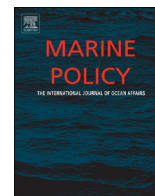




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Cooperation and compliance control in areas beyond national jurisdiction

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ABSTRACT

Past decades have shown a constant increase in the number of international agreements regulating marine areas. Environmental changes as well as technological developments resulting in an increased use of oceans ensure the need for further governance in the future of high seas. At the same time, compliance by States with international obligations remains a considerable challenge in international law. In particular, regulations governing areas beyond national jurisdiction (ABNJ) are at risk of not being obeyed due to factual challenges posed to the control of high seas territories and the (legal) limits of the law of the sea. This article evaluates a stronger cooperation between States through the incorporation of compliance control systems in agreements regulating ABNJ in order to enhance compliance by States. For this purpose, provisions on compliance control measures which have already been established in two agreements regulating ABNJ, namely the International Convention for the Regulation of Whaling and the United Nations Fish Stocks Agreement, are analyzed. It is argued that the incorporation of compliance control elements into agreements regulating ABNJ is a promising avenue to secure improved compliance among States Parties and further implementation of this approach is recommended.

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1. Introduction

Scientific and technological developments have increased and expanded the use of High Seas in recent decades. In order to ensure equal opportunities concerning the use of marine resources (economic considerations) and to preserve marine species and the environment (ecological considerations), the future of the High Seas will require further regulation. At the same time, ensuring compliance by States with international obligations remains one of the main challenges in international law [1]. In particular, regulations governing areas beyond national jurisdiction (ABNJ) are at risk of not being obeyed, not only due to factual challenges but also due to legal obstacles.

One such legal obstacle affecting compliance in ABNJ is the weakness of flag State jurisdiction. The principle of flag State jurisdiction constitutes the cornerstone of the current high seas enforcement system. As regulated in Article 92 (1) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) [2], the flag State is responsible for exercising jurisdiction over ships flying its flag, irrespective of the ship's geographical location [3]. Hence, the jurisdiction of the flag State encompasses vessels on the High Seas. Unfortunately, the past has shown, as evident in the

Black and Grey Lists contained in the annual reports of the Paris and Tokyo Memoranda of Understanding [4,5], numerous flag States not effectively exercising their jurisdiction [6,7].

Considering the dearth of effective exercise of flag State jurisdiction, it remains to be seen how compliance by States could be enhanced. One possible option could be a revision of the principle of flag State jurisdiction. However, since that option requires the abandonment of long existing traditions, it is to be expected that attempts to modify the parameters of flag State jurisdiction will involve a protracted process. Therefore, in order to establish compliance, the use of traditional, rather confrontational means of enforcement under international law may be relevant [7,8], in particular, countermeasures, such as reprisals, retorsions and/or sanctions [8,9]. However, the principle of State sovereignty, which includes the concept of equality among States, limits the extent and success of those traditional means of enforcement. Consequently, neither traditional measures of enforcement nor a major reform of the principle of flag State jurisdiction seem to represent genuine options to tackle the problems surrounding the issue of compliance with international obligations within ABNJ.

In order to enhance compliance by States with agreements regulating ABNJ, this article suggests considering a cooperative approach. It will be argued that compliance control systems enhance cooperation among States Parties. Therefore, the incorporation of compliance control systems in agreements regulating ABNJ is a promising approach to tackle the challenges facing high

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seas governance in regard to compliance by States. Compliance control systems as part of an institutionalized form of inter-State cooperation are seen as promising in ensuring and improving compliance. This article will first provide a brief overview on compliance control systems. Thereafter, compliance control systems within two existing agreements regulating ABNJ will be examined, namely the International Convention for the Regulation of Whaling (ICRW) and the United Nations Fish Stock Agreement (UNFSA) [10,11]. Both conventions are prominent examples of agreements partly regulating ABNJ and which include, to a greater or lesser extent, elements of compliance control systems.

2. Compliance and compliance control

In order to set the methodological background to the analysis of compliance control measures in existing agreements, it is necessary to elaborate certain underlying elements and concepts.

2.1. Definition

There is no generally accepted definition of the terms “compliance” and “compliance control” in international law [12]. Despite the fact that multilateral environmental agreements and soft law instruments, such as the UNEP Agenda 21 [13], often use the terms “compliance” and/or “non-compliance”, they frequently do not provide a definition. The term “compliance” can be briefly described as the fulfillment by States Parties of their obligations under an international agreement [14]. This description is similar to the non-binding definition provided in the 2002 UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements which defines compliance in Part 1 as “the fulfillment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement” [15]. With regard to the uncertainty concerning the definition of the term “compliance” [12], the aforementioned definitions constitute the lowest common denominator and serve as a starting-point.

The systems of compliance control describe a variety of means which are based on stronger cooperation among States Parties and which ultimately serve to enhance compliance [12,16]. Elements of compliance control systems have already been included in arms control regimes, however, they have most notably been developed in the field of international environmental law during the past decades [17]. Prominent examples include the compliance control procedures laid down in the 1987 Montreal Protocol on Substances that deplete the Ozone Layer or the procedures under the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change [18,19].

2.2. Structure and content

Although compliance control systems can include a variety of procedures, the systems often share the underlying idea that stronger transparency through the comprehensive supply of information serves as the basis for the enhancement of compliance by States. Therefore, principally, though not exclusively, they include measures such as reporting, monitoring and verification obligations [8,20]. Additionally, the systems often provide measures in response to instances of non-compliance [16,20]. A clear distinction between these measures is not always possible, nor is a clear distinction required [12], rather, a brief description can be provided.

2.2.1. Reporting and monitoring

Reporting serves as a fundamental basis of compliance control. It comprises collection and recording of facts in order to determine the factual situation of a certain area of regulation [17,20]. In this regard, States Parties mainly provide the required information by self-reporting [12,20]. The reporting system constitutes a precondition for informed and advanced decision-making and serves the purpose of understanding whether and if so, to what extent, States are fulfilling their obligations under the pertinent agreements [12]. Monitoring complements reporting and includes further collection of data. It encompasses various measures such as inspections [12]. Overall, the importance of fact-finding as a prerequisite for subsequent steps in the compliance control procedure places it at the heart of that mechanism.

2.2.2. Verification and evaluation

Another level in the context of compliance control procedures is the verification and evaluation of the received information. The role of verification is to examine the plausibility and relevance of information submitted and it is a necessary pre-requisite for the subsequent evaluation [8,12]. The mechanisms of verification have mostly been developed for cold war arms control agreements as a result of the hostility and suspicion between the United States and the Soviet Union [17]. During the factual and legal evaluation process, the level of compliance reached by a State as well as the reasons for non-compliance are assessed [8,20].

2.2.3. Measures in response

The aforementioned measures provide mechanisms to detect constellations where States are not complying with their treaty obligation(s) and to evaluate the reasons for instances of non-compliance. It has been stated that States generally intend to comply with their international obligations [17]. Nonetheless, non-compliance remains one main challenge of international law [1]. In fact, the reasons and motives for non-compliance are often manifold and have a political dimension [17]. That said, appropriate measures can only be determined, when the reasons for non-compliance are identified. Possible measures of response could, for example, relate to compliance assistance in terms of financial, technical or administrative aid [21]. This would address cases in which non-compliance is the result of a lack of capacity and/or financial means.

2.2.4. Dispute settlement

In international law, States may avail non-judicial or judicial means of dispute settlement. Non-judicial refers to negotiations whereas judicial concerns proceedings before arbitral tribunals and international courts [22]. Generally, dispute settlement is not regarded to be a part of compliance control systems. However, frequent cooperation between States increases the potential for a variety of conflicts. Therefore, dispute settlement should be seen as an annex to compliance control measures as it applies in situations in which States are unable to find a solution to a specific matter and wish to rely on the expertise of third parties expert panels or judicial bodies.

2.3. Cooperation through compliance control systems

Cooperation between States is a basic element in international relations. It facilitates the possibility for sovereign States to act on a common level with regard to certain issues [23]. Moreover, cooperation not only addresses factual and political aspects in international relations, but it also comprises a legal dimension. In this respect, the term “cooperation” has never been defined by an international treaty or a resolution of an international organization [24].

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