, the focus will be on the issue of what tools (self-help measures) are available to States to unilaterally protect their interests in a CMR dispute.

In discussing all of these issues the thesis will use the Mackerel dispute as a case study. The Mackerel dispute is a very useful lens through which the abovementioned issues are to be examined for two main reasons – its multifaceted nature and its overall significance. With respect to its multifaceted nature, the Mackerel dispute, as will be explained in further detail later in the thesis, involves two associated stocks and their CMRs, several States with different fishing interests, unsuccessful cooperation efforts, initiation of international dispute settlement proceedings, and the use of self-help measures. This multitude of aspects largely overlaps with the issues concerning the application of the duty to cooperate that will be

¹⁴ See European Commission Staff Working Paper, Impact Assessment, Accompanying the document Commission proposal for a Regulation of the European parliament and of the Council on certain measures directed to non-collaborating countries for the purpose of the conservation of fish stocks, SEC(2011) 1576 final, 14 December 2011, 9. There it was recognised that other similar situations could occur in the short term. The EU is experiencing similar hardships with respect to the fishing activities of Iceland and Greenland and it is a matter of time for such issues to occur elsewhere around the world.

discussed. The practice of all States involved in the Mackerel dispute will, therefore, be greatly elucidating the discussion. A crucial part of this practice is the EU's Regulation 1026/2012. It is a forerunner instrument breaking new ground for measures aimed at ensuring sustainable fishing. It is meant to address cooperation failures and incentivise the relevant parties to cooperate by warning them of possible trade measures. Such an instrument can have an immense effect on the *modus cooperandi* of States and hence on the application of the duty to cooperate, which requires this thesis to pay special attention to it.

With respect to its significance, the Mackerel dispute is the first CMR dispute that developed as far as to include trade measures and the initiation of international proceedings. The dispute also involves the EU – a major fishing entity and consumption market as well as the largest importer of seafood products. The practice of such a large stakeholder in the international fisheries must not be lightly ignored. These two aspects, together with the successes and failures of the Mackerel dispute will undoubtedly serve as a reference base to other States and interested parties when they have to deal with CMRs of shared stocks in the future. It is only wise to do the same in the literature.

2. Scope, caveats and use of terms in the discussion

At this juncture several clarifications need to be made with respect to the scope of this thesis and the usage of certain terms. First, the focus of this thesis will be on the current treaty framework regulating shared stocks, as formed by the UNCLOS and the UNFSA. Although they are only two of the several main international instruments dealing with fisheries,¹⁵ they are the two instruments that form the international regime specifically for shared fish stocks. Furthermore, the thesis will leave out the situations where some States are parties to the one agreement but not to the other. Although the UNFSA is not as widely ratified as the UNCLOS, many of the important fishing nations/entities, including the EU, have ratified it and as such focusing the discussion on both instruments, together, will be highly relevant. Both treaties

¹⁵ The other highly prominent instruments are a mixture of binding and non-binding instruments, some of which are the 1993 FAO Compliance Agreement; the 1995 FAO Code of Conduct on Responsible Fisheries and the FAO International Plans of Action. See further E Meltzer, *The Quest for Sustainable International Fisheries: Regional Efforts to Implement the 1995 United Nations Fish Stocks Agreement: An Overview for the May 2006 Review Conference* (NRC Research Press, Ottawa 2009) 11-31.

will be analysed together and will be referred to as ‘the existing regime’, unless otherwise indicated.

The two instruments are also linked – both substantively and legally – and this must be kept in mind when considering the analysis of this thesis. The UNFSA’s main objective is “to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the [UNCLOS]”.¹⁶ According to its Article 4, the UNFSA shall not “prejudice the rights, jurisdiction and duties of States under the [UNCLOS]. [The UNFSA] shall be interpreted and applied in the context of and in a manner consistent with the [UNCLOS]”.¹⁷ While the UNFSA is meant to implement certain UNCLOS provisions, it is still a separate international agreement with its own (and not overlapping with the UNCLOS) States parties. As such the UNFSA provisions are not applicable to States that did not ratify it, in accordance with the *pacta tertiis* rule.¹⁸ Unless otherwise provided, the UNFSA applies only to the management of stocks on the high seas.¹⁹

Focusing exclusively on the UNCLOS and the UNFSA, however, would be counterproductive because the existing regime is a framework one and in need of being effectuated by a multitude of various other agreements.²⁰ In particular, regional fisheries management organisations (RFMO) and the various direct arrangements between the relevant States represent focal points for the implementation of the existing regime.²¹ Together with the UNCLOS and the UNFSA, the RFMOs and the arrangements comprise “a three-tiered structure [...] with mutual reinforcement and dependence”,²² which can be seen throughout the thesis.

¹⁶ UNFSA, *supra*, n 6, art 2.

¹⁷ On whether the UNFSA provisions go beyond the UNCLOS or not see e.g. A Tahindro, ‘Conservation and management of transboundary fish stocks: Comments in light of the adoption of the 1995 agreement for the conservation and management of straddling fish stocks and highly migratory fish stocks’ (1997) 28 ODIL 1, 2.

¹⁸ See E Franckx, ‘Pacta Tertiis and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks’ (FAO Legal Papers Online, No 8, 2000); P Örebech, K Sigurjonsson and T McDorman, “The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement” (1998)13 IJMCL 119.

¹⁹ UNFSA, *supra*, n 6, art 3.

²⁰ R Macdonald, ‘The Charter of the United Nations in Constitutional Perspective’ (1999) 20 AYIL 205, 220.

²¹ E Clark, ‘Strengthening Regional Fisheries Management – an Analysis of the Duty to Cooperate’ (2011) 9 NZJPIIL 223.

²² P Davies and C Redgwell, ‘The International Legal Regulation of Straddling Fish Stocks’ [1996] 67 BYBIL 199, 270.

Second, by CMR it is meant the change in the zonal attachment of the shared stocks. The zonal attachment refers, more generally, to the geographical distribution of the stocks and is a prominent principle in the process of division of shared stocks.²³ The two main yardsticks for determining the zonal attachment are (1) the amount of stock present in the particular waters and (2) the time the stock spends in the particular zone during its migration.²⁴ Simple as it looks at first sight, however, the zonal attachment of a stock can be measured differently and can be controversial.²⁵ These variations have to do with the factual specificities of the stocks throughout their migration – that is – where the spawning areas are; what the distribution of egg and larvae is; what the occurrence of juvenile fish is; and what the occurrence and migrations of the fishable part of the stock are.²⁶ A main premise of this thesis in this regard is that the CMR is a given fact and the focus will be on how the law addresses such a factual situation. Thus, the thesis will not deal with issues of proof and evidence of CMRs as these are, although relevant, separate issues.

Third, as indicated in the title, the discussion in this thesis will focus on shared fish stocks. This notion needs a short explanation as it is used neither by the UNCLOS nor by the UNFSA but has emerged as shorthand for certain types of stocks in the literature and in the practice. The International Tribunal for the Law of the Sea (ITLOS), in its recent Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (the Opinion) also identified the need to clarify this term.²⁷ The ITLOS started with the definition of shared stocks that is provided in the regional treaty at hand in the Opinion. This definition states that shared stocks are “stocks occurring within the exclusive economic zones of two or more coastal states or both within the exclusive economic zone and in an area beyond and adjacent to it”.²⁸ Another notion that the ITLOS had to deal with (also used in Regulation 1026/2012) is ‘stocks of common interest’. The SRFC provided an explanation of this notion, which, as the ITLOS

²³ A Hoel and I Kvalvik, ‘The allocation of scarce natural resources: The case of fisheries’ (2006) 30 MP 347, 351.

²⁴ S Engesæter “Scientific Input to International Fish Agreements” (1993) 13(2) International Challenges: the Fridtjof Nansen Institute Journal 85.

²⁵ R Hannesson, *supra*, n 9, 230.

²⁶ ICES, The biology, distribution and state of exploitation of shared stocks in the North Sea area, Cooperative Research Report No. 74, International Council for the Exploration of the Sea, Copenhagen, 1978.

²⁷ *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (No 21)* (Advisory Opinion 2, April 2015) ITLOS Reports 2015 NYR [183]-[184].

²⁸ Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (adopted 08 June 2012, entered into force 16 September 2012) art 2(12).

noted, overlaps with the notion shared stocks.²⁹ Both of these notions were found by the ITLOS to refer to the stocks referred to in paragraphs 1 and 2 of Article 63 UNCLOS.

Mindful of the fact that these notions are not yet of universal and uniform usage, this thesis will adopt the meaning that the ITLOS ascribed to them in its Opinion, as this author finds it to be generally encapsulating the notion fittingly. With respect to the stocks referred to in paragraphs 1 and 2 of Article 63 UNCLOS, it must be stated that these are also referred to in shorthand as transboundary and straddling stocks, respectively. Transboundary stocks are the ones occurring only in (migrating only through) the EEZs of two or more States without reaching the high seas.³⁰ Straddling stocks, on the other hand, are stocks that, next to the EEZs, are also present in and migrate onto the high seas.³¹ Additionally, since the thesis will focus on the shared stocks only, it will not discuss the specifics of highly migratory, anadromous or catadromous stocks, although certain parts of the analysis may be applicable *mutatis mutandis* to them as well.

Fourth, the thesis will also have a more specific spatial focus. The issue of CMRs of shared stocks is predominantly, if not almost completely, relevant for only two particular maritime zones – the exclusive economic zone (EEZ) and the high seas. Consequently, the thesis will not look at the specifics and the peculiarities in other maritime zones such as internal waters, territorial sea, enclosed or semi enclosed seas, international straits, as well as archipelagic waters.

3. Structure of the discussion

Section II will focus on the case study of the thesis – the Mackerel dispute – and Regulation 1026/2012. The section will start by briefly introducing the role of the EU in fisheries conservation matters. The discussion will then look at how the Mackerel dispute developed and how it led to the adoption of Regulation 1026/2012. It will then take a quick look at the substance of the Regulation and its importance. The section will conclude with a recollection of the first implementation of the Regulation against the Faroe Islands.

²⁹ *Case No 21*, ITLOS, *supra*, n 27, [185]-[186].

³⁰ M Hayashi, 'The Management of Transboundary Fish Stocks under the LOS Convention' (1993) 8 IJMCL 245.

³¹ *Ibid.*

Section III will aim to provide a thorough analysis of the duty to cooperate in the area of fisheries and its application. The discussion will start by examining the main characteristics of the duty to cooperate. Then, the bulk on the section will deal with the impact that CMRs have on the duty to cooperate, particularly on its application. This impact will be examined from two perspectives – the voluntarist and the conservationist ones. Each of them will be tailored to certain factual circumstances that may arise in a CMR situation.

Section IV will aim to explore the consequences of unsuccessful cooperation. In particular, it will deal with three issues that this author finds most pressing in the case of a CMR. They are (1) the status of pre-existing (pre-CMR) agreements, (2) available dispute settlement mechanisms, and (3) self-help measures. Where the existing regime fails to provide the necessary guidance with respect to these issues, the discussion will go beyond the existing regime and apply general international law. The conclusions of the thesis will consequently be presented in section V.

II. The EU and the Mackerel dispute

1. The EU and fisheries conservation and management

The EU's involvement in fisheries on the international plane represents an important part of the external action of the Union in general and it has been so for quite some time.³² Ever since the developments on the international plane in the 1970s relating to the establishment of the EEZ, the EU has been getting increasingly involved in almost all aspects of international fisheries. This progressive action went hand-in-hand with the development of EU's competences, internally as well as externally. Internally, it was in the 1960s that the EU first started drawing upon its agricultural competence to develop what later became with the Maastricht Treaty a separate fisheries policy.³³ With the increasing international consensus on the establishment of the EEZ as a new pivotal element of the LOS, the EU's internal competences were of little use without the corresponding external competence. The European Court of Justice (ECJ) categorically agreed and in 1976 ruled in the *Kramer* case that the EU had the implied and exclusive competence to also act externally in the area of fisheries conservation.³⁴

The assumption of the external competence in the fisheries and other LOS matters put the EU firmly on the map by securing it a separate seat (and not just an observer status) at the negotiating table of the Third United Nations Conference on the Law of the Sea.³⁵ This separate seat was also along the seats of the Member States, making the resulting Convention a mixed agreement for the EU and a mystery in terms of competence, representation and responsibility for the other negotiating parties. In an attempt to answer these concerns the EU

³² R Churchill, 'The EU as an International Fisheries Actor - Shark or Minnow?' (1999) 4 EFAR 463.

³³ R Churchill and D Owen, *The EC Common Fisheries Policy* (OUP, Oxford 2010) 4-6.

³⁴ Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279 [30/33].

³⁵ T Treves, 'The EEC, the UN and the Law of the Sea' in E Brown and R Churchill (eds) *The UN Convention on the Law of the Sea: Impact and Implementation: proceedings Law of the Sea Institute nineteenth annual conference* (Law of the Sea Institute annual conference, Law of the Sea Institute, Honolulu 1987) 520.

was obliged to issue a declaration of competence, which in hindsight has proven to be of limited usefulness. Seemingly settled for the time being, the issue of the scope of EU's exclusive external competence in the area of fisheries was re-opened again in the 1990s with respect to EU's participation in the Food and Agriculture Organization's (FAO) Compliance Agreement, the UNFSA and the UNCLOS.³⁶ The issue was settled again with the result that both the UNCLOS and the UNFSA became mixed agreements for the EU with corresponding declarations of competence. Be that as it may, the aspects concerning fisheries conservation in these agreements remained an exclusive competence and this is now explicitly stated in Article 3(1)(d) TFEU.

The exclusive authority that the EU developed in the area of fisheries, both internally and externally, has led to it being rightfully considered a "Single Coastal State" for the purposes of fisheries, notwithstanding the initial refusal by Eastern European States (the Soviet Union and fellow members of the Council for Mutual Economic Assistance) to recognise the EU as a negotiating partner.³⁷ Accordingly, the references to 'States' in this thesis are to be read to include the EU. Notwithstanding this image of unity and singularity, the EU is still composed of Member States with diverging fishing interests that are interacting at the EU level. In that sense, the EU's execution of its Common Fisheries Policy (CFP) can also be seen as a highly developed cooperative effort. This cooperative effort is underpinned by *inter alia* the autonomous EU law principle of sincere cooperation (loyalty).³⁸

This principle has very wide implications for the way the EU institutions as well as the Member States act, including in the area of the LOS. One of the expressions of this principle – the exclusive jurisdiction of the ECJ under Article 344 TFEU – was decisive in the *MOX Plant* dispute between Ireland and the UK.³⁹ In the infringement proceedings initiated by the Commission, the ECJ found Ireland to have breached its obligations of loyalty and of respect for ECJ's exclusive jurisdiction by instituting proceedings before a tribunal outside of the framework of the EU concerning issues of exclusive EU competence. Similar loyalty concerns arose in the Mackerel dispute. This was due to the special status of Denmark as an

³⁶ R Churchill and D Owen, *supra*, n 33, 307.

³⁷ R Churchill, 'The EEC's Contribution to "State" Practice in the Field of Fisheries' in E Brown and R Churchill, *supra*, n 35, 557-558.

³⁸ For a very comprehensive discussion of the principle see M Klamert, *The Principle of Loyalty in EU Law* (Oxford Studies in European Law, OUP, Oxford 2014).

³⁹ Case C-459/03 *Commission v Ireland* [2006] I-4635.

EU Member State having the Faroe Islands as a self-governing territory within its borders but outside of the EU ones. Because Denmark is still in charge of certain aspects of the Faroe Islands' external relations, including the participation in international court proceedings, formally, it was Denmark that initiated proceedings against the EU – a very rare occurrence that would normally violate Article 344 TFEU.⁴⁰ However, in this particular case Denmark complied with its loyalty obligations. This was because EU law contains an exception for Member States having territories outside of the EU that need to have their interests protected even from the EU itself.⁴¹

In the context of the abovementioned exclusive competence developments, the CFP has been evolving and has gone through several reforms. With the last CFP reform, in 2011 the Commission introduced a new set of policy orientations for the external dimension of the CFP.⁴² These orientations were intended *inter alia* to “contribute to more responsible international fisheries governance”.⁴³ The Commission also noted that the EU was cooperating with its Northern neighbours with respect to shared stocks, including mackerel, and that it will consider “best approaches to strengthen this cooperation to take into account developments in regional processes”.⁴⁴ With these policy goals and competences in the background, the EU got involved in the Mackerel dispute and adopted Regulation 1026/2012.

2. The Mackerel dispute as the background of Regulation 1026/2012

2.1 Overview of the two fisheries

The Mackerel dispute, more generally, was a fishing-quota dispute concerning both Atlanto-Scandian herring (*Clupea harengus*) (hereinafter referred to as herring) and North-East Atlantic mackerel (*Scomber scombrus*) (hereinafter referred to as mackerel). The involvement of the two fish stocks needs to be elaborated upon here as they comprise a crucial part of the

⁴⁰ Opinion 2/13 *ECHR* [2014] ECR I-0000 [202].

⁴¹ See M Vatsov, ‘The Mackerel War: Testing the Limits of the Exclusive Jurisdiction of the Court of Justice under Article 344 TFEU’ (2014) 6 *ELR* 864.

⁴² European Commission, Communication on External Dimension of the Common Fisheries Policy, COM(2011) 424 final, Brussels 13 July 2011.

⁴³ *Ibid.*, 5-6.

⁴⁴ *Ibid.*, 5.

factual background. Furthermore, both fisheries have a long history and for reasons of clarity a short overview of their recent history and regulatory regime needs to be provided as well.

The Mackerel dispute concerned both herring and mackerel due to the changes in their zonal attachments, which coincided temporally and geographically to a large extent. Additionally, the two stocks are also associated species and are sometimes caught together, as in Faroese waters.⁴⁵ Associated species, as a term, is mentioned several times in both the UNCLOS and the UNFSA but without providing a definition. Regulation 1026/2012 gives some insight in that regard. According to it, associated species means

“any fish that belongs to the same ecosystem as the stock of common interest and that preys upon that stock, is preyed on by it, competes with it for food and living space or co-occurs with it in the same fishing area, and that is exploited or accidentally taken in the same fishery or fisheries”.⁴⁶

Both the herring and the mackerel are straddling stocks and as such they also appear beyond the EEZs of the relevant States – in the high seas. Accordingly, due to their high seas presence in the Regulatory and Convention Area set up by the North-East Atlantic Fisheries (NEAF) Convention,⁴⁷ both stocks fall under the competence of the NEAF Commission (NEAFC). The contracting parties to the NEAF Convention are Denmark in respect of the Faroe Islands and Greenland, the EU, Iceland, Norway and the Russia. The NEAFC can *inter alia* make recommendations concerning fisheries conducted (1) within the jurisdiction of contracting party (if it so requests) and (2) beyond the areas under the jurisdiction of the contracting parties but within the Convention Area.⁴⁸ These recommendations can become binding unless objected to within the specified periods.⁴⁹

The *Clupea harengus* is deemed the largest herring stock in the world and is “widely distributed and highly migratory throughout large parts of the [North-East] Atlantic during its

⁴⁵ See for more detailed explanation why the mackerel is an associated species with herring Commission Implementing Regulation (EU) No 793/2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock [2013] OJ L223/1, recital [23].

⁴⁶ Regulation 1026/2012, *supra*, n 13, art 2(b).

⁴⁷ Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries (adopted 18 November 1980, entered into force 17 March 1982) 1285 UNTS 129.

⁴⁸ *Ibid.*, arts 5-7.

⁴⁹ *Ibid.*, arts 12 and 13.

lifespan”.⁵⁰ The stock of the herring collapsed several decades ago due to overfishing and all fishing was ceased between the early 1970s and the mid-1990s. Once the stock was recovered and the fishing re-opened in 1996, it was managed by the EU, Iceland, Faroe Islands, Norway and the Russia (the herring Coastal States) as it visited their EEZs during its migration.⁵¹ In 1996 a long-term management plan was agreed upon lasting until 2002.⁵² From 2003 to 2006 no agreement was reached and the quotas were set unilaterally.⁵³ From 2007 to 2012 the herring Coastal States had an agreement on a management plan. However, with the outbreak of the Mackerel dispute in 2013 the Faroe Islands and the other herring Coastal States have been failing to agree on common Total Allowable Catch (TAC) and quota allocations. The agreement reached in 2013 and 2014 excluded the Faroe Islands, which adopted unilateral quotas.⁵⁴ In 2013 and 2014 the Faroe Islands also objected to the NEAFC recommendations and was, therefore, not bound by them. In 2015 an agreement was reached on the TAC but not on the quota allocations.⁵⁵

Since the early 1960s the migration route of the herring changed several times.⁵⁶ When the stock collapsed the juvenile and the adult fish remained only in Norwegian waters.⁵⁷ During the years of rebuilding of the stock, the herring slowly returned to its previous routes beyond Norwegian waters.⁵⁸ This CMR, however, have been argued to be caused not only by changes in the parent stock biomass but also by changes in the environment.⁵⁹ The International Council for the Exploration of the Sea (ICES) – a major intergovernmental organization delivering *inter alia* scientific management advice for the area of the North Atlantic – has recently also observed a change in the zonal attachment of the herring. In its reports for the past few years the ICES indicate increased presence of herring in Faroese and Icelandic

⁵⁰ ICES, Report of the Working Group of Widely Distributed Stocks, ICES CM 2014/ACOM:15, 784.

⁵¹ *Ibid.*, recital [2].

⁵² ICES, WG WIDE, *supra*, n 50, 371.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 371-372.

⁵⁵ Council Regulation (EU) No 2015/523 amending Regulations (EU) No 43/2014 and (EU) 2015/104 as regards certain fishing opportunities [2015] L84/1, recital 8.

⁵⁶ E. Sissener and T. Bjørndal, *supra*, n 9, 300.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* 301.

⁵⁹ A Corten and G van den Kamp, ‘Natural changes in pelagic fish stocks of the North Sea in the 1980s’ (1992) 195 ICES Marine Science Symposia 402.

waters.⁶⁰ Catches of herring by Greenland in the last few years have also been noted by the ICES.⁶¹

The *Scomber scombrus* is a stock present on both the West and the East sides of the North Atlantic.⁶² For the present discussion only the North-East Atlantic mackerel is of relevance.⁶³ In the North-East Atlantic the stock of the mackerel has been divided in three spawning components – Southern, Western and North Sea.⁶⁴ The stock in the North Sea component collapsed in the 1970s.⁶⁵ Even after extensive regulation aimed at protecting the stock in the North Sea it has not return to its pre-collapse levels and the reasons for this are unknown.⁶⁶ For many years the main part of the mackerel fishing was done by the EU and Norway. Since 1999 the management agreements for mackerel included the Faroe Islands.⁶⁷ However, from 2009 till 2013 no agreement was in place and international regulation on catch limitation was lacking. A trilateral agreement between the EU, Norway and the Faroe Islands was reached once again in 2014 for a period of five years.⁶⁸ In 2014 the NEAFC did not adopt a recommendation with respect to mackerel, while the trilateral agreement explicitly mentioned the NEAFC and the share left to it.⁶⁹

⁶⁰ ICES, Report of the Working Group of Widely Distributed Stocks, ICES CM 2011/ACOM:15, 35, 502; ICES, Report of the Working Group of Widely Distributed Stocks, ICES CM 2012/ACOM:15, 297-8, 796; ICES, Report of the Working Group of Widely Distributed Stocks, ICES CM 2013/ACOM:15, 795; ICES, WG WIDE, *supra*, n 50, 373, 786.

⁶¹ ICES, WG WIDE, *supra*, n 50, 385, 393.

⁶² *Ibid.*, 738.

⁶³ For a description of the North-West Atlantic part of the stock, see A Studholme *et al.* Essential Fish Habitat Source Document: Atlantic Mackerel, *Scomber scombrus*, Life History and Habitat Characteristics (NOAA Technical Memorandum NMFS-NE-141, 1999)

<<http://www.nefsc.noaa.gov/nefsc/publications/tm/tm141/tm141.pdf>> accessed 1 October 2015.

⁶⁴ ICES, WG WIDE, *supra*, n 50, 738.

⁶⁵ T Jansen, 'Pseudocollapse and rebuilding of North Sea mackerel (*Scomber scombrus*)' (2014) 71 ICES Journal of Marine Science 299.

⁶⁶ *Ibid.*, 1-2; T Jansen *et al.* 'Long-Term Retrospective Analysis of Mackerel Spawning in the North Sea: A New Time Series and Modeling Approach to CPR Data' (2012) 7(6) PLoS ONE, doi:10.1371/journal.pone.0038758.

⁶⁷ Note to the Council on North East Atlantic Mackerel Management and Trade Measures (PECHE 315, 10 July 2013), Annex, 1 <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2012122%202013%20INIT>> accessed 1 October 2015.

⁶⁸ Agreed Record on a Fisheries Arrangement Between the European Union, the Faroe Islands and Norway on the Management of Mackerel in the North-East Atlantic from 2014 to 2018 (London, 12 March 2014) <http://www.magrama.gob.es/es/prensa/14.03.14%20Documento%20Acuerdo%20Estados%20Costeros%20Atl%C3%A1ntico%20Noroeste_tcm7-320362_noticia.pdf> accessed 1 October 2015.

⁶⁹ *Ibid.*, [7].

The zonal attachment of the mackerel has also gone through major changes.⁷⁰ Currently, the stock is expanding northward and to the westward beyond its usual migration patterns.⁷¹ This change has led to increased presence of mackerel in Icelandic and Faroese waters.⁷² Most recently the mackerel has reached the waters of Greenland as well with increasing reported catches.⁷³ Next to the ‘simple’ change in the presence of the stock, this CMR of the mackerel affects other stocks that are also present in these waters, including herring. A Consequence of this new overlap of the stocks is *inter alia* a significant amount of by-catch and, as such, a decreased possibility of targeted fishing of either of the two stocks.⁷⁴

2.2 Interactions between the relevant States

Keeping in mind these basic descriptions of the two fisheries we should now dive in the specifics of the Mackerel dispute. The Mackerel dispute refers to a disagreement going back to 2008.⁷⁵ The Mackerel dispute involved several parties with different intensity of involvement throughout it. However, the main active parties were the EU and Norway on the one hand and Iceland and the Faroe Islands on the other.⁷⁶ Accordingly, the Mackerel dispute, more broadly speaking, represents a several-party dispute over the quotas of two stocks, but, more specifically speaking, a dispute between the EU and the Faroe Islands concerning both mackerel and herring. When referring to the Mackerel dispute, this thesis deals with the latter while taking note of the involvement of all parties where relevant.

⁷⁰ D Reid, A Eltink, C Kelly, ‘Inferences on the changes in pattern in the prespawning migration of the western mackerel (*Scomber scombrus*) from commercial vessel data’ ICES CM 2003/Q:19; D Reid, A Eltink, C Kelly, M Clark, ‘Long-Term Changes in the Pattern of the Prespawning Migration of the Western Mackerel (*Scomber scombrus*) Since 1975, using Commercial Vessel Data’ ICES CM 2006/B:14; M Walsh, J Martin, ‘Recent changes in the distribution and migration of the western mackerel stock in relation to hydrographic changes’ ICES CM 1986/H:17.

⁷¹ Q Bates, ‘Mackerel Mayhem’ Samudra Report No. 57, 5

<http://www.icsf.net/images/samudra/pdf/english/issue_57/3521_art_sam57_art01.pdf> accessed 21 April 2015.

⁷² *Ibid.*; ICES, WGWIDE, *supra*, n 60, 45.

⁷³ ICES, WGWIDE, *supra*, n 50, 39, 44, 53.

⁷⁴ *Ibid.*, 786; ICES, WGWIDE, *supra*, n 50, 315.

⁷⁵ Council of the European Union Press Release, Council for Agriculture and Fisheries, 3253rd meeting Brussels, (15 July 2013) 18 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/agricult/138086.pdf> accessed 1 October 2015.

⁷⁶ B Charron, ‘Movements in the right direction... But’ – Faroese Government’s position in the ongoing ‘Mackerel War’ (25 February 2013) <http://www.seafoodintell.com/?page_id=229> accessed 1 October 2015.

It all started in the Icelandic waters. After a long period of no reported catches of mackerel in Icelandic waters, the catches of mackerel rocketed in the late 2000s.⁷⁷ In 2007 Iceland reported 36 706 tonnes.⁷⁸ The catch soared to over 108 000 tonnes in 2008.⁷⁹ This change in the catches was explained with a change in the zonal attachment of mackerel and corresponding with the warmer waters of the North Atlantic.⁸⁰ This steep increase in catches incensed many, mainly in Scotland.⁸¹ Since then Iceland has been striving to be recognised as a Coastal State and to be involved in the agreements on the management of the mackerel. However, the share that Iceland wanted was not acceptable to the others, mainly the EU and Norway, due to its size. Initially Iceland was allocated only 2 000 tonnes and this offer increased to 26 000 tonnes in 2010 but was rejected and considered “unreasonable” by Iceland.⁸² Iceland’s catch of mackerel continued to increase in the meantime and in 2010 Iceland unilaterally set its quota to 130 000 tonnes (15 000 more than in 2009).⁸³

The Faroe Islands being in the same boat and facing pressure at home went along with Iceland and also increased its quota for mackerel to 85 000 tonnes in 2010.⁸⁴ This quota amounted to about 15% of the recommended TAC (previously amounting to only 4%).⁸⁵ This increase by the Faroe Islands was far from appreciated in Scotland where fishermen in August 2010 aligned their boats, forming a physical blockade for the Faroese trawler – the *Jupiter* – in order to prevent it from entering Peterhead harbour in Aberdeen and offloading its mackerel catch.⁸⁶ At the same time Norway imposed a ban on the mackerel landings in its ports by the

⁷⁷ Icelandic Fisheries, Information centre of the Icelandic Ministry of Fisheries and Agriculture, Atlantic mackerel <<http://www.fisheries.is/main-species/pelagic-fishes/atlantic-mackerel/>> accessed 1 October 2015; ICES, Report of the Working Group of Widely Distributed Stocks, ICES CM 2008/ACOM:13, 83.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Ó Ástþórsson, Þ Sigurðsson and S Sveinbjörnsson, ‘Makrill á Íslandsmiðum /Mackarel in Icelandic waters’ in Þættir úr vistfræði sjávar 2009 / Environmental conditions in Icelandic waters 2009 (Hafrannsóknir nr. 152, Reykjavík 2010) 25-32.

⁸¹ --, ‘Icelandic overfishing 'scandal'’ (10 November 2008)

<http://news.bbc.co.uk/2/hi/uk_news/scotland/7720234.stm> accessed 1 October 2015.

⁸² A Eckstein, Fisheries: Mackerel: Reykjavik Rejects EU Proposals (4 November 2010)

<<http://www.highbeam.com/doc/1G1-243036020.html>> accessed 1 October 2015.

⁸³ --, ‘Overfished and over there Scotland’s fishermen are up in arms as rivals commandeer a valuable catch’ (2 September 2010) <<http://www.economist.com/node/16945395>> accessed 1 October 2015.

⁸⁴ Q Bates, *supra*, n 71.

⁸⁵ Department for Environment, Food & Rural Affairs, Press Release, ‘Concern over Iceland and Faroe Islands mackerel quota action’ (10 August 2010) <<https://www.gov.uk/government/news/concern-over-iceland-and-faroe-islands-mackerel-quota-action>> accessed 1 October 2015.

⁸⁶ C Davis, ‘Britain prepares for mackerel war with Iceland and Faroe Islands’ (22 August 2010)

<<http://www.theguardian.com/environment/2010/aug/22/britain-iceland-faroe-islands-mackerel-war>> accessed 1 October 2015.

Faroe Islands and Iceland.⁸⁷ Not long after the possibility of adopting sanctions was also mentioned by the EU.⁸⁸ It led to the adoption by the EU of a framework regulation for coercive measures,⁸⁹ which was eventually implemented (further discussed *infra*). The EU also warned that this dispute may affect negatively Iceland's EU membership prospective.⁹⁰ However, this warning hardly had any teeth as Iceland itself stopped the negotiation talks in 2013 and in March 2015 officially withdrew its candidacy.⁹¹ The unilateral allocations of the high mackerel quotas by the Faroe Islands and Iceland continued in the following years as well while trying to reach a hard-fought agreement with the EU and Norway. While the mackerel spat was intensifying, in April 2012, the mackerel fishery got its Marine Stewardship Council (MSC) certification suspended.⁹²

A further complication of the Mackerel dispute was the involvement of Greenland. The appearance of herring and mackerel in the waters of Greenland did not go unnoticed for the fishermen of the big island and they were quick to claim what was in their waters.⁹³ Greenland engaged in exploratory fishing of herring and mackerel and it was met with high interest by the industry.⁹⁴ However, as the presence of these pelagic species is news, the industry had to catch-up by adapting its fleet.⁹⁵ During this adaptation period Greenland had

⁸⁷ Ministry of Fisheries and Coastal Affairs, Press Release 44/2010, 'Ban on landings of mackerel from Faroese and Icelandic vessels' (29 July 2010) <<https://www.regjeringen.no/en/aktuelt/Ban-on-landings-of-mackerel-from-Faroese-and-Icelandic-vessels/id611793/>> accessed 1 October 2015.

⁸⁸ S Johnson, 'Iceland and Faroes facing EU ban in mackerel war' (14 December 2010) <<http://www.telegraph.co.uk/news/uknews/scotland/8202042/Iceland-and-Faroes-facing-EU-ban-in-mackerel-war.html>> accessed 1 October 2015.

⁸⁹ Impact Assessment, *supra*, n 14, 3.

⁹⁰ F Pope, 'Mackerel war puts Iceland's EU bid at risk, says Fisheries Minister' (10 September 2010) <<http://www.thetimes.co.uk/tto/environment/article2721178.ece>> accessed 1 October 2015.

⁹¹ --, 'Iceland officially drops EU membership bid' (13 March 2015) <<http://www.euractiv.com/sections/enlargement/iceland-officially-drops-eu-membership-bid-312877>> accessed 1 October 2015.

⁹² --, 'Mackerel certificates suspended by Certifiers' (2 April 2012) <<http://www.msc.org/newsroom/news/mackerel-certificates-suspended-by-certifiers>> accessed 1 October 2015. The MSC is an NGO evaluates the sustainability of a wide range of fisheries and grants an ecolabel for the fisheries it evaluates as sustainable, which is well-valued in the industry.

⁹³ N Ramsden, 'Greenland could complicate Faroese-EU herring debate' (17 July 2013) <<http://www.undercurrentnews.com/2013/07/17/greenland-could-complicate-faroese-eu-herring-debate/>> accessed 1 October 2015.

⁹⁴ --, 'Greenland swamped by applications for mackerel fishing' (18 February 2014) <<http://www.undercurrentnews.com/2014/02/18/greenland-swamped-by-applications-for-mackerel-fishing/>> accessed 1 October 2015.

⁹⁵ N Ramsden, 'Polar Seafood prepared for Greenlandic industry shift' (15 April 2013) <<http://www.undercurrentnews.com/2013/04/15/polar-seafood-prepared-for-greenlandic-industry-shift/#.UePQ321LpTg>> accessed 1 October 2015.

to rely also on foreign fishing fleets for its exploratory fishing.⁹⁶ This became a dividing point of contention during the Mackerel dispute negotiations. The interest of the EU and Iceland to heavily participate in Greenland's exploratory fishery, outside of the 2014 mackerel negotiations, was unacceptable to Norway.⁹⁷ It was unacceptable because it would have *de facto* undermined any eventual agreement and would have given more legitimacy to Greenland's claims, which Norway was rejecting. Eventually, as stated *infra*, the mackerel deal reached was only between the EU, the Faroe Islands and Norway and explicitly limited any participation in a third country exploratory fishery to only 4 000 tonnes, indirectly aimed at Greenland.⁹⁸

The Mackerel dispute further escalated with respect to the Faroe Islands when it extended to the herring quotas. This happened on 23 January 2013 when, after unsuccessful negotiations between the Coastal States on the TAC levels, the Faroe Islands did not become a party to the 2013 agreement on the quotas for herring.⁹⁹ While the Coastal States alleged in the agreement that the Faroe Islands withdrew from the agreement without notification,¹⁰⁰ the Faroe Islands instantly disagreed.¹⁰¹ The Faroe Islands recalled in its response that during the consultations in October 2011 it expressed reservations as regards the allocation and highlighted the need for a process of renegotiation of the allocation of the quotas. The following year at the plenary meetings in October and December 2012 the Faroe Islands noted that it could not continue to adhere to an agreement allocating to it the same quotas as in previous years. This was also noted at the meeting on 23 January 2013. On 26 March 2013 the Faroe Islands unilaterally increased its herring quota to 17% of the recommended TAC (a 145% increase from the previous 5.16%). The justification for that increase was the information in the

⁹⁶ E Tallaksen, 'Greenland ups 2014 mackerel quota by 66% to 100,000t' (24 February 2014) <<http://www.undercurrentnews.com/2014/02/24/greenland-ups-2014-mackerel-quota-by-66-to-100000t/>> accessed 1 October 2015.

⁹⁷ E Tallaksen, 'Norway: EU, Iceland demand to fish in Greenland broke mackerel talks' (6 March 2014) <<http://www.undercurrentnews.com/2014/03/06/norway-eu-iceland-demand-to-fish-in-greenland-broke-mackerel-talks/>> accessed 1 October 2015.

⁹⁸ E Tallaksen, 'Greenland cries foul in mackerel deal' (17 March 2014) <<http://www.undercurrentnews.com/2014/03/17/greenland-cries-foul-in-mackerel-deal/>> accessed 1 October 2015.

⁹⁹ Agreed Record of Conclusions of Fisheries Consultations on the Management of the Norwegian Spring-Spawning (Atlanto-Scandian) Herring Stock in the North-East Atlantic for 2013 (London, 23 January 2013) <http://wkshop.bakuri.dk/filarkiv/dkfisk.die.dk/file/Info_for_bestyrelsen/%C2%A7_5-udvalget/F_20-13_Agreed_Record_ND_18-re01_en13_annex_1.pdf> accessed 1 October 2015.

¹⁰⁰ *Ibid.*, [6].

¹⁰¹ Annex 4, Letter from the Faroe Islands to the Russian Federation, EU, Iceland and Norway dated 24 January 2013 <http://www.fisk.fo/Files/Billeder/Fisk/01_stjornarskrivstovan/Fylgiskj%C3%B81.pdf> accessed 30 April 2014.

abovementioned ICES reports observing a CMR of the herring with an increased presence in Faroese waters.¹⁰²

On 15 April 2013 the Commission announced during the plenary debate of the European Parliament that trade sanctions are being considered against the Faroe Islands¹⁰³ and even that the internal Commission procedure was opened for using trade instruments.¹⁰⁴ On 18 April 2013 the Faroe Islands protested against that announcement.¹⁰⁵ On 17 May 2013 the Commission notified the Faroe Islands of its intention to identify the Faroe Islands as a country allowing non-sustainable fishing.¹⁰⁶ The Faroe Islands responded on 17 June 2013 that, among others, if the Commission proceeds with the adoption and implementation of the contemplated measures it reserves the right “to take necessary measures to instigate appropriate compulsory conciliation proceedings”.¹⁰⁷

Nevertheless, the Commission continued with the procedure for adoption of measures and on 31 July 2013 the Committee for Fisheries and Aquaculture backed the Commission’s proposal.¹⁰⁸ On 16 August 2013 Denmark in respect of the Faroe Islands initiated arbitration under Annex VII to the UNCLOS against the EU.¹⁰⁹ The dispute before the Annex VII tribunal concerned the interpretation and application of Article 63(1) UNCLOS with respect to herring.¹¹⁰ On 20 August 2013, the EU acting under Regulation 20126/2012 eventually adopted coercive measures with Commission Implementing Regulation 793/2013.¹¹¹ Norway

¹⁰² ICES, WGWIDS, *supra*, n 60, 297-298 and 796.

¹⁰³ European Commission Press Release, ‘Unsustainable mackerel fishing in the North East Atlantic’ (16 April 2013) <http://ec.europa.eu/commission_2010-2014/damanaki/headlines/press-releases/2013/04/2010416_en.htm> accessed 1 October 2015.

¹⁰⁴ See the recording of the answer of Commissioner Damanaki available at <<http://www.europarl.europa.eu/ep-live/en/plenary/video?debate=1366050749473&streamingLanguage=en>> accessed 30 April 2014.

¹⁰⁵ Annex 6, Letter from Minister of Fisheries, Mr Jacob Vestergaard, to Commissioner Ms Maria Damanaki, 18 April 2013 <http://www.fisk.fo/Files/Billeder/Fisk/01_stjornarskrivstovan/Fylgiskj%C3%B81.pdf> accessed 30 April 2014.

¹⁰⁶ Decision C(2013) 2853 of 17 May 2013.

¹⁰⁷ Letter to Commissioner Ms Maria Damanaki (17 June 2013), 3 <http://www.fisk.fo/Files/Billeder/Fisk/01_stjornarskrivstovan/Svarskriv%20til%20ES.pdf> accessed 30 April 2014.

¹⁰⁸ European Commission Press Release, ‘Faroe Islands: trade measures on herring supported by Member States’ Committee’ (31 July 2013) <http://ec.europa.eu/commission_2010-2014/damanaki/headlines/press-releases/2013/07/20130731_en.htm> accessed 1 October 2015.

¹⁰⁹ Press Release by the Prime Minister’s Office of the Faroe Islands, ‘The Faroe Islands takes the EU to international tribunal over intended economic measures’ (16 August 2013) <<http://www.mfa.fo/Default.aspx?ID=13626&Action=1&NewsId=5264&PID=23631>> accessed 3 January 2014.

¹¹⁰ PCA Case N° 2013-30 *In the Matter of the Atlanto-Scandian Herring Arbitration (Denmark in respect of the Faroe Islands v the European Union)*, Procedural Order No 1, 2.

¹¹¹ Regulation 793/2013, *supra*, n 45.

also followed suit and adopted a ban against Faroese herring.¹¹² In response to the EU's sanctions, on 4 November 2013, Denmark on behalf of the Faroe Islands requested consultations with the EU, under Article 4 of the World Trade Organisation's (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994.¹¹³ This was the first time for, formally, an EU Member State to request consultations with the EU under the WTO DSU.¹¹⁴ After the period for consultations passed, on 8 January 2014 the establishment of a panel was requested by Denmark but the DSB deferred the establishment of a panel due to the EU's veto on 22 January.¹¹⁵ On 26 February 2014, when the EU could veto no more, the panel was established.¹¹⁶ On 15 March 2014, the Annex VII arbitration had its first organisational meeting when it discussed the procedural framework for the arbitration and accepted the calendar for written submissions.¹¹⁷

In the meantime, the intense rounds of negotiations continued but the EU and Norway were disagreeing on the quota concessions for the Faroe Islands. Eventually, on 12 March 2014, the EU, the Faroe Islands and Norway managed to reach an agreement on the mackerel quotas.¹¹⁸ The agreement was reached by going above the advised TAC by ICES, leaving doubts for the sustainability of the agreement.¹¹⁹ The agreement also excluded Iceland, Greenland and Russia but left a 15.6% quota of the agreed TAC as a "Coastal State and Fishing Party reserve". From the remaining 84.4%, according to the agreement, for the next five years the EU has 58.40%, the Faroe Islands has 14.93% and Norway has 26.67%.¹²⁰

¹¹² --, 'Norway bans Faroese herring landings' (27 August 2013) <<http://www.undercurrentnews.com/2013/08/26/norway-imposes-ban-on-faroese-herring-landings/>> accessed 1 October 2015.

¹¹³ European Union – Measures on Atlanto-Scandian Herring, Request for Consultations by Denmark in respect of the Faroe Islands, WT/DS469/1, 7 November 2013 <https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/120697/q/WT/DS/469-1.pdf> accessed 1 October 2015.

¹¹⁴ However, keep in mind the *GATT Panel Report, EEC—Quantitative Restriction on Certain Products from Hong Kong (EEC-Import Restrictions)* L/5511 adopted July 12, 1983 (BISD 30S/129), discussed in M Vatsov, *supra*, n 41, 869-870.

¹¹⁵ European Union — Measures on Atlanto-Scandian Herring, DISPUTE DS469 <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds469_e.htm> accessed 1 October 2015.

¹¹⁶ *Ibid.*

¹¹⁷ PCA Case N° 2013-30, *supra*, n 110; *Ibid.*, Rules of Procedure.

¹¹⁸ Agreed Record, *supra*, n 68.

¹¹⁹ --, 'Iceland: EU, Faroe Islands, Norway take full responsibility for overfishing' (13 March 2014) <<http://www.undercurrentnews.com/2014/03/13/iceland-eu-faroe-islands-norway-take-full-responsibility-for-overfishing/>> accessed 1 October 2015.

¹²⁰ Agreed Record, *supra*, n 68, Section 7.4.

The EU trade sanctions against the Faroe Islands were expected to be removed after an agreement is reached for the allocation of the herring.¹²¹ However, this did not happen because the 2014 agreement from 28 March once again excluded the Faroe Islands.¹²² Nevertheless, since a mackerel deal was reached, the Faroe Islands could catch 29% of its mackerel quota in the EU waters, where herring was not a by-catch. According to the Commission, the trade sanctions did not apply to that catch of mackerel.¹²³ On 11 June 2014, an *ad hoc* agreement was finally reached on the herring quotas.¹²⁴ The Mackerel dispute was officially ended after the EU lifted the trade sanctions on 18 August 2014,¹²⁵ and both the arbitration and the WTO proceeding were terminated a few days later.¹²⁶ While the dispute ended it must be reminded that an agreement on the herring quotas was not reached in 2015.

3. Regulation 1026/2012

3.1 Importance

According to Article 1 of Regulation 1026/2012, it is a framework regulation “for the adoption of certain measures regarding the fisheries-related activities and policies of third countries in order to ensure the long-term conservation of stocks of common interest to the Union and those third countries”. Being ‘simply’ a framework for the adoption of measures Regulation 1026/2012 does not have a specific legal effect on its own and it requires

¹²¹ Statement of fisheries minister Jacob Vestergaard reported by E Tallaksen, ‘Mackerel deal gets bitter reception as TAC set at 1.24m, Faroes get 12.6%’ (13 March 2014) <<http://www.undercurrentnews.com/2014/03/13/mackerel-deal-gets-bitter-reception-as-tac-set-at-1-24m-faroes-get-12-6/>> accessed 1 October 2015.

¹²² Agreed Record of Conclusions of Fisheries Consultations on the Management of the Norwegian Spring-Spawning (Atlanto-Scandian) Herring stock in the North-East Atlantic for 2014 (Reykjavik, 28 March 2014) <http://www.regjeringen.no/upload/FKD/Herring_signed.pdf> accessed 1 October 2015.

¹²³ E Tallaksen, ‘EU: Sanctions on Faroese mackerel still on, partially’ (8 April 2014) <http://www.undercurrentnews.com/2014/04/08/eu-sanctions-on-faroese-mackerel-still-on-partially/?utm_source=Undercurrent+News+Alerts&utm_campaign=80ad3a460e-From_Email_Europe_briefing_4_8_2014&utm_medium=email&utm_term=0_feb55e2e23-80ad3a460e-91343769> accessed 1 October 2015.

¹²⁴ European Commission Press Release, ‘Herring dispute between European Union and Faroe Islands nears end’ (11 June 2014) <http://europa.eu/rapid/press-release_IP-14-668_en.htm> accessed 1 October 2015.

¹²⁵ Commission Implementing Regulation (EU) No 896/2014 repealing Implementing Regulation (EU) No 793/2013 establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock [2014] OJ L244/10.

¹²⁶ Press Release by the Prime Minister’s Office of the Faroe Islands, Arbitral and WTO proceedings terminated, 21 August 2014 <<http://www.mfa.fo/Default.aspx?ID=11730&M=News&PID=25703&NewsID=5771>> accessed 3 September 2014.

implementing regulations. Be that as it may, the framework that is built with Regulation 1026/2012 – its substance – is quite revolutionary in dealing with shared stocks.

Before going into its substance, it is important to situate Regulation 1026/2012 in the broader CFP framework. Regulation 1026/2012 is not the first framework regulation for the adoption of measures against third countries in the area of fisheries. Regulation 1005/2008 on illegal, unreported and unregulated (IUU) fishing is the main such regulation.¹²⁷ While the two regulations are not directly connected they do form part of the EU's toolset for dealing with third countries in the area of fisheries, as recognised in Article 31 and 36 of Regulation 1380/2013 – the central CFP regulation.¹²⁸ To the extent that the two frameworks may be implemented to target the same third country, it becomes clear that action under the two regulations must be coordinated. It is for that reason that Regulation 1026/2012, in one of its recitals, states that “[i]n order to ensure that Union action for the conservation of fish stocks is effective and coherent, it is important that” IUU measures are taken into consideration.

The complementary nature of Regulation 1026/2012 to the combating of IUU fishing was highlighted by the EU in a report it presented to the UN in 2012 on major developments of relevance to sustainable fisheries.¹²⁹ This complementary nature is succinctly explained in the Impact Assessment that accompanied the proposal for Regulation 1026/2012:

“It must be underlined that the results of [the quota-allocating] consultations are not legally binding: they cannot be called "agreements" with the meaning implied in international law. They are instead termed "arrangements" whereby the parties announce that they will recommend their respective fishing authorities the adoption of one or another measure. These authorities are free (although bound politically) to adopt or not the measures discussed during the consultations.

¹²⁷ Council Regulation 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999 [2008] L286/1.

¹²⁸ European Parliament and Council (EU) No Regulation 1380/2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC [2013] OJ L354/22.

¹²⁹ EU Report on major developments of relevance on sustainable fisheries since 2008, 15
<http://www.un.org/depts/los/general_assembly/contributions_fisheries/2012/1st_Contrib_EU.pdf> accessed 1 October 2015.

This is the reason why, in the case of mackerel, the decision of Faroe Islands to break the arrangements concluded in 2008 for the management plan could not be taken as a breach of international law that could led (sic) to apply the measures of the IUU Regulation.”¹³⁰

Furthermore, “mackerel fisheries by Iceland and Faroe Islands are carried out under domestic law and as such, they are not illegal and therefore cannot be covered by the IUU legislation”.¹³¹ Therefore, the mechanism in Regulation 1026/2012 “would complement, but not overlap with, the measures adopted under the IUU Regulation. The action that is being explored in the present context does not target illegal fisheries strictly speaking, but fisheries not conducted within a legal framework guaranteeing sustainability”.¹³² Accordingly, while the IUU Regulation deals with fishing activities that are ‘avoiding’ the law, Regulation 1026/2012 covers fishing activities that are completely legal but still seen by the EU as threatening the sustainability of a particular stock.

3.2 Substance

Turning to the text of Regulation 1026/2012, it is prudent to start with its scope. The measures implementing Regulation 1026/2012 may be applied in all situations where the EU and a third country are required to cooperate in order to jointly manage stocks of common interest including in a RFMO setting.¹³³ Regulation 1026/2012 defines stocks of common interest as

“a fish stock the geographical distribution of which makes it available to both the Union and third countries and the management of which requires the cooperation between such countries and the Union, in either bilateral or multilateral settings”.¹³⁴

At first sight the definition of a stock of common interests as provided largely coincides with the one discussed by ITLOS, which overlapped with the meaning of shared stocks and Article 63 UNCLOS. However, the text of the Regulation is not precise enough and may involve also

¹³⁰ Impact Assessment, *supra*, n 14, 70.

¹³¹ *Ibid.*, 9.

¹³² *Ibid.*, 10.

¹³³ Regulation 1026/2012, *supra*, n 13, art 1(2).

¹³⁴ *Ibid.*, art 2(a).

highly migratory stocks.¹³⁵ It is also unclear what is meant by “geographical distribution [...] which makes it available”. Should the particular stock be always also present in the EU’s waters? If the answer is in the negative then the geographical scope of Regulation 1026/2012 can potentially be the world ocean. Discussing these issues further goes beyond the discussion here but are important points to keep in mind. With respect to third countries, the Regulation conveniently includes “territories enjoying self-governing status and endowed with competencies in the area of conservation and management of living marine resources”¹³⁶ – clearly aimed at the Faroe Islands but Greenland could easily match the description as well.

Article 3 sets out the criteria for identifying countries allowing non-sustainable fishing. For a third country to be identified by the EU as allowing unsustainable fishing two cumulative criteria must be fulfilled and each criterion is composed of multiple alternative elements. The first criterion requires this country to fail to cooperate in the management of a stock of common interest in accordance with three alternative sets of norms. These sets are (1) the provisions of the UNCLOS and the UNFSA; (2) “any other international agreement”; and (3) any other “norm of international law”. Interestingly, the text of the Regulation does not explicitly state that these sets of norms must be binding on both the EU and the particular third country. The second criterion can be satisfied by one of two alternatives. First, the third country must fail to adopt necessary fishery management measures. Alternatively, the third country must adopt such measures “without due regard to the rights, interests and duties of other countries and the Union” and, when taken together with the measures of the other countries, the measures of the third-country measures lead to fishing activities that risk the stock getting in an unsustainable state. This alternative element is considered fulfilled also where the third-country measures did not lead to an unsustainable state of the stock only because of the reaction of the other countries.

Article 4 lists exhaustively a wide-array of possible measures that the Commission may adopt by means of implementing acts. These measures include various port state measures as well as prohibitions on the private activities of economic operators from the EU such as reflagging, vessel purchasing and chartering, concluding private trade agreements and conducting joint

¹³⁵ The management of highly migratory stocks appears to have been equally included in the scope of the Regulation when looking at the Impact Assessment of the proposal. This lack of clarity could be criticised because the two types of stocks have, while not that many, important differences in the way they are regulated in the UNCLOS and not differentiating between them in the Regulation could be problematic.

¹³⁶ Regulation 1026/2012, *supra*, n 13, art 2(h).

fishing operations. In adopting such measures the Commission may also identify specific vessels or fleets of the particular third country to which only certain measures would apply.

Article 5 provides certain general requirements concerning the measures adopted under the Regulation. As already mentioned above, measures under Regulation 1026/2012 must take into account measures already taken under the IUU fishing Regulation. Other notable requirements are for the Article 4 measures (1) not to be applied by arbitrarily or unjustifiably discriminating between countries in similar situations or by using them as a disguised restriction in international trade; (2) to be made effective by being complemented by imposing restrictions, relating to the same fish stocks, on fishing by EU vessels or on production or consumption within the EU; and (3) to be “proportionate to the objectives pursued and compatible with the obligations imposed by international agreements to which the Union is a party and any other relevant norms of international law”. This last requirement indicates that with the eventual implementing regulations the EU aims to adopt measures of retorsion rather than reprisals (and more particularly countermeasures). To what extent the EU achieved this aim is a different matter.

Article 6 provides for a certain pre-adoption procedure that the Commission must follow with respect to the particular third country. First, where the Commission considers it necessary to adopt measures against a third country, the Commission must notify that third country and must immediately inform the European Parliament and the Council. Second, the notification must include reasons for targeting the particular third country and describe possible measures to be adopted by the third country to remedy the situation. Third, the Commission must provide the third country with a reasonable opportunity to respond in writing and to remedy the situation within a month of the notification.

Article 7 deals with the period of application of the measures to the particular third country. Once imposed, the measures shall cease to apply when the targeted third country “adopts appropriate corrective measures necessary for the conservation and management of the stock of common interest”. These corrective measures must fulfil two criteria. First, they must be adopted either autonomously by the third country or in a context of consultations with the EU and other relevant countries. Second, they must not undermine the effect of the conservation measures of the particular stock(s) that were adopted by the EU alone or in cooperation with other States. The EU measures do not cease automatically but require a determination by the Commission to that extent in accordance with the relevant comitology procedure. In urgent

situations relating to unforeseen economic or social disruptions the Commission is to adopt immediately applicable implementing acts. The ‘miscellaneous’ provisions are Article 8, which refers to the comitology procedure to be used with specific references to Regulation 182/2011¹³⁷ and Article 9, which deals with the entry into force.

3.3 Implementation

There have been only two regulations implementing Regulation 1026/2012, so far, and both of them are related to the Mackerel dispute. Regulation 793/2013¹³⁸ was the first Implementing Regulation and with it the EU imposed sanctions on the Faroe Islands. The sanctions were twofold. First, it was prohibited to introduce into the EU territory, including for transshipment, fish or fishery products made of, consisting of or containing herring or mackerel caught under the control of the Faeroe Islands.¹³⁹ Caught under Faroese control was defined as fish caught by Faroese-flagged vessels or by vessels of another State authorised to fish in the Faroese EEZ or by vessels chartered by a Faroese firm or the Faroese authorities.¹⁴⁰ Second, subject to cases of *force majeure* or distress under Article 18 UNCLOS, it was prohibited for the EU ports to be used by (1) vessels flying a Faroese flag that fish for herring or mackerel and (2) vessels transporting herring or mackerel or products derived from them if caught under the control of the Faroe Islands.¹⁴¹

Regulation 793/2013 was not amended when an agreement was reached on the mackerel quotas in March 2014. This created some confusion on how the sanctions were going to be applied with respect to the mackerel catches in the EU or Norwegian waters. The Commission provided an interpretative explanation stating that mackerel catches under the control of the Faroe Islands within the EU and Norwegian waters will not be covered by the sanctions as long as they are not mixed with catches from Faroese waters.¹⁴² This was so even if the

¹³⁷ European Parliament and Council (EU) No Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers [2011] OJ L55/13.

¹³⁸ Regulation 793/2013, *supra*, n 45.

¹³⁹ *Ibid.*, art 5(1).

¹⁴⁰ *Ibid.*, art 3(d).

¹⁴¹ *Ibid.*, art 5(2).

¹⁴² E Tallaksen, ‘EU clarifies sanctions on Faroese mackerel, herring’ (19 May 2013)

<<http://www.undercurrentnews.com/2014/05/19/eu-clarifies-sanctions-on-faroese-mackerel-herring/>> accessed 1 October 2015.

catches were processed in Faroese plants. Regulation 896/2014¹⁴³ was the second Implementing Regulation and with it the sanctions against the Faroe Islands were put to an end. The basis for the revocation of the sanctions was the adoption of the Faroe Islands of a 40 000 tonnes quota (down from about 105 000 tonnes in 2013).¹⁴⁴ As a side note, a curious point of timing has been the break-out of the Ukraine crisis and the deterioration of the EU-Russia relations. The EU sanctions against the Faroe Islands forced it to redirect much of its exports to Russia,¹⁴⁵ which became even more profitable with the Russian food ban against the EU, which did not apply to the Faroes.¹⁴⁶

¹⁴³ Regulation 793/2013, *supra*, n 45.

¹⁴⁴ *Ibid.*, recital [3].

¹⁴⁵ E Tallaksen, 'Russia becomes key Faroese herring, mackerel market as sales in 2013 soar' (27 February 2014) <<http://www.undercurrentnews.com/2014/02/27/russia-becomes-key-faroese-herring-mackerel-market-as-sales-in-2013-soar/>> accessed 1 October 2015.

¹⁴⁶ N Ramsden, 'Russia confirms Faroes, Greenland exempt from import embargo' (11 August 2014) <<http://www.undercurrentnews.com/2014/08/11/russia-confirms-faroes-greenland-exempt-from-import-embargo/>> accessed 1 October 2015.

III. Application of the duty to cooperate

Increased international cooperation is central for addressing the major challenges in the world's oceans.¹⁴⁷ Naturally, the duty to cooperate is a major cornerstone for the development of the international fisheries conservation regime.¹⁴⁸ The duty to cooperate with respect to the conservation of fish stocks was reaffirmed in the UNCLOS¹⁴⁹ and was heavily relied on for further developing the regime for straddling and highly migratory stocks in the UNFSA. The application of the duty to cooperate is, thus, a crucial part of the way the regime operates. The ITLOS has held that “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment”¹⁵⁰ and has, subsequently, found this statement equally applicable to fisheries cases.¹⁵¹ The overarching argument in this section – that CMRs affect the application of the duty to cooperate – will be developed in the following way. First, the characteristics of the duty in the area of fisheries will be examined. Next, building on these characteristics, the discussion will show how CMRs impact the application of the duty.

1. The characteristics of the duty to cooperate in the area of fisheries

¹⁴⁷ S Nandan, ‘Introduction’ in M Nordquist *et al* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (vol 7, Nijhoff, Leiden 2011) xxii.

¹⁴⁸ M Cecilia Engler, *Establishment and Implementation of a Conservation and Management Regime for High Seas Fisheries, with Focus on the Southeast Pacific and Chile: From Global Developments to Regional Challenges* (Research Paper, UN-Nippon Foundation Fellow 2006-2007) 5, 14 and 16.

¹⁴⁹ Before UNCLOS, the duty to cooperate with respect to fisheries conservation has been recognised as an important cornerstone of the regime in preamble of the 1958 Fisheries Convention as well as in Article 1(2) thereof, saying that “[a]ll States have the duty to adopt, or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas”.

¹⁵⁰ *The MOX Plant Case (No 10) (Ireland v UK)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 95, [82].

¹⁵¹ *Case No 21*, ITLOS, *supra*, n 27, [140].

In the literature the duty to cooperate is identified as the bedrock of international law that prescribes various limits on absolute state sovereignty.¹⁵² This duty is central to a myriad of issues that in one way or another are of transboundary nature, usually related to the environment and sharing common resources. The duty to cooperate under international law, while probably having certain core aspects, is quite multifaceted in the different areas of law. It is multifaceted in terms of its characteristics, including the specific conduct that is required from the respective subject of international law. This variation depends mainly on the context within which the duty operates. The context of the duty to cooperate is crucial because different contexts have different goals or objectives and have different factual specificities defining them. The area of fisheries conservation is such an area with very specific context and the duty to cooperate therein merits separate examination.

1.1 The natural aspect

The first thing to be said here is that the duty to cooperate in the area of fisheries conservation is tightly connected to the nature (the factual dimensions) of the sea as well as the sea-related developments on land. The duty to cooperate emerged as a natural solution to the tensions between State sovereignty, the freedom to fish and its developing legal limitations. The migratory nature and interconnectedness of most, if not all, fish stocks, by their very nature, make illusory the possibility of fishing States to fully exercise their rights and fulfil their duties without interacting with one another, which was also recognised by the ECJ, as shown below. Furthermore, due to the principle of sovereign equality, such interaction is not supposed to be one of imposition but rather one of consensual nature. Accordingly, cooperation between States, when it comes to the exploitation of shared natural resources, is recognised as a necessary requirement.¹⁵³ Another important and nature-driven aspect of the duty to cooperate with respect to shared stocks is that the parties that are obliged to cooperate do not have much freedom to choose their partners: this choice is, to a considerable extent,

¹⁵² P Wouters, ‘‘Dynamic cooperation’ in international law and the shadow of state sovereignty in the context of transboundary waters’ [2013] EL 88.

¹⁵³ UNGA Res on Co-operation in the Field of the Environment Concerning Natural Resources Shared by Two or More States, A/Res/3129 (XXIII) 13 December 1973; UNGA Res on Charter of Economic Rights and Duties of States, A/Res/3281 (XXIX) 15 January 1975; Draft Principles in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of the Natural Resources Shared by Two or More States (1978) 17 ILM 1098.

predetermined by nature. The nature-driven origin of the duty to cooperate in the area of fisheries is evident in the 1958 Fisheries Convention¹⁵⁴ which stated in its preamble

“*Considering* also that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international cooperation through the concerted action of all the States concerned”.

The ECJ went along similar lines in the *Kramer* case when it stated that

“it none the less follows [...] moreover *from the very nature of things* that the rule-making authority of the community *ratione materiae* also extends - in so far as the member states have similar authority under public international law - to fishing on the high seas. The only way to ensure the conservation of the biological resources of the sea both effectively and equitably is *through a system of rules binding on all the states concerned*, including non-member countries.”¹⁵⁵ (Emphasis added)

Indeed, trying to divorce the fisheries conservation law and, particularly, the duty to cooperate from the factual circumstances and the biological realities in the oceans is not only unadvisable but can render obsolete any regime. These (and other) extra-legal elements, such as technological and scientific, economic, social and political ones, shape the cooperative framework, which leads to the continuous interaction between the environment (in the narrow and in the wider sense) and the legal regime.¹⁵⁶ The duty to cooperate thus provides a necessary degree of flexibility in the law, for the ocean realities to be timely accommodated.¹⁵⁷ This flexibility is further expressed in the sub-duties that comprise the duty to cooperate, which will be examined now.

1.2 The triggering aspect

¹⁵⁴ Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285.

¹⁵⁵ *Kramer* case, *supra*, n 34.

¹⁵⁶ E Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources: the United Nations Law of the Sea Convention cooperation between states* (Martinus Nijhoff, Dordrecht 1989) 15-22.

¹⁵⁷ In the words of B Oxman, “Stability in the law [of the sea] required authoritative uniform articulation of the basic rights and duties of states in a manner flexible enough to accommodate different and changing circumstances”. B Oxman, ‘Complementary Agreements and Compulsory Jurisdiction’ (2001) 95 AJIL 277, 286.

While the duty to cooperate imposes limitations on the way States exercise their sovereign powers, it still provides them with wide discretion. The existing regime directs States to cooperate and gives them the freedom to adopt any kind of measures at any time as long as they contribute to the conservation and management of the fish stocks. However, giving complete discretion to States would have very little effect and some modalities of the cooperation need to be spelled out. These modalities are incarnated in its sub-duties. The existing regime contains a multitude of different obligations (sub-duties) with different characteristics that are expressions as well as triggers of the overarching duty to cooperate. Clear examples of this are the instances where in the UNFSA a number of obligations are preceded by the expression “in giving effect to their duty to cooperate States shall [...]”.¹⁵⁸ In other instances the provisions start with the obligation to cooperate and then develop it further. The duty to cooperate, thus, acts as a *chapeau* for all of the sub-duties, which trigger it, and unifies them towards the objective of conservation and management. The sub-duties in the regime are so numerous that it goes beyond the scope of this thesis to take account of every one of them. Rather, the discussion will examine them by grouping them together.

Some of the sub-duties are static, that is, they prescribe a static end-goal or objective that can be reached once and for all. Such is the obligation to set up RFMOs or arrangements for the conservation of different fish stocks where they are lacking but are needed¹⁵⁹ – once set up the sub-duty is discharged but not the whole duty to cooperate. Opposite to the static ones are the continuous sub-duties. They prescribe a continuous end-goal or objective that requires constant action for it to be maintained, even if reached. Many of the sub-duties in the regime are continuous ones, reflecting its ‘living’ nature. Such are the sub-duties requiring States, in giving effect to their duty to cooperate, to adopt various measures. Such are the duties to adopt necessary conservation measures in light of the best scientific advice – the scientific knowledge develops and thus the conservation measure must constantly follow it in order to discharge the obligation. Other examples are the duties to take measures where the viability of a certain stock is under threat – in order to discharge the obligation States have to adopt the necessary measures every single time a stock is threatened. It is not enough to do it only once.

¹⁵⁸ See UNFSA, *supra*, n 6, arts 5, 7(3) and 24(2).

¹⁵⁹ *Ibid.*, art 8(5).

Relevant are also the monitoring duties – to keep under *constant* review the state of the stock and enhance that monitoring where the stock is of concern.¹⁶⁰

Connected to this static-continuous division, is the division between duties of result and duties of conduct. Example of an obligation of result in the regime is the duty to inform other States of adopted autonomous measures, as contained in Article 7(7) and (8) UNFSA. To the contrary, duties of conduct represent “an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result”.¹⁶¹ The regime provides many examples of such duties. Usually, they require that States, through cooperation, adopt measures that *ensure* a particular conservation result. Such obligations ‘to ensure’ have been read by the Seabed Disputes Chamber (and also referring to ICJ’s decision in the *Pulp Mills* case¹⁶²) to be duties of conduct that also imply a duty of due diligence in their exercise.¹⁶³ In its discussion on “due diligence obligation”, the ITLOS quoted the Seabed Disputes Chamber saying that:

“The content of “due diligence” obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that “due diligence” is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge.”¹⁶⁴

This passage shows the close relationship between the duties of conduct and the continuous duties. In fact, most of the sub-duties in the existing regime have such continuous and conduct-oriented nature. Generally (and with some degree of oversimplification), the States are obliged to continuously exercise their best efforts to keep the stocks in a state viable for exploitation through the adoption of common measures. This is an expression of one of the basic aims of the regime – to avoid conservation gaps to the best possible extent – with the appearance of new challenges the States are obliged to address them accordingly.

¹⁶⁰ *Ibid.*, art 6(5).

¹⁶¹ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber) (No 17)* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 10, [110].

¹⁶² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Merits) [2010] ICJ Reports 14 [187].

¹⁶³ *Ibid.*

¹⁶⁴ *Case No 17*, ITLOS, *supra*, n 161, [117].

This overview of the sub-duties shows that the duty to cooperate represents a collection of various sub-duties and that it is being triggered by the existence of certain circumstances contained in the various sub-duties. These circumstances act as ‘safety triggers’ obliging States to act together in an adequate manner, in order to fulfil the overarching goal of conservation and management. The CMRs, it will be explained *infra*, involve those sets of circumstances that trigger the duty to cooperate through the abovementioned characteristics of the duty to cooperate and its various sub-duties.

1.3 The negotiations aspect

Returning to the measures that States are obliged to adopt, there is one very important aspect of the regime that needs to be examined – the negotiations – as they will often be the initial stages of cooperation.¹⁶⁵ The regime contains many continuous obligations of conduct with respect to the adoption of various measures. These obligations also have one important dividing characteristic – their addressees. Where a single State is the addressee, it has a due diligence obligation to ensure that certain result is achieved and maintained, which necessarily requires the adoption of certain national measures. Where a plurality of States is obliged to take measures together the situation is different due to the issue of sovereignty. Unless otherwise explicitly provided, these States have the duty to negotiate such measures, to seek to agree, but not an obligation to actually adopt them. Hence, the duty to negotiate serves as a connecting link and deserves special attention because in this way it is central to the regime for shared stocks.

The duty to negotiate, as opposed to the duty to reach an agreement,¹⁶⁶ is also conduct-oriented. As the Permanent Court of International Justice (PCIJ) has stated “an obligation to negotiate does not imply an obligation to reach an agreement”¹⁶⁷ and the ICJ has continued in the same suit.¹⁶⁸ Under the UNCLOS the coastal states are obliged only to “seek to agree” on the necessary measures as prescribed in Article 63 UNCLOS. In the UNFSA, next to the seek-to-agree formula there is also the “make every effort to agree” formula. However, even if

¹⁶⁵ E J Molenaar, ‘The Concept of “Real Interest” and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms’ (2000) 15 IJMCL 475, 482.

¹⁶⁶ For a short recollection of the difference between the two see A Cassese, ‘The Israel-PLO Agreement and Self-Determination’ (1993) 4 EJIL 564, 566.

¹⁶⁷ *Railway Traffic between Lithuania–Poland* (Advisory Opinion) PCIJ Series A/B, No. 42 (1931) 108, 116.

¹⁶⁸ *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Reports, 128, 140.

obliged 'only' to seek to agree or make every effort, the duty to negotiate has real legal content¹⁶⁹ with a multitude of emanations, which, if not observed, can lead to its violation.

The Tribunal in the *Lac Lanoux* case confirmed this when it said that:

“the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusal to take into consideration adverse proposals or interests, and, more generally, in cases of the violation of the rules of good faith”.¹⁷⁰

This also emerged from the ICJ decision in the *North Sea Continental Shelf* case, which stated that

“the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it”.¹⁷¹

Accordingly, if States negotiate in good faith and try to reach an agreement on the respective measures and they fail, the duty to cooperate will not be violated. This is a particular and inherent weakness of the regime, which was also at the heart of the Mackerel dispute. The duty to negotiate is, thus, crucial for the application of the duty to cooperate. As such, it will also be important for the discussion in the next sub-section where the impact of CMRs on the duty to cooperate is examined. Before continuing, however, there is one more important characteristic of the duty to cooperate in the area of fisheries that needs to be mentioned.

1.4 The equity aspect

¹⁶⁹ I Shearer, 'High Seas: Drift Gillnets, Highly Migratory Species, and Marine Mammals' in T Kuribayashi and E Miles (eds) *Law of the Sea in the 1990s: A Framework for Cooperation* (Law of the Sea Institute, Honolulu 1990) 244.

¹⁷⁰ *Lac Lanoux Arbitration (France v Spain)* (1957) 24 ILR 101, 128.

¹⁷¹ *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, [1969] ICJ Reports, 3, [87].

The duty to cooperate in the area of fisheries conservation is underpinned and informed by the principle of equity. This is because the resources of the seas and the oceans, including fisheries, are to be utilised equitably and this equitable utilisation is to be effectuated through the duty to cooperate. In the preamble of the UNCLOS the contracting parties recognised the desirability to establish through the UNCLOS a legal order which *inter alia* will promote “the equitable and efficient utilization” of the sea and ocean resources. The parties also bore in mind that achieving this will contribute to the realisation of “a just and equitable international economic order”. The ECJ echoed this in *Kramer* when it said that the “only way to ensure the conservation of the biological resources of the sea both effectively and *equitably* is through a system of rules binding on all the states concerned” (Emphasis added).¹⁷²

The equity principle is encapsulated, albeit without being mentioned as such, in several fundamental UNCLOS and UNFSA provisions that cover issues well beyond only equity. The fisheries-related provisions are Articles 56(2), 87(2) and 116 UNCLOS. Article 56(2) UNCLOS obliges States, in the exercise of their rights and duties within their EEZs, to have due regard to the rights and duties of other States. Article 87(2) UNCLOS echoes this with respect to the exercise of the freedoms of the high seas. Article 116 UNCLOS continues in saying that, while States have the right for their nationals to engage in fishing on the high seas, this right is subject to “the rights and duties as well as the interests of coastal States”. Articles 7, 8 and 16 UNFSA also reiterate the due regard obligation.

The link between having due regard to the rights and duties of other States and the principle of equity is exemplified in the ICJ’s pronouncements in the *Fisheries Jurisdiction* cases. The ICJ recognised that

“[i]t is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.”¹⁷³

¹⁷² *Kramer* case, *supra*, n 34.

¹⁷³ *Fisheries Jurisdiction (UK v Iceland)* Jurisdiction [1973] ICJ Reports 3, [72].

Consequently, the ICJ continued, States have the obligation to *inter alia* examine together “the measures required for the [...] equitable exploitation of those resources”.¹⁷⁴ The ICJ found negotiations to be the best fitting solution in that case. One of the objectives in these negotiations, the ICJ held, was “to balance and regulate equitably questions such as catch-limitations and share allocations”.¹⁷⁵ Furthermore, the ICJ directed the parties before it to conduct their negotiations on the basis of paying in good faith “reasonable regard to the legal rights of the other” and *thus* “bringing about an equitable apportionment of the fishing resources based on the facts of the particular situation”.¹⁷⁶ Accordingly, the role of equity in allocating fisheries resources, which is effectuated through cooperation, could hardly be denied by anyone who had to deal with this issue.¹⁷⁷

Three roles of equity have been identified with respect to the apportionment of water resources,¹⁷⁸ which can easily be borrowed for the situations concerning sea and ocean resources. These roles are complementary and can occur simultaneously.¹⁷⁹ First, equity allows a decision-maker to reach a just or equitable solution when faced with more than one possible interpretation of the law.¹⁸⁰ Second, equity lacks specific legal content¹⁸¹ and, instead, serves as a tool for considering the relevant circumstances.¹⁸² Third, equity assists in the establishment of the specific legal content of rules which do not provide answers for specific situations by themselves due to their generality or vagueness.¹⁸³

This equity, which underpins and informs the duty to cooperate, however, must be differentiated from *ex aequo et bono*, which need not be based on law, subject to consent of

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*, [73].

¹⁷⁶ *Ibid.*, [78].

¹⁷⁷ J van Dyke, ‘Allocating Fish Across Jurisdictions’ in T Ndiaye and R Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff, Leiden 2007) 821, 832.

¹⁷⁸ O McIntyre, ‘Utilization of shared international freshwater resources – the meaning and role of “equity” in international water law’ (2013) 38 *WI* 112, 120-121.

¹⁷⁹ *Ibid.*

¹⁸⁰ See *Continental Shelf (Tunisia v Libya)* (Judgment) [1982] ICJ Reports 18, [71].

¹⁸¹ In this sense, equity has been also called an interstitial norm that can “operate as positive catalysts *vis-à-vis* the fragmentation of international law”. See A Gourgourinis ‘Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)’ (2009) 103 *ASIL Proceedings* 71, 81.

¹⁸² R Higgins, *Problems and process: international law and how we use it* (OUP, New York 1994) 221.

¹⁸³ *Ibid.*, 222.

the parties.¹⁸⁴ The ICJ importantly clarified in the *Fisheries Jurisdiction* case that the necessary negotiations are not “a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law”.¹⁸⁵ On this point the ICJ referred to its *North Sea Continental Shelf* cases where it said that “it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles”.¹⁸⁶ In the case of the conservation of shared fish stocks, the rule of law applied is the duty to cooperate and its respective sub-duty, in the fulfilment of which the parties are required to have due regard to each other’s rights and duties, which in turn includes equitable considerations. As such, the nature of the principle of equity in the case of fisheries conservation is *infra legem*.¹⁸⁷

The operation of the equity aspect of the duty to cooperate is aiming to prevent inequitable burden sharing between States in the conservation and management of shared stocks. In particular, it aims to prevent situations where one State carries an excessive burden of conservation due to the irresponsible fishing practices of another State with which a particular stock is being shared. Such inequitable burden sharing may particularly arise in CMR situations and the equity principles, as it will be shown below, will serve to bring the burden sharing (back) to an equitable state.

2. The impact of changes in the migration routes of shared stocks on the duty to cooperate

All of the aspects of the duty to cooperate that have been discussed above show one clear *leitmotif* – flexibility and responsiveness to changing circumstances that affect the status of the shared stocks. This sits perfectly in line with the qualification given to the UNCLOS (and by extension to the UNFSA) as a “Constitution for the Oceans”.¹⁸⁸ The UNCLOS is a living

¹⁸⁴ On the difference between equity and *ex aequo et bono* see e.g. A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, Oxford 2008) 225-255; T Franck, *Fairness in International Law and Institutions* (OUP, Oxford 1998) 53-56.

¹⁸⁵ *Fisheries Jurisdiction (UK v Iceland)* case, *supra*, n 173, [78].

¹⁸⁶ *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, *supra*, n 171, [85].

¹⁸⁷ Other types that have been identified are *praeter legem* and *contra legem*. For a discussion on the three types see V Lowe, ‘The Role of Equity in International Law’ (1992) 12 AYIL 54.

¹⁸⁸ Ambassador Koh in UN, *The Law of the Sea: Official Text of the UNCLOS* (London 1983) xxxiii. This determination has been well accepted in the literature. See A Boyle, ‘Further Development of the Law of the Sea Convention: Mechanisms for Change’ (2005) 54 ICLQ 563, 566.

instrument and should be treated as such in order for it to stay alive and relevant in its entirety.¹⁸⁹ This is especially so with respect to its fisheries provisions in light of the constant developments in this area, this thesis discussing a prime example of them – CMRs. They involve sets of changing circumstances that can practically take the form of myriad different constellations, which need to be briefly outlined here. Rather than addressing them one by one, the discussion will be based on certain general (common) threads of these constellations, which this author identified and which will be referred to later-on. The proposed grouping is made with the understanding that the constellations can be equally grouped along other lines. However, it is maintained that the ones proposed here do provide a workable point of view for the purposes of the present discussion.

The first common thread appears where due to a CMR the nature of a shared stock is changed. Example of this would be when the stock changes from being simply a transboundary stock to being a straddling one or even a discrete one¹⁹⁰ and *vice versa*. The second common thread appears where the nature of the stock is not changed but the relevant States (or their statuses) change. Examples of this common thread would be where a transboundary or a straddling stock enters the EEZ of yet another State or, conversely, leaves the EEZ of one of the coastal States. With the transboundary stocks it is the relevant States that change, while with the straddling it is only their status as coastal States that changes. A curious twist of this thread is where a stock also crosses the maritime boundaries of RFMOs. That is, it could happen that a stock changes its migration route in such a way that it is no longer confined within the Convention Area of one RFMO but transcends to the Area of a neighbouring RFMO (assuming there is one). In this case there is no change in the coastal status of a State but in the status of States as previously exclusive managers of the stock. Such thing is thought to have happened with redfish when going beyond NEAFC's Area and entering NAFO's Area.¹⁹¹ The third common thread appears where the stock changes only its zonal attachment

¹⁸⁹ J Noyes, 'Memorializing UNCLOS III, Interpreting the Law of the Sea Convention and the *Virginia Commentary*' in M Lodge, S Nandan and M Nordquist, *Peaceful order in the world's oceans: essays in honor of Satya N. Nandan* (Brill Nijhoff, Leiden 2014) 218, 236. This applies with no less force to the UNFSA.

¹⁹⁰ Fish stocks that are present exclusively on the high seas.

¹⁹¹ A Thomson, 'The Management of Redfish (*Sebastes mentella*) in the North Atlantic Ocean - A Stock in Movement' in FAO Papers presented at the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks (FAO Fisheries Report No. 695, Supplement, 2002) <<http://www.fao.org/docrep/006/y4652e/y4652e0f.htm>> accessed 1 October 2015. However, due to incomplete scientific data it is doubted whether the redfish was not within these waters even before but only later discovered. Whichever is true, the theoretical possibility is still there with all of the complications it creates as exemplified in the cited paper.

while preserving its nature and not involving changes in the relevant States. Example of this would be where a transboundary stock between two States increases its zonal attachment in State A at the expense of its zonal attachment in State B.

The CMRs, thus outlined, represent a variety of different circumstances that affect the application of the duty to cooperate in many different ways by triggering it through its various sub-duties. The multitude of triggers that the CMRs can activate can be grouped in two separate (yet connected) perspectives – the voluntarist and the conservationist perspectives. These two perspectives are closely related to the two aims of the regime that were identified above – avoiding both conservation gaps and inequitable burden sharing. The conservationist and the voluntarist perspectives differ, mainly, in terms of the amount of discretion left to the relevant States for addressing the change. Evidently from their names, the voluntarist perspective is the one providing more freedom. The specifics of the two perspectives and the way the application of the duty to cooperate is affected fall to be discussed next. The discussion on each of the perspectives will be structured as follows. First, in order to provide the legal context, the discussion will start with the main characteristics of each perspective and the provisions from the regime on which the perspective is based. Second, it will be examined how a CMR triggers the duty to cooperate from each perspective.

2.1 The voluntarist perspective

2.1.1 Legal context

The voluntarist perspective could be said to be the default perspective when a CMR occurs. It deals with situations where a CMR occurs but there are no threats for the viability of the stock in question (or its associated species). In that sense the voluntarist perspective is alternative to the conservationist perspective. However, by virtue of the very nature of the ocean realities, the voluntarist perspective may be superseded by its counterpart due to a subsequent deterioration of the stock's viability (or its associated species), irrespective of the circumstances that brought about the decrease. The voluntarist perspective is based on the discretion given to the relevant States by the flexibility of the duty to cooperate.

This flexibility needs to be examined in a greater detail here and this will be done by looking at the actual provisions that provide for it. The examination of the provisions will show, in

general, the degree of discretion left to the States and, in particular, it will show that the regime provides for similar but, still, different solutions for transboundary and straddling stocks. These differences are due to the variations in the rights and obligations of States within the EEZ and on the high seas. As it will be shown *infra*, this distinction bears important consequences for the way the duty to cooperate is affected. The discussion will be divided along the lines of the two different types of shared stocks – first, the transboundary and, second, the straddling stocks.

Since the transboundary stocks migrate through the EEZs of two or more States, the discussion will start by looking at the basics of the EEZ regime. The main rights, freedoms and duties within the EEZ are set out in Part V of the UNCLOS. Within the EEZ the coastal State, with respect to fisheries, has sovereign rights and jurisdiction as well as certain obligations. Some of these rights and obligations are generally outlined in Article 56 UNCLOS. In its first paragraph it states that the coastal State has sovereign rights in exploring, exploiting, conserving and managing the natural resources therein, including the living ones. It also states that the coastal State has jurisdiction for the protection and preservation of the marine environment as well as other rights and obligations as provided for in the UNCLOS. The second paragraph states that within the EEZ the rights and obligations must be exercised and performed with due regard to the rights and duties of other States.

Effectively, the coastal State is the master of its EEZ when it comes to the fisheries. Other States have a very limited access to these resources under Article 62 UNCLOS. In promoting the objective of optimum utilization of the living resources, coastal States must determine its harvesting capacities and, where they are lower than the TACs it has determined, access to the surplus must be given to other States. However, this access is not direct; that is, it happens through agreements and arrangements and pursuant to the conditions, laws and regulations that the coastal State has put in place. Article 61 UNCLOS sets out rules for the conservation of the living resources within the EEZ, which are examined *infra* under the conservationist perspective. As it can be seen, the coastal States are given very wide discretion within their EEZs with respect to natural resources.

These basic and default provisions are further developed in Part V for specific types of living natural resources. In the case of the shared fish stocks it is Article 63 UNCLOS that provides some more specificity in the shape of a basic cooperative framework for the shared stocks. Be

that as it may, the exclusive authority bestowed to the coastal State under Articles 56, 61 and 62 UNCLOS is not lost in the case of shared stocks.¹⁹² The authority is, however, largely insufficient in such cases for reaching management and conservation goals.¹⁹³ The first paragraph of Article 63 UNCLOS deals with transboundary stocks, while paragraph two deals with straddling stocks.¹⁹⁴ Article 63(1) UNCLOS requires from the coastal States to seek to agree “upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part” either directly or through an international organisation.

The language of Article 63(1) UNCLOS does not explicitly speak of a duty to cooperate but it does lay down one specific aspect of the duty – to seek to agree, that is – to negotiate. As already observed, the negotiation obligation itself has real legal content, as confirmed by the *Lac Lanoux* Tribunal and by the ICJ.¹⁹⁵ Article 63(1) UNCLOS requires negotiations in good faith – an obligation of conduct and not of result.¹⁹⁶ It is a weak¹⁹⁷ and not very consequential¹⁹⁸ obligation as there is no duty to enter into the said agreements.¹⁹⁹ It is the result of a deliberate choice of the drafters, considering the failed attempt of Argentina to have the provision amended to “be obliged” to agree.²⁰⁰ Article 63(1) UNCLOS only requires that the relevant States seek to agree in good faith and should this fail the default provisions – Articles 61 and 62 UNCLOS would apply within the respective EEZs.²⁰¹

¹⁹² W Burke, ‘The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction’, (1984) 63 OLR 73, 104.

¹⁹³ *Ibid.*

¹⁹⁴ Center for Oceans Law and Policy, University of Virginia, ‘Article 63: Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it’ in M Nordquist *et al* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (vol 2, Nijhoff, Dordrecht 1993) 639, 640.

¹⁹⁵ I Shearer, ‘High Seas: Drift Gillnets, Highly Migratory Species, and Marine Mammals’ in T Kuribayashi and E Miles (eds) *Law of the Sea in the 1990s: A Framework for Cooperation* (Law of the Sea Institute, Honolulu 1990) 244.

¹⁹⁶ E Hey, *supra*, n 156, 81.

¹⁹⁷ R Churchill and D Owen, *supra*, n 33, 94.

¹⁹⁸ W Burke, *supra*, n 192, 106.

¹⁹⁹ F Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (CUP, Cambridge 1989) 61.

²⁰⁰ Official Records of the Third United Nations Conference on the Law of the Sea, vol. XII, Report of the Chairman of the Second Committee, 24 August 1979, UN Doc. A/CONF.62/L/42 (1979), 92, 93, [42].

²⁰¹ K Mfodwo, M Tsamenyj and S Blay, *The Exclusive Economic Zone: State Practice in the African Atlantic Region* (1989) 20 ODIL 445, 461; R Churchill and A Lowe, *The Law of the Sea* (3rd ed, MUP, Manchester 1999) 294. This should not be called into question even by looking at the award of the Tribunal in *Barbados v. Trinidad and Tobago*, which stated that the parties are under a duty to agree (thus omitting ‘seek’). This language has been explained in the literature rather with the commitments made by the agents of the two States before the Tribunal than with a new reading of Article 63. See B Kunoy, *supra*, n 10, 698.

The language of Article 63(1) UNCLOS, as it will be seen *infra*, gives more discretion to the coastal States than its counterpart for straddling stocks. Not only are the State obliged to only “seek to agree” but the obligation relates only to the measures that are “necessary to *coordinate* and *ensure* the conservation and development” of the transboundary stocks. Coordinating measures and measures ensuring conservation and development are not very demanding instances of cooperation. The States are still free to agree to much more detailed forms of cooperation if they so wish but are not obliged to. Another freedom of choice concerns the form of measures and whether they would be a direct arrangement of in the form of an RFMO. This point is developed in much more detail with respect to straddling stocks within both the UNCLOS and the UNFSA. Furthermore, in the UNFSA, as it can also be seen *infra*, the regime is developed even more in terms of the approaches to be adopted during cooperation, such as the precautionary and the ecosystem approaches. However, the UNFSA and the high seas provisions do not apply to the transboundary stocks and the coastal States are, thus, given much greater discretion.

The high seas presence of the straddling stocks makes the regime applicable to them more intricate. There are close resemblances between the transboundary and the straddling stocks regimes but there also are important differences, especially with respect to the discretion of the relevant States. These variations can be detected first at the level of the basic default provisions. In the general provisions of Part VII “High Seas”, Article 87 UNCLOS provides *inter alia* that all States have the freedom to fish on the high seas and that they have to exercise this freedom “with due regard for the interests of other States in their exercise of the freedom of the high seas” – mirroring Article 56(2) UNCLOS. Article 87(1)(e) UNCLOS also subjects the freedom to fish on the high seas to Section 2, to which the discussion will now turn.

Article 116 UNCLOS sets out the right for all parties to the UNCLOS to have the right for their nationals to engage in fishing on the high seas. However, this freedom of the high seas fishing is not unfettered. There are three sets of caveats introduced in Article 116 UNCLOS, which are (1) the treaty obligations of the parties; (2) the rights and duties as well as the interests of coastal States; and (3) the rest of the Section 2 provisions. Article 117 UNCLOS introduces the duty of the parties to adopt necessary measures for the conservation of the living resources of the high seas with respect to their own nationals. Such measures are to be taken by the States themselves or in cooperation with other States. In the UNCLOS

Commentary, the adoption of autonomous measures by States is not considered to provide a way for avoiding cooperation altogether.²⁰² The Legal Affairs Office in the UN law of the sea division considered that taking measures was “designed to be a cooperative activity, with States acting individually in applying to their nationals the conservation measure determined in cooperation with other States”.²⁰³ Support for this is found more generally in the text of Article 118 UNCLOS, which sets out the duty to cooperate for the management and conservation of the living resources on the high seas. A specific duty to enter into negotiations with a view of taking necessary conservation measures, as a form of cooperation, is prescribed for the States the nationals of which exploit identical living resources or different resources but in the same area. To that extent and where appropriate regional or sub-regional fisheries organisations are to be established. However, even if the negotiations are not successful, States are still obliged to take the relevant measures with respect to its nationals with the aim of conservation of the resources.²⁰⁴

Article 119 UNCLOS builds on the provisions of Article 118 UNCLOS as it provides an indication of what constitutes necessary conservation measures, which include the determination of allowable catch. In particular, the States are obliged to take measures on the basis of the best scientific evidence available to them and which are designed in line with the maximum sustainable yield (MSY) of the particular stocks. In doing so the States must have regard to the biological, ecological, economic and environmental factors as well as generally recommended international minimum standards. Article 119(2) UNCLOS elaborates on the scientific information side of the duty to cooperate. It requires all States concerned to contribute and exchange regularly data relevant to the fisheries conservation through competent international organisations. The determination of allowable catch is by its very nature a multilateral cooperative effort, as required by Article 118 UNCLOS. It mentions prominently the role of the best scientific evidence available. Thus, it is not prohibited to take measures on a different basis where such evidence is unavailable or inadequate, which reflects the precautionary approach to fisheries conservation.²⁰⁵ However, where such evidence is

²⁰² Center for Oceans Law and Policy, University of Virginia, ‘Article 117: Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas’ in M Nordquist *et al* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (vol 3, Nijhoff, Dordrecht 1995) 290, 294.

²⁰³ UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Regime for High-Seas Fisheries: Status and Prospects* (UN Sales No. E.92. V.12, 1992) [19].

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*, 310.

present it must be used as a basis for the conservation and management measures. In this way the scientific evidence plays an important role for the way States should conduct themselves during the negotiations undertaken to discharge the duty to cooperate.

These default rules for the high seas draw a very different framework for the exploration and exploitation of natural resources from the one within the EEZ. They also do not exclude the application of the EEZ regime with respect to straddling stocks. This creates a problem for the management of such stocks. Article 63(2) UNCLOS complements the default high seas provisions with the hope to resolve that problem. Article 63(2) UNCLOS requires from the coastal States, together with the States fishing beyond the EEZs, to seek to agree “upon the measures necessary for the conservation of these stocks” on the high seas, again, either directly or through an international organisation. As in the case of the transboundary stocks, the relevant States only have a negotiating obligation of conduct – to seek to agree. The negotiation obligation in Article 118 UNCLOS, although put in different terms, resembles closely the requirements of Article 63(2) UNCLOS.²⁰⁶ The language in Article 63(2) UNCLOS, with respect to the measures to be agreed, is also a bit more limiting than in the case of transboundary stocks – it is not limited to coordinating measures and measures ensuring the conservation and development of the stocks but refers to ‘necessary’ measures. However, it must be noted that these measures are with respect to only the high seas part of the straddling stocks. This leaves wide open the possibility of having conflicting measures for the same stocks within the different maritime zones. With the aim to avoid such conflicting measures and, generally, to strengthen the regime for straddling (and highly migratory) stocks the UNFSA was adopted. While it is explicitly stated that the UNFSA does not contradict the UNCLOS it goes a long way in providing in greater detail the modalities of the cooperation that States must enter into. These modalities need to be examined here.

Article 5 UNFSA sets out the general principles that States must follow when giving effect to their duty to cooperate under the UNCLOS for the purpose of conservation and management of shared stocks. These principles apply *mutatis mutandis* to the relevant measures adopted by the States within their EEZs. The general principles include a long list of environmental factors to be taken into consideration, including the precautionary approach as well as an

²⁰⁶ Center for Oceans Law and Policy, University of Virginia, ‘Article 118: Co-operation of States in the conservation and management of living resources’ in M Nordquist *et al* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (vol 3, Nijhoff, Dordrecht 1995) 296, 302.

ecosystem-based approach; capacity limiting; consideration of artisanal and subsistence fishers; data collection; scientific research promotion; and effective monitoring control and surveillance. Article 6 UNFSA builds on that list by further elaborating on the way the precautionary approach is to be applied. As stated in the beginning, this thesis operates on the assumption that a CMR is established, which implies certain availability of adequate scientific information. As such, greater detail on this point will be spared. In any event, the precautionary approach could have an important role to play until the CMR is established, due to the unpredictability of the CMRs in terms of time, scale, and effects on other species.

Article 7 UNFSA is one of the UNFSA cornerstones. It starts by restating Article 63(2) UNCLOS and the obligation to seek to agree on the necessary measures. Article 7 UNFSA also states that this negotiation obligation is without prejudice to the sovereign rights of the coastal States within their EEZs and the right of all States for their nationals to fish on the high seas. Article 7 UNFSA then moves to elaborate on this negotiation obligation by introducing the principle of compatibility. Article 7(2) UNFSA states that conservation and management measures adopted for the high seas and the EEZs must be compatible in order to ensure the conservation and management of the stocks in their entirety. In order to achieve the compatibility of these measures the relevant States are obliged to cooperate. Article 7 UNFSA also provides a list of several factors that must be taken into account in determining the compatibility. It is required that States ensure that the measures are not harmful to the living marine resources as a whole and take into account (1) the coastal State measures applicable within its EEZ and ensure that their effectiveness is not undermined; (2) previously agreed measures by relevant coastal States and high seas fishing States as well as by RFMOs or arrangements; (3) the biological characteristics of the stocks and the geographical particularities of the region and of the stock's occurrence; and (4) the dependence of coastal States on the particular stocks. In agreeing on the compatible measures, Article 7(3) UNFSA requires that States make every effort to agree on them within a reasonable period of time. Failing to do that, Article 7(4) UNFSA refers to the dispute settlement mechanisms, which will be considered in the next section.

The list of factors does not seem to be hierarchal and in finding compatible measures a bottom up and a top down approaches have been identified as possible.²⁰⁷ In the former, the coastal State has the lead, while in the latter leading are the RFMO members or States participating in a direct arrangement. The lack of priority to the one or the other method creates a problem of authority as exemplified in the Mackerel dispute. In situations of disagreements, the disagreeing parties may each take one of the approaches and insist on it. The irreconcilable result of taking both mutually exclusive approaches clearly contradicts the obligation in Article 7(2) UNFSA that the measures “shall be compatible”.

Another cornerstone of the UNFSA is highlighting the role of the RFMOs and arrangements as mediums of cooperative action. With the UNFSA, the RFMOs and the various direct arrangements between the relevant States have become the focal points for the fulfilment of the duty to cooperate.²⁰⁸ Part III of the UNFSA elaborates on the mechanisms for international cooperation. It strongly emphasises the use of RFMOs as a way for States to “pursue cooperation” and “give effect to their duty to cooperate”.²⁰⁹ However, it also gives the choice of direct cooperative mechanisms – arrangements. The UNFSA even allows for formal non-participation in certain occasions as long as the conservation and management measures established by such RFMO or arrangement are applied. Where a State is not interested in a particular fishery the regime does not oblige that State to get involved with the RFMO or arrangement in question. Consequently, such States, pursuant to their duty to cooperate, have to forbid their nationals from fishing the particular stock.²¹⁰ Effectively, the UNFSA provides wide discretion to States in choosing whether and how to participate in the conservation and management of a given shared stock but is also clear that access to the fisheries resources is forbidden to States that do not participate or, otherwise, do not observe the applicable measures. Where no RFMOs or arrangements exist the relevant States are obliged to cooperate to establish such RFMOs or enter into appropriate arrangements to ensure conservation and management of the stocks.²¹¹

The UNFSA also gives a lot of freedom for States to choose how the envisioned RFMOs and arrangements will be formed and will function. This freedom is, nevertheless, streamlined to

²⁰⁷ P Örebech, K Sigurjonsson and T McDorman, *supra*, n 18.

²⁰⁸ See generally E Clark, *supra*, n 21.

²⁰⁹ UNFSA, *supra*, n 6, art 8(1) and (3).

²¹⁰ *Ibid.*, art 17.

²¹¹ *Ibid.*, art 8(5).

some extent and some basic characteristics are made mandatory in a number of UNFSA provisions. Such characteristics are the material and geographical scopes, the main functions and activities, the participation, development and the transparency in the decision-making provided mostly in Articles 9 to 13 UNFSA. For the present discussion of interest are only some of these characteristics.

As the duty to cooperate with respect to shared stocks applies both within the EEZ and on the high seas,²¹² both RFMOs and arrangements can be used for cooperation in both maritime zones. The UNFSA provides a freedom to agree on the application *ratione loci* of the RFMO or the arrangement.²¹³ This freedom is (not very consequentially) qualified as account must be taken of Article 7(1) UNFSA and the regional and sub-regional characteristics.²¹⁴ Usually, RFMOs are given the competence to deal with cooperation on the high seas and only exceptionally, on a request by a particular party, to adopt measures or give advice applicable within the EEZ. Furthermore, the measures adopted are usually subject to the objections of the RFMO members, which can render the measures (recommendations) non-binding.²¹⁵ The freedom to vote against or eventually object to measures derives from the underlying negotiating nature of the duty to cooperate. Conversely, when it comes to the EEZ, direct arrangements are usually used. These arrangements often constitute political agreements rather than treaties and are, therefore, not binding and problematic to enforce.²¹⁶ While they create enforcement issues, these non-binding instruments have certain aspects, which make them preferable to treaties.²¹⁷ Nevertheless, since the conservation and management measures can have a wide array of substantive incarnations, some of the direct arrangements can indeed take the form of binding agreements.²¹⁸ In terms of application *ratione materiae*, the relevant States are free to include in the RFMOs and the arrangements all species in the defined geographical area or only particular stocks.

²¹² It applies within both maritime zones but on different legal bases. See *Case No 21*, ITLOS, *supra*, n 27, [201].

²¹³ UNFSA, *supra*, n 6, art 9(1)(b).

²¹⁴ P Örebech, K Sigurjonsson and T McDorman, *supra*, n 18, 127

²¹⁵ This aspect has attracted criticisms of being the weak spot of the regime. See generally D Day, 'Tending the Achilles' heel of NAFO: Canada acts to protect the Nose and Tail of the Grand Banks' (1995) 19 MP 257.

²¹⁶ J Gulland, 'Some problems of the management of shared stocks' (1980) 206(22) FAO Fisheries Technical Paper.

²¹⁷ See D Bodansky, *The Art and Craft of International Environmental Law* (HUP, London 2010) 156.

²¹⁸ Such an example is the Minimal Conditions for Access (MCA) Convention, which sets the minimum conditions for the exploitation of marine resources within the EEZs of the respective States and which gave rise to the recent ITLOS Opinion.

Since the formation and functioning of an RFMO or an arrangement are an expression of a cooperative effort, the participation therein does not depend completely on the interests and desires of one State. The effectiveness of the cooperation is equally depending on the parties involved and on the intensity of the cooperation. At the heart of the participation question is the issue of “real interest”.²¹⁹ Article 8(3) UNFSA provides that

“States having a *real interest* in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a *real interest* in the fisheries concerned.”(Emphasis added)

Furthermore, pursuant to Article 9(2) UNFSA, where an RFMO or an arrangement is being formed through cooperation, the cooperating States must inform other States “which they are aware have a real interest in the work of the proposed organization or arrangement of such cooperation”. These provisions show that, while States have wide discretion in the form of cooperation, they do not have the freedom to arbitrarily exclude other States having real interest in the particular fishery by freezing them out.²²⁰

Unfortunately, the UNFSA does not explain what real interest means and when exactly it will be met, which can easily give rise to disputes.²²¹ However, considering the nature of shared stocks and its influence on the duty to cooperate, it is submitted that there should be no question about the existence of ‘real interest’ with respect to the coastal States, through the EEZs of which the stocks migrate.²²² Such States objectively have real interest in the stock due to their sovereign right over the natural resources present in their EEZs. The coastal States have real interest even if previously they have not participated in the particular fishery. The reason for non-participation is irrelevant – it does not matter whether it was due to lack of

²¹⁹ G Munro, A van Houtte and R Willmann, The conservation and management of shared fish stocks: legal and economic aspects (FAO Fisheries Technical Paper 465, Rome 2004) 40.

²²⁰ M Lodge, ‘Are Present International High Seas Governance Structures Sufficient to Reap the Benefits of Globalisation?’ in OECD and FAO, *Globalisation and Fisheries: Proceedings of an OECD-FAO Workshop* (OECD Publishing, Paris 2007) 143, 148.

²²¹ E J Molenaar, *supra*, n 165, 475.

²²² C Hedley, E J Molenaar, A G Elferink, *The Implications of the UN Fish Stocks Agreement (New York, 1995) for Regional Fisheries Organisations and International Fisheries Management* (Fisheries Series, Working Paper, European Parliament 2004) 20.

economic interest or because the fish was previously lacking or was in small abundance within the EEZ. The existence of real interest for non-coastal States is much harder to determine as it will be reliant much more on factors other than the objective status of a State as a high seas fishing State for the particular stock.²²³ The situation is even more complicated where a transboundary stock becomes a straddling one due to a CMR. The vagueness of the qualification ‘real interest’ can create problems for States seeking to participate in already established RFMOs or arrangements. A problem of such nature was present in the Mackerel dispute when Iceland and, later-on, Greenland, asked to be included in the negotiations of the arrangement for the management of mackerel.²²⁴

Article 8(2) UNFSA provides an interesting twist to the issues of participation and the qualification of the participating States. It states that “any interested State” may initiate consultations with the view that appropriate arrangements are established to ensure the conservation and management of the stocks. This provision has special relevance for CMR cases because the consultations may be initiated by any interested State and not any State which has real interest. This is an important difference as it explicitly allows for a much wider group of States to join the process of adoption of relevant measures.

2.1.2 Triggering the duty to cooperate

Where a CMR occurs, irrespective of which common thread materialises, the rights and duties of the relevant States under the voluntarist perspective are getting affected automatically. However, the way in which the rights and duties are affected and which are the relevant States vary, depending on the common thread in question. These two issues will be considered first, before examining in more detail the triggering of the duty to cooperate.

The relevant States

²²³ E.g. UNFSA, *supra*, n 6, art 11.

²²⁴ The EU’s opposition to these claims is quite interesting, considering that the EU was in the same position in the mid-1990s when the other coastal States did not want to include it in the management of herring due to the almost complete lack of herring in EU’s waters at the time. R Churchill, ‘Managing Straddling Fish Stocks in the North-East Atlantic: A Multiplicity of Instruments and Regime Linkages— but How Effective a Management?’ in O Stokke (ed) *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (OUP, Oxford 2001) 236, 247.

The issue of which are the relevant States can be very complicated in a CMR situation due to the vagueness of the undefined qualifications in the UNFSA of ‘real interest’ and ‘any interested State’. The term ‘relevant States’ is used here independently from the interest-based qualifications used in the UNFSA and includes all States that can potentially fish a particular shared stock as of right, thus, excluding the arrangements for fishing in foreign EEZs.

The relevant States issue is simpler in the third common thread and more complicated in the first and the second ones. It is relatively simple in the third common thread because the relevant States are not directly changed by the CMR. Whether the States that are actually involved in the fishery changes, will be a separate choice made by these States on the basis of the actual degree of zonal attachment variation and will not be automatically predetermined. Nevertheless, through these choices, which are, effectively, expressions of interest, the third common thread may indirectly lead to a change in the number of interested States or States having real interest in a particular stock. In the first and in the second common threads the issue is more complicated because the relevant States can be changed directly by the CMR and it is also possible that there is indirect influence as in the third common thread.

The essence of the second common thread is the change of the relevant States or of their status. The change of the relevant States is clear with transboundary stocks – they may increase as well as decrease, following a CMR. With the straddling stocks the relevant States remain the same but the changes in their statuses can have influence on their classification as interested States or States with real interest. In the first common thread the relevant States will almost always change due to the changes in the nature of the stock.²²⁵ In the first common thread the changes of the relevant States are quite abrupt. If a transboundary stock becomes straddling the relevant States would include a great number of States due to the fishing freedoms on the high seas. In such cases it would be even harder to evaluate real interest because fishing opportunities are becoming available for the first time to a much bigger number of States. Conversely, where a straddling stock becomes transboundary just a small number of States will suddenly have an exclusive role in the conservation and management of a resource that previously may have been accessed by a much bigger number of States.

²²⁵ Except in the very unlikely scenarios of stocks becoming discrete or the reverse, where there would only be a change of the status of the States.

Irrespective of how real was the interest of the non-coastal States before the CMR, the sovereign rights over the natural resources within the EEZ will exclude them.

These changes in the relevant States are important because the voluntarist perspective applies only to the post-CMR relevant States. The voluntarist perspective applies in this way because it is strictly based on the rights and duties provided in the regime. That is to say, for example, the pre-CMR coastal States of a transboundary stock cannot rely on Article 63(1) UNCLOS to exclude other States from the negotiations of the conservation and management measures if that stock has become straddling. Accordingly, while the rights and duties of all (old and new) relevant States are affected by CMRs it is only the relevant States after the CMR that can trigger the duty to cooperate through its sub-duties.

Affecting the rights and duties of the relevant States

At this juncture it is necessary to consider how the rights and duties of the relevant States are actually affected. In the first common thread the impact of the CMR on the rights and duties of the relevant States is substantial because with the change of the nature of the stock there is a change in the applicable sub-regimes. As it was shown above, the sub-regimes for transboundary and straddling stocks, while similar, contain important differences. Such differences relate to the involvement of different maritime zones within which the number of States exercising fishing rights and fulfilling the respective obligations is drastically different and the substance of these rights and obligations is also quite different. The discretion the relevant States have for dealing with transboundary and straddling stocks is also different. Essentially, the rights and obligations of the relevant States with respect to the conservation and management of the particular stock are changed when the first common thread materialises. That is not to say, however, that the law has changed by the CMR, but that a different part of the law is applicable due to the factual changes that have occurred.

In the second common thread the impact of the CMR on the rights and duties of the relevant States is not as substantial as in the first common thread but also involves important changes. With respect to States within the EEZs of which a shared stock appears or disappears, the rights and obligations differ substantially. To give two indicative examples, in the case of a transboundary stock, the CMR completely changes the terms of access of the particular State to that fishery; and in the case of a straddling stock, the basis for access is strengthened or

weakened when the stock, respectively, enters or leaves the EEZ. Effectively, for such States this change determines whether or not Articles 56, 61 and 62 UNCLOS are applicable to them with respect to the particular stock. This makes a huge difference as it happened with Iceland and Greenland when mackerel was found in their waters. With respect to the other relevant States, their rights and obligations are affected only in terms of scope. This is to say that, while the other relevant States do not experience a change in the applicable law, the scopes of some of the rights and obligations they have widens or shrinks geographically and, respectively, applies to more or less States.

In the third common thread the rights and duties are also affected, albeit in a more limited manner than in the other common threads. Most notably, the applicable part of the law and the scope of the rights and duties are not changed. While they remain the same, the rights and duties are affected under the voluntarist perspective because (and to the extent that) the zonal attachment of the stocks is a factor to be taken into account in the conservation and management of the particular shared stock. For straddling stocks, the UNFSA makes this explicitly a factor to be considered by stating that account must also be taken of “the extent to which the stocks occur and are fished in areas under national jurisdiction” in determining compatible conservation measures. There is no such explicit statement for transboundary stocks in the UNCLOS. However, it would be wrong to assume that the zonal attachment is not a factor to be considered for transboundary stocks as well. The existing regime gives States sovereign rights over all natural resources present within their EEZs. This does not change when the resources increase, even if it is at the expense of a decrease within the EEZs of other States. The bigger the share of the stock within a given EEZ, the bigger the intensity of the fishing that can be undertaken legally and *vice versa*, which affects the fishing interests, rights, and duties of the relevant States. This is not to say that the amount that each party can fish changes proportionately to the change in the zonal attachment of the stock, due to the additional factors to be considered,²²⁶ but that the zonal attachment change is not inconsequential and does affect the rights and duties of the relevant States. This conclusion is also supported by the characteristics of the duty to cooperate, particularly, the equity aspect.

The triggering of the duty to cooperate

²²⁶ UNFSA, *supra*, n 6, art 7. See also T Henriksen and A Hoel, ‘Determining Allocation: From Paper to Practice in the Distribution of Fishing Rights Between Countries’ (2011) 42 ODIL 66, 76.

Having considered the issues of the relevant States and the affected rights it is now necessary to turn to the issue of triggering the duty to cooperate in more detailed manner. The first thing to be said in this regard is that, in order for the duty to cooperate to be triggered, it is not enough that the rights and duties of the relevant States are affected. There is an additional element (circumstance) that must be present, which is the essence of the voluntarist perspective – the will of at least one of the relevant States to address the CMR. If all of the relevant States agree, explicitly or implicitly, not to address the CMR they may do so, under the voluntarist perspective. However, once one of the relevant States requests the CMR to be addressed, the others are obliged to respect it.

This obligation not to ignore the cooperation calls of the relevant States flows from three of the aspects of the duty to cooperate in the area of fisheries. First, the natural aspect of the duty to cooperate dictates that ocean realities must not be ignored and that the cooperating partners are predetermined to a certain extent. The calls for cooperation arising from CMRs are aimed, by definition, at addressing (changed) ocean realities and may come from States that are made new cooperating partners by these very same ocean realities. Second, the triggering aspect of the duty to cooperate is based on the presence of a multitude of particular circumstances which require different kinds of action. When such circumstances appear and are called upon they cannot be ignored. Third, the equity aspect requires due regard for the rights and duties of other States. Due regard for the fishing rights and obligations of other States is achieved *inter alia* by equitably allocating fishing resources through cooperation, considering the existing circumstances, and, as such, avoiding inequitable burden sharing in the conservation and management of the stocks.

Even where an equitable result is achieved, if the circumstances change and a party questions the equitableness and requests that the result is revisited through cooperative methods, it must not be ignored. While the ICJ correctly stated, generally about equitable principles, that “equity does not imply equality [...] nor does it seek to make equal what nature has made unequal”,²²⁷ it is submitted here, that equity does seek to redistribute *equitably* what nature has also redistributed. Article 8(2) UNFSA exemplifies the role of these aspects of the duty to cooperate in limiting the freedom of the relevant States to ignore calls for cooperation. It obliges States to enter into consultations in good faith which can be initiated by any interested

²²⁷ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Reports, [46].

State with the view to adopt appropriate measures. It does not oblige States to reach an agreement but does oblige them not to ignore calls for cooperation.

Being that as it may, the triggering of the duty to cooperate in and of itself does not say much about the scope and the content of the sub-duty(ies) through which the duty to cooperate is triggered. The array of possible variations of triggered sub-duties is so wide that a detailed examination goes beyond the point of discussion here. Instead, the discussion will now look at the factors on which these cooperation particularities depend. First, reflecting the natural aspect of the duty to cooperate, they depend on the factual circumstances of the occurring CMR. With respect to scopes of application, where the relevant States change due to a CMR, the scopes *ratione personae* as well as *ratione loci* of the sub-duties change. For example, where a straddling stock enters the EEZ of a new State, the scope of application of Article 7 UNFSA expands; the measures that the new State would adopt within its EEZ will also be covered by the compatibility obligation. With respect to the substantive content of the respective sub-duties, it is not changed by the CMRs. What changes is the set of applicable sub-duties that can be triggered by any of the relevant States. For example, where a straddling stock becomes transboundary, none of the relevant States can trigger Article 7 UNFSA on the compatibility of EEZ and high seas measures because there will no longer be any high seas measures applicable to that stock.

Second, reflecting the triggering aspect of the duty to cooperate, the cooperation particularities depend also on the will of the relevant party that triggers the duty to cooperate. This is central for the voluntarist perspective. It can happen that different relevant States trigger different sub-duties and even with different addressees due to the discretion the regime provides. For example, where a transboundary stock becomes straddling, one of the pre-CMR relevant States may request that the CMR is addressed but only with respect to quota allocations and only by this original group of States. However, if some of the new relevant States want to join the fishery on the high seas they can request that the CMR is addressed in a more comprehensive manner and even that an RFMO is formed, if the stock was previously managed by a direct arrangement.²²⁸ Another consequence of the triggering aspect, which limits the discretion of the parties, is the triggering chain reaction with some sub-duties. Using the transboundary to straddling stock example again, if the relevant States decide to address

²²⁸ See generally P Örebech, K Sigurjonsson and T McDorman, *supra*, n 18, 124.

the CMR by adopting measures also for the high seas, they cannot ignore the compatibility obligation of Article 7 UNFSA – they have to go all the way in that regard.

Third, reflecting the equity aspect of the duty to cooperate and its inherent elements of fairness and justice, the cooperation particularities are influenced by the good faith obligation and the prohibition of abuse of rights, which are enshrined in the existing regime²²⁹ and have been proclaimed as part of “generally recognized principles and rules of international law”.²³⁰ Good faith is to be observed both where requests for cooperative action are made and where these requests are received. Where requests are made they are to be well-founded on evidence of CMRs and must not be made in an abusive manner. That is to say, while the requests as such can concern all parts of the existing measures, because nothing prevents their complete renegotiation should the relevant States so desire, the requests that can actually trigger sub-duties under the voluntarist perspective are limited. They are limited to the practical issues relating to the CMRs. For example, using small-scale CMRs or CMRs with very limited economic, ecological, etc. consequences to request and demand changes of conservation and management measures of the given stock that go beyond the particularities of the CMR will at the very least be questionable from the perspective of good faith. Conversely, when requests are made, the addressees of these requests must not ignore them, as already explained above. Responding to the cooperation requests and the exchanges that will follow phase into the stage of negotiations, for which acting in good faith is just as important.

The negotiations aspect of the duty to cooperate becomes relevant for the issue of fulfilling the triggered obligations. The cooperative effort that requires multilateral agreement on certain actions or measures will need to undergo a process of negotiations. In situations of pre-CMR measures (which would usually be the case) these measures will have to be renegotiated in good faith. Article 8(2) UNFSA can be applied here. It states that

“States shall enter into consultations in good faith and without delay, particularly where there is evidence that the straddling fish stocks and highly migratory fish stocks concerned may be under threat of over-exploitation or where a new fishery is being developed for such stocks. To this end, consultations may be initiated at the request of any

²²⁹ UNCLOS, *supra*, n 3, art 300; UNFSA, *supra*, n 6, art 34.

²³⁰ UNGA Res, Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States, A/Res/2625 (XXV) 24 October 1970.

interested State with a view to establishing appropriate arrangements to ensure conservation and management of the stocks. Pending agreement on such arrangements, States shall observe the provisions of this Agreement and shall act in good faith and with due regard to the rights, interests and duties of other States.”

Article 8 UNFSA is titled “cooperation for conservation and management” and its first paragraph reiterates that coastal States and States fishing on the high seas have the obligation to pursue cooperation to ensure effective conservation and management of the relevant stocks. Following, Article 8(2) UNFSA provides some basic procedural aspects for this cooperation. It is especially relevant for CMR cases because it explicitly addresses two situations that can also arise as a result of a CMR. For example, a new fishery may be developed as a result of a CMR as it happened with Greenland, which started exploratory fishing in its EEZ for mackerel. The threat of over-exploitation could appear where a CMR is not addressed appropriately but this is to be discussed under the conservationist perspective. Moreover, Article 8(2) UNFSA is not limited to these two situations as it introduces them with the words “particularly where”, which shows that the procedural aspects have wider scope of application.

The initial stage of the negotiations is consultations, as Article 8(2) UNFSA shows. These consultations must be entered into in good faith and without delay. That means that not only the cooperation requests may not be ignored, but they should be promptly answered. The consultations may be initiated by any interested party, without definition being provided of ‘interested’. There is no indication of whether some States must be excluded or not. The qualification ‘interested’ may be interpreted even to mean that the moment a State requests consultations it is showing interest and it is to be considered as interested as such. As it has been noted above, it is important that this qualification is different from States with ‘real interest’ whatever it means. Article 8(2) UNFSA does not specify which must be the States that have to enter into the consultations (the addressees). This open-endedness exemplifies the discretion the relevant States are given by the regime under the voluntarist perspective, which was discussed above.

During the negotiations for the appropriate measures, Article 8(2) UNFSA requires that States observe the UNFSA and act in good faith and with due regard to the rights, interests and duties of other States. These conduct-oriented obligations restate obligations that States already have under the existing regime and the added value of their additional mentioning is

not immediately clear. It may be said that the added value is that they inform the way the negotiating States must conduct themselves during the negotiations. It may also be read to mean that non-negotiating States must nevertheless take note of the negotiations and, possibly, not to act in a way that will frustrate them. This part of Article 8(2) UNFSA is yet to be further clarified in practice.

The basic procedural aspect of Article 8(2) UNFSA can be applied by analogy to the respective negotiations for transboundary stocks. This is because the logic of Article 8(2) UNFSA runs on the basic characteristics of the duty to cooperate, which applies to both transboundary and straddling stocks. There is nothing that makes the obligation to enter into consultations with the view to agree on appropriate measures exclusively applicable to straddling stocks and not transposable to regime for transboundary stocks. The sovereign rights over the natural resources within the EEZ are not going to be prejudiced precisely because this procedure is based on the duty to cooperate, which is applicable for the conservation and management of transboundary stocks. Naturally, the provisions will be applied *mutatis mutandis*, which means, for example, that the list of the interested States initiating the consultations and the addressees of the cooperation requests will be much more limited.

In the Mackerel dispute the issue of renegotiation of measures was very problematic. Greenland and Iceland were adamant to be included in the new agreements and, together with the Faroe Islands, have argued for a change in the TAC allocations, all because of the CMRs of mackerel and herring. The EU and Norway, on the other side, were very hesitant in respecting these claims. While this seems to be an instance of disagreement on the law, it may not necessarily be the case. During the Mackerel dispute, in a joint statement on mackerel, Commissioner Damanki and the Norwegian Minister Berg-Hansen stated that the “EU and Norway recognise that the change in the migration pattern in recent years, due to the expansion of the stock, justifies a modified sharing arrangement”.²³¹ Immediately after saying this, the statement expresses dissatisfaction with Iceland’s skyrocketing increase of catches in a very short amount of time.

²³¹ Ministry of Fisheries and Coastal Affairs, Press release, No 16/2012, ‘Joint Statement of Commissioner Damanaki and Norwegian Minister Berg-Hansen on mackerel’ (15 February 2012) <<https://www.regjeringen.no/en/aktuelt/joint-statement-of-commissioner-damanaki/id672636/>> accessed 1 October 2015.

This statement points not so much to a disagreement on the obligation to answer the call for cooperation through renegotiating the relevant conservation and management measures, in this case TACs, but rather a disagreement on facts such as abundance levels and, consequently, on the *equitable level* of the new TAC allocations. This conclusion was very clearly supported during a reporting by the Commission on the issue of trade sanctions and subsequent developments before the Fisheries Committee of the European Parliament.²³² In particular, the Commission representative stated that it was confirmed that there was far more mackerel in the Faroese and Icelandic waters and that their rights to get a larger share must be recognised, even more so for Iceland, which was not a coastal State before but now is. However, there was no mentioning of Greenland and as far as herring was concerned it was stated that higher abundance was not shown.

Disagreement on the law, however, may have arisen on whether a *de minimis* rule applies to the calls for cooperation. Regulation 793/2013 stated that the Commission

“examined the existing scientific literature on the subject and only found statements pointing to occasional occurrence of herring in Faeroese waters for longer time in the season, but did not find any reference allowing to interpret this phenomenon as a stable or permanent increase in abundance”.²³³

This implies that if there was a “stable or permanent increase in abundance” the EU would have acted differently. Unfortunately, from the available public exchanges, the views of the parties involved in the Mackerel dispute are not completely clear on this point and it is unclear whether there was a dispute on this point of the law. In any event, it must be clarified that such *de minimis* rule is unfounded in the existing regime, unlike in the 1958 regime. Instead, the existing regime relies on the good faith obligation of all relevant States, which is in line with its decentralised and cooperative nature.

2.2 *The conservationist perspective*

²³² See the web-streaming of the Committee meeting of 17 October 2013 (see 12:19:00 *et seq*) <<http://www.europarl.europa.eu/ep-live/en/committees/video?event=20131017-0900-COMMITTEE-PECH#managehelp>> accessed 1 October 2015.

²³³ Regulation 793/2013, *supra*, n 45, recital [17].

2.2.1 Legal context

The conservationist perspective deals with the situations where the relevant States lack the discretion to choose whether or not to address a CMR and its consequences. In particular, the conservationist perspective derives from the provisions in the regime that prescribe the rights and obligations of the States dealing with the conservation of marine (fisheries) resources. A brief overview of these provisions is needed here in order to better explain the application of the perspective. This overview will build on the discussion of the regime that was provided for the voluntarist perspective. The overview here will focus on the sovereign right to explore and exploit, conserve and manage natural living resources of the waters superjacent to the seabed and the jurisdiction to protect and preserve the marine environment.²³⁴

Article 61 UNCLOS deals with conservation of the living resources and sets out the general rules concerning the determination of allowable catch of living resources by the coastal State and the maintenance of these resources through proper measures.²³⁵ Article 61(1) UNCLOS provides the default rule that the coastal State determines the allowable catch of the living resources within its EEZ. This default rule is, however, limited by the following paragraphs, which set out the factors to be considered in determining the catch.²³⁶ Article 61(2) UNCLOS requires the coastal State to ensure that the living resources in its EEZ are not endangered by over-exploitation by taking into account the best scientific evidence available to it and taking proper conservation and management measures. As appropriate, it is required that the coastal State cooperates with competent global, regional or sub-regional international organisations in achieving this end. The exact modalities of the cooperation required are not clear from the language of the provision. It is noteworthy that the cooperation here is between the coastal State and the relevant international organisations and not also with other States as it has been suggested during the drafting.²³⁷ The other subparagraphs provide some specifics to be considered by the coastal State while devising its conservation measures. Article 61(3)

²³⁴ UNCLOS, *supra*, n 3, art 56(1).

²³⁵ Center for Oceans Law and Policy, University of Virginia, 'Article 61: Conservation of the living resources' in M Nordquist *et al* (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (vol 2, Nijhoff, Dordrecht 1993) 594, 596.

²³⁶ *Ibid.* 609.

²³⁷ E.g. A/AC.138/SC.III.54, articles A and D, reproduced in III SBC Report 1973, at 107 and 108 (Ecuador, Panama and Peru); A/AC.138/SC.III.37, article 10, reproduced in III SBC Report 1973, at 78, 80 (Argentina); A/CONF.62/C.2/L.38 and Corr.1 (1974), articles 11, 12 and 14, III Off. Rec. 214, 215 (Bulgaria, Byelorussian SSR, German Democratic Republic, Poland, Ukrainian SSR and USSR).

UNCLOS requires that the measures thus taken are in line with the MSY of the stocks and “as qualified” by relevant environmental and economic factors, including the special requirements of developing States and taking into account fishing patterns, stocks’ interdependence and generally recommended international minimum standards. Article 61(4) UNCLOS builds on the interdependence aspect of the stocks and requires that the effects of the measures on associated or dependent species is taken into consideration.

With respect to the high seas, the regime similarly imposes conservationist restrictions on the freedoms of the States. The freedom to fish on the high seas is generally recognised in Article 87 UNCLOS and further reaffirmed in Article 116 UNCLOS. However, this freedom is not unfettered. Among others, there are conservationist limitations that are imposed on the States. Articles 117 and 118 UNCLOS require States to take necessary conservation measures and Article 119 UNCLOS elaborates on what constitutes necessary conservation measures and on issues to be taken into consideration. In particular, the States are obliged to take measures that are designed “to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield”. As in the EEZ, these measures are to be based on the best scientific knowledge and be “as qualified” by relevant environmental and economic factors. Furthermore, in taking such measures the States are obliged to consider the effects of such measures on associated species with the view to maintain or restore the populations of such associated species “above levels at which their reproduction may become seriously threatened”

The UNFSA complements these conservationist obligations and requires action in certain situations where stocks are in an ‘undesirable’ state. In Article 5 UNFSA the MSY-level requirement is reiterated. Furthermore, where necessary, it is also reiterated that measures must be taken for associated species or species that otherwise belong to the same ecosystem with the view to maintain or restore “populations of such species above levels at which their reproduction may become seriously threatened.” Article 5 UNFSA also requires that biodiversity in the marine environment is protected and that measures are taken to ensure that fishing effort levels “do not exceed those commensurate with the sustainable use of fishery resources”.

Article 6 UNFSA, which deals with the application of the precautionary approach, further provides for situations where the regime requires action from States. In implementing the

precautionary approach, States are required *inter alia* to determine stock-specific reference points on the basis of best scientific information available and in the event that these reference points are exceeded to take action to restore the particular stock. Article 6(5) UNFSA requires “[w]here the status of target stocks or non-target or associated or dependent species is of concern” that States “subject such stocks and species to enhanced monitoring in order to review their status and the efficacy of conservation and management measures”. Moreover, Article 6(7) UNFSA prescribes that measures are also to be taken in case of a natural phenomenon having adverse impact on the status of shared stocks. This is relevant here because such ‘adverse impact’, while not defined in the UNFSA, may easily be connected with a CMR. In the case of such natural phenomena the States are obliged to adopt emergency measures “to ensure that fishing activity does not exacerbate such adverse impact” as well as “adopt such measures on an emergency basis where fishing activity presents a serious threat to the sustainability of such stocks”.

The conservation measures that the regime requires, both within the EEZ and on the high seas, are also an “element in the protection and preservation of the marine environment” as the ITLOS has famously stated.²³⁸ The protection and preservation of the marine environment is an obligation imposed by Article 192 UNCLOS. While States have the right to exploit their natural resources, they are to do so in accordance with their marine-environment duty.²³⁹ This duty is formally separate from the duty to cooperate as it is not a sub-duty but it does affect the way States have to cooperate.

2.2.2 Triggering the duty to cooperate

Having briefly considered the conservationist provisions of the regime, now it falls to explain how the duty to cooperate is triggered. Due to its different legal foundation, the conservationist perspective also triggers the duty to cooperate in a different way. Like with the voluntarist perspective, the conservationist one requires that two circumstances are present for the duty to cooperate to be triggered. These circumstances, however, differ. Contrary to the voluntarist perspective, under the conservationist one, the occurrence of a CMR does not

²³⁸ *Southern Bluefin Tuna (No 3 and 4) (New Zealand v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, 280, [70].

²³⁹ UNCLOS, *supra*, n 3, art 193.

automatically affect the conservationist rights and obligations of the relevant States. That is, next to a CMR there is an additional circumstance that must be present, which, put in very general terms, is a threat for the viability of the particular stock. Accordingly, when a CMR occurs and a threat materialises, the rights and duties of the relevant States will be triggered and they cannot choose to ignore the CMR and its consequences as they could under the voluntarist perspective. The issues of which are the relevant States and how their rights are affected also need some attention under the conservationist perspective because they differ from the voluntarist one.

The relevant States

With respect to the relevant States, the conservationist perspective has different scope. The relevant States are not all States that can potentially exercise their rights to fish a particular shared stock. In particular, the relevant States are more limited to the States that are actually involved in the fishery or otherwise impact the fishery for which the conservationist perspective applies. Impacting States would be the ones that, while not fishing the particular stock, are coastal States, which have sovereign rights over it, or which fish associated species. The reasons for this more limited scope are the different nature and rationale of the perspective. Where the viability of a stock is threatened the main solution is lowering the fishing effort and catch and the discussion would usually evolve around the question of how low. For States on the other end of the world that are not involved in the particular fishery in no way whatsoever, there is no obligation to do anything. Accordingly, which are the relevant States depends more on the actual involvement of the States with the fishery than on the common threads of the CMR. The common threads are influential to the extent that they determine that States can (or cannot) be involved in the fishery, which was examined above.

Affecting the rights and duties of the relevant States

Under the conservationist perspective the rights and obligations of the relevant States are affected by being activated, without their content being changed in any way, due to the particularities of the given CMR. These rights and duties are activated after being dormant, either because they have been previously fulfilled or because the circumstances they address have never previously existed. For example, such dormancy is present with the conservationist provisions in the regime that oblige the States to ensure that living resources are maintained above certain safety levels: as long as the living resources are above these

levels these provisions are in the background and dormant. Such is the case where the existing regime requires, in particular, that the stocks, both within the EEZ and on the high seas, are sustained at MSY levels; that the effects on associated species are considered with the view to maintain or restore their populations above seriously threatening levels for their reproduction; and where coastal States are required to ensure the stocks within their EEZs are not endangered by over-exploitation. Accordingly, once a threat for the living resources surfaces these provisions are activated and action is required by the States. The way the rights and obligations of the relevant parties are affected depends mainly on the ecological consequences that flow from the CMRs. The common threads are relevant where the nature of the stock is being changed because this determines whether the transboundary or the straddling stocks regime is applicable, together with the differences in their conservationist provisions.

The triggering of the duty to cooperate

Triggering the duty to cooperate under the conservationist perspective, as with the voluntarist perspective, is not very indicative of what the relevant States must actually do and a closer look must be taken at the sub-duties. Here as well the number of possible sub-duties that can be triggered is too big for a one-by-one discussion. Instead, the focus will be on the main factors influencing the scope and the content of the sub-duties, keeping also in mind the corresponding discussion for the voluntarist perspective and the role of the aspects of the duty to cooperate.

The leading factors under the conservationist perspective are the factual particularities of the CMR and its consequences. The will of the parties is barely present. Whether a particular sub-duty is triggered does not depend on the will of the parties but on whether the viability of the particular stock is affected in a given way. For example, the relevant States have no freedom on whether or not to subject stocks to enhanced monitoring in order to review their status and the efficacy of the applicable measures, where these stocks are of concern, under Article 6(5) UNFSA. The same is the situation where a natural phenomenon has significant adverse impact on the status of the particular stocks – States have to act in accordance with the triggered provisions. Naturally, the relevant States still have the residual freedom to adopt additional measures but this is only complementary due to the application of the voluntarist perspective by default. Furthermore, as indicated in the discussion on the relevant States above, they also can vary somewhat under the conservationist perspective depending on the

circumstances. This is especially the case with the States that have impact on the particular stock. Most often this can be the case where associated species are concerned and where the States fishing for the different associated species do not overlap but measures must be taken for all. Another important aspect of the conservationist perspective is the desired result of the triggered duty to cooperate. While in the voluntarist perspective the eventual aim is generally to reach an agreement with little constraints on its form and substance, in the conservationist perspective the triggered sub-duties have a particular conservation goal to be achieved.

The procedure for fulfilling the triggered sub-duties under the conservationist perspective does not differ much from the one under the voluntarist perspective. Here as well the negotiations aspect of the duty to cooperate is central. The regime does not provide for different procedures depending on the subject-matter of the negotiations.²⁴⁰ The provisions of Article 8(2) UNFSA can be applied for the conservationist perspective, as one of the explicitly provided situations therein shows – where stocks are under threat of over-exploitation. After all, the negotiations start by being initiated by somebody. However, the main difference between the two perspectives, in terms of negotiation, is that under the voluntarist one the cooperation request is the trigger for the respective sub-duties, but under the conservationist perspective the request is simply a formality required by the already triggered sub-duty.

In the Mackerel dispute, the conservationist perspective had an ambivalent role to play. The CMR that occurred fell under the voluntarist perspective. The relevant States had to address it due to the requests made by some of the relevant States – Iceland, Greenland and the Faroe Islands. Their claims were met with fierce opposition almost amounting to outright ignoring. When these three relevant States decided to then exercise their sovereign fishing rights in their EEZs, coupled with the resilience of the EU and Norway to step back, the status of the herring stock worsened. Whether the cooperation failure under the voluntarist perspective actually got to turn into a situation under the conservationist perspective needs further analysis with empirical data, which will not be done here. However, it is clear that even if did not transform, it was surely down that road.

²⁴⁰ Possible exception can be said to be Article 8(6) UNFSA, which requires preliminary direct consultation where an action is intended to be proposed that would have a significant effect on established measures.

Another conservationist perspective aspect in the Mackerel dispute related to the issue of associated species. As indicated above, a shared stock that is in a predator-prey relationship with another stock changes its migration route conservation issues can arise as a result. In the Mackerel dispute, while not getting that far, there was such an issue for the Faroese fishermen. While on the one hand, mackerel was seen as an increased resource it was also a predator for the juveniles of other stocks the fishermen targeted, such as cod, haddock and saithe.²⁴¹ If the Faroes did not act to increase their mackerel catches, the CMR could have led to a deterioration of these associated stocks.

When it comes to the measures the EU imposed against the Faroe Islands, traces of the conservationist perspective can also be found. The justification the EU put forward for both the framework regulation and the implementing one is the environment. This transpires from the initial calls for Regulation 1026/2012, from its preparatory works and its final shape. They talk about sustainable fishing – clearly a conservationist perspective element. Be that as it may, the EU never suggested that the framework or the implementing regulations had a legal basis in the regime for the oceans – because it clearly does not. As it will be seen in the next section, the regime does not provide a basis for any of the relevant States to adopt such autonomous measures against each other in the event of unsuccessful cooperation. This is so even though sustainable use of straddling stocks is one of the main objectives of the UNFSA (Article 2) and is often mentioned throughout the UNFSA. The regime only obliges States to take measures relating to their own activities and their own vessels and, within their own EEZs, for all vessels.

²⁴¹ Q Bates, *supra*, n 71.

IV. Consequences of unsuccessful cooperation

So far, this thesis discussed the duty to cooperate and its application in the case of CMRs. It showed the multitude of twists and turns that can impact the duty to cooperate in a variety of different ways. Now the thesis will look at certain consequences of the application of the duty to cooperate. In particular, the attention will be on the consequences of unsuccessful cooperation. Unsuccessful cooperation can equally arise in situations where the relevant States breach their duty to cooperate as well as where, without breaching their duty, they fail to negotiate an agreement. Note will be taken of the main challenges that the relevant States can face without going into excessive detail. There are three main issues that this author considers most pressing and in need of examination: (1) the status of pre-existing (pre-CMR) agreements, (2) dispute settlement, and (3) self-help measures.

Unlike the discussion so far, the examination here will also rely on the openness of the regime and will often go beyond the regime by applying general international law. This openness refers to the fact that the existing regime is not self-contained²⁴² and allows for the application of external sources of international law. This is true for both primary and secondary norms. Support for this can be found in the fact that both the UNCLOS and the UNFSA provide in their preambles that matters not regulated therein “continue to be governed by the rules and principles of general international law”. Furthermore, the preparatory works of neither the UNCLOS nor the UNFSA suggest any intent of the drafters to exclude the complementary application of norms external to the regime. Even more, there is nothing in the regime clearly providing for such exclusion with respect to secondary norms, which is required due to the “presumption against the creation of wholly self-contained regimes in the field of reparation”.²⁴³

²⁴² See A Boyle, *supra*, n 188, 565.

²⁴³ J Crawford, Third Report on State Responsibility, UN Doc. A/CN.4/507 (2000) [147]. See also J Crawford, *State Responsibility: the General Part* (CUP, New York 2013) 105.

1. Status of pre-existing agreements

As explained in section III, the primary way to address a CMR, whether under the voluntarist or the conservationist perspective, is through negotiation. In some situations this negotiation could involve the adoption of entirely new measures and agreements that have no bearing on the pre-existing ones (if any). However, in most cases, it would happen that this negotiation will actually encroach on pre-existing measures and agreements, which will be, effectively, renegotiated in whole or in part. The question then arises what becomes of these pre-existing agreements and measures where new agreement is lacking. To what extent the CMRs can affect the status of pre-existing agreements in such situations? Can these agreements be terminated due to the CMRs? The answers of these questions are to be found in the law of the treaties. However, before answering them, it must be examined which are the pre-existing agreements that can be affected.

1.1 Types of pre-existing agreements

The CMRs of shared stocks can have impact both in the EEZs and on the high seas, depending on the common thread that is materialised. Furthermore, the gravity of the impact can vary as well, depending on the circumstances of the particular CMR. For these reasons the number of the potential agreements that can be affected and the extent to which they can be affected will also vary. Their main connecting link between these agreements is the extent to which they govern the particular shared stock. These agreements can be systemised in different ways along the different characteristics that they have. They can be, to say the least,²⁴⁴ (1) binding as well as non-binding; (2) applicable within the EEZ or on the high seas (or both); (3) adopted in the context of an RFMO or a treaty.

Non-binding agreements can be direct political agreements such as the ones negotiated between the relevant States in the Mackerel dispute or non-binding recommendations of an RFMO. Conversely, the binding ones can be treaties, with or without the need for protocols to implement them, as well as binding RFMO measures. On the high seas, the agreements would

²⁴⁴ Other groupings can also be found in the literature. See R Churchill and A Lowe, *supra*, n 201, 295; W Edeson, 'Types of Agreements for Exploration of EEZ Fisheries' in in E Brown and R Churchill, *supra*, n 35, 157.

almost exclusively be related to an RFMO – RFMO measures as well as the constitutive instrument(s) of the RFMO. These would be affected the most where a straddling stock becomes transboundary – in the case of a single-stock-specialised RFMO (or other kind of arrangement) its whole existence could be put to a question. Within the EEZ, the types of agreements that can have bearing on a particular shared stock are numerous.²⁴⁵ Such can be agreements on technical cooperation, boundary agreements, access agreements under Article 62 UNCLOS, friendship agreements etc.²⁴⁶ Specialised fisheries agreements also can vary among themselves. They may simply refer to terms and conditions of the issued licences and the applicable national laws or they can set out in full detail the terms and conditions for fishing a particular stock.²⁴⁷ However, even where details such as quota allocations are included in a treaty provision, it would be unlikely that they are fixed for a long period without an adjustment mechanism, due to the unpredictability of the conditions in the world ocean.²⁴⁸

1.2 Reaching new agreement

Where the relevant States do reach an agreement in the negotiations for addressing a CMR, there are very few legal issues that may arise due to the overriding importance of the State consent. In such a case the pre-existing agreements may be partially or fully amended, modified, suspended or even terminated,²⁴⁹ if the parties so wish. The constraints that the States may face can only be related to the particular framework/context of the negotiations. For example, in the case of binding RFMO instruments or decisions of a special bilateral commission (both are usually annual), once an agreement is renegotiated, either a new provisional instrument would be adopted, if the rules of the RFMO or the commission allow for it, or the parties will have to wait for the annual measure to lapse. In the case of a treaty on access rights and/or quotas, usually, it would be a framework one with a periodically negotiated agreement (also usually annual) in the form of a protocol. In such a case the RFMO situation applies *mutatis mutandis* and either the protocol is amended or it is left to lapse.

²⁴⁵ *Ibid.* 161.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ See M Hayashi, *supra*, n 30, 260.

²⁴⁹ See M Shaw, *International Law* (7th ed, CUP, Cambridge 2014) 674-675 and 685-690.

It must be stated here that the existing regime does not specify what instruments must be used for the duty to cooperate to be fulfilled, except where it requires for an RFMO to be formed, which would imply a treaty. As such, the existing regime recognises that international cooperation does not require a binding or even a written document.²⁵⁰ If the parties have actually reached a renegotiated agreement, it is its implementation through provisional and practical arrangements that would be important, in the spirit of the existing regime, which gives freedom for the means as long as the end is achieved.

1.3 Not reaching new agreement

Where no agreement is reached, the status of pre-existing agreements may get more complicated. Lack of agreement may occur due to unsuccessful negotiations or because the relevant States simply decided not to act. In the case of unsuccessful negotiations, one or more of the parties that are unhappy with the existing agreements may wish to, nevertheless, change the status of the agreement through any available autonomous action. The situation is simpler with non-binding agreements, because the State that is unhappy with the *status quo* may easily disrupt it without any legal (but not some political) consequences, as the Faroes did in the Mackerel dispute.

However, in the case of binding agreements, such as RFMO measures or treaties, the freedom to act is much more limited. The triggering of the duty to cooperate and renegotiations that are to follow do not have the force of releasing the particular State from its existing obligations. In such cases, the State in question must have recourse to the law of the treaties, which allows autonomous actions to lead at the most to a suspension or termination of an agreement. Some of the provisions of section 3 of the Vienna Convention on the Law of the Treaties (VCLT) are relevant in that regard.²⁵¹ The suspension or termination grounds provided in the VCLT that are relevant here are treaty provision, material breach, supervening impossibility of performance, and fundamental change of circumstances. The VCLT also provides for denunciation or withdrawal where a treaty is silent on these matters, including termination.

²⁵⁰ See generally K Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 581, 583.

²⁵¹ Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Where a treaty provision so provides, a State may withdraw from the treaty, in conformity with its provisions.²⁵² The treaty may also be terminated or suspended in regard to all parties or only to a particular party if this is provided for in the treaty and the relevant provisions are observed.²⁵³ Where the treaty does not provide for termination, denunciation or withdrawal, a State may nevertheless do so where “it is established that the parties intended to admit the possibility of denunciation or withdrawal” or where such a right may be implied by the treaty’s nature.²⁵⁴ In such cases, the intention to denounce or withdraw must be notified at least twelve months in advance. It may be added here that where the agreement or the measure has an expiry period, the State in question may simply wait for it and decline to renew it.

Material breach of a treaty is another important ground for treaty termination or suspension.²⁵⁵ It gives the right to the other party or parties to the agreement to suspend or terminate a treaty where a provision essential for the object or purpose of the treaty was violated.²⁵⁶ In a CMR case this ground may be of use where a fisheries treaty includes certain allocation provisions of the catch and they are violated by one of the parties and the conservation and management of the particular stock is hindered.

A rather exceptional ground for termination, withdrawing or suspension is the supervening impossibility of performance. It can be invoked where fulfilling the treaty’s provisions has become impossible due to “permanent disappearance or destruction of an object indispensable for the execution of the treaty”. The impossibility must not be the result of a breach by the party invoking it. Such exceptionality may be present in CMR situations. For example, in the case of an access agreement (treaty) under Article 62 UNCLOS, a party may invoke impossibility of performance where the stock in question has left the EEZ to which the treaty is applicable.

²⁵² *Ibid.*, art 54.

²⁵³ *Ibid.*, art 54 and 57.

²⁵⁴ *Ibid.*, art 56.

²⁵⁵ M Goma, *Suspension or Termination of Treaties on Grounds of Breach* (Martinus Nijhoff, The Hague 1996).

²⁵⁶ VCLT, *supra*, n 251, art 60.

Fundamental change of circumstances is yet another exceptional ground for the termination, withdrawing or suspension of a treaty.²⁵⁷ Similar to the two previously discussed grounds, it involves certain change in circumstances but the three are completely separate grounds with separate legal bases and application.²⁵⁸ This ground was developed through centuries in order to answer the practical needs of the States that were not answered by the other existing termination grounds.²⁵⁹ It is well-founded in international law and has been relied on by the EU and recognised by the ECJ.²⁶⁰ Fundamental change of circumstances is based on grounds of equity and justice²⁶¹ and serves a narrow but very important role in the treaty relations between States. In the *Fisheries Jurisdiction* case the ICJ famously held that:

“International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty.”²⁶²

Furthermore, the change in question “must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken”.²⁶³ This ground can be applied even only to some of the provisions of a treaty,²⁶⁴ which will be especially relevant where fisheries provisions have been included in treaties dealing with other matters as well.

Fundamental change of circumstances is probably the ground of highest relevance for pre-existing binding agreements in the context of a CMR. It is not hard to imagine situations of CMRs in whichever common thread that could increase the burden of the obligations to the extent where their performance amounts to something essentially different from what was initially agreed upon. This is tightly connected to the aim in the existing regime to prevent inequitable burden sharing between States in the conservation and management of shared

²⁵⁷ *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] ICJ Reports 7, [104].

²⁵⁸ A Vamvoukos, *Termination of treaties in international law: the doctrines of rebus sic stantibus and desuetude* (Clarendon Press, Oxford 1985) 200-206.

²⁵⁹ *Ibid.*, 215.

²⁶⁰ Case C-162/96 *Racke* [1998] I-3655, [46].

²⁶¹ Report of the International Law Commission on the work of its fifteenth session (1963) II YILC, 82-3.

²⁶² *Fisheries Jurisdiction (UK v Iceland)* case, *supra*, n 173, [36].

²⁶³ *Ibid.*, [43].

²⁶⁴ A Vamvoukos, *supra*, n 259, 205.

stocks. It is driven by equitable concerns just like this ground. Being this as it may, fundamental change of circumstances cannot be invoked in any CMR situation. This is because of the *de minimis* rule that its qualification 'fundamental' introduces. Even if a State has the right to request consultations with the view to renegotiate the applicable measures the moment a CMR occurs, it takes a CMR with very big consequences to allow that State to successfully invoke a fundamental change of circumstances and terminate, suspend or withdraw from a valid binding agreement that imposes certain conservation and management obligations on it, including quota allocations. Another mandatory requirement is that the change must not have been foreseen by the parties. While in most cases a CMR would not be anticipated, in others it may be. This is especially so with the increasing awareness of the threat of CMRs and their relationship with environmental change. Furthermore, where a CMR has occurred once and an agreement has been renegotiated, it is questionable to what extent it can be argued that another CMR has not been foreseen. In any event, where all requirements are satisfied, if the invoking State faces a general refusal from the other relevant States to renegotiate the terms of the treaty, it can eventually be released from its obligations under that treaty due to the fundamental change of circumstances.

In the Mackerel dispute, neither of these grounds were discussed or relied upon, as the relevant conservation and management measures were not included in a treaty but in a non-binding political instrument. Furthermore, the CMR did not involve a change in the nature of the stock (from straddling to transboundary) and, as such, did not bring up issues on the relevance of the NEAF Convention. Lastly, the CMR has not yet involved stocks leaving the EEZ of a coastal State in order to bring up the issue of the relevance of the access agreements with that State.

2. Dispute settlement

Dispute settlement in the area of the LOS has a long history, has generated a considerable amount of international litigation and has evolved greatly for the past century.²⁶⁵ The dispute settlement in the area of fisheries is a prominent part of the LOS dispute settlement and has

²⁶⁵ See P Rao, 'Law of the Sea, Settlement of Disputes' in E Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (OUP, Oxford 2012) and A Boyle 'Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks' in O Stokke (ed) *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (OUP, Oxford 2001) 91.

been discussed at length in the literature.²⁶⁶ The discussion here will examine the extent to which the existing regime provides solutions for settling disputes arising out of the specifics of the CMRs. That is, it suggested here that CMR disputes would most likely revolve around more specific points of contention due to CMRs' very nature and characteristics. Looking at the available dispute settlement mechanisms from the perspective of these more specific points of contention (thus not claiming exhaustiveness) will provide a better account of the suitability and adequacy of these mechanisms for resolving CMR disputes. The focus of the discussion will initially be on the solutions provided by the UNCLOS and the UNFSA and then will turn to the role of external agreements in the fisheries dispute settlement.

2.1 The UNCLOS and the UNFSA

As it was already shown, the rights and duties of the relevant States can be considerably affected in many different ways by CMRs, which also makes the possible CMR-related disputes no less nuanced. The dispute settlement mechanisms that the regime provides in Part XV UNCLOS are also very diverse and represent a system of two-tiered, interlinked, voluntary, and compulsory procedures.²⁶⁷ In case of a dispute on the interpretation or application of the UNCLOS, States are obliged to settle that dispute, in accordance with Article 2(3) UN Charter, through peaceful means, choosing from the means listed in Article 33(1) UN Charter.²⁶⁸ Procedurally, when a dispute arises the States are obliged to expeditiously exchange views regarding its settlement by negotiation or other peaceful means. However, a State "is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted".²⁶⁹ Furthermore, irrespective of the other applicable provisions the States remain free to agree at any time on settling a dispute by peaceful means of their own choosing.²⁷⁰ Should States fail to settle their dispute through these discretionary means, their dispute shall be submitted to a court or

²⁶⁶ E.g. A Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: a drafting history and a commentary* (Martinus Nijhoff, Dordrecht 1987); T Mensah, 'The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea' (1998) 2 MPYUNL 307.

²⁶⁷ Y Tanaka, *The International Law of the Sea* (2nd ed, CUP, Cambridge 2015) 420.

²⁶⁸ UNCLOS, *supra*, n 3, art 279.

²⁶⁹ *MOX Plant*, Provisional measures, 2002, [60].

²⁷⁰ UNCLOS, *supra*, n 3, art 280.

tribunal vested with jurisdiction under section 2 of Part XV at the request of any party to the dispute.²⁷¹

The compulsory dispute settlement procedures, however, are subject to section 3 of Part XV UNCLOS, which is crucial for fisheries disputes and, as such, CMR-related due to the wide jurisdictional limitations therein.²⁷² Notably, section 2 of Part XV is not applicable to disputes concerning (1) the sovereign rights of a coastal State relating to living resources in the EEZ and (2) the exercise of these sovereign rights such as determining allowable catch, harvesting capacity, surpluses allocation to other States, and the requirements in the conservation and management measures.²⁷³ Further limitation may be applied with respect to disputes dealing with law enforcement activities in regard to these sovereign rights.²⁷⁴ These wide jurisdictional limitations render the available compulsory dispute settlement mechanisms of very limited use for CMR disputes.

These limitations were put in place to explicitly reflect the intention of the States parties during the UNCLOS negotiations. They wanted to exclude compulsory dispute settlement mechanisms where negotiations for conservation and management measures reach *impasse* and the relevant States cannot reach an agreement.²⁷⁵ The jurisdictional limitations would apply equally to deadlocks during renegotiations in a CMR context. The relevant States are neither obliged to negotiate *ad infinitum* until they reach an agreement, nor are particular consequences spelled out should the negotiations fail.²⁷⁶ This is because the regime only streamlines and provides the framework for the negotiations for shared stocks without dictating specific solutions.²⁷⁷

This was a conscious choice and it was a clear move away from the 1958 Fisheries Convention. Articles 4 to 7 of the 1958 Fisheries Convention provided that, after failing to reach an agreement within a year of negotiating the necessary conservation measures, any of

²⁷¹ *Ibid.*, art 286.

²⁷² B Kunoy, *supra*, n 10, 699-700; W Burke, *supra*, n 192, 117.

²⁷³ UNCLOS, *supra*, n 3, art 297(3)(a).

²⁷⁴ *Ibid.*, art 298(1)(b).

²⁷⁵ B Kunoy, *supra*, n 10, 699.

²⁷⁶ P Davies and C Redgewell, *supra*, n 22, 236.

²⁷⁷ A Ásgeirsdóttir, 'Achieving Ecosystem Management across Political Boundaries: Key Challenges during the Bargaining Process' in D Russel and D Vanderzwaag (eds) *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles: Canadian and International Perspectives* (Martinus Nijhoff, Leiden 2010) 358.

the relevant States may initiate a dispute settlement procedure entailing a binding decision. The 1958 Fisheries Convention also included a provision that would have addressed a CMR dispute very well. Article 12 stated that where the factual basis on which the binding decision was based is “altered by substantial changes in the conditions of the stock or stocks of fish or other living marine resources” any of the relevant States may request the other relevant States to “enter into negotiations with a view to prescribing by agreement the necessary modifications in the measures of conservation”. This is essentially the renegotiation obligation discussed in section III above but put in terms of a dispute settlement mechanism. There was also a *de minimis* rule included in the qualification ‘substantial’. Such *de minimis* rule was unfoundedly echoed in the recitals of Regulation 793/2013, as already observed. Article 12 also provided that where an agreement was not reached within a reasonable period of time the same dispute settlement mechanism could be used again, provided that two years have passed since the original decision. Unfortunately, Article 12 did not find its way to the existing regime today in such a clear form.

Notwithstanding these limitations and the conduct-oriented nature of the negotiation obligations, there is a way in which the compulsory dispute settlement mechanisms can be used for a CMR dispute. This is where the dispute concerns the issue whether the due diligence and good faith obligations were respected during the required negotiations.²⁷⁸ Such a dispute falls outside of the jurisdictional limitations and can be subjected to the compulsory dispute settlement mechanisms in the existing regime, which do entail a binding decision. The two main problems in such proceedings are (1) the burden of proof and (2) the available remedies.

With respect to the burden of proof, the *Tacna-Arica* case²⁷⁹ is indicative. There the arbitration dealt with *inter alia* the issue of bad faith in negotiations that were prescribed by a bilateral treaty and which proved unsuccessful. The award stated that, for bad faith, intent must be found “to frustrate the carrying out of the provisions”, which is not “simply the refusal of a particular agreement proposed thereunder, because of its terms, but the purpose to prevent any reasonable agreement”.²⁸⁰ While finding bad faith, if established, should not be a

²⁷⁸ *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan)*, Award of 4 August 2000 (Jurisdiction), (2006) XXIII RIAA 1, [64].

²⁷⁹ *Tacna Arica question (Chile v Peru)* 2 RIAA 921.

²⁸⁰ *Ibid.*, 930.

hesitation, “it is plain that such a purpose should not be lightly imputed”²⁸¹ especially when it comes to States. The award concluded on this issue by saying that a finding of bad faith “should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion”.²⁸² With respect to the available remedies, even if a court or tribunal finds bad faith, considering the jurisdictional limitations, the remedy could not go further than a declaratory judgment.²⁸³ That is, the seized court or tribunal will not have the power to make TAC allocations or otherwise prescribe conservation measures as a remedy without the consent of the parties to the dispute.

The existing regime provides another possible solution with respect to disputes dealing with coastal State rights and duties within the EEZ. This is the compulsory conciliation commission under Annex V UNCLOS,²⁸⁴ which can be used in a CMR dispute, without, however, entailing a binding decision.²⁸⁵ It is a solution in case States fail to resolve their dispute by the peaceful means they have chosen and it can be used for very specific CMR disputes. Such proceedings may be initiated only where it is alleged that a coastal State has (1) manifestly failed to ensure that living resources are not endangered in its EEZ; (2) arbitrarily refused to determine allowable catch and harvesting capacity; and (3) arbitrarily refused to allocate the surplus it has declared to exist in its EEZ.²⁸⁶

The first mechanism could be used where a CMR must be addressed from the conservationist perspective and a coastal State fails to act accordingly. The other two mechanisms are closely connected as they deal with the access of States to the surplus within the EEZ of a particular coastal State and can be discussed together. Usually, in the case of a CMR a new coastal State for a particular shared stock would argue to be recognised as such by the old coastal States and could potentially face resistance from them, as it was the case with Iceland and Greenland for mackerel. However, it could theoretically happen that a CMR leads to such redistribution in the zonal attachment of a shared stock that there is an overwhelming abundance of the stock within the EEZ of a new or one of the old coastal States to the abrupt and heavy detriment of the other relevant States. Then, in order to continue with their fishing activities,

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ B Kunoy, *supra*, n 5, 437-8.

²⁸⁴ UNCLOS, *supra*, n 3, art 297(3)(b).

²⁸⁵ *Ibid.*, Annex V, art 7.

²⁸⁶ *Ibid.*

the other relevant States would be highly interested to fish in that coastal State's EEZ. Furthermore, the coastal State must determine the surplus, if any, and allocate it in accordance with the relevant UNCLOS provisions. However, if the coastal State is inactive in doing so and arbitrarily refuses to do it, even after being requested by the other relevant States, the conciliation proceedings can be used. Being that as it may, even if this commission is used it cannot "substitute its discretion for that of the coastal State",²⁸⁷ which includes the discretionary powers on allowable catch and conservation and management measures.²⁸⁸

Accordingly, once a coastal State adopts measures concerning the living resources within its EEZ, these measures may not be subject to external review involving binding decision without its consent.²⁸⁹ In cases of disputes about shared fish stocks only the part of the dispute concerning the high seas may be submitted to compulsory settlement, which is of little use considering its incomprehensiveness.²⁹⁰ The CMR disputes that involve a high-seas aspect can also develop in the context of RFMOs and/or stock-specific treaties having their own dispute settlement mechanisms. These will be discussed in the sub-section on external agreements.

Since the UNCLOS and the UNFSA are to be read together as if they were a single instrument, with priority given to the UNCLOS, it was only logical that they were also governed by more or less the same dispute settlement rules.²⁹¹ This was done in Part VIII with Article 30(2) UNFSA, which states that the Part XV UNCLOS provisions apply *mutatis mutandis* to disputes on the interpretation and application of the UNFSA, even without the parties to the dispute necessarily being parties to the UNCLOS. However, the UNCLOS jurisdictional limitations on fisheries are also incorporated through Article 32 UNFSA rendering the mechanisms therein of limited use, unless the dispute is on high seas measures.²⁹² The CMR-related disputes may concern a great number of UNFSA provisions due to its specialised subject-matter. The attention here will be focused only on two issues due to their prominence in the Mackerel dispute.

²⁸⁷ *Ibid.*, art. 297(3)(c).

²⁸⁸ B Kunoy, *supra*, n 10, 700.

²⁸⁹ W Burke, *supra*, n 192, 118.

²⁹⁰ A Boyle, *supra*, n 265, 101.

²⁹¹ Y Tanaka, *supra*, n 267, 419.

²⁹² B Kunoy, *supra*, n 10, 705.

The first one concerns the disputes on the compatibility of the conservation measures in the EEZ and on the high seas, under Article 7 UNFSA. Where States fail to agree, they are referred to dispute settlement mechanisms in Part VIII UNFSA. While negotiating, the States are also to make every effort to enter into practical provisional arrangements. In the event of failing to agree to such arrangements, the UNFSA redirects them again to Part VIII in order to obtain provisional measures from the seized court or tribunal. However, considering the applicable jurisdictional limitations, these *prima facie* compulsory dispute settlement procedures cannot lead to a decision specifying measures applicable within the EEZ of a relevant party without its consent.²⁹³ In the Mackerel dispute such a problem appeared when the quota-increases of the Faroe Islands, Iceland and Greenland, on the one hand, and the lack of balancing decreases by the other relevant States, for both the EEZ and the high seas, on the other hand, seemingly led to an incompatibility of the measures and the consequent suspension of the MSC certificate. However, Article 7 UNFSA procedures were not initiated.

The second CMR issue concerns disputes relating to the inclusion of States in already established RFMOs or arrangements for the conservation and management of a particular shared stock. In this regard the UNFSA provisions on 'real interest' are of relevance, since States with real interest must not be excluded from the negotiations on conservation measures by the other relevant States. Put in terms of a CMR, such a dispute could happen in a situation where a State, in the EEZ of which a particular shared stock has just entered, wants to join the establishment of or the already established RFMO or arrangement and is excluded by the other States. Such disputes cannot be initiated against the RFMO in question, if there is one, because RFMOs do not have standing under neither the UNCLOS nor the UNFSA dispute settlement mechanisms.²⁹⁴ It would also be impossible to use the RFMO's mechanism, if it is available, where the complaining State is a non-member.²⁹⁵ The only available option is to initiate proceedings against the actual member States of the RFMO, under UNFSA for the violation of Article 8 or under the UNCLOS for failing to cooperate or to have due regard to the rights and duties of other States.²⁹⁶ This may raise concerns of attributability but this issue will not be further examined here.

²⁹³ B Kunoy, *supra*, n 10, 705.

²⁹⁴ C Hedley, E J Molenaar, A G Elferink, *supra*, n 222, 27.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

In the Mackerel dispute, the issue of participation/inclusion in an RFMO did not arise because all of the States involved were members of the NEAF Organisation. The issue there was rather with the participation in the negotiations of the measures applicable within the EEZ of the coastal States. Particularly, there were such problems with the participation of Greenland in the arrangements for mackerel and herring. However, no steps were taken with respect to a dispute settlement on that point either.

The CMR-related disputes concerning the interpretation and application of the regime, playing the important role that they do, are complemented by another type of more circumstance-oriented disputes, which is probably just as important, if not more. The CMR-related disputes, being, essentially, fisheries disputes, have two crucial characteristics – scientific and technical issues in such disputes as well as fact-finding. The importance of these characteristics was recognised in the 1958 Fisheries Convention and was further developed in the UNCLOS and the UNFSA. Since the CMRs are instances of changing ocean realities, fact-finding as well as scientific and technical matters play a very important role in resolving the relevant disputes. Accordingly, it is necessary to examine the solutions the regime provides for such disputes as well.

The points of contention with respect to facts and scientific and technical matters can vary widely due to, on the one hand, the different ocean realities around the world and, on the other hand, the different constellations in which a CMR can occur. Such points of contention can deal with whether a CMR has actually occurred, what kind of CMR is it, is it temporary or not, does it affect associated species, etc. These and other such questions, when answered can go a long way in helping the relevant States solve their disputes. The drafters, thoughtfully, provided a tool in Article 287(1)(d) UNCLOS, albeit not compulsory, to the relevant States for solving such issues. This provision gives the choice of using “a special arbitral tribunal constituted in accordance with Annex VIII” UNCLOS.

The mechanisms provided therein are subject-matter-oriented and include, explicitly, disputes with respect to fisheries.²⁹⁷ They are also subject to the general UNCLOS dispute settlement provisions and their fisheries-related exceptions.²⁹⁸ While the Annex VIII special tribunal

²⁹⁷ UNCLOS, *supra*, n 3, Annex VIII, art 1.

²⁹⁸ *Ibid.*

generally can also decide on disputes concerning the interpretation and application of UNCLOS provisions, its importance lies in the fact that the tribunal is to be composed primarily by experts from the particular field (from the FAO in case of fisheries)²⁹⁹ and the possibility that the parties to a fisheries dispute may request the tribunal to solve disputes mainly concerning facts.³⁰⁰ The tribunal could make conclusive finding of fact as between the parties, unless they agree otherwise³⁰¹ and, if so requested, it may also formulate non-binding recommendations that will be meant to serve as a basis for review of the disputed question by the parties.³⁰²

Another related provision that can assist the relevant States in resolving their CMR dispute is Article 289 UNCLOS. According to it,

“In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or *proprio motu*, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex VIII, article 2, to sit with the court or tribunal but without the right to vote.”

This provision gives the other necessary tools that may be missing from Annex VIII for dealing with issues requiring specific expertise in CMR disputes, where a court or tribunal has jurisdiction to decide them. Further choice is given to the relevant States by Article 29 UNFSA, which provides that

“Where a dispute concerns a matter of a technical nature, the States concerned may refer the dispute to an ad hoc expert panel established by them. The panel shall confer with the States concerned and shall endeavour to resolve the dispute expeditiously without recourse to binding procedures for the settlement of disputes.”

All of these provisions and possibilities for dispute settlement, however, are not compulsory but are optional, which can negate the central role that they can play for resolving CMR disputes.

²⁹⁹ *Ibid.*, arts 2 and 3.

³⁰⁰ *Ibid.*, art 5(1).

³⁰¹ *Ibid.*, art 5(2).

³⁰² *Ibid.*, art 5(3).

In the Mackerel dispute, the dispute settlement mechanisms in the existing regime were used to a certain extent. Under the existing regime, the Faroe Islands and the EU had a CMR dispute on the interpretation and application of a number of provisions from the existing regime,³⁰³ as it appears from the exchanges they had. In Regulation 793/2013, with which the EU imposed sanctions against the Faroes, the EU considered that the Faroe Islands failed to cooperate and as such breached its obligations under Articles 61(2), 63(1) and (2), 118, 119 and 300 UNCLOS and Articles 5, 6, 8(1) and (2) UNFSA.³⁰⁴ The inclusion of Article 300 UNCLOS means that the EU considered the Faroe Islands to have also breached its obligation to comply with its obligations in good faith and not to exercise its rights and jurisdiction in a way constituting abuse of right. This means that one of the contention points under this CMR dispute fell outside of the jurisdictional limitations and the EU could have initiated compulsory dispute settlement proceedings entailing binding decision under Part XV, section 2 UNCLOS. However, the EU did not use this opportunity, probably because *inter alia* it considered it too slow in light of the issue at hand.³⁰⁵

In response to the threat of measures the Faroe Islands stated that if the EU proceeds “with the adoption and implementation of the contemplated measures, [it] would consider consultations under section 1 of Part XV of UNCLOS, as further reflected in [the fisheries treaty between them], as being exhausted, given the impossibility of continuing meaningful negotiations under such circumstances.”³⁰⁶ The Faroes continued by saying that it reserves “the right to take necessary measures to instigate appropriate compulsory *conciliation* proceedings”³⁰⁷ (emphasis added). This suggested that the Faroes may have been considering the compulsory proceedings that do not entail a binding decision. However, the Faroe Islands eventually initiated proceedings that do entail a binding decision under Annex VII UNCLOS. In particular, the Faroe Islands, interestingly, initiated proceedings with regard to a dispute over the interpretation and application of only Article 63(1) UNCLOS concerning herring.³⁰⁸ As the Faroe Islands and the EU resolved their dispute the proceedings were eventually

³⁰³ A dispute with respect to WTO law was also very much present but will not be addressed here.

³⁰⁴ Regulation 793/2013, *supra*, n 45, recital [10].

³⁰⁵ Impact Assessment, *supra*, n 14, 16.

³⁰⁶ Letter to Commissioner Ms Maria Damanaki, *supra*, n 107, 2.

³⁰⁷ *Ibid.*, 3.

³⁰⁸ This is interesting because Article 63(1) deals with transboundary stocks and the herring stock at hand is not only transboundary but straddling and Article 63(2) would have also been applicable. The Statement of Claim of the Faroe Islands (on file with the author) also does not elucidate the reasons for this choice.

terminated by a joint request, which was “without prejudice to the rights and duties of either of the Parties under the [UNCLOS]”.³⁰⁹

2.2 External agreements

In order to accommodate the multitude of views and interests with respect to the dispute settlement mechanisms applicable to the LOS, the UNCLOS was drafted in such a way as to allow for a high degree of flexibility. This flexibility includes dynamic interplay with instruments external to the regime, as long as disputes are resolved in a peaceful manner. This interplay involves instances of ‘outsourcing’ as well ‘insourcing’ of dispute settlement. The outsourcing part has spurred many debates and has attracted criticisms relating to fragmentation of international law, forum-shopping and conflicting decisions. One need only think in that regard of the *Southern Bluefin Tuna*³¹⁰ and the *MOX Plant*³¹¹ cases, before the Annex VII Tribunals. While neither of them were CMR disputes, the issues of dispute settlement and jurisdiction that were raised in them can equally apply to a CMR dispute and, thus, a brief recollection of the main points is needed.

The *Southern Bluefin Tuna* case concerned, mainly, Article 281 UNCLOS and the conditions under which States may exclude the dispute settlement mechanisms in the UNCLOS. The arbitral tribunal considered that, due to the existence of a dispute settlement mechanism in the trilateral Convention for the Conservation of Southern Bluefin Tuna (CCSBT),³¹² it lacked jurisdiction to rule on the merits of the dispute, which dealt directly with the duty to cooperate.³¹³ The tribunal read the relevant CCSBT clause as excluding the UNCLOS compulsory mechanisms, even though the CCSBT clause provided neither for a compulsory procedure entailing a binding decision, nor did it explicitly exclude the compulsory UNCLOS mechanisms. The conclusion that States may exclude the compulsory UNCLOS mechanisms

³⁰⁹ PCA Case N° 2013-30, *supra*, n 110, *Termination Order*, 2.

³¹⁰ *Southern Bluefin Tuna* case (Award), *supra*, n 278.

³¹¹ *The MOX Plant Case (Ireland v UK)* (Order No 4, 14 November 2003), 2.

³¹² Convention for the Conservation of Southern Bluefin Tuna (adopted 10 May 1993, entered into force 20 May 1994) 1819 UNTS 360. The CCSBT formed an RFMO in implementation of Article 64 UNCLOS on highly migratory stocks. Although not dealing with shared stocks under Article 63 UNCLOS *per se*, the analysis is still relevant here *mutatis mutandis*.

³¹³ *Southern Bluefin Tuna* case (Award), *supra*, n 278, [72]. However, the tribunal was not unanimous on this point and Justice Sir Kenneth Keith issued a Separate Opinion.

through agreement pursuant to Article 281(1) UNCLOS,³¹⁴ even if it does not contain compulsory procedures for dispute settlement, spurred many discussions on the effectiveness of the UNCLOS compulsory procedures.³¹⁵ Since shared stocks are to be conserved and managed mainly through RFMOs or direct agreements, the decision in the *Southern Bluefin Tuna* case will weigh heavily in CMR disputes, if these agreements have some sort of dispute settlement procedures.

The *MOX Plant* cases before the ITLOS (2001) and the Annex VII tribunal (2003) are relevant here for their discussions of Article 282 UNCLOS, which allows for dispute settlement mechanisms in “general, regional or bilateral agreement or otherwise” to supersede the mechanisms in the UNCLOS, if the mechanism “entails a binding decision”. The UK argued before the ITLOS that the main issues to be decided by the Annex VII tribunal were excluded from its jurisdiction because they were governed by other agreements with compulsory dispute settlement procedures – the OSPAR Convention, the TEC, or the Euratom Treaty.³¹⁶ While the ITLOS gave ‘a green light’ for the dispute,³¹⁷ the Annex VII tribunal decided that the jurisdictional question depended on whether the UNCLOS interpretation as between Ireland and the UK fell within ECJ’s exclusive jurisdiction.³¹⁸ Thus, the tribunal suspended the procedures in anticipation of ECJ’s decision, which firmly asserted its jurisdiction on this point.

These two outsourcing possibilities in Articles 281 and 282 UNCLOS put very few constraints on States in choosing the institutional setting for solving their dispute. A much more constrained form of outsourcing is present in Article 287 UNCLOS where several forum choices, including the ICJ, are given to the States, but which would apply the UNCLOS procedural rules. The concurrence of forum choices is made a necessary requirement in Article 287 UNCLOS. Absent such concurrence, the Annex VII Tribunal is the default solution, which was also used in the Mackerel dispute.

The mutual agreement between the parties to the dispute is equally important for insourcing, that is, where the UNCLOS mechanism is to be used to settle disputes arising from external

³¹⁴ *Ibid.*, [63].

³¹⁵ Y Tanaka, *supra*, n 267, 422.

³¹⁶ *Ibid.*, 423.

³¹⁷ *Case No 10*, ITLOS, *supra*, n 150, [62].

³¹⁸ *The MOX Plant Case*, *supra*, n 312, 2.

agreements, setting the UNFSA aside. This is regulated by Article 288(2) UNCLOS. It allows for such external, yet “related to the purposes of [the UNCLOS]”, agreements to be included in the jurisdiction of the relevant court or tribunal under Article 287 UNCLOS, as the ITLOS Advisory Opinion confirmed. Such inclusion, however, is to happen in accordance with the respective international agreement. This dispute settlement opportunity could be relevant for CMR disputes arising in the contexts of bilateral, multilateral or RFMO-constituting treaties. Even then, however, unless otherwise agreed in such treaties, the UNCLOS jurisdictional limitations with respect to fisheries would equally apply.

In the Mackerel dispute there was one relevant external binding agreement – the NEAF Convention. However, it does not contain a dispute settlement mechanism. In 2003 the EU proposed an amendment to the NEAF Convention with respect to dispute settlement together with two recommendations concerning dispute settlement procedures,³¹⁹ which were to be applied once the amendment entered into force.³²⁰ The proposed amendment was to take the form of Article 18bis and provided that “the [NEAFC] shall make recommendations establishing procedures for the settlement of disputes arising under [the NEAF] Convention”. Although the amendment was adopted in 2004, it has not yet entered into force, due to Russia’s subsequent objection.³²¹ While the EU suggested that the amendment is applied provisionally until it enters into force,³²² it seems that this has not been done, considering that the Declaration on Interpretation of the NEAF Convention only notes the 2006 amendments but not the 2004 ones.³²³ Furthermore, to the best of this author’s knowledge, at no point during the Mackerel dispute was Article 18bis and the respective recommendations mentioned or invoked.³²⁴

3. Self-help measures

³¹⁹ European Commission, Amendment of the Convention on Dispute Settlement, D(2003) – 11384, 24 July 2003 <http://archive.neafc.org/about/docs/dispute_settlement_23am_nov2004.pdf> accessed 1 October 2015.

³²⁰ T Henriksen, G Hønneland and A Sydnes, *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (Brill, 2005) 107.

³²¹ Letter to the NEAFC from the Foreign and Commonwealth Office on the status of the 2004 and 2006 amendments to the NEAF Convention, 2.

³²² Amendment of the Convention on Dispute Settlement, *supra*, n 319.

³²³ Declaration on the Interpretation and Implementation of the Convention on the Future Multilateral Cooperation in North-East Atlantic Fisheries, AM 2005/21 <<http://neafc.org/system/files/London-Declaration.pdf>> accessed 1 October 2015.

³²⁴ The reason for this non-use could also be the fact that the formal dispute revolved mainly around the measures the Faroe Islands adopted within its EEZ and not NEAFC measures or other high-seas measures.

As it can be seen, the UNCLOS dispute settlement provisions contain many and wide jurisdictional limitations for disputes concerning EEZ fisheries and, by the same token, for CMR disputes, which are tightly connected to EEZ measures. For this reason and due to the very long and time consuming nature of such disputes, the relevant States may be inclined to consider self-help measures in order to protect their interests in contentious situations of unsuccessful cooperation, as in the Mackerel dispute.

In broad terms, the defining objective of such CMR-related self-help measures can be said to be the dissuasion of a particular State from adopting and implementing measures that are affecting the conservation and management of a shared stock and that are considered, by the State adopting the self-help measures, to have negative effect on the stock. The State may be dissuaded through measures adopted against it directly or against vessels flying its flag. The measures can be specific or broad. They can be specific when they aim at enforcing or otherwise ensuring compliance with conservation measures for the particular shared stock. Conversely, they can be broad to target other (unrelated) stocks or even include other non-conservation issues such as suspension of bilateral agreements, etc. The conservation measures being enforced can be of national or of RFMO origin and the enforcement may take place on the high seas, within the EEZ or at port. Although these measures can vary quite widely, they can generally be put in three categories of compulsion available to states under general international law.³²⁵ These categories are retorsion (retaliation), countermeasure and self-defence. Connected to these are also the circumstances precluding wrongfulness, with which they overlap somewhat.³²⁶

The various self-help measures also seem to be considered as alternative to dispute settlement and not as a measure of last resort, at least this was the case in the Mackerel dispute. There, during the Commission consultations that led to Regulation 1026/2012, the target groups suggested the use of the ITLOS mechanism – an option that was not even considered by the EU before that.³²⁷ This option was quickly rejected because it was considered that it was “too lengthy and [did] not respond to the imperatives of short-term risk of overfishing”.³²⁸ The unilateral character of such measures is in direct contrast with the cooperative character of the

³²⁵ M Shaw, *supra*, n 249, 818.

³²⁶ *Ibid.*, 577-581.

³²⁷ Impact Assessment, *supra*, n 14, 16.

³²⁸ *Ibid.*

existing regime. For this reason they must not be taken lightly and must be heavily scrutinised. The discussion here will start with the self-help measures that States can adopt under the regime. Then the discussion will turn to the broader toolset that is provided beyond the existing regime.

3.1 Under the existing regime

Considering the wide variety of possible measures, the next step in discussing the self-help measures is to examine to what extent they can be supported by the existing regime. Here, again, the existing regime provides for comparatively less options than the 1958 Fisheries Convention. In the 1958 Convention, the special interest of the coastal State in shared stocks in the waters adjacent to its national jurisdiction was recognised and the coastal State was given the authority to adopt measures extending unto the high seas in certain situations.³²⁹ By contrast, the UNCLOS does not, generally, recognise a special interest for straddling stocks, save for special cases such as the anadromous species.³³⁰ Furthermore, the UNCLOS does not provide a basis for extending jurisdiction on the high seas over vessels flying foreign flags and failure to agree on conservation measures is left largely inconsequential with wide dispute settlement limitations.³³¹

The only self-help measures that could possibly be of use in CMR situations and in accordance with the UNCLOS are (1) limiting the access of foreign fishing vessels within the home EEZ and (2) limiting the access of vessels flying the home flag to the EEZ of the relevant State. The effect of these measures will not be equal in all situations because they greatly depend on the factual circumstances of the CMR. Limiting access to the home EEZ will only be effective where this EEZ contains fishing grounds that provide comparatively much more efficient fishing opportunities. Limiting the access of home vessels to a foreign EEZ can be effective where a CMR involves the EEZ of a new State, the fishing industry of which lacks the technical capacity to exploit the newly arrived stock and, as such, this State depends on foreign fishing fleets. Similar situation happened with Greenland during the

³²⁹ P Davies and C Redgewell, *supra*, n 22, 248.

³³⁰ *Ibid.*, 237.

³³¹ *Ibid.*, 248.

Mackerel dispute. Norway was aware of the appetites of Greenland towards EU's fishing fleet for its exploratory fishing of mackerel. In order to exert pressure, Norway negotiated a clause in the mackerel deal with the EU and the Faroe Islands from 2014 that was severely limiting the access of the vessels of the parties to the agreement to fishing mackerel in the waters of a third State. This clause has been interpreted to be indirectly aimed at Greenland.

The UNCLOS self-help measures were further developed in the UNFSA through the provisions in its Part VI, which regulates the compliance and enforcement measures. While the UNFSA does not provide for any enforcement measures with respect to the fishing activities of foreign vessels in their home EEZ, it does allow in Article 21 for certain enforcement measures against fishing activities on the high seas. In particular, Article 21 allows enforcement action against violations of RFMO measures/arrangements on the high seas.³³² The enforcement action can be taken by a member of the RFMO/arrangement and can be even against a non-member as long as both States are parties to the UNFSA. The enforcement is to happen through boarding inspections at sea with the purpose of ensuring compliance with the applicable measures.³³³ Article 21 UNFSA distinguishes between serious and non-serious violations (by the vessel and its crew) and prescribes different consequences for both types, when registered during the inspection. With non-serious violations, the flag State is the one responsible for imposing sanctions, which makes them unfit for self-help measures. For serious violations, in case the flag State fails to respond or to take necessary action, the inspectors can remain on board and secure evidence and even require the master to bring the vessel to port.³³⁴ Article 21(11) UNFSA provide for a list of situations amounting to serious violations, which can be extended by a relevant RFMO/arrangement. In the case of a CMR, serious violations are relevant where a vessel fishes without or after the attainment of a quota established by the relevant RFMO/arrangement.

Article 23 UNFSA also provides for the possibility of reaction through port State measures. It empowers a port State to promote the effectiveness of applicable conservation measures in accordance with international law. Article 23(2) UNFSA allows for inspections of documents,

³³² *Ibid.*, 267. Article 20(7) UNFSA is supplementing in allowing action until appropriate action is taken by the flag State. The action must be in accordance with international law and is to deter vessels from fishing on the high seas if they undermine the effectiveness or otherwise violate applicable conservation measures.

³³³ *Ibid.* Article 22 UNFSA sets out boarding and inspection procedures, including obligations for both the inspecting and the flag State.

³³⁴ UNFSA, *supra*, n 6, art 21(8).

fishing gear and on-board catches when the vessels are voluntarily in port. For situations where it is established that the catch was taken in a manner undermining the effectiveness of the applicable measures, the national authorities may be empowered to prohibit landings and transshipments. Article 23 UNFSA served as basis for the development of the international IUU regime, for which the EU also has a Regulation in place but did not use in the Mackerel dispute due to its inapplicability, as already explained in section II.

Accordingly, the existence of an RFMO measure or an arrangement is central to the discussed compliance and enforcement measures under Articles 21 and 23 UNFSA. In a CMR case this will be crucial. Where all of the relevant States in a CMR situation are also members of the particular RFMO or arrangement, due to the usually available option of objections, measures will often not get adopted or if they do, they will not be binding on the objecting party. In such case the self-help provisions will prove useless.

The Mackerel dispute showed that objections in such cases are not purely theoretical, as the Faroe Islands objected to the NEAFC recommendations on herring for 2013 and 2014. Circumvention of the RFMO procedure through direct arrangements is not possible once an RFMO is established and is given competence within that geographical area. Reference point here is the 2014 trilateral mackerel deal. While the NEAFC did not adopt a recommendation on mackerel for 2014, the trilateral arrangement between the EU, Norway and the Faroe Islands explicitly mentioned the NEAFC and left a certain quota allocated to it.³³⁵ The arrangement relating to the NEAFC area could not have the legal force of an actual NEAFC measure. This is because, first, the arrangement was not binding and, second, because it was made outside of the NEAFC framework and, as such, it is a *res inter alios acta* not only towards the other fishing parties but also towards the NEAFC itself. Therefore, it could not have been used as a basis for measures under Articles 21 and 23 UNFSA. Consequently, the self-help provisions of the UNFSA can only prove useful where a CMR involves a new State that is not a member of the particular RFMO or arrangement and its members are unwilling to recognise that State's real interest in the fishery and do not admit it as a member. In such case once a measure is adopted its members can enforce it against the new entrant in the fishery through inspections and port State measures outside of the new entrant's EEZ.

³³⁵ A similar situation arose in 1997, when an agreement outside of the NEAFC was reached by the majority but not all NEAFC members with respect to herring and a certain quota was left for the NEAFC. This agreement was then effectively presented to the NEAFC for adoption. Poland (which was a member at the time) voted against and then objected to the Recommendation as matter of principle. R Churchill, *supra*, n 224, 248.

In light of this overview of the possible self-help measures under the existing regime, it is necessary to examine to what extent the measures used in the Mackerel dispute can be based on the existing regime. The first measure that the EU took against the Faroe Islands, separate from Regulation 793/2013, was to deny access of Faroese vessels to the fishing grounds within the EU's EEZ. This EU measure fell squarely in the existing regime. This is a measure that could easily be undeservedly overlooked because it is a rather passive one. While, usually, the negotiations on the conservation and management measures involve TAC, quota allocations and EEZ access, as a package-deal, these three are separate issues and there could be an agreement on some and lack of agreement on the others. This is exemplified by the result of the 2014 mackerel deal, after which Faroese vessels were once again allowed to fish mackerel within the EU's EEZ while there was still no agreement on herring and, thus, the sanctions still applied to the mackerel caught in Faroese waters.

Regulation 793/2012 was the more visible instrument containing a collection of self-help measures. In Article 5 thereof, the EU prohibited (1) the introduction in the EU, including transshipment at EU ports, of mackerel and herring as well as resulting fishery products and (2) the use of the EU ports by Faroese vessels or vessels authorised by the Faroes that fished and/or transported mackerel and herring or their resulting fishery products. The first measure is essentially an import ban, while the second is a port State measure.³³⁶ Both of these measures were, therefore, to be enforced at the EU borders and not at sea. The prohibitions introduced by Regulation 793/2013 had very wide scopes *ratione loci* and *ratione personae*. *Ratione loci*, they could include both the high seas and the EEZ. With respect to the EEZ, they could include every EEZ in which a vessel 'under the control of the Faroe Islands' fished herring and mackerel, not only the Faroese one.³³⁷ *Ratione personae* they could also be very wide to include vessels flying the flag of any other State that were chartered by a Faroese firm or the Faroese authorities or that have been authorised to fish within the Faroes' EEZ. While the scope *ratione personae* could include vessels flying the EU flag and be in full compliance with the existing regime, it is much wider.

³³⁶ Both of which resembled closely the measures Chile adopted against the EU during the Swordfish War, against which the EU strongly objected.

³³⁷ For mackerel the geographical scope is smaller because in Article 3(c) Regulation 793/2013 defined mackerel as mackerel fish that was "caught in the areas occupied by Atlanto-Scandian herring".

The import ban measure clearly fell outside of the existing regime as the trade in fish and fish products is not regulated by it but by WTO law. The port State measure could have been justified to certain extent³³⁸ under the existing framework, if they were enforcing an RFMO measure. However, there was no binding NEAFC measure to be enforced. The recitals of Regulation 793/2013 referred to arrangements from 2007 which, however, were not binding. As such, Regulation 793/2013 did not refer to any binding conservation measures for the high seas, which it was to enforce. It also did not refer to any other separate basis in the existing regime for the measures it prescribed against the Faroe Islands. Accordingly, the EU measures in the Mackerel dispute, in totality, were only partially covered by the existing regime. Consequently, in order to be in compliance with international law they must be legally based beyond the existing framework.

3.2 Beyond the existing regime

Beyond the existing regime, the self-help measures that can be used can be governed by the law on state responsibility or by more specialised treaty regimes, such as WTO law. The discussion here will examine only the main available self-help tool and their application in CMR situations without going in detail in these regimes as it goes beyond the scope of this thesis. The categories of self-help measures that were identified above have one important dividing feature – the original legality of the measure. Where the measure itself constitutes an illegal act, that is, breach of international law, it will be dealt with by the customary law on state responsibility, to the extent that no *lex specialis* rules are applicable. The discussion will begin with the lawful self-help measures.

Retaliation measures are unfriendly and harmful lawful acts and can be adopted as retaliation against harmful acts of another State, which can be both lawful and unlawful.³³⁹ Such measures are a way of expressing serious discontent with the conduct of another State by hurting that State, while staying within the boundaries of legality.³⁴⁰ The retaliation measures can be lawful under customary international law and can include, for example, severance of diplomatic relations. They can also be lawful under treaty law, that is, be based on rights to

³³⁸ Whether the UNFSA would support measure with so wide geographical and personal scopes needs to be further examined.

³³⁹ M Shaw, *supra*, n 249, 818-819.

³⁴⁰ *Ibid.*

take certain measures provided in particular treaty provisions. Such are the self-help measures that are available under the UNCLOS and the UNFSA and some of which the EU used.

However, the self-help measures in the context of a CMR, as the Mackerel dispute showed, can involve economic restrictions, which are not covered by the LOS regime. In particular, in cases of disagreement on applicable conservation and management measures States are inclined to adopt trade retaliation measures with various degrees of success.³⁴¹ In such cases for the measures to be considered retaliation they must respect the relevant economic and trade agreements. At the global level, for most States, WTO law would be the specialised trade regime that must be observed.³⁴² At the regional level, in the different parts of the world, there would usually be different bilateral or multilateral economic and trade agreements, which must be observed. The EU was well aware of that and the Legal Service of the Commission was, thus, asked to give its opinion on whether the measures the EU envisioned for the Faroe Islands and Iceland could be justified under WTO law as well as the EEA Agreement and the respective bilateral trade agreements.³⁴³

Even where the measures in question constitute illegal acts, they can be considered in compliance with international law if there are circumstances precluding the wrongfulness of these measures. If such circumstances exist, the international responsibility of the State adopting these measures will not be involved. There are six main circumstances considered to be applicable under general international law.³⁴⁴ These are consent, countermeasures, self-defence, *force majeure*, distress and necessity.³⁴⁵ In the context of self-help measures, adopted in a CMR-related disagreement, these circumstances have varying degrees of relevance. These rules on state responsibility apply as a default regime and special regimes (*lex specialis*) can to a certain extent³⁴⁶ take precedence.³⁴⁷ Such special regime can be the WTO regime, which provides for rules regulating the consequences for WTO law breaches. The discussion below, however, will not venture into the WTO regime.

³⁴¹ E.g. the WTO *Shrimp/Turtle*, *Tuna/Dolphin* and *Chile-Swordfish* cases. See also Impact Assessment, *supra*, n 14, 8; B Kunoy, *supra*, n 5, 423.

³⁴² *Ibid.*, 439-458.

³⁴³ Note for the Attention of Mrs Lowri Evans Director General, DG MARE, Opinion of the Legal Service, the European Commission, Brussels, sj.b.(2011)708046, 1-2. On file with the author.

³⁴⁴ J Crawford, *supra*, n 243, 278.

³⁴⁵ Articles on the Responsibility of States for Internationally Wrongful Acts, YILC 2001/II(2), 26, arts 20-26.

³⁴⁶ See B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483

³⁴⁷ ARSIWA, *supra*, n 345, art 55.

The consent circumstance, as its name goes, requires that the State, which would otherwise be injured by the particular act, has given its consent and, thus, wrongfulness is precluded. This circumstance has no relevance for CMR self-help measures due to the context in which they arise. Countermeasures, however, are crucial. For countermeasures to be justifiable, they must meet several conditions.³⁴⁸ First, the countermeasure must be taken against a State that has breached an obligation it owed to the State taking the countermeasure. Second, before taking the countermeasure, the target State must be called upon to discontinue its wrongful conduct and to provide reparations. Furthermore, notification is to be given of planned countermeasures, while offering the opportunity of negotiations.³⁴⁹ Where the international wrongful act has ceased and the dispute is pending before a court or tribunal with jurisdiction to take binding decisions, countermeasures must not be taken or, if taken, must be suspended.³⁵⁰ Third, the countermeasure must be commensurate to the injury initially suffered, taking into account the nature of the wrongful conduct and the rights in question.³⁵¹ In that regard countermeasures must not breach obligations such as threat of use of force, human rights, *jus cogens* or obligations of humanitarian character.³⁵² Fourth, countermeasures must be terminated when the wrongful act ceases and must, as far as possible, be taken in a way not preventing the resumption of performance of the obligation, which was temporarily stopped.

Countermeasures can be very relevant for self-help measures in a CMR context, as the preparatory works of Regulation 1026/2012 show, where it was one of the main options considered. However, as it will be shown below, the Legal Service of the Commission found it an unadvisable option for the EU. Still, if one looks closely at the provisions of Regulation 1026/2012, one can see a very good match between the conditions for countermeasures and the way in which the implementing coercive measures are to be adopted.

The circumstance of self-defence can have little relevance in the context of CMR self-help measures because they are taken in response of certain fisheries policy, which is not *per se* an

³⁴⁸ *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] ICJ Reports 7, [55]-[57]. See also R Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) 51 NILR 41.

³⁴⁹ ARSIWA, *supra*, n 345, art 52.

³⁵⁰ *Ibid.*

³⁵¹ *US-France Air Services Agreement Arbitration* 54 ILR 303, 307.

³⁵² See Eritrea-Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claim 17, 1 July 2003, [159].

“overwhelming danger to an actual and essential right of a State”.³⁵³ Furthermore, resorting to force in self-defence requires proof that the State exercising self-defence was a victim of an armed attack.³⁵⁴ Admittedly, certain fisheries disputes³⁵⁴ may progressively escalate to the point where complaints of threat of use of force appear³⁵⁵ as well as instances of actual use of force.³⁵⁶ In the Mackerel dispute, the one instance where physical compulsion was used was in 2010 when a Faroese vessel was blocked from entering harbour in Aberdeen and offloading its mackerel catch. This was privately organised by the fishermen and, while incurring economic losses for the trawler operator, does not amount to use of force. Therefore, self-defence could in very rare situations only be used in a CMR dispute.

Force majeure, distress and necessity are, arguably, even more exceptional circumstances than self-defence and could be relied on to preclude the wrongfulness of certain self-help measures in a CMR context in even more rare situations. In the *Rainbow Warrior* arbitration the tribunal stressed that the *force majeure* doctrine was one of “absolute and material impossibility”.³⁵⁷ Thus, “circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*”.³⁵⁸ One can hardly imagine self-help measures in a CMR context that can be covered by this doctrine. Similar is the case with the circumstance of distress where it is required that “the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care”.³⁵⁹ While cases of distress would usually involve ships and aircrafts, they refer to single isolated instances connected to bad weather conditions and cannot, therefore be relied to preclude the wrongfulness of a policy choice of self-help measures against the fishing practices of another State.

Finally, the circumstance of necessity, which is equally to be accepted “on an exceptional basis”,³⁶⁰ may have some relevance here. For necessity to be invoked by a State, its act must be the only way for it “to safeguard an essential interest against a grave and imminent peril”

³⁵³ This was seen as an important element for self-defence by the Legal Adviser to the US Department of State, DUSPIL, 1975, 17.

³⁵⁴ *Oil Platforms (Iran v US)* [2003] ICJ Reports 161, [61].

³⁵⁵ E.g. the Turbot and the Cod Wars. See N Stürchler, *The Threat of Force in International Law* (Cambridge studies in international and comparative law, CUP, Cambridge 2007) 65-66.

³⁵⁶ D O’Connell, *The Influence of Law on Sea Power* (The Melland Schill lectures, MUP, Manchester 1975) 64.

³⁵⁷ *‘Rainbow Warrior’ Affair (New Zealand v France)* [1990] 20 RIAA 215, [77].

³⁵⁸ *Ibid.*

³⁵⁹ ARSIWA, *supra*, n 345, art 24.

³⁶⁰ *Gabcikovo-Nagymaros case, supra*, n 348, [51].

and the act must not “seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole”.³⁶¹ Necessity has been invoked in a number of different situations by States. Probably, the most relevant here is the Turbot War and the reliance on necessity by Canada, which, however, was not ruled on by the ICJ, due to lack of jurisdiction.³⁶² In 1994 Canada declared the straddling stocks of the Grand Banks to be “threatened with extinction” and, consequently, Canada had to “take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding”.³⁶³ The subsequent arrest of the Spanish vessel *Estai* was in the view of Canada “necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen”.³⁶⁴ If this is considered a rightful reliance on necessity as a circumstance precluding wrongfulness, it could be applied in CMR situations where the particular shared stock is in very dire situation due to the fishing activities of the State against which the measures are adopted.

The EU Regulations that were adopted with respect to the Mackerel dispute were neither based on the UNCLOS nor on the UNFSA, although they were said to be in pursuance of their cooperation provisions. In particular, Regulation 1026/2012 states in its second recital that, where third States, which are interested in the fishery of a shared stock, allow unsustainable fishing and fail to cooperate with the other relevant States, “specific measures should be adopted in order to encourage that country to contribute to the conservation of that stock”. In the fifth recital it is stated that the measures are to be designed in such a way so that they are, *inter alia*, compatible with international and, specifically, with WTO law. As such, the EU decided to use tools outside of the existing regime in order to contribute to the effectiveness of this regime by ‘encouraging cooperation’. However, from the very broadly drafted recitals it does not become clear what kind of self-help measures the EU envisions – retaliation or countermeasures or something else. A closer look is thus needed.

Regulation 1026/2012, being simply a framework for adopting measures, cannot be said to be any kind of self-help measure on its own. What can be said, though, is that Regulation

³⁶¹ ARSIWA, *supra*, n 345, art 25.

³⁶² *Fisheries Jurisdiction (Spain v. Canada)* (Judgment) [1998] ICJ Reports, 432.

³⁶³ Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Ybk 2001/II(2), 36, art 25.

³⁶⁴ *Fisheries Jurisdiction (Spain v. Canada)*, *supra*, n 362, [20]. See also the Canadian Counter-Memorial (29 February 1996), [17]–[45].

1026/2012 does not rule out anything, as long as it will achieve the aim of encouraging cooperation and is in compliance with international law. This can be read to include countermeasures because if they are lawful they preclude wrongfulness and are, as such, in more general sense in compliance with international law. The EU paid special attention on the issue of countermeasures during the drafting of Regulation 1026/2012 and whether and how they can be used. The Legal Service of the Commission was explicitly asked “whether the [envisioned] measures could be justified as "countermeasures" in response to an "internationally wrongful act””.³⁶⁵

The Legal Service expressed considerable doubts as to the need for resorting to countermeasures as well as whether a breach of an obligation owed to the EU can be established, considering the EU’s complaints of States that only “fail to cooperate” or take “extreme negotiating positions”.³⁶⁶ With respect to the need for resorting to countermeasures, the Legal Service stated that the desired import restrictions were permitted under certain conditions by the relevant WTO, EEA and bilateral agreements.³⁶⁷ Thus, countermeasures were seen as redundant in light of the express intent of the EU, at the time, to adopt measures compatible with the existing agreements. The eventual text of Regulation 1026/2012, most notably, is not limited to compatibility with existing agreements but with international law, in general. With respect to the EU’s complaints, the Legal Service stated that “very specific investigation” would be required to show breaches of obligations. In particular, the “assessment of cooperation failures would require analysis of the legal context, the specific cooperation obligations at stake, the relevant circumstances and the behaviour of states allegedly breaching their obligations”.³⁶⁸ The Legal Service cited these aspects as important for the EU to be considered ‘injured’, which is a condition for a lawful countermeasure.

Having this opinion in mind, the eventual text of Regulation 1026/2012 has not made it clear whether it is to be used only for situations where the particular third State has breached its obligations or also where the third State only harmed the EU’s fishing interests, albeit through legal conduct. The second recital of Regulation 1026/2012 speaks of failing to cooperate, which does not necessarily mean breaching the duty to cooperate as the Legal Service

³⁶⁵ Opinion of the Legal Service, *supra*, n 343, 2.

³⁶⁶ *Ibid.*, 13 and 16.

³⁶⁷ *Ibid.*, 13.

³⁶⁸ *Ibid.*, 16.

indicated and as it was already explained in section III. Negotiations and, by the same token, cooperation may be unsuccessful in the sense that they do not result in an agreement. However, due to the conduct-oriented nature of the duties, even if the duties were complied with, lack of agreement may result. An addition is made in Article 3(a) of Regulation 1026/2012, which sets out one of the criteria for identifying a State as allowing non-sustainable fishing. It refers to failure to cooperate “*in full compliance* with the provisions of the UNCLOS and the UNFSA, or any other international agreement or norm of international law” (Emphasis added).

This provision seems to suggest that measures can only be adopted against third States that are, in the view of the EU, in breach of their cooperation obligations but this is not completely clear. If this is so, with Regulation 1026/2012, the EU puts the imperative on reaching an agreement. In practice, this shifts the nature of the duties from conduct-oriented to result-oriented. Doing this distorts a distinction that was held to be “of fundamental importance in determining how the breach of an international obligation is committed in any particular instance”.³⁶⁹ Naturally, the Faroe Islands objected to it. Accordingly, one needs to examine the measures of every implementing regulation to determine what kind of self-help measure the EU is employing and whether it is in compliance with international law.

Looking at the recitals of Regulation 793/2013, it seems that, in the opinion of the EU, the adopted measures are not countermeasures but retaliations. Recital twenty-seven stated that

“the Commission examined the compatibility of the measures with international law and concluded that they relate to the conservation of an exhaustable (sic) fish stock and aim at the avoidance of over-exploitation of the stock made effective, since the measures aim to maintain the Atlanto-Scandian herring stock within safe biological limits”.

³⁶⁹ S Rosenne (ed), *The International Law Commission's Draft Articles on State Responsibility: Part 1, Articles 1-35* (Martinus Nijhoff Publishers, Dordrecht 1991) 217.

The Regulation continues to say that together with these measures the EU has also reduced its catches by 26%, implying compatibility with WTO law.³⁷⁰ This retaliation, in the view of the EU, was against illegal activities by the Faroe Islands. This appears from recital ten where it is stated that the Faroe Islands, with its herring-related activities, has “failed to cooperate with the Union [...] and [has] failed to comply with the obligations under” several UNCLOS and UNFSA cooperation provisions as well as with the good faith obligation in Article 300 UNCLOS. To what extent this was so remains arguable, due to the termination of the international proceedings in the Mackerel dispute.

³⁷⁰ Be that as it may, even if the EU’s measures were compatible with WTO law, there is nothing in Regulation 793/2013 on whether they are compatible with the UNCLOS and the UNFSA, which seems to have been assumed.

V. Conclusion

In today's world of increasing attention given to the environment and consequences of the climate change, even by the Pope,³⁷¹ one phenomenon seems to have undeservedly fallen off the radar of the masses: the CMR of shared stocks. Under its seemingly technical veil there are very dynamic and curious processes occurring with enormous implications. With the decreasing number of fish in the sea, societies relying on fish for food and for their economic prosperity become increasingly sensitive to any disruptions in their fishing activities, and understandably so.

CMRs can range from barely noticeable to tremendous changes in stock abundance. As the three common threads that were identified in this thesis show, CMRs may involve a change in the nature of the stock, a change in the States involved in the fishery (or their status), or a change in the zonal attachment of the stock. These changes have huge impact on the legal rights and obligations of the States affected by a CMR. Changing the nature of the stock changes the whole set of applicable legal provisions. The involvement of a new State, through the entering of the stock in that State's EEZ, can lead to major reshuffling in the fishing interests and hence in the stakeholders in the fishery. Changes in the zonal attachment of shared stocks can raise serious equity concerns. These are just some examples of the said impact.

These changes are, thus, representing compelling reasons for States to address CMRs when and where they occur. Addressing a CMR is not explicitly regulated in the existing regime but its provisions and the very nature of the regime easily allow for this to happen and the answer is simple – cooperation. The existing regime is not a snapshot of the realities when it was adopted or when it entered into force. Quite the contrary, it contains numerous references to

³⁷¹ Dan Roberts and Stephanie Kirchgaessner, 'Pope Francis calls for urgent action on climate change in White House speech' <<http://www.theguardian.com/world/2015/sep/23/pope-francis-climate-change-white-house-speech>> accessed 1 October 2015.

situations of changing circumstances and the UNCLOS has, thus, fittingly been called a living instrument. This living nature resonates in many fisheries provisions, requiring continuous action from States in ensuring the conservation and management of the fish stocks in the world ocean. Be that as it may, the analysis in this thesis showed that the existing regime provides States with some discretion to choose whether or not to actually address a CMR. There are two perspectives that were discerned from the regime – the voluntarist and the conservationist perspectives.

The voluntarist perspective allows States to ignore a CMR and continue with the conservation and management plans they have already set up for the particular stock. This freedom is provided only where all relevant State agree with this course of action. However, once one of the relevant States requests renegotiation, the others must not ignore this call and must seek to agree in good faith on new measures. The Mackerel dispute supports the conclusion that there must be a renegotiation as a matter of law in such cases and also shows that CMR disputes will tend to concern factual disagreements. The existing regime was found to be well-equipped for resolving such disputes with the Annex VIII UNCLOS fact-finding proceedings.

The conservationist perspective does not, however, provide such freedom and does require action where conservationist concerns are present. This perspective is based on the multitude of provisions in the existing regime demanding action from States where the viability of stocks is threatened and sometimes even before that, in line with the precautionary approach. The regime also requires that effects on associated species are taken into account and the UNFSA strengthens this with its reference to the ecosystem approach. In such situations States are obliged to adopt measures alone or together, depending on the case at hand. In the case of transboundary and straddling stocks, however, very little can be achieved acting unilaterally. Thus, cooperation is once again the answer with negotiations as its first step.

The strong emphasis on cooperation and negotiation under both perspectives, however, lacks a much needed safety net – provisions regulating the consequences of unsuccessful cooperation. The analysis showed that CMRs can, in certain circumstances, be a reason for the termination of international agreements and that the wide jurisdictional limitations in the dispute settlement provisions can lead States to act unilaterally and adopt self-help measures instead of cooperating further. These two factors can be detrimental to legal certainty. Hence, the lack of the safety net is seen as a major shortcoming of the existing regime for CMR cases.

The review of the preparatory works showed that a conscious choice was made to exclude any provisions regulating the consequences of unsuccessful cooperation in order to strengthen the newly-acquired sovereign rights in the EEZ and ensure the freedom of the high seas. While these goals were achieved, another goal of the whole regime was somewhat undermined – the peaceful use of the oceans. Without that safety net, as the Mackerel dispute showed, a CMR may lead to bitter disagreements involving trade measures with serious economic implications even in the Western world. In other parts of the world, such disagreements may have even graver consequences – something that should not be discarded lightly.

The trade measures in the Mackerel dispute were prompted by the lack of any instruments to effectively resolve situations of unsuccessful cooperation and, allegedly, had nothing but the sustainability of the herring in mind. Taking the enforcement of the existing regime into one's own hands, however, can be a very dangerous initiative, irrespective of the intentions. The Faroe Islands started international proceedings asking for legal scrutiny of this action but they were all terminated. The legality of such autonomous acts must, nevertheless, be given an authoritative consideration. Although this is not possible now at the WTO, the existing regime provides the tool of Advisory Opinions by the ITLOS.³⁷² It is a tool that can shed some light on the matter of cooperation, especially since the ITLOS unequivocally asserted its advisory jurisdiction earlier this year in another fisheries case.

With the discussion of the duty to cooperate this thesis meant to further the legal debate on the consequences of CMRs for the international fisheries conservation regime by giving it a separate stand. While the thesis was narrowed down to only transboundary and straddling stocks (among other scope limitations), its analysis may be borrowed for evaluating the consequences for other types of stocks as well. One thing that becomes clear from the discussion is that States must cooperate more and early-on as well as avoid the use of coercive measures as their legality and productiveness is far from settled. When a State asks for the renegotiation of conservation and management measures due to a CMR, the request must be taken seriously and its merits reviewed even by a third party, if needed. The ocean realities in CMR cases require more expert assessments than political spats so that it is the news of collapsing and collapsed stocks that becomes a reminiscence of the past instead of Grotius's view of fish as an inexhaustible resource.

³⁷² See E Clark, *supra*, n 21, 236.