

Review of Legal Frameworks aiding Implementation of the United Nations Fish Stocks Agreement in South Asian countries

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United Nations – The Nippon Foundation of Japan Fellowship Programme 2024

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ABSTRACT

The United Nations Fish Stocks Agreement (UNFSA) is a crucial implementing agreement of the United Nations Convention on the Law of the Sea. UNFSA is mandated to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through the effective implementation of the relevant provisions of the Convention. With 50 articles, the Agreement outlines principles for the conservation and management of these fish stocks, establishing that such management must be based on a precautionary approach and the best available scientific information. The Agreement cannot be effective unless all relevant states become parties to it, implement its provisions, and comply with its obligations. Further, there has been a longstanding emphasis on the duties of flag states in ensuring the effective control of vessels flying their flags.

The present study examined the effectiveness and challenges of implementing the flag state duties outlined in UNFSA in selected South Asian countries, such as Bangladesh, India, Maldives, and Sri Lanka, within the Bay of Bengal region. These countries collectively account for 44% of the total catch from the Bay of Bengal Large Marine Ecosystem. The research assesses their compatibility with UNFSA provisions, particularly Articles 17-19, concerning the flag state duties.

The study identifies the level of compliance with the countries' legal frameworks by conducting legal reviews and stakeholder interviews. It highlights legislative gaps that need to be addressed for full compliance with the flag state provisions of the UNFSA. Additionally, the study review analysed the capacity development provisions of UNFSA and the different allocations of funds across various categories.

Furthermore, the study evaluated the performance of Regional Fisheries Bodies and their contributions to implementing UNFSA. To enhance flag state duties, the thesis proposes strategies including periodic compliance assessments, strengthened national legislation, and the establishment of a dedicated regional framework for cooperation among neighbouring countries. This research underscores the importance of effectively implementing UNFSA provisions to achieve sustainable fisheries management, emphasising the necessity of a comprehensive approach that integrates binding obligations with voluntary frameworks to enhance the capacity of South Asian countries in the Bay of Bengal region.

ACKNOWLEDGMENTS

I would like to express my profound gratitude to my supervisor, **Dr. Arron N. Honniball**, Senior Research Fellow at the Max Planck Foundation for International Peace and the Rule of Law. His depth of knowledge and thoughtful feedback have been instrumental in refining my work, encouraging me to approach my thesis with greater clarity and rigour.

I would also like to sincerely thank **Valentina Germani** and **Vanessa Arellano Rodriguez**, Division of Ocean Affairs and Law of the Sea, for their constant support during my fellowship. I am immensely grateful to the United Nations-Nippon Foundation Fellowship Programme for giving me the opportunity to participate in this programme.

I wish to express my sincere gratitude to **Johannes Krusemark-Camin**, Managing Director at the Max Planck Foundation for International Peace and the Rule of Law and the entire Law of the Sea team at the Foundation.

Additionally, I would like to express my heartfelt appreciation to **Dr. P. Krishnan**, Director, and **Mr. Rajdeep Mukherjee**, Policy Analyst at the Bay of Bengal Programme Inter-Governmental Organisation, for their invaluable support in shaping this study from the very beginning of the Fellowship and for their input throughout the study.

LIST OF ACRONYMS

ALDFG	Abandoned, Lost, or otherwise Discarded Fishing Gear
BOB	Bay of Bengal
BOBLME	Bay of Bengal Large Marine Ecosystem
BOBP-IGO	Bay of Bengal Programme Inter-Governmental Organisation
CBD	Convention on Biological Diversity
CC	Compliance Committee
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCRF	Code of Conduct of Responsible Fisheries
CFP	Common Fisheries Policy
CMMs	Conservation and Management Measures
COFI	Committee on Fisheries
CP	Contracting Party
DOALOS	Division of Ocean Affairs and Law of the Sea
DWFN	Distant Water Fishing Nations
EEZ	Exclusive Economic Zone
EIO	Eastern Indian Ocean
e-MARIS	Electronic Monitoring and Reporting Information System
EMS	Electronic Monitoring System
FAO	Food and Agriculture Organization of the United Nations
FFA	Pacific Islands Forum Fisheries Agency
GCF	Green Climate Fund
HSBI	High Seas Boarding and Inspection
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICG	Indian Coast Guard
ICSP	Informal Consultation of State Parties
IMO	International Maritime Organization
IOC	Indian Ocean Commission
IOTC	Indian Ocean Tuna Commission
IPOA-IUU	International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, Unreported, Unregulated fishing
LME	Large Marine Ecosystem
LOSC	United Nations Conventions on the Law of the Sea (Also referred to as UNCLOS)
MCS	Monitoring, Control and Surveillance
MFRA	Marine Fisheries Regulation Act (India)
MMD	Mercantile Marine Department

MMSI	Maritime Mobile Service Identity
NCP	Non-Contracting Parties
NPOA-IUU	National Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing
PCIJ	Permanent Court of International Justice
PR	Performance Review
PSMA	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and Voluntary Guidelines for Flag State Performance
RBI	Reserve Bank of India
RECOFI	Regional Commission for Fisheries
RFB	Regional Fisheries Body
RFMO	Regional Fisheries Management Organization
RPOA-IUU	Regional Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing
SC	Scientific Committee
SDG	Sustainable Development Goals
SIDS	Small Island Developing States
SIOFA	Southern Indian Ocean Fisheries Agreement
SPC	Pacific Community
SRFC	Sub-Regional Fisheries Commission
SWIOFC	Southwest Indian Ocean Fisheries Commission
SWIO-FFA	Southwest Indian Ocean Fisheries Framework Agreement
UNCED	United Nations Conference on Environment and Development
UNFCCC	United Nations Framework Convention on Climate Change
UNFSA	United Nations Fish Stocks Agreement
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
UT	Union Territory (India)
VGFSF	Voluntary Guidelines of Flag State Performance
VMS	Vessel Monitoring Systems
WCPFC	Western and Central Pacific Fisheries Commission

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INTRODUCTION

1.1. Genesis of United Nations Fish Stock Agreement

The 1982 United Nations Conventions on the Law of the Sea (LOSC (or) the Convention)¹ provided the international community with guidelines for peacefully managing shared marine resources. It calls for cooperation among states to manage stocks that occur within multiple EEZs or between EEZs and the high seas.² However, certain states have neglected the calls for the conservation of stocks, resulting in overfishing and environmental degradation, which imperils the stock.³

In 1992, the United Nations Conference on Environment and Development (UNCED) was convened in Rio de Janeiro to promote economic development, reduce poverty, and preserve and protect the earth's ecological systems. The conference, also known as the Earth Summit, was famous for creating new pathways for sustainable development. It also paved the way for the United Nations Fish Stock Agreement, albeit overshadowed in popular knowledge by the development concerning the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD). The conference identified several issues related to unregulated fishing and insufficient cooperation among states for the management of shared stocks. The term “*shared stocks*” is an umbrella term that often encompasses other transboundary stocks, highly migratory species, straddling stocks, and discrete high-seas fish stocks.⁴ Thus, the conference called for convening an intergovernmental conference by the states under the auspices of the United Nations to promote the effective implementation of the relevant provisions of the LOSC. The conference also appealed to the Food and Agriculture Organization of the United Nations (FAO) to carry out studies to identify and assess the existing problems in the management of the shared stock and formulate appropriate recommendations in consistency with LOSC.⁵

¹ U.N. Convention on the Law of the Sea, *Open for signature 10 December 1982*, UNTS 1833 (entered into force 16 November 1994).

² Sathya Nandan and Michael Lodge, “Some suggestions towards better implementation of the United Nations Agreement on straddling fish stocks and highly migratory fish stocks of 1995”, *The International Journal of Marine and Coastal Law*, vol.20, no. (3), (2005), pp.345-379.

³ David A Balton, “Strengthening the law of the sea: the new agreement on straddling fish stocks and highly migratory fish stocks”, *Ocean Development & International Law*, vol.27, no. (1-2), (1996), pp.125-151.

⁴ Gordon Munro and Others, “The conservation and management of shared fish stocks: legal and economic aspects”, *FAO Fisheries Technical Paper*, no. 465. Rome, FAO, (2004), 69p.

⁵ Agenda 21, Chapter 17, Programme Area C, Para 17.49 on *Report of the United Nations Conference on Environment and Development, Rio De Janeiro, Brazil 3-14 June 1992* (A/CONF.151/26 (Vol. II)).

Taking this into account, the United Nations General Assembly (UNGA) adopted Resolution 47/192 on 22 December 1992 and convened the UN Conference on Straddling Fish Stocks and Highly Migratory Stocks in 1993.⁶ After six sessions, on 4 August 1995, the conference adopted 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 (UNFSA (or) the agreement).⁷ UNFSA is a ‘*freestanding treaty*’, as the agreement does not require the states to be parties to the convention before they become parties to the agreement.⁸ As of July 2024, the total number of parties to the UNFSA is 93, including the European Union.⁹ With 93 parties to the agreement, UNFSA is considered to be the most successful multilateral agreement since LOSC. It is comprised of 50 articles with two annexes. In his statement after the agreement was adopted, the chairman stated that the agreement is built on three pillars: conservation and management of stocks based on the precautionary principle, ensuring that the conservation and management measures are adhered to and complied with, and peaceful settlement of disputes.¹⁰ The agreement establishes the jurisdictional framework for regulating shared fish stocks without explaining the specific measures regarding fishing practices. Also, Article 4 of UNFSA made clear that 1982 LOSC remains the jurisprudential basis upon which the provisions of UNFSA are founded.

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

⁶ A/RES/47/192, Resolution Adopted by the General Assembly on 22 December 1992.

⁷ ‘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’ (1995). Open for signature 4 December 1995, UNTS 2167 (entered into force on December 11, 2001).

⁸ James Harrison. Making the Law of the Sea: A Study in the Development of International Law, (Cambridge Studies in International and Comparative Law; No. 80, (Cambridge University Press, 2011), p103.

⁹ United Nations, “Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements” Available at <https://www.un.org/oceancapacity/unfsa> (accessed on 08 July 2024).

¹⁰ A/CONF.164/35, 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.

The Agreement includes three types of implementing rules: (a) those reiterating existing LOSC provisions, (b) those enhancing the general provisions of the Convention, and (c) those representing significant advancements beyond the LOSC.¹¹

1.2. Overview of Fisheries in the Indian Ocean and Bay of Bengal

Spanning three continents and 39 littoral states, the Indian Ocean encompasses nearly 30% of the global ocean area. Forecasts suggest that the Indian Ocean economy may account for around a fifth of global GDP by 2025.¹² The Indian Ocean accounts for nearly 15% of the total global marine capture fisheries production.¹³ It is likely the most crowded ocean, with Indian Ocean rim countries owning more than 60% of the global fishing fleet. Another distinctive feature of the fisheries is the dominance of small-scale fisheries, as the countries surrounding the Indian Ocean are mainly developing countries, giving the ocean a unique characteristic. While developed countries primarily exploit the Pacific Ocean and Atlantic Ocean, Indian Ocean catches are nearly equally distributed among least developed countries, small island developing states, and developed countries.

The BOBLME is one of the largest Large Marine Ecosystems (LME), spanning over 6.2 million km². Sixty-six per cent of the catch falls within the EEZs of eight countries, and the rest being high seas.¹⁴ Recent estimates showed that only 62.5% and 63.5% of the stocks from the Western Indian Ocean and Eastern Indian Ocean, respectively, are caught sustainably.¹³ In the Eastern Indian Ocean (EIO), nearly 80% of the catch comes from countries bordering the Bay of Bengal Large Marine Ecosystem (BOBLME).¹⁵

The Bay of Bengal (BOB) region encompasses lower to middle-income countries characterized by multi-fleet and multi-species fisheries. The present study focuses on the countries bordering the western Bay of Bengal Region, namely Bangladesh, India, Maldives, and Sri Lanka. Approximately 44% of the Bay of Bengal Large Marine Ecosystem area is covered within the

¹¹ Andre Tahindro. “Sustainable Fisheries: The Legal Regime of the 1995 United Nations Fish Stocks Agreement and Its Contribution to Subsequent Developments Promoting Sustainable Fisheries”, in *Legal Order in the World’s Oceans*, Myron H. Nordquist, John Norton Moore and Ronan Long, eds. (Koninklijke Brill NY, Leiden, The Netherlands). p325.

¹² Ganeshan Wignaraja and Others. Opportunities and challenges for regional economic integration in the Indian Ocean. *Journal of Asian Economic Integration*, Vol.1, No.1, (2019), pp.129-151.

¹³ FAO, “The State of World Fisheries and Aquaculture 2024 – Blue Transformation in action”, Rome, (2004), 264p.

¹⁴ Vivekanandan Elayaperumal and Others, “An ecosystem-based approach to the assessment and governance of the Bay of Bengal Large Marine Ecosystem”, *Deep Sea Research Part II: Topical Studies in Oceanography*, vol.163, (2019), pp.87-95.

¹⁵ Estimated using data available at: Daniel Pauly and Others, “Sea Around Us-Concepts, Design and Data”. Available at: www.seaaroundus.org (accessed on 08 July 2024).

EEZ of these four countries. The study will, therefore, cover a significant portion of the BOBLME.

The fish catch data from 2000 to 2021 in Bangladesh, India, the Maldives, and Sri Lanka reveal distinct trends with fluctuations (Fig. 1). From 2000 to 2021, Bangladesh's fish catch increased gradually, while India's catch increased by 13% despite fluctuations. The Maldives and Sri Lanka showed variations, with the Maldives reaching their highest in 2005 and Sri Lanka reaching its peak in 2014. These fluctuations underscore the dynamic nature of fish catch across the years and countries in the South Asian region.

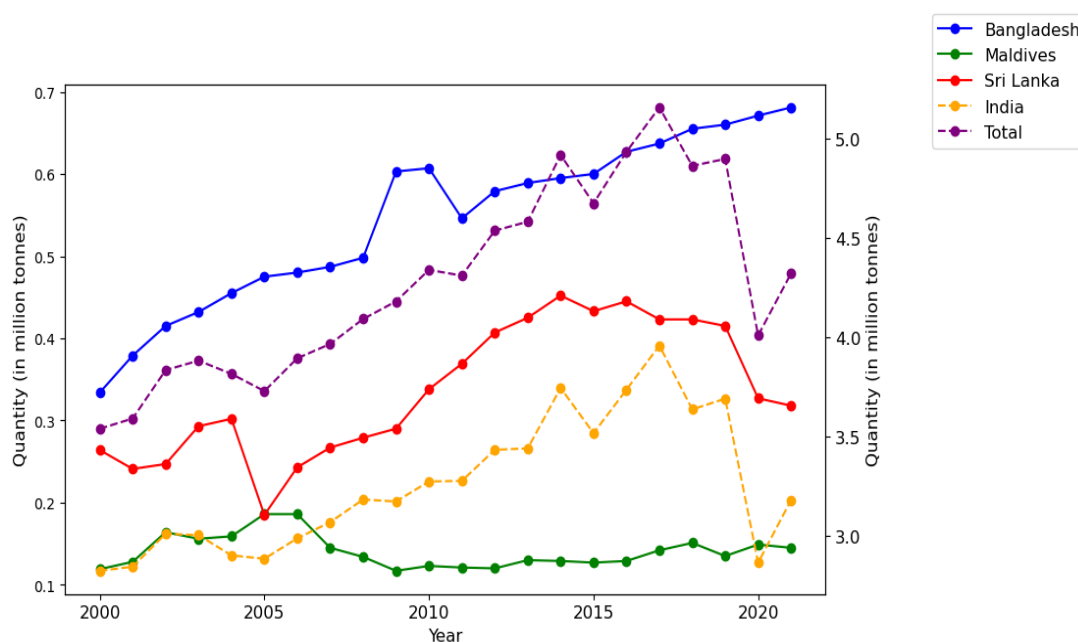


Figure 1. Marine Capture Production of Four Selected South Asian countries¹⁶

1.3. Shared Stocks in the Region

In 2002, the shared stocks contributed to nearly one-third of the Marine Capture Fisheries Production. Due to their significant contribution, the FAO declared that the effective management of these internationally shared fish stocks is one of the significant challenges to achieving long-term sustainable fisheries.¹⁷

In terms of institutional coverage, geographically, the whole Indian Ocean is under one or other regional arrangement. However, the three Regional Fisheries Management Organizations

¹⁶ FAO, “Global Capture Production”, In: Fisheries and Aquaculture. Rome. Available at <https://www.fao.org/fishery/en/collection/capture?lang=en> (accessed on 08 July 2024)

¹⁷ FAO, “Report of the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks”, Bergen, Norway, FAO Fisheries Report No. 695, Rome, (7–10 October 2002), 42p.

(RFMO) present in the Indian Ocean Region cover a limited number of species, equating to only 19% of the catch.¹⁸

Several ecosystems within the Bay of Bengal region are unique from ecological and fisheries points of view. Each of these subregions is a self-sustaining ecosystem with shared species. The differences in species distribution and abundance, but with overlapping national jurisdictional boundaries, underline the need for recognising subregions to help manage the resources of two or more countries sustainably. These species are not managed by an RFMO and, therefore, require proper sustainable management by the countries for the region.¹⁹

1.4. Need for Implementation of Flag States Provisions of UNFSA

The UNFSA is a pivotal framework for the conservation and management of straddling fish stocks and highly migratory fish stocks. UNFSA cannot be effective unless all relevant states (coastal states and flag states) become parties to the agreement, implement its provisions, and comply with its obligations. The Agreement applies to areas within national jurisdiction to a limited extent, as most provisions are intended solely for the high seas.²⁰ There has been a longstanding emphasis on the duties of flag states in ensuring the effective control of vessels flying their flag. A significant challenge for high seas fisheries is the ineffective enforcement by flag states, as many states fail to ensure compliance with international fisheries agreements, including those of the UNFSA. In the Review conferences of the Fish Stock Agreement, several states have consistently called for the flag states to enhance their regulatory oversight to meet their obligations. Several delegations felt that “.... *flag States needed to do more to live up to their obligations under the Convention and the Agreement, as well as other relevant international instruments, to ensure that vessels flying their flags were complying with multilateral conservation and management measures...*”²¹ Despite these calls, challenges persist, especially concerning high seas fisheries management. The most recent recommendations from the UNFSA review conference highlight the importance of promoting the implementation of the FAO Voluntary Guidelines for Flag State Performance, which aim

¹⁸ Analysed from data available in the Sea Around Us database (www.seaaroundus.org).

¹⁹ BOBP-IGO. “Report of the Technical Committee for Establishment of a Regional Fisheries Management Organization in the Bay of Bengal”. 2010. (BOBP-IGO/RFMO/2010/WP 2).

²⁰ See Article 3,5,6,7 of the UNFSA.

²¹ Report of the resumed Review Conference on 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, New York, United States of America, 24-28 May 2010.(A/CONF.210/2010/7), para 93.

to address these challenges and improve overall compliance and sustainability in global fisheries.²²

UNFSA does not establish a direct institutional link with the RFMOs,²³ through which many of its provisions could preferably be implemented. This disconnect means that country-level systems are necessary to ensure the implementation of UNFSA provisions. Further, reduced participation and representation in RFMOs limit countries' engagement, thereby impacting their ability to influence decisions.²⁴ The domination of Distant Water Fishing Nations (DWFNs) in influencing the decision-making process of RFMOs has been well analysed.²⁵ However, countries that adhere to the obligations of the UNFSA might have a stronger voice and more significant influence within the RFMO's decision-making process, along with several other factors.

Several challenges exist in enforcing flag state duties, including a lack of regulatory oversight, insufficient monitoring and surveillance systems, limited resources and capacity, and inadequate legal frameworks. Further, most tuna RFMOs use compliance with their conservation and management measures, among others as a major criterion for resource allocation.²⁶ Comprehensive evaluations regarding the effectiveness of UNFSA in achieving its intended objectives are notably absent. Several states have called for the development of appropriate processes to assess the flag states' performance with respect to the provision of the agreement.²¹ Such evaluations are essential for understanding the impact of the agreement on global fisheries management and making informed adjustments to enhance its effectiveness.

Thus, this thesis examines the effectiveness and challenges of implementing the flag state provisions of the UNFSA in selected South Asian countries (Bangladesh, India, Maldives, and Sri Lanka) within the BOB region. In doing so, the thesis analyses existing domestic legal

²² Report of the resumed Review Conference on 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, New York, United States of America, 22-26 May 2023 (A/CONF.210/2023/6), para 108.

²³ Regional Fisheries Management Organizations (RFMOs) are international organizations establishing binding measures for the conservation and sustainable management of highly migratory or straddling fish species based on the best scientific evidence, and it differs from Regional Fishery Advisory Bodies (RFABs), which provide only advice to its member states.

²⁴ Johanne Fischer, "How transparent are RFMOs? Achievements and challenges", *Marine Policy*, vol.136, (2022), e.104106.

²⁵ Hussain Sinan and Others, "Disentangling politics in the Indian Ocean Tuna Commission", *Marine Policy*, vol. 133. (2021), e. 104781.

²⁶ Katherine Seto and Others, "Resource allocation in transboundary tuna fisheries: A global analysis", *Ambio*, vol. 50, (2021), pp.242-259.

frameworks, assessing their compatibility with the flag state provisions of UNFSA. Through the analysis, the thesis plans to identify gaps, challenges, and practical difficulties in implementing UNFSA. The thesis will provide recommendations based on the findings, which aim to improve the governance and management of shared fish stocks in South Asia, thereby increasing the effectiveness of UNFSA and fostering sustainable fisheries management in the region.

1.5. Thesis outline

The thesis is divided into two parts, with two chapters in each part discussing different aspects of the questions mentioned above. Part I deals with the examination of flag state measures of the UNFSA with a comparative analysis of the provision of flag states with other international instruments, like LOSC, FAO Compliance agreement, FAO Code of Conduct of Responsible Fisheries (CCRF), Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and Voluntary Guidelines for Flag State Performance (PSMA) to provide a brief overview of measures mentioned in the international agreements. It also deals with the assessment of the legal frameworks of South Asian nations like Bangladesh, India, Maldives, and Sri Lanka, which have interpreted and applied these UNFSA provisions within their national legislation.

Part II examines the various gaps and challenges in the effective implementation of the UNFSA. It assesses the issues identified through legal analysis and stakeholder interviews. Further, it also discusses the inadequacies in capacity development provisions and the specific need to enhance capacity to ensure better implementation of the agreement. Part II explores potential solutions and strategies to overcome the challenges identified above and to improve the implementation of UNFSA. It also focuses on the critical role that regional organisations play in this process, including their contributions and areas for improvement.

2. METHODOLOGY

Domestic legal instruments related to fisheries governance from Bangladesh, Maldives, India, and Sri Lanka have been sourced from legal databases, including GlobalLEX and FAOLEX. Additional instruments not listed in these databases have been gathered from other country-specific sources. The study used the legal instruments available up to August 31, 2024.

A legal analysis was conducted to assess to what extent the select provisions of the UNFSA Articles have been implemented in national legislation. It is important to note that this study does not cover policy documents or plans of the countries involved. The focus of the study is on legal instruments rather than policy documents or plans. This is because the primary objective of this study is to analyse the binding legal framework that governs fisheries management and the implementation of UNFSA provisions. However, it is also essential to recognise that treaty obligations under the UNFSA often require implementation through domestic law in specific circumstances. Many provisions necessitate both policy and legal measures, making it clear that 'action plans' or policies alone are insufficient. Legal instruments, such as Acts, rules, and regulations, provide the guidelines that must be followed. In contrast, policy documents and plans, though important, are generally non-binding and often serve as guidance rather than mandatory rules.

A Rapid Assessment tool was developed based on the existing checklist, *United Nations Fish Stocks Agreement: A Guide for raising awareness, furthering understanding and strengthening the implementation of its provisions*,²⁷ with a few modifications. The Rapid Assessment tool, provided in Appendix I, employs scoring values to indicate the level of alignment with the provisions of the UNFSA. It was utilised to assess the alignment of the countries' legal instruments with selected articles of the UNFSA, specifically focusing on flag state duties.

²⁷ UN-DOALOS, “United Nations Fish Stocks Agreement: A Guide for raising awareness, furthering understanding and strengthening the implementation of its provisions”, (2024), 219pp.

3. PART ONE: FRAMEWORK AND STATUS OF REGIONAL IMPLEMENTATION OF THE UN FISH STOCKS AGREEMENT IN SOUTH ASIA

CHAPTER I: ANALYSIS OF UNITED NATIONS FISH STOCKS AGREEMENT (UNFSA) PROVISIONS ON FLAG STATE DUTIES

Section A: UNFSA and Its Provisions (Art 17-19)

3.1. Concept of the Flag State

States can play numerous and possibly concurrent roles in a maritime context, such as a coastal, flag, port, and landlocked state. The concept of flag state jurisdiction is one of the highly recognised aspects of the law of the sea but remains equally obscure. Since the evolution of this concept, the responsibilities borne by the flag states have grown exponentially.²⁸

In *S.S. Lotus* case, the Permanent Court of International Justice (PCIJ) stated, in dictum, that “vessels on the high seas are exclusively subject to the authority of the state whose flag they fly.”²⁹, a statement that significantly influenced the concept of flag state jurisdiction. This was followed by the 1958 Convention of High Seas, one of the first international legally binding instruments describing the rights and responsibilities of the flag state.³⁰ Such rights and responsibilities were further explained in detail in the LOSC. Nonetheless, a number of slightly differing definitions of the flag state have evolved in international instruments (Table.1)

Table 1: Evolution of Definition of Flag States

Definitions	Instrument	Reference
State, whether coastal or not, has the right to sail ships under its flag	High Seas Convention	Article 4 ³¹
State whose flag a ship flies and is entitled to fly	Convention on Conditions for Registration of Ships	Article 2 ³²
State in whose territory a ship is registered has the right to fly its flag.	LOSC	Article 91(1) ³³

²⁸ Camille Goodman. “*The regime for flag state responsibility in international fisheries law-effective fact, creative fiction, or further work required?*”, *Australian and New Zealand Maritime Law*, vol. 23, (2009) pp.157-169. (2009).

²⁹ *S.S. Lotus*, France v Turkey, 1927 PCIJ (Series A) No. 10.

³⁰ Convention of High Seas, Open for Signature 29 April 1958, UNTS 1569 (entered into force on 30 September 1962).

³¹ *Ibid.* p8.

³² Convention on Conditions for Registration of Ships, Opened for Signature 1 May 1986.

³³ LOSC, *supra* note 1.

According to Article 91 of LOSC, the state shall fix the conditions for granting the nationality of the ships, but there must be a genuine link between the state and the vessel. However, even after four decades, the meaning and the spirit of the genuine link concept are still unclear.³⁴ One of the legal interpretations of the genuine link between the state and its ship was in the *M/V Saiga case*; the International Tribunal For Law of the Sea (ITLOS) concluded that “*purpose of the provision of the Convention requiring a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States*”.³⁵ The contribution –or lack thereof– of the ‘genuine link’ debate to improved fisheries governance and UNFSA implementation remains mixed. For one, the 2006 Review conference of UNFSA recommended that the states, individually and collectively through regional fisheries management organisations, should cooperate to examine and clarify the role of the “genuine link” in relation to the duty of flag states to exercise effective control of overfishing by vessels flying their flag.³⁶ By contrast, the Joint IMO / FAO ad hoc Working Group on IUU fishing and related matters has continued to reiterate that defining the concept of ‘genuine link’ would be of little benefit; a better approach being to tackle the main issues that could ensure effective flag state control.³⁷

3.2. Flag State Duties in the context of United Nations Fish Stocks Agreement

To ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks, the UNFSA elaborated the provisions of the LOSC and provided a framework for the cooperation and management of fish stocks. Compared to the LOSC and Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993³⁸ (FAO Compliance Agreement), the

³⁴ Iyowuna Milton Abibo. “*The Intrigues and Intricacies of the Twin Concepts of Flag State Jurisdiction and the Requirement of a Genuine Link under International Maritime Law*”. (2022) Available at: <http://dx.doi.org/10.2139/ssrn.4044120>

³⁵ *M/V "SAIGA (No.2)"*. (Saint Vincent and the Grenadines v. Guinea). International Tribunal for the Law of the Sea, Report of Judgement, 1999, para 83.

³⁶ Review Conference on 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, New York, 22–26 May 2006. (A/CONF.210/2006/15). para 81.

³⁷ FAO, “Report of the Joint IMO/FAO ad hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters”, FAO Fisheries Report No. 637, Rome, (9–11 October 2000), 24p.

³⁸ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, *Open for signature 24 November 1993*, UNTS 2221 (entered into force 24 April 2003).

agreement provides stringent flag state responsibilities.³⁹ With regard to the implementation of Conservation and Management Measures (CMMs), the UNFSA focuses on the responsibility of the flag states and is relatively silent on the role of flag states. Article 8(4) provides that for UNFSA Parties, only states who are members of the relevant regional organisation or arrangement or otherwise agree to apply the conservation and management measures established by such organisation or arrangement have the right of access to the fisheries resources managed therein. This is designed to reinforce the connection between the rights of flag states and their responsibilities.⁴⁰

While the international community often emphasises the role of port states in combating IUU fishing, it is equally important to address the lack of effective control by flag states. This issue is acknowledged in the role of port states, which have been designed to address the primary responsibilities of flag states and respond to both historical flag state failings and the potential rise of ports of convenience. The UNFSA provides principles and international standards for regulating resources in the EEZs and high seas, with a particular emphasis on the flag states. Although flag states generally have enforcement jurisdiction over vessels on the high seas, Articles 21 and 22 of the UNFSA provide a specific exception. These articles grant enforcement powers to states other than the flag state, but only among parties to the UNFSA. Despite these provisions, there remains a significant issue with non-compliance. During the 2023 session of the resumed review conference on UNFSA, several states called out for control of fishing activities and increased compliance with CMMs adopted by RFMOs.⁴¹ The ineffective exercise of flag state duties through inadequate enforcement can thus undermine RFMO measures. For example, the Indian Ocean Tuna Commission (IOTC) has established several CMMs specifically targeting flag states, focusing on key areas such as catch and effort data reporting, observer schemes, records of active and authorised fishing vessels, and Vessel Monitoring Systems (VMS). To address issues of non-compliance and illegal fishing, the IOTC also implements trade measures, including catch documentation schemes and potential trade restrictions on fish products from non-compliance states.

³⁹ See Part V and Part VI of UNFSA.

⁴⁰ Richard A Barnes, “Flag States”, in *The Oxford Handbook of the Law of the Sea*. Donald R Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens, eds. (Oxford Academic, 2016), p.313.

⁴¹ Review Conference on 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, New York, 22–26 May 2023. (A/CONF.210/2023/6). para 91.

The following analysis addresses select provisions of the UNFSA to examine its legal framework with a focus on the roles and responsibilities of flag states. It will cover Article 17-Non-members of organisations and non-participants in arrangements (3.2.1), Article 18-Duties of flag states (3.2.2), and Article 19-Compliance and Enforcement (3.2.3).

3.2.1. Article 17: Non-members of organizations and non-participants in arrangements

LOSC explicitly states that the cooperation of states is of utmost importance in the conservation and management of living resources on the high seas.⁴² One of the widely accepted methods for cooperation is being a member of the RFMOs or a cooperating non-contracting party. However, non-compliance with the CMMs of the RFMOs, whether by parties to an agreement or not, poses a severe threat to the sustainability of the fisheries in the region. UNFSA comes with a “carrot-stick approach” to deal with the non-parties to the agreement; the agreement offers the right for the parties to fish in the area of competence of the RFMO. It also provides specific provisions under 17(4) and 33(2), which direct state parties of UNFSA to take “measures consistent with UNFSA and international law”. This includes punishing them using trade-related measures such as catch documentation systems, inspections, etc., if they fail to comply with the CMMs.⁴³ There is an emerging practice of RFMOs categorising the vessels of non-members engaged in fishing in their competence area as IUU fishing if they fail to ensure the CMMs.⁴⁴

Article 17 of UNFSA imposes the obligation on non-members and non-participants to cooperate in accordance with the LOSC and the UNFSA. States should agree to and comply with the CMMs of the RFMOs to carry out fishing operations in the area managed by those organisations.⁴⁵ Further, suppose no mechanism is in place for managing a fish stock. In that case, coastal states and high seas fishing states must cooperate to establish RFMOs or create appropriate measures or agreements for conservation and management.⁴⁶ This overcame the pitfall of the LOSC provisions to fish on high seas,⁴⁷ Where there was no mechanism to curtail the fishing practices of non-members, which undermines the existing practices of RFMOs.

⁴² See Article 118 of LOSC

⁴³ Nandan and Lodge. *supra* note 2. p356.

⁴⁴ Evelyn 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). p62.

⁴⁵ See Article 17(2) of UNFSA

⁴⁶ See Article 8(3) of UNFSA

⁴⁷ See Article 116 of LOSC

Article 17(4) requires states which are members of RFMO/As to request non-parties to comply with CMMs adopted by RFMOs and directs the parties to take necessary measures consistent with the agreement and international law to avoid non-parties from undermining the effectiveness of CMMs adopted by RFMOs; this was again re-emphasised in Article 33(2) of the UNFSA.

3.2.2. Article 18: Duties of Flag States

Article 18 outlines the duties of a flag state regarding fishing vessels on its register that engage in fishing on the high seas and the national jurisdiction of the other states. The states are required to exercise their responsibilities effectively over their ships. Key sections of this article relate to implementing obligations, standards, and procedures framed by subregional or regional organisations/instruments.⁴⁸ Article 18 (2) outlines the core obligation of the flag state and authorises states to fly their flags only for high seas fishing. It also explains that states are not permitted to use their flags if they cannot effectively exercise responsibility over such vessels for the LOSC and the UNFSA.

Article 18(3) (a-i) reflects on the measures that the flag states should take necessary measures to regulate fishing on the high seas, such as licensing, the establishment of regulations and national records of fishing vessels, marking of fishing gear and vessels, verification of catch, the establishment of an MCS mechanism, regulation of transshipment and regulation of fishing activities in line with the subregional, regional (or) global measures in the high seas. According to this Article, several RFMOs have established regional registers of fishing vessels authorised to fish in their respective areas of competence.⁴⁹ However, states can effectively carry out this fundamental obligation through strengthened legal frameworks and increased penalties. Also, the catch reporting obligations in the article act as a trade-related measure, helping to identify potential IUU catches.⁵⁰ It also directs the state to ensure that the vessels flying its flag do not engage in illegal fishing activities under the national jurisdiction of other states.⁵¹

Article 18 also provides provisions for MCS systems, including the implementation of national inspection schemes, observer schemes, and VMS.⁵² The implementation of inspection schemes

⁴⁸ See Article 18 (1) of UNFSA.

⁴⁹ IOTC, Record of Active Vessels, Available at <https://iotc.org/vessels> (accessed on 19 July 2024); SIOFA, "Record of Authorised Vessels". Available at <https://siofa.org/mcs/authorised-vessels> (accessed on 19 July 2024).

⁵⁰ M.Lack, "Catching On? Trade-related Measures as a Fisheries Management Tool", TRAFFIC International, (2007). p60.

⁵¹ See Article 18 (3) (b) of UNFSA.

⁵² See Article 18(g) of UNFSA.

is in accordance with Articles 21 and 22 of the UNFSA, which require states to cooperate directly or through RFMOs. If the vessel's flag state is not a member of an RFMO, the inspector must check whether the vessel is a party to the UNFSA. If it is, the inspector may board and inspect the vessel according to Articles 21 and 22. However, if the vessel is neither a member of an RFMO nor a party to the UNFSA, the inspector must obtain consent from the flag state of the vessel before proceeding with boarding and inspection. Furthermore, the Articles recommend that flag states shall ensure a compatible MCS system when there is an agreed system already in place by the sub-regional, regional (or) global arrangements.⁵³ This was dealt with in detail in Article 19 of UNFSA.

3.2.3. Article 19: Compliance and Enforcement

Compliance and enforcement are two sides of the same coin; both are crucial for achieving fisheries' sustainability and have also been significant challenges and weak points in high sea governance.⁵⁴ Part VI of the agreement deals with "Compliance and Enforcement," which are mostly centred around flag states. These measures empower a flag State over its vessels' activities or involve the flag state in procedures when other UNFSA parties take enforcement measures against its vessels. Also, the agreement suggests enforcement in three other areas: a) Article 20 (enforcement by international cooperation), 21(enforcement through subregional and regional cooperation), and 22 (measures taken by a port state). In their capacity as flag states, Article 19 requires a state to ensure that its vessels comply with the CMMs adopted by the RFMOs; flag states principally remain responsible for enforcing compliance on the high seas,⁵⁵ whereas other states merely function as enforcement agents. However, this was also seen as a weakness, as states were not willing to enforce the duties when their flagged vessels were on the high seas.⁵⁶ The UNFSA is noted for its innovative compliance and enforcement provisions, recognising that flag state jurisdiction alone is insufficient to address enforcement issues. It facilitates the development of regionally agreed-upon enforcement mechanisms, allowing other states to take enforcement measures and thereby addressing the problems that

⁵³ See Article 18(4) of UNFSA.

⁵⁴ Robin Rolf Churchill and Alan Vaughan Lowe, "The Law of the Sea", 3rd edition, (Manchester: Manchester University Press, 1999).

⁵⁵ See Article 19(1)(a) of UNFSA.

⁵⁶ Áslaug Ásgeirsdóttir, "An International Relations perspective on Compliance and Enforcement", in *Strengthening Fisheries Law in an Era of Changing Oceans*. Richard Caddell and Erik J. Molenaar, eds. (Bloomsbury Publishing, 2019), p.279.

afflict existing RFMOs.⁵⁷ A state is also obliged to investigate any alleged violations, including conducting physical inspections. Even when the violation is committed by a vessel not flying its flag, a state can proceed with inspection in accordance with Article 21 of the UNFSA.⁵⁸

However, several states cannot enforce the agreed regulations on the high seas as monitoring at sea is often expensive, and several states lack the necessary resources and infrastructure.⁵⁹ The lack of enforcement capacities in developing states often leads to increased IUU fishing. However, joint enforcement, inspection and boarding schemes can be focussed on strengthening their implementation.⁶⁰ Article 19 (1) (c-d) also requires any vessel flying its flag to provide relevant information on alleged violations and, if sufficient evidence is available, refer the case to authorities for proceedings and, where appropriate, detain the vessel. Other provisions explain that if there are repercussions, the exposing state shall refer the case for proceedings and detain the vessel. The state shall also ensure that the vessels are not allowed to fish on the high seas until all sanctions imposed by the flag state are met.⁶¹ The flag state shall ensure that the investigation and proceedings are expedited and consider the sanctions where they are directly proportional to the severity of the violation.⁶² Failure of a flag state to meet its obligations under Article 19 can lead to international repercussions, exposing it to countermeasures and legal actions from affected states.⁶³ UNFSA also urges state parties to cooperate in the conservation and management of fisheries resources and in ensuring compliance with CMMs.

⁵⁷ Christopher J. Carr, "Recent Developments in Compliance and Enforcement for International Fisheries", *Ecology Law Quarterly*, vol. 24, no.4 (1997), pp. 847-860.

⁵⁸ See Article 19(1)(b) of UNFSA.

⁵⁹ David M McEvoy and John K. Stranlund, "Self-enforcing International Environmental Agreements with Costly Monitoring for Compliance", *Environmental and Resource Economics*, vol. 42, (2009), pp.491-508.

⁶⁰ Review Conference, *supra* note 41, (A/CONF.210/2023/6), para 98.

⁶¹ See Article 19(1) (d-e) of UNFSA.

⁶² See Article 19(2) of UNFSA.

⁶³ Tore Henriksen, Geir Hønneland and Are Sydnes. "The Fish Stocks Agreement", in *Law and Politics in Ocean Governance: The UN Fish Stocks Agreement and Regional Fisheries Management Regimes*. (Koninklijke Brill NV, 2005). p49.

Section B: Comparative Analysis UNFSA and other international agreements on Flag state duties

3.3. Analysis of UNFSA and other international instruments on Flag State

Duties

This section provides a detailed analysis of the international instruments governing flag state responsibilities in relation to the relevant provisions of UNFSA. It is divided into two sub-sections: binding instruments (Sections 3.3.1 to 3.3.3) and voluntary instruments (Sections 3.3.4 to 3.3.6). Each will explore key provisions, obligations, and implications for flag states.

3.3.1. United Nations Convention on the Law of the Sea

The LOSC offers very limited provisions on flag state responsibility in relation to fisheries, as the flag state duties at the time of adoption of the convention were primarily centred on merchant vessels. Also, the *SRFC Advisory opinion* of the International Tribunal for the Law of the Sea (ITLOS) noted that the convention does not explicitly address the responsibilities of flag states concerning IUU fishing.⁶⁴

The maritime jurisdictions demarcated under LOSC provide the basis for governing fishing operations in the EEZ and the high seas. Of most importance, given the focus on global fisheries resources therein, according to article 56(1)(a) of LOSC, coastal states have sovereign rights for conserving and managing marine living resources. Articles 61 and 119 of LOSC explain the duty of states to cooperate to conserve resources through subregional, regional, or global organisations, which was dealt with in detail in Article 8 of UNFSA. Also, Article 62(2) of LOSC allows the right of access to coastal resources. If the resources are available in surplus, coastal states can allow foreign vessels to fish in the EEZ, subject to access agreements with the relevant coastal state. According to Article 58(3) and Article 62(4), flag states are mandated to take necessary measures to prevent vessels flying their flags from engaging in IUU fishing within the EEZ of a coastal State.⁶⁵

Articles 63(2), 64(1), and 118 of the LOSC guide the States to cooperate on the conservation and management of straddling stock and high migratory species both within EEZ and in the high seas. Further, the agreement strengthens this cooperation by promoting the use of regional fisheries management organisations (RFMOs). Also, the above-mentioned Articles, along with

⁶⁴ Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) [Advisory Opinion] [2015] ITLOS Case No. 21. para 11, 34. Available at www.itlos.org.

⁶⁵ Ibid. para 111.

Articles 116-20 of the LOSC, discussed the conservation and management of living resources on the high seas, but they remained too general,⁶⁶ which was further elaborated in Article 5 of the UNFSA.

In its Advisory Opinion on Flag State Responsibility, ITLOS holds that the provisions of LOSC 91, 92, 94, 192, and 193 have general obligations that the flag states are to meet in all maritime zones under the convention.⁶⁷ Article 91 (1) of LOSC provides the right to states to grant nationality to ships. The flag state can also define the requirements for granting, and the states shall issue the documents based on their domestic law.⁶⁸

Article 73 permits a coastal state to board, inspect, arrest, and conduct judicial proceedings against foreign ships only within its EEZ to enforce national laws and for the conservation of living resources. According to Article 92 of LOSC, the flag state has exclusive jurisdiction over its vessel on the high seas. However, some exceptions allow a state to intervene in a vessel when it is suspected of its involvement in piracy, slave trade, a threat to the security (or) the integrity of the state (or) a stateless ship.^{69 70} However, LOSC does not provide compliance and enforcement measures associated with fishing activity on the high seas.

Article 94 of the LOSC is the cornerstone provision regarding flag state obligations, outlining a broad and non-exhaustive array of duties. Article 94 outlines the general responsibilities of flag states over ships flying their flag, including administrative, technical, and social matters⁷¹, which, by virtue of Article 58 (2), is also applicable to EEZ. Additionally, a flag state must take all necessary steps to ensure the maritime safety of the crew and the vessel. Flag states must also comply with international regulations, procedures, and practices as specified in Article 94(3) and (4). However, this does not address the need for distinct rules and regulations for fishing vessels and operations. Fishing vessels, which were initially not the primary focus, began to exploit regulatory gaps by registering under flags of convenience to avoid compliance with CMMs of RFMOs and engage in IUU fishing, which undermines the efforts to manage the stocks sustainably. ITLOS holds that Article 94 is an overarching provision capable of

⁶⁶ Budislav Vukas and Davor Vidas. "Flags of Convenience and High Seas Fishing: The Emergence of a Legal Framework", in *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes*. Olav Schram Stokke, eds. (Oxford Academic, 2001). pp.53-90.

⁶⁷ Advisory opinion, *supra* note 67, para 111.

⁶⁸ M.V. Saiga (No.2) Case, *supra* note 37, para 63.

⁶⁹ Robert C.F. Reuland, "Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction", *Vanderbilt Journal of Transnational Law*, vol.22, no.5. (1989), p.1161.

⁷⁰ See Article 110 (1) of LOSC.

⁷¹ See Article 94(1) of LOSC.

covering diverse subject matters. Since the duties to exercise jurisdiction and control are specified in other provisions of the LOSC and various treaties, Article 94 should not be interpreted too broadly to impose obligations beyond those explicitly stated in LOSC and related agreements.⁷²

All state parties to the convention have the general obligation to protect and preserve the marine environment. States also have the sovereign right to exploit their natural resources.⁷³ Further, ITLOS suggested that the flag state is under an ‘obligation to ensure’ vessels flying their flag comply with coastal states’ conservation measures for living resources in their EEZs, as these measures are essential for protecting and preserving the marine environment.⁷⁴ The flag state is under the “due diligence obligation” to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag,⁷⁵ following this, the Arbitral Tribunal used the due diligence obligation of the flag state in the South China Sea case, holding that China, the flag State, had failed to exercise due diligence to prevent fishing by Chinese flagged vessels at Mischief Reef and Second Thomas Shoal, thus violating the obligations under Article 58(3) of the LOSC.⁷⁶

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

The 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement) resulted from the need for an agreement to promote compliance with international conservation and management measures on the high seas during the Cancun Conference on Responsible Fishing in 1992, which was reiterated during several conferences and meetings in the 1990s. Back in the '90s, the Compliance agreement was “*a momentous achievement and a milestone in the international management of high seas fisheries*”.⁷⁷ Although resolution 15/93 urged the members to accept the agreement “as soon as possible,” the current party to the agreement is 45, less than the UNFSA, which opened for signature later. Although both treaties can be referred to as the "Two Pillars" safeguarding high seas fishing, the Compliance Agreement, the

⁷² Valentin Schatz, “Fishing for Interpretation: The ITLOS Advisory Opinion on Flag State Responsibility for Illegal Fishing in the EEZ”, *Ocean Development & International Law*, vol.47, no.4, (2016), p333.

⁷³ See Article 192 and 193 of LOSC

⁷⁴ Advisory opinion, *supra* note 36, para 120.

⁷⁵ Advisory opinion, *supra* note 36, para 129.

⁷⁶ The South China Sea Arbitration. (Philippines v China). Permanent Court of Arbitration. para 757.

⁷⁷ Report of the Conference of FAO. Twenty-seventh Session. Rome, 6-24 November 1993 (Resolution 15/93).

first internationally legally binding instrument focused specifically on flag state control and responsibilities, has not been as successful as the UNFSA. This disparity is due to several factors, including the Compliance Agreement's limited scope compared to the UNFSA, its perceived restrictiveness for some countries, particularly those without significant high seas fleets (or) does only apply to certain types of fishing vessels,⁷⁸ states which are parties to the agreement not effectively implementing the agreement in their national frameworks⁷⁹ and the lower level of global attention, as the UNFSA was built on the same international consensus following LOSC. Unlike UNFSA and LOSC, the Compliance Agreement does not include a specific clause that addresses how the agreement interacts with other treaties or obligations that its member states might have.⁸⁰

The UNFSA applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction. In contrast, the compliance agreement applies to fishing vessels on the high seas and includes commercial exploitation of living marine resources, which includes all types of fish stocks.⁸¹ It is important to note that the UNFSA refers specifically to “subregional and regional conservation and management measures.” At the same time, the Compliance Agreement includes “international conservation and management measures,” encompassing global ones.

The agreement was initially created to tackle the issues related to “reflagging,” where vessel owners tend to change the registration of their vessels to countries known as “flags of convenience” or “flags of non-compliance.” This helps them bypass the CMMs established by these organisations.⁸² The Compliance Agreement aims to enhance the role of flag states by ensuring that vessels without authorisation do not fish on the high seas, which does not undermine the effectiveness of international conservation and management measures, and to deny such authority unless able to control the fishing activity of the vessel.⁸³ This was

⁷⁸ See Article II of CA.

⁷⁹ FAO, “Study on the Implementation of the 1993 FAO Compliance Agreement”, Thirty-fifth Session of Committee on Fisheries, Rome, (5-9 September 2022). p3.

⁸⁰ Erik Franckx, “The Relationship between Cites, FAO and Related Agreements: Legal Issues”, FAO Fisheries and Aquaculture Circular No. 1062, Rome, (2011), p49.

⁸¹ See Article I (a) of CA.

⁸² Gerald Moore. The FAO Compliance Agreement. In *Current Fisheries Issues and the Food And Agriculture Organization of the United Nations*. (Eds) Myron H. Nordquist and John Norton Moore. (2000). p78.

⁸³ See Article III (1)-(3) of CA.

considered “*a new vision for high sea fisheries*”,⁸⁴ as the flag state can now oversee high sea fisheries.

These obligations complement articles 18 and 19 of the UNFSA. The Compliance Agreement, beyond the requirements set by the UNFSA, imposes a crucial obligation on states. It prohibits states from granting fishing authorisations to vessels that have changed their flag if the vessel is still under suspension from its previous flag state or within three years of having its fishing authorisation withdrawn by the former flag state.⁸⁵ This provision is designed to prevent “flag-hopping”,⁸⁶ Where vessels frequently change their registration to avoid regulations.

Article III (6) of the Compliance Agreement states that the flag State must keep a record of fishing vessels as outlined in Article 4. It is considered to be one of the pillars of the agreement, as it ensures the adequate flow of information to FAO on a real-time basis, which allows the development of a primary data bank on high seas fishing operations.⁸⁷ These vessels should be marked in accordance with globally accepted standards, such as the FAO Standard Specifications for the Marking and Identification of Fishing Vessels. However, the agreement does not specify details regarding the marking of fishing gear; this information can be found in Article 18(3)(d) of the UNFSA. Also, Article 18(3) (e) of UNFSA and Article III (7) of the agreement requires vessels to provide detailed information, including position, catch data, and fishing efforts, to ensure proper management and compliance with regulations. The Compliance Agreement addresses only a portion of the extensive compliance and enforcement framework established by the UNFSA. Specifically, Article III (8) mandates that parties must, but are restricted to, taking enforcement actions only against the vessels that violate the provisions.

Some critics argue that the Compliance Agreement is intended explicitly for countries that become parties to it and does not aim to influence customary international law, unlike broader agreements such as the UNFSA, as it focuses on institutional obligations and cooperation with

⁸⁴ Testimony of D. Balton, Deputy Assistant Secretary of State for Oceans and Fisheries. before the United States House Committee on Resources. Subcommittee on Fisheries Conservation, Wildlife and Oceans. 11 September 2003, US Congress online. Available at <http://resourcescommittee.house.gov/108cong/fish/2003sep II/balton.html>

⁸⁵ Article III (5)(a) of CA.

⁸⁶ One such example of Flag Hopping is the fishing vessel *Yongding*, suspected of illegal Patagonian toothfish fishing since 2001, was finally detained in Cape Verde in 2016. It evaded capture by registering under nine different flags and using 11 different names, making it difficult to track.

⁸⁷ Gerald Moore, *supra* note 82, p81.

the FAO.⁸⁸ While the Compliance Agreement complements and supports the broader objectives of the UNFSA, it has not been as widely adopted or impactful. The Agreement effectiveness in improving high seas fisheries management largely depends on the willingness of flag states to ratify and implement it. Balton, in his testimony before the subcommittee on Fisheries Conservation, stated that “If all States were parties to the FAO Compliance Agreement and other relevant international agreements, and if all states fully implemented their commitments under these instruments, there would be virtually no IUU fishing.”⁸⁹ Notably, many South and Southeast Asian countries, among the top 25 global fish producers, have not yet become parties to the agreement, limiting its overall reach and effectiveness.

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

The 2009 Agreement on Port State Measures (PSMA) is a recent and the first binding international agreement to specifically target and curb IUU fishing.⁹⁰ One of the significant steps in developing a legally binding instrument for preventing IUU fishing based on minimum standards for port state measures was the 2006 UNFSA Review Conference, which recommended that states initiate a process within the FAO Framework based on Article 23 of UNFSA,⁹¹ which was further endorsed by the 27th Committee on Fisheries.⁹² The failure or reluctance of many flag states to manage the fishing activities of vessels under their flag resulted in the international community focusing on port states. This can be seen in the increased number of states that have become parties to the agreement.⁹³ Also, the cost-effectiveness of inspections and enforcement in ports further supports the shift from the financially burdensome enforcement by flag states.⁹⁴ The duties of port states, as outlined in global agreements, have been changing and developing over time. This began with the UNFSA, which acknowledged that a port state not only has the right but also the responsibility to take actions in line with international law to support the effectiveness of CMMs at subregional,

⁸⁸ James Harrison, “The contribution of the Food and Agriculture Organization to international fisheries law” in *Making the Law of the Sea A Study in the Development of International Law*, (Cambridge University Press, 2011), p.212.

⁸⁹ Balton, *supra* note 84.

⁹⁰ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing, *Opened for Signature 22 November 2009*, UNTS 49611 (entered into force 05 June 2016).

⁹¹ Review conference 2006, *supra* note 36, para 108.

⁹² FAO, “Report of the 27 Session of the Committee on Fisheries”, FAO Fisheries Report No 830, Rome, (2007), para 68.

⁹³ As of 08.08.2024, the total parties to the PSMA stand at 79.

⁹⁴ Robert Daley, “New agreement establishing global port state measures to combat IUU fishing”, *Australian Journal of Maritime & Ocean Affairs*, vol.2, no.1, (2010). p29.

regional, and global levels.⁹⁵ Although the Port State Measures Agreement primarily emphasises port state control, it cannot act alone to curb IUU fishing with the necessary support rendered by flag states. Thus, Article 20 of PSMA has provisions on the role of flag states. The preamble of the agreement recognised that the measures to combat IUU fishing should build on the primary responsibilities of flag states.⁹⁶

Under the agreement, each Party is required to ensure that vessels flying its flag cooperate with port State inspections conducted under the Agreement,⁹⁷ and avoid using the so-called "ports of convenience"⁹⁸. Also, Article 20 (2) provides that the flag state could request the port state to inspect the vessel if the party believes that the vessel has been engaged in IUU fishing or related activities and that the ship is trying to enter or is already in the port of another country. The Agreement mandates that flag states that are parties must ensure their vessels comply with the inspections conducted by the port state. Upon receiving the inspection report, the flag state will "immediately and fully investigate" any alleged IUU fishing claim, and upon sufficient evidence, it will take enforcement action without delay.⁹⁹ Further, Article 20(5) directs the flag states to report the action taken against vessels involved in IUU fishing to port states, RFMOs, and FAO. This information should be provided when such determinations are made because of measures taken by port states under the Agreement.

Article 18 of the UNFSA provides a broad framework for flag state responsibilities related to regulation, monitoring, and enforcement. Meanwhile, Article 20 of the PSMA focuses on the specific interactions between flag states and port states, emphasising cooperation, prompt action, and reporting in response to port state inspections. Therefore, this Agreement will serve as an effective "second line of defence" against IUU fishing, providing a cost-efficient means of enforcing conservation and management measures when flag states are unwilling or unable to fulfil their responsibilities.

⁹⁵ See Article 23(1) of UNFSA.

⁹⁶ See Preamble of PSMA.

⁹⁷ See Article 20(1) of PSMA.

⁹⁸ Tang Jianye, "The Agreement on Port State Measures: A Commentary", *China Oceans Law Review*, vol.312, (2009). p327.

⁹⁹ See Article 20(4) of PSMA.

3.3.4. Code of Conduct for Responsible Fisheries

The 1995 FAO Code of Conduct for Responsible Fisheries (CCRF), adopted in the 28th Session of the FAO conference, consolidates the commitments outlined in major fishery instruments into a single, non-binding document. The 12 Articles of the Code are global in scope, encompassing different fields of fisheries, including capture, processing, and trade.¹⁰⁰ Even though the code is voluntary, FAO considers it to be a flag instrument.¹⁰¹ The Code aims to establish principles and criteria to build both national and international policies for responsible fisheries management.¹⁰² This voluntary code has specific provisions that are binding in other binding international fisheries agreements.

The Code reflects many of the provisions in the UNFSA, as it was primarily negotiated over three years alongside the UN Fish Stocks Conference.¹⁰³ In Article 3.2, the code stipulates that it must be interpreted and applied in alignment with other international laws, including the LOSC and the UNFSA. States must exercise effective control of overfishing vessels flying their flags to ensure compliance with CMMs and data reporting obligations in accordance with laws adopted at national, subregional, regional, or global levels.¹⁰⁴ Further, Article 7.7.5 of CCRF is in line with Article 17 of UNFSA, which focuses on the flag state of non-members or non-participants to any organisations or arrangements.

The dedicated Article 8.2 on flag state duties has several provisions in line with Articles 18 and 19 of UNFSA, which include maintaining a record of fishing vessels, authorising fishing vessels, vessel and gear marking based on international systems, and enforcement measures.¹⁰⁵ Notably, Articles 8.2.5 and 8.2.8 emphasise safety requirements and social protection for the crew. CCRF remains a non-binding yet influential framework. It harmonises closely with the UNFSA for the future development of international fisheries law by reflecting its principles and provisions, particularly in areas of flag state duties, conservation measures, and international cooperation.

¹⁰⁰ Code of Conduct on Responsible Fisheries. Food and Agriculture Organization of the United Nations. Adopted on 31 October 1995. Available at <https://www.fao.org/responsible-fishing/resources/detail/en/c/1316854/>

¹⁰¹ Serge M Garcia and David J Doulman, “FAO Fisheries Programme and the Plan of Implementation of the World Summit on Sustainable Development”, in *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources*. Syma A. Ebbin, Ald Hakon Hoel and Are K Sydnes, eds. (Springer, 2005), p170.

¹⁰² Article 2.2 of CCRF.

¹⁰³ See Meltzer, *supra* note 42. p20..

¹⁰⁴ Article 6.11 of CCRF.

¹⁰⁵ Articles 8.2.1-8.2.7 of CCRF.

3.3.5. International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing

At its twenty-third session in 1999, the FAO Committee on Fisheries (COFI) identified IUU fishing as a top priority and recommended the development of an International Plan of Action. The COFI approved the IPOA-IUU by consensus on 2 March 2001 and urged all Member States to take the necessary steps to implement it.¹⁰⁶ The objective of the IPOA-IUU is to deter IUU fishing by providing all States with comprehensive, effective, and transparent measures. Even though the code is voluntary, it is elaborated within the framework of CCRF and includes measures to be taken by flag States, coastal States, port States, and RFMOs, among others.¹⁰⁷

The plan encouraged the states to ratify the binding international fisheries agreements, such as the LOSC, UNFSA, and Compliance agreements, as a matter of priority. It recommended states which are non-parties to these agreements that it should not act in a manner inconsistent with these agreements.¹⁰⁸ Further, it states that fishes in high seas that are not regulated by RFMO should implement their obligations under Part VII of the LOSC.¹⁰⁹ The plan recognises the flag state's primary responsibility over vessels operating on the high seas and asks that they should take possible actions to prevent IUU fishing conducted by flagged vessels.¹¹⁰

Section 4 forms the substance of the IPOA-IUU and contains measures to be taken by States and RFMOs. The plan outlines the establishment of a comprehensive MCS system, including implementing VMS systems and observer programs in accordance with national, regional, or international standards. Further, the IPOA advises the States to effectively implement national and, when relevant, internationally agreed procedures for boarding and inspecting fishing vessels and acknowledges that such boarding and inspection regimes are outlined in some international agreements, like the UNFSA, and apply only to the parties involved in those agreements.¹¹¹ States are urged to take all feasible actions, in line with international law, to prevent, deter, and eliminate IUU fishing activities by non-cooperating States within relevant provisions of RFMOs. Additionally, the Plan advocates for coordinated efforts and direct cooperation among States, and through relevant RFMOs, with Flag states encouraged to enter

¹⁰⁶ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). Food and Agriculture Organization of the United Nations (FAO). Adopted on 2 March 2001. Available at <https://www.fao.org/iuu-fishing/international-framework/ipoa-iuu/en/>.

¹⁰⁷ Ibid. para 4,8.

¹⁰⁸ Ibid. para 11.

¹⁰⁹ Ibid. para15.

¹¹⁰ Ibid. para18.

¹¹¹ Ibid. para 24.

into agreements or arrangements with other states to ensure the enforcement of laws and conservation measures at national, regional, or global levels.¹¹²

A separate section of flag state responsibilities under IPOA ensures that fishing vessels flying their flag do not engage in IUU fishing. Before registering a vessel, a flag state must verify that it can fulfil its responsibilities to prevent IUU fishing. Also, States should avoid flagging vessels with a history of non-compliance unless there is clear evidence of ownership change or other justifications. Flag states should have necessary measures in place to prevent reflagging for non-compliance and to avoid flag hopping. Flag states must maintain detailed records of fishing vessels and ensure that all vessels, including those operating on the high seas, have valid fishing authorisations. They should also impose conditions on fishing authorisations, such as vessel monitoring and catch reporting, and ensure their vessels do not support IUU fishing activities. Furthermore, flag states must regulate transshipment at sea, including reporting and authorisation, and make relevant catch and transshipment data available to national and international organisations.¹¹³

3.3.6. Voluntary Guidelines of Flag State Performance

The global fisheries governance framework is complicated, being tightly packed with both binding laws and voluntary commitments, which makes it challenging to assess whether a flag state fully meets its responsibilities. This was reiterated by the members in the 27th COFI, where members raised concerns about irresponsible flag states and suggested that the committee develop criteria for assessing the performance of flag states as well as to examine possible actions against vessels flying the flags of states not meeting such criteria.¹¹⁴ An ‘Expert workshop on flag state responsibilities: assessing performance and taking action’ organised by the Department of Fisheries and Oceans of Canada in March 2008, in collaboration with the FAO, noted that “*lack of flag State control might be due to the flag State being unaware of the requirements, being unable to implement the requirements, or lacking the political will to do so.*”¹¹⁵

Built on the outcomes of the Vancouver workshop, a series of FAO consultations took place in 2011, 2012, and 2013. Finally, the FAO Technical Consultation on flag state performance

¹¹² Ibid. para 20,22,28.

¹¹³ Ibid. para 34-50.

¹¹⁴ FAO. *supra* note 92. p11.

¹¹⁵ Report of Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action, Guidance Document. 25-28 March 2009. Department of Fisheries and Oceans of Canada. p2.

adopted the Voluntary Guidelines of Flag State Performance (VGFSP) in 2013¹¹⁶. These guidelines focus on the role of the flag state in combating IUU fishing based on existing international law. They establish criteria and procedures for evaluating the performance of flag states, registration and record of fishing vessels, authorisations, MCS and outline provisions for cooperation between flag states and coastal states and support for developing countries. These guidelines are voluntary, and they have been developed based on the elements of LOSC. In exercising the responsibility, a flag state should adhere to international law, respect the sovereignty of the coastal state, and combat IUU fishing. This includes maintaining authorised vessels flying their flag, ensuring that those under its jurisdiction do not engage in IUU activities, and taking necessary action against non-compliance. The flag state must also prioritise the CMMs, cooperate with other states, and exchange information among relevant national agencies and with other states.¹¹⁷

VGFSP extends the duties outlined in Article 18 of UNFSA by emphasising the incorporation of international laws into national legislation, ensuring that vessels do not engage in activities undermining CMMs of RFMOs and contributing to the functioning of RFMO by fulfilling the reporting requirements of fishing and related activities either as a contracting party or as a cooperating non-party. Both documents stress that the flag state must effectively exercise control and oversight over vessels under its flag.¹¹⁸ The guidelines provide a detailed framework for maintaining and sharing vessel records on registration, deregistration, and suspension; it also includes procedures for vessel registration and verification of vessel records and specifies that flag states follow the marking of fishing vessels according to the FAO Standard Specifications and Guidelines for Marking and Identification of Fishing Vessels. Flag State should undertake comprehensive and effective MCS of fishing and fishing-related activities. Further, these states should implement timely sanctions and ensure they are proportionate to the seriousness of the violation. It also stresses the need for judicial and administrative processes capable of enforcing these sanctions effectively.¹¹⁹ Although the VGFSP provides a comprehensive framework, its effectiveness is challenging, as it is a “soft law” and voluntary. However, because the VGFSP extensively covers flag state duties outlined

¹¹⁶ Voluntary Guidelines of Flag State Performance. Food and Agriculture Organization of the United Nations (FAO). Adopted on 20 June 2014. Available at <https://www.fao.org/iuu-fishing/international-framework/voluntary-guidelines-for-flag-state-performance/en/>.

¹¹⁷ Ibid. para 2.

¹¹⁸ Ibid. para 6-10.

¹¹⁹ Ibid. para 38.

in other international agreements, it can serve as a foundational basis for developing binding instruments at national or regional levels,¹²⁰ or separate legally binding instrument on flag state performance.¹²¹ Notably, the PSMA evolved from the Model Scheme, which was also a soft law instrument.

Table 2: Extent of Obligations in International Instruments for Flag State Responsibilities related to Fishing Vessels (*Red – None; Yellow- Limited; Green – Comprehensive*)

Duties / Responsibilities	LOSC	UNFSA	CA	PSMA	CCRF	IPOA-IUU	VGFSF
Nature	Binding	Binding	Binding	Binding	Voluntary	Voluntary	Voluntary
Authorisation of vessels	Yellow	Green	Green	Yellow	Green	Green	Green
Maintenance of Vessel Records	Red	Green	Green	Red	Green	Green	Green
Enforcement of CMMs	Yellow	Green	Yellow	Yellow	Green	Green	Green
Cooperation with RFMOs	Yellow	Green	Yellow	Yellow	Yellow	Green	Green
MCS	Red	Green	Red	Red	Yellow	Green	Green
Safety and Social Protection of Crew	Yellow	Red	Red	Yellow	Green	Yellow	Red
Marking of Vessels and Gear	Red	Green	Yellow	Red	Green	Green	Yellow
Obligations Related to Non-Members	Yellow	Green	Green	Green	Red	Green	Green
Enforcement Actions by Flag States	Yellow	Green	Yellow	Yellow	Green	Green	Green
Coordination with Port States	Red	Yellow	Yellow	Green	Yellow	Green	Red

¹²⁰ Karine Erikstein and Judith Swan, “Voluntary Guidelines for Flag State Performance: A New Tool to Conquer IUU Fishing”, *The International Journal of Marine and Coastal Law*, vol 29, (2014). p146.

¹²¹ Hai and Others, “International Soft Laws against IUU Fishing for Sustainable Marine Resources: Adoption of the Voluntary Guidelines for Flag State Performance and Challenges for Taiwan”, *Sustainability*, vol.12. (2020). p14.

CHAPTER II. ASSESSMENT OF LEGAL FRAMEWORKS IN SOUTH ASIA

Section A: Evaluation of existing legal frameworks in South Asia

3.4. Status Selected Fisheries Instruments and Regional Fisheries Bodies in South Asian Countries

International Fisheries Law refers to agreements, organisations, and practices that are global in scope and collectively shape the structure and order of international fisheries governance. States should adhere to international agreements, as these frameworks are essential for ensuring sustainable fisheries management, combating IUU fishing, and gaining equitable access to shared marine resources by promoting regional and global cooperation in fisheries management. States that are parties to multilateral conventions or agreements, as well as those that adopt or endorse international non-binding instruments embodying principles of international law, have a primary duty to ensure that their national policies and instruments are in line with the obligations of the international agreements. Also, non-party states may nonetheless find themselves bound by some aspects of international fisheries agreements if these elements reflect customary international law. Table 3 provides a comprehensive overview of the participation and status of the South Asian countries in global fisheries law instruments and regional bodies.

Table 3: Overview of Selected Instruments and Regional Fisheries Bodies in South-Asian Countries

	Bangladesh	India	Maldives	Sri Lanka
Hard Law				
1982 LOSC	Party (RAT:27/07/01)	Party (RAT:29/06/95)	Party (RAT:07/09/00)	Party (RAT:19/07/94)
1993 FAO Compliance Agreement	Not Party	Not Party	Not Party	Party (ACP: 29/08/14)
1995 UNFSA	Party (RAT:05/11/12)	Party (ACS:19/08/03)	Party (RAT:30/12/98)	Party (RAT:24/10/96)
2009 PSMA	Party (ACS: 20/12/19)	Not Party	Party (ACS:17/03/17)	Party (ACS:20/01/11)
Soft Law				
NPOA-IUU	Adopted (2019)	Not Adopted	Adopted (2019)	Adopted (2013,2015,2020)
NPOA-Sharks	Adopted (2022)	-	Adopted (2015)	Adopted (2013)
Regional Fisheries Management Bodies				
Indian Ocean Tuna Commission (IOTC)	Contracting Party (ACP: 24-04-18)	Contracting Party (ACP: 13-04-95)	Contracting Party (ACP: 13-07-11)	Contracting Party (ACP: 13-06-94)

	Bangladesh	India	Maldives	Sri Lanka
Southern Indian Ocean Fisheries Agreement (SIOFA)	Not Party	Cooperating non-Contracting Party	Not Party	Not Party
Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)	Not Party	Contracting Party (ACP: 17-06-85)	Cooperating non-Contracting Party	Not Party
Regional Fishery Advisory Bodies				
Bay of Bengal Programme Inter-Governmental Organisation (BOBP-IGO)	Contracting Party	Contracting Party	Contracting Party	Contracting Party
Southwest Indian Ocean Fisheries Commission (SWIOFC)	Not Party	Not Party	Contracting Party	Not Party

*RAT - Ratification; ACS - Accession; ACP - Approval

3.5. Assessment of Legal Frameworks in South Asia in relation to selected Articles of UNFSA

3.5.1. Overview of Fisheries Legal Instruments in Bangladesh

The Private Fisheries Protection Act 1889 (Act No. II of 1889) was enacted to protect the right to fish in private waters and prohibits fishing in private waters and erecting, placing, maintaining, or using any fixed gear. The Protection and Conservation of Fish Act of 1950 (Act XVIII of 1950), which was subsequently amended in 1982, 1995, and 2002, includes provisions for a ban on destructive fishing, control over the catching season, and minimum size of fish to be caught from water. Marine Fisheries Ordinance, 1983 (No. XXXV of 1983) was the first exclusive law to make provisions for the management, conservation, and development of marine fisheries in Bangladesh, which the Marine Fisheries Rules, 1983 accompanied. A recent addition to the legal framework of Bangladesh is the Marine Fisheries Act 2020 (Act No. XIX of 2020), which was enacted to reflect the needs of the time, repealing the Marine Fisheries Ordinance 1983. The Act was followed by Marine Fisheries Rules 2023 with detailed provisions on IUU fishing. Although the act was perceived to update the old law, it contains several provisions from the latter. Also, Bangladesh enacted the Territorial Waters and Maritime Zones Act in 1974 (Act No. XXVI of 1974), which was amended in 2017 for the declaration of maritime zones and related provisions. Further, the Merchant Shipping

Ordinance, 1983 (Ordinance No. XXVI of 1983) has provisions for the registration of marine fishing vessels.

Apart from the legal instruments, the country formulated the National Fisheries Policy in 1998, which provided a foundation for managing the fisheries sector. This was followed by the National Fisheries Strategy 2006 – Marine Fisheries Sub-Strategy with the objective of ensuring the sustainable management of the marine sector through the allocation of fishing rights and its management to communities and relevant fishing groups and by providing the regulatory framework for this management. The Marine Fisheries Management Plan of 2021 (Part 1 – Industrial) presents the plan “on the ecosystem approach for the sustainable development and harvest of marine fisheries.” In 2019, as a significant step to curb IUU fishing, Bangladesh developed a National Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (NPOA-IUU), in line with the IPOA-IUU. To further promote responsible fishing practices and ensure compliance with international, regional, and national regulations, the Marine Fishing Policy of 2022 was introduced.

3.5.2. Analysis of Legal Instruments of Bangladesh with UNFSA provisions

To implement the rights and responsibilities of Bangladesh concerning the freedom of fishing on the high seas, fishing vessels of Bangladesh are subject to provisions of the Territorial Waters and Maritime Zones (Amendment) Act 2021, as well as other international laws, as per the duties of the flag states detailed in UNFSA. Further, the act states that the ships that fly the flag of Bangladesh should have a genuine link with the state. Bangladesh has exclusive enforcement jurisdiction over the vessel unless provided in international treaties or conventions like IOTC, where authorised officers and observers may exercise their powers within and beyond areas of national jurisdiction in accordance with international law.¹²² The government shall also maintain a register for the names and other details of its ships. The act directs the government to create and enforce laws based on bilateral or multilateral agreements to establish cooperative mechanisms for preserving and protecting fish stocks in the high seas and the EEZ, and it may also issue related rules.¹²³

The Registration of Marine fishing vessels is under the purview of the Mercantile Marine Department (MMD), detailed in the Merchant Shipping Ordinance 1983.¹²⁴ The Ordinance

¹²² IOTC. “Evidence in fisheries offenses: effective collection and use. Laws, procedures, prosecutions, illegal, unreported and unregulated fishing vessel listing”. FAO, Victoria, (2023), p29.

¹²³ Bangladesh, Territorial Waters and Maritime Zones (Amendment) Act 2021, sect 7C.

¹²⁴ Bangladesh, Merchant Shipping Ordinance, 1983.

requires mechanised (power-driven) fishing vessels over 15 tonnes to be registered with MMD, and details are entered in the fishing vessel register maintained by the department.¹²⁵ However, the Marine Fisheries Act 2020 stipulates provisions for licensing vessels of a capacity of less than 15 tonnes.¹²⁶ Further, the Department of Fisheries will manage the national register of fishing vessels for which license permits are provided.¹²⁷ Multiple registers are maintained by different ministries for different types (sizes) of vessels, in accordance with the UNFSA provisions.

The authorisation to fish (licenses), including commercial trawlers and mechanised fishing vessels for fishing in the Marine Fishing Waters area or deep sea (*which, according to the act, are the territorial sea and the international waters outside the exclusive economic zone*), relies on the Director of Fisheries, based on the submission of the documents, including the Certificate of Registration and Certificate of Inspection issued by MMD. However, commercial trawlers need prior permission from the government before obtaining the license; without the permit, no person shall fish in the marine fishing waters area or deep sea.¹²⁸ The director can reject the authorisation to fish (license) if the vessel is listed as illegal by Bangladesh, other countries, or any regional organisation. An authorised officer shall order the skipper to show a license and voyage permit during the journey of harvesting the fish at sea (or) during harvesting (or) post-harvest transportation.¹²⁹ One of the license conditions is that fishing vessels should install a turtle excluder device on shrimp trawlers to reduce bycatch during fishing operations. Additionally, the conditions state that the bycatch must not exceed the percentage limits specified in the bycatch fisheries management plan.¹³⁰ The authorisation to fish is in concordance with provisions of flag state duties of the UNFSA, especially Article 18(3), and also in accordance with Article 94 of LOSC. Further, UNFSA emphasises cooperation between countries, and through the RFMO, the provision above mentions that the license of the vessel will be rejected if the vessel is listed illegally in other countries or regional organisations, thereby promoting coordination across jurisdictions.

Section 6 (1) of Marine Fishing Rules 2023 provides a detailed definition of IUU fishing and actions to be taken against the vessels involved in IUU fishing. The rules also outline that

¹²⁵ Ibid. chapter 32(388)

¹²⁶ Bangladesh, Marine Fisheries Act, 2020, sect 21.

¹²⁷ Bangladesh, Marine Fishing Rules, 2023, para 5 (*unofficial translation*)

¹²⁸ Bangladesh, *supra* note 126, chapter 3, sect 7-9.

¹²⁹ Bangladesh, *supra* note 127, para 7.

¹³⁰ Ibid. sect 10(17, 23).

vessels should report fishing activities in the designated area of the concerned agreement.¹³¹ The conditions also cover any law (or) regulation applicable to the conservation and management of fishery resources in force in Bangladesh and any provision or condition of any convention, treaty, or agreement signed or ratified by Bangladesh, notwithstanding the provision of the act. Section 6 (1) closely aligns with the flag state duties of UNFSA by defining IUU fishing, which in turn obligates the state to comply with CMMs and stresses the need for data reporting. It is here to be noted that Section 6(1) defines IUU fishing, which highlights challenges posed by non-member states, which may engage in fishing activities without adhering to CMMs. Bangladesh, through its Marine Fishing Rules, acknowledges these challenges and establishes a framework to mitigate them, which is in line with Article 17 of UNFSA.

Sections 16 and 17 of the Marine Fisheries Act 2020 direct the vessel owner to manage the details regarding the voyage, fishing logbook, and stacking sheets. The individual should also submit a copy of the details of the fish caught and details of sales to the director in the prescribed manner. This is further detailed in sections 7 and 18 of the Marine Fishing Rules, 2023. The requirement to maintain detailed records of fishing activities reinforces the flag state compliance with UNFSA responsibilities.

Further, the harvested fish shall not be landed in any landing centre other than the specified landing centre mentioned in the sea voyage permit (or) transferred (or) handed over to any other vessel at sea.¹³² These provisions help monitor and verify the landed catch, increase the accuracy of catch reporting, prevent illegal landings and transshipments, and report catch data according to the RFMO Guidelines.¹³³

Section 20 of the Merchant Shipping Ordinance, 1983 made marking the ship mandatory for registration, and it has been made compulsory to obtain a license for fishing,¹³⁴ with a criterion that it should be visible and written in Bengali and English.¹³⁵ Detailed provisions for fishing vessel identification marking have been provided in Section 32 of Marine Fishing Rules 2023. Failure to mark the vessels as per the prescribed instructions includes a penalty of

¹³¹ Ibid. sect 6.

¹³² Ibid. sect10 (2,4,5).

¹³³ IOTC. Guidelines for the reporting of fisheries statistics to the IOTC. Available at <https://data.iotc.org/reference/latest/guidelines/>.

¹³⁴ Bangladesh, *supra* note 124, sect 16(1).

¹³⁵ Bangladesh, *supra* note 127, sect 10(25).

imprisonment up to 2 years (or) with a fine not exceeding 8500 USD,¹³⁶ which is much higher than the penalty mentioned in the 1983 ordinance.¹³⁷ UNFSA requires flag states to ensure their vessels are clearly marked for easy identification and to strengthen the enforcement mechanisms; higher penalties for failing to mark vessels properly are coupled with this requirement. Proper vessel marking helps in curbing IUU fishing as it ensures vessels can be easily identified and tracked.

The Director General can also issue orders related to MCS of fishing vessels and fishing upon prior approval from the government.¹³⁸ The skipper of the flagged vessel shall keep the instrument (*not specified as a Vessel Monitoring System*) in operation to continuously monitor the movement of the vessel and not to disable the instrument. Every fishing vessel should respond to the signal of the office on duty at the Marine Fisheries Surveillance Check Post.¹³⁹ This provision helps the flag state to track the vessel's movements, thereby supporting its obligations to prevent IUU fishing by the fleets. Also, the IOTC resolution calls for adopting a satellite-based VMS for all vessels operating outside EEZ involved in fishing of species covered by the IOTC agreement.¹⁴⁰

Chapter 8 of the Marine Fisheries Act, 2020 authorises officers from the Department of Fisheries, Navy, Coast Guard, Customs, or any other officer appointed by the Government of Bangladesh to inspect and search Bangladeshi flagged vessels if there is a valid reason to believe that fish have been harvested, transported, or stored in violation of the provisions of this Act. Authorised officers may inspect the quantity, type, or nature of the catch of fish.¹⁴¹ Further, the officer might ask the skipper to show the license and sea voyage permit during the journey of harvesting fish at sea (or) during harvesting (or) post-harvest transportation and allow the officer-in-charge to inspect the vessel.¹⁴² The catch shall be released in the presence of an authorised officer, and the skipper/owner/representative of the vessel is obliged to cooperate with the authorised officer.¹⁴³ Additionally, the Bangladesh Coast Guard is tasked with preventing illegal fishing in maritime areas of Bangladesh.¹⁴⁴ Effective MCS

¹³⁶ Bangladesh, *supra* note 126, sect 45.

¹³⁷ Bangladesh, *supra* note 124, sect 45.

¹³⁸ Bangladesh, *supra* note 127, sect 31(j).

¹³⁹ Ibid. sect 10(8, 15).

¹⁴⁰ IOTC, Resolution 15/03 On the Vessel Monitoring System (VMS) Programme, p25.

¹⁴¹ Bangladesh, *supra* note 126, sect 16(4).

¹⁴² Bangladesh, *supra* note 127, sect 10(5)(6).

¹⁴³ Bangladesh, *supra* note 126, sect 18(6)(9).

¹⁴⁴ Bangladesh, Coast Guard Act, 1994, sect 7(b).

implementation is vital for the long-term conservation and sustainable exploitation of fish stocks. Even though there is no mention of High Seas Boarding and Inspection (HSBI) in the Marine Fisheries Act 2020 of Bangladesh, the provisions ensure compliance with Article 19 on compliance and enforcement by granting the authorised officers to verify compliance with licensing and other operational requirements.

If a person is arrested for violating this Act, they must be brought to the nearest police station "*as soon as possible*." The police station shall then take appropriate action in accordance with this act, the associated rules, and the code of criminal procedure, 1898 (Act No. V of 1898). Suppose the person is convicted of violating this act or its rules. In that case, the court may, in addition to any penalties imposed, order the confiscation of cargo, fishing gear, vessels, and other equipment. The court may also suspend the person's license for a specified period. The government shall be responsible for disposing of any items confiscated under these provisions. Any offence committed by a person in the Marine Fisheries Waters of Bangladesh in violation of this act or rules shall be deemed to be a punishable offence under this Act and shall be tried by any court in Bangladesh as if the offence had happened anywhere in Bangladesh. These provisions reflect the UNFSA provisions on timely enforcement actions and ensure that the violations are addressed efficiently; further, suspending the person's fishing licence for violations helps to prevent repeated violations and provides the responsibilities of fishers to adhere to the fisheries regulations.

Fishing-related violations and corresponding sanctions/penalties can be found in different sections across chapters of this act. These include harvesting fish in restricted areas (Section 3[3]), violating directives to prevent IUU fishing (Section 5[3]), fishing without a license (Section 7[2]), and violating license conditions (Section 15[4]). Further offences include harvesting fish in violation of license terms (Section 16[6]), unloading a catch without prior notification (Section 16[9]), failing to provide details of fish caught (Section 17[2]), and artisanal vessels catching fish without permission (Section 21[8]). Further, the Act provides penalties for obstruction of duty office (or) officer-in-charge, damage to fishing vessels, destruction of evidence (or) operating vessels without marking and crime committed by a person aboard of the ship, preserving, selling illegally caught fish, adding the crime and recurrence of offences.¹⁴⁵ Article 19 encourages effective enforcement measures, and these provisions for sanctions and penalties are needed to ensure that the flag vessels comply with

¹⁴⁵ Bangladesh, *supra* note 126, chapter 10.

CMMs. These provisions help maintain control of overfishing activities and effective monitoring and compliance and accounts transparency and accountability,

3.5.3. Overview of Fisheries Legal Instruments in India

In India, the management and regulation of fisheries is decentralised. According to the Constitution of India, the responsibilities for fisheries management are shared between the central and state governments. The Union List (List I) Entry 57 grants the central government authority over "Fishing and fisheries beyond territorial waters," enabling it to legislate on matters related to fishing in the Exclusive Economic Zone (EEZ) and international waters. On the other hand, the State List (List II) Entry 21 pertains to "Fisheries," which includes fisheries within the state's territorial sea, internal waters, rivers, and inland fisheries, allowing state governments to manage and regulate the above-mentioned areas (i.e., 'territorial waters' as defined in the law of India)

The coastal states of India enacted exclusive Marine Fisheries Regulation Acts (MFRAs) to regulate fishing and conservation measures in territorial waters, and these were subsequently amended. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act 1976 (Act No. 80 of 1976) enables the government to take measures to protect the marine environment and exploit marine resources in the region. Further, to control the fishing activities of foreign vessels, the Maritime Zones of India (Regulations of Fishing by foreign vessels) Act, 1981 (Act No. 42 of 1981), was introduced. Further, as a part of the economic reforms programme, the New Deep Sea Fishing Policy 1991 was announced for the operation and leasing out of foreign vessels and test fishing in the Indian EEZ.

This was followed by several policies exclusive to the marine fisheries sector, including the Comprehensive Marine Fishing Policy 2004, the National Policy on Marine Fisheries Policy 2017. Apart from these acts, rules, and policies, several bills have been prepared and are awaiting approval, such as the Draft National Fisheries Policy 2020, the Indian Marine Fisheries Bill 2021, the Indian Antarctic Bill 2022, and the Draft Guidelines for the Regulation of Fishing by Indian-Flagged Fishing Vessels in the High Seas 2022.

3.5.4. Analysis of Legal Instruments of India with UNFSA provisions

The analysis focuses on evaluating the legal instruments adopted by the Central Government. Since most flag state duties are covered under the legislation of coastal states and Union Territories (UTs), the analysis will include standard provisions in the Marine Fishing

Regulations Acts of coastal states of India with examples from Tamil Nadu (a coastal state/province of India).

Part XV-A of the Merchant Shipping Act 1958 (Act No. 44 of 1958), last amended in 2002, provides the legal framework for registering fishing boats.¹⁴⁶ It provides various provisions regarding the definition of an Indian fishing boat, obligations to register, port of registry, registrars of Indian fishing boats, certificate of registry, painting of fishing boats, change of name, inspection of safety equipment, and transfer of registry. Additionally, under section 435U, the Central Government may make rules to carry out the provisions of this Act. According to section 435W, the Central Government may, by notification in the Official Gazette, require every Indian fishing boat or any specified class of Indian fishing boats to furnish fishery data to the registrar in a prescribed form and at specified intervals. However, there has been no rule from the central government to provide the fishery data for Indian-flagged vessels. Provisions of this act align with Article 18 of the UNFSA by clearly defining and establishing a port of registry and a registrar of fishing boats to ensure the flag state measures.

Indian flag fishing boats of length 20 meters and above were required to be registered with the Mercantile Marine Department of the Govt. of India.¹⁴⁷ In 2014, further notifications (GSR-594(E) and GSR-595(E)) expanded the scope to allow State and Union Territory (UT) authorities to handle these tasks, including delegation of survey and certification responsibilities.¹⁴⁸ In 2020, New notification S.O. 2986(E) delegated the Central Government's powers under section 9(1) to state fisheries departments and UT Administrators for Part XV-A regarding fishing boats. Further, G.S.R. 543(E) supersedes the 2014 notification (GSR-595(E)), specifying new ports/places and appointing registrars for Indian fishing boats. Thus, coastal states, under their Marine Fisheries Regulation Act and rules, can perform registration and licensing of fishing vessels.¹⁴⁹ By decentralising the powers, the states can effectively perform the flag state duties, considering the larger number of fishing vessels in India.

The Territorial Waters, Continental Shelf, Exclusive Economic Zone, and Other Maritime Zones Act 1976 exempts Indian citizens from requiring *special* permission, a license, or an agreement with the Central Government to fish in the EEZ up to 200 nautical miles. In contrast,

¹⁴⁶ India, Merchant Shipping Act 1958, part XV-A.

¹⁴⁷ India, Notification GSR-449(E) [F. No. SR-1901410112009-MG], 2013.

¹⁴⁸ India, DGS Order No.03. of 2018.

¹⁴⁹ India-Tamil Nadu, Marine Fishing Regulation Act, 1983, sect 10.

other activities like exploration or construction require government authorisation.¹⁵⁰ In 2014, the Central Government published guidelines for the operation of Deep-Sea Fishing Vessels in the Indian EEZ. However, the guidelines were rescinded in an order dated 30 January 2017.¹⁵¹ Indian fishing vessels that are licensed and registered with the competent authority and operate with an entire Indian crew are permitted to fish within EEZ, provided they do so in a sustainable manner.¹⁵² For licensing, every registered fishing vessel shall be brought for inspection and physical verification by the authorised officer every year at the renewal of the license. Further, every mechanised fishing vessel shall obtain a daily fishing permit from the authorised officer to venture into the sea.¹⁵³ In reply to a Right-To-Information application, the Department of Fisheries informed that the coastal state of India (Maharashtra) is the regulatory authority for fishing in the EEZ.¹⁵⁴ This likely refers to the role of the coastal state in implementing and enforcing specific regulations within the EEZ as delegated or coordinated by the central government. Mandating the licensing of fishing vessels and obtaining a fishing permit for mechanised fishing vessels from an authorised officer before venturing into the sea reinforces the flag state duties of UNFSA. Even though licensing falls under the mandate of the coastal states, there have been no clear rules for licensing fishing beyond territorial waters and on the high seas.

Merchant Shipping (Registration of Indian Fishing Boats) Rules 1988 provide guidelines for painting the distinguishing letters indicating the port of registry, the name of the fishing boat, and the number assigned to it.¹⁵⁵ However, the MFRA of coastal states has provided detailed guidelines. Every vessel registered under the act shall carry a registration mark and be painted with a specific colour code. These rules support compliance with Article 18 (3) (d) of the UNFSA. However, it is essential to note that except in a few states of India, there are no uniform gear marking rules, which is also one of the requirements under the duties of the flag state.¹⁵⁶

Every registered fishing vessel, according to size, shall have a sea safety, surveillance, and communication system (especially for Mechanised Fishing Vessel, VMS shall be provided in

¹⁵⁰ India, Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, sect 7.

¹⁵¹ India, Order No. 21001/12/2011-FY(Ind), 2017.

¹⁵² India, Order No. 21002/12/2011-FY(Ind), 2017.

¹⁵³ India-Tamil Nadu, Marine Fishing Regulation Rules, 2020, sect 8.

¹⁵⁴ India, Order No. 21006/243/2018- Fy(Ind), 2019.

¹⁵⁵ India, Merchant Shipping (Registration of India Fishing Boats) Rules, 1988, sect 8.

¹⁵⁶ Leela Edwin and Others. Fishing Gear Marking: A technique for traceability of lost gears. Fish Technology Reports. Vol. 6. No.1. (2020). p1-2.

every vessel that stays at sea for more than 48 hours and in every vessel that travels a distance more than 50 nautical miles from the base of operation).¹⁵⁷ The implementation of VMS is essential for monitoring fishing activities and ensuring compliance with the existing regulations. These provisions align with the requirements of UNFSA article 18 (3) (g) and to develop effective measures for compliance and enforcement. It is also worth noting that not all coastal states of India have mandated VMS at the time of this report.

Voluntary catch reporting has not been streamlined in any of the legislative instruments of India, which is a significant gap. UNFSA encourages flag states to establish data collection of the catch of target and non-target species and other related data, as it is crucial for assessing stock health.

The Reserve Bank of India issued guidelines for the mid-sea transshipment of catches by Indian-owned deep-sea fishing vessels, addressing regulatory challenges in the export declaration and reporting under the Foreign Exchange Management Act, 1999 (Act No. 42 of 1999). The guidelines allow exporters (i.e., the company (or) enterprise that owns the vessel) to submit a guaranteed remittance form, signed by the Master of the vessel, in place of customs certification, detailing the catch's composition, quantity, value, and transfer date.¹⁵⁸ The RBI guidelines streamline the mid-sea transshipment process in accordance with article 18 (3)(h); however, since most states lack significant VMS regulations, it is feared that this compliance will be challenging to ensure.

Since fishing and fisheries beyond territorial waters fall under the purview of the Central Government, the Indian Coast Guard (ICG) handles law enforcement related to fisheries in the EEZ.¹⁵⁹ The Department of Fisheries further reiterated this in an order, “*ICG is requested to take necessary action to prevent LED light fishing in the Indian EEZ beyond Territorial waters.*”¹⁶⁰ The Marine Fishing Regulation Acts (MFRAs) of all coastal states in India include comprehensive provisions detailing the authorities' powers to enter, inspect, and search fishing vessels. These acts also outline the processes for adjudication, stipulate penalties for violations, and provide mechanisms for appeal. According to Chapter III of the Coast Guard Act 1978

¹⁵⁷ India-Tamil Nadu, *supra* note 153, sect 3.

¹⁵⁸ India, 2011 RBI/2011-12/267 A.P. (DIR Series) Circular No. 48 Mid–Sea Trans-shipment of catch by Deep Sea Fishing Vessel.

¹⁵⁹ Mayank Mishra. The Challenge of IUU Fishing: A First Look at Indian Responses. National Maritime Foundation. 2024. (Available at: <https://maritimeindia.org/indian-responses-to-the-challenge-of-iuu-fishing-a-first-look-at/>).

¹⁶⁰ India. Order No. 21001/3/2014-Fy (Ind).

(Act No. 30 of 1978), the duties of ICG and functions include protecting fishers in distress, preserving and protecting the marine environment, and ensuring the implementation and compliance with the existing legal provisions within the designated maritime zones under national jurisdiction.¹⁶¹ Further, the legal authority for the ICG actions includes boarding, searching, and seizing vessels or objects and arresting individuals involved in offences under the Coast Guard Act, including Section 121 (1)(i), within India's maritime zones, including the EEZ.¹⁶² The MFRAs of coastal states and their inspection frameworks align with Article 19 of the UNFSA, which focuses on the enforcement of national regulations by coastal states within their jurisdiction. Additionally, the authority to board and arrest vessels or individuals involved in fisheries offences strengthens enforcement of the UNFSA provisions.

3.5.5. Overview of Fisheries Legal Instruments in Maldives

General Fisheries Regulations, 1987 provides selected rules relative to marine fisheries in the Maldives, such as that Maldivian vessels should not fish beyond the Maldivian waters without obtaining proper approval. The latest addition to the legal framework related to fisheries is the Fisheries Act of the Maldives 2019 (Act No. 14/2019). The act has provisions for the sustainable management of fisheries and marine resources and their ecosystems in the maritime zones of the Maldives. It provides for the control of fishing by all persons within the maritime zones of the Maldives as well as fishing by Maldivians outside the maritime zones of the Maldives. General Fisheries Regulation of the Maldives 2020 was made pursuant to the Fisheries Act of Maldives, with its recent amendment in 2023. Apart from this, there are several regulations related to licensing fishing-related activities, prevention and elimination of illegal activities, and port state measures. The government of Maldives also developed NPOA-Sharks and NPOA-IUU in 2015 and 2019, respectively. Apart from them, species/group-specific management plans have been developed for tuna, billfish, diamondback squid, grouper, lobster, marine aquarium fishery, reef fishery, and cucumber fishery.

3.5.6. Analysis of Legal Instruments of Maldives with UNFSA provisions

The act stipulates that no person shall use a Maldivian vessel for fishing or related activities in areas beyond the maritime zones of the Maldives without a valid permit or license. These activities must comply with the rules established under this act and its related regulations, as well as with international fisheries laws, conventions, and resolutions. Furthermore, the

¹⁶¹ India, Coast Guard Act 1978, chapter III.

¹⁶² India, Extraordinary Gazette Notification S.R.O. 16(E), 05 December 2019.

ministry, in consultation with relevant authorities, is empowered to establish additional regulations as necessary to govern fishing and related activities conducted by Maldivian vessels beyond the maritime zones of the Maldives.¹⁶³ The requirement for Maldivian vessels to obtain permits to fish beyond national waters, in compliance with both national and international laws, aligns with UNFSA Article 18(2).

Section 9 of the act directs the ministry to formulate a registry under this Act to register, including but not limited to anglers, fishing crew, fishing vessel owners, and information on fishing vessels. Also, the regulation on the general process of Issuing Licenses and Permits for Fishing provides detailed procedures for issuing, renewing, and cancelling permits or licenses for fishing.¹⁶⁴ The regulations also have detailed information that needs to be compiled by the ministry for the registry.¹⁶⁵ Parties involved in fisheries, related activities, or fish product manufacturing must provide the ministry with accurate and complete information or statistics as required.¹⁶⁶ The act empowers the ministry to develop specific rules that help ensure compliance with both national and international obligations regarding fisheries management. While it does not explicitly mention the Maldives' membership in RFMOs, it indicates an understanding of the importance of effectively managing these fisheries in line with international commitments. Further, proper registration aids in regulating fishing activities and monitoring compliance with international obligations. Establishing a registry of fishing vessels is also in line with Article 18(3) of the UNFSA.

Chapter Seven of the act primarily focuses on deterring illegal fishing. It provides that the ministry shall take all necessary actions to prevent, deter, and eliminate IUU fishing, both within Maldivian maritime zones and by Maldivians outside these zones. Additionally, it will cooperate with foreign states, international organisations, and private entities, sharing information as needed to address IUU fishing. The regulations may also set procedures for cooperating with other states, as well as inter-governmental and non-governmental organisations.¹⁶⁷ The provisions outlined in Chapter Seven of the act complement the obligations set forth in Article 17 of the UNFSA by prioritising the deterrence of IUU fishing and emphasising international cooperation.

¹⁶³ Maldives, Fisheries Act of the Maldives 2019, 34-35.

¹⁶⁴ Maldives, Regulation on the General Process of Issuing Licenses and Permits for Fishing and Fishing-related Activities and Aquaculture Activities. 2020. (*unofficial translation*).

¹⁶⁵ Ibid. sect 12.

¹⁶⁶ Maldives, General Fisheries Regulations 2020, sect 23.

¹⁶⁷ Maldives, *supra* note 163, sect 43-44.

The provisions on transshipment focus on specific regulations within the Maldives' maritime zones, particularly around atolls and their fore reefs. The prohibited activities described are not directly linked to the high seas.¹⁶⁸ Recently, regulations relating to the licensing of fishing-related activities in 2023 have detailed provisions on issuing licenses to vessels used for transshipping fish from carrier (or) reefer vessels. Vessels to be licensed under this regulation must be equipped with a vessel locating device and electronic monitoring system. The regulation also necessitates reporting fish transhipped from the carrier vessels to the ministry.¹⁶⁹ Regulations requiring transshipment vessels to be licensed and equipped with VMS support UNFSA Article 18(3) (g-h), which promotes the use of VMS to monitor fishing vessels and regulate transshipment.

The Act mandates the ministry to establish comprehensive regulations for MCS of fisheries activities in coordination with relevant authorities. These regulations cover the collection and protection of data, cooperation with other states and international bodies to combat IUU fishing, and the use of satellite and electronic monitoring of fishing vessels.¹⁷⁰ The act mandates the establishment of comprehensive MCS systems, which aligns with UNFSA Articles 18 and 19, to ensure compliance with international conservation efforts. Cooperation with other states in MCS activities is crucial for addressing high seas fishing and ensuring that vessels adhere to established rules.

The Act says that the Ministry shall announce in the Government Gazette about the parties designated as observers, including foreign citizens, if deemed necessary. These observers are responsible for collecting, recording, and reporting accurate information for scientific, fisheries management, and other prescribed purposes. Regulations will define the requirements, protections, and privileges for these observers.¹⁷¹ A web-enabled fishery information system, “*Keyolhu*,” is now fully functional, and all catch data are recorded and analysed through the system. Further, observer data helps to verify logbook-reported data. All parties conducting fishing or fishing-related activities shall fully cooperate with the fisheries observers. Fisheries observers are tasked with collecting and compiling comprehensive data to be shared by the Maldives with regional organisations that organise, operate, and manage fisheries.¹⁷² Further,

¹⁶⁸ Maldives, *supra* note 166, sect 12 (h-i).

¹⁶⁹ Maldives, Regulations relating to the licensing of fishing-related activities 2023, sect (3) (9). (*unofficial translation*)

¹⁷⁰ Maldives, *supra* note 163, sect 71.

¹⁷¹ Maldives, *supra* note 163, sect 69.

¹⁷² Maldives, *supra* note 166, sect 25-27.

recent regulations require the owner/operator of the vessels to give 48 hrs notice to the ministry to place an observer in the vessel. Under this regulation, the operation of the vessel may be conducted in the presence of a fisheries observer under a special permit issued by the Ministry for the purpose of operating in the absence of proper tracking or signal.¹⁷³ The appointment of fisheries observers and the sharing of data with RFMOs are directly related to UNFSA Article 18(3)(g-ii), which encourages flag states to place observers on vessels to ensure compliance with international conservation measures. The requirement for vessels to cooperate with observers further strengthens compliance with the UNFSA.

The Ministry, in collaboration with the Coast Guard, Maldives Police Service, Customs Service, and other relevant authorities, is responsible for creating and enforcing an MCS system to regulate fishing activities. Additionally, the Ministry can appoint additional staff, local councils, or government agencies as rangers to assist in enforcement. The Maldives Police Service is authorised to stop vessels travelling within the maritime zones to inspect documents and fishing gear and seize items as necessary. The Maldives Coast Guard has broader authority and can stop and board Maldivian fishing vessels both within and outside the country's maritime zones. Their inspections ensure vessels are seaworthy and compliant with regulations under this act. If a Maldives-registered vessel is found engaging in IUU fishing or assisting such activities, the ministry can request inspection if it enters another country's port. If illegal activities are confirmed after inspection, the vessel will face penalties under the Fisheries Act. Actions will be taken based on the port state information and other relevant data.¹⁷⁴ These provisions on monitoring and inspecting vessels align with UNFSA Article 19, which emphasises the role of flag states in ensuring compliance and enforcement within their jurisdiction and on the high seas. Further, penalising the vessels involved in IUU fishing and requesting inspections at foreign ports provides a robust legislative framework for curbing IUU fishing and aligning with its provisions.

The Fisheries Act of Maldives establishes that any violations of the Act, whether within or outside the maritime zone of Maldives, are subject to the jurisdiction of Maldivian courts as if the violations occurred within the territory. It also sets a 12-month statute of limitations for actions under the Act, except for criminal offences governed by the Maldives Penal Code. Additionally, it details presumptions that facilitate legal proceedings, including assumptions

¹⁷³ Maldives, *supra* note 169, sect 10.

¹⁷⁴ Maldives, Regulation on Port State Measures to Prevent, Deter and Eliminate IUU Fishing 2020, sect 6, 12. (*unofficial translation*).

about the location of events based on logbook entries, the responsibility of vessel owners and operators for illegal activities, and the presumption of fish being caught illegally if found on vessels in contravention of the Act, unless proven otherwise.¹⁷⁵ Further, General Regulations 2020 specifies that any act prohibited by the regulation, or any act conducted contrary to its stipulations, is considered an offence. Individuals who commit such offences will be penalised according to the procedures outlined in Regulation on Administration of Penalties for Fisheries-related Offences 2020.¹⁷⁶ The ministry has the discretion to take administrative action against all parties involved in a fisheries-related offence, including the vessel's master, owner, and operator.¹⁷⁷ Updated penalties for the failure to share information with regard to fishing trips to the ministry, providing inaccurate or false information to the ministry, operation of the vessel outside the maritime waters of the Maldives without authorisation, operation of vessel within areas under the jurisdiction/territory of another state, transshipment of fish from one vessel to another outside the maritime zones of the Maldives, failure to cooperate with fisheries rangers and fisheries observers appointed by the ministry, by parties who conduct fishery or fishing related activities can be found in the recent amendment to the regulation.¹⁷⁸ Additional penalties can also be found in Regulation on Licensing of Fisheries Related Activities 2023.¹⁷⁹ The provision that Maldivian courts have jurisdiction over fishing violations, whether inside or outside the maritime zones of the Maldives, aligns with Article 19, which emphasises flag states' responsibility to ensure compliance by their vessels wherever they operate. The General Regulations 2020 and its amendments regarding penalties for failing to share information or operating without authorisation further reinforce Article 19 by ensuring adequate sanctions are in place to deter non-compliance.

3.5.7. Overview of Fisheries Legal Instruments in Sri Lanka

The legal framework for fisheries in Sri Lanka started with the Fisheries Regulations in 1941. This was followed by two key acts: the Fisheries and Aquatic Resources Act 1996 (Act No 2 of 1996), which provides regulations for the management, conservation, and development of fisheries resources in Sri Lanka, and the Fisheries (Regulation of Foreign Fishing Boats) Act 1979 (Act No 59 of 1979), which regulates, controls, and manages fishing and related activities

¹⁷⁵ Maldives, *supra* note 163, chapter 11.

¹⁷⁶ Maldives, *supra* note 166, chapter 12.

¹⁷⁷ Maldives, Regulation on Administration of Penalties for Fisheries-related Offences 2020, sect 5. (*unofficial translation*).

¹⁷⁸ Maldives, First Amendment to the General Fisheries Regulations of Maldives 2023, schedule 4. (*unofficial translation*).

¹⁷⁹ Maldives, *supra* note 169, table 3.

by foreign boats in Sri Lankan waters. The Fisheries and Aquatic Resources Act of 1996 has undergone several amendments between 2000 and 2023 to keep pace with evolving needs and challenges in the sector. Since the 1996 act is limited to Sri Lankan waters, to fill the legal vacuum and comply with international obligations in the high sea fishery, the 2013 amendment had changes in the wording of the Act's long title to expand its scope. The amendment also says the ministry may make regulations regarding the implementation of conservation and management measures adopted under LOSC, IOTC, UNFSA, and PSMA.¹⁸⁰ Further, several regulations on the prohibition of catching thresher sharks, fish catch data collection, high sea fishing operations, implementation of VMS for boats in high seas, and port state measures have been made under section 61 of this act.

Additionally, several necessary regulations have been enacted for the registration of fishing boats, fishing operations, fish landing procedures, high-seas fishing operations, fishing gear marking, implementation of port state measures, and the implementation of VMS. The country has also established species-specific regulations to protect and manage concerned fish populations. The government has also adopted the third edition of NPOA-IUU in 2020, building on the success of implementing previous editions of 2013 and 2015. Several other policy and strategy documents have also been developed to support the sustainable growth and development of the fisheries sector.

3.5.8. Analysis of Legal Instruments of Sri Lanka with UNFSA provisions

Under the Fisheries and Aquatic Resources Act 1996 act, the Director General of Fisheries is required to maintain a register of all licensed boats.¹⁸¹ Every local fishing boat needs registration to fish in Sri Lankan waters and on the high seas.¹⁸² Further, detailed registration regulations are provided in Regulations for Registration of Fishing Boats 1980, last amended in 2011. For multi-day fishing boats, a certificate confirming the installation of a transponder must be produced to get a registration.¹⁸³ Registration Numbers and Code Letters assigned to the boats are to be painted on the ship in a prescribed manner.¹⁸⁴ Further, no person shall engage in fishing operations without a license from the Director.¹⁸⁵ 2013 Amendment of the act

¹⁸⁰ Sri Lanka, Fisheries and Aquaculture Resources Act, 1996 (last amended 2023), sect 61.

¹⁸¹ Sri Lanka, *supra* note 180, sect 14D.

¹⁸² Sri Lanka, *supra* note 180, sect 15(1-2).

¹⁸³ Sri Lanka, Registration of Fishing Boat Regulations 1980, sect 3 (2) (b).

¹⁸⁴ *Ibid.* sect 6-7.

¹⁸⁵ Sri Lanka, *supra* note 180, sect 6.

prescribes the provisions for licensing fishing operations on the high seas.¹⁸⁶ The Director-General shall cancel a fishing license if the license holder has been convicted of an offence under the Act or has violated any provision of the Act, its regulations, or the terms and conditions of the license. Cancellation shall occur if the license holder has used the local fishing boat for unauthorised fishing or illegal activities within the jurisdiction of another state or on the high seas.¹⁸⁷ The director-general can refuse to grant the license if the boat is not registered, without any international marking systems for vessels and gear, and is not equipped with VMS and safety equipment.¹⁸⁸ The 2023 Amendment of the act prohibits local fishing boats from engaging in fishing operations without a license within the national jurisdiction of another state. Further, the amendment prohibits IUU fishing in Sri Lankan waters (or) high seas and specifies the cancellation of the registration and license of the vessels engaged in IUU fishing.¹⁸⁹ The Amendment also defines IUU fishing, with particular emphasis on the conservation and management measures adopted by the IOTC or other RFMOs and the relevant provisions of any international agreements or obligations undertaken by Sri Lanka.¹⁹⁰ By mandating that fishing boats to obtain licenses for operations in both Sri Lankan waters and the high seas, the Act seeks to prevent IUU fishing, reflecting the obligations set forth in Article 17 for non-member states to comply with conservation measures. The 2013 amendment requiring specific licensing for fishing operations on the high seas reinforces UNFSA Article 18(1), as it strengthens the framework by mandating VMS and gear marking systems as prerequisites for obtaining a license. This creates a robust structure for licensing, ensuring effective MCS with international conservation measures, thereby preventing IUU fishing and promoting sustainable fishing practices on the high seas.

A detailed High Seas Fishing Operations Regulations was published in 2015, with most provisions related to flag state duties of UNFSA. A few important provisions pertaining to Flag state duties are discussed below.

According to these regulations, the Skipper/Master must keep the operation license for high seas fishing, the registration certificate of the boat, and the skipper license (or a certified copy) on board at all times and produce them upon demand by an authorised officer. Further, Sri Lankan fishing vessels operating on the high seas should adhere to conditions aligned with

¹⁸⁶ Ibid. sect 14.

¹⁸⁷ Ibid. 14J.

¹⁸⁸ Ibid. sect 14B (4).

¹⁸⁹ Ibid. sect 14F, 14O-P.

¹⁹⁰ Ibid. sect 66(2).

international agreements and organisations like LOSC, UNFSA, IOTC, PSMA to obtain a license and display the Sri Lankan flag along with the vessel's name and registration number in accordance with FAO standards mentioned in Schedule V and the 1980 Fishing Boat Registration Regulations. Fishing gear must be marked per the Fishing Gear Marking Regulations 2014, and communication systems such as VHF and HF/MF radios must be installed according to the Fishing Boats Safety Regulations 2009. Satellite-based VMS equipment approved by the Department of Fisheries and Aquatic Resources shall be installed in the boat to link with the land-based fisheries monitoring system in accordance with the Implementation of Satellite-based VMS for Fishing Boats Operating in High Seas Regulations, 2015. For vessels longer than 24 meters, a scientific observer, trained and authorised in line with IOTC Resolution No. 11/04, must be on board, with facilities provided like those for the boat master. Observers may also be deployed on smaller vessels at the discretion of the Director-General. High seas operators are prohibited from transshipping fish at sea or ports without written approval from the Director-General. The Skipper/Master must maintain an accurate and updated logbook, certify its correctness, and submit it upon arrival at the fishery harbour. No person who operates on the high seas shall tranship fish to any other boat at sea or any port without the prior written approval of the Director-General. Additionally, fishing in the territorial waters of another coastal state requires proper authorisation under the law of the other state.¹⁹¹ Cancellation (or) suspension of registration of fishing boats and license fishing operations can be undertaken when a local fishing boat is engaged in unlawful fishing operations within the jurisdiction of another state.¹⁹² Circulation on implementation of the High Seas Fishing Operation Regulations 2015 states that only authorised vessels can engage in high seas fishing. An authorised vessel is “*a vessel issued with a High Seas Fishing Operations License by the Department of Fisheries and Aquatic Resources*” and registered with IOTC for the current year. 2015 regulations closely adhere to the provisions of flag state duties of UNFSA. They establish clear responsibilities for vessel documentation, licensing, and monitoring, ensuring vessels operating on the high seas are properly regulated. Transparency and accountability are reinforced through the mandatory installation of VMS, the deployment of scientific observers on larger vessels, and accurate record-keeping. Additionally, the regulations prohibit unauthorised transshipment and fishing in the waters of other states.

¹⁹¹ Sri Lanka, High Seas Fishing Operations Regulations 2014 (last amended 2015).

¹⁹² Sri Lanka, *supra* note 180, sect 16A.

The Fish Catch Data Collection Regulations 2014, direct the person engaged in fishing in Sri Lankan waters (or) high seas to maintain a record of the catch in the logbook for each fishing trip. The logbook should be produced for inspection by any authorised officer.¹⁹³ Further, the master of the boat shall submit a copy of the logbook maintained for fish catch data collection, and data on tuna catch and similar species along with the geographic location of the catch.¹⁹⁴ Schedule I of the regulations also includes details that the master needs to submit on transshipment. By mandating fishers to maintain and produce logbooks for inspections, these regulations promote transparency and accountability in fishing activities in line with Article 18 (3)(e) and 19(1)(c) of the UNFSA.

The Implementation of a Satellite-based Vessel Monitoring System (VMS) for Fishing Boats Operating in High Seas Regulations of 2015 requires all fishing boats, supply or cargo vessels, reefers, and carrier vessels with a length of 10.3 meters (34 feet) or more to be equipped with a department-approved VMS device for high seas operations. The master, skipper, owner, or licensee must ensure the VMS is always activated, transmitting required information (including the vessel's registration number, international call sign, IMO number, and IOTC number) every four hours. A Fisheries Monitoring Centre is established to monitor vessels 24/7 on the high seas, ensure VMS devices function correctly, and verify data accuracy.¹⁹⁵ The requirement that vessels over 10.3 meters be equipped with VMS devices and transmit information regularly, which complies with Article 18 (g), helps to enhance oversight of fishing operations.

Departure and Arrival of Mechanised Fishing Boats Regulations 2023 shall apply to the fishing boat registered under the Registration of Fishing Boats Regulations, 1980 and engaged in fishing operations in Sri Lanka waters or the High Seas. Without a valid permit issued by the Director-General for the departure and arrival of a mechanised fishing boat specified in these regulations, a person or an organisation shall not operate any mechanised fishing boat for fishing either in Sri Lanka Waters or in the High Seas.¹⁹⁶ Additionally, permit holders must equip their boats with an Automatic Identification System (AIS) configured with a Maritime Mobile Service Identity (MMSI) number to mark the fishing gear.¹⁹⁷ These regulations align

¹⁹³ Sri Lanka, Fish Catch Data Collection Regulations, 2014.

¹⁹⁴ Sri Lanka, Implementation of Port State Measures to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing Regulations 2015, sect 12.

¹⁹⁵ Sri Lanka, Implementation of Satellite based Vessel Monitoring System (VMS) for Fishing Boats Operating in High Seas Regulations 2015, sect 2-4.

¹⁹⁶ Sri Lanka, Departure and Arrival of Mechanized Fishing Boats Regulations 2023, sect 2-3.

¹⁹⁷ Ibid. Schedule IV.

with UNFSA Articles 18 and 19 (1) by mandating permits and implementing AIS to enhance monitoring and compliance in fishing operations.

Part VIII and Part IX of the act have provisions for authorised officers, empowering them to penalise offences and impose penalties for the crime committed. An authorised officer (not below the rank of fisheries inspector, any officer of the Army, Air Force or Police not below the rank of Sergeant and any officer of the Navy not below the rank of a Petty Officer or any Coast Guard officer of the Department of Coast Guard established by the Department of Coast Guard Act, No. 41 of 2009) has broad powers to enforce regulations, including stopping, boarding, and searching fishing boats in Sri Lankan waters or on the high seas, inspecting fishing gear, crew, and fish harvested. Officers can enter premises suspected of harbouring illegal fishing activities, seize boats, fishing gear, vehicles, fish, or other items used in violations, and arrest individuals suspected of committing offences under the Act, with or without a warrant. Arrested individuals must be informed of the reasons and brought before a court within 24 hours, excluding travel time.¹⁹⁸ The provisions concerning authorised officers and their enforcement powers are critical for ensuring compliance with Article 19 (1) of the UNFSA. Granting broad powers to authorised officers enhances the capacity to enforce regulations effectively, deterring illegal fishing activities and promoting adherence to conservation measures.

Anyone violating the provisions of sections 14A (Licensing of Fishing Operations in the High Seas), 14E (Licence to be carried on board), 14F (Prohibition on fishing in foreign waters), 14G (Licensee to comply with conservation and management measures), and 61(1)(t) (implementing CMMs) of this Act commits an offence and, upon conviction after a summary trial before a Magistrate, may face imprisonment for up to two years or a fine which is determined based on the length of the fishing boat.¹⁹⁹ Also, under section 49B, any person who violates section 14O (Prohibition of illegal, unreported or unregulated fishing in Sri Lanka waters or high seas of this act) and commits an offence, if no specific penalty is provided, will be fined not less than one hundred thousand rupees upon conviction after a summary trial by a Magistrate. By establishing clear penalties, including imprisonment and fines based on the boat's length, these regulations aim to discourage illegal fishing and promote compliance.

¹⁹⁸ Sri Lanka, *supra* note 180, sect 46-47.

¹⁹⁹ Sri Lanka, *supra* note 180, sect 49(2A).

Section B: Degree of Consistent Implementation with the UNFSA

3.6. Need for Assessing Implementation

Compliance, implementation, and enforcement are related but distinct concepts in international instruments. Compliance is usually defined as “conformity of behaviour with legal rules.”²⁰⁰ Implementation is the process of putting commitments into practice by creating (or modifying) existing laws in the country, developing specific rules (or regulations), creating certain institutions, and enforcing rules.²⁰¹ However, compliance is the goal, reflecting the actions of the state conforming to the standards through the national implementation of the provisions.²⁰² Also, the ultimate goal, however, is ensuring compliance by non-state actors, achieved through the state implementing its obligations effectively to regulate and guide the behaviour of these actors.

For international law to be applied in a nation’s context, it must be “domesticated”.²⁰³ Countries usually integrate international instruments into their national systems using two common approaches. One is the transformation approach, where domestic law needs to be transformed through legislative action; on the other hand, there is an *incorporation approach*, where international law automatically becomes part of national law upon treaty ratification. However, automatic incorporation generally applies only in monist states; dualist states require domestic legislation to incorporate treaty frameworks into their national laws.

Failure of a party to implement any international agreement might breach its treaty obligations and is evidence of non-compliance, potentially leading to a series of negative knock-on effects.²⁰⁴ When one party does not fulfil its obligations under an agreement, it can cause significant issues for others. Furthermore, failure to implement coastal state obligations often has the most severe negative consequences for the state itself and its people, undermining its sustainable management of resources. The implementation of international fisheries law plays a crucial

²⁰⁰ Benedict Kingsbury, “The Concept of Compliance as a Function of Competing Conceptions of International Law”, *Michigan Journal of International Law*, vol. 19, no. 345, (1998), p346.

²⁰¹ David G. Victor and Others. Introduction and Overview to the Implementation and effectiveness of International Environmental Commitments: Theory and Practice. (MIT Press, 1998).

²⁰² Gisele Vigneron, “Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement”, *Georgetown International Environmental Law Review*, vol.10, no. 2, (1998), p591.

²⁰³ Rommel J. Casis. “Domesticating International Law: Resolving the Uncertainty and Incongruence”, *Philippine Yearbook of International Law*, vol. 19, (2020). p129.

²⁰⁴ Emily O’Brien and Richard Gowan, “What Makes International Agreements Work: Defining Factors for Success”, (New York University, 2012), p13.

role in achieving compliance in two aspects: (i) implementation processes ensure that an actor (state) meets its legal obligations, and (ii) these processes can influence other actors' compliance.²⁰⁵ However, failure to implement these obligations reflects non-compliance and can disrupt the effectiveness of international legal frameworks.

Enforcement is a critical component of ensuring adherence to international agreements, it builds upon the foundation of implementation and compliance, serving as the mechanism to compel or incentivise conformity with legal obligations and to address violations effectively. Enforcement involves measures such as monitoring, reporting violations, and imposing sanctions or other penalties. Enforcement powers can be carried out either by international organisations or by individual states. However, states are often reluctant to grant substantial enforcement authority to international organisations as they are keen to safeguard their sovereignty.

There is a common belief that enforcing international agreements is quite challenging. Even though a country may have a solid mechanism for enforcing international instruments, it can still struggle, as enforcement mechanisms are just one side of the coin; the other side involves legal mechanisms.²⁰⁶ Assessing the implementation of the provisions of any international agreement by a country is critical to ensuring that the instruments are effective in promoting their intended purpose. It helps identify gaps in adherence and improves accountability. In International law, the "implementation gap" is a significant challenge, which is the difference between the provisions outlined in agreements and their actual execution. It can hinder the intended goals of member states commitments. Addressing the implementation gap is, therefore, crucial for translating international commitments into tangible outcomes.

²⁰⁵ Hyun Jung Kim, "Inducing state compliance with international fisheries law: lessons from two case studies concerning the Republic of Korea's IUU fishing", *International Environmental Agreements: Politics, Law and Economics*, vol.19, (2019). p631.

²⁰⁶ Gisele Vigneron, *supra* note 202, p581.

3.6.1. Level of Implementation of UNFSA

International organisations have developed various mechanisms to facilitate the implementation of international instruments, such as mechanisms for assistance, compliance, advocacy, and monitoring.²⁰⁷ Various processes, such as review conferences, informal consultation of state parties, the assistance fund established pursuant to Part VII of the Agreement and compulsory dispute settlement framework, are in place for UNFSA to strengthen progress towards the complete and effective implementation of the Agreement.

Despite these frameworks, a detailed evaluation of the implementation of the UNFSA in the four selected countries has yet to be conducted. This subsection aims to address this gap by examining the extent to which specific articles of the UNFSA have been incorporated into national frameworks. It will evaluate how effectively these states have integrated UNFSA provisions and identify both successful strategies and areas needing improvement.

The following sections provide an analysis of the alignment of the legal instruments of Bangladesh, India, Maldives, and Sri Lanka with selected articles of the UNFSA that focus on flag state duties. This assessment is based on a modified implementation checklist developed by DOALOS,²⁰⁸ which utilises scoring values to indicate the level of alignment with the provisions of the UNFSA. Figure 2 gives a pictorial representation of the alignment of legal instruments of the countries with the articles of the UNFSA.

Article 17 details the responsibilities of non-members of organisations and non-participants in arrangements. Bangladesh, Maldives, and Sri Lanka demonstrate significant alignment in areas such as cooperation in conservation efforts and the management of fish stocks. These countries generally deny authorisations for their flagged vessels to fish for stocks managed by RFMOs if they are not participants. Notably, India and Maldives are cooperating non-contracting parties to SIOFA and CCAMLR, respectively.²⁰⁹ The legislative instrument in India shows a low level of alignment with the provisions of this article of UNFSA.

²⁰⁷ OECD. Compendium of International Organisations' Practices: Working Towards More Effective International Instruments, OECD Publishing, Paris. (2021). p39.

²⁰⁸ UN-DOALOS, *supra* note 27.

²⁰⁹ Cooperating non-contracting Party (CCP) means a State that is not formally associated as a Contracting Party with an RFMO but abides by its recommendations. *See* India is a CCP to SIOFA (Available at : <https://siofa.org/>) & Maldives is a CCP to CCAMLR (Available at: <https://www.ccamlr.org/en/compliance/non-contracting-parties>).

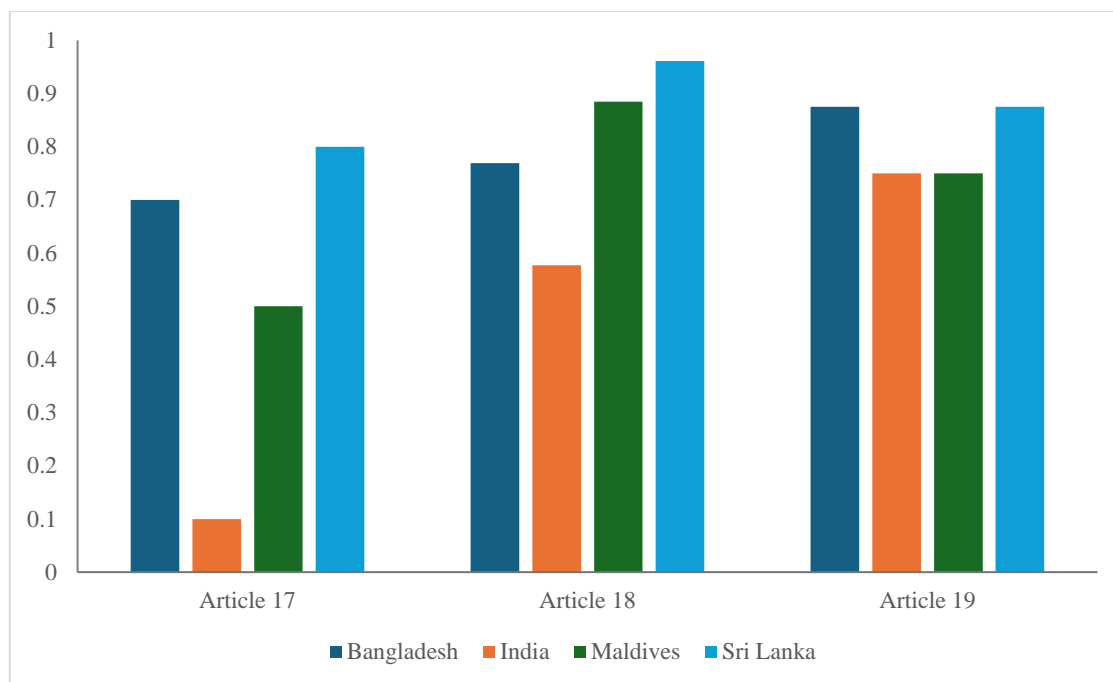


Figure 2. Level of alignment with the Selected Articles of UNFSA
(0: No alignment, 0.5: Partial alignment, 1: Full alignment)

Article 18 focuses on measures that flag states should implement to ensure their vessels comply with conservation and management measures established by RFMOs. Legal instruments of Bangladesh, Maldives, and Sri Lanka show substantial compliance across multiple indicators like effective authorisation and licensing systems, maintaining national records of fishing vessels, and regulating fishing in foreign jurisdictions. In 2014, the EU identified Sri Lanka as a non-cooperating third country in fighting IUU fishing.²¹⁰ After 2014, Sri Lanka strengthened its legal frameworks towards curbing IUU fishing. Sri Lanka has a separate instrument to manage fisheries in the high seas, with provisions for most of the provisions in Article 18.²¹¹ However, the instruments of India exhibit a mix of partial and full alignment. While in full alignment with licensing and regulatory frameworks, there is limited alignment with measures like observer programs, data recording, and reporting, suggesting a need to enhance the legislative framework further. It is important to note that the rescinded guidelines for fishing operations in the Indian EEZ of 2014 were mainly in alignment with the provisions of this article of UNFSA.

²¹⁰ European Commission. Commission Implementing Decision of 14 October 2014 identifying a third country that the Commission considers as a non-cooperating third country pursuant to Council Regulation (EC) No 1005/2008 establishing a community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. (2014/15/EU). Para 34.

²¹¹ Sri Lanka, *supra* note 191.

Article 19 addresses the compliance and enforcement mechanism, including the investigation of alleged violations and the imposition of adequate sanctions. The legal instruments of Bangladesh and Sri Lanka are highly aligned with enforcing conservation measures, conducting prompt and thorough investigations, and imposing sanctions that effectively discourage violations as per UNFSA. The legislative instruments of Maldives and India show partial compliance, indicating some enforcement measures are in place but may need to be more comprehensive.

4. PART II: CURRENT CHALLENGES AND STRATEGIES FOR STRENGTHENING THE IMPLEMENTATION OF THE UNFSA IN SOUTH ASIA

CHAPTER 1: CHALLENGES FOR EFFECTIVE UNFSA IMPLEMENTATION

Section A: Gaps & Challenges Identified Through Legal Analysis

4.1. Gaps Identified Through Legal Analysis

4.1.1. Bangladesh

Bangladesh has taken steps to align with the provisions of flag state duties of UNFSA. Despite these initiatives, certain gaps still need to be addressed in ensuring full compliance with UNFSA. However, certain enhancements are essential to meet the obligations, which are discussed in this section.

The legal framework of Bangladesh emphasises the need for compliance with CMMs. Still, it lacks robust mechanisms to ensure cooperation with states that are non-members of relevant RFMOs. The NPOA-IUU mentions that Bangladesh will cooperate and act in accordance with the CMMs agreed upon by the RFMO, of which it is not a member.²¹² Even though it has been outlined in section 2.2.5 of NPOA-IUU, explicit provisions in the act (or) rules should outline how Bangladesh will engage with non-member states that fish in the RFMO area of competence, ensuring that these states adhere to conservation measures.

The requirement for information exchange between member states on the activities of fishing vessels that are not part of the relevant organisations needs to be clearly established. The Marine Fishing Policy 2022 also mentions that the exchange of information about the vessels that a country or any international organisation recognises will be made publicly available.²¹³ Further commitment has been made to publish IUU fishing vessels in the regional fishing vessel register in collaboration with RFMOs.²¹⁴ However, these commitments are yet to be fulfilled.

²¹² Bangladesh, National plan of action to prevent, deter, and eliminate Illegal, Unreported, and Unregulated (IUU) fishing in Bangladesh. 2019, sect 7.2.

²¹³ Bangladesh, Marine Fishing Policy 2022, para.8.11 and 8.19. (*Unofficial Translation*).

²¹⁴ Bangladesh, *supra* note 210, p27.

Regarding documentation of target and non-target species, Bangladesh introduced rules on the IUU regulation through a gazette notification on 25 February 2010 (S.R.O. no. 59-Act/2010) to comply with the catch certification requirements as outlined in European Commission regulation 1005/2008 to prevent IUU fishing and also in line with the IOTC CMMs Resolution 15/01. This compliance includes monitoring industrial fishing vessels and their catch. However, it is not directly related to verifying the catch of target and non-target species and measures. Further, improving the existing MCS measures and upgrading to the modern MCS system have been reinstated in the policy document.²¹⁵

Even though the national legislation contains provisions for observer programmes, implementation has been an issue mainly due to a need for more trained staff.²¹⁶ Also, a comprehensive framework for observer programs that align with regional or international standards needs to be included. While authorised officers can inspect vessels, there is no explicit mention of deploying independent observers for high seas operations; it was also reiterated in the 23rd session of the IOTC scientific committee that low observer coverage had been observed.²¹⁷

Further, there are no explicit provisions for marking fishing gear in line with Article 18(3)(g). However, as marking is one of the proposed solutions to curb the issues related to ALDFG, Bangladesh has committed to modifying its regulations based on the 2018 Voluntary Guidelines for Marking Fishing Gear.²¹⁸ Also, there needs to be a particular gap in regulating and ensuring compliance with subregional, regional, or global measures aimed at minimising catches of non-target species; it has also been instated in the NPOA-IUU.

Currently, there is a limited engagement of Bangladesh-flagged fishing vessels in fishing in the high seas. However, the government shall establish authorisation arrangements and regulations to investigate and sanction violations that occur on the high seas or in the EEZ of different states. UNFSA requires that flag states investigate violations immediately and thoroughly, regardless of where they occur. The current inspection regime appears limited to vessels within the jurisdiction of Bangladesh, and there needs to be a mention of cooperation with other coastal states in inspecting vessels that may be violating conservation measures on the high seas or in foreign maritime zones.

²¹⁵ Ibid. para 8.15.

²¹⁶ Bangladesh, *supra* note 212, sect 2.2.7.

²¹⁷ IOTC, Resolution 22/04 on a Regional Observer Scheme, p1.

²¹⁸ Bangladesh, *supra* note 210, p23.

Although Bangladesh has provisions for penalties and sanctions, the framework needs to fully emphasise expeditious judicial proceedings and the adequacy of sanctions to deter violations on the high seas. It is also to be noted that the recent Bangladesh Marine Fisheries Management Plan: Part 1-Industrial assigns the Bangladesh Coast Guard the responsibility of MCS within the 40m depth contour and the Bangladesh Navy the responsibility of MCS in offshore EEZ (seaward of the 40m depth contour).²¹⁹ However, there needs to be more clarity concerning whether this extends to high seas enforcement as there is no explicit mention of high seas or beyond 200nm in the management plan. Further, the legal framework may strengthen sanctions to align with Article 19, which requires penalties to be severe enough to secure compliance and discourage illegal activities.

Strengthening the legislative frameworks in accordance with the above-mentioned areas would help Bangladesh fully align with the flag state duties mentioned in the UNFSA.

4.1.2. India

As discussed in the sub-section 3.5.3 and 3.5.4, India has a decentralised structure for fisheries management. The management of fisheries within territorial sea falls within the jurisdiction of coastal states, while beyond 12 nm falls within the purview of the central government. Coastal states have their own Marine Fishing Regulation Acts, which have been updated through subsequent amendments. However, beyond 12 nm, there is a regulatory vacuum in terms of fisheries management. In 2022, the Department of Fisheries released the "*Draft Guidelines for the Regulation of Fishing by Indian-Flagged Vessels in the High Seas*" and invited comments from all stakeholders. This subsection addresses the legislative gaps in the overall Indian framework and compares them with the draft guidelines, which provide potential solutions to this regulatory gap.

Indian regulations do not specifically address the requirement for non-members of subregional or regional fisheries management organisations to comply with adopted CMMs, which is inconsistent with Article 17 of the UNFSA. Indian regulations also do not explicitly prohibit the authorisation of Indian-flagged vessels to fish for highly migratory or straddling fish stocks outside the frameworks of subregional or regional fisheries management organisations,

²¹⁹ Bangladesh, Bangladesh Marine Fisheries Management Plan: Part I – Industrial. p12.

reflecting non-compliance with UNFSA obligations. However, the draft guidelines state that vessels operated by Indian operators shall comply with CMMs adopted by relevant RFMOs.²²⁰

Although the coastal states of India are responsible for providing licenses for fishing in the EEZ, the area of competence falls within territorial waters, to some extent in the EEZ. There are no explicit provisions for issuing high seas fishing permits and ensuring compliance with RFMOs. Recognising the importance of high-seas fishing, the Government of India, in its National Marine Fishing Policy 2017, states that the central government will develop a holistic plan considering all coastal states for utilisation between 12 and 200 nm and also to promote fishing in high seas subject to compliance of relevant provisions of international agreements.²²¹ Following this, the draft guidelines have detailed provisions for issuing permits for fishing in the high seas.²²²

While the Merchant Shipping Act provides some guidelines for vessel identification, Indian regulations do not mandate uniform gear marking in accordance with international standards across all coastal states, which is required for effective enforcement and compliance with Article 18. The government requires vessels and gears to be marked according to the FAO Standard Specification for the Marking and Identification of Fishing Vessels in its new draft guidelines but needs to mention gear marking.²²³

Voluntary catch reporting is not mandated in India, and no precise legislative instruments require consistent and timely reporting of vessel positions, catch data, or fishing efforts. This is a significant gap in comparison to the UNFSA. However, the new draft guidelines rectify this by providing provisions for maintaining the logbook and submitting it to the competent authorities on the completion of every voyage.²²⁴

The VMS has not been uniformly mandated by all coastal states, limiting the effectiveness of monitoring fishing vessels in the EEZ and on the high seas. Also, recently, the government introduced a scheme to install transponders in fishing boats.²²⁵ It has also been mandatory as

²²⁰ India, Draft Guidelines for Regulation of Fishing by Indian Flagged Fishing Vessels in the High Seas, para 5. Available at < <https://dof.gov.in/documents/office-orders/draft-guidelines-high-sea-fishing-3082022> >(accessed on 4 August 2024).

²²¹ India, National Marine Fishing Policy 2017, para 17-18

²²² India, *supra* note 220, para 1-5.

²²³ India, *supra* note 220, para 5(ii).

²²⁴ India, *supra* note 220, para 23.

²²⁵ India, Press Information Bureau. Available at < <https://pib.gov.in/PressReleasePage.aspx?PRID=2050195> > (accessed on 10 September 2024).

one of the minimum standards in the guidelines.²²⁶ The absence of a uniform national observer program further weakens compliance; however, although an optional provision, it has been provided in the guidelines.²²⁷ Although the Reserve Bank of India has issued guidelines for mid-sea transshipment, there needs to be a clear regulatory framework to ensure that transshipment activities on the high seas comply with conservation measures. With adequate VMS coverage, it becomes easier to monitor transshipments effectively.

Further, the legislation needs to have specific provisions requiring the immediate and thorough investigation of alleged violations. There needs to be a clear regulatory framework in place to ensure that vessels involved in severe violations are prevented from resuming fishing operations on the high seas until all sanctions have been complied with. Additionally, while inspections are provided for under the MFRA, there needs to be a clear mandate for such actions beyond territorial waters. Under the section “Enforcement and Appeal”, the draft guidelines provide regulations in line with Article 19, including the suspension of permits and actions for violations. However, they do not include provisions for penalties for the violations committed.

Recent developments in the legal framework of India, when enacted, including the Marine Fisheries (Regulation and Management) Bill of 2019, which empowers coastal states to manage fishing in the EEZ, and the Draft Guidelines for the Regulation of Fishing by Indian-Flagged Vessels in the High Seas of 2022, which align with relevant international agreements, will help address the existing gaps in both the EEZ and the high seas.

4.1.3. Maldives

Maldives has established a comprehensive legislative framework to manage and regulate its fisheries, particularly within its maritime zones. The following section highlights the legislative gaps in the regulatory framework, which helps ensure compliance with UNFSA regulations.

The Fisheries Act 2019 applies to all Maldivian fishing vessels, foreign fishing vessels, and fishing-related vessels entering the maritime zones of the Maldives and Maldivian flagged vessels operating beyond those zones. However, it is essential to note that the Maldives' tuna fishing fleet operated exclusively within the Maldivian EEZ until longline operations were suspended in 2019.²²⁸ The Maldives legislative framework covers most of the duties of the flag

²²⁶ India, *supra* note 220, para 17-18.

²²⁷ India, *supra* note 220, para 5 (iv).

²²⁸ Maldives, Maldives National Report to the Scientific Committee of the Indian Ocean Tuna Commission 2023. (2023), p4.

states as provided in the provisions of UNFSA; however, there are a few gaps in the legislation regarding regulations on the high seas. This subsection covers those legislative gaps.

The Maldives Fisheries Act does not explicitly mention its obligations regarding non-membership or non-participation in RFMOs. While the act implies international cooperation and obligations, it lacks clear language addressing the responsibilities of the country if it were not a member of an RFMO, which is a gap compared to UNFSA Article 17(1). Also, Article 17(4) of the UNFSA requires measures to deter the fishing activities of vessels from non-member states that could undermine RFMO conservation measures.

There are provisions for licensing Maldivian vessels on the high seas. Still, the act does not mention explicitly that such vessels must always carry licenses onboard and produce them upon demand for inspection, as required under Article 18(3)(b)(iii). It is also to be noted that the regulation of transshipment is limited within the EEZ between the atolls and not explicitly mentioned on the high seas, considering the possible expansion of fishing in the high seas in the future.

Further, there are provisions for reporting catches and requiring VMS, but there are no specific provisions addressing the verification of both target and non-target species. However, in the recent national report to the scientific committee of IOTC, observer data are reported to be used to cross-check with the logbook information submitted by the fishers. Also, no bycatch has been reported since the suspension of the longline fishery in 2019.²²⁹

While the act stipulates the Coast Guard and other authorities for monitoring and enforcement, there are no explicit provisions for cooperating with international bodies to ensure compliance with subregional or regional conservation measures, as required by Article 19(1)(a-b). It also does not provide precise mechanisms for reporting such violations to international organisations or other states.

In its NPOA-IUU, the Maldives acknowledges its support of the IOTC in encouraging relevant states to become contracting parties. Furthermore, the Maldives meets most of its flag state responsibilities under the IPOA-IUU, with only minimal actions needed to strengthen its MCS systems further.²³⁰

²²⁹ Maldives, *supra* note 228, p14.

²³⁰ Maldives. National Plan of Action to Prevent, Deter and Eliminate illegal unreported and unregulated fishing. 2019. pp 62.

4.1.4. Sri Lanka

Among the other countries in this study, Sri Lanka has one of the most robust legal frameworks, which mostly complies with flag state duties, notably separating high sea fishing regulations for managing the fishery on the high seas. While the country has established several mechanisms for regulating fishing activities, there are a few shortcomings that need to be addressed.

The existing regulations do not clearly state how Sri Lanka would prevent or penalise vessels from non-member states that are undermining RFMO measures. There is limited reference to exchanging information with other states or taking collective action to deter non-member vessels from the obligation under Article 17.

Further, there need to be explicit references to the specific type of data collection required (e.g., non-target species), which could be a gap in terms of meeting the requirements under Article 18(3)(e). The observer program applies only to vessels over 24 meters, and there's only mention of observer programs for vessels below that length if at the discretion of the Director-General. Also, Sri Lanka is conducting a trial project on an electronic monitoring system (EMS)²³¹ and a crew-based observer programme for vessels less than 24 meters.²³²

Although Sri Lankan authorities have broad powers, no specific process is outlined for investigating the violations by Sri Lankan vessels on the high seas in accordance with international agreements. The regulations need to detail how investigations should be conducted or reported to relevant regional bodies, as required under Article 19(1)(b). Addressing these gaps in Sri Lankan regulations would enhance their alignment with the provisions of UNFSA.

²³¹ IOTC, Report of the 3rd Session of the IOTC Ad-hoc Working Group on the Development of Electronic Monitoring Programme Standards (WGEMS), (2023), pp62.

²³² Sri Lanka, Sri Lanka National Plan of Action to Prevent, Deter, And Eliminate Illegal, Unreported, And Unregulated Fishing 2015. p20.

Section B: Issues with Capacity under UNFSA

4.2. Capacity Development

The terms ‘capacity,’ ‘capacity building,’ or ‘capacity development’ are not precise, as they are open to varying interpretations and are used interchangeably.²³³ Capacity development is defined as “*the process whereby people, organisations, and society as a whole unleash, strengthen, create, adapt, and maintain capacity over time.*”²³⁴ The principal aim of SDG Target 17.9 is to strengthen global assistance, including north-south, south-south, and triangular cooperation, to develop and carry out effective, targeted capacity-building efforts in developing countries, supporting their national strategies for achieving all the SDGs.²³⁵

Capacity development is a central function of the United Nations Development System. Over the past two decades, the General Assembly has repeatedly focused on this issue in its resolutions.²³⁶ Addressing the disparities among countries and creating the environment needed for the full implementation of any international agreement is essential. A recent resolution adopted by the General Assembly on “Our ocean, our future, our responsibility” expressed the GA's commitment to addressing the capacity needs of developing countries, particularly small island developing States and the least developed countries, with urgent science-based and innovative actions.²³⁷ Various organisations of the United Nations have included developing the national capacity of its member countries to achieve its strategic objectives.

The capacity of a country in terms of its people and its institutions, as well as ecological and geographical conditions, plays a significant role in its ability to follow sustainable development paths. The core aim of capacity building is to improve the ability to make informed policy choices and implement development options, considering environmental and societal factors.²³⁸ In relation to the sustainable management of fisheries and ocean resources, the Johannesburg Plan of Implementation called for strengthening donor coordination and partnerships between international financial institutions, bilateral agencies, and other relevant stakeholders to develop the capacity of developing countries for infrastructure and integrated

²³³ Also see Angela Bester. “Capacity development-A report prepared for the United Nations Department of Economic and Social Affairs for the 2016 Quadrennial Comprehensive Policy Review”, (2015), para 14.

²³⁴ See United Nations Development Group, ‘UNDG Capacity Assessment Methodology: User guide for national capacity development’, (2008), p3.

²³⁵ Sustainable Development Goals. Capacity Building. Available at <https://sustainabledevelopment.un.org/topics/capacity-building> > (accessed on 04 September 2024)

²³⁶ Angela Bester. *supra* note 232. p3.

²³⁷ A/RES/76/296. para 14.

²³⁸ Agenda 21. United Nations Conference on Environment and Development. Rio De Janerio, Brazil, (3 to 14 June 1992), para 37.1.

management and the sustainable use of fisheries and assist developing countries in coordinating policies and programs at the regional and subregional levels aimed at the conservation and sustainable management of fishery resources.²³⁹

4.2.1. Capacity Development in Law of the Sea

LOSC serves as the foundational framework for global ocean governance. However, it includes only limited provisions related to capacity building rather than a broader and holistic approach. Also, capacity building is not explicitly defined or comprehensively discussed in the original text of the convention. Despite this, specific articles refer to the importance of supporting the capacity of states. These mentions can be found in various parts of the LOSC, which includes Articles of Part XI (Section 2), Part XII (Section 3), Part XIII (Section 2), and Part XIV (Section 2).

Over time, the recognition of the significance of capacity building in achieving the objectives of LOSC has grown, leading to more explicit mentions in subsequent implementing agreements. For instance, in the 1994 Agreement relating to the Implementation of Part XI, capacity building is emphasised in Section 5, alongside Article 144, which addresses the promotion of international cooperation in marine scientific research and the transfer of marine technology. Additionally, UNFSA dedicates Part VII to addressing the broader needs of developing states, not limited to its parties, underscoring the critical role of capacity building.

The most recent implementing agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction includes a separate Part on capacity building and the transfer of marine technology, emphasising the importance of capacity building in ocean governance; however, these provisions are limited to parties to the agreement.

4.2.2. Capacity Building Provisions in the Articles of UNFSA

Part VII consists of three articles (24-26) that provide different mechanisms and requirements for developing states. A few authors argue that the provision, in part, is carefully worded not to benefit the “developing states” that have distant-water fishing fleets.²⁴⁰ To avoid this, the

²³⁹ Johannesburg Plan of Implementation, Plan of Implementation of the World Summit on Sustainable Development, (2012), para 30(g)-31(g).

²⁴⁰ Colin Warbrick, Dominic McGoldrick and D. H. Anderson, “The Straddling Stocks Agreement of 1995—an Initial Assessment”, *International and Comparative Law Quarterly*, vol. 45. (1996), p473.

agreement uses more specific terms, such as “least developed states” and “small island developing states.”²⁴¹

Article 24 of the UNFSA directed the states, either directly or through appropriate international bodies, to assist in developing states and also emphasised the obligation of States to consider the unique needs of developing states, focusing on three critical considerations i) vulnerability of developing states ii) avoiding impact on local fishers and iii) preventing disproportionate burden, while recognising the particular requirements.²⁴²

Article 25 provides various forms of cooperation among states to enhance the ability of developing states such as by enabling them to participate in high seas fisheries. This includes facilitating access to such fisheries subject to articles 5 (General Principles) and 11 (New members) and encouraging the participation of developing countries in subregional and regional fisheries management organisations and arrangements. Furthermore, it specifies the forms of assistance, which include financial support for human resource development, technical assistance, and technology transfer. The areas to be focused on are data collection, reporting, exchange and development, scientific research and MCS, compliance and enforcement, and training and capacity building, as well as in the development and funding of national and regional observer programs. In addition to the above-mentioned areas, the review conference also stressed the need for increased capacity of developing states in the areas of a) port state control, b) compliance with market and trade-related measures and meeting market access requirements, and c) information sharing.²⁴³ In Resolution 69/109, the General Assembly encouraged states to use existing funds to support developing countries in designing and strengthening their national fisheries regulations.²⁴⁴

Although the exact amount or form of assistance is not precisely mentioned in the agreement, it can be assumed that the aid should be adequate and suitable to achieve the overall objectives of this agreement. It has also been argued that the disadvantage of the agreement, which

²⁴¹ C. Hedley, E.J. Molenaar and A.G.Elferink, “The Implications of the UN Fish Stocks Agreement (New York, 1995) for Regional Fisheries Organisations and International Fisheries Management”. European Parliament, FISH 113 EN, (2004), p50.

²⁴² Article 24(1-2) of UNFSA.

²⁴³ Review conference 2006, *supra* note 36, para 49.

²⁴⁴ A/RES/69/109, para 184.

involves the high cost and compliance difficulty for developing states that lack capacity and resources, outweighs the advantage of access to financial assistance and support provided.²⁴⁵

Article 26 states that states shall cooperate to establish a fund to help developing states implement the agreement, settle disputes, and establish (or strengthen) existing RFMOs.²⁴⁶ Based on this, the General Assembly established an assistance fund (Voluntary Trust Fund), which is administered by FAO, the implementing office of the fund, in collaboration with the United Nations.²⁴⁷ The Terms of Reference emphasised that the Fund was only one component of assistance to be provided in accordance with Part VII of the agreement and was meant to supplement other sources of assistance.²⁴⁸

4.2.3. Focus of Capacity Development in Review Conference and Informal Consultation of State Parties

The focus on capacity development in the Review Conferences and ICSP to the UNFSA has evolved steadily over the years. It is one of the major themes in these meetings, reflecting growing awareness of the challenges faced by developing states in managing their fisheries. Over the years, discussions have focused on strengthening the ability of developing states to effectively implement fisheries management practices, reflecting an increasing awareness of the financial, technical, and human resource challenges these nations face. The following table provides the chronological picture of key developments and discussions related to capacity development:

Table 4: Chronological Picture of Key Discussions related to Capacity Development

Event / Year	Key Focus / Discussion Points
ICSP 1 (2002)	Several States Parties emphasised the importance of linking the trust fund to the implementation of Part VII of the Agreement. They advocated for a broader approach to capacity building under Article 25, suggesting enhanced assistance through regional organisations and bilateral mechanisms. (<i>Para 19</i>)
ICSP 2 (2003)	European community intended to discharge its obligations under Part VII by continuing a programme of bilateral partnerships. The involvement of the World Bank was seen as critical to the long-term implementation of Part VII of the Agreement (<i>Para 45, 46</i>)

²⁴⁵ E.J. Molenaar, “Non-Participation in the Fish Stocks Agreement: Status and Reasons”, *The International Journal of Marine and Coastal Law*, vol. 26, no.2, (2011). p212.

²⁴⁶ Article 26 of UNFSA.

²⁴⁷ A/RES/58/14, para 10.

²⁴⁸ Informal Consultations of the States Parties to 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, New York, 23-25 July 2003. (ICSP2/UNFSA/REP/INF.1), Annex II, para 4.

Event / Year	Key Focus / Discussion Points
Review conference (2006)	Targeted delivery of assistance and capacity-building to developing States was deemed essential for cooperative fisheries management. <i>(Para 44)</i>
ICSP 5 (2006)	The importance of bilateral assistance was underscored, reflecting a continued focus on direct and effective means of capacity development. <i>(Para 30)</i>
ICSP 7 (2008)	Questions were raised regarding the use of the Assistance Fund for capacity-building, specifically for developing national legislation and supporting the ratification process. Despite applications for assistance, FAO noted limited flexibility due to precise terms of reference, which restricted the types of activities eligible for funding. <i>(Para 53)</i>
Review Conference (2010)	Developing states often had limited resources for monitoring, control, and surveillance of vast exclusive economic zones. Capacity-building was recognised as crucial for the effective implementation of both regional and bilateral initiatives, especially in combatting IUU fishing. <i>(Para 92, 121)</i>
ICSP 10 (2014)	A compilation of the specific capacity-building needs of developing states was made, emphasising the importance of targeted assistance for effective implementation of the agreement. <i>(Annex-II)</i>
Review Conference (2016)	The Conference recognised the vulnerability of certain states to the effects of climate change, suggesting they should be prioritised for access to the assistance fund. A delegation proposed convening a special meeting of developing states parties to the agreement, funded by the Assistance Fund, to share best practices and identify implementation-related needs. <i>(Para 20,161)</i>
ICSP 13 (2017)	Concerns were raised about the depletion of the Fund, which had led to reduced participation of developing states in RFMO meetings. The lack of capacity-building was seen as a factor contributing to the widening gap between developed and developing states in fisheries management. <i>(Para 75,77)</i>
ICSP 14 (2019)	The terms of Reference have been revised to promote voluntary contributions through donor agreements for specific activities that meet any of the Fund's purposes, as set forth in paragraph 16 of the revised terms of reference. <i>(Para 13)</i>
Review Conference (2023)	Urgent contributions to the Assistance Fund were called for, with a focus on its diversified use. Such assistance should be targeted to such areas as “(i) stock assessment and scientific research; (ii) data collection and reporting; (iii) monitoring, control and surveillance; (iv) port state control; (v) compliance with market and trade-related measures and meeting of market access requirements, including with respect to health and quality standards; (vi) development of fisheries for straddling fish stocks and highly migratory fish stocks; (vii) human resource development; (viii) sharing of information, including vessel information; (ix) flag state responsibility; and (x) settlement of disputes.” <i>(Sect D-4)</i>

4.2.4. Status of the Assistance Fund: Comparisons with Global Environmental Funds

Despite the continued calls from the United Nations and FAO for contributions to the Assistance Fund at several international forums, the status of the fund remains depleted. One of the few significant contributions came in 2021 when the European Union (EU) and FAO entered into a donor agreement for a three-year project valued at \$1,127,599. This capacity-building initiative was aimed at strengthening nations' participation in the implementation of

the UNFSA. A first instalment of \$451,040 was made by the EU in 2022, but the overall status of the fund remains insufficient to meet global needs.²⁴⁹

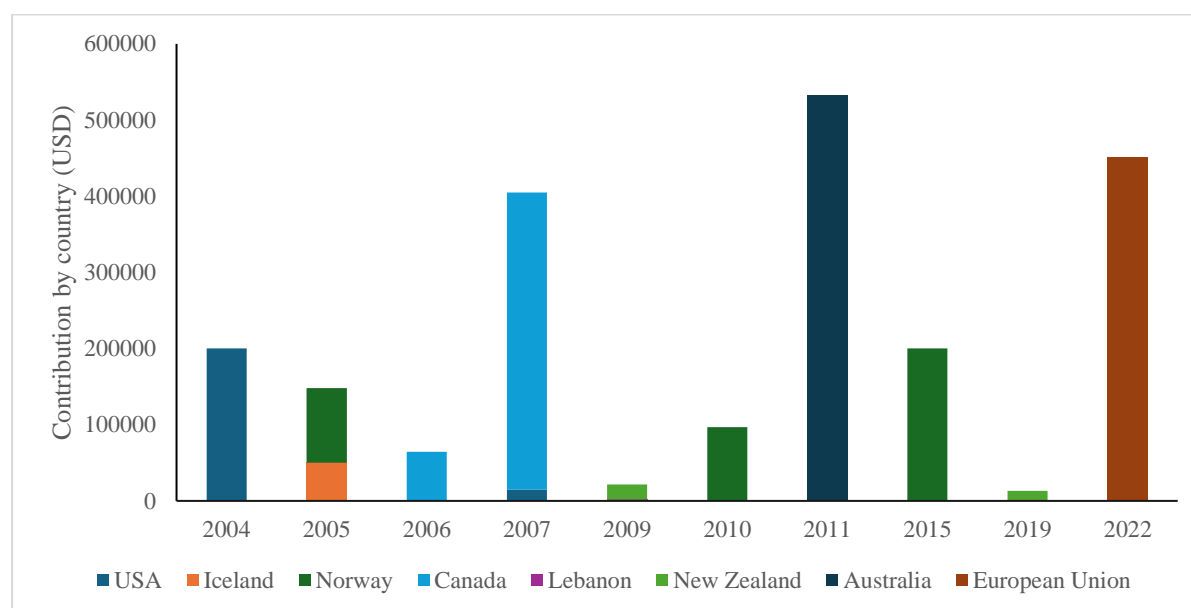


Figure 3: Contributions made to the UNFSA Assistance Fund²⁵⁰

This situation also reflects the more significant challenges in environmental finance, especially the gap between developed and developing countries in the financing of biodiversity conservation and climate change mitigation. Inadequate funding levels are the primary impediment to effective biodiversity conservation.²⁵¹

For instance, in the field of climate change, the Green Climate Fund (GCF), established under the United Nations Framework Convention on Climate Change (UNFCCC), is the most significant climate fund in the world.²⁵² The GCF aims to mobilise \$100 billion annually from different public, private, bilateral, and multilateral sources to address the needs of developing countries.²⁵³ The initial commitment of \$100 billion was not met by the 2020 deadline, reaching only \$83.3 billion; progress was seen by 2022, when contributions increased to \$115.9

²⁴⁹ Project of Assistance to Strengthen Participation in and Implementation of the United Nations Fish Stocks Agreement (UNFSA). Available at <<https://www.un.org/oceancapacity/UNFSAPproject>> (accessed on 17 September 2024).

²⁵⁰ Review Conference 2023, *supra* note 41, A/CONF.210/2023/2, Annex I.

²⁵¹ Anthony Waldron and Others, “Targeting global conservation funding to limit immediate biodiversity declines”, *Proceedings of the National Academy of Sciences*, vol. 110, no. 9, (2013), pp.12144-12148.

²⁵² Green Climate Fund. Available at <<https://www.greenclimate.fund/>> (accessed on 18 September 2024)

²⁵³ UNFCCC. “Report of the Conference of the Parties on its fifteenth session”. United Nations Framework Convention on Climate Change, (7 to 19 December 2009), para 8.

billion.²⁵⁴ This is still far from sufficient, but it shows a more coordinated effort compared to fisheries governance funds.

Also, biodiversity conservation faces a substantial financial shortfall. Studies, such as those by Daniel C. Miller, have found a positive relationship between biodiversity aid and good governance indicators, suggesting that aid can promote sustainable environmental practices.²⁵⁵ A recent report by the BIOFIN Initiative also indicated that around a tenth of biodiversity and finance flow from developed to developing countries. However, a tenfold increase is needed to impact the large gap in biodiversity financing.²⁵⁶ Biodiversity conservation will supersede climate change risk mitigation and adaptation as the next grand challenge for sustainable finance. Over the next ten years, closing the financing gap between what is currently spent and what is needed to mobilise private investment to maintain ecosystem integrity and biodiversity and the services they provide is estimated to exceed hundreds of billions per year.²⁵⁷

Finance has become a sore point in many intergovernmental discussions in recent years, considering the disparity between developing and developed nations. The gap in contributions to fisheries governance can be attributed to several factors, including national priorities, economic conditions, and political will. Despite several studies focusing on financing the conservation of biodiversity, few detailed analyses focus on fisheries' governance and international aid.

4.2.5. Allocation of Assistance Funds vs Capacity Building Needs

With respect to the amount of money spent from the assistance funds on different expenditures, most of the funds have been allocated to attending meetings and activities organised by RFMOs and participating in high seas meetings. Only a limited portion of the funds has been assigned to building capacity for flag state responsibilities, MCS, data collection, and research, with the highest allocation in 2009 at 11%. During 2009 and 2010, a significant percentage of the funds was directed toward supporting human resource development, technical training, and technical assistance.²⁵⁸

²⁵⁴ OECD. "Climate Finance Provided and Mobilised by Developed Countries in 2013-2022", Climate Finance and the USD 100 Billion Goal. (OECD Publishing, Paris-2024), p7.

²⁵⁵ Daniel C. Miller and Others, "Biodiversity, Governance, and the Allocation of International Aid for Conservation", *Conservation Letters*, vol.6, (2013). pp 12-20.

²⁵⁶ UNDP, "The 2016 BIOFIN Workbook: Mobilizing resources for biodiversity and sustainable development". The Biodiversity Finance Initiative, (United Nations Development Programme-New York, 2016), p35.

²⁵⁷ G. Andrew Karolyi and John Tobin-de la Puente, "Biodiversity finance: A call for research into financing nature", *Financial Management*, vol. 52, no.2, (2023), pp 231-251.

²⁵⁸ Review Conference 2023, *supra* note 41, Annex II.

There is an urgent need to prioritise capacity building in fisheries governance. While scientists and policymakers possess a comprehensive understanding of the needs and priorities for conserving and managing fish stocks, they often need more detailed insight into how global expenditures are distributed for these purposes. Also, several bilateral contributions from developing countries to their fellow developing countries should be noticed by developed countries. Accurate reporting would address the issue of visibility, ensuring these efforts are fully accounted for in global discussions and frameworks while also fostering equitable partnerships and shared responsibility in addressing global challenges.

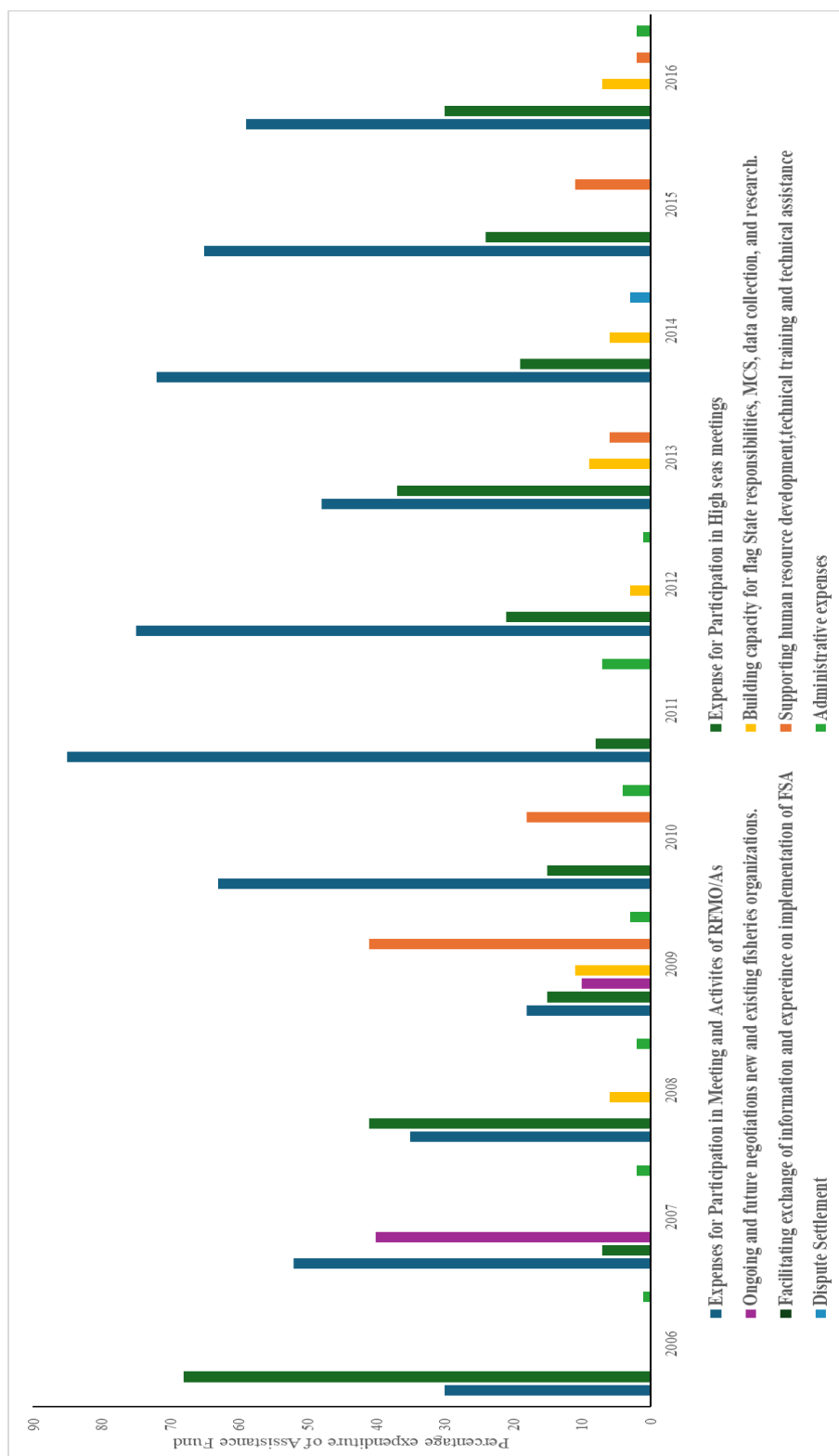


Figure 4: Percentage Share of Voluntary Assistance Fund in Different Categories

4.2.6. Issues That Hamper Capacity-Building Under Part VII of UNFSA

Since 2004, the contributions to the trust fund have been volatile and inadequate, which impede long-term planning and implementation of Part VII of the agreement. This lack of consistent financial support prevents the development and execution of long-term capacity development plans. Capacity building is an ongoing process involving a series of interconnected activities such as training, infrastructure development, technology transfer, and institutional strengthening. Continuous funding and support over time are required to be effective, and more than one-time funding injections is required to achieve the desired outcomes.

It is noteworthy that more than 70% of the funding has been spent on delegations from different states attending meetings rather than capacity-building activities. This misallocation might result in limited tangible improvements in capabilities of developing countries to manage their fisheries and comply with the provisions of UNFSA.

Several international, regional, and national bodies have been involved in capacity-building activities directly or indirectly related to UNFSA.²⁵⁹ This can create overlapping mandates and repeated capacity building on similar topics, leading to inefficiencies. Also, generic capacity-building programs often fail to address the specific needs and contexts of individual countries or regions.

While south-south and triangular cooperation are emphasised in international frameworks like the SDGs,²⁶⁰ they are not effectively operationalised in practice. These forms of cooperation could provide opportunities for developing countries to share knowledge, expertise, and resources. Strengthening these cooperation mechanisms can enhance the effectiveness of capacity-building by utilising regional strengths and fostering peer learning among countries with similar challenges.²⁶¹

²⁵⁹ Kathleen Auld and Others, “The collective effort of the United Nations Specialised Agencies to tackle the global problem of illegal, unreported, and unregulated (IUU) fishing”, *Ocean and Coastal Management*, vol. 243, (2023), e106720.

²⁶⁰ Sustainable Development Goals Fund. Available at < <https://www.sdgfund.org/south-south-cooperation#:~:text=South%2DSouth%20Cooperation%20is%20shaping,partnerships%20for%20advancing%20the%20SDGs> > (accessed on 15 October 2024).

²⁶¹ Kochi Declaration: A Resolution for Marine Science Cooperation in the Bay of Bengal Region. p2-3. Available at < <https://www.bobpigo.org/publications/HD/BOBP%20Kochi%20Declaration%20A%20Resolution%20for%20Marine%20Science%20Cooperation%20in%20the%20Bay%20of%20Bengal%20Region.pdf> > (accessed on 10 October 2024).

Chapter 2: Opportunities to Address the Challenges and Improve Implementation of Flag State Duties under UNFSA

Section A: Role of Regional Fisheries Bodies

4.3.1. RFBs in implementing UNFSA

RFBs are an essential component of the overall framework for fisheries governance. They promote regional cooperation and the development of national research and management capacity.²⁶² It is important to note that the UNFSA does not use the term “Regional Fisheries Bodies.” Its application is mainly to “Subregional (or) Regional Fisheries Management Organisations (or) Agreements,” which have a management mandate. It is not officially intended for Regional Fisheries Bodies that do not have the above mandate. However, the bodies with advisory mandates also assist in implementing the agreements as required. For example, in the Pacific, the Pacific Community (SPC), which is an advisory body, has a Memorandum of Understanding and a data-sharing agreement with the Western and Central Pacific Fisheries Commission (WCPFC).²⁶³ Thus, this chapter addresses RFBs, regardless of their mandate, in implementing the provisions of UNFSA.

RFBs and UNFSA operate as complementary pillars in this system, where UNFSA provides a comprehensive framework for the establishment and functioning of RFMOs, which, in turn, assist member states in implementing the provisions of UNFSA, ensuring effective management and conservation of fish stocks. Despite their often-debated mixed performance, RFBs remain critical players in international fisheries governance and crucial in the implementation of the agreement.²⁶⁴ Although UNFSA primarily applies to highly migratory and straddling fish stocks on the high seas, it is widely implemented within national jurisdiction, which signifies its efficacy.²⁶⁵

The obligations under the UNFSA apply to states that are either party to either the Agreement or the RFMO or both. These states must implement the Agreement, either by amending the establishing agreement or through decisions made by the RFMOs.²⁶⁶ The performance of

²⁶² Judith Swan, “Decision-making in Regional Fishery Bodies or Arrangements: the evolving role of RFBs and the international agreement on decision-making processes”, FAO Fisheries Circular. No.995. Rome. FAO. (2004). p82.

²⁶³ WCPFC. Relations with Other Organisations. Available at. <https://www.wcpfc.int/relations-other-organisations> (accessed on 20 October 2024).

²⁶⁴ Review Conference 2023, *supra* note 41, (A/CONF.210/2016/5), para 28.

²⁶⁵ Judith Swain, *supra* note 261, p82.

²⁶⁶ Tore Henriksen, Geir Hønneland and Are Sydnes, *supra* note 63, p35.

RFMOs is a crucial indicator for implementing UNFSA. In a significant development, the 26th session of COFI in 2005 underscored the importance of establishing principles to review the performance of RFMOs in meeting their objectives and the obligations and principles set forth in relevant international instruments. This recognition was a pivotal moment in the history of UNFSA implementation. Thus, in 2006, UNGA was urged to conduct a performance review of RFMOs, following the recommendations of the ministerially led task force on IUU Fishing on the high seas.²⁶⁷

In 2007, a comprehensive and exhaustive list of performance review (PR) criteria was developed during a joint meeting of Tuna RFMOs. The comprehensive nature of the criteria ensured that all aspects of performance of RFMOs were thoroughly evaluated.²⁶⁸ Criteria for performance review of RFMOs are provided by two different FAO Fisheries and Aquaculture Circulars No. 1072 & No. 1108. They are broadly classified into the following categories: *conservation and management of fish stocks; compliance with and enforcement of international obligations; legal framework, financial affairs, and organisation; and cooperation with other international organisations and non-member states*. Also, some PRs include socio-economic aspects of fishing, the duties of RFBs towards developing countries, and the possible effects of fleet modernisation.²⁶⁹ Although the wording of the criteria varies from report to report, the areas of interest are generally the same.

Under the broad area of compliance and enforcement, one of the criteria for assessing the performance of RFMOs was the “flag state duties”, which measure the extent to which the Contracting Parties (CPs) are fulfilling their duties as flag states under their convention, pursuant to measures adopted by the RFMOs, and under other international instruments, including, inter alia, LOSC, UNFSA, and the FAO Compliance Agreement. Further, one of the criteria under international cooperation was “special requirements of developing states”, which analyses the extent to which RFMOs recognise the unique needs of developing states and cooperate with them in accordance with Part VII of the UNFSA. Its CPs provide relevant assistance to these states, as outlined in Article 26 of the same agreement. The following section will focus on a brief analysis of the performance review of RFMOs to which the countries are

²⁶⁷ High Seas Task Force (2006). “Closing the net: Stopping illegal fishing on the high seas”, Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University. p63.

²⁶⁸ Report of the Joint Meeting of Tuna RFMOs, Kobe, Japan, (22-26 January 2007), pp10.

²⁶⁹ FAO, “The implementation of performance review reports by regional fishery bodies 2004–2014”, by Péter D. Szigeti and Gail L. Lugten. FAO Fisheries and Aquaculture Circular No. 1108. Rome, (2015), p5.

CPs (or) NCPs, which indirectly highlight the effectiveness of these bodies in supporting the implementation of the UNFSA, particularly in relation to the above-mentioned areas.

4.3.2. RFMOs in Indian Ocean

Indian Ocean Tuna Commission

The Indian Ocean Tuna Commission is the only RFMO in the Indian Ocean, where all the countries in this study are CPs. IOTC underwent performance reviews in 2008 and 2015.

First performance Review: During the first performance review, the panel recommended that any amendments to, or replacements of, the IOTC agreement should incorporate specific provisions regarding the duties of members as *flag states*, based on the relevant provisions of the UNFSA. Also, the panel recommended establishing a comprehensive MCS system by enforcing the measures already in place and introducing new measures and tools, such as a potential on-board regional observers' programme, a catch documentation scheme, and a potential boarding and inspection system.²⁷⁰

Regarding follow-up on infringements as provided in Article 19 of UNFSA, the commission has adopted resolution 06/01. However, since it only applies to non-members, the commission recommends that it be amended to include flagged vessels of members. Also, it suggests that it explores options concerning the possible lack of follow-up on infringements by CPs.²⁷¹

Regarding the special requirements of developing states, the panel recommended that, even though the IOTC has provided various forms of assistance to developing states, there is no specific IOTC fund to assist the developing member states.²⁷² It should be noted that the IOTC agreement needs to correctly address both flag state duties and the special requirements of developing states.

Second Performance Review: IOTC is one of the RFMOs that adopted the newest or updated measures since the first PR.²⁷³ Several resolutions were amended regarding flag state duties, such as 11/03, 15/01, 15/02, and 15/04, and resolutions on bycatch, which indirectly contribute to the data reporting mechanism. In addition to the recommendations made during PR1, PR2

²⁷⁰ IOTC. Report of the IOTC Performance Review Panel. 2009. 56pp.

²⁷¹ Ibid. p36.

²⁷² Ibid. p43.

²⁷³ Bianca Haas and Others, "The influence of performance reviews on regional fisheries management organizations", *ICES Journal of Marine Science*, vol.76, no.7, (2019), pp. 2082-2089.

also advocated the same recommendations and suggested that IOTC take due note of VGFSP while making those amendments.²⁷⁴

For MCS, IOTC has implemented Resolutions 14/06 and 15/03 regarding transshipment. The panel noted that sub-regional initiatives are also being undertaken in the region, including by the Indian Ocean Commission (IOC).²⁷⁵ PR2 recommended that the commission review the exiting IOTC MCS measures, identify gaps, and recommend moving forward based on the experiences of other RFMOs.

As recommended in PR1, IOTC has amended the record of authorised vessels, obliging CPs to ensure that vessels with a history of IUU fishing are not authorised (Resolution 15/04). Also, the commission adopted Resolution 11/03, establishing a list of vessels presumed to have carried out illegal, unreported, and unregulated fishing in the IOTC area of competence. To address the follow-up procedures by CPs, the commission has revised the ToR of the compliance committee.²⁷⁶ The PR2 directed the commission to establish a scheme of responses to non-compliance regarding CPs' obligations and develop an online reporting tool.

Based on PR1's recommendations, IOTC has established a special fund to assist in building capacity and developing CPs participation in the commission's work.²⁷⁷ However, it is to be noted that most of the funds have been directed to participation in meetings, which is the same in the case of voluntary trust funds. Also, the commission has been collaborating with the Overseas Fishery Cooperation Foundation of Japan in a project that contributes to the realisation of sustainable utilisation of tuna resources in the Indian Ocean. PR2 recommended that the Meeting Participation Fund be made a part of the IOTC regular budget. Also, it directed the commission to develop a five-year regional fisheries capacity development programme to ensure coordinated capacity-building activities across the region.

Follow-up on the IOTC PR2: IOTC has amended and adopted several resolutions regarding the flag state duties, MCS, and follow-up on infringement. Based on the recommendations from PR1 and PR2, the draft agreement was prepared in 2019 to modernise and amend the suggestions given by the PR.²⁷⁸ To address the issues raised, the revised draft agreement has a separate article on flag state duties (Article XVIII), monitoring, compliance, and enforcement

²⁷⁴ IOTC. Report of the 2nd IOTC Performance Review. 2016. 86pp.

²⁷⁵ Ibid. para 148.

²⁷⁶ Ibid. para 151.

²⁷⁷ Ibid. para 206.

²⁷⁸ Draft IOTC Agreement Text. Available at < <https://iotc.org/documents/draft-iotc-agreement-text-0> > (accessed on 25 October 2023).

(Article XX), and Special requirements of developing states contracting parties (Article XXII). However, this draft has not been adopted till now.

It is important to note that the IOTC agreement does not have a provision for non-members of the commission, unlike the separate Part in WCPFC (Article 32), which significantly reflects the provisions of Article 17 of UNFSA. However, the report of the technical committee on Performance Review mentions that the IOTC secretariat will work with RECOFI members to promote membership.²⁷⁹ Article IV (1)(3) of the IOTC agreement directs the commission members to encourage initiatives by states entitled to become CPs.

Based on the recommendations on compliance with data collection and reporting requirements and follow-up on infringement in the IOTC PR2, the Electronic Monitoring and Reporting Information System (e-MARIS) application was developed and institutionalised to support the IOTC's compliance process.²⁸⁰ The e-MARIS application aims to replace the current manual process with a web-based centralised system, allowing CPs to declare their information and help the IOTC Secretariat assess each CP's compliance status. Further, reporting obligations have been strengthened by Resolution 18/07.

Concerning the capacity building programs regarding flag state performance, support has been provided under the SWIOFISH 2 project to identify constraints and gaps in exercising flag state responsibilities; so far, Seychelles (2019), Tanzania (2019) and Mozambique (2022) have benefitted. Countries like Maldives, Mauritius, and South Africa also volunteered to benefit from this project. Still, due to financial shortage, it cannot be done but may be conducted under an alternate finance mechanism.²⁸¹

Further, it is also to be noted that the commission has been working in close collaboration with other international organisations such as Common Oceans, the Indian Ocean Commission, the World Bank, the European Union, the Japan Social Development Fund, the Global Environment Facility, the Nordic Development Fund, BOBLME phase I to conduct workshops and training programmes on implementation of IOTC resolutions, Port state measures,

²⁷⁹ IOTC. Progress on the Implementation of Performance Review Recommendations. IOTC-2019-S23-06_Rev1[E]. (2019). 31pp.

²⁸⁰ IOTC. Progress on the development of the e-MARIS application. IOTC-2022-WPICMM05-10. (2023). 35pp.

²⁸¹ IOTC. Summary Report on Compliance Support Activities. IOTC-2023-CoC20-11_Rev2 [E]. (2023). 14pp.

enhancing fisheries data reporting, electronic Monitoring and Reporting Information System (e-MARIS) and science and management processes.²⁸²

The current analysis of the period after PR2 until 2024 indicates that IOTC has made significant progress in mainstreaming the flag state duties and associated obligations in various resolutions. Also, the IOTC agreement has been revised but has yet to be adopted. In this case, it is necessary to look at the ICCAT PR2 in 2016, where the panel convened issued a similar statement stating that “...*flag State duties recognised in international fisheries law are adequately reflected in current ICCAT recommendation*”. However, the panel has no view as to whether such responsibilities are being executed correctly.²⁸³ A similar observation can be made regarding the IOTC.

Despite the existence of several CMMs regarding flag state duties, there remains a crucial need for a robust mechanism to assess how effectively these measures are being implemented and enforced. The consensus-based nature of decision-making within the IOTC often leads to the dilution of measures to accommodate the diverse interests of all members, which can significantly reduce the effectiveness of these decisions.²⁸⁴ While consensus ensures inclusivity and broader acceptance, it can also hinder timely and decisive action in situations that demand more stringent or scientifically guided measures. A clear example is the failure to reach a consensus on the adoption of the revised IOTC agreement due to disagreements over whether the IOTC should remain under the FAO framework.²⁸⁵

Moreover, many developing countries within the IOTC may lack the necessary infrastructure, expertise, and resources to fully comply with these measures. This underscores the urgent need for targeted capacity-building initiatives to ensure all contracting parties, particularly developing states, are equipped to fulfil their obligations. Strengthening these capacity-building efforts is essential for promoting compliance, achieving sustainable fisheries management, and ensuring that CMMs lead to meaningful and effective outcomes.

South Indian Ocean Fisheries Agreement

As one of the younger RFMOs that came into force in 2012, SIOFA has ten contracting parties, one participating fishing entity, and two cooperating non-contracting parties, Comoros and

²⁸² Ibid.

²⁸³ ICCAT, Report of the Independent Performance Review of ICCAT. (2016). p50.

²⁸⁴ Hussain Sinan and Megan Bailey, “Understanding Barriers in Indian Ocean Tuna Commission Allocation Negotiations on Fishing Opportunities”, *Sustainability*, vol. 12, no.16. (2020).

²⁸⁵ IOTC, Report of the 23rd Session of the Indian Ocean Tuna Commission, (2019), sect 13.4.

India. Recently, SIOFA underwent its first performance review.²⁸⁶ In 2023, it was presented to the Scientific Committee (SC) to provide advice to the Meeting of the Parties (MoP) on the PR Panel's recommendations. The SC was tasked with guiding the MoP on the Performance Review Panel's recommendations. Since, apart from India, which holds the status of a Cooperating Non-Contracting Party, the other countries considered in this study are neither Contracting Parties nor Cooperating Non-Contracting Parties of SIOFA, only a brief overview of performance review related to flag state responsibilities is included.

The Performance Review Panel has made several key recommendations. It advises CPs to adopt flag state performance self-assessment principles within compliance monitoring frameworks. Specifically, it suggests that the Compliance Committee (CC) review the annual national reports from CPs, a task currently overseen solely by the SC. Furthermore, the Panel urges CPs to continue establishing a VMS to track vessel activity within the Agreement Area and recommends adopting rules for the submission of VMS data until the system is fully operational.²⁸⁷

Regarding capacity building, the Panel recommends that CPs prioritise initiatives to help developing states conduct bottom-fishing impact assessments that align with SIOFA standards. Additionally, it suggests that the secretariat assess capacity-building needs to improve compliance, focusing on urgent issues and providing necessary assistance where required.²⁸⁸ Extraordinary Scientific Committee Meeting (SC-EXTRA-1) recommended that the MoP capacity-building activities focus on data capture, data quality, and data reporting rather than specifically on the Bottom Fishing Impact Assessment Standard (BFIA).²⁸⁹

SIOFA contains articles related to flag state duties (Article 11), mirroring some of the provisions of Article 18 of the UNFSA. These duties include authorisation, compliance with CMMs adopted by the MoPs, implementation of VMS, maintenance of fishing vessel records, sharing of fisheries data, and investigating violations at the request of CPs. Similarly, the Article on Non-Contracting Parties (Article 17) draws heavily from the provisions of Article 17 of the UNFSA.

²⁸⁶ SIOFA. 1st Performance Review Report. (2023). (MoP-10-01).143pp.

²⁸⁷ Ibid. Nr. 22,26.

²⁸⁸ Ibid. Nr. 6,31.

²⁸⁹ SIOFA, Report of the 1st Extraordinary Meeting of the Scientific Committee (SC-EXTRA1) of the Southern Indian Ocean Fisheries Agreement. (2023). para 25.

4.3.3. RFABs in Indian Ocean

Southwest Indian Ocean Fisheries Commission (SWIOFC)

SWIOFC is responsible for promoting regional cooperation in the utilisation and management of fish stocks within the EEZs of the Southwest Indian Ocean states. As a body created under Article VI (1) of the FAO constitution, SWIOFC has only an advisory and coordination role. A performance review of SWIOFC was carried out in 2012; this section draws inferences from the performance review and the developments in SWIOFC since then.

First Performance Review

Considering that area of competence of SWIOFC is restricted to the EEZ of member states, the commission could not adopt any CMMs. Most of the work done by SWIOFC has been related to providing advice and coordination on institutional and organisational systems, needs, and processes, including methods and protocols, for data collection, analyses, and reporting by member States at the country level.²⁹⁰ SWIOFC has established a Working Party on Fisheries Data and Statistics to collect, analyse, and share data. Its statutes include a precautionary approach and an Ecosystem Approach to Fisheries as one of its basic principles. Regarding EAF, SWIOFC has been serving as a platform for the development of specific projects like the EAF-Nansen Project. However, limited work has been carried out with respect to PA.²⁹¹

MCS has been discussed during various sessions of the Commission; however, SWIOFC has not taken any direction in promoting MCS in the region. The panel noted that the different MCS capabilities of the various countries in the region hamper coordination on this matter.²⁹²

SWIOFC has not promoted any significant capacity building in the region; it has again served as a means for facilitating and coordinating capacity-building initiatives, mainly through workshops organised by other institutions and projects, such as SIDA, SWIOFP, EAF—Nansen Project, etc.²⁹³

²⁹⁰ SWIOFC. Report of the Performance Review of the South West Indian Ocean Fisheries Commission. (2012). sect 3(a).

²⁹¹ Ibid. sect 3(e-f).

²⁹² Ibid. sect (g).

²⁹³ Ibid. sect 3(h).

Activities of SWIOFC After Performance Review

The commission has taken significant steps that directly (or indirectly) support the implementation of the provisions of UNFSA. SWIOFC developed voluntary guidelines that are addressed to the SWIOFC states at all levels of the country and to flag states of vessels operating in the SWIOFC region. The objectives of the guidelines are to provide a common access regime for foreign fishing vessels involved in fishing tuna and tuna-like species in the SWIOFC region.²⁹⁴ According to these guidelines, SWIOFC states should require all foreign vessels to be registered in the IOTC record of authorised vessels, have a flag state authorisation to fish, have clearly marked gear and vessels, have a functioning VMS and AIS, establish a regional observer scheme within the framework of IOTC, have a vessel reporting requirement in line with IOTC requirements, and have authorisation to fish by the flag state.²⁹⁵ These guidelines by SWIOFC states as “coastal states” will make the flag state of foreign fishing vessels comply with the UNFSA provisions of flag state duties and the existing RFMO CMMs. It is to be noted that provisions drawn from Article 23 of UNFSA regarding port state measures. Further, to improve performance in implanting the IOTC CMMs and provide a voice on common positions at the IOTC, the commission has created a Working Party on Collaboration and Cooperation in Tuna Fisheries. In 2019, most of the SWIOFC member states had more than 50% compliance with IOTC CMMs.²⁹⁶

The statute of the SWIOFC agreement contains provisions for entering into an agreement (or) arrangement for the conservation of high seas resources in the southern Indian Ocean.²⁹⁷ Possible areas of collaboration were identified between the SWIOFC and SIOFA, which include i) research into demersal fisheries resources, ii) curbing IUU fishing, and iii) projects to promote the application of SIOFA CMMs.²⁹⁸ Based on this, SWIOFC and SIOFA shared information on the status of the stocks in their area of competence and encouraged its members to join SIOFA.²⁹⁹

²⁹⁴ SWIOFC, Guidelines For Minimum Terms and Conditions (MTC) For Foreign Fisheries Access In The Southwest Indian Ocean Fisheries Commission (SWIOFC) Region. 21pp.

²⁹⁵ Ibid. sect 4-22.

²⁹⁶ SWIOFC, Actions for Improved Coordination and Compliance of the SWIO States to IOTC Conservation and Management Measures (CMMs). Ninth Working Party on Collaboration and Cooperation in Tuna Fisheries. SWIOFC/WPCCTF/19/8 E. (2019), p2.

²⁹⁷ SWIOFC, Statutes of the Southwest Indian Ocean Fisheries Commission, sec 10.

²⁹⁸ SWIOFC. Report of the ninth session of the Southwest Indian Ocean Fisheries Commission. 9-12 October 2018. SFS/R1258. 101pp.

²⁹⁹ SWIOFC. Report of the eleventh session of the Southwest Indian Ocean Fisheries Commission. SFS/R1368. (2021). 94pp.

Further, to strengthen fisheries management and development, discussions are underway to establish the Southwest Indian Ocean Fisheries Framework Agreement (SWIO-FFA), based on the successful Pacific Islands Forum Fisheries Agency (FFA) or an agreement with binding CMMs like SIOFA outside the FAO framework.³⁰⁰

Bay of Bengal Programme Inter-Governmental Organisation

Bay of Bengal Programme Inter-Governmental Organisation (BOBP-IGO), established in 2003, evolved from the erstwhile Bay of Bengal Programme of the Food and Agriculture Organization of the United Nations, founded in 1979. The current members of the Organisation are Bangladesh, India, Maldives, and Sri Lanka, while Indonesia, Malaysia, Myanmar, and Thailand are cooperating non-contracting parties.³⁰¹ The objectives of the Organisation are to enhance cooperation among member countries, other countries and organizations in the region and provide technical and management advisory services for sustainable coastal fisheries development and management in the Bay of Bengal region.³⁰² The area of the competence of BOBP-IGO is the EEZ under the jurisdiction of the Member States and areas beyond national jurisdiction.³⁰³ The organisation has not so far undergone any performance review.³⁰⁴

The organisation is currently implementing Phase II of the Bay of Bengal Large Marine Ecosystem Programme. One component of the project involves institutionalising EAFM for stocks in EEZs, targeting transboundary fish stocks, and reducing IUU fishing by improving MCS and port-state measures. The project also consists of developing the Capacity of the relevant national and regional authorities and the fishing sector to implement effective gear marking systems.³⁰⁵

³⁰⁰ SWIOFC. Policy Brief on a Possible Southwest Indian Ocean Fisheries Framework Agreement.

Ninth Working Party on Collaboration and Cooperation in Tuna Fisheries. SWIOFC/WPCCTF/19/4 E. (2019). 7pp.

³⁰¹ BOBP-IGO, Available at < <https://www.bobpigo.org/pages/view/bobp> > (accessed on 27 October 2023).

³⁰² BOBP-IGO, Agreement on the Institutionalisation of the Bay of Bengal Programme as An Inter-Governmental Organisation, BOBP/INF/17.

³⁰³ FAO. Regional Fishery Bodies Summary Descriptions - BOBP-IGO. Available at [https://www.fao.org/figis/pdf/fishery/rfb/bobp_igo/en?title=FAO%20Fisheries%20%26%20Aquaculture%20-%20Regional%20Fishery%20Bodies%20Summary%20Descriptions%20-%20Bay%20of%20Bengal%20Programme%20Inter-Governmental%20Organization%20\(BOBP-IGO\)](https://www.fao.org/figis/pdf/fishery/rfb/bobp_igo/en?title=FAO%20Fisheries%20%26%20Aquaculture%20-%20Regional%20Fishery%20Bodies%20Summary%20Descriptions%20-%20Bay%20of%20Bengal%20Programme%20Inter-Governmental%20Organization%20(BOBP-IGO)) (accessed on 27 October 2023)

³⁰⁴ Terje Løbach and Others, Regional fisheries management organizations and advisory bodies. Activities and developments, 2000–2017. FAO Fisheries and Aquaculture Technical Paper No. 651. Rome, (2020), 127pp.

³⁰⁵ BOBP-IGO, Sustainable Management of Fisheries, Marine Living Resources and their Habitats in the Bay of Bengal Region for the Benefit of Coastal States and Communities. Work Plan 2024. Available at https://www.bobpigo.org/webroot/img/img-docus/BOBLME_Workplan_Brochure.pdf (accessed on 27 October 2023)

BOBP-IGO has also adopted the Chittagong Resolution on Monitoring, Control, and Surveillance for small-scale fisheries to biologically address the multidimensional issue.³⁰⁶ In accordance with Article 4a of the BOBP-IGO agreement, BOBP-IGO is in the process of developing and implementing a Regional Plan of Action to Combat Illegal, Unreported, and Unregulated Fishing (RPOA-IUU).³⁰⁷ The draft text of RPOA-IUU has provisions in line with the UNFSA, which include maintaining a Regional record of fishing vessels, marking the fishing vessels and gear, developing standard operating procedures regarding port state measures, establishing joint regional MCS and enforcement procedures (including schemes, patrols, and observer programmes), maintaining a list of IUU fishing vessels and harmonised catch documentation schemes.³⁰⁸ However, the RPOA-IUU is yet to be signed by the member countries.

Further, the organisation has organised several capacity-building initiatives, focusing on MCS and stock assessment, which are among the target areas for using the voluntary trust fund, as mentioned in the report of the 2023 Review Conference. BOBP-IGO also conducted a series of capacity-building programs on CCRF, which contains provisions like those outlined in UNFSA.³⁰⁹

Like SWIOFC, the organisation has constituted a Technical Committee at its 6th Governing Council Meeting to establish an RFMO in the BOB Region. While 80% of the catch from the EIO comes from the BOB region, a significant portion is not under any form of management.³¹⁰ However, discussion is underway, and no conclusion has yet been reached.

4.3.4. Issues that Undermine the Overall Objectives of Flag State Duties

Even though RFMOs direct member states to act against the flagged vessels, timely flag state actions are required, but neither RFMOs nor UNFSA has mandated the severity of the actions. Further, most of the coastal states in the Indian Ocean hold membership CPs in an RFMO or RFAB, which has its area of competence in the region. When assessing the recent IUU vessel list from IOTC & SIOFA, a few non-members were seen being placed under the IUU vessel

³⁰⁶ BOBP-IGO. Report of the Regional Workshop on Monitoring, Control and Surveillance in Marine Fisheries. 2008. p25-27.

³⁰⁷ BOBP-IGO. Report of the Regional Meeting for the Review and Validation of the RPOA to Combat IUU Fishing. 2021.

³⁰⁸ Ibid. p38-42.

³⁰⁹ Information on capacity building collated from the data available at < <https://www.bobpigo.org/pages/eventsbobp> > (Accessed on 2 November 2024).

³¹⁰ BOBP-IGO. Report of the Eighth Meeting of the Governing Council. BOBP/REP/129. sect3.

list. This indirectly reflects the lack of flag state measures to comply with the CMMs adopted by the RFMOs.

The lack of comprehensive and coordinated fisheries MCS systems among RFMOs undermines the effective implementation of CMMs. These systems help curb IUU fishing, verify flag state control, and implement CMMs.³¹¹ One of the best examples is HSBI; except for SIOFA, other RFMOs in the Indian Ocean region do not have an HSBI scheme, even though it is stressed as an essential measure to promote compliance with CMMs.³¹² As mentioned, adoption by consensus is a significant factor that acted as a barrier to the adoption of voluntary HSBI in IOTC.

Limited coordination between and among RFBs has been a point of discussion for quite some time, which includes differences in regulatory frameworks of species of common interest like *Scomberomorus commersoni* (IOTC-RECOFI) & *Ruvettus pretiosus* (IOTC-SIOFA). Despite information sharing between RFMOs and RFABs like SIOFA-SWIOFC (sharing information on stock status), there are limited collaborative frameworks in the region, which might strengthen the implementation of the UNFSA. Even though curtailed by its advisory mandate, RFABs can act as an extended arm of RFMO in implementing the CMMs.

The limited capacity (or) capacity deficit of its members is a significant problem identified across RFMOs when complying with the CMMs,³¹³ which might ultimately result in severe inconsistencies in the implementation of CMMs. It is to be noted that both the RFMOs covered in this study have more developing countries and least developed countries as members. Though there are projects that were implemented to improve developing countries' compliance with CMMs,³¹⁴ it is uncertain how effective these projects are in improving the compliance of members. Several IOTC members are requesting capacity building to enhance their compliance with CMMs.³¹⁵ However, as noted in the previous sections, funding has been a significant constraint in implementing capacity development programmes.

³¹¹ Claire van der Geest, "Redesigning Indian Ocean Fisheries Governance for 21st Century Sustainability", *Global Policy*, vol.8, no.2, (2017), pp-227-236.

³¹² Review conference, *supra* note 41, (A/CONF.210/2023/6), para 115.

³¹³ Hannah Paris and others. The Challenge of Fisheries Governance after UNFSA. The Case of the Western and Central Pacific Fisheries Commission. In *Handbook of Marine Fisheries Conservation and Management*. (Eds) Q. Quentin Grafton and others. Oxford University Press. New York.

³¹⁴ FAO. Improving Developing Countries' Compliance with IOTC Conservation and Management Measures. Available at < <https://openknowledge.fao.org/server/api/core/bitstreams/027964bc-ad40-45f9-baa1-17c8a43e2d88/content> > .

³¹⁵ IOTC. Report of the 21st Session of the Compliance Committee. para95.

Section B: Strategies and Opportunities for Enhancing UNFSA Implementation

4.4.1. Measures to Enhance Flag State Duties at the National Level

a. Assessment of flag state performance

Performance measurement provides valuable insights into the past, current, and expected future standings concerning specific commitments.³¹⁶ Bourne identifies key drivers and blockers of performance measurements in business organisations, which are relevant to the implementation of international legal frameworks as well. The primary drivers are a strong commitment to the process and the perceived benefits of implementation. At the same time, the blockers include the time and effort required, the complexity of implementation, and potential resistance from stakeholders.³¹⁷

VGFSF encourages flag states to carry out periodic performance assessments of flag state performance to assess their compliance with their duties and obligations. The 2023 Review Conference also strongly recommended that states implement VGFSF and conduct performance assessments as the first step.³¹⁸ Such assessments can identify both legal and implementation gaps, providing a basis for targeted improvements.

However, there is ongoing debate over what constitutes a "performance failure" in relation to flag state duties. It is still unclear when a flag state's actions should be considered as falling short or as breaching its obligations. Despite these uncertainties, conducting performance assessments remains crucial. A two-stage approach is proposed: first, a general evaluation of overall performance, and second, a more specific review of RFMO-related flag state measures. Periodic assessments are always advisable to ensure continuous improvement and to strengthen flag state performance over time.

b. Strengthening National Legislation

All international instruments will only be effective if they are reflected in national legislation. Countries also noted that developing national legislation is one of the significant constraints in the effective implementation of the agreement and stated that the target delivery of assistance

³¹⁶ U.S. Bititici, "The interplay between performance measurement, organizational culture and management styles", *Measuring Business Excellence*, vol. 8, no. 3. (2004). pp.18-41.

³¹⁷ Bourne, M., (2001). Implementation Issues. "Handbook of Performance Measurement", GEE publishing, London.

³¹⁸ Review Conference 2023, *supra* note 41, (A/CONF.210/2023/6), para 110.

was critical to achieving successful implementation.³¹⁹ For example, IOTC has assisted the Maldives in transposing the relevant obligations of IOTC Resolutions into their national legislation to enhance their implementation and compliance.³²⁰

Adaptive management in fisheries has been proposed as one of the best mechanisms for sustainable fisheries management. In this approach, management should be adapted based on the existing fisheries scenario.³²¹ In line with this, countries should prioritise building legal frameworks that incorporate adaptive provisions that are flexible and responsive. Additionally, national legislation should establish transparent processes for periodic reviews and updates to ensure that laws remain aligned with international and regional commitments.

c. Enhance Inter-departmental Cooperation

Fragmented management responsibilities, a common weakness identified in frameworks such as the EU Common Fisheries Policy (CFP), can lead to inefficiencies and hinder timely decision-making.³²² Although many countries have established mechanisms for inter-departmental cooperation, there is an ongoing need to strengthen and institutionalise these efforts to ensure cohesive and effective fisheries management. Human and financial resource constraints often limit the effectiveness of coordination between national authorities, potentially hindering compliance with international standards. One of the criteria for assessing flag state performance is that a robust national fisheries regime should incorporate a clear internal organisational structure dedicated to inter-departmental coordination.³²³

The interplay of trust, control, and risk in inter-organisational alliance networks significantly influences their formation, governance structures, and overall performance, particularly in terms of knowledge sharing and collaboration.³²⁴ This conceptual framework provides valuable insights for understanding the social dynamics that shape transboundary fisheries governance networks.³²⁵ While initially proposed for transboundary fisheries, this model is equally

³¹⁹ Review conference 2006, *supra* note 36, (A/CONF.210/2006/15), para 116.

³²⁰ Data collated from information Available at < <https://iotc.org/meetings> > (accessed on 8 September 2024).

³²¹ Ray Hilborn and John Sibert, “Adaptive management of developing fisheries”, *Marine Policy*, vol. 12, no.2, (1988). pp.112-121.

³²² David Symes, “The European Pond: who actually manages the fisheries?”, *Ocean & Coastal Management*, vol. 27, no.1-2, pp. 29-46.

³²³ Voluntary Guidelines of Flag State Performance. Food and Agriculture Organization of the United Nations (FAO), Adopted on 20 June 2014, para 11.

³²⁴ T.K. Das and B.S. Teng, “Trust, control, and risk in strategic alliances: an integrated framework”, *Organization Studies*, vol.22, no.2, (2001), pp.251-283.

³²⁵ Gordon. M. Hickey and Others. “On inter-organizational trust, control and risk in transboundary fisheries governance”, *Marine Policy*, vol. 134, (2021), e104772.

applicable to inter-agency collaboration within countries where similar dynamics of trust, control, and risk can enhance or hinder effective coordination and governance outcomes.

Establishing a comprehensive framework that enables streamlined coordination and efficient information exchange is essential, especially as countries strive to meet their obligations under international agreements. This framework should support adaptive management strategies and continuous improvement through regular evaluation and updates. To mitigate these risks, forming inter-departmental working groups focused on critical areas like MCS is essential.

d. Capacity-building for effective implementation

A capacity needs assessment offers countries a comprehensive understanding of their strengths, weaknesses, and resources within a sector—identifying capacity gaps that hinder progress and implementation barriers.³²⁶ However, while methods exist for specific agreements, like the PSMA,³²⁷ there is no standardised capacity assessment methodology tailored to UNFSA obligations. Thus, nations can develop their methods tailored to their unique needs while drawing upon regional, sectoral, and cross-sectoral linkages to foster a more integrated approach to identifying gaps.

Although many countries send officials to capacity-building programs conducted by regional and international organisations, the knowledge gained often does not reach all levels of government or the people responsible for enforcement. Without a structured mechanism for sharing knowledge across all levels, particularly at the local and operational levels, capacity-building efforts risk becoming fragmented and unimpactful. Governments must prioritise creating clear channels for this knowledge transfer, ensuring that information on international and regional fisheries measures reaches officials and fishers alike. Raising awareness among fishers is especially crucial, as they need to understand the importance of sustainable fishing practices and regulatory compliance.

With fish stocks rapidly depleting and fishing pressures mounting, nations must urgently address capacity gaps to protect marine resources. Despite various national and international programs that fund capacity-building efforts, support remains insufficient, and countries often struggle to build the long-term capacity necessary for fulfilling flag state duties. To bridge these gaps, capacity-building initiatives must be participatory, inclusive of all relevant stakeholders, and designed with feedback mechanisms that inform ongoing improvements. A collaborative,

³²⁶ FAO. Capacity Development. Available at <https://www.fao.org/capacity-development/resources/practical-tools/capacity-assessment/en/> (accessed on 27 October 2023).

³²⁷ Capacity Needs Assessment methodologies for PSMA has been developed by Pew Charitable Trust.

two-way approach to knowledge transfer is essential, leveraging existing skills while building new competencies.³²⁸

e. Incentivising Compliance through Positive Reinforcement

Non-compliance in fisheries, involving the violation of fishing regulations, continues to be one of the most persistent challenges hindering the sustainable management of fisheries resources. It is believed to exist due to a combination of economic, social, political, and environmental factors.³²⁹ Despite the robust legal framework, the ultimate success of fisheries management depends on the compliance of the fishers themselves. The international agreements for compliance recommend strict sanctions. However, rather than focusing only on punitive measures for non-compliance, flag states could explore a system of incentives for fishing vessels and companies that consistently comply with regulations.

For instance, to implement the CFP, the Spanish government passed a decree in 2013 establishing the national register of severe violations of the CFP to regulate and record serious fishing infringements committed by vessels flying the Spanish flag in compliance with EU regulations. It details the implementation of a points system for severe infractions, where repeated violations lead to progressive penalties, including suspension or permanent withdrawal of fishing licenses. Furthermore, to ensure full compliance with the regulations, if no further infractions are committed within three years, the points are automatically removed from the record of offenders, which is similar to that of an incentive.³³⁰

Such incentive programmes could promote voluntary compliance, reduce the administrative burden of enforcement, and foster a culture of responsibility among fishers. A modified version of this points-based sanctions and incentives system could be developed and implemented at the national level, potentially increasing compliance with flag state duties by fishers at the ground level.

³²⁸ G. Macfadyen and T. Huntington. “Human Capacity Development in Fisheries”. FAO Fisheries Circular No. 1003, Rome, FAO, (2004), 80p.

³²⁹ Wiebren J Boonstra, Simon Birnbaum and Emma Björkvik, “The quality of compliance: investigating fishers’ responses towards regulation and authorities”, *Fish and Fisheries*, vol. 18, no.4, pp.682-697.

³³⁰ Spain. Real Decreto 114/2013, de 15 de febrero, por el que se crea y regula el registro nacional de infracciones graves en la política pesquera común, se establecen las normas de aplicación del sistema de puntos y se actualizan los importes de las sanciones previstas en la Ley 3/2001, de 26 de marzo, de Pesca Marítima del Estado, (2013).

4.4.2. Measures to Enhance Flag State Duties at the Regional Level

a. Regional Monitoring Control and Surveillance Strategy of the FFA

Effective fisheries management relies on well-coordinated MCS systems that integrate tools like VMS, HSBI procedures, and observer programmes to control IUU fishing. Beyond capacity building and financial resources, MCS remains a clear priority in supporting the successful implementation of flag state duties. Recognising this, the International MCS (IMCS) Network was established in 2001 to encourage communication, cooperation, coordination, and capacity building within the fisheries MCS and enforcement communities. However, only India and the Maldives are currently members of the IMCS Network, limiting its effectiveness in the region.³³¹

A dedicated regional or sub-regional MCS framework tailored to the specific needs of countries in the region could prove to be a strong option for reducing IUU fishing by enhancing compliance with flag state duties. A model similar to the Regional MCS framework developed by the FFA could serve as a blueprint for this region,³³² Adaptable at a sub-regional level to support joint efforts. Examples of such sub-regional collaborations could include MCS partnerships between Bangladesh-India, India-Sri Lanka, and India-Sri Lanka-Maldives.

Establishing subregional MCS frameworks could also support RFMOs like the IOTC and the SIOFA, strengthening their efforts to monitor and manage fish stocks across the Indian Ocean.

b. Regional Sanction by RFBs

RFMOs must ensure that CPs fulfil their obligations as flag states, including enforcing IUU fishing, as mandated by UNFSA. Recognising the need to address compliance gaps, RFMOs should establish a robust system of non-discriminatory sanctions applicable to both parties and non-parties that repeatedly fail to meet their responsibilities.³³³ RFMOs should also ensure transparent reporting and follow-up on sanctions imposed by flag States for vessels listed as engaging in IUU activities. Compliance committees should systematically review

³³¹ International Monitoring, Control, and Surveillance (MCS) Network. Available at <https://imcsnet.org/members>, (accessed on 28 October 2023).

³³² Claire van der Geest, *supra* note 309.

³³³ Report of the Second Joint Meeting of Tuna Regional Fisheries Management Organizations (RFMOs). San Sebastian. Spain. (2009), para 13.

CPs' adherence to existing recommendations and apply straightforward sanctions to states in cases of repeated and significant non-compliance.³³⁴

One of the significant drawbacks identified in the region of the IUU fishing vessels is the failure to apply sanctions.³³⁵ To address this, it is necessary to develop regional or global guidelines for fisheries sanctions that flag States can apply. These guidelines would help states evaluate their sanction systems to ensure they are effective in securing compliance and deterring violations.³³⁶

c. Need-based Capacity Building Programmes

Despite the current depletion of the assistance fund under Part VII of the Agreement, it is crucial to establish a cap on resource allocation across various sub-sections or categories within the fund. A trust fund has been created under Part VI to provide financial and technical assistance for implementing the PSMA, which focuses mainly on port state duties. Given that there is no separate agreement for flag state duties, a dedicated sub-fund exclusively for capacity-building programs aimed at implementing flag state duties under this agreement should be created, with allocations based on regional criteria such as the volume of fish caught, socio-economic factors, and compliance with the agreement. This targeted approach will ensure that resources are distributed effectively to address the specific needs of different regions.

At the regional level, RFBs are actively conducting various capacity-building initiatives funded by different donors. However, there is significant potential for improvement in how these funds are allocated. RFBs should conduct comprehensive capacity-needs assessments to identify specific gaps within their regions. This data-driven approach will enable the development of tailored programs that address the unique challenges faced by local communities, enhancing the overall effectiveness of capacity-building efforts. Additionally, the regional fund could finance collaborative projects and establish performance metrics to tackle common challenges.

³³⁴ WWF, “Achieving Transparency and Combating IUU fishing in RFMOs. Reinforcing the EU’s multilateral actions to promote best practices”, p24.

³³⁵ Iwao Fujii and Others, “Potential cooperation of RFMOs for the integrity of MCS: Lessons from the three RFMOs in the Asia-Pacific”, *Marine Policy*, vol.155. e105748.

³³⁶ Review Conference 2023, *supra* note 41, (A/CONF.210/2023/2), sec C. 2(b).

d. Enhanced Cooperation between RFMOs and RFABs

Considering the importance of exchanging information among regional fisheries bodies, including RFABs and RFMOs, the Regional Fishery Body Secretariats' Network (RSN) was established.³³⁷

FFA, an RFAB in the South Pacific Region, showcases an effective model for collaboration with the WCPFC by establishing an MoU for the exchange of information and activities related to highly migratory fish stocks, associated and dependent species in the Pacific Islands subregion to maximise the effectiveness of scientific and compliance activities. In the IOR, possible areas of collaboration were identified between the SWIOFC and SIOFA, which include i) research on demersal fisheries resources, ii) curbing IUU fishing, and iii) projects to promote the application of SIOFA Conservation and Management Measures.³³⁸

In accordance with Article 15 of the establishment of IOTC and Article 10 of SIOFA, RFMOs can collaborate with RFABs like BOBP-IGO and SEAFDEC to exchange information and act as extended arms to coordinate efforts in surveillance, monitoring, and enforcement. This collaboration would address regulatory gaps and strengthen the fight against IUU fishing.

³³⁷ Regional Fishery Body Secretariats' Network (RSN), Available at <https://www.fao.org/fishery/en/rsn> (accessed on 28 October 2023).

³³⁸ SWIOFC. *supra* note 296.

5. CONCLUSION

As an overarching framework derived from the Law of the Sea Convention (LOSC), the United Nations Fish Stocks Agreement (UNFSA) provides a structure for the conservation and management of straddling fish stocks and highly migratory fish stocks. When countries and RFBs properly implement the provisions of these agreements, the sustainable management of these resources is enhanced. Adhering to these provisions can also empower countries, giving them a stronger voice and more significant influence in the decision-making processes of RFMOs, among other benefits.

A significant challenge facing high-seas fisheries is the ineffective enforcement of regulations by flag states. Flag states have long been pointed at for their responsibilities to ensure effective control over the vessels flying their flags. However, several obstacles hinder the enforcement of these duties, including a lack of regulatory oversight, inadequate monitoring and surveillance systems, limited resources and capacity, and insufficient legal frameworks.

In the BOBLME, which contributes nearly 80% of the catch from the EIO, this study focuses on the bordering countries of Bangladesh, India, Maldives, and Sri Lanka, which together account for 44% of the total BOBLME catch. Therefore, this thesis examines the effectiveness and challenges of implementing the flag state provisions of the UNFSA in the selected South Asian countries within the BOB region.

A comparative analysis of the obligations placed on flag states under the UNFSA and other international instruments related to fisheries management provided the extent of commitments in key areas such as vessel authorisation, maintenance of vessel records, enforcement of CMMs, cooperation with RFMOs, MCS, crew safety, vessel marking, and enforcement actions. Stemming from the LOSC, the UNFSA imposes broader flag state responsibilities compared to other binding agreements. However, UNFSA falls short in addressing the safety and social protection of crew members, an essential duty of flag states that is better covered in non-binding instruments like the CCRF and, to some degree, in the IPOA-IUU. Furthermore, given the absence of a dedicated binding agreement that comprehensively addresses flag state duties, like how the PSMA exclusively governs port state responsibilities, there is a need for stricter implementation of the UNFSA, while drawing valuable lessons from voluntary frameworks like the VGFSP.

Binding agreements like UNFSA, LOSC, CA, and PSMA generally impose comprehensive legal duties on flag states, particularly regarding the enforcement of CMMs, cooperation with

RFMOs, and MCS. In contrast, voluntary instruments such as the CCRF, IPOA-IUU, and VGFSF emphasise flexible, non-binding guidelines, often focusing on soft law approaches to encourage best practices in areas like crew safety and vessel identification. The analysis underscores the critical role of UNFSA in setting binding obligations for the sustainable management of fish stocks, while highlighting the complementary role of other international frameworks in filling gaps through voluntary measures.

The study assessed the legal frameworks of South Asian countries in implementing Articles 17-19 of the UNFSA. In Bangladesh, the Marine Fisheries Act 2020 and Marine Fishing Rules 2023 cover many of the critical provisions of flag state duties of UNFSA. However, the analysis revealed several gaps that need to be addressed, such as the lack of robust frameworks for cooperation with non-member states. Existing rules partially meet the documentation and certification requirements for fishing catches, but further measures are needed to ensure comprehensive monitoring of both target and non-target species. Although the fishing vessels of Bangladesh do not currently operate on the high seas or other countries' EEZs, the legal framework lacks specific provisions for addressing violations occurring in these areas, as required by the UNFSA. Additionally, the NPOA-IUU of Bangladesh outlines commitments to adhere to RFMO measures but needs precise legal provisions to address full compliance.

Unlike the other countries in the study, India has a federal system for managing fisheries. Although fisheries beyond territorial waters are managed by the central government, within territorial waters, individual states (provinces) govern fisheries through the MFRA. In 2022, draft guidelines were issued to regulate Indian-flagged vessels fishing on the high seas. These guidelines propose compliance with CMMs set by RFMOs and with most of the flag state duties. Furthermore, India lacks uniform gear marking regulations, a national observer program, and VMS, although recent efforts, such as the transponder scheme, aim to address these gaps. Additionally, while vessel identification and transshipment activities require more robust regulations, the draft guidelines introduce provisions for logbook maintenance, VMS, observer programs, and enforcement actions in line with international standards. The Marine Fisheries (Regulation and Management) Bill 2019, once enacted, will empower coastal states to manage fishing in the EEZ, complementing the draft guidelines for high seas regulation and addressing the current legal shortcomings.

The Maldives, through its Fisheries Act of 2019 and General Fisheries Regulations 2020, along with amendments, complies with most of the flag state duties outlined in the UNFSA. Sri Lanka has a robust legal framework for managing the fisheries in the high seas, with its High Seas

Fishing Operation Regulations 2014, supported by other instruments that focus on fish catch data and the implementation of VMS. The Fisheries Act lacks explicit provisions addressing the Maldives' obligations concerning non-membership or non-participation in RFMOs, as required under Article 17 of the UNFSA. It also does not provide clear measures for handling non-member vessels, which undermines RFMO conservation measures. Although licensing provisions for Maldivian vessels on the high seas exist, there is no explicit requirement for vessels to carry and present licenses during inspections. NPOA-IUU acknowledges the Maldives' commitment to international conservation efforts, mainly through the IOTC, but further actions are needed to strengthen MCS systems.

Among the countries examined, Sri Lanka demonstrated a high level of alignment with the provisions of the UNFSA. Sri Lanka has a separate High Seas Fishing Operation Regulations 2014, which is supplemented by other instruments focusing on Fish catch data and the Implementation of VMS. However, several gaps remain, including a lack of explicit provisions on penalising or preventing vessels from non-member states that RFMO measures. Additionally, the regulations lack explicit data collection requirements for non-target species, and the observer program is limited to vessels over 24 meters. Although trial projects on electronic monitoring and crew-based observer programs are underway for smaller vessels, there are no comprehensive mechanisms for regulating high seas transshipment or investigating violations on the high seas. Addressing these gaps would strengthen Sri Lanka's compliance with UNFSA provisions.

The capacity of a country, encompassing its human and institutional resources as well as ecological and geographical conditions, is crucial for pursuing sustainable development and effectively implementing the UNFSA, including its flag state duties, which contribute to SDG 14. While the LOSC provides a foundational framework for global ocean governance, its provisions for capacity building are limited and not comprehensive. Over time, awareness of the importance of capacity building has grown, leading to more explicit mentions in subsequent implementing agreements. Part VII of the UNFSA includes articles that outline mechanisms for developing states to enhance their fisheries management practices, addressing the financial, technical, and human resource challenges they face. Despite calls from the UN and FAO for contributions to the Assistance Fund, its status remains depleted, with most funds allocated to attending meetings rather than to capacity-building initiatives for flag state responsibilities, MCS, and data collection. Inconsistent funding, resource misallocation, overlapping mandates

among various bodies, and poorly operationalised south-south cooperation further hinder targeted support and knowledge sharing among developing countries.

RFBs and UNFSA operate as complementary pillars in this system, where UNFSA provides a comprehensive framework for the establishment and functioning of RFMOs, which, in turn, assist member states in implementing the provisions of UNFSA, ensuring effective management and conservation of fish stocks. The performance of RFMOs is a crucial indicator for implementing UNFSA; one of the criteria for assessing the performance of RFMOs under the broad area of compliance and enforcement is the “flag state duties.” This study analysed the performance reviews of RFBs, which indirectly highlight the effectiveness of these bodies in supporting the implementation of UNFSA. Being one of the oldest RFMOs in the region, IOTC has made significant progress in mainstreaming flag state duties and associated obligations in various resolutions and has also conducted several capacity-building workshops through multiple donors. Key insights from SIOFA also reveal that the Performance Review Panel advises CPs to adopt flag state performance self-assessment principles within their compliance monitoring frameworks. Unlike IOTC, SIOFA has separate articles on flag state duties that reflect the provisions of UNFSA.

The study also analysed the performance of RFABs in the region, focusing on the implementation of flag state duties. Following its 2012 performance review, SWIOFC focused on enhancing data collection and sharing through its Working Party on Fisheries Data and Statistics. The commission has developed voluntary guidelines for foreign fishing vessels, aligning them with UNFSA provisions, and created a Working Party on Collaboration and Cooperation in Tuna Fisheries to improve compliance with CMMs of IOTC. Meanwhile, BOBP-IGO aims to enhance cooperation for sustainable fisheries in the Bay of Bengal and is currently implementing Phase II of the Bay of Bengal Large Marine Ecosystem project, focusing on implementing EAFM and reducing IUU fishing. BOBP-IGO is developing an RPOA-IUU, which includes provisions aligned with the UNFSA, but it is yet to be signed by member countries. A lack of comprehensive and coordinated MCS systems hinders the effectiveness of RFBs in the Indian Ocean, undermining the implementation of CMMs. Additionally, limited capacity among member states, particularly developing and least developed countries, has increased the compliance challenges. At the same time, insufficient funding and coordination between RFMOs and RFABs restrict efforts to enhance compliance and improve fisheries management in the region.

The study analysed the legal frameworks of various countries and the performance of RFBs to propose strategies and opportunities for improving the implementation of UNFSA provisions. Several measures are recommended to enhance flag state duties at the national level. First, periodic performance assessments should be conducted to evaluate compliance with obligations, identify gaps, and foster targeted improvements. Strengthening national legislation by incorporating adaptive management provisions to ensure alignment with global commitments. Enhanced inter-departmental cooperation is vital for cohesive fisheries management supported with adequate capacity-building efforts focussing on identifying gaps and ensuring knowledge transfer across all levels of government and the fishers. To ensure strict compliance, implementing incentive systems, such as a points-based approach, can encourage responsible fishing behaviours while reducing reliance on punitive measures.

To enhance flag state duties at the regional level, a well-coordinated MCS strategy tailored to regional needs is essential for combating IUU fishing. A dedicated regional framework, similar to the FFA model, should be developed to foster collaboration among neighbouring countries like Bangladesh, India, Sri Lanka, and the Maldives. Additionally, RFMOs should enforce compliance by establishing robust, non-discriminatory sanction systems for flag states, ensuring transparent reporting on violations and systematic reviews of compliance. Given that there is no separate agreement for flag state duties, a dedicated sub-fund exclusively for capacity-building programs aimed at implementing flag state duties should be created, with allocations based on regional criteria. It is also recommended that RFMOs strengthen collaboration with RFABs to facilitate the exchange of information and best practices. This coordinated approach will enhance surveillance, monitoring, and enforcement efforts in the Indian Ocean Region.

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APPENDIX I

Rapid Assessment Tool for Evaluating National Legal Alignment with UNFSA

#	Assessment Indicators	Question
Article 17		
1.	Cooperation in Conservation and Management	Does your state cooperate in the conservation and management of straddling and highly migratory fish stocks, even if it is not a member or participant in an RFMO/A?
2.	Denial of Authorizations to Fish	Does your State deny authorisations to its flag vessels to fish for stocks under RFMO/A management if it is not a member or participant?
3.	Request for Cooperation by Non-Members	As a member/participant, does your state request non-members with vessels in the relevant area to cooperate fully with the RFMO/A?
4.	Information Exchange	Does your state exchange information on the activities of non-member vessels in RFMO/A areas?
5.	Measures to Deter Non-Compliant Activities	Does your State take measures to deter activities by non-member vessels that undermine RFMO/A measures?
Article 18		
6.	National Measures to Ensure Compliance	Are there national measures ensuring flag vessels comply with subregional and regional conservation management measures?
7.	Authorisation for High Seas Fishing	Are flag vessels authorised to fish on the high seas only when the State can effectively manage them?
8.	Licenses, Authorizations, and Permits	Are control measures such as licenses, authorisations, or permits enforced for fishing on the high seas in accordance with applicable RFMO/A procedures?
9.	Regulation of Fishing in Foreign Jurisdictions	Does your State prohibit unauthorised fishing in areas under the jurisdiction of other States?
10.	Regulations for Licenses, Authorizations, or Permits	Do regulations specify requirements related to licenses, authorisations, or permits, including terms and conditions, carrying it on board, and presenting it to authorised personnel?
11.	National Record of Fishing Vessels	Does your state have a single, complete and updated registry in place, which includes all of your flagged vessels?
12.	Marking of Vessels and Gear	Are fishing vessels and fishing gear marked in accordance with international marking systems?
13.	Recording and Reporting of Data	Is vessel position, catch data (including target and non-target species), fishing effort, and other relevant fisheries data recorded and reported in accordance with RFMO/A standards for data collection?

#	<i>Assessment Indicators</i>	<i>Question</i>
14.	Verification of Catch	Are measures in place to verify the catch of target and non-target species, including observer programs, inspection schemes, transshipment supervision, and monitoring of landed catches and market statistics?
15.	Monitoring, Control, and Surveillance (MCS)	Does your State have a national system for monitoring, control, and surveillance of its fishing vessels?
16.	Observer Programs on Vessels	Does your state implement observer programs on its flag vessels to verify compliance with RFMO/As measures?
17.	Regulation of Transshipment	Are transshipment activities on the high seas regulated by your State?
18.	Compliance with Measures to Minimize Bycatch	Does your State ensure compliance with subregional, regional, or global measures aimed at minimizing catches of non-target species?
Article 19		
19.	Enforcement of Conservation Measures	Are conservation measures enforced regardless of where violations occur? Are alleged violations investigated promptly and thoroughly?
20.	Procedures for Expeditious Investigations	Are there procedures ensuring investigations and judicial proceedings are carried out expeditiously?
21.	Adequacy of Sanctions	Are sanctions severe enough to secure compliance and discourage violations? Do sanctions deprive offenders of any benefits gained from illegal activities?
22.	Measures Against Vessel Masters and Officer	Are there provisions for refusing, withdrawing, or suspending authorisations for vessel masters or officers involved in violations?

Score: 0 – No Alignment; 0.5 – Partial Alignment; 1 Full Alignment