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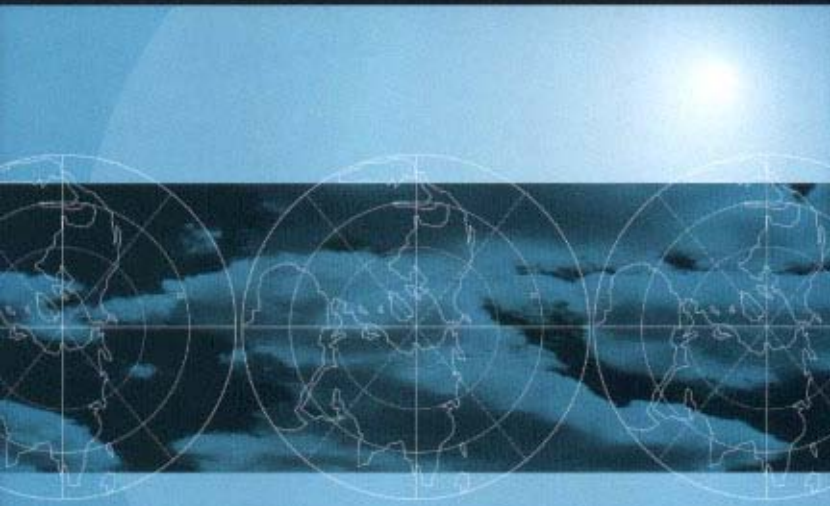
The Changing International Law of High Seas Fisheries



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The Changing International Law of High Seas Fisheries

This book examines the international law of high seas fisheries in the light of the negotiations of the Third United Nations Conference on the Law of the Sea, the state and international practice that followed, and its influence on the 1995 Straddling Stocks Agreement. The 1995 Agreement and related developments are discussed in detail, particularly in terms of conservation and management problems, the interactions with the exclusive economic zone, and the introduction of environmental perspectives that have led to major conceptual changes in the legal approach to fisheries and practical solutions in the field. Questions relating to compliance, enforcement, and dispute settlement are also discussed.

Francisco Orrego Vicuña is a Judge and Vice-President of the World Bank Administrative Tribunal; and a member of the panels of conciliators and arbitrators of the International Centre for the Settlement of Investment Disputes (ICSID). He is President and Vice-President of the Chilean Delegation to the Third United Nations Conference on the Law of the Sea; a member of the Commission for the Settlement of Disputes between Chile and the United States; a former Senior Legal Advisor at the Organization of American States; a former member of the Inter-American Juridical Committee; and a member of the Chilean commission for the Papal mediation in the dispute between Chile and Argentina.

He has written extensively on international law, the law of the sea, Antarctica, and the environment.

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Francisco Orrego Vicuña

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Introduction

The principles and rules governing high seas fisheries have long been a matter of debate under international law. The freedom of fishing in the high seas is generally considered one of the fundamental principles underlying the regime of the oceans beyond the limits of national jurisdiction, a principle indeed embodied both in customary international law and in the major codification conventions on the law of the sea. Evolving economic realities and technological developments led, however, to increasing pressures on the resources of the oceans which in turn gave place to competing interests between various groups of states.

For a good number of decades this competition for fisheries took on the form of a conflict of interests between long-distant fishing nations and coastal states. The expansion of maritime areas under national jurisdiction, with particular reference to the enactment of exclusive economic zones and exclusive fisheries zones, was the outcome of this period, a situation largely consolidated under the 1982 Convention on the Law of the Sea and related developments. The implications of this extension of national jurisdiction in the international legal system have been well studied and will not be discussed in the context of this work.

The issue of high seas fisheries, however, was not entirely put to rest because of the above developments. In respect of this matter, the Convention on the Law of the Sea contained only some very general principles while providing some guiding rules about given species, such as straddling stocks, highly migratory species, marine mammals, anadromous species and others. Basic rules on international cooperation were also built into the Convention. Although the aggregate of these provisions meant an important step in the clarification of the law and the accommodation of interests, they were not sufficient to support a new and standing regime for high seas fisheries.

The issues posed in this context were no longer solely related to the competition between coastal states and distant-water fishing nations, which continued to play an important role, but also to other dimensions that had been emerging parallel to the negotiations leading to the Convention on the Law of the Sea and particularly in the years following its signature. These new dimensions referred in essence to environmental concerns and the implications that the continued depletion of ocean resources had in the overall condition of broad ecosystems. Early expressions of concern about the conservation of fisheries for the purpose of economic performance of the industry and the availability of resources gave place to additional concerns about conservation in relation to environmental standards and management and its broader outlook, in the context of which both the national interests and the economic performance acquired a different meaning.

As these developments began to unfold, international law, however much it had already changed, was subject to added pressures to accommodate the new dimensions. The trends for change became evident in the frame of both international negotiations and national legislation and practice. The former have led to innovative regional and global conventions and arrangements while national developments have revealed differing approaches to the question of conservation in the high seas.

This work discusses the changes taking place in international law in connection with high seas fisheries in terms of both the shaping of a new international regime on this matter and the manner in which the issues posed by related developments in national legislation and practice are being accommodated. Particular emphasis is placed on the changes introduced by recently adopted global and regional fisheries regimes as they relate partly to the principle of freedom of fishing in the high seas and its relationship to the introduction of conservation standards and measures, and partly to the international arrangements governing global and regional cooperation in this field, including difficult questions of enforcement and settlement of disputes.

The discussion that follows highlights the essential role of international law in guiding the required accommodation of interests and the emerging new dimensions, a role that makes the difference between the development of an orderly regime under the aegis of international cooperation and the search for solutions to the existing problems solely under individual domestic action of each state or group of states concerned.

1 The evolving principles and concepts of international law in high seas fishing

Freedom of fishing in the high seas in a historical setting

The contemporary law of the sea has attained an important degree of elaboration during its evolution, as evidenced in particular by the detailed provisions of the 1982 United Nations Convention on the Law of the Sea.[1] Notwithstanding this significant legal progress, many of its underlying principles and concepts are still strongly influenced by ancient rules of customary international law. Most notable among these rules is the principle of the freedom of fishing in the high seas. Many of the changes experienced in the context of this international legal process during the twentieth century have been founded not so much in the creation of new principles and concepts as in the interpretation and reformulation of traditional rules of international law. Historical linkages have thus kept their influence in the shaping of contemporary international law, combining traditional values with the needs of modernization of legal rules and structures.

The problem that has prompted most of the disagreements characterizing this evolution has been that the interpretation and reformulation of traditional legal rules has not always been faithful to their true meaning and extent, or having so been has not always drawn the full set of legal implications and consequences of the change envisaged. The different interests of states have of course played a major role in this changing legal context.

All modern developments on the law of the sea have been closely connected to the principle of the freedom of the high seas. New concepts,

[1] United Nations Convention on the Law of the Sea, 10 December 1982, UN Doc. A/CONF. 62/122, *International Legal Materials*, Vol. 21, 1982, 1261. Hereinafter cited as Convention on the Law of the Sea.

such as state jurisdiction over the contiguous zone or later over the continental shelf and the exclusive economic zone, had to be made compatible with the freedom of the high seas to a given extent if they were to become admitted into the body of international law. This is of course quite natural because classic international law had been structured on the existence of only two broad types of maritime areas: the territorial sea and the high seas.[2]

The manner in which that compatibility could be attained depended in essence on the content attributed to the principle of the freedom of the high seas. As evidenced by the very evolution of international law the meaning and extent of such a principle can change with the different economic, political, and scientific perceptions prevailing at a given moment in the community of nations. It follows that the principle is not a fixed dogma and that it may be subject to a process of adaptation according to the realities characterizing significant historical periods.

The principle of the freedom of the high seas emerged as a reaction to the pretension of subjecting the high seas to the territorial sovereignty of some naval powers in the fourteenth and fifteenth centuries.[3] The original meaning of the principle was in essence a negative one since it only sought to prohibit the interference of states in the high seas. Two consequences would follow from this formulation: on the positive side one result was the freedom of utilization of the high seas; but on the negative side there were also "les désordres, les destructions, les gaspillages."[4] These negative aspects are at the very heart of the evolution that the principle has been experiencing along its historical evolution.

Grotius' conception of the principle of the freedom of the high seas was founded, as is well known, on two basic premises: the impossibility of the sea being subject to effective occupation and the inexhaustible nature of marine resources.[5] The latter aspect, however, should be carefully examined in his fundamental work on *The Freedom of the Seas*.[6] In point of fact,

[2] F. V. Garcia Amador, *La Utilización y Conservación de las Riquezas del Mar*, 1956, at 3; also published as *The Exploitation and Conservation of the Resources of the Sea*, 1959.

[3] United Nations, "Memorandum on the Regime of the High Seas, prepared by the Secretariat," Doc. A/CN. 4/32, 14 July 1950, *Yearbook of the International Law Commission*, 1950, Vol. II, 69. The preparation of this memorandum is attributed to Gidel. H. Lauterpacht, "Sovereignty over submarine areas," *British Yearbook of International Law*, 1950, at 408, note 1.

[4] United Nations, "Memorandum," para. 11.

[5] Lauterpacht, "Sovereignty," at 399. See also generally Pitman B. Potter, *The Freedom of the Seas in History, Law, and Politics*, 1924.

[6] Hugo Grotius, *The Freedom of the Seas*, edited with an introductory note by James Brown Scott, Oxford University Press, 1916.

Grotius indeed stated that the "same principle which applies to navigation applies also to fishing, namely, that it remains free and open to all,"[7] following closely on this point the writings of Vasquez who is quoted as justifying the right of nations over the sea on the ground that "the same primitive right of nations regarding fishing and navigation which existed in the earliest times, still today exists undiminished and always will, and because that right was never separated from the community right of all mankind, and attached to any person or group of persons."[8] But in so stating Grotius was also very clear that fish are exhaustible and drew on this point the fundamental difference between the freedom of fishing and the freedom of navigation: "And if it were possible to prohibit any of those things, say for example, fishing, for in a way it can be maintained that fish are exhaustible, still it would not be possible to prohibit navigation, for the sea is not exhausted by that use."[9]

The Grotian distinction was largely ignored and the sea as *res communis* came to be understood as the natural legal consequence of his writings.[10] However, as experience would demonstrate before long, the understanding that fishing was not exhaustible turned out not to be true. In any event the principle came to identify the freedom of navigation and the freedom of utilization of the resources of the sea, with particular reference to the freedom of fishing, as its main components. It then became firmly established as a rule of customary international law, where it has remained independently of the legal considerations present in its origins.[11] But this does not mean of course that changes and adaptations inspired in new circumstances were prevented from intervening.

It is noteworthy that Grotius himself was quite aware of the shortcomings that the concept of *res communis* entailed, for he also wrote in his work:

> If today the custom held of considering that everything pertaining to mankind also pertained to one's self, we should surely live in a much more peaceable world. For the presumptiveness of many would abate, and those who now neglect justice on the pretext of expediency would unlearn the lesson of injustice at their own expense.[12]

These are the very thoughts underlying today's discussions on the global commons and the need to introduce regulatory elements on high seas fishing, including eventually the question of privatization of fishing rights.

[7] *Ibid*., at 32. [8] *Ibid*., at 56–57. [9] *Ibid*., at 43.
[10] Garcia Amador, *La Utilización*, at 27–28 and the literature cited at note 16 thereof.
[11] Lauterpacht, "Sovereignty," at 399. [12] Grotius, *Freedom*, at 6.

When the negative implications of the principle came to be realized, various exceptions were introduced. The unrestricted extent of freedom of navigation was modified to exclude piracy and slave traffic, or more recently the shipment of narcotic drugs, and jurisdictional functional elements were correspondingly introduced in terms of the right of boarding and inspection, the right of hot pursuit and other expressions.[13]

Still more significant was the realization that some of the earlier understandings of Grotius' conceptions were no longer valid as time went by. Effective occupation of the high seas has indeed become possible considering technological developments, first in the minor form of occupation of pearl banks and other such exploitation, next by way of the exploitation of the continental shelf, and more recently by means of the exploitation of the deep seabed mineral resources. This reality had of course a major impact on the law, in terms of both the development of new maritime areas subject to national jurisdiction, notably the continental shelf, and the establishment of a new international legal regime governing the seabed mineral activities and related matters beyond the limits of national jurisdiction.

More profound were the implications of the scientific findings and empirical evidence gathered throughout the nineteenth and early twentieth centuries that the living resources of the sea were indeed exhaustible because of overexploitation. Although the problem came to be fully realized only in the late nineteenth century as evidenced by the discussion leading to the *Bering Sea Fur Seals Arbitration*,[14] earlier expressions were already available.[15]

Specific legal consequences followed as to the meaning of the principle of the freedom of fishing in the high seas. The latter would no longer be conceived in an absolute manner but subject to the right of other states and participants to undertake fishing activities. It should also be noted that, in the view of influential writers of international law, while the high seas were not subject to national appropriation, neither did they belong to the international community, as all states were equally entitled to its use.[16] Another important legal consequence was that gradually the right of coastal states to introduce conservation measures in the high seas was recognized, first, in relation to its nationals and, secondly, in a limited

[13] United Nations, "Memorandum," at 70–72.
[14] *Ibid*., at 73–74.
[15] Gidel, *Le Droit International Public de la Mer*, 1932, Vol. I, at 438–439.
[16] See, for example, Fauchille, Bustamante, and François, as cited by Garcia Amador, *La utilización*, at 27.

manner, in relation to foreigners.[17] This was the central concept on which coastal states could later establish fishing zones of various kinds.

As this legal process evolved the original content of the principle of the freedom of the high seas also experienced significant conceptual changes. The high seas as *res communis* only differed from the concept of *res nullius* in that it did not allow for the exercise of national sovereignty, but it had no influence on the question of the abusive use of the oceans; this situation began gradually to change as the concept of the utilization in the interest of the international community came to be accepted in some respects. Under the latter approach, while the use of the oceans was open to all states, it would nonetheless be subject to some extent to the general interest and not exclusively to individual interests.[18] This assumed some definition of the general interest by the international community and the exercise of regulatory powers on its behalf. Although this approach has seldom been applied to fishing activities, except in limited circumstances or regional arrangements, it underlies many of the recent developments in high seas fishing and had been present in a number of early scholarly discussions. The interesting consequence of such changes was that the principle of the freedom of the high seas was subject, first, to some control of the abuse of rights and, secondly, to a test of compatibility with the general interest.

Most of the discussion that has taken place on the law of the sea has concentrated on the question of expanded coastal state jurisdiction. Given the influence of the new maritime areas on the traditional rules and standards this is quite natural. However, sight should not be lost of the fact that such a development is but one expression of the fundamental changes surrounding the principle of the freedom of fishing in the high seas since its inception. The search for the control of the abuse of rights and the common interest, which is only now becoming an open concern, is linked to the same process of conceptual changes described. In fact, as will be discussed further below, the very jurisdictional trends characteristic of the contemporary law of the sea can be seen not necessarily or exclusively as a selfish expression of national interest but also as the search for regulatory authority which has been lacking under traditional

[17] Gidel, *Le droit international*, at 437–441.

[18] United Nations, "Memorandum," at 73. See also the proposal made by Strupp at the Institut de Droit International emphasizing the interests of the international community, *Annuaire de l'Institut de Droit International*, Session de Paris, 1934, at 550, 712.

international law, the absence of which explains many of the problems of overexploitation and depletion of fishing resources.[19]

The issue was clearly stated by a distinguished Latin American scholar in the early nineteenth century:

> There is no reason which would legitimize the appropriation of the sea under the aspect now being considered [navigation] ... However, under another aspect, the sea is similar to the land. There are many marine exploitations that are restricted to certain areas; for just as all lands do not give the same fruits, neither do all oceans yield the same products. Coral, pearls, amber, whales, are not found but in limited areas of the ocean, which are impoverished daily and then depleted; and however generous nature may be in other species, it cannot be doubted that the competition of many peoples would render its fishing more difficult and less plentiful, and would end in their depletion, or at least in displacing them to other seas. Not being, therefore, inexhaustible, it seems that it would be licit for people to appropriate the areas where those species are found and which are not actually in the possession of others.[20]

The evolving legal concepts relating to high seas fishing

In the light of the historical setting described above legal concepts relating to high seas fishing correspondingly evolved as circumstances and interests changed. Three distinct periods can be identified in this regard. First, there was the conceptual development that led from unrestricted freedom of fishing to reasonable use, introducing a measure of restraint as justified by the equal interest of other participants in a given activity of exploitation of ocean resources. Just as happened historically with similar forms of organization of activities relating to common lands and areas, this approach had merit insofar as participants were few and technologies were of an artisan kind, but as soon as these conditions were surpassed the approach became largely ineffective and incapable of ensuring appropriate conservation of resources.[21]

When this situation became obvious in the context of fishing activities

[19] Francisco Orrego Vicuña, ''De Vitoria a las nuevas políticas de conservación y aprovechamiento de los recursos vivos del mar,'' in Araceli Mangas Martín, *La Escuela de Salamanca y el Derecho Internacional en América. Del Pasado al Futuro*, 1993, 139–153, at 153.

[20] Andrés Bello, *Principios de Derecho de Jentes*, Santiago, 1832, Complete Works, 1886, Vol. X, at 50. Translation by the author.

[21] Francisco Orrego Vicuña, ''The 'Presential Sea': defining coastal states' special interests in high seas fisheries and other activities,'' *German Yearbook of International Law*, Vol. 35, 1993, 264–292, at 292.

the need for regulation opened a second major conceptual period.[22] This was first identified with the development of national claims to maritime areas, a trend which in part reflected the interest of coastal states in gaining exclusive access to given resources or activities to the exclusion of third parties.[23] But it was also the means to introduce conservation authority in areas that had been until then subject to growing depletion of resources because of the lack of regulatory authority under international law as understood at the time.[24] It should be noted in this regard that all major initiatives relating to enlarged claims to maritime areas were associated with problems of conservation in view of the unrestricted activities of high seas fishing vessels. Such claims were legitimate and they brought the interest of coastal states in line with the interest of distant-water fishing nations. Until then the latter nations and not the international community as a whole were the sole beneficiaries of the freedom of fishing in the high seas as understood under traditional concepts.

The need for regulatory authority was not only expressed in terms of national claims to maritime areas. As mentioned above, it also found expression in the concept of exploitation of ocean resources in the general interest of the international community and not exclusively in the interest of individual nations, thus opening the third and latest period in the conceptual changes discussed. While this concept has not been well defined, it has nevertheless permeated many of the solutions found under international law to the competing interests of coastal states and distant water-fishing states. This is indeed the case with the regime of the exclusive economic zone in which the exclusive rights of the coastal state are combined with the right of access of other states to a part of the total allowable catch not exploited by the former.[25]

Similarly, this concept also underlies a number of developments relating specifically to fishing in the high seas. Regulatory authority entrusted to fishing commissions and other types of institutions or arrangements is an example of this other trend, which has become paramount in recent regional developments and global agreements on

[22] Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment*, 1992, at 425.

[23] *Ibid*., at 507.

[24] William T. Burke, *The New International Law of Fisheries*, 1994, at 95.

[25] On the regime of the exclusive economic zone see generally David Attard, *The Exclusive Economic Zone in International Law*, 1987; Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, 1989; Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law*, 1989.

high seas fisheries. Conservation is again the driving force behind these developments while at the same time maintaining a balance of interests between coastal states and distant-water fishing states.

Occasionally, the concept of the general interest or other similar formulations have been identified with that of the common heritage of mankind. In fact specific proposals were made during the Third United Nations Conference on the Law of the Sea to apply the common heritage concept to the waters overlying the seabed beyond the limits of national jurisdiction,[26] and distinguished writers of international law have expressed their concern that such a concept might be made applicable to high seas fisheries.[27]

Despite the fact that the Convention on the Law of the Sea makes specific reference to the intrinsic unity of ocean space,[28] there are important differences between the general or common interest of the international community and the common heritage of mankind. The latter was a concept devised specifically in the context of particular international regimes, most notably the 1979 Moon Treaty[29] and the regime for seabed mineral exploitation embodied in Part XI of the Convention on the Law of the Sea and later accommodations thereto,[30] and cannot be extended beyond these regimes unless there is an express agreement to that effect. This has certainly not happened in relation to high seas fisheries and it is not likely to happen in the future, as it has not happened in the context of the long debate about the Antarctic Treaty System in the United Nations and elsewhere.[31] On the other hand, the common heritage concept, while sharing with the high seas regime the purpose of nonappropriation, requires some additional elements that are not given in the case of other high-seas-related regimes, such as an international administration that might be able in certain respects to undertake exploitation on behalf of mankind and the sharing and distribution of benefits in a very broad context.

[26] See, for example, the statement by Lebanon in the Seabed Committee as to the collective organization of high seas fisheries, Doc. A/AC. 138/SC. 1/SR. 17, 9 August 1971; and by Mexico as to the establishment of an international authority for high seas fisheries, Doc. A/AC. 138/ SC. II/SR. 30, 29 March 1972.

[27] Shigeru Oda, *International Control of Sea Resources*, reprint with a new introduction, 1989, at xxvi.

[28] Convention on the Law of the Sea, preamble, para. 3.

[29] Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 1979, *International Legal Materials*, Vol. 18, 1979, 1434.

[30] Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea, 29 July 1994.

[31] Francisco Orrego Vicuña, *Antarctic Mineral Exploitation*, 1988, 483–497.

Most importantly, while the high seas and fishing activities have been historically related to the concept of the freedom of the high seas, subject to the evolution and regulation described, the exploitation of seabed mineral activities was never included under such a principle in an unqualified manner,[32] and even if in the view of some writers it was so included[33] the community of states promptly discarded this connection by means of the adoption of the 1970 Declaration of Principles Governing the Sea-bed and Ocean Floor which instituted the common heritage principle in the first place.[34] By its very nature the latter concept is founded on a legal approach entirely different from that of the freedom of the seas and hence the regimes relying on one or the other cannot be compared. Regulation of high seas freedoms is certainly different from collective undertakings.

The sequence of changes and developments that has been described could be understood by reference to the evolving historical conditions and interests and that may suffice to set out clearly its meaning and extent. There is, however, one other dimension of recent emergence that needs to be taken into account since it explains not only the nature of the changes taking place but also the significance of current trends, namely the environmental concerns prevalent today in the international community and public opinion and the corresponding influence this is exercising on international law as related to the environment.[35]

In fact, as international environmental law has evolved since the 1972 Stockholm Declaration[36] and through the United Nations Conference on Environment and Development[37] and the important body of law at present characterizing this field,[38] conservation of fisheries and other

[32] Francisco Orrego Vicuña, *Los Fondos Marinos y Oceánicos*, 1976, 233–235.

[33] For the debate about the application of the principle of the freedom of the high seas to the seabed and ocean floor, see the literature cited in Feith, ''Rights to the sea bed and its subsoil,'' report to the International Law Association, Brussels Conference, 1948, 2–5; José Luis de Azcarraga y Bustamante, ''Los derechos sobre la plataforma submarina,'' *Revista Española de Derecho Internacional*, 1949, at 80–81; Francisco Orrego Vicuña, *Los Foudos Marinos*, at 41–43, 235–237.

[34] United Nations General Assembly, Resolution 2749 (XXV), 17 December 1970.

[35] Edith Brown Weiss (ed.), *Environmental Change and International Law*, 1992, 124–158; Birnie and Boyle, *International Law*, 1992; Philippe Sands, *Principles of International Environmental Law*, 1995.

[36] United Nations Conference on the Human Environment, Stockholm Declaration on the Human Environment, 16 June 1972, *International Legal Materials*, Vol. 11, 1972, at 1416.

[37] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, 14 June 1992, *International Legal Materials*, Vol. 31, 1992, at 874.

[38] See generally Birnie and Boyle, *International Law*.

marine resources is no longer solely a question of economic efficiency but one that touches upon the preservation of broad ecosystems and their fragile nature. The preservation of the marine environment is therefore not exclusively a problem of prevention and control of marine pollution but also a matter relating to the rational and effective management of fisheries and other resources. In this context regulatory functions acquire a new meaning while maintaining nevertheless the need to balance competing interests among nations.

It is relevant to mention that the main purpose of the developments discussed has not been to derogate from the freedom of fishing generally or in the high seas in particular, but only to subject this freedom to such restraints as are needed to ensure the broader objectives of conservation in so far as the successive stages have been unable to cope with the problems evidenced by experience and practice. The practical result of some of the restraints put into effect has been to derogate from such freedom in given instances and for specific purposes, as has happened in part with areas brought under the regulatory authority of national jurisdiction; but this has been so only because of the lack of more appropriate alternatives under international law by way of the enhancement of international cooperation and other arrangements. In point of fact, such developments were mainly prompted by both the failure of unrestricted fishing activities and the ineffectiveness of flag state jurisdiction to ensure necessary conservation in the high seas.[39]

As the whole purpose of this evolution was to bring order to the question of access to resources and to ensure effective conservation, the issue lies not so much in the questioning of freedom of high seas fishing as in the availability of the appropriate means to ensure this end, an end that is important not only to coastal states' interests but also to the international community as a whole, including therein the legitimate interest of distant-water fishing nations. It follows that what is envisaged is not the end of the freedom of fishing but its adequate regulation so as to achieve those necessary objectives.

As will be discussed throughout this work, in so far as means to that end have been available under international law, unilateral or other equivalent forms of action have been both unnecessary and undesirable. However, to the extent that international law has been unable to provide the appropriate responses to the existing problems, then the search for

[39] Ellen Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*, 1989, at 5–6.

solutions has opted for alternatives involving individual state action or approaches that seek to remove the obstacles emerging from the ineffectiveness of international cooperation.[40]

The freedom of fishing in the high seas in customary international law

The freedom of fishing in the high seas became well established in customary international law in spite of the reservations that the concept had motivated since early times. Customary international law did little more than to state the existence of the principle; it did not purport to define its meaning and extent, except in the negative sense mentioned above that states should not interfere with such high seas freedoms. Furthermore, it should be noted that the freedom of fishing never stood as a customary rule quite clearly on its own but always in association with the freedom of the high seas generally. Since the latter was conceived for the specific needs of navigation it is arguable whether such existence by association was solid enough to support the pressure that time and experience would bring to bear upon it.

It is appropriate to keep in mind that, while freedom of navigation has stood unabated for a long historical period since the Grotian formulation, this has not been true of the freedom of fishing in the high seas. The former has survived the extension of national jurisdiction in the high seas, in terms of both the enlargement of the territorial sea and the establishment of coastal state rights over resources and other matters, but freedom of fishing has been restrained in various ways precisely because of its negative implications as to the goals of orderly access and conservation. In both cases there has been a growing regulation of the manner in which the freedom is to be exercised, but only in respect of freedom of fishing has the matter been controversial in the extreme.

On the other hand, the meaning of freedom of fishing in the high seas under customary international law cannot be taken in isolation from other rules that customary law has developed. That states are required to act with reasonable regard for the rights of others, that the abuse of rights is a controlling principle, and that equity has a preponderant role in the utilization of resources, are significant principles of customary

[40] Francisco Orrego Vicuña, ''Coastal states' competences over high seas fisheries and the changing role of international law,'' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 55, No. 2, 1995, 520–535, at 526, 534.

international law that cannot be ignored in this context.[41] Furthermore, these principles have given rise to a large body of treaty law and other sources relevant to the issue of conservation of living resources. However difficult the implementation of these principles might be in practice, the fact is that it would be wrong to state that customary law provides for the unrestricted freedom of fishing in the high seas. It provides for freedom indeed, but subjecting its exercise to other controlling principles that have also been received in the *corpus juris* of customary international law. This situation becomes still more evident when customary law is discussed in the context of international environmental law and the global reach of many of its obligations, particularly in so far as the high seas and areas beyond national jurisdiction are concerned.[42]

Two leading decisions explain clearly the manner in which the freedom of fishing in the high seas has been connected to other relevant principles that provide a setting of restraint and control over its negative effects. First, in the *Bering Sea Fur Seals Arbitration*,[43] the central argument put by the United States was that it had a right to protection and property over such species even when found in the high seas beyond the limits of its territorial sea, invoking to this effect common and civil law principles, state practice, the law of natural history, and the common interests of mankind,[44] views that are not altogether different from those held in a number of recent controversies over fishing rights and coastal states' rights in the high seas. It is well known that the arbitral tribunal found for Great Britain and upheld the freedom of the high seas. However, in so finding it also recognized the need for conservation to prevent overexploitation, the regulation of which was to be agreed by the participants in the fishery.[45] The customary rule was in the instance coupled with other requirements and even if these were to be agreed by the parties it nevertheless meant a recognition of the need for restraint in the exercise of the freedom concerned.

At the request of the parties the tribunal also provided for a conserva-

[41] For a discussion of reasonable use, abuse of rights, and equity and equitable utilization as principles governing resource exploitation and protection of the environment under international law, see Birnie and Boyle, *International Law*, at 124–127.

[42] See in particular Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. For the discussion of these and related developments, see Francisco Orrego Vicuña, "State responsibility, liability, and remedial measures under international law: new criteria for environmental protection," in Brown Weiss, *Environmental Law*, at 128–133.

[43] *Bering Sea Fur Seals Arbitration*, 1893, Moore, *International Arbitration Awards*, Vol. I, 755.

[44] Birnie and Boyle, *International Law*, at 493.

[45] *Ibid*., at 494.

tion scheme, including aspects such as prohibited areas, closed seasons, limitation of the type of vessels, licensing, catch records, exchange of data, and other measures. A three-year ban on sealing was also recommended by the tribunal.[46] Here again, although these measures required state acceptance and national enforcement, the relevant point is that they curtailed the unrestricted freedom and provided for solutions to the existing problems of conservation. The solutions failed later on other grounds, namely that the conservation scheme did not cover all participants in the fishery and that reflagging took place to evade regulations,[47] a situation also known in contemporary practice; but in any event the precedent of combining customary law with conventional or other arrangements was duly set. Birnie and Boyle have evaluated this precedent as follows:

> Thus, although it perpetuated the high seas freedom of fishing and hence made conservation more difficult, especially in relation to enforcement, the tribunal strongly supported the need for restraint in exploitation, clearly indicated the requisite measures, and recognized that freedom was not absolute but had to be regulated to take reasonable account of the interests of other states.[48]

The same customary rule of freedom of fishing in the high seas was years later related to other relevant principles of international law in an entirely different manner, evidencing the changing meaning of the rule that had intervened. In fact, in the 1974 *Icelandic Fisheries* cases the International Court of Justice upheld the rights of fishing in the high seas, but given the nature of the dispute as to extended fisheries jurisdiction such rights were in the instance related to established fishing states, namely those that had been active in the areas concerned. In so doing the court also emphasized the obligation of reasonable use in connection with conservation and the preferential rights of coastal states in the allocation of high seas stocks in such areas. The obligation to undertake negotiations in good faith so as to reach an equitable solution was also underlined by the decision.[49]

Freedom of fishing in the high seas was thereby made subject to coastal states' preferential rights, taking into account conservation needs, while seeking at the same time to accommodate the divergent interests of the states concerned by reference to the substantive principles of reasonable use and equitable arrangements in the allocation of resources. Although

[46] *Ibid*. [47] *Ibid*., at 495. [48] *Ibid*.

[49] *Ibid*., at 118. See also Hannes Jbonsson, *Friends in Conflict: The Anglo-Icelandic Cod Wars and the Law of the Sea*, 1982.

the cases were only concerned with limited extensions of coastal state fisheries jurisdiction and the historical rights held by other states, the conceptual changes embodied in the reasoning of the court as to the meaning of customary international law in the matter were in fact of a broad scope. It has been rightly concluded that this decision opened the way for the transfer to coastal state jurisdiction of much of the world's fishing resources, soon after to be expressed in the form of 200-mile exclusive economic zones and other claims, while also relating the customary rule to the novel concept of conservation for future benefit in the interest of sustainable utilization.[50]

The contribution of this decision to the development of the law came too late in time since issues such as historical rights, coastal states' preferential allocation and others that the court discussed had been a matter of long debate leading to the 1958 and 1960 Conferences on the law of the sea. At the time the decision was rendered, state practice had already taken a strong turn towards the establishment of 200-mile exclusive fishing areas as evidenced by the preparatory work of the Third United Nations Conference on the Law of the Sea, the beginning of its deliberations and related legislative developments.

Nevertheless, it should be noted that the reasoning of the court in the *Icelandic Fisheries* cases is also applicable in certain respects to high seas fisheries as presently conceived, particularly as to the exercise of the freedom of fishing in the context of reasonable use, the role and need for conservation, the equitable allocation of resources, and good faith negotiations. While coastal states might claim on occasions a preferential right in such allocation, one important difference at present is that such claims are no longer related to a given spatial extension but to a functional role. As will be discussed below, this difference has greatly facilitated new accommodations under international law and the more active role of regional organizations in the process of accommodation and allocation.

Even in the context of exclusive economic zone claims the interests of distant-water fishing states were not ignored. Although the exclusive economic zone meant the reduction of the high seas to the areas beyond the 200-mile limit, a number of third states' interests and rights were kept within such zones in so far as fishing activities are concerned as a part of the balancing of interests between distant-water fishing nations and

[50] Birnie and Boyle, *International Law*, at 118–119.

coastal states that is characteristic of the solutions devised under international law in the matter.[51]

These developments in customary international law clearly show that the very same rule of freedom of fishing had different meanings at different points in time as determined by the changing contextual elements of state interests and practice. This is also noticeable in treaty developments and other arrangements, as well as in the opinion of leading writers on international law.

The *Bering Sea Fur Seals* arbitral decision and the proposed regime for conservation it contained had a decisive influence on the 1911 Convention for the Preservation and Protection of Fur Seals,[52] which set out a model of conservation and international cooperation of long-standing significance. The broad participation of all states concerned proved to be an essential element of the success of conservation regimes ever since, and is still a fundamental requirement of contemporary arrangements. Various other international conventions on conservation and fisheries commissions would follow but their success would be rather limited because of the narrow concepts and powers underlying such regimes.[53] In spite of the failure of the 1930 League of Nations Conference on the Law of the Sea to tackle the issue of conservation and other relevant jurisdictional matters,[54] the pursuit of new approaches would be the central task of the successive United Nations Conferences on the Law of the Sea.

Distinguished writers on international law had also foreseen the need to undertake new arrangements and develop new concepts so as to ensure high seas fisheries conservation. Alvarez and Colombos had proposed in 1924 the establishment of an international commission with some management powers over given activities in the high seas, which in the view of the former were to include the prohibition of fishing in areas of the high seas, taking into account conservation needs, and the imposition of sanctions on vessels held to be in violation.[55] Schücking had similarly proposed the creation of an international bureau that would keep a

[51] For a discussion of Article 62 of the Convention on the Law of the Sea, see Burke, *The New International Law*, at 62–68; and E. D. Brown, *The International Law of the Sea*, Vol. I, at 222–224.

[52] Treaty for the Preservation and Protection of Fur Seals, Washington, 1911, *British and Foreign State Papers*, Vol. 104, at 175.

[53] Birnie and Boyle, *International Law*, at 495–502.

[54] *Ibid*., at 502.

[55] For a discussion of the proposals by Alvarez and Colombos at the International Law Association Stockholm meeting of 1924, see Gidel, *Le Droit International*, Vol. I, at 19–22. For a similar proposal by M. de Magalhaes at the League of Nations Committee of Experts for the Progressive Codification of International Law, see *ibid*., at 486.

registry of rights beyond certain areas, including the rights relating to a common use of the sea.[56] Suarez had advocated rules for the prevention of extinction of species and uniform regulations for the exploitation of resources, including reserved zones and closed periods.[57] Draft resolutions introduced by Strupp[58] and Gidel[59] at the Institut de Droit International in 1929 had enlarged the scope of the discussion even more by conceiving ocean space as a whole and empowering the proposed international commission to promote its use concerning navigation, transportation, communications, industry, and science, including the prevention of abuses, an approach which in Gidel's view came under his concept of *service public international*.[60]

This broad conception of ocean use would inevitably pose the question of the extent of coastal state claims which was also actively discussed.[61] With the basic terms of the debate set out in the early part of the century, it would take the best part of its second half to find the negotiated solutions under international conventions.

Fishing and conservation in the high seas under the 1958 Geneva conventions

The pressures that had been mounting on the issue of high seas fishing and related problems of conservation led to the confrontations that were characteristic of the 1950s.[62] This in turn prompted important efforts at finding negotiated international settlements, the most prominent of which were the First United Nations Conference on the Law of the Sea and related technical and regional developments.[63] The Geneva Conference of

[56] Proposal by Schücking at the 1925 meeting of the League of Nations Committee of Experts for the progressive codification of international law, as commented upon by Gidel, *Le Droit International*, at 27–28.

[57] League of Nations, Committee of Experts for the Progressive Codification of International Law, "Exploitation of the resources of the sea," report by José León Suarez, January 1926, *American Journal of International Law*, Special Supplement, 20, July 1926, at 231.

[58] See the proposal made by Strupp at the Institut de Droit International, *Annuaire de l'Institut de Droit International*, Vol. 35, 1, 1929, Session de New York, at 155.

[59] Proposal by Gidel, *Annuaire de l'Institut de Droit International*, at 199.

[60] *Ibid*., at 207.

[61] See the comments by Strupp and Schücking, *Annuaire de l'Institut de Droit International*, at 165–166.

[62] See generally Garcia Amador, *La Utilización* and Oda, *International Control*.

[63] See in particular the discussions by R. E. Charlier, "Résultats et enseignements des conférences du droit de la mer," *Annuaire Français de Droit International*, 1960, 63–76; Arthur H. Dean, "The Geneva Conference on the Law of the Sea: what was accomplished," *American Journal of International Law*, Vol. 52, 1958, 607–628; Nguyen

1958 approached the question on a two-track approach. First, there was the track of reaching an agreement on the problem of enlarged maritime areas subject to national jurisdiction, whether this took the form of an extension of the territorial sea or the establishment of adjacent fishing and other areas, or both. It is well known that this track failed rather dramatically both in the First Genova Conference of 1958 and in the Second Geneva Conference of 1960.

The second track dealt with the question of high seas fisheries and conservation beyond the areas subject to national jurisdiction, whatever these might turn out to be.[64] However, since the most productive fishing areas would have come under some kind of coastal state jurisdiction and related compromises with distant-water fishing states, such as historical rights, fishing in the high seas was approached in a rather timid manner. Since the connection between the two tracks failed to materialize international law was left without coastal state extended jurisdiction and with limited rules on the high seas, a situation that was of course a poor answer to the difficult existing problems. The movement towards unilateral and regional action would gain momentum soon thereafter.[65]

The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas,[66] in spite of its contextual shortcomings, was not devoid of significance as a step forward in the long process of evolution that international law had been experiencing in the matter. In fact, freedom of fishing in the high seas was recognized for the first time under a major international convention as being subject to treaty obligations, to the interests and rights of other states as provided for under such a convention, and to the conservation of the living resources.[67] These principles were meaningful at the time, particularly if contrasted with the freedom of competition that until then had prevailed and with the very limited proposals and arrangements that had introduced the principle of abstention in high seas fishing.[68]

Quoc Dinh, ''La revendication des droits préférentiels de pêche en haute mer devant les Conférences des Nations Unies sur le Droit de la Mer de 1958 et 1960,'' *Annuaire Français de Droit International*, 1960, 77–110.

[64] See generally André Gros, ''La Convention sur la pêche et la conservation des ressources biologiques de la haute mer,'' *Recueil des Cours de l'Académie de Droit International*, 1959-II, 3–89.

[65] Birnie and Boyle, *International Law*, at 507.

[66] Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958, *United Nations Treaty Series*, Vol. 559, 285. Hereinafter cited as the 1958 Convention.

[67] Birnie and Boyle, *International Law*, at 503.

[68] For a discussion of the principle of abstention see Oda, *International Law*, at 56–90. See

In any event, even those modest principles were not coupled with the appropriate mechanisms to ensure any effectiveness.[69] Flag-state jurisdiction stood unabated as the sole source of authority over vessels in the high seas in spite of its poor record in ensuring enforcement of international obligations. The concept of these states being required to adopt conservation measures was therefore flawed in terms of its practical meaning.

The special interest of coastal states was referred to but again lacked appropriate implementation.[70] A limited degree of participation by such states in conservation arrangements was provided for, but the obligations of fishing states mainly related to the requirement to enter into negotiations with coastal states to agree on conservation measures.[71] Unilateral measures could be adopted in the event of failed negotiations provided the requirements of urgency, appropriate scientific findings, and nondiscrimination were met.[72] No means of enforcement on foreign vessels in the high seas were made available unless this could be achieved under special agreement. If the approach of the 1958 Convention had innovated in respect of the principles conditioning the extent of freedom of fishing, this was certainly not the case as to the practical implications of the Convention.

Critical views would inevitably follow in connection with the overall results of the system devised in 1958. Conservation under the freedom of fishing, lacking effective regulation and enforcement, usually led to depletion as a normal course of conduct.[73] Also, allocation of the resources meant that each participant would take as much as it could and institutional mechanisms for control could only be established by agreement. Fisheries commissions have many times resulted in serious failures and political and economic manipulation has been a common occurrence.[74] Neither has effective dispute settlement been available. Even the concept of maximum sustainable yield on which conservation was based in the system of the 1958 Convention was open to criticism from both a

also generally United States Senate, Committee on Interstate and Foreign Commerce, "Hearing on implementing the International Convention for the High Seas Fisheries of the North Pacific Ocean, signed at Tokyo on May 9, 1952," 12 July 1954; United States House of Representatives, Committee on Merchant Marine and Fisheries, *ibid*., 13 July 1954; Roy I. Jackson and William F. Royce, *Ocean Forum: An Interpretative History of the International North Pacific Fisheries Commission*, 1986.

[69] See the discussion by Birnie and Boyle, *International Law*, at 505–507.

[70] 1958 Convention, Art. 6. [71] *Ibid*., Art. 4. [72] *Ibid*., Art. 7.

[73] Burke, *The New International Law*, at 96–98.

[74] Birnie and Boyle, *International Law*, at 506.

scientific point of view and the requirements of broader approaches that were already known at the time.[75]

It has been aptly concluded that "[t]he failure of this mode of dealing with resource conservation and allocation is mainly responsible for the large extensions of national jurisdiction over the past two decades."[76] In fact, to the extent that the 1958 Convention did not provide effective answers only the freedom of fishing envisaged in Article 2 of the 1958 Convention prevailed as the governing rule on the matter, a situation that would not stand the pressures at hand on law of the sea questions. Extended coastal state jurisdiction would follow soon thereafter together with new compromises and conservation approaches that came to characterize the Third United Nations Conference on the Law of the Sea.

The changing role of international law on high seas fisheries

As a result of the above the expanding exercise of jurisdiction by coastal states over maritime areas became the salient characteristic of the contemporary law of the sea. This phenomenon, however, needs to be measured against two very different reactions from international law over time.[77] During a long period international law evolved as the consequence of a confrontation between the different interests of coastal states and distant-water fishing nations. While the first group pressed for increased jurisdiction and control over key fishing grounds, partly on the ground of the need to ensure appropriate conservation and partly on that of securing exclusive fishing rights, the second group sought to rely on the traditional rules protecting the freedom of the high seas.

A first expression of these competing views at the global level came on the occasion of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, as discussed, but the issues associated with the breadth of the territorial sea, and later the establishment of the exclusive economic zone and other maritime claims, were also the outcome of a similar pattern of confrontational attitudes. These would not come to an end with the Third United Nations Conference on the law of the sea, although the contentious aspects would be narrowed down to very specific questions that were left pending or which were insufficiently treated. Prominent among such questions were high seas fisheries in general, and highly migratory species and straddling stocks in particular,

[75] *Ibid*., at 435–440. [76] Burke, *The New International Law*, at 95.
[77] See generally Orrego Vicuña, "Coastal states' competences."

all of it spatially redefined to the new area of the high seas as resulting from that conference.

It should be noted, however, that, as conservation needs became more pressing worldwide and the matter became closely related to major environmental issues, the evolution experienced by international law in the matter took on a very different meaning as compared to earlier periods. The question would no longer be whether coastal states could or should devise new maritime areas for the exercise of given forms of jurisdiction, eroding further the area of the high seas, but rather whether, in view of evident problems that needed to be solved, the pertinent answers should be provided by coastal states or negotiated by interested parties or the international community as a whole.

Two important implications would follow from this redefinition of the question. First, the issue would no longer be whether some fisheries activities should be regulated or unrestricted, but who should undertake the appropriate regulatory functions and to what extent. Secondly, the high seas could no longer be considered an area free from certain regulations just as coastal states' maritime areas can no longer be regarded as the sole source of jurisdictional authority. In this new context the principle of the freedom of the high seas is not derogated from but it is no longer tantamount to uncontrolled or depredatory fishing activities.

The experience gathered in the past few decades in terms of the interaction of national claims and the response of international law, not unlike many other historical experiences, reveals that the issue lies not in establishing new maritime areas but in the exercise of badly needed regulatory authority or the introduction of individual rights to ensure conservation in high seas fisheries. The option of doing so under international law or under unilateral state action depends essentially on the effectiveness and timeliness of the solutions envisaged.

Important occasions such as the First and Second United Nations Conferences on the Law of the Sea missed the opportunity to provide the solutions sought at the time. In so far as freedom of fishing in the high seas continued uncontrolled, the trend was away from the prospects of international cooperation and towards extended coastal states' claims. The Third United Nations Conference on the Law of the Sea proceeded differently and managed to achieve important solutions, while providing at the same time the framework for further advancement of the law, as has happened precisely with the issue of high seas fisheries.

The evolving role of international law also shows that a negotiated international solution has always been the preferred alternative, but this

means in turn that such a solution needs to be effective to cope with the underlying problems. Should this not be the case then unilateral options again become active. In the course of this evolution new principles, concepts, and views have emerged to address effectively the pending problems by means of the development of international cooperation, thereby avoiding the continued situation of uncontrolled high seas fishing operations that would result in serious damage both to international law and to the collective interest of the community of nations. The role of the Third United Nations Conference on the Law of the Sea, state practice, and recent global and regional agreements in advancing this evolution will be examined in the chapters that follow.

2 The influence of the Third United Nations Conference on the Law of the Sea in the new regime of high seas fisheries

The Third United Nations Conference on the Law of the Sea made a major contribution to the development of the principles governing the conservation and management of living resources.[1] These principles referred mostly to fisheries within the exclusive economic zone,[2] an area that was separate from the high seas from a jurisdictional point of view. However, the new approaches adopted in this context were to prove meaningful for the question of high seas fisheries.[3] Furthermore, the Convention on the Law of the Sea also made a significant innovation in incorporating the species approach to the policies relating to conservation and management; many of these species interacted with the high seas and thereby questions of high seas fisheries also came to be regulated under the Convention or related arrangements.[4] In addition, specific provisions on high seas fisheries were built into the Convention.[5]

[1] On the work of the Third United Nations Conference on the Law of the Sea see generally René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea*, 1991; Churchill and Lowe, *The Law of the Sea*, 1988; E. D. Brown, *The International Law of the Sea*, 1994.

[2] On the exclusive economic zone see generally the works cited in chapter 1, note 25 p. 9 above, and M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone*, 1987.

[3] Carl August Fleischer, "Fisheries and biological resources," in Dupuy and Vignes, *Handbook*, 989–1126; Carl August Fleischer, "The new regime of maritime fisheries," *Recueil des Cours de l'Académie de Droit International*, 1988-II, 95; J. Carroz, "Les problèmes de la pêche à la conférence sur le droit de la mer et dans la pratique des etats," *Revue Générale de Droit International Public*, 1980, No. 3, 705; Charles Higgeson, "The Law of the Sea Convention and the protection of fisheries," *Georgetown International Environmental Law Review*, Vol. 7, 1995, 771–773; G. N. Barrie, "Fisheries and the 1982 United Nations Law of the Sea Convention," *Acta Juridica*, 1986, 43–49.

[4] William T. Burke, *The New International Law of Fisheries*, 1994, 131–141; Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment*, 1992, 530–538.

[5] Convention on the Law of the Sea, Arts. 116–120, and discussion by Burke, *The New International Law*, at 82–150.

The full meaning of the Convention on the Law of the Sea comes to light when the provisions relating to the protection of the marine environment are also taken into account.[6] A number of principles which today are common in international environmental law[7] emerged from the Convention in the context of marine environmental protection. As will be discussed further below, questions such as the preventive approach to marine pollution, the utilization of a precautionary approach, the assessment of the environmental impact of given activities, and the rules on responsibility and liability are examples of an early expression of those principles.[8] Neither was ecosystem management alien to the concepts embodied in the Convention.[9] Particularly significant in this context are the provisions relating to compliance, enforcement and settlement of disputes, a number of which set precedents that have found a renewed application in the regime of high seas fisheries.[10]

It follows from the above that the influence of the Convention on the Law of the Sea in the conservation and management of high seas fisheries exceeds by far the establishment of 200-mile exclusive economic zones or other types of jurisdictional areas as has often been thought.[11] The extension of national jurisdiction, as explained above, provided a clear source of authority to deal with the shortcomings that international law had been experiencing in the matter, but this is only one aspect to be taken into account, albeit a very important one. Another aspect is that at the same time the Convention devised solutions, compromises, and new approaches that were to prove equally relevant for the conservation and management of high seas fisheries beyond these areas or in conjunction therewith.[12]

[6] See generally IUCN, *The Law of the Sea: Priorities and Responsibilities in Implementing the Convention*, 1995.

[7] Philippe Sands, *Principles of International Environmental Law*, 1995. See also A. R. Carnegie, ''The challenge of environmental law to the Montego Bay Convention,'' *Environmental Policy and Law*, Vol. 25, 1995, 302–311.

[8] Lee A. Kimball, ''The United Nations Convention on the Law of the Sea: a framework for marine conservation,'' in IUCN, *The Law of the Sea*, 13–119, at 17.

[9] *Ibid*., at 17. See further M. Belsky, ''Marine ecosystem model: the law of the sea's mandate for comprehensive management,'' *Law of the Sea Institute Proceedings*, Vol. 22, 1989, 115.

[10] Kimball, ''The United Nations Convention,'', at 27–29, 71–82.

[11] G. Pontecorvo, ''The enclosure of the marine commons, adjustment and redistribution,'' *Marine Policy*, Vol. 12, 1988, 361–372; Gary Knight, *Managing the Sea's Living Resources: Legal and Political Aspects of High Seas Fisheries*, 1977.

[12] J. L. Meseguer, ''Le régime juridique de l'exploitation de stocks communs de poissons au delà des 200 milles,'' *Annuaire Français de Droit International*, Vol. 28, 1982, 884–899; Ellen Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*, 1989.

The emerging principles relating to conservation and management of living resources within the exclusive economic zone

The sovereign rights that the coastal state was granted in relation to the living resources of the exclusive economic zone did not amount to an unqualified right.[13] Irrespective of the discussions concerning the precise meaning of sovereignty and jurisdiction in the context of the exclusive economic zone concept, coastal state authority was subject to specific obligations, the most important of which concern the conservation and management of living resources.[14]

As Burke explains, Articles 61 and 62 of the Convention on the Law of the Sea involve a sequence of decisions by the coastal state relating to the determination of the total allowable catch, harvesting restrictions, the harvesting capacity of the coastal state, and others such as the eventual access to fishing by other states and the terms, conditions, and agreements governing such access.[15] In this process questions of conservation appear prominently and the access of other states is in fact made conditional on the success of conservation and the resulting availability of resources.[16] It is interesting to note in this regard that the historical situation has been reversed by these provisions: previously it was open access that prevailed and conservation had a secondary role in the structure of fishing arrangements.[17] While this may appear at first sight

[13] W. T. Burke, ''1982 Convention on the Law of the Sea provisions on conditions of access to fisheries subject to national jurisdiction,'' *FAO Fisheries Report*, No. 293, 1983, 23–42; J. E. Carroz and M. Savini, ''The practice of coastal states regarding foreign access to fishery resources,'' *ibid*., 43–72.

[14] B. Kwiatkowska, ''Conservation and optimum utilization of living resources,'' in Thomas A. Clingan (ed.), *The Law of the Sea: What Lies Ahead?*, 1988, 245–275.

[15] Burke, *The New International Law*, at 43.

[16] W. R. Edeson, ''Types of agreements for exploitation of EEZ fisheries,'' in E. D. Brown and R. R. Churchill (eds.), *The UN Convention on the Law of the Sea: Impact and Implementation*, 1987, 157–177; J. A. Gulland, ''Conditions of access to fisheries: some resource considerations,'' *FAO Fisheries Report*, No. 293, 1983, 143–151; G. Moore, ''Coastal state requirements for foreign fishing,'' *FAO Legislative Study*, No. 21, Rev. 4, 1993.

[17] For the changing approaches to fisheries in the light of new conservation needs see generally D. M. Johnston, *The International Law of Fisheries: A Framework for Policy-Oriented Inquiries*, 1965; Albert W. Koers, *International Regulation of Marine Fisheries*, 1973; William T. Burke, ''Importance of the 1982 UN Convention on the Law of the Sea and its future developments,'' *Ocean Development and International Law*, Vol. 27, 1996, 1–4; Bruce P. Chadwick, ''Fisheries, sovereignties and red herrings,'' *Journal of International Affairs*, Vol. 48, 1995, 559–584.

to be a small change in terms of practical results, it involves a major conceptual evolution on the basis of which many other consequences would follow in the context of both the Convention on the Law of the Sea and other treaty developments. One such consequence is, for example, the trend leading to a reversal of the burden of proof in environmentally sensitive activities; while open access was the rule, fishing activities could proceed until proven to be seriously depleting the resources, but to the extent that conservation prevails as the governing criterion fishing will only be possible if it safeguards conservation requirements.[18]

Total allowable catch is the basic concept on which the new organization of fisheries under national jurisdiction is based.[19] Although the determination of allowable catch falls within the discretionary powers of the coastal state and its practical implementation might be difficult,[20] the fact that the concept introduces major innovations remains unaltered. In fact, the coastal state is under a specific obligation to ensure that the maintenance of the living resources of the exclusive economic zone is not endangered by overexploitation.[21] Conservation thus becomes a major conditioning factor of the exercise of discretion. The manner in which this is to be achieved is not left open but is also made subject to specific standards that in turn require a major innovation in the regulation of fisheries.

First, there is an obligation for the coastal state to take into account the best scientific evidence available to it, coupled with a mechanism for the exchange of information and conservation data.[22] To the extent that institutional capabilities are simultaneously developed and international cooperation enhanced in this field, the risk of manipulation of data that has harmed conservation efforts in the past is correspondingly diminished.

Secondly, the goal of avoiding overexploitation is to be attained by means of the adoption of proper conservation and management measures.[23] However loose this language may be, it is nonetheless a clear mandate for the adoption of measures that might ensure reasonable

[18] On the implications of the Convention on the Law of the Sea regarding the shift of the burden of proof in high seas fisheries, see generally Hey, *The Regime*, chapter 7.

[19] J. P. Troadec, ''Introduction à l'aménagement des pêcheries: intérêt, difficultés et principales méthodes,'' *FAO Fisheries Technical Paper*, No. 224, 1982; O. Flaaten, ''Limited entry into fisheries: Why and how,'' in G. Ulfstein, P. Andersen, and R. Churchill (eds.), *The Regulation of Fisheries: Legal, Economic, and Social Aspects*, 1987, 89–105.

[20] Burke, *The New International Law*, 44–51.

[21] Convention on the Law of the Sea, Art. 61(2).

[22] *Ibid*., Art. 61(2), (5).

[23] *Ibid*., Art. 61(2).

conservation standards.[24] The standard of maintaining or restoring populations of harvested species at levels that can produce the maximum sustainable yield is specifically established under the Convention on the Law of the Sea.[25] Moreover, maximum sustainable yield is expressly qualified by "relevant environmental and economic factors" and by the need to take into account other elements, such as fishing patterns, interdependence of stocks and generally recommended international minimum standards.[26] The effect of such measures on associated or dependent species is also to be considered in the context of ensuring their conservation.[27]

Once all of the above has been achieved, only then does the objective of optimum utilization come into play.[28] This is the specific mechanism through which foreign fishing fleets can be granted access to the surplus of the total allowable catch exceeding the harvesting capacity of the coastal state, a mechanism that is expressly conditioned to the fulfillment of the conservation requirements provided for under Article 61 of the Convention.[29] Since such conservation obligations apply equally to the coastal state's fishing, it follows that all fishing within the exclusive economic zone is subject to the same fundamental objective.

The change of emphasis in favor of conservation was not an isolated development related to the Law of the Sea Conference negotiations.[30] A number of important statements and declarations had already been emerging on this matter, and many others would follow, not always specifically concerned with fisheries but touching on important issues of conservation of living resources, thereby helping to shape new definitions, criteria, and orientations. Among such developments mention must be made of the 1972 Stockholm Declaration of the Conference on the Human

[24] Burke, *The New International Law*, 51–52.

[25] Convention on the Law of the Sea, Art. 61(3). See generally J. A. Gulland, "The concept of maximum sustainable yield and fishery management," *FAO Fisheries Technical Paper*, No. 70, 1968.

[26] Convention on the Law of the Sea, Art. 61(3).

[27] *Ibid*., Art. 61(4).

[28] *Ibid*., Art. 62(1). On Arts. 61 and 62 of the Convention on the Law of the Sea, see generally *The Law of the Sea: Conservation and Utilization of the Living Resources of the Exclusive Economic Zone. Legislative History of Articles 61 and 62 of the United Nations Convention on the Law of the Sea*, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, 1995.

[29] See generally Burke, *The New International Law*, 58–80.

[30] Birnie and Boyle, *International Law*, chapter 11, "Principles and problems of conservation and sustainable use of living resources," 419–442. See also generally Peter Bautista Payoyo (ed.), *Ocean Governance: Sustainable Development of the Seas*, 1994.

Environment, with particular emphasis on the maintenance of renewable resources;[31] the 1978 UNEP Principles on shared natural resources, encouraging cooperation on their conservation and use;[32] the 1980 IUCN World Conservation Strategy, which develops the concept of sustainable utilization of species and ecosystems and refers specifically to fisheries in the high seas in terms of oceanic species as the common resource of humanity and migratory species as shared resources;[33] and the World Charter for Nature adopted in 1982, also with specific reference to ecosystems approaches to conservation.[34] The World Commission on Environment and Development 1987 report would lay the groundwork for a number of more recent developments leading to the United Nations Conference on Environment and Development that will be considered further below.[35]

Various new conservation strategies were thus already emerging at the time the Conference on the Law of the Sea negotiations took place and had of course an influence in the approaches the latter would take. An important common denominator was the ecosystem approach that a number of those declarations had recommended and that had also been embodied in the 1980 Convention on the Conservation of Antarctic Marine Living Resources.[36] Although this concept was not made explicit in the Convention on the Law of the Sea, it nevertheless underlies most of its mechanisms and objectives and would become prevalent in many of the events that followed the adoption of the Convention.[37]

Besides the overall evolution described there were also practical reasons

[31] Declaration of the United Nations Conference on the Human Environment, 1972, particularly Principle 3, text in Edith Brown Weiss, Paul C. Szasz, and Daniel B. Magraw, *International Environmental Law: Basic Documents and References*, 1992, 171–177; see generally Louis B. Sohn, "The Stockholm Declaration on the Human Environment," *Harvard International Law Journal*, Vol. 14, 1973, 423.

[32] United Nations Environment Programme, "Principles of conduct for the guidance of states in the conservation and harmonious utilization of natural resources shared by two or more states," 1978, text in Brown Weiss *et al.*, *International Environmental Law*, 180–183.

[33] International Union for Conservation of Nature and Natural Resources, *World Conservation Strategy*, 1980.

[34] United Nations General Assembly, Resolution 37/7, 28 October 1982; text in Brown Weiss *et al.*, *International Environmental Law*, 184–187.

[35] World Commission on Environment and Development, *Our Common Future*, 1987.

[36] Convention on the Conservation of Antarctic Marine Living Resources, 1980; text in Brown Weiss *et al.*, *International Environmental Law*, 520–529. See also J. R. Beddington, M. Basson, and J. A. Gulland, "The practical implications of the eco-system approach in CCAMLR," *International Challenges*, Vol. 10, 1990, 17–20.

[37] IUCN, *The Law of the Sea*, 71–81.

strengthening conservation as the main element of a fisheries regime. First, if most of the world fisheries were to be brought under the authority of national jurisdiction because of the conservation problems that had characterized the open access regime prevailing historically, it would have been inconceivable that this fundamental step was not accompanied by strong conservation obligations of the coastal state.[38] As noted in Chapter 17 of UNCED's *Agenda 21*, marine fisheries yield 80–90 million tons per year, 95 percent of which is taken from waters under national jurisdiction, with yields having increased nearly fivefold over the past four decades;[39] the provisions of the Convention on the Law of the Sea are those that set forth the rights and obligations of states concerning the conservation and utilization of these resources.

These provisions are important not only to ensure general goals of conservation but also as a means to take care of other problems relating to fishing under national jurisdiction. Reference is made in this regard by *Agenda 21* to local overfishing, unauthorized incursions by foreign fleets, ecosystem degradation, overcapitalization and excessive fleet sizes, underevaluation of catch, insufficiently selective fishing gear, unreliable databases and increasing competition with other interests.[40]

Next, the particular interest of distant-water fishing nations was to ensure the greatest possible availability of resources in order to gain access to the surplus of the total allowable catch, and this was best done by means of conservation of such resources.[41] The paradox of it all lies in the fact that if conservation had been a matter of similar priority two decades earlier it might have been possible to conceive a regime for the high seas fisheries on an entirely different basis, even perhaps without the need to resort to expanded national jurisdiction to ensure this objective;

[38] Birnie and Boyle, *International Law*, at 520–521. See also generally F. T. Christy, Jr., "Global perspectives on fisheries management: disparities in situations, concepts and approaches," in Ulfstein *et al.*, *The Regulation of Fisheries*, 48–70; G. Saetersdal, "200 mile zones – Have the expectations been fulfilled?," in Ulfstein *et al.*, *The Regulation of Fisheries*, 6–21.

[39] United Nations Conference on Environment and Development, *Report*, Doc. A/CONF. 151/26/Rev. 1, Vol. 1, 1993, chapter 17, "Protection of the Oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources," Section D, para. 17.70; text in P. Sands, R. Tarasofsky, and M. Weiss, *Documents in International Environmental Law*, 1994, Vol. II A, 55.

[40] *Ibid.*, para. 17.72.

[41] See generally L. G. Anderson, "Criteria for maximum economic yield of an internationally exploited fishery," in H. G. Knight (ed.), *The Future of International Fisheries Management*, 1975, 159–182; G. Saetersdal, "Problems of managing and sharing of living resources under the new ocean regime," *Ocean Yearbook*, Vol. 4, 1983, 45–49.

only when the latter measure became inevitable did conservation acquire a renewed priority.

The species approach and the linkage with high seas issues

The Convention on the Law of the Sea introduced another major innovation in the concepts governing fisheries conservation and management. Contrary to the views that had until then conceived fishing as an economic activity concerning fish in general as a simple input, the Convention adopted the species approach providing for discriminatory treatment and management of different biological realities.[42] In so doing the Convention not only improved and enhanced the prospects of appropriate conservation of living resources but also laid the groundwork for fundamental changes in the legal regime governing fisheries.

In point of fact, this approach allowed for conservation measures to take into consideration relationships among species, a criterion that Article 61 specifically relates to the concept of maximum sustainable yield.[43] On this basis it facilitated other related developments, such as the requirements concerning selective fishing gear, that clearly distinguish between target and non-target species, and the objective of protecting endangered marine species. All of these aspects would be developed to a significant extent by the legislation and practice that followed the Convention.[44] It should also be noted that the species approach brought the provisions of the Convention quite close to the concept of ecosystem management and revealed an early concern for the preservation of biological diversity.[45]

The species approach covers a variety of situations within the purview of the Convention. Some of these situations are related to fisheries that lie entirely under national jurisdiction, such as coastal species and others that do not transcend the ambit of the exclusive economic zone. The criteria relating to conservation and utilization explained above apply in particular to these species.

Sedentary species belong to a different category as they were attached

[42] See generally Burke, *The New International Law*, chapter 3; Hey, *The Regime for the Exploitation*, chapter 5.

[43] Convention on the Law of the Sea, Art. 61(3); Burke, *The New International Law*, at 58–59.

[44] See generally United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea. Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea*, 1994.

[45] IUCN, *The Law of the Sea*, 77–78, 83–106.

to the exclusive rights of the coastal state over the continental shelf resources since the 1958 Convention on the Continental Shelf.[46] The requirements of conservation and utilization set forth in Part V of the Convention on the Law of the Sea do not apply to these other species, although general obligations of conservation of renewable resources might still be applicable.[47] Jurisdiction over the continental shelf might of course extend beyond the 200-mile limit and hence jurisdiction over sedentary species will also follow this rule; however, since the overlying waters will be those of the high seas the potential for conflict with foreign fishing will increase.[48]

A number of other situations included in the species approach involve species that do not fall exclusively under national jurisdiction, thus providing a direct nexus with high seas issues. Questions relating to the regimes governing these other species and problems originating in this context were at the very heart of the new regime of high seas fisheries that will be discussed further below. Anadromous and catadromous species, marine mammals, straddling stocks, and highly migratory species are the most important subjects that prompted the new developments.

Salmon fisheries and the prevailing interest of the state of origin

Fishing for anadromous species, notably salmon, has long been a source of difficult disputes but has also resulted in novel arrangements of international cooperation that have significantly developed both the applicable rules of international law and national legislation and practice.[49] Just as happened with high seas fisheries generally, the early approaches based on the principle of abstention dramatically failed to

[46] Convention on the Continental Shelf, 1958, Art. 2(4), *United Nations Treaty Series*, Vol. 499, at 311; Convention on the Law of the Sea, Art. 77(4).

[47] Birnie and Boyle, *International Law*, 519–520.

[48] For a reference to disagreements about Canadian jurisdiction over species of scallops associated with the continental shelf, see IUCN, *The Law of the Sea*, at 75.

[49] Burke, *The New International Law*, chapter 4; W. T. Burke, "Anadromous species and the new international law of the sea," *Ocean Development and International Law*, Vol. 22, 1991, 100–102; Francisco Orrego Vicuña, "International cooperation in salmon fisheries and a comparative law perspective on the salmon and ocean ranching industry," *Ocean Development and International Law*, Vol. 22, 1991, 133–151; John Warren Kindt, "The law of the sea: anadromous and catadromous fish stocks, sedentary species and the highly migratory species," *Syracuse Journal of International Law and Commerce*, Vol. 11, 1984, 9–46.

ensure conservation of salmon.[50] This situation prompted a strong initiative in favor of the species approach during the negotiations of the Third United Nations Conference on the Law of the Sea, which had salmon as its most prominent case.[51]

Article 66 of the Convention on the Law of the Sea recognized the primary interest and responsibility of the state of origin in anadromous stocks, thereby changing in a fundamental manner the very concept on which the law of the sea had been based in this matter. In fact, jurisdiction of the state of origin prevailed not only in the adjacent waters but throughout the migratory range of salmon in the high seas. While the reference to ''interest'' reflects the economic realities associated with the exploitation of salmon, particularly the heavy investments required, the reference to ''responsibility'' is related to the conservation appropriate for the biological characteristics of the species. The state of origin might be different from the coastal state since in a number of peculiar geographical situations salmon originating in the rivers of one country might reach the sea in the waters of another.[52]

The geographical scope of the regime is also quite new. On the one hand, it includes ''all waters landward of the outer limits of its exclusive economic zone,'' thus also covering territorial waters and internal waters, a situation not at all common in the regime of sea fisheries. On the other hand, the regime extends into the high seas, thus universalizing the primary interest and responsibility of the state of origin. This means that conservation measures adopted by such a state will have an effect beyond the exclusive economic zone, subject to some forms of cooperation.[53] Because of the prevailing interest of the state of origin there are no requirements as to the optimum utilization or other forms of participation of third states in the fisheries of salmon in the exclusive economic zone.[54] For the same reason it will be for the state of origin to establish the total allowable catch of salmon for the whole of its migratory range, subject again to some forms of consultation and cooperation;[55] enforcement of measures and regulations beyond the exclusive economic zone

[50] See generally H. N. Scheiber, ''Origins of the abstention doctrine in ocean law: Japanese–US relations and the Pacific fisheries, 1937–1958,'' *Ecology Law Quarterly*, Vol. 16, 1989, 23–99.

[51] For the various proposals on salmon fisheries introduced during the Law of the Sea Conference negotiations, see Orrego Vicuña, ''International cooperation,'' at 134–136.

[52] *Ibid*., at 135–136.

[53] *Ibid*., at 136.

[54] Birnie and Boyle, *International Law*, at 535.

[55] Burke, *The New International Law*, at 168.

will normally require an agreement between the state of origin and other states concerned,[56] but unilateral action is not unknown in practice.[57]

A major innovation of this regime is that as a general rule salmon fisheries "shall be conducted only" in the waters landward of the outer limit of the exclusive economic zone.[58] This means in practice that fishing of salmon is now prohibited on the high seas.[59] Because of the prevalent needs of conservation the freedom of fishing in the high seas has been abolished in relation to salmon. There are, however, limited exceptions to this prohibition justified by the need to avoid economic dislocation for other states. Various measures of international cooperation are called for in this context, including consultations with a view to reaching an agreement on terms and conditions of such fishing and participation in measures to renew anadromous stocks and expenditures for this purpose.[60] In practice, these exceptions may be considered of a rather transitory nature since economic dislocation usually leads to a process of economic adjustment.

Another innovative provision of this regime is that which calls for the cooperation of other coastal states through the waters of which salmon migrate with the state of origin for the conservation and management of stocks.[61] In a sense this approach evidences that the interest and responsibility of the state of origin penetrate even in the jurisdictional ambit of other states.

The new principles, concepts, and approaches embodied in the Convention on the Law of the Sea in respect of anadromous stocks have had a specific influence in all the major regional agreements that have followed.[62] This has been particularly the case with the 1985 Agreement on Fisheries Cooperation between Japan and the Soviet Union in the Northwest Pacific;[63] the 1991 Convention for the Conservation of Anadro-

[56] Convention on the Law of the Sea, Art. 66(3)(d).

[57] For the United States and Soviet unilateral action, see Burke, *The New International Law*, 161–162; see also C. Sathre, "Salmon interception on the high seas: a continuing controversy between the United States and Japan," *Environmental Law*, Vol. 16, 1986, 731–755.

[58] Convention on the Law of the Sea, Art. 66(3)(a).

[59] Burke, *The New International Law*, 168–169.

[60] *Ibid*., 169–172.

[61] Convention on the Law of the Sea, Art. 66(4).

[62] For the treaty practice in the northeast and northwest Pacific region and in the Atlantic Ocean region, see Burke, *The New International Law*, 172–192. See also H. Kasahara and W. T. Burke, *North Pacific Fisheries Management*, 1973.

[63] Japan–USSR Agreement Concerning Cooperation in the Field of Fisheries, 12 May 1985, as cited in Burke, *The New International Law*, at 173, note 63.

mous Stocks in the North Pacific Ocean to which Canada, Japan, Russia, and the United States are parties;[64] the 1985 Treaty on Pacific Salmon between Canada and the United States;[65] and the 1982 Convention for the Conservation of Salmon in the North Atlantic.[66] The role of the state of origin in the conservation of salmon, the enforcement of conservation measures in the high seas and the prohibition of high seas fisheries of salmon appear prominently in some of these agreements.[67] International commissions and scientific advice are also a normal institutional feature of these agreements.[68]

On the basis of the broad consensus surrounding Article 66 of the Convention on the Law of the Sea and the subsequent practice and agreements of states, it can be concluded that a rule of customary international law has developed from these provisions, with only minor points of national legislation remaining a matter of doubt as to their meaning and extent and their compatibility with that Article.[69] Important developments of national legislation in terms of conservation of salmon and the protection of the rights of producers have also followed in respect of both aquaculture and ocean ranching, evidencing a remarkable degree of uniformity in the legal objectives pursued; to this extent there are also grounds for identifying emerging rules of customary law.[70] The international law and the domestic law applicable to salmon are thus mutually reinforced in the context of the mechanisms of international cooperation and comparative law in relation to some specific issues, notably conservation, although of course national differences in the models for exploitation of salmon remain.

The regime for catadromous species established in Article 67 of the

[64] Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, 20 September 1991, as cited by Burke, *The New International Law*, at 177, note 88. See also N. Okuwaki, ''Japanese salmon fishery and the LOS Convention – between regimes in EEZ and on high seas,'' *Japanese Annual of International Law*, 1990, 1–24; Kelly R. Bryan, ''Swimming upstream: trying to enforce the 1992 North Pacific Salmon Treaty,'' *Cornell International Law Journal*, Vol. 28, 1995, 241–263.

[65] Canada–United States Treaty concerning Pacific Salmon and Memorandum of Understanding, 28 January 1985, *Canada Treaty Series*, 1985, No. 7; see generally J. A. Yanagida, ''The Pacific Salmon Treaty,'' *American Journal of International Law*, Vol. 81, 1987, 577–592; and Ted L. McDorman, ''The west coast salmon dispute: a Canadian view of the breakdown of the 1985 Treaty and the transit license measure,'' *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 17, 1995, 477–506.

[66] Convention for the Conservation of Salmon in the North Atlantic Ocean, 2 March 1982, *EEC Official Journal*, L378, 1982, 25.

[67] Burke, *The New International Law*, at 188–192.

[68] *Ibid*., at 189–190.

[69] *Ibid*., at 192–196.

[70] Orrego Vicuña, ''International cooperation,'' at 146–147.

Convention on the Law of the Sea also identifies new situations and governing principles. Responsibility for the management of these species is assigned to the coastal state in whose waters they spend the greater part of the life cycle.[71] Cooperation is also considered for the management of fish migrating through the exclusive economic zone of other states.[72] Here again the harvesting of these species shall be conducted only in waters landward of the outer limit of the exclusive economic zone;[73] thus high seas fishing is prohibited. An important difference with the regime of salmon is that in the case of fishing of catadromous species in the exclusive economic zone the provisions of Part V of the Convention do apply, including optimum utilization requirements and foreign access if appropriate.[74]

These new regimes embodied in the Convention on the Law of the Sea are the direct result of the failure of prior approaches to ensure conservation of valuable stocks. Freedom of fishing and early timid restrictions associated with the principle of abstention or loose forms of international cooperation did not solve the problems posed. National jurisdiction came to provide the authority necessary for conservation and enforcement, this time conceived in a functional manner that extends beyond the spatial ambit of the exclusive economic zone. This particular aspect, together with the prohibition of fishing in the high seas, constitutes a unique feature of the new regime that evidences the fundamental changes experienced by the principles of international law applicable in respect of high seas fisheries. International cooperation has also been used as a means of harmonizing the various interests involved in such fisheries, conceived no longer as a rather vague objective but as a very specific mechanism for the enactment and implementation of conservation measures.

Marine mammals: furthering the restrictions to the freedom of exploitation

Another major innovation of the Convention on the Law of the Sea regarding the principles that had historically prevailed in high seas fisheries is found in the regime governing marine mammals.[75] The over-exploitation and depletion of the various species of marine mammals,

[71] Convention on the Law of the Sea, Art. 67(1).
[72] *Ibid*., Art. 67(3). [73] *Ibid*., Art. 67(2).
[74] Birnie and Boyle, *International Law*, at 538.
[75] Patricia Birnie, *International Regulation of Whaling*, 1985.

notably whales and seals, had generally been approached by limited forms of international cooperation that did not purport to address the fundamental issue of freedom of exploitation of these stocks and therefore were usually not successful in their objectives. The debate about freedom of exploitation and the need for protection and conservation had been ongoing since the *Fur Seals Arbitration*[76] and had also been evident in the negotiation of every major international agreement, such as the 1946 International Convention on the Regulation of Whaling[77] or the 1972 Convention on the Conservation of Antarctic Seals.[78]

The protection of whales had been at the very heart of the first enactment of a 200-mile maritime zone by Chile in 1947, since it was specifically the need to end overexploitation of whales and to make available a limited number of species for the local industry that led to the design and implementation of this measure.[79] Coastal state authority came to replace in this instance the unrestricted freedom of exploitation that was the cause of depletion. Article 65 of the Convention on the Law of the Sea followed a similar approach in safeguarding the right of coastal states or the competence of an international organization to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for under the rules applicable to fisheries in the exclusive economic zone. This provision was also made specifically applicable to the high seas.[80]

In actual fact the meaning of this provision is that while conservation obligations will of course apply to the exploitation of whales in the exclusive economic zone there shall be no obligation as to optimum utilization or other forms of third states' participation in this respect.[81] Since this approach applies equally to high seas whaling it follows that freedom of exploitation is no longer the prevailing principle of international law in this context. Cooperation is also called for in the management of this regime. Although the language of Article 65 of the Convention on the Law of the Sea has led to differing interpretations

[76] *Bering Sea Fur Seals Fisheries Arbitration* (*Great Britain* v. *United States*), *Moore's International Arbitrations*, 1893, 755.

[77] International Convention for the Regulation of Whaling, 2 December 1946; text in Sands *et al.*, *Documents*, Vol. II A, 701.

[78] Convention for the Conservation of Antarctic Seals, 1 June 1972; text in Sands *et al.*, *Documents*, Vol. II B, 1636.

[79] Ann L. Hollick, "The origins of 200-mile offshore zones," *American Journal of International Law*, Vol. 71, 1977, 494–500.

[80] Convention on the Law of the Sea, Art. 120.

[81] Birnie and Boyle, *International Law*, at 533.

about its precise scope,[82] it nonetheless provides for a stricter standard of conservation than would otherwise be the case under the Convention. It should also be noted that, while enforcement in the exclusive economic zone will be strong in view of the powers of coastal states in this respect, this is not so in the high seas where flag-state jurisdiction will still prevail, thereby causing some imbalance in the effectiveness of this provision.

The International Whaling Commission has been the main body in charge of global conservation of whales but its work has been the subject of serious differences of opinion between states aiming at the protection of whales and those whose interest lies rather in the exploitation of stocks.[83] The scientific research exception authorized under the Convention has been badly abused in some instances.[84] Enforcement and inspection procedures have been strengthened but they are still limited. In spite of these shortcomings the International Whaling Commission has been successful in achieving the prohibition of commercial whaling by establishing a zero catch limit under its Schedule.[85] Among other disputed issues, the establishment of a whale sanctuary in Antarctica has been particularly difficult.[86] It should also be noted that activities under the International Whaling Convention are not included within the Protocol on Environmental Protection to the Antarctic Treaty.[87] The role of the International Whaling Commission has also been supported by the commitments of *Agenda 21*.[88]

Various other treaty developments have an influence on the orientations of the marine mammals regime. The concern about the conservation of small cetaceans is evident in the 1992 Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas,[89] but this is a controversial issue within the framework of the International Whaling Commission where a number of countries have opposed its intervention in the matter

[82] For a discussion of Canadian and other views in this context, see Birnie and Boyle, *International Law*, at 533–534.

[83] Sands, *Principles*, at 433–436.

[84] *Ibid*., at 434. [85] *Ibid*., at 435. [86] *Ibid*., at 435–436.

[87] Protocol on Environmental Protection to the Antarctic Treaty, 4 October 1991, *International Legal Materials*, Vol. 30, 1991, 1455, and Final Act of the XI Special Consultative Meeting; for comments on these see Francisco Orrego Vicuña, ''The Protocol on Environmental Protection to the Antarctic Treaty: questions of effectiveness,'' *Georgetown International Environmental Law Review*, Vol. 7, 1994, 1–13, at 6.

[88] Para. 17.62.

[89] Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, adopted under the 1979 Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), as cited in Sands, *Principles*, at 436, note 473.

of small cetaceans in the exclusive economic zone.[90] The role of regional organizations, such as the North Atlantic Fisheries Organization, has been preferred by some countries in this context, Canada having departed from the International Whaling Commission on these grounds.[91] On the other hand, the 1992 Agreement on the North Atlantic Marine Mammals Conservation Organization aims at the resumption of some forms of commercial whaling among a few countries in the region, thus detracting from the present objectives of the International Whaling Commission.[92]

The conflict between commercial and trade interests on the one hand and environmental and conservation concerns on the other, has been clearly posed in the context of the marine mammals regime. First it should be noted that a few environmental conventions apply to marine mammals in their own right. This is notably the case of the Convention on International Trade in Endangered Species[93] and the Convention on the Conservation of Migratory Species of Wild Animals.[94] Next, in view of the failure of international cooperation to ensure appropriate conservation some countries have resorted to unilateral measures in order to prohibit the import or otherwise restrict the trade of given products originating in situations or activities considered contrary to such aims. Unilateral restrictive measures adopted by the United States have been the subject of important GATT panel decisions.[95] Various recent international conven-

[90] Birnie and Boyle, *International Law*, at 533.

[91] *Ibid*., at 533–534; Sands, *Principles*, at 436.

[92] Agreement on the North Atlantic Marine Mammals Conservation Organisation, 1992, as cited by Sands, *Principles*, at 436–437.

[93] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, Appendix I; text in Sands *et al*., *Documents*, Vol. II A, 765.

[94] Bonn Convention; see note 89 above.

[95] GATT: Dispute Settlement Panel Report on United States Restriction on Imports of Tuna, 1991, *International Legal Materials*, Vol. 30, 1991, 1594; and Panel Report of June 1994, *ibid*., Vol. 33, 1994, 839. See generally T. L. McDorman, ''International trade law meets international fisheries law,'' *Journal of International Arbitration*, Vol. 7, 1990, 107–121; T. L. McDorman, ''The GATT consistency of US fish import embargoes to stop driftnet fishing and save whales, dolphins and turtles,'' *George Washington Journal of International Law and Economics*, Vol. 24, 1991, 477–525; T. L. McDorman, ''The 1991 US–Mexico GATT panel report on tuna and dolphin: implications for trade and environment conflicts,'' *North Carolina Journal of International Law and Commerce Review*, Vol. 17, 1992, 461–488; M. Hall and S. Boyer, ''Incidental mortality of dolphins in the tuna purse-seine fishery in the eastern Pacific Ocean during 1988,'' *Reports of the International Whaling Commission*, Vol. 40, 1990, 461; Richard J. McLaughlin, ''UNCLOS and the demise of the United States' use of trade sanctions to protect dolphins, sea turtles, whales, and other international marine living resources,'' *Ecology Law Quarterly*, Vol. 21, 1994, 1–78; Philippe Cullet and Annie Patricia Kameri-Mbote, ''Dolphin bycatches in tuna fisheries: a smokescreen hiding the real issues?,'' *Ocean Development*

tions provide for trade sanctions and other measures in the context of environmental protection and the issue of compatibility between trade and the environment is being actively considered under the World Trade Organization.[96] In view of the changing principles of international law applicable to fisheries and the emphasis placed on conservation, law of the sea questions will be increasingly faced with these kinds of differing approaches and the need to ensure the compatibility of legitimate objectives of economic activity and environmental protection.

The Convention's limited approach to the straddling stocks and highly migratory species question

The species approach adopted by the Convention on the Law of the Sea dealt with two other questions that had appeared prominently among the new issues relating to high seas fisheries, namely the regime applicable to straddling stocks[97] and to highly migratory species.[98] In both cases there was also a decisive interaction between the interests of coastal states and

and International Law, Vol. 27, 1996, 333–348; D. Hurwitz, "Fishing for compromises through NAFTA and environmental dispute settlement: the tuna dolphin controversy," *Natural Resources Journal*, Vol. 35, 1995, 501–540; United States House of Representatives, Committee on Resources, Subcommittee on Fisheries, Wildlife, and Oceans, "Hearings on tuna/dolphin issues," 104th Congress, First and Second Sessions, 22 June 1995, 29 February 1996.

[96] See generally Sands, *Principles*, chapter 18.

[97] Hey, *The Regime for the Exploitation*; B. Applebaum, "The straddling stocks problem: the northwest Atlantic situation, international law, and options for coastal state action," in Alfred H. A. Soons (ed.), *Implementation of the Law of the Sea Convention through International Institutions*, 1990, 282; T. Kawasaki, "The 200-mile regime and the management of the transboundary and high seas stocks," *Ocean Management*, Vol. 9, 1984, 7–20; E. L. Miles and W. T. Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 arising from new fisheries conflicts: the problem of straddling stocks," *Ocean Development and International Law*, Vol. 20, 1989, 343–357; J. A. Gulland, "Some problems of the management of shared stocks," *FAO Fisheries Technical Paper*, No. 206, 1980; Will Martin, "Fisheries conservation and management of straddling stocks and highly migratory stocks under the United Nations Convention on the Law of the Sea," *Georgetown International Environmental Law Review*, Vol. 7, 1995, 765–769.

[98] Burke, *The New International Law*, chapter 5; Burke "Highly migratory species in the new law of the sea," *Ocean Development and International Law*, Vol. 14, 1984, 273–314; G. Munro, "Extended jurisdiction and the management of Pacific highly migratory species", *Ocean Development and International Law*, Vol. 21, 1990, 289–307; V. Kaczynski, "Distant water fisheries and the 200 mile economic zone," *Law of the Sea Institute Occasional Paper*, No. 34, 1983. See also United States House of Representatives, Committee on Merchant Marine and Fisheries, Subcommittee on Fisheries and Wildlife Conservation and the Environment, "Hearing on conservation and management of migratory fish species," 101st Congress, First Session, 20 July 1989.

those of distant-water fishing nations that had to be accommodated under new concepts.

The question of straddling stocks referred to the stocks that occur both in the exclusive economic zone of two or more coastal states or in the exclusive economic zone and an area of the high seas adjacent to and beyond this zone, situations dealt with respectively under paragraphs 1 and 2 of Article 63 of the Convention.[99] The basic principle of the coastal states' sovereign rights in the exclusive economic zone embodied in Article 56 of the Convention also governs this matter and remains unchanged in relation to straddling stocks, being the general regime of fishing in the exclusive economic zone applicable also to such stocks.[100] However, the respective coastal states or the coastal state and the states that fish in the adjacent high seas area shall seek an agreement on the necessary conservation measures, either directly or by means of the appropriate organizations. The expression ''shall seek'' used in Article 63 appeared to mean that there was no obligation to enter into such agreements.[101]

Various proposals to recognize the ''special interest'' of coastal states in relation to straddling stocks in the adjacent high seas areas were made during the negotiations of this Article but they were not successful.[102] Coastal state authority to extend conservation measures to the high seas was also the subject of specific proposals but neither were these successful.[103] The discussion, however, was not foreclosed by these unsuccessful attempts to make explicit the interest of coastal states since it should be noted that Article 116 of the Convention subjects the right of high seas fishing to the rights and duties as well as the interests of coastal states provided for, among other cases, in Article 63(2), that is, in connection with the straddling stocks regime.[104]

On the basis of these legal interrelations the argument has been made that since the sovereign rights provided for under Article 56 apply to the

[99] Hey, *The Regime for the Exploitation*, 81–83, 89–99.

[100] *Ibid*., at 82; Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law*, 1989, at 61.

[101] Orrego Vicuña, *The Exclusive Economic Zone*, at 61.

[102] United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: The Regime for High Seas Fisheries*, 1992, at 23.

[103] Australia, Canada, Cape Verde, Iceland, Philippines, Sao Tome and Principe, Senegal, and Sierra Leone, ''Amendments to Article 63, paragraph 2,'' Doc. A/CONF. 162/L. 114, *Official Records of the UNCLOS*, Vol. XVI; see also United Nations, document cited at note 102 above, at 24.

[104] Convention on the Law of the Sea, Art. 116(b); Burke, *The New International Law*, 133–136.

living resources of the exclusive economic zone and they include the rights of the coastal state in connection with straddling stocks, Article 116 subjects the high seas fishing of straddling stocks to the sovereign rights of the coastal state.[105] Although this argument may be considered far-fetched it is nonetheless revealing of the difficult issues that had to be considered in the detailed examination of a straddling stocks regime. In any event it has been rightly pointed out that the provisions of Article 63(2), involve an important shift in the burden of proof to the extent that high seas fishing states will need to show that their activities do not affect the rights and interests of coastal states and may be required to enter into the necessary conservation agreements as a condition of such activities.[106] Furthermore, possible alternatives of unilateral action for the implementation of conservation measures also found support in these provisions as shall be examined further below.

Although the provisions on straddling stocks in the Convention were general indeed and insufficient to cope with the problems that were simultaneously emerging in the fishing of these species,[107] they provided a first step to approaching the issue which, together with scholarly discussions, state practice, and treaty developments, led the way to further diplomatic negotiations on the detailed regime applicable to such species. In so doing the Convention also contributed to the changing of the principles governing high seas fishing since in this case the options would no longer be the freedom of high seas fishing or the extension of national jurisdiction, but an entirely new scheme based on the combination of both types of interests in a rather functional manner that had to rely heavily on the prospects of international cooperation and the broader acceptance of conservation measures in the high seas.

The issues underlying the discussion on highly migratory species were still more difficult to resolve since the interests involved were more extensive and the historical experience evidenced a strong confrontational attitude between coastal states and distant-water fishing nations.[108] For coastal states in whose waters these species abound the position is that fishing in the exclusive economic zone is subject to its sovereignty in accordance with the general principles of the Convention, without

[105] Burke, *The New International Law*, at 133.

[106] Hey, *The Regime for the Exploitation*, at 82, 83.

[107] Francisco Orrego Vicuña, "The 'Presential Sea': Defining coastal states' special interests in high seas fisheries and other activities," *German Yearbook of International Law*, Vol. 35, 1993, 264–292, at 282–283.

[108] Burke, *The New International Law*, at 200–204.

prejudice to forms of cooperation that can be agreed upon.[109] On the other hand, some countries engaged in the distant fishing of these species, in particular tuna, were of the view that they should be treated as an exception to the coastal state's sovereign rights in the exclusive economic zone, wherein only a special international regime of cooperation should apply.[110]

These differences of opinion explain the somewhat vague nature of Article 64 of the Convention, which provides for cooperation with respect to the species listed in Annex I so as to ensure conservation and the promotion of the objective of optimum utilization throughout the entire region, both within and outside the exclusive economic zone.[111] In spite of this general language Article 64 is clearly indicative of some important trends in the principles and concepts governing this regime. First, the provision emphasizes conservation even in the high seas, thereby strengthening the conceptual evolution that was already beginning to predominate over the traditional unrestricted freedom of fishing; the acceptance of this principle by distant-water fishing states was already an important step forward. Secondly, by providing for cooperation in conservation and optimum utilization throughout the entire region concerned, the Article is in fact dealing with such resources in terms of ecosystem approaches, which is also a new development in the law of high seas fisheries. It was on the basis of these new principles and concepts that the detailed regime governing highly migratory species would later be negotiated and approved.

It should also be pointed out that Article 64 uses the expression "shall cooperate," this language being more mandatory than that used in Article 63 as noted above.[112] However, in spite of this more peremptory wording there is nothing in the Article that could lead to the conclusion that this regime is an exception to the sovereign rights that correspond to the coastal state within the exclusive economic zone.[113] Moreover, Article 64(2) expressly indicates that these provisions will be applied "in addition to the other provisions of this Part," thereby reaffirming the governing role of the sovereign rights established in Article 56 and of other relevant

[109] United Nations, document cited at note 102 above, 19–21.
[110] W. T. Burke, "Impacts of the UN Convention on the Law of the Sea on tuna regulation," *FAO Legislative Study*, No. 26, 1982.
[111] Convention on the Law of the Sea, Art. 64(1).
[112] Orrego Vicuña, *The Exclusive Economic Zone*, at 62.
[113] *Ibid*., at 62.

provisions. A number of important developments that followed the adoption of the Convention came to confirm this interpretation as will be examined further below.

While the regime applicable within the exclusive economic zone could be considered stabilized in view of the governing role of Article 56 and the sovereign rights of the coastal state, the situation regarding fishing of these species in the high seas was left more uncertain precisely because of the absence of a clearly guiding principle or source of authority. International cooperation was a useful but limited tool as written down in the Convention. The only criteria available in the Convention on this point are found under Articles 87 and 116–119 concerning fishing in the high seas. Under Article 87 freedom of fishing is subject to the conditions established in Section 2 of Part VII. In the latter Section Article 116 makes the right of fishing in the high seas subject to Article 64 and other provisions referring to the rights and duties as well as the interests of coastal states, following a path of connections similar to that relating to straddling stocks examined above. While a number of interpretations have been made of these legal cross-references,[114] the fact remains that fishing in the high seas that would disregard conservation would be inconsistent with the rights and interests of coastal states and therefore incompatible with the regime established under the Convention. At the very least this prompts again the question of the burden of proof having shifted to the fishing states since they would have to prove that such activities are consistent with the combined effects of Articles 87, 116–119 and 64 of the Convention.[115] This in itself is also a change of major importance in the law of high seas fisheries.

Limited as the regimes on straddling stocks and highly migratory species might be under the Convention, they established basic principles and concepts which embodied significant changes in the law of high seas fisheries as understood until then. Although these new provisions would be difficult to implement in view of the lack of enforcement mechanisms and the absence of adequate machinery for international cooperation, they nonetheless set the appropriate legal precedent on the basis of which further elaboration would take place in the ensuing years.

[114] Burke, *The New International Law*, at 220–225.
[115] Hey, *The Regime for the Exploitation*, at 83–84.

Conservation and management of the living resources of the high seas under the Convention

In addition to the specific regimes relating to species discussed in the preceding sections, the Convention on the Law of the Sea dealt with the broader issue of conservation and management of the living resources of the high seas under Articles 116–120. Because of the close connection the matter had with the provisions of the 1958 Geneva Convention on Fishing and Conservation of Living Resources of the High Seas,[116] Articles 116–120 were included in Section 2 of Part VII of the Convention which specifically refers to the regime of the high seas. Interestingly enough the title of the 1958 Convention referring to ''fishing and conservation'' was reversed in Section 2 of Part VII to read ''conservation and management,'' thus evidencing the new trends of the time.[117]

The new provisions could not deal any longer with high seas fisheries in isolation since the most fundamental innovation of the 1982 Convention had been to introduce the governing authority of national jurisdiction to cope with the problems of high seas fisheries as experienced under the traditional approaches of unrestricted freedom of access. Accordingly Articles 116–120 were intertwined with the relevant provisions governing coastal state interests in straddling stocks, highly migratory species, marine mammals, anadromous stocks, and catadromous species as discussed above. The very freedom of fishing listed in Article 87 of the Convention as one of the basic high seas freedoms, while following the language of the 1958 Convention on the High Seas, introduces a major change by making it ''subject to the conditions laid down in Section 2'' of Part VII, thus providing as noted a direct link with the coastal state's rights, duties, and interests in the high seas fisheries as recognized under that Section and its Articles 116–120.[118] In the light of this change freedom of access would no longer be an unqualified right in the high seas. Furthermore, Article 87 emphasizes that the freedoms of the high seas shall be exercised with due regard for the interests of other states in their exercise of the freedoms of the high seas. Some proposals made during the negotiations of these Articles purported to have high seas

[116] 1958 Convention; see the discussion by W. W. Bishop, ''The 1958 Geneva Convention on Fishing and the Conservation of the Living Resources of the High Seas,'' *Columbia Law Review*, Vol. 62, 1962, 1206.

[117] Convention on the Law of the Sea, Part VII, Section 2, Arts. 116–120.

[118] Burke, *The New International Law*, at 93–95.

fisheries internationally managed but they did not succeed[119] nor would they have been justified since the changes explained were already quite an achievement for the gradual evolution of the law on this matter.

Under Article 116 of the Convention the duties of conservation of the living resources of the high seas become prominent since the very right to fish is conditioned to this major objective. This relates in part to the coastal state's rights, duties, and interests in the question of conservation but in view of the broad meaning of the due regard clause mentioned above it also relates to the interests of other states, thus becoming a general obligation of fishing states.[120] Treaty obligations are an additional condition referred to under Article 116 that also reinforces this policy. In addition to the obligations arising from these provisions, Article 117 establishes also a general obligation concerning the adoption of conservation measures in respect of nationals or the cooperation with other states necessary to this effect. While the latter provision does not innovate in respect of the powers of the flag state to adopt conservation measures in the high seas applicable to its nationals, the emphasis placed on a ''duty'' to this effect reflects the fact that this is no longer a loose objective but a specific legal obligation if the circumstances so justify.[121]

The specific criteria to achieve conservation in respect of the living resources of the high seas are provided for under Article 119 which introduces some major innovations in the applicable law. It should be noted first that the opening sentence of this provision relates to the determination of the allowable catch for the living resources of the high seas, as well as to the adoption of other conservation measures, thereby strongly suggesting that the establishment of allowable catch is a desirable measure in this context. While it has been rightly commented that this provision does not require such determination,[122] it nonetheless follows an approach that is not dissimilar to that of Article 61 in respect of conservation in the exclusive economic zone.[123] The specific measures to be adopted under Article 119 further strengthen this parallel line of thinking.

In fact, the objective of attaining the maximum sustainable yield is also qualified by relevant environmental and economic factors, thus allowing for the introduction of conservation criteria that may be much broader than the mere productivity approach followed in the past. The influence

[119] United Nations, document cited at note 102 above, at 7.
[120] *Ibid*., at 7–8. [121] *Ibid*., at 9.
[122] Burke, *The New International Law*, at 113.
[123] United Nations, document cited at note 102 above, at 9–10.

of environmental factors would be further reinforced by the consideration of high seas fisheries in UNCED and the ensuing United Nations negotiations on the matter. Among other elements to be taken into account under these provisions there are the special requirements of developing states, fishing patterns, interdependence of stocks, and recommended international minimum standards. Conservation measures shall also take into consideration the effects on associated or dependent species. It should be noted in this respect that, while the general objective of attaining the maximum sustainable yield is related to the maintenance or restoration of harvested species as defined in Article 119(1)(a), in the case of associated or dependent species it appears to be defined in more stringent terms since under Article 119(1)(b) the maintenance or restoration of populations is to be kept "above levels at which their reproduction may become seriously threatened." Discussions about the implementation of these or similar standards have been at the very heart of important recent fisheries disputes.[124]

The objective of conservation is linked to two other requirements established under Article 119. The first concerns the obligation to exchange information relevant to the conservation of fish stocks by means of the appropriate international organizations. The need for transparency in the information available has become a major concern since manipulation of data in this matter has also been a somewhat frequent practice. This requirement is also closely related to the mandate that states shall adopt conservation measures based on the best scientific evidence available to the states concerned.[125] A second significant requirement provided for under this Article is that the states concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any state. As this is an important principle of the law of high seas fisheries that appeared prominently in the 1958 Geneva Convention on Fishing and Conservation in the High Seas, it does require certain qualifications since it assumes that such fishermen and their states are willing to abide by the conservation measures introduced;[126] otherwise the principle would be self-defeating. It is on these grounds that recent treaty and legislative developments have introduced the necessary distinctions so as to prevent the evasion of conservation obligations by third states and other situations

[124] Burke, *The New International Law*, at 113.
[125] *Ibid*., at 115–121. [126] *Ibid*., at 131.

that could nullify the arrangements envisaged under the Convention on the Law of the Sea.

Following the historical tradition of the international law of fisheries the Convention emphasizes the role of international cooperation in high seas fisheries management.[127] The species approach examined above relies to a meaningful extent on cooperation, particularly in the case of anadromous species, straddling stocks and highly migratory species. Also Article 120 makes applicable to the high seas the provision of Article 65 relating to marine mammals, both in respect of a more stringent prohibition, limitation or regulation of exploitation and in respect of the necessary cooperation to ensure conservation; the role of international organizations becomes paramount in the high seas in the light of this provision.

Cooperation is further strengthened under Article 117 in connection with the specific regime of high seas fisheries since in addition to the adoption of conservation measures for their nationals states have the duty to cooperate to this effect. Again Article 118 emphasizes cooperation for the conservation and management of the living resources in high seas areas, including the related duty to enter into negotiations to take the appropriate conservation measures when their nationals exploit identical or different living resources in the same area of the high seas. Important as cooperation is, it nonetheless rests on weak grounds since it assumes a degree of good will and a spirit of accommodation that is not always available among highly competitive entities, some of which are even beyond the effective control of flag states. In addition this cooperative approach has been one of the important flaws in the historical experience of international law in the matter. This situation, without diminishing the need for cooperation, has prompted the introduction of more stringent controls under the most recent arrangements or the proposal of alternative arrangements based on individual rights.

Environmental achievements of the Convention

The fact that the Convention on the Law of the Sea has approached the question of fisheries in general, and of high seas fisheries in particular, within the purview of conservation and sustainability of resources, is in itself a major environmental achievement that had not been readily at hand under the previous general multilateral conventions on this matter.

[127] Convention on the Law of the Sea, Arts. 117 and 118.

However, this is still more so if the specific environmental obligations under the Convention are examined. It has been rightly noted that the Convention "recognizes that environmental protection must go hand in hand with control over development activities if the viability of those activities is to be sustained."[128]

The general obligation to protect and preserve the marine environment follows as the consequence of the above recognition, both in respect of areas under national jurisdiction and areas of the high seas. It has also been noted that on the basis of this obligation a number of developments relating to the international law of the environment have been anticipated or actually accomplished under the Convention, particularly in connection with the ecosystem management approach, marine protected areas, the preventive approach to marine pollution, the introduction of the precautionary principle even if conceived at the time in a different language, the assessment of adverse environmental impacts and the integrated regimes applicable to waste management and pollution control.[129] Environmental monitoring and international communication of findings, together with other mechanisms aimed at the better implementation of obligations have also found a specific application in the Convention's provisions. These various aspects have since become a common feature of international environmental agreements,[130] but at the time of the preparation of the Convention they could indeed be considered as important innovations in the field.

The concern relating to marine pollution led also to very specific developments on the questions of compliance and enforcement of obligations. Since the role of the flag state in enforcement had a rather poor record of effectiveness,[131] it came to be supplemented by two other sources of authority. One was quite naturally the coastal state in whose expanded jurisdiction violations of the obligations might take place, but even in this context its enforcement powers have been curtailed by the need to ensure as much as possible the objective of unimpeded freedom of navigation.[132] The second source of authority is quite novel indeed and is related to the role of the port state. A limited precedent of port-state jurisdiction concerning pollution had been envisaged under the MARPOL Convention to the extent that pertinent certificates can be inspected by

[128] Kimball, "The United Nations Convention," at 17.
[129] *Ibid*., at 17. See also p. 25, notes 6–9 above.
[130] See generally Birnie and Boyle, *International Law*; and Sands, *Principles*.
[131] Birnie and Boyle, *International Law*, at 271–273.
[132] *Ibid*., at 274–283.

any state in whose ports a ship might be present.[133] Under Article 218 of the Convention on the Law of the Sea, however, the port state can investigate and eventually prosecute violations concerning discharges that might have taken place either in the high seas or in the jurisdictional zones of another state, subject to some restrictions and rights of preemption.[134] While this enforcement mechanism relates to pollution of the sea in violation of the Convention's obligations and not to other matters covered by this Convention, the precedent set would be of such importance that it would be utilized later to deal with questions of enforcement of high seas fisheries obligations, thereby further contributing to the development of the law of high seas fisheries.

A somewhat similar situation would occur with the provisions relating to the settlement of disputes under the Convention.[135] The system devised to this effect provides for the compulsory settlement of disputes in important questions, while establishing the necessary exceptions to make it fully compatible with coastal state rights in areas subject to its sovereignty and jurisdiction. This very system would be made applicable to high seas fisheries, partly under the Convention itself and more significantly under the new arrangements specifically dealing with straddling fish stocks and highly migratory fish stocks.

New perspectives in the development of international law

The long historical sequence of events that had taken place before the Third United Nations Conference on the Law of the Sea was convened, revealed the limited role that international law had been able to have in the solution of the mounting problems and conflicts of interest concerning high seas fisheries. In fact, as discussed in chapter 1, depletion of ocean resources had continued at an increasing speed and the general criteria embodied in the 1958 Geneva Convention on Fishing and Conservation in the High Seas, while orientated in the right direction, had been insufficient to cope with this critical situation. Conservation objectives had gained in importance, but obligations were loosely defined and enforcement mechanisms were lacking. Furthermore, cooperation alone had proved altogether unsuitable to provide the necessary source of

[133] International Convention for the Prevention of Pollution by Ships, 1973, and Protocol, 1978 (MARPOL 73/78), Art. 5(2), text in Sands *et al.*, *Documents*, Vol. II A, 326, 341. On developments relating to port-state jurisdiction see in particular pp. 259–266 below.

[134] Birnie and Boyle, *International Law*, at 280–283.

[135] Law of the Sea Convention, Part XV.

authority for the accomplishment of such goals and the introduction of orderly arrangements to this effect.

The Convention on the Law of the Sea meant the completion of a second major stage in the development of international law in this context. Conceptually the law was advanced in a significant manner in order to devise wholly new approaches to the conservation and management of high seas fisheries and other questions. The recognition of national jurisdiction over the exclusive economic zone provided a clear source of authority as to the conservation and management of the world's most important fishing grounds, not excluding third states' interests in and access to those resources. Substantive conservation obligations were also built into this new approach. With the high seas having been geographically redefined as a consequence of these changes, new approaches were also introduced to deal with the interactions between the exclusive economic zone and the high seas; the species approach and the new provisions on high seas fisheries were the result of this parallel development. Enforcement and dispute settlement mechanisms were also perfected and while strong emphasis is always kept on international cooperation this is no longer conceived in isolation but in close connection with coastal states' rights and interests.

Important as these developments were they were not quite complete or sufficient to dispose of high seas fisheries problems. Emphasis was of course put in the arrangements concerning the exclusive economic zone and other areas under national jurisdiction, but in relation to high seas fisheries only the basic principles were devised and again implementation mechanisms were left largely undefined. In connection with some species the necessary details were provided for since there was a substantial consensus on the matter, this being the case notably with anadromous and catadromous species and to a lesser extent with marine mammals. However, in respect of other species where consensus was not readily available, particularly straddling stocks and highly migratory species, the concepts that the Convention did include were not followed by the detailed specific arrangements that would have made their implementation possible and practical. Broad forms of cooperation were called for but the required authority was lacking, while the role of the flag state continued to provide the fundamental jurisdictional link. In addition, open ocean fisheries that are not attached to any particular form of interaction with areas under national jurisdiction were loosely dealt with by means of the very general provisions of Section 2 of Part VII of the Convention. Some of these shortcomings of the Convention would lead to

continuing problems and the search for supplementary solutions, while others are still largely pending. Here again the option of solutions devised under national jurisdiction would come to compete with that of solutions brought under the authority of international law.

The overall assessment of the 1982 Convention on the Law of the Sea can only be a positive one. In spite of its limitations it made a major contribution indeed to the development of the law in this field and, above all, it set the pace for the significant international law developments that would follow in respect of contemporary environmental concerns. The interlinkages between the law of the sea and the broader concepts of international environmental law, while already present in a number of the provisions of the Convention, would be the salient characteristic of a third stage of development in the international law of high seas fisheries that began to unfold parallel to the completion of the Convention and which is today the prevalent concern in the management of the oceans.

3 Developing the international law options for high seas fisheries conservation and management

The decade following the signing of the Convention on the Law of the Sea came to be characterized by increasing activity in high seas fisheries which laid the groundwork for a number of actual and potential disputes between coastal states and distant-water fishing states. Broader questions of conservation and sustainable utilization of high seas fish resources were also posed in this context. The general provisions that the Convention had devised in this matter came, as a consequence, to be tested against this background. Important issues of interpretation arose in this regard involving the role of coastal states and other interests in the adoption of conservation measures in the high seas. Whether such provisions were self-sufficient or required the development of a supplementary legal framework for an adequate implementation was also a question which promptly emerged during the discussions associated with this matter.

The principles and concepts of international law applicable to high seas fisheries had for a long time departed from the traditional clearcut rule that coastal state authority was restricted to given areas brought under national jurisdiction beyond which total and unrestricted freedom prevailed. The post-Law of the Sea Conference developments would further confirm that new options were available under international law to accommodate the emerging interests in high seas fisheries, including the broader perspectives associated to environmental concerns.

The growing pressure on high seas fisheries

It has recently been estimated that marine fisheries catches reached a peak of 86 million metric tons in 1989.[1] Whereas prior to the introduction

[1] United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,

of extended maritime jurisdictions about 5 percent of total marine production originated beyond 200 miles, at present this figure has increased to an estimated 8–10 percent of the total.[2] Up to 400 marine species have been considered purely or significantly oceanic,[3] many of which still remain largely unregulated for the purpose of conservation and management. This pressure has been particularly felt by straddling stocks and highly migratory species, the catches of which have doubled in the period 1970–1991.[4]

As the pressure has increased and high-valued species have reached a production plateau the fishing effort has concentrated lately on low-valued species,[5] thus expanding the problems of conservation to the whole range of species of commercial interest. Since the geographical distribution of oceanic species is most varied, ranging from localized situations close to or associated with the 200-mile exclusive economic zone to major transoceanic stocks,[6] this has also meant that the problem is not confined to restricted areas but has become a broad issue in the oceans as a whole. Quite obviously this pressure has been particularly felt by the species interacting with the exclusive economic zone.

Such pressure is directly related to the increased capacity of distant-water fishing fleets that operate in the high seas, a development that has been particularly significant in the aftermath of the Law of the Sea Conference.[7] It has often been said that these developments were prompted by the enactment of exclusive economic zones and the shifting of operations of distant-water fleets away from areas brought under national jurisdiction.[8] The fundamental reason for increased high seas

Some High Seas Fisheries Aspects Relating to Straddling Fish Stocks and Highly Migratory Fish Stocks, A/CONF. 164/INF/4, 15 June 1993, at 2.

[2] *Ibid*., at 2–3. [3] *Ibid*., at 4.

[4] *Ibid*., Annex IV, ''Catches of highly migratory species and straddling stocks,'' at 14.

[5] *Ibid*., at 2.

[6] *Ibid*., at 4, with reference to the Chilean horse mackerel which straddles 1,500 miles off the exclusive economic zones of Chile and Peru.

[7] *Ibid*., at 3. See also United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, *Report of the Technical Consultation on High Seas Fishing and the Papers Presented at the Technical Consultation on High Seas Fishing*, A/CONF. 164/INF/2, 14 May 1993, paper on ''Background to high seas fishing issues,'' at 27. See also S. M. Garcia and J. Majkowski, ''State of high seas resources,'' in Kuribayashi and Miles, *The Law of the Sea in the 1990s: A Framework for Further International Cooperation*, 1992, 175–236; Simon Fairlie (ed.), ''Overfishing: its causes and consequences,'' *Ecologist*, Vol. 25, 1995, 41–127, special issue; Lennox O. Hinds, ''World marine fisheries: management and development problems,'' *Marine Policy*, Vol. 16, 1992, 394–403.

[8] Report cited at note 7 above, paper on ''The state of our knowledge on high seas living resources and their controlled exploitation,'' at 47.

operations, however, lies in the fact that these very fleets had already overexploited fisheries related to the 200-mile ocean areas and had to move elsewhere to carry on their activities when the exclusive economic zone intervened to provide a clear authority as to conservation, just as present high seas regulatory efforts purport to introduce conservation in areas beyond the exclusive economic zone.

A related reason for the increased high seas fleet capacity has been that in a number of cases heavy state subsidies have intervened to support their operations.[9] It has also been estimated that the annual shortfall of capital returns in the world fishing fleet has amounted to US$48 billion, a large part of which has been offset by subsidies.[10] This was quite typically the situation of the fleet of the former Soviet Union which operated without reference to costs, prices, and market principles, and continues to be the case with a number of other fleets. This necessarily results in overcapitalization, economic waste, and uneconomical exploitation of resources, all of which has a serious impact on conservation and sustainability.[11]

Since nearly all the high seas fisheries resources are located within the exclusive economic zone at some stage of their development, particularly in association with the edge of continental shelves and the continental slope,[12] the issue of straddling stocks and highly migratory species became paramount in the consideration of new approaches to conservation and management. In fact, some of the world's most important demersal stocks are straddling stocks, many of which have relatively low densities of growth and reproduction rates thus further limiting their sustainable utilization.[13] The situation of highly migratory species is no different in that heavy fishing has had a severe impact and a number of stocks may not recover for long periods from overexploitation.[14]

The global reach of high seas fisheries overexploitation

Since the Convention on the Law of the Sea and the discussions that followed concentrated on the implications of the exclusive economic zone

[9] United Nations Conference, document cited at note 1 above, at 3.
[10] Paper cited at note 7 above, at 27.
[11] *Ibid*., at 27. See also generally J. A. Crutchfield, ''Overcapitalization of the fishing effort,'' in Lewis M. Alexander (ed.), *The Law of the Sea: The Future of the Sea's Resources*, 1968, 23–27; OECD, *Towards Sustainable Fisheries: Economic Aspects of the Management of Living Marine Resources*, 1997.
[12] Paper cited at note 8 above, at 47.
[13] *Ibid*., at 47–48.
[14] Paper cited at note 7 above, at 33.

regime, it was generally believed that high seas fisheries questions were restricted to a few localized problems and eventually to some fisheries surrounded by historical disputes such as the case of tuna in the Pacific. However, it gradually became clear that the problem had reached global proportions in relation to both straddling stocks and highly migratory species.[15]

Recent research has revealed that similar difficulties in connection with straddling stocks are found in countries and areas like Chile, Peru, Argentina, west Africa, the northeast Pacific, the Sea of Okhotsk, Namibia, New Zealand, and Canada, among other ocean regions.[16] The central, western and eastern Pacific, the Indian Ocean, the western and south Atlantic, and even the Southern Ocean, are areas well identified in connection with highly migratory species issues.[17]

A prime area of concern in this regard has been the Pacific Ocean, particularly in connection with the Bering Sea and the Sea of Okhotsk.[18] High seas enclaves in both these areas – commonly known as the Donut Hole and the Peanut Hole respectively – have been extensively overfished for Alaska pollack. In the first area this situation has prompted serious disputes between, on the one hand, Russia and the United States as coastal states and, on the other hand, distant-water fishing states such as Korea, Japan, and Poland. Recent arrangements for the management of these resources have opened new ground in the development of the international law of high seas fisheries. In the Sea of Okhotsk, Russia surrounds the entire high seas enclave as the sole coastal state, and has also undertaken important diplomatic efforts to reach new management arrangements with the distant-water fishing states operating in the area.

Problems have also arisen in connection with the fishing of the Orange roughy in the south Pacific, involving in particular the interests of New Zealand as the main coastal state whose exclusive economic zone is

[15] Evelyn Meltzer, "Global overview of straddling and highly migratory fish stocks: the nonsustainable nature of high seas fisheries," *Ocean Development and International Law*, Vol. 25, 1994, 255–344.

[16] *Ibid*., at 268–305. See also "Law of the sea: 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," report of the United Nations Secretary-General, Doc. A/51/583, September 1996, at 7–14.

[17] Document cited at note 1 above, at 7–8.

[18] Meltzer, "Global overview," at 283–293. See also W. Burke, "Fishing in the Bering Sea donut: straddling stocks and the new international law of fisheries," *Ecology Law Quarterly*, Vol. 16, 1989, 285–310.

associated with this fishery, and to some extent the interests of Australia.[19] The fishing fleets from Japan, Korea, Norway, and Russia have been active in this fishery as distant-water fishing nations. Negotiations have also been undertaken among the interests concerned in order to establish a moratorium of catches and introduce other conservation arrangements in the high seas.

The southeast Pacific region has also been seriously affected by the extensive fishing of Chilean jack mackerel and the Peruvian horse mackerel as the main straddling stocks found both in the exclusive economic zones of Chile and Peru and in an extended high seas area reaching across the Pacific as far as New Zealand.[20] The fishing fleets of the former Soviet Union, Bulgaria, Cuba, Poland, and Spain have operated in the area in the recent past, but a number of them have left the area as a consequence of the economic restructuring taking place in their national economies and the elimination of heavy state subsidies. Important legislative developments have taken place in Chile as a reaction to the overfishing and conservation problems in the adjacent high seas areas. The Jumbo flying squid is also a significant straddling stock along the coast of the southeast Pacific.[21]

Another prime area of high seas fisheries difficulties and disputes is the northwest Atlantic Ocean. Straddling stocks of cod and other fish have been at the very heart of the controversy between Canada as the coastal state concerned and distant-water fishing states operating in the area, particularly Spanish and Portuguese fleets and the overall interest of the European Union.[22] The management arrangements of the North Atlantic Fishery Organization have been called into question in this context and have been the subject of complex negotiations and supplementary understandings. The impact of high seas overfishing in Canadian jurisdictional waters has been extensive. Straddling stocks in the northeast Atlantic are carefully monitored by both the northeast Atlantic Fisheries Commission and the European Union.[23] Problems have been reported in the past in the

[19] Meltzer, ''Global overview,'' at 294–296. See also Comment, ''High seas fishing for roughy,'' *Australian Fisheries*, Vol. 52, No. 10, October 1993, 15.

[20] *Ibid*., at 268–272. See also V. Kaczynski, *Management Problems of Shared Chilean Jack Mackerel: The Coastal State Perspective*, University of Washington, Institute of Marine Studies, 1984; and T. Kawasaki, ''The 200-mile regime and the management of the transboundary and high seas stocks,'' *Ocean Management*, Vol. 9, 1984, 7.

[21] Document cited at note 1 above, at 4–5.

[22] *Ibid*., at 5. See also Meltzer, ''Global overview,'' at 297–305.

[23] Document cited at note 1 above, at 5. See also J. A. Gulland, ''The management of the North Sea fisheries: looking towards the 21st century,'' *Marine Policy*, Vol. 11, 1987,

eastern and western central Atlantic areas but apparently these have been solved by the extension of national jurisdictions by coastal states.[24] Potential problems are also feared in relation to the northeast Atlantic off west Africa.[25]

The southeast Atlantic has also been a critical area in the recent past mainly as a consequence of overfishing in Namibian waters before the enactment of an exclusive economic zone following independence in 1990.[26] Early efforts to control fishing in these waters had failed. While issues concerning straddling stocks have not been reported in connection with high seas fishing it is probably only a question of time before they emerge as powerfully as in other ocean areas.

The southwest Atlantic area has also been heavily overfished in the high seas with the inevitable consequences for the productivity of the Argentine exclusive economic zone.[27] Hake, squid, and other valuable stocks are fished in the high seas by Korea, Japan, Taiwan, and Spain and have been at the origin of serious disputes, including the use of force by the Argentine navy. Conservation arrangements have been worked out between Argentina and the United Kingdom in spite of the sovereignty dispute over the Falkland Islands. High seas overfishing, not unlike the case of Namibian waters, was developed taking advantage of a jurisdictional vacuum related to the unsettled questions of sovereignty in the area.

Straddling stocks in the Mediterranean sea are largely unregulated[28] with the added problem that coastal states have not enacted exclusive economic zones or other jurisdictional areas because of the problems of delimitation that will be confronted.

FAO studies have reached the conclusion that demersal straddling fish stocks are presently fully fished in the high seas and many of them are

259–272. See further G. Saetersdal, ''Fisheries conservation in the north-east Atlantic and the North Sea,'' in R. Churchill, K. R. Simmonds, and J. Welch (eds.), *New Directions in the Law of the Sea*, Vol. III, 1973, 36–45.

[24] Document cited at note 1 above, at 6.

[25] Meltzer, ''Global overview,'' at 278–279.

[26] *Ibid*., at 293–294.

[27] *Ibid*., at 273–278. See also the document cited at note 1 above, at 6; Gustavo A. Bisbal, ''Fisheries management on the Patagonian shelf: a decade after the 1982 Falklands/Malvinas conflict,'' *Marine Policy*, Vol. 17, 1993, 213–229; Luis Castelli and Juan Rodrigo Walsh, ''Environmental concerns arising from natural resource exploitation in the south Atlantic: Regional and Patagonian implications,'' *Review of European Community and International Environmental Law*, Vol. 5, 1996, 30–37; R. R. Churchill, ''Falkland Islands – Maritime jurisdiction and co-operative arrangements with Argentina,'' *International and Comparative Law Quarterly*, Vol. 46, 1997, 463–477.

[28] Meltzer, ''Global overview,'' at 264.

overfished, a situation that requires the introduction of controls to restrict the fishing effort and limit the current exploitation by means of sophisticated management arrangements.[29] While the situation relating to pelagic straddling stocks is less understood, the fishing problems discussed above reveal that in a number of significant cases the reality is not too different.

Highly migratory species have been listed in Annex I to the Convention on the Law of the Sea, with particular reference to tuna which is the most valuable of such species; however, the updating of this list has been suggested in the light of new information about species.[30] Catches of tuna in 1991 totaled 3.5 million metric tons with a sale value of US$7,600 million. Ninety percent of canned tuna is produced in developing countries and an equal proportion is consumed in developed countries. The Pacific Ocean – notably the central and western areas – is the most important fishing ground for tuna, followed by the Indian Ocean and the Atlantic. Ninety percent of the Pacific Ocean catch is taken in the exclusive economic zones of the Pacific island states, a situation that explains the importance of the arrangements worked out by this group of countries with distant-water fishing states and the emphasis put on the management of the fishery including high seas areas in the region.[31]

FAO conclusions in this respect indicate that while some tuna stocks remain in healthy condition with a relatively low-to-moderate level of exploitation, others are under severe pressure, some exploited beyond their maximum sustainable yield, and still others must be considered depleted.[32] Many stocks are also classified as heavily-to-fully exploited. It follows that conservation and management arrangements are equally needed in this other context. However, because of the historical and geographical distribution of the fishery such arrangements would not be restricted to the high seas areas adjacent to exclusive economic zones as in the case of straddling stocks, but would come to cover the whole area

[29] Document cited at note 1 above, at 7. [30] *Ibid*., at 7–8.

[31] See generally M. van Dyke and S. Heftel, ''Tuna management in the Pacific: an analysis of the South Pacific Forum Fisheries Agency,'' *University of Hawaii Law Review*, Vol. 3, 1981, 1–45; J. Joseph, ''Management of tuna fisheries in the eastern Pacific Ocean,'' in E. L. Miles and S. Allen (eds.), *The Law of the Sea and Ocean Development Issues in the Pacific Basin*, 1983, 145–157; W. T. Burke, ''Highly migratory species in the new law of the sea,'' *Ocean Development and International Law*, Vol. 14, 1984, 273–314; Gordon R. Munro, ''Extended jurisdiction and the management of highly migratory species,'' *Ocean Development and International Law*, Vol. 21, 1990, 289–308. See also Pamela M. Mace, ''Limited access for Atlantic highly migratory fish stocks,'' *Fisheries*, Vol. 21, No. 4, April 1996, 20.

[32] Document cited at note 1 above, at 8.

of the fishery whether within or outside areas of national jurisdiction. As will be discussed further below, this explains the differences between these various regimes in the light of the recent agreements on straddling fish stocks and highly migratory fish stocks.

Implications of the state of high seas fisheries for conservation and management regimes

The situation of high seas fisheries described would have profound implications for the conservation and management regimes that are required in order to cope with the new problems and the kind of issues that ought to be addressed in this context. The Technical Consultation on High Seas Fishing organized by FAO in 1992 following the agreements of the United Nations Conference on Environment and Development was quite illustrative in this regard.[33]

Responsible fishing practices were the first major new approach identified in the light of the situation of marine fisheries generally and high seas fisheries in particular.[34] Issues such as the marking of vessels and fishing gear, standards of fishing operations, guidelines for the development of new fisheries, mechanisms to prevent the reflagging of vessels to avoid compliance with conservation standards and fair trade practices were envisaged under the concept of responsible fishing practices. Important agreements negotiated under FAO and other arrangements that will be examined further below would be a specific result of these concerns.

New concepts and techniques relating to management would also emerge in this context.[35] While keeping with the concepts embodied in the Convention on the Law of the Sea, sustainable development and utilization of high seas fisheries resources in harmony with the environment was introduced as an added approach to management. Environmental concerns would become paramount in the management of fisheries thus providing a broader framework than that allowed under traditional concepts of conservation. Ecosystem management of fisheries focusing on broad areas of distribution of the resources and the compat-

[33] FAO, *Report of the Technical Consultation on High Seas Fishing*, Rome, 7–15 September 1992, as cited in note 7 above.

[34] Report, note 7 above, at 11–13. See also the paper on "Responsible fishing practices for the high seas," *ibid*., at 55–62.

[35] Report cited in note 7 above, at 13–15. See also the paper on "High seas fisheries management: new concepts and techniques," ibid., at 63–69. See further R. L. Stokes, "Limitation of fishing effort: an analysis of options," *Marine Policy*, Vol. 3, 1979, 289–301.

ibility between high seas measures and those adopted under exclusive economic zones would also follow from these new approaches and concerns about the environment.

A key aspect of the fisheries management emerging in this new context is the need to control the fishing effort in areas of the high seas in order to avoid problems of overcapacity and the resulting overfishing. This would no longer be a question solely associated with the control of nationals in the high seas but also would involve the development of management regimes applicable to all fishing vessels in a given area. Cooperation among interested states was also a necessary development in this regard although a number of management regimes could no longer rely on purely voluntary compliance and would introduce compulsory measures to ensure their objectives. Allocation of resources among competing interests would of course be the cornerstone of any such regime.

In a more complex setting maximum sustainable yield could not be the only reference point for management of fisheries thus leading to the consideration of additional criteria associated with economic, multispecies, and ecosystem management factors. Target and by-catch species would be brought under these broader management approaches in view of environmental considerations. Precautionary management of fisheries came to be the single most important innovation in the light of the new environmental concerns, albeit with the necessary differences as compared to the precautionary approach followed in other fields.

The improvement of statistical reporting and the development of research were also significant elements of the changing scenario of high seas fisheries,[36] although some concern about the precise meaning of these obligations or recommendations would come to light later in the negotiation of agreements.

All these implications would also have a specific impact on the nature and functions of international fisheries bodies which would indeed require a significant reshaping in order to handle the present situation.[37] Issues relating to membership, new entrants to the fishery, non-con-

[36] Report cited in note 7 above, at 7–10. See also the paper on ''High seas fisheries: statistical reporting,'' ibid., at 38–44, and the paper cited in note 8 above.

[37] Report cited in note 7 above, at 15–18. See also the paper on ''International fishery bodies: considerations for high seas management,'' *ibid*., at 70–80. See further M. Savini, ''Summary information on the role of international fishery bodies with regard to the conservation and management of living resources of the high seas,'' *FAO Fisheries Circular*, No. 835, Rev. 1, 1991; J. E. Carroz, ''Institutional aspects of fishery management under the new regime of the oceans,'' *San Diego Law Review*, Vol. 21, 1984,

tracting parties, compliance and enforcement, the role of particularly affected coastal states, decision-making, and settlement of disputes would all have to be carefully considered in order to ensure the effectiveness of the arrangements made to rationalize high seas fisheries and their management.

To what extent the provisions of the Convention on the Law of the Sea would be able to deal with these new issues or to what extent they would have to be further developed, or what alternative arrangements might be considered by concerned states collectively or individually, were the essential questions prompted by the new reality of high seas fisheries.

The Convention in a static view: protecting the interests of distant-water fishing nations

The first major approach to the question of whether the Convention on the Law of the Sea could provide an answer to the emerging problems of high seas fisheries was rather negative. The view was held that the Convention had provided only for two basic situations in a clearcut manner: coastal state jurisdiction in the exclusive economic zone and freedom of fisheries beyond.[38] No coastal state competence, jurisdiction, or rights could be allowed beyond the 200-mile limit irrespective of the arguments or conditions involved. It followed that any new problems relating to high seas fisheries would have to be dealt with under the traditional principles of high seas freedom and at the very most an enhanced effort at cooperation should be made.

The meaning of Article 63(1) of the Convention dealing with stocks occurring within the exclusive economic zone of two or more coastal states has not been significantly disputed in the context of the basic approaches to the interpretation of the Convention since, as noted by the International Law Association, the exclusive economic zone regimes of the countries involved will prevail in any event and there is no requirement to establish a special legal regime.[39] Special arrangements made by concerned coastal states have dealt with problems such as rights of access

513–540; A. G. Roche, "A new intergovernmental fisheries organization: INFOFISH," *The Law and the Sea: Essays in Memory of Jean Carroz*, 1987, 207–221.

[38] International Law Association, International Committee on the Exclusive Economic Zone, "Principles applicable to living resources occurring both within and without the Exclusive Economic Zone or in zones of overlapping claims," Report of the Committee by Professor Rainer Lagoni, *Report of the Sixty-Fifth Conference*, Cairo, 1992, 254–289, para. 49, at 271.

[39] *Ibid*., para. 15, at 259.

and cooperation, joint international commissions and regulations, special boundary areas, exchange of information, and allocation of resources.[40] Practice relating to some of these arrangements will be discussed further below.

Some useful new insights were also suggested by the International Law Association in this connection, particularly in so far as the environmental and economic factors mentioned in Article 61(3) of the Convention could also be taken into account for agreements on allocation in respect of transboundary stocks.[41] In fact, such criteria would also be relevant for straddling stocks and other high seas fisheries arrangements. On some other points, however, questionable issues of interpretation have arisen, thus indicating that even here the problems of divergent approaches were not absent. This is the case, for example, with the view that lack of agreement does not require the states concerned to suspend fishing in their zones, that compulsory dispute settlement exceptions provided for by the Convention might not apply to certain kinds of disputes such as the duty to negotiate and, above all, that Article 63(1) already forms a part of customary international law.[42] While there is no doubt that the concept of the exclusive economic zone is part of customary international law, the specific and detailed regimes established under Part V of the Convention have not all followed the same path.

The fundamental issue of interpretation, however, relates to the question of straddling stocks in the light of Article 63(2) of the Convention. It is in this context that the interests of distant-water fishing nations have purported to interpret the Convention in such a way as to ensure their protection and prevent as far as possible any active role of coastal states in the conservation and management of high seas fisheries. The starting point of this interpretation is that coastal states only have an interest in the conservation of straddling stocks in the adjacent high seas areas but this does not amount to any form of sovereign rights or special jurisdiction in that area.[43] It follows that the provision of Article 116(b) of the Convention which makes high seas fishing subject to the rights, duties, and interests of coastal states and specifically refers to Article 63(2) would only have the effect of requiring fishing states to have ''due regard'' to the interests of coastal states and only when negotiations on conservation have failed.[44] In

[40] *Ibid*., para. 16, at 259. See also generally Ellen Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*, 1989.

[41] International Law Association, report cited in note 38 above, para. 22, at 261.

[42] *Ibid*., paras. 24, 27 and 30, at 262–264.

[43] *Ibid*., para. 51, at 272.

[44] *Ibid*., para. 53, at 273. See, however, the reservation made by Professor W. T. Burke and

the view of one author, not even the ''due regard'' effect can be recognized as a legal obligation under the Convention.[45]

Furthermore, the argument has been made that the due regard effect only requires fishing states to take into account the possible repercussions of their fishing on the straddling stocks of the exclusive economic zone but it ''means neither that the fishing states are bound by the conservation measures of the coastal state, nor that their interests are subordinate to the interests of the coastal state with the effect that they would have to yield to the coastal state, when the negotiations fail.''[46] Moreover, on this interpretation, coastal states have to take into account the rights and interests of fishing states when adopting conservation and management measures for straddling stocks in the exclusive economic zone.[47]

The concept of compatibility and consistency between the measures taken in the adjacent area and the measures taken by the coastal state in its exclusive economic zone also emerged in the context of this interpretation,[48] a concept which would be highly influential in the negotiations later to be undertaken on the matter of straddling fish stocks and highly migratory fish stocks.

The argument underlying this interpretation is in essence that if the states concerned fail to agree on the conservation of straddling stocks in the adjacent area, the general regime for fishing on the high seas will apply and hence freedom of fishing will generally prevail not being subject to suspension or termination.[49] The argument, however, fails to take into account that the very concept of freedom of fishing in the high seas had already changed under the Convention on the Law of the Sea, resulting in specific legal obligations for fishing states in terms of both conservation and the new interests of coastal states in the adjacent area. The specific language of Articles 63–67 and 116–120 cannot be ignored by this effort at interpretation which runs counter to the sense of the Convention and the ensuing practice. Even less so could it be held that

Professor Barbara Kwiatkowska dissenting from the views taken by the report and its conclusions and recommendations on the question of straddling stocks.

[45] Hisashi Owada, reservation made to the report cited at note 38 above, at 273.

[46] International Law Association, report cited in note 38 above, para. 53, at 273.

[47] *Ibid*., para. 54, at 273.

[48] *Ibid*., para. 55, at 274, with particular reference to Article XI(3) of the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 24 October 1978, *EEC Official Journal*, L378/16, 1978.

[49] International Law Association, report cited in note 38 above, para. 39, at 267. See also generally Shigeru Oda, ''Fisheries under the United Nations Convention on the Law of the Sea,'' *American Journal of International Law*, Vol. 77, 1983, 739.

the high seas fisheries provisions of the Convention are today a part of customary international law.[50]

The practical result of this narrow interpretation is that if concerned states fail to agree in their negotiations on conservation measures for straddling stocks in the adjacent high seas areas the coastal state would end up entirely helpless since distant-water fishing states could continue operating irrespective of the existing problems. At most there could be resort to dispute settlement mechanisms, but even these are not always readily available. This interpretation would certainly be an open invitation to fishing states to make such demands so as to ensure that negotiations will fail, the duty to undertake negotiations in good faith not being specific enough to prevent this abuse. Consequently, other approaches would emerge to seek a positive answer to the existing problems of high seas fisheries.

The Convention in an evolutionary interpretation: advancing the interests of coastal states

The second major school of thought that intervened in the matter has sought an interpretation of the Convention on the Law of the Sea that tends to highlight the role of coastal states in the management and conservation of high seas fisheries resources if the efforts at negotiation and cooperation fail adequately to materialize. Many different points of view have been made in relation to this, ranging from the expression of interest of the coastal state to the exercise of actual or potential jurisdiction and thereupon to new claims of comprehensive national jurisdiction, all having as a common factor that if, negotiations with distant-water fishing nations fail, the coastal state shall not remain helpless as a passive observer of events that cause damage to some of its crucial interests.[51] The most significant models followed in this connection, namely those of

[50] For a discussion on this point see International Law Association, report cited in note 38 above, para. 56, at 274; and Burke, ''Fishing in the Bering Sea donut,'' at 292.

[51] See generally Burke, ''Fishing in the Bering Sea donut''; and E. L. Miles and W. T. Burke, ''Pressures on the United Nations Convention on the Law of the Sea of 1982 arising from new fisheries conflicts: The problem of straddling stocks,'' *Ocean Development and International Law*, Vol. 20, 1989, 343. See further Barbara Kwiatkowska, ''Creeping jurisdiction beyond 200 miles in the light of the 1982 Law of the Sea Convention and State practice,'' *Ocean Development and International Law*, Vol. 22, 1991, 153, at 167; and see also generally José Luis Meseguer, ''Le régime juridique de l'exploitation de stocks communs de poissons au delà des 200 milles,'' *Annuaire Français de Droit International*, Vol. 28, 1982, 884–889.

Chile, Argentina, and Canada, will be examined in chapter 4 in the context of contemporary practice, while in this section the basic arguments put forth in support of this interpretation of the Convention will be discussed.

The starting point of this other interpretation is that conservation must be the main objective of the fisheries regime established under the Convention on the Law of the Sea either by means of negotiations and solutions agreed between concerned interests or else by means of the exercise of authority by the coastal state.[52] The combined effect of Articles 56, 63(2) and 116 of the Convention is, according to this view, a legal construction providing ''a basis for unilateral action if negotiations on an international approach fail.''[53] As noted above, both Articles 63 and 116 do in fact qualify high seas fishing by making it subject to the rights, duties, and interests of the coastal state. Furthermore, in one interpretation already noted, the sovereign rights provided for under Article 56 also have a role to play in connection with high seas fisheries due to the combined effects and interrelations between these various provisions.[54]

This potential action by the coastal state has been legally described in different terms with the express intent of qualifying its connotations and extent. Authority, rights, superior rights, preferential rights, and jurisdiction have all been used to convey the policy assigning priority to conservation of high seas fisheries resources when other options are not available.[55] Irrespective of the various expressions used to this effect, to the extent that there is an exercise of jurisdiction involved there shall also be the corresponding problem of enforcement.[56] Enforcement in respect of nationals of the coastal state is not disputed although the extent of the powers of domestic enforcement agencies in the high seas has been questioned in some cases;[57] this, however, is a problem of national

[52] B. Applebaum, ''The straddling stocks problem: the northwest Atlantic situation, international law, and options for coastal state action,'' in A. H. A. Soons (ed.), *Implementation of the Law of the Sea Convention through International Institutions*, 1990, 282.

[53] Burke, ''Fishing in the Bering Sea donut,'' at 299. See also W. T. Burke, *The New International Law of Fisheries*, 1994, at 91.

[54] Burke, ''Fishing in the Bering Sea donut,'' at 133.

[55] International Law Association, report cited in note 38 above, para. 44, at 269–270, and the literature cited therein.

[56] *Ibid*., para. 45, at 270.

[57] See the decisions by the Court of Appeals of Santiago, Chile, rejecting recourses by two corporations that objected to the powers of the National Fisheries Service to implement conservation regulations in the high seas and in areas governed by conservation regulations of the Convention on the Conservation of Antarctic Marine Living Resources, 4 November 1993, unreported, on file at the Institute of International Studies of the University of Chile.

legislation rather than one under international law. The fundamental issue concerns of course the enforcement over foreign fishing vessels in the high seas adjacent area. Thus far international law has not authorized the exercise or enforcement of jurisdictional powers over foreign vessels in the high seas[58] except in very exceptional circumstances; this would be one of the most critical issues in the negotiations that would follow on the matter and it shall be noted further below that important accommodations took place in the context of the agreed solutions. Even in the absence of enforcement powers in the high seas, the coastal state is not entirely deprived of legal measures that can be adopted in pursuing its interests. Retorsion and reprisals have been suggested as alternatives to this restriction of enforcement powers in the high seas,[59] and other enforcement measures can be and have been adopted under domestic legislation, with particular reference to penalties and the refusal of access to ports and other areas for logistic support or marketing.

The Convention on the Law of the Sea in a sense evaded the issue of the powers of the coastal state to enact conservation measures in the high seas since it gave preference to the alternatives of cooperation and agreement between concerned states. Much has been made of the fact that the Convention did not positively authorize the coastal state to exercise jurisdictional powers in the high seas, generally restricting such powers to the 200-mile exclusive economic zone area.[60] The argument that any extension of these powers beyond that area would amount to a violation of the freedom of the high seas has followed,[61] thus interpreting Article 116(b) of the Convention in the sense that it cannot grant the coastal state more rights or jurisdiction in the adjacent area than it already has there, and further interpreting the reference to the related provisions of Article 63(2) and others which might apply under the ''*inter alia*'' clause as not creating more rights, duties and interests than those already contained in those provisions, which according to this argument do not include any powers in relation to the high seas.[62]

However elaborate these arguments might be, the fact is that they ignore altogether the sense of the species approach under the Convention,

[58] Burke, ''Fishing in the Bering Sea donut,'' at 303.

[59] Applebaum, ''The straddling stocks problem,'' at 297 and 298.

[60] International Law Association, report cited in note 38 above, para. 49, at 271. See also Choung Il Chee, ''Rights, duties and interests of the coastal states under Article 116, paragraph (b) of the 1982 United Nations Law of the Sea Convention,'' *Korean Journal of International Law*, Vol. 39, 1994, 73–85.

[61] Oda, ''Fisheries under the United Nations Convention,'' at 751.

[62] International Law Association, report cited in note 38 above, para. 50, at 271–272.

which provided for special rules in those cases that did not meet the clearcut division between the exclusive economic zone and the high seas, thus justifying different arrangements departing from the normal jurisdictional separations. This is not only the case of straddling stocks but also and perhaps more eloquently that of anadromous and catadromous stocks and highly migratory species. It will also be noted that the practice is far more extensive than might be thought at first sight, partly because of the fisheries issues but partly because of other matters of concern that have justified special forms of jurisdiction in the high seas.

That Article 63(2) of the Convention does indeed involve relevant high seas jurisdictional issues is also well illustrated by the fact that it is generally agreed that as far as the adjacent area is concerned binding dispute settlement procedures apply;[63] should this not be the case the exceptions to binding dispute settlement as pertain exclusively to the exclusive economic zone would govern the matter. In this connection it is essential to distinguish between conservation measures relating to the areas under national jurisdiction and those relating to the adjacent areas beyond, since the former will be covered by the exceptions while the latter will be subject to the general rules on dispute settlement.

Occasionally there have been references to potential claims of extension of the exclusive economic zone beyond the 200-mile limit.[64] These potential claims exceed of course the ambit of the lawful and legitimate interpretation of the Convention and respond to negotiating strategies and threats rather than to any real option. For the same reason they have not been favored either by scholarly opinion or by government practice.

Interpreting the Convention in a spirit of mutual accommodation

The third major school of thought attempted to interpret the Convention in a manner that would provide a balanced solution to both types of relevant interests. In so doing, however, the problem of shortcomings in the Convention's provisions was inevitably quickly found and any interpretation came to be coupled simultaneously with proposals for the further development and clarification of the law. It follows that for the purposes of this accommodation the provisions of the Convention were

[63] *Ibid*., para. 41, at 268.

[64] *Ibid*., para. 43, at 269, with reference to D. M. Johnston, *The Theory and History of Ocean Boundary-Making*, 1988, at 253.

not generally considered self-sufficient and that new negotiations would have to be convened.

An interesting study prepared by the United Nations Division for Ocean Affairs and the Law of the Sea rightly identified the duty to cooperate in the conservation and management of high seas fisheries resources as the cornerstone for any accommodation under the overall framework of the Convention.[65] In addition to the general obligation to cooperate that might be identified under international law, the study remarks that Part VII, Section 2, of the Convention implicitly relates to this duty in that reasonable terms should be accepted in order to reach an agreement on conservation in the high seas.[66] This interpretation would indeed be the only one consistent with the duty provided for under Article 117 to take measures necessary for the conservation of the living resources of the high seas, under which the refusal to reach an agreement would constitute a failure to act reasonably in the fulfillment of the obligation. In one view, the abuse of rights referred to in Article 300 of the Convention could be applicable to this situation.[67]

In the light of this interpretation, the fact that Article 118 does not expressly stipulate an obligation to pursue negotiations until an agreement is reached or that it does not specify the consequences of the failure to reach an agreement, does not mean that fishing states could simply ignore the matter and proceed unrestrictedly under the freedom of the high seas. The obligation to accept a reasonable proposal, however, has been linked to the availability of effective dispute settlement mechanisms.[68] While this interpretation may be regarded as a modest starting point it is nonetheless quite significant if contrasted with the views held under the principle of the freedom of fishing mentioned above.

Cooperation by means of participation in regional or subregional fisheries commissions is one approach favored by the interpreters of the Convention in this school of thought.[69] However, in view of the varied practices offered at present by this type of body, some successful and some not, a number of recommendations have been made in this context

[65] United Nations, Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: The Regime for High Seas Fisheries. Status and Prospects*, 1992; for an updated version see also United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: *Background Paper Prepared by the Secretariat*, A/CONF. 164/INF/5, 8 July 1993; references that follow are to the latter version.

[66] Background paper cited in note 65, paras. 67–69, at 23–24.

[67] FAO, Technical Consultation on High Seas Fishing, ''Legal issues concerning high seas fishing,'' Doc. FI/HSF/TC/92/8, June 1992, at 4–5.

[68] *Ibid*., para. 30, at 6.

[69] Background paper cited in note 65 above, para. 70, at 24.

in order to improve their contribution to the settlement of difficult fisheries conflicts of interests.[70] Questions of availability or authority of such organizations to deal with specific fisheries issues, problems of membership and voting rights, lack of agreement on the management regime to be applied, including the determination of allowable catches and allocation of fishing rights, issues of monitoring, enforcement, and dispute settlement, and financial difficulties, have all been listed as obstacles preventing these organizations achieving their potential role in the conservation and management of high seas fisheries resources. Direct forms of cooperation between concerned states are of course an alternative always available.

One major problem that promptly came up in connection with this interpretation of the duty to cooperate was the question of new entrants to the fishery.[71] In point of fact, even if the coastal state and the distant-water fishing states came to an understanding in respect of the conservation and management measures needed, new entrants not parties to such agreements could always claim a right to fish under the principle of the freedom of high seas fishing, invoking to this effect the provisions of Article 87 of the Convention declaring the high seas and the freedom of fishing open to all states and the non-discrimination clause of Article 119(3). Should this argument be accepted then any restraints agreed for the purposes of conservation would be rendered useless or very limited by the activities of the new entrants. Here an additional interpretation was required so as to make the obligations agreed by the parties applicable to new entrants.

The United Nations study referred to above also made an interesting contribution in this matter. The point was rightly made that, since high seas fishing is subject to the obligation to cooperate in the conservation and management of the resource under Articles 116, 118, and 119, where an organization or arrangement has been established the new entrant is also under the obligation to cooperate within that established framework.[72] Such an arrangement shall normally provide for the total allowable catch, conservation measures, and for the conditions applicable to new entrants. To the extent that the non-discrimination clause is observed, the new entrant will be bound to comply with the obligations so established and could not claim a right to fish separate from the arrangements lawfully made under the Convention. This same reasoning applies

[70] *Ibid*., paras. 71–79, at 24–25. See also the literature cited in note 37 above.
[71] *Ibid*., paras. 80–86, at 25–27. [72] *Ibid*., para. 83, at 26.

to the obligation to comply with any moratorium on fishing that may have been decided as the appropriate conservation measure.[73] The problem of reflagging of fishing vessels in order to evade conservation obligations would also have to be addressed in the framework of effective arrangements.

Another major issue correctly identified is that of the nature of the rights of coastal states in the conservation and management regime of high seas fishing resources. The essential point is to ensure that such rights are not ignored in the negotiation and establishment of any such regime, particularly in connection with the fishing of straddling stocks in the adjacent area.[74] While in the view of the United Nations study "the coastal state can claim that its interests are to be properly provided for in the conservation and management of the straddling stock as a whole, there is no basis on which the coastal state can make any preferential claim to a share in the catch of that stock taken on the high seas,"[75] since this interest is not different from that of any other state fishing for that resource. Accordingly, it was concluded that coastal states are also under the requirement to accept reasonable proposals for an agreement and should not arbitrarily withhold their consent, all of it subject to the operation of dispute settlement mechanisms if needed.[76] To ensure that the interest of the coastal state is duly taken into account, it was suggested that the management regime for the high seas should be consistent with the management regime of the coastal state for the same stock within its exclusive economic zone.[77]

As will be discussed further below in connection with the recent United Nations agreement on the matter, while it is true that there is no question of preferential fishing rights for the coastal state in the high seas, there is strong interest of such a state in the conservation standards and measures adopted, from which consequences for the fishing in the adjacent area may flow. It should also be noted that in a number of instances the coastal state will in fact be performing the dual role of a coastal state and of a high seas fishing state, a situation which will also have specific consequences as to its influence in the design and operation of the arrangement in question.

While all of the above could be accommodated to the Convention's provisions through a process of interpretation, a number of other issues required the development of specific management regimes that could

[73] *Ibid*., para. 84, at 26.
[74] *Ibid*., para. 91, at 27.
[75] *Ibid*., para., 91, at 28.
[76] *Ibid*., para. 92, at 28.
[77] *Ibid*., para. 93, at 28.

further the implementation of practical solutions for achieving the goals of conservation. General forms of cooperation were certainly not enough to ensure these objectives, as historical experience had shown, and new approaches had to be explored.

The first such issue is a most difficult one since it involves designing management regimes that can cope with the traditional problems of common property resources, namely those of the open access historically associated with the freedom of fishing and the ensuing incentive to outfish all present or potential competitors.[78] Securing access to information on the state of stocks, overcapitalization of fleets, monitoring catches, surveillance, and enforcement are the key elements that need to be attended to in order to safeguard the effectiveness of any conservation effort. While these various elements can be consistent with the conservation obligations of the Convention, their actual operation and implementation would indeed require new arrangements.

Furthermore, the argument would be promptly made that any such developments would interfere with the unrestricted freedom of high seas fishing that allegedly the Convention reiterates.[79] Of particular difficulty are of course the problems associated with controls relating to gear, vessels, fishing seasons, and areas, as well as the problems involved in the determination of quotas. If such problems have been difficult to surmount under national jurisdiction where clear authority is available, they become compounded in the high seas since authority is more diluted even under specific management regimes and organizations.

The experience gathered with property rights over quotas, including exclusivity and transferability in terms of market economy principles of supply and demand, has been also suggested for the management of high seas fisheries in order to ensure economic efficiency and sustainability of the resources.[80] This alternative has the advantage of minimizing the

[78] *Ibid*., paras. 94–99, at 28–30.

[79] See the literature cited in note 49 above.

[80] See generally P. H. Pearse, ''Fishery rights, regulations and revenues,'' *Marine Policy*, Vol. 5, 1981, 135–146; P. H. Pearse, ''From open access to private property: recent innovations in fishing rights as instruments of fishing policy,'' in Law of the Sea Institute, *The Marine Environment and Sustainable Development: Law, Policy and Science*, 1991, 178–195; Philip A. Neher, Ragnar Arnason, and Nina Mollett (eds.), *Rights-Based Fishing*, 1989; Lee G. Anderson, ''The share system in open-access and optimally regulated fisheries,'' *Land Economics*, Vol. 58, 1982, 435–449; E. A. Keen, ''Common property in fisheries: is sole ownership an option?,'' *Marine Policy*, Vol. 7, 1983, 197–211; M. H. Nordquist, ''The Commercial Fishing Industry Vessel Act: reducing regulatory obstacles to the full development of the American fisheries,'' *Journal of Maritime Law and Commerce*, Vol. 17, 1986, 327–358; OECD, *The Use of Individual Quotas in Fisheries Management*, 1993; Philip E. Graves *et al*., ''Alternative fishery management policies:

regulatory functions of governments and organizations, which will be needed essentially for the initial allocation of fishing rights, market supervision, and enforcement, while at the same time encouraging private initiative in the management of the fishery; since resource availability will be crucial for the success of the business, conservation will be pursued by the private operators in order to ensure the long-term sustainability of the industry.

A closely related issue is the determination of the total allowable catch under international management regimes. On the one hand, this determination requires the availability of adequate scientific information and other data on fishing activities; while scientific information may be obtained by means of research programs, it has been noted that such programs are often expensive and lengthy;[81] information on fishing data

monitoring costs versus catch limits,'' *Environment Resource Economics*, Vol. 4, 1994, 595–599; James A. Wilson *et al.*, ''Chaos, complexity and community management of fisheries,'' *Marine Policy*, Vol. 18, 1994, 291–305; G. R. Morgan, ''Optimal fisheries quota allocation under a transferable quota management system,'' *Marine Policy*, Vol. 19, 1995, 379–390; Ralph E. Townsend, ''Transferable dynamic stock rights,'' *Marine Policy*, Vol. 19, 1995, 153–158; Ralph E. Townsend, ''Fisheries self-governance: corporate or cooperative structures?,'' *Marine Policy*, Vol. 19, 1995, 39–45; Svein Jentoft and Bonnie McCay, ''User participation in fisheries management: lessons drawn from international experiences,'' *Marine Policy*, Vol. 19, 1995, 227–246; G. L. Kesteven, ''Chaos, complexity and community management,'' *Marine Policy*, Vol. 19, 1995, 247–248; M. J. Fogarty, ''Chaos, complexity and community management of fisheries: an appraisal,'' *Marine Policy*, Vol. 19, 1995, 437–444; R. Hannesson, ''Fishing on the high seas: cooperation or competition?,'' *Marine Policy*, Vol. 19, 1995, 371–377; S. Freese, J. Glocq, and D. Squires, ''Direct allocation of resources and cost–benefit analysis in fisheries: an application to Pacific whitting,'' *Marine Policy*, Vol. 19, 1995, 199–211; J. F. Caddy, ''An objective approach to the negotiation of allocations from shared living resources,'' *Marine Policy*, Vol. 20, 1996, 145–155; L. Scott Parsons and Jean-Jacques Maguire, ''Comments on chaos, complexity and community management of fisheries,'' *Marine Policy*, Vol. 20, 1996, 175–176; Ray Hilborn and Don Dunderson, ''Chaos and paradigms for fisheries management,'' *Marine Policy*, Vol. 20, 1996, 87–89; Michael D. Young, ''The design of fishing-right systems: the New South Wales experience,'' *Ocean and Coastal Management*, Vol. 28, 1995, 45–61; Bonnie J. McCay *et al.*, ''Individual transferable quotas in Canadian and US fisheries,'' *Ocean and Coastal Management*, Vol. 28, 1995, 85–115; Gísli Pálsson and Agnar Helgason, ''Figuring fish and measuring men: the individual transferable quota system in the Icelandic cod fishery,'' *Ocean and Coastal Management*, Vol. 28, 1995, 117–146; Jay J. C. Ginter, ''The Alaska community development quota fisheries management program,'' *Ocean and Coastal Management*, Vol. 28, 1995, 147–163; Susan S. Hanna, ''User participation and fishery management performance within the Pacific Fishery Management Council,'' *Ocean and Coastal Management*, Vol. 28, 1995, 23–44; Instituto Libertad y Desarrollo, ''Pesca: las bondades de las cuotas individuales,'' *Temas Públicos*, No. 316, 6 December 1996.

[81] Background paper cited in note 65 above, para. 101, at 30, with reference to J. A. Gulland, ''Some problems of the management of shared stocks,'' *FAO Technical Paper*, No. 206, 1980, at 8–12.

is not always easy to obtain and on a number of occasions this may be confidential commercial information. On the other hand, the determination of the allowable catch will require the precise identification of criteria and standards to this effect, a matter on which the Convention provides only general principles and does not establish any priorities;[82] it will be for each particular arrangement and management regime to identify such criteria assigning specific weight to economic, environmental, or other factors on which there shall certainly be differing interests and views.

A third issue concerns the allocation of individual quotas within the total allowable catch. As far as the original negotiating states are concerned the situation most probably will be resolved by means of an understanding at the time of the definition of the management regime and its various components, but there is still the problem of new entrants. Since nationals of all states are entitled to engage in high seas fishing, in principle new entrants would be entitled to a share of the agreed quotas. However, since this cannot be established beforehand a request for such a share by a new entrant would probably mean a reduction of the quotas originally assigned to the participants, a situation which is quite likely to be resisted. Furthermore, if the fishery is fully utilized the ability to accommodate new entrants is further restricted.[83] Even when the new entrants can be accommodated there is still the problem of the criteria to determine the attribution of shares, a matter in which again environmental and economic criteria will probably collide because of differing interests. In any event the accommodation of new entrants assumes their willingness to abide by the conservation measures enacted under the arrangement in force, since otherwise, as noted above, they would be claiming fishing rights contrary to an agreement done in furtherance of the Convention.

Monitoring and enforcement is another major issue related to the effectiveness of any conservation agreement and here again the provisions of the Convention are not quite self-sufficient.[84] Unauthorized fishing by participating states and fishing by non-parties are some of the questions that are inevitably posed in this context. While the role of flag states had been the logical outcome of the principle of the freedom of high seas fishing and is still a most important source of authority in the high seas,

[82] Background paper cited in note 65 above, paras. 104–107, at 31.
[83] *Ibid*., para. 105, at 31.
[84] *Ibid*., paras. 108–110, at 31–32.

given the intervention of other relevant interests this could no longer be the only source of authority, particularly in view of the poor record that flag-state enforcement has evidenced thus far. The role of fisheries organizations and forms of joint inspection and other enforcement activities came to be added, including new approaches to the role of coastal states and the concept of port-state jurisdiction for the purpose of enforcement. It should also be noted that views held occasionally in order to justify interfering with fishing vessels in given situations in the high seas on the basis of Article 110 of the Convention have not found support either in practice or in scholarly writings.[85] This means in fact that any enforcement taking place in respect of high seas fisheries ought to be a part of conservation measures and should not be based on entirely different matters and principles.

Dispute settlement is yet another issue that requires additional consideration in any management regime.[86] While the provisions of the Convention offer a clear set of basic rules in this regard, there are many problems that require specific dispute settlement arrangements, particularly in so far as questions of determination of catches, allocation of quotas and sufficiency of cooperation are concerned. Furthermore, while high seas fishing is subject to compulsory binding dispute settlement under the Convention, fishing in the exclusive economic zone is not because of its connection with sovereign rights and discretionary powers of the coastal state; in practice it will be much more difficult to separate clearly one from the other in view of questions of consistency and compatibility of measures adopted under national authority and international management, a situation that will require careful dispute settlement provisions in order not to upset the fundamental balances of the Convention itself.

The various developments needed to achieve effective conservation and

[85] For an expression of this view see FAO, document cited in note 67 above, para. 51, at 9. This document, however, was not made available as a part of the documentation of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks; see report cited in note 7 above, para. 99, at 18. On the problem of unauthorized fishing see the United Nations General Assembly resolution on "Unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources of the world oceans and seas," Doc. A/Res.49/116, 19 December 1994, in Netherlands Institute for the Law of the Sea, *International Organizations and the Law of the Sea Documentary Yearbook*, Vol. 10, 1994, at 358, hereinafter cited as *NILOS Yearbook*; A/Res/50/25, 4 January 1996; A/Res./51/36, 21 January 1997; and the reports of the United Nations Secretary-General on the same subject, A/50/549, 12 October 1995; and A/51/404, 25 September 1996, Section III.

[86] Background paper cited in note 65 above, paras. 112–116, at 32–33.

management regimes for high seas fisheries that have been outlined, while consistent with the interpretation of the Convention, would not find sufficient support in its provisions alone in order to become binding legal rules responding to the new realities of high seas fisheries. This is particularly so in view of the fact that a number of such developments involve the introduction of additional requirements as to the operation of the freedom of high seas fisheries as originally understood, in terms not of derogation of freedom but of regulation of activities that have historically been unrestricted. To this extent an additional legal framework would become necessary for both the interpretation and the progressive development of the Convention.

The search for new criteria in the light of environmental concerns

It has been noted above that the post-Law of the Sea Conference period came to be characterized by new environmental concerns relating to the oceans generally and to high seas fisheries in particular, a matter in which the Convention had made a significant contribution by advancing the relevant concepts and principles but had not got in all cases to the point of providing the necessary specificity as to their implementation. This changing perspective underlies in many respects the discussion about the options available under international law to address the problems that high seas fisheries have evidenced with the passing of time.

Various treaties made during the period of the Law of the Sea Conference negotiations had defined conservation obligations in terms of protecting endangered living resources for their own value and not necessarily as species or products solely targeted for human consumption.[87] While most of these treaties referred to endangered species on land, a few had already extended this conservation concern to the living resources of the sea, mainly in respect of marine mammals. This very rationale would apply to the conservation of fish to the extent that the issue of overexploitation and depletion became clearer and more generalized, although this would take a longer time to be realized by the international community. One first major international convention that dealt with the problem within this new perspective was the Convention for the Conservation of Antarctic Marine Living Resources and the

[87] Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment*, 1992, at 436.

introduction of the ecosystem approach to its conservation and management rules and policies.[88]

It has also been noted that while the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas contained a very general definition of conservation, relying on the optimum sustainable yield so as to secure a maximum supply of food and other marine products, the Convention on the Law of the Sea contained no definition at all and instead relied on the listing of criteria to achieve this goal.[89] While this could be read as a shortcoming, it could also mean that the complexity that the matter had reached did not allow for overall definitions and that it was better to identify the relevant criteria for specific determinations, wherein the qualification of conservation by environmental factors was appropriately introduced. Comprehensive definitions were in any event developed by scientific bodies and readily available at the time when the Convention on the Law of the Sea was finalized, thus evidencing that the new perspectives were not ignored. The International Union for the Conservation of Nature and Natural Resources in its World Conservation Strategy, for example, identified conservation with the maintenance of life-support systems, preservation of genetic diversity and sustainable utilization of species and ecosystems.[90] More recently, the World Commission on Environment and Development has conceived conservation as ''the management of human use of a natural resource or the environment in such a manner that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. It embraces the preservation, maintenance, sustainable utilization, restoration, and enhancement of a natural resource or the environment.''[91]

The discussion about conservation was not in any way theoretical but had many practical implications for the preparation of conservation and management regimes for the high seas and other marine areas. The standard of the maximum sustainable yield, for example, has been heavily criticized from the scientific point of view since it relates to the greatest harvest that can be taken from a self-regenerating stock, thus ignoring both economic objectives and the ecological relationship of

[88] J. A. Heap, ''Has CCAMLR worked? Management policies and ecological needs,'' in A. Jorgensen and W. Ostreng (eds.), *The Antarctic Treaty in World Politics*, 1991, 43–53.
[89] Birnie and Boyle, *International Law*, 87, at 436.
[90] *Ibid*., at 437, with reference to the IUCN 1980 World Conservation Strategy.
[91] *Ibid*., at 440, with reference to the Legal Experts Group of the World Commission on Environment and Development.

species, habitat considerations, biomass limits, and disturbances of the environment.[92] Alternative strategies have been suggested to better accommodate the changing environmental perspectives, including the concept of optimum population, optimum sustainable population, optimum economic yield, optimum ecological resource management and the already mentioned ecosystem approach under CCAMLR.[93] Multispecies management is a part of the new approach to conservation policies.

The ecosystem approach to the conservation of fish resources has been one of the most influential developments of the conceptual evolution taking place.[94] Although not always expressly recognized, this approach underlies most of the legal interactions between the exclusive economic zone and the high seas, either in relation to given species and biomass distribution or in connection with the necessary compatibility that management regimes must ensure between conservation measures adopted under national jurisdiction and in the high seas. It will be noted further below that most contemporary fishing arrangements are built on these kinds of ecosystem considerations to a greater or lesser extent. Once this approach has permeated the structure of conservation and management regimes, other consequences have followed in terms of incorporating related environmental concepts, with particular reference to precautionary management when scientific evidence is not fully conclusive as is often the case with fisheries.[95]

It is precisely because of the influence of such broader environmental concerns and concepts that static interpretations of the Convention on the Law of the Sea objecting to any developments in respect of high seas fisheries were not likely to prosper. The essential options were thus narrowed down to whether the necessary developments to cope with the new problems of high seas fisheries conservation would be carried out under the authority of national jurisdiction or under management regimes internationally regulated and organized within the framework of commonly agreed rules and effective forms of cooperation.

[92] *Ibid*., at 438. [93] *Ibid*., at 438.

[94] Lewis M. Alexander, ''Large marine ecosystems: a new focus for marine resources management,'' *Marine Policy*, Vol. 17, 1993, 199–212.

[95] L. Gundling, ''The status in international law of the principle of precautionary action,'' *International Journal of Estuarine and Coastal Law*, Vol. 5, 1990, 23–30. On the precautionary approach see pp. 156–164 below.

4 Trends in contemporary international law and national legislation and practice on high seas fisheries issues

The many issues relating to high seas fisheries that emerged in the aftermath of the Law of the Sea Conference[1] led to the practice of involving both the negotiation and conclusion of international conventions and other arrangements and the enactment of national legislation

[1] See generally Moritaka Hayashi, ''The management of transboundary fish stocks under the LOS Convention,'' *International Journal of Marine and Coastal Law*, Vol. 8, 1993, 245–261; Tullio Treves, ''La pêche en haute mer et l'avenir de la Convention des Nations Unies sur le droit de la mer,'' *Annuaire Français de Droit International*, Vol. 38, 1992, 885–904; David Freestone and Gerard J. Mangone (eds.), ''The Law of the Sea Convention: unfinished agendas and future challenges,'' *International Journal of Marine and Coastal Law*, Vol. 10, 1995, 157–334; D. M. McRae, ''State practice in relation to fisheries,'' *Proceedings of the American Society of International Law*, No. 84, 1990, 1991, 283–287. See also chapter 2 above; and William T. Burke, ''Some comments on high seas fishing and international law,'' in Ronald St. John MacDonald (ed.), *Essays in Honour of Wang Tieya*, 1994, 103–113; Ragnar Arnason, ''Ocean fisheries management: recent international developments,'' *Marine Policy*, Vol. 17, 1993, 334–339; V. Kaitala and Gordon R. Munro, ''The management of high seas fisheries,'' *Marine Resource Economics*, Vol. 8, 1993, 313–329; Francisco Orrego Vicuña, ''Coastal states' competence over high seas fisheries and the changing role of international law,'' ZaöRV, Vol. 55, No. 2, 1995, 520–535; Bernard H. Oxman, comment to the latter article, *ibid*., 536–543; Edward L. Miles, ''Towards more effective management of high seas fisheries,'' *Asian Yearbook of International Law*, Vol. 3, 1993, 111; David A. Colson, ''Conserving world fish stocks and protecting the marine environment under the Law of the Sea Convention,'' *Congressional Record*, Vol. 141, 104th Congress, First Session, 14 March 1995; FAO, ''The state of world fisheries and aquaculture,'' 1995; FAO, ''Trends and prospects for capture fisheries and aquaculture in the next 25 years and the role of FAO,'' COFI/89/2, October 1988, in *NILOS Yearbook*, Vol. 5, 1989, at 156; FAO, ''Marine fisheries and the law of the sea: a decade of change,'' special chapter (revised) of the *State of Food and Agriculture 1992*, COFI/93/INF. 6, *Fisheries Circular* No. 853, 1993, *NILOS Yearbook*, Vol. 9, 1993, at 654; FAO, ''World fisheries ten years after the adoption of the 1982 United Nations Convention on the Law of the Sea,'' COFI/93/4, December 1992, *NILOS Yearbook*, Vol. 9, 1993, at 606. See also the information contained in the following reports of the United Nations Secretary-General on the Law of the Sea: A/42/688, 5 November 1987 (paras. 91–124); A/43/718, 20 October

concerning important questions of interpretation of international law as it relates to the conservation and management of such fisheries.

These developments reveal clear trends as to the need to introduce regulatory elements in high seas fisheries so as to prevent the depletion of resources and to safeguard key environmental components, but also evidencing in most cases a careful approach directed to ensure the evolution of the law in a manner compatible with the essence of the freedom of the high seas. It will be noted that this balanced approach has become the main characteristic of the present international law of high seas fisheries.

Trends relating to the conservation and management of transboundary stocks

A number of bilateral and regional agreements have dealt with situations that basically correspond to the provision of Article 63(1) of the Convention on the Law of the Sea.[2] As noted above this provision is not concerned strictly with high seas fisheries since it refers to stocks that migrate essentially in maritime areas under national jurisdiction, but it involves questions of conservation and cooperation that are indeed relevant for the high seas issues. Various agreements falling under this category have the added problem that they respond to situations of disputed maritime boundaries, which is of course a complicating factor, particularly in terms of enforcement arrangements.[3] Even in areas of undisputed boundaries

1988 (paras. 125–143); A/44/650, 1 November 1989 (paras. 96–117); A/45/721 and Corr. 1, 19 November 1990 (paras. 107–133); A/46/724, 5 December 1991 (paras. 90–135); A/47/623, 24 November 1992 (paras. 101–132); A/48/527, 10 November 1993 (paras. 46–53); A/49/631 and Corr. 1, 16 November 1994, 5 December 1994, Section VIII; A/51/404, 25 September 1996; A/52/487, 20 October 1997 (paras. 190–225); and the report on the "Progress made in the implementation of the comprehensive legal regime embodied in the UN Convention on the Law of the Sea," A/47/512, 5 November 1992 (paras. 123–127).

[2] See for example the Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea of 2 March 1953 and the Protocol of 29 March 1979 between Canada and the United States; and the Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and Belts of 13 September 1973 and the Protocol of 11 November 1982. For comments on these and other relevant conventions see Ellen Hey, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources*, 1989, Annex I.

[3] See for example the Agreement for Purposes of Establishing a Provisional Joint Fishing Zone in the Barents Sea of 11 January 1978 between Norway and the Soviet Union and

buffer zones have been occasionally established to prevent fishing conflicts.[4]

The main purpose of this type of agreement is always to provide for a framework conducive to adequate measures for the conservation of resources. In some cases there is just an elementary coordination of conservation measures while in more advanced forms of cooperation this may take the form of a joint adoption of such measures either directly by the governments concerned or by means of the intervention of international commissions.[5] Opt-out arrangements are quite usual in this context as in many fisheries conventions, thereby weakening to some extent the effectiveness of the system. Similar approaches are followed in respect of the determination and allocation of allowable catches, which is done either directly or with the participation of international bodies or combinations thereof; it has been noted that in various instances the allocation is done under the agreement itself in order to avoid periodical discussions and negotiations on this difficult point.[6]

Reciprocal access by fishermen of participating states is normally provided for and various arrangements have been made to facilitate this objective, particularly when common fishing areas have been established.[7] The question of access of third states to the resources is normally left for each participating coastal state to decide since it is a matter falling within

comments by Hey, *The Regime for the Exploitation*, Annex I.H. For a discussion on the practice relating to living resources in areas of overlapping claims, see International Law Association, International Committee on the EEZ, ''Report,'' in *Report of the Sixty-Fifth Conference*, 1992, at 274–276; R. R. Churchill and G. Ulfstein, ''Marine management in disputed areas: the case of the Barents Sea,'' *Ocean Management and Policy Series*, 1992; and R. R. Churchill, ''Fisheries issues in maritime boundary delimitation,'' *Marine Policy*, Vol. 17, 1993, 44–57.

[4] Hernan Santis Arenas and Monica Gangas Geisse, ''Chile–Peru relations: the special maritime border zone,'' in Gerald H. Blake *et al.* (eds.), *The Peaceful Management of Transboundary Resources*, 1995, 451–460.

[5] For a comparative discussion of the agreements on transboundary stocks, see Hey, *The Regime for the Exploitation*, at 89–96.

[6] *Ibid*., at 93.

[7] On the European Union's Common Fisheries Policy and related arrangements see generally R. R. Churchill, ''Fisheries in the European Community: sustainable development or sustained mismanagement?,'' in Law of the Sea Institute: *The Marine Environment and Sustainable Development: Law, Policy, and Science*, 1991, 140–177; R. R. Churchill, ''The EEC's fisheries management system: a review of the first five years of its operation,'' *Common Market Law Review*, Vol. 25, 1988, 369–389; R. R. Churchill, ''Quota hopping: the Common Fisheries Policy wrongfooted?,'' *Common Market Law Review*, Vol. 27, 1990, 209–247; R. R. Churchill, ''EC fisheries and an EZ–easy!,'' *Ocean Development and International Law*, Vol. 23, 1992, 145–163; R. R. Churchill and Peter Orebech, ''The European Economic Area and fisheries,'' *International Journal of Marine and Coastal Law*,

its discretionary powers in the exclusive economic zone; in a number of cases, however, access by third states is not granted in common or disputed areas, while in some other instances reciprocal preferential access to the surplus is agreed to by the parties to the agreement, thereby preventing in practice third party participation. Once the allocation of catch has been agreed to, any permissible fishing by a third party will normally be deducted from the catch allocated to the coastal state granting such access.

One of the most elaborate arrangements dealing with transboundary stocks is the 1973 agreement between Argentina and Uruguay concerning the River Plate and its maritime areas, which establishes a broad joint fishing area overlying the maritime and continental shelf boundary agreed.[8] Conservation and management in this area, including the determination of the allowable catch and its allocation, is undertaken jointly by the parties operating within the functions of the Joint Technical

Vol. 8, 1993, 453–469; Adam Gwiazda, ''The Common Fisheries Policy: economic aspects,'' *Marine Policy*, Vol. 17, 1993, 251–255; Yann-Huei Song, ''The EC's Common Fisheries Policy in the 1990s,'' *Ocean Development and International Law*, Vol. 26, 1995, 31–55; David Symes and Kevin Crean, ''Historic prejudice and invisible boundaries: dilemmas for the development of the Common Fisheries Policy,'' in Blake, *Peaceful Management*, 395–411; Maria Clelia Ciciriello, ''La conservazione e la gestione razionale delle risorse alieutiche nel diritto internazionale del mare e nel diritto comunitario,'' *Comunità Internazionale*, Vol. 48, 1993, 448–474; Danielle Charles-Le Bihan, ''Les évolutions de la politique commune de la pêche: gestion durable de la ressource et développement des zones côtieres,'' *Espaces et Ressources Maritimes*, No. 9, 1995, 206–221. See also Giuseppe Cataldi, ''La conférence sur la conservation et la gestion des ressources halieutiques en Méditerranée: vers l'établissement d'une politique commune de la pêche par les états côtiers de cette mer? Une initiative communautaire,'' *Espaces et Ressources Maritimes*, Vol. 8, 1994, 210–219; A. Karagiannakos, ''Total Allowable Catch (TAC) and Quota Management System in the European Union,'' *Marine Policy*, Vol. 20, 1996, 235–248; For other cooperative arrangements see the Agreement between Australia and Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as the Torres Strait and Related Matters of 18 December 1978, *International Legal Materials*, Vol. 18, 1979, at 291; the Agreement between Colombia and the Dominican Republic on the Delimitation of Marine and Subsoil Areas and Maritime Cooperation of 15 February 1979, US Department of State, *Limits in the Seas*, No. 105; see further note 3 above and also B. A. Cook, ''International cooperative agreements: Scotia–Fundy herring fisheries,'' *Marine Policy*, Vol. 18, 1994, 275–283; Stuart Kaye, ''The Torres Strait treaty: a decade in perspective,'' *The International Journal of Marine and Coastal Law*, Vol. 9, 1994, 311–336.

[8] Agreement between Argentina and Uruguay for Purposes of Regulating Jurisdiction in the Plate River and Ocean Areas Adjacent and Beyond this River of 19 November 1973, *International Legal Materials*, Vol. 13, 1974, at 251. See generally J. E. Greño Velasco, ''Argentina–Uruguay: punto final a una larga controversia,'' *Revista de Política Internacional*, No. 134, 1974, 43–72; H. Gros Espiel, ''Le traité relatif au 'Rio de la Plata' et sa façade maritime,'' *Annuaire Français de Droit International*, Vol. 21, 1975, 241–249; E. R.

Commission. Enforcement jurisdiction, however, is done by each party on their respective side of the agreed boundary. The unity of the fisheries ecosystem has been an important concern and has been developed through the practice of the implementation of the agreement.[9] An interesting regional agreement covering the Baltic Sea and the Belts is provided by the 1973 Gdansk Convention on Fishing and Conservation of the Living Resources of this area.[10]

Since this type of agreement is concerned with areas under national jurisdiction it is not surprising that the role of coastal states is highlighted in all cases and the eventual participation by third states in the fishery is subject to the general rules of the Convention on the Law of the Sea and the specific rules of the agreement in question. But even in this context it can be noted that, while technical functions relating to fisheries are normally submitted to forms of cooperation, other matters more closely associated with jurisdictional questions are generally kept under the control of the coastal state concerned; among such other matters there are of course boundary issues, enforcement powers, and the exercise of essential rights connected with the exclusive economic zone. This explains why there is some reluctance to submit to international cooperation the determination and allocation of allowable catches and why, when this is done, milder forms of cooperation are usually preferred. It is also noticeable that bilateral arrangements can often be more advanced than regional conventions, the latter coming closer to traditional fisheries arrangements and the work of their international commissions.

Hooft, ''Los problemas pesqueros regionales maritimos Argentinos y el derecho internacional público,'' *Anuario Argentino de Derecho Internacional*, Vol. 1, 1983, 177–250; Ernesto J. Rey Caro, ''Aspectos de derecho internacional maritimo en el Tratado sobre el Rio de la Plata,'' *Anuario Argentino de Derecho Internacional*, 1974, 317–334; Frida M. Armas Pfirter, *El Derecho Internacional de Pesquerias y el frente maritimo del Rio de la Plata*, 1994. See also Instituto de Estudios Internacionales de la Universidad de Chile, *El Rio de la Plata: Análisis del Tratado sobre limites fluviales y frente maritimo en la perspectiva de Argentina y Uruguay*, 1976.

[9] Armas, *El Derecho International*, at 375–376.

[10] See the Convention of 13 September 1973 cited in note 2 above. See also M. Fitzmaurice, ''New developments in the legal regime of the Baltic Sea Fisheries,'' *Finnish Yearbook of International Law*, Vol. 2, 1991, 1–37; M. Fitzmaurice, ''Common Market participation in the legal regime of the Baltic Sea fisheries,'' *German Yearbook of International Law*, Vol. 33, 1990, 214–235; Jeffrey L. Canfield, ''The independent Baltic states: maritime law and resource management implications,'' *Ocean Development and International Law*, Vol. 24, 1993, 1–39; Alex G. Oude Elferink, ''Bilateral agreements on fisheries between Sweden and Estonia, Latvia and the Russian Federation,'' *International Journal of Marine and Coastal Law*, Vol. 9, 1994, 101–105.

The leading role of salmon fisheries arrangements

Arrangements relating to the conservation and management of salmon fisheries have taken a leading role in the establishment of basic trends since this is the paramount example of interaction of coastal states' interests with the high seas.[11] The most significant treaties dealing with these species have been discussed above in terms of the role of the state of origin and coastal states in the management of the fishery, enforcement arrangements relating to the high seas, and the role of international institutions established in this context.[12]

Most agreements in this field tend to rely on the work of international commissions such as the North Pacific Anadromous Stocks Commission, the North Atlantic Salmon Conservation Organization, the United States–Canada Pacific Salmon Commission, or the Japan–Soviet Fisheries Joint Commission.[13] In all cases particular emphasis is put on the gathering of information relevant for the management of the stock, including the identification of the state of origin and migratory patterns, as well as on the conduct of scientific functions and studies which may serve as the basis for the adoption of management measures.

More limited functions are envisaged in relation to the adoption of specific management measures by these bodies. Normally this type of commission will be assigned only recommendatory powers regarding conservation while decisions will be adopted directly by the governments concerned, again evidencing here the reluctance to submit delicate functions to international cooperation. On occasions this system is perfected in terms of recommendations coming into effect unless objected to in a given time period. Only very exceptionally is a commission

[11] See pp. 32–36 above, and the literature cited therein.

[12] See in particular the 1991 Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean; the 1982 Convention for the Conservation of Salmon in the North Atlantic Ocean; the 1985 Agreement on Fisheries Cooperation Between Japan and the Soviet Union in the Northwest Pacific; and the 1985 Treaty on Pacific Salmon between Canada and the United States, as cited pp. 34–35 above. See also Shannon C. Swanstrom, "The trend toward ecosystem-based management in the north Pacific anadromous fisheries," *Colorado Journal of International Environmental Law and Policy*, Vol. 6, 1995, 225–243.

[13] Hey, *The Regime for the Exploitation*, at 110–112; see also generally William T. Burke, *The New International Law of Fisheries*, 1994, chapter 4; FAO, "The role of regional fishery organizations and arrangements in fisheries management," Doc. COFI/95/4, 1995; FAO, "Summary information on the role of international fishery and other bodies with regard to the conservation and management of living resources of the high seas," *FAO Fisheries Circular* No. 908, FIPL/C 908, 1996; *Law of the Sea*, Report of the United Nations Secretary-General, 15 October 1996, paras. 154–171.

empowered to adopt regulatory measures on its own, and even when this is done it is usually restricted to special circumstances.[14]

Contemporary practice fully confirms the extent of Article 66 of the Convention on the Law of the Sea in that the state of origin has the fundamental right to fish these species and in that no fishing should take place beyond the outer limit of the exclusive economic zone, that is, reiterating the prohibition to fish in the high seas.[15] For practical reasons, sometimes the coastal state, where different from the state of origin, is given a special role, and exceptionally high seas fishing is also envisaged on the ground of historical circumstances, but even these are being gradually restricted.

As with the case of transboundary stocks enforcement powers are normally reserved for governments and not submitted to international cooperation except in limited aspects. Because of their scope a number of salmon conventions deal only with enforcement powers in areas under national jurisdiction, but it should be noted that in a few instances broad enforcement powers of the state of origin in the high seas are recognized, thus attaching a specific legal consequence to the jurisdiction of the state of origin provided for under Article 66 of the Convention on the Law of the Sea. The power to board, inspect, arrest, and seize foreign fishing vessels in the high seas for violation of conservation obligations is a most significant development in this context; the state of origin, however, shall notify the flag state and turn over the vessel to it for prosecution.[16] These innovations in the law of high seas fisheries, together with the adoption of effective dispute settlement arrangements, would be highly influential in the negotiations on straddling fish stocks and highly migratory fish stocks.

Given the preponderant role of the state of origin in the conservation and management of the fishing of anadromous stocks, it is only natural that cooperation has been kept to a minimum and that the institutions intervening under the various treaties have more a role of coordination and research than a prescriptive function. Various solutions devised in

[14] Hey, *The Regime for the Exploitation*, at 112–114. See also J. L. Bubier, "International management of Atlantic salmon: equitable sharing and building consensus," *Ocean Development and International Law*, Vol. 19, 1988, 35–57.

[15] P. L. Walton, "Piracy of north Pacific salmon: economic implications and potential solutions," *George Washington Journal of International Law and Economics*, Vol. 25, 1991, 581–613.

[16] Hey, *The Regime for the Exploitation*, at 116.

this context, however, have proven relevant for other types of high seas fisheries.

Marine mammals and the increasing emphasis on conservation

The main treaty developments relating to the regime applicable to marine mammals have also been examined above in the context of Articles 65 and 120 of the Convention on the Law of the Sea.[17] Important trends have also emerged from the practice under these various instruments.[18]

The most significant aspect of this practice is undoubtedly the moratorium on whaling in the framework of the International Convention for the Regulation of Whaling where exploitation has become the exception to the rule; subsistence whaling and the much-abused scientific catch are the only mechanisms orientated to exploitation under this evolving system, without prejudice to the opt-out alternatives.[19] From this point of view access to whaling has been to a meaningful extent closed. The establishment of a whaling sanctuary in the Southern Ocean further reinforces this trend since the prohibition envisaged applies irrespective of the conservation status of some species. The question that arises in this

[17] See pp. 36–40 above, with particular reference to the 1946 International Convention for the Regulation of Whaling and the 1992 Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas. See further the 1972 Convention on the Conservation of Antarctic Seals; the 1957 Interim Convention on conservation of North Pacific Fur Seals; and the 1990 Agreement on the Conservation of Seals in the Wadden Sea.

[18] See Hey, *The Regime for the Exploitation*, at 107–110 and Annex IV; Burke, *The New International Law*, chapter 6. See also A. D'Amato and S. K. Chopra, "Whales: their emerging right to life," *American Journal of International Law*, Vol. 85, 1991, 21; M. Howton, "International regulation of commercial whaling: the consequences of Norway's decision to hunt the Mink whale," *Hastings International and Comparative Law Review*, Vol. 18, 1994, 175–193; Robert L. Friedheim, "Moderation in the pursuit of justice: explaining Japan's failure in the International Whaling Commission," *Ocean Development and International Law*, Vol. 27, 1996, 349–378; Maria Clara Maffei, "Développements récents en matière de protection des cétacés," *Espaces et Ressources Maritimes*, No. 9, 1995, 236–248; Ray Gambell, "Activities of the International Whaling Commission in the Southern Ocean," Inter-Governmental Oceanographic Commission, *First Southern Ocean Forum*, Bremerhaven, 9–11 September 1996; for the activities of the International Whaling Commission see also "Law of the Sea: Report of the United Nations Secretary-General," 1996, paras. 179–183.

[19] For a discussion of the whaling moratorium and the Southern Ocean Sanctuary see p. 38 above, and the literature cited therein. For an objection to the adoption of the Whaling Sanctuary on the ground of lacking scientific findings, see William T. Burke, "Memorandum of opinion on the legality of the designation of the Southern Ocean Sanctuary by the IWC," *Ocean Development and International Law*, Vol. 27, 1996, 315–326.

context is whether exploitation shall remain prohibited in spite of the fact that some species may reach a sustainable condition allowing for controlled exploitation, a matter on which opinions are sharply divided and which has led to the negotiation of arrangements rivaling the International Whaling Commission regulations.[20] In any event it does not seem likely that exploitation will be much favored unless clear evidence of its compatibility with conservation can be provided, this having seldom been the case in the past.[21]

Conservation of Antarctic seals has not been directly concerned with problems of access to the resource but rather with the adoption of measures of a general kind since no commercial exploitation has been undertaken while the Antarctic Treaty System has been in force. However, it has been noted that access regulations cannot be ruled out if activities of exploitation would so justify.[22] Other arrangements for the conservation of seals do provide for total allowable catches and their allocation to the parties.

Major new approaches to conservation and the protection of ecosystems have evolved from the concern about marine mammals and other species in the high seas. This is, first, the case with the 1989 United Nations moratorium on the use of large driftnets on the high seas mainly in view of the impact on incidental catches,[23] and the 1991 determination that this effort should be reduced and ultimately terminated.[24] This approach

[20] See the 1992 Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, as cited p. 39 above. See also generally David D. Caron, "The International Whaling Commission and the North Atlantic Marine Mammal Commission: the institutional risks of coercion in consensual structures," *American Journal of International Law*, Vol. 89, 1995, 154–174; William C. Burns, "The International Whaling Commission and the regulation of the consumptive and non-consumptive uses of small cetaceans: the critical agenda for the 1990s," *Wisconsin International Law Journal*, Vol. 13, 1994, 105–144.

[21] Patricia Birnie, "UNCED and marine mammals," *Marine Policy*, Vol. 17, 1993, 501–514.

[22] Hey, *The Regime for the Exploitation*, at 107–109.

[23] United Nations General Assembly, Resolution 44/225 on "Large-scale pelagic driftnet fishing and its impacts on the living marine resources of the World's oceans and seas," UN Doc. A/44/746/Add. 7, 1989. See also the following related reports of the United Nations Secretary-General, A/45/663, 26 October 1990, in *NILOS Yearbook*, Vol. 6, 1990, at 35; A/46/615 and Corr. 1, and Add. 1, 8 November 1991, in *NILOS Yearbook*, Vol. 7, 1991, at 63; A/47/487, 6 October 1992, in *NILOS Yearbook*, Vol. 8, 1992, at 106; A/48/451 and Corr. 1, 11 October 1993, in *NILOS Yearbook*, Vol. 9, 1993, at 75; A/49/469, 5 October 1994, in *NILOS Yearbook*, Vol. 10, 1994, at 128; A/50/553, 12 October 1995; A/51/404, 25 September 1996.

[24] United Nations General Assembly, Resolution 46/215, 1991, *International Legal Materials*, Vol. 31, 1992, at 241. See also the following related resolutions and decisions of the United Nations General Assembly, A/Res. 45/197, 21 December 1990, in *NILOS Yearbook*,

entailed specific conservation regulations in the high seas, without prejudice to obligations under general international law or conventional arrangements. Secondly, and most importantly, this was also the case with the introduction of the precautionary principle in high seas fisheries, early evidence of which is found under the Convention on the Conservation of Antarctic Seals and later in the practice of the International Whaling Commission and the United Nations 1989 moratorium.[25]

In addition to the case of conventions or other arrangements specifically designed to deal with the conservation and management of marine mammals, it should also be noted that a number of other treaties are concerned with these species in a more general manner, such as the Convention on International Trade in Endangered Species and the Convention on the Conservation of Migratory Species of Wild Animals.[26] In yet other instances, the practice of the application of given conventions or arrangements has led to cover situations regarding marine mammals, this being the case of the Inter-American Tropical Tuna Commission that has become active in the effort to minimize the incidental catch of dolphins.[27]

Most of these developments are in turn related to the availability of enforcement mechanisms. Since these are rather limited under international arrangements, domestic enforcement legislation is becoming an alternative increasingly resorted to, although this may pose added jurisdictional problems under international law and trade agreements.[28]

Vol. 6, 1990, at 128; A/Dec. 48/445, 21 December 1993, in *NILOS Yearbook*, Vol. 9, 1993, at 181; A/Dec. 49/436, 19 December 1994, in *NILOS Yearbook*, Vol. 10, 1994, at 363; A/Res/50/25, 4 January 1996; A/Res/51/36, 21 January 1997.

[25] Burke, *The New International Law*, at 270–272.

[26] See p. 39 above.

[27] Burke, *The New International Law*, at 283. See Colombia, Costa Rica, Ecuador, France, Japan, Mexico, Nicaragua, Panama, Spain, United States, Vanuatu, and Venezuela, Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, La Jolla, June 1992, *International Legal Materials*, Vol. 33, 1994, 936–942.

[28] For references to the US–Mexico tuna–dolphin dispute and the Gatt Panel reports of 1991 and 1994 see pp. 39–40 above, and the literature cited therein. See also C. J. Beyers, "The US/Mexico tuna embargo dispute: a case study of the GATT and environmental progress," *Maryland Journal of International Law and Trade*, Vol. 16, 1992, 229–253; D. J. Black, "International trade vs. environmental protection: the case of the US embargo on Mexican tuna," *Law and Policy in International Business*, Vol. 24, 1992, 123–156; S. M. Boreman, "Dolphin-safe tuna: what's in a label?: the killing of dolphins in the eastern tropical Pacific and the case for an international legal solution," *Natural Resources Journal*, Vol. 32, 1992, 425–447; Alejandro Nadal Egea, "The tuna–dolphin association in the eastern Pacific Ocean tuna fishery: international trade and resource management issues," *Ocean Yearbook*, Vol. 11, 1994, 120–143; James Joseph, "The tuna–dolphin controversy in the eastern Pacific Ocean: biological, economic, and political

This is without prejudice, of course, to the power of coastal states under the Convention on the Law of the Sea to adopt more restrictive measures than those agreed to internationally.

The trends outlined above clearly point towards the greater emphasis assigned to the conservation of marine mammals over their commercial exploitation. Although the latter has not been ruled out (except in the case of the whaling moratorium), the fact is that exploitation activities are being increasingly subject to regulation and evaluation in the light of conservation and environmental principles, including the precautionary principle and the reversal of the burden of proof as to meeting the conservation standards envisaged. To an extent, the role of coastal states has also been strengthened in this context. Again these trends would be highly influential in the situation of the high seas fishing of other species.

Straddling stocks and the development of the role of coastal states

Conventional developments and the practice relating to straddling stocks had been until recently rather limited since they typically involved a high seas fisheries situation, thus prompting greater caution in view of the historical prevalence of the principle of the freedom of high seas fishing. However, in the light of the pressing problems that have been outlined above, concerted steps were taken in this matter and a number of important precedents came to be established in a short period of time, with the role of coastal states having been emphasized in most cases directly or indirectly.[29]

impacts,'' *Ocean Development and International Law*, Vol. 25, 1994, 1–30; Thomas E. Skilton, ''GATT and the environment in conflict: the tuna–dolphin dispute and the quest for an international conservation strategy,'' *Cornell International Law Journal*, Vol. 26, 1993, 455–494.

[29] For a discussion of current international practice see generally Burke, *The New International Law*, chapter 3; Hey, *The Regime for the Exploitation*; Barbara Kwiatkowska, ''The high seas fisheries regime: at a point of no return?,'' *International Journal of Marine and Coastal Law*, Vol. 8, 1993, 327–358; Barbara Kwiatkowska, ''Creeping jurisdiction beyond 200 miles in the light of the 1982 Law of the Sea Convention and state practice,'' *Ocean Development and International Law*, Vol. 22, 1991, 153; Barbara Kwiatkowska, ''Straddling and migratory fish stocks in the new law of the sea: reconciling rights, freedoms and responsibilities,'' in Ronald St. John MacDonald (ed.), *Essays in Honour of Wang Tieya*, 1994, 463–482; J. A. Pastor Ridruejo, ''La jurisdicción rampante de los Estados ribereños sobre la pesca en alta mar,'' *Estudios en Homenaje al Profesor Don Manuel Diez De Velasco*, 1993, 521; Lennox O'Riley Hinds, ''World marine fisheries: management and development problems,'' *Marine Policy*, Vol. 16, 1992, 394–403; Roger Jeannel, ''Le régime en haute mer de la pêche des espèces se trouvant

Two important multilateral conventions, namely the Northeast Atlantic Fisheries Convention[30] and the Northwest Atlantic Fisheries Convention,[31] had established the first precedents in this area.[32] In both cases the central purpose of the regime established has been the regulation of high seas fisheries, but in so doing the question of straddling stocks and associated stocks had to be addressed in order to achieve a meaningful regime relating to the conservation and management of the fisheries involved.

Although neither of the two treaties formally assigns a special role to coastal states concerning the high seas fisheries, in fact such a role underlies a number of mechanisms of the regimes established. First, there is of course the right of participation of coastal states in the conventional arrangements, and even if in appearance there is no difference from the right of participation of any other state the intervention of key coastal states is essential for the viability of the regime as a whole. This is further reinforced by the fact that restrictions relating to the composition of the Fisheries Commission in the Northwest Atlantic Convention that could affect coastal states are not applied in practice.[33]

Secondly, and more important, there is the question of the consistency of measures adopted for the high seas and for areas under national jurisdiction when relating to straddling stocks or to situations that could affect stocks under coastal state jurisdiction, thus establishing a link of compatibility that of necessity has to take into account the conservation measures enacted by the coastal state in its exclusive economic zone. Under both conventions the respective commissions have a specific

aussi dans une zone économique exclusive,'' *Espaces et ressources maritimes*, Vol. 6, 1992, 123–127; Serge Pannatier, ''Problèmes actuels de la pêche en haute mer,'' *Revue Générale de Droit International Public*, Vol. 102, 1997, 421–446; Rafael Casado Raigon, *La pesca en alta mar*, 1994; Rafael Casado Raigon, ''L'application des dispositions relatives à la pêche en haute mer de la Convention des Nations Unies sur le Droit de la Mer,'' *Espaces et ressources maritimes*, Vol. 8, 1994, 210–219; Rafael Casado Raigon, ''El derecho de la pesca en alta mar y sus últimos desarrollos,'' *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz*, 1995, 97–135; Djamchid Momtaz, ''La conservation et la gestion des stocks de poissons chevauchants et grands migrateurs,'' *Espaces et ressources maritimes*, Vol. 7, 1993, 47–61; Blake, *Peaceful Management*. See also pp. 40–44 above, and the literature cited therein.

[30] Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries, 18 November 1980, *EC Official Journal*, L227, 1980, at 22.

[31] Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 24 October 1978, *EC Official Journal*, L378, 1978, at 2.

[32] For a comparative discussion of these conventions see Hey, *The Regime for the Exploitation*, at 97–99 and Annex II.

[33] *Ibid*., at 98.

mandate to this effect.[34] Through this particular mechanism coastal states intervene quite actively in the regulatory regime of the fisheries in the high seas while safeguarding their own conservation powers in areas under national jurisdiction. This is yet another precedent that would be very influential in the recent arrangements relating to straddling fish stocks.

Another significant trend emerging from the practice on straddling stocks is found in the NAFO agreed policy that states not parties to this arrangement should not fish for straddling stocks in the high seas if this is contrary to the management measures adopted for the area.[35] The effectiveness of conservation measures has led to a further restriction on third states fishing in areas subject to this type of management regime, a development that would be perfected under the recent arrangements on straddling stocks.

More significant steps have been undertaken in the context of recently concluded conventions and other negotiations dealing with particularly affected high seas areas. The situation affecting the Bering Sea ''doughnut hole'' and the Sea of Okhotsk ''peanut hole'' has been described above.[36] In both cases the overfishing of straddling stocks in the high seas enclaves resulted in the collapse of the fishery and the need for the neighboring coastal states to reduce and suspend domestic fisheries under national jurisdiction, while high seas fishing operations by distant-water fleets continued unabated until the collapse became evident.[37] In the ''doughnut hole'' case a voluntary moratorium came to be accepted by distant water fleets at a very late point in time and only after a threatened unilateral action by the United States in the high seas had been explicitly

[34] Northeast Atlantic Fisheries Convention cited in note 30 above, Article 5(2); Northwest Atlantic Fisheries Convention cited in note 31 above, Article XI(3). A similar understanding was reached in the context of the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, cited in note 39 below, to the effect that measures adopted for the high seas and for the related exclusive economic zones should be ''fully compatible with each other''; David A. Balton, ''Strengthening the law of the sea: the new Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Ocean Development and International Law*, Vol. 27, 1996, 125–151, note 91, at 150.

[35] Burke, *The New International Law*, at 135.

[36] See p. 56.

[37] Russian Federation and United States of America, ''Conservation and management of straddling fish stocks in the Bering Sea and the Sea of Okhotsk,'' United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Doc. A/CONF. 164/L. 33, 28 July 1993.

made in terms of a proposed functional extension of fisheries jurisdiction beyond 200 miles.[38]

The seriousness of the situation in the Bering Sea led as a consequence to the adoption of the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea[39] by Japan, the People's

[38] Jeffrey L. Canfield, ''Recent developments in Bering Sea fisheries conservation and management,'' *Ocean Development and International Law*, Vol. 24, 1993, 257–289, at 273–274. See further William T. Burke, ''Fishing in the Bering Sea donut: straddling stocks and the new international law of fisheries,'' *Ecology Law Quarterly*, Vol. 16, 1989, 285–310; Edward L. Miles and David L. Fluharty, ''US interests in the north Pacific,'' *Ocean Development and International Law*, Vol. 22, 1991, 315–342; Edward L. Miles, ''The evolution of fisheries policy and regional commissions in the north Pacific under the impact of extended coastal state jurisdiction,'' *Essays in Memory of Jean Carroz*, 1987, 139; Moritaka Hayashi, ''Fisheries in the north Pacific: Japan at a turning point,'' *ibid*., 343–364; Ted L. McDorman, ''Canada and the north Pacific Ocean: recent issues,'' *ibid*., 365–379; Kunio Yonezawa, ''Some thoughts on the straddling stock problem in the Pacific Ocean,'' in Kuribayashi and Miles (eds.), *The Law of the Sea in the 1990s: A Framework for Further International Cooperation*, 1992, 127–135; Natalia S. Mirovitskaya and J. Christopher Haney, ''Fisheries exploitation as a threat to environmental security: the North Pacific Ocean,'' *Marine Policy*, Vol. 16, 1992, 243–258; William C. Herrington, ''In the realm of diplomacy and fish: some reflections on the International Convention on High Seas Fisheries in the North Pacific Ocean and the law of the sea negotiations,'' *Ecology Law Quarterly*, Vol. 16, 1989, 101–118; L. Miovski, ''Solutions in the Convention on the Law of the Sea to overfishing in the central Bering Sea: analysis of the Convention, highlighting the provisions concerning fisheries and enclosed and semi-enclosed seas,'' *San Diego Law Review*, Vol. 26, 1989, 525; Stuart B. Kaye, ''Legal approaches to polar fisheries regimes: a comparative analysis of the Convention for the Conservation of Antarctic Marine Living Resources and the Bering Sea Doughnut Hole Convention,'' *California Western International Law Journal*, Vol. 26, 1995, 74–114; David Fluharty, ''Evolution of pollock fisheries management in the north Pacific and east Asian economies,'' *Law of the Sea Institute Proceedings*, Vol. 21, 1995, 477–516; Seong-Kwae Park, ''The status of fisheries in Korea with emphasis on distant-water operations,'' *Law of the Sea Institute Proceedings*, vol. 21, 1995, 517–535.

[39] Japan, People's Republic of China, Republic of Korea, Poland, Russian Federation, United States, ''Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea,'' 16 June 1994, *International Legal Materials*, Vol. 34, 1994, at 67. See William V. Dunlop, ''The Donut Hole Agreement,'' *International Journal of Marine and Coastal Law*, Vol. 10, 1995, 114–135. See also the following United States Congress material: House of Representatives, Committee on Merchant Marine and Fisheries, Subcommittee on Fisheries Management, ''Hearing on International straddling fisheries stocks'' and concurrent resolution, 103rd Congress, First Session, 1993, Doc. 103-59; Senate, Committee on Foreign Relations, ''Hearing on the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (Treaty Doc. 103-27),'' 103rd Congress, Second Session, 1994, Doc. 103-767; Senate, Committee on Foreign Relations, ''Report to accompany Treaty Doc. 103–27,'' 1994, Doc. 103-36. For a discussion of the implications of the ratification by the United States of the Convention on the Law of the Sea in this context see William T. Burke, ''Implications for fisheries management of US acceptance of the 1982 Convention on the Law of the Sea,'' *American Journal of International Law*, Vol. 89, 1995, 792–806, at 804–805. See also

Republic of China, the Republic of Korea, Poland, Russia, and the United States, the latter two being the coastal states particularly concerned with this area. Important precedents have been set by this convention which would also have a particular influence in the negotiation of a general regime on high seas fishing of straddling fish stocks and highly migratory fish stocks. Measures for the conservation and management of the resource include the establishment of the allowable harvest level and individual national quotas, a determination which shall be made by an annual conference operating by consensus, but if every effort to this end fails then determination shall be made by Russia and the United States and ultimately by the United States alone. Fishing is also prohibited when the biomass falls below agreed measurements. Fishing in the convention area requires the specific authorization of the flag-state party, in addition to advance notifications and the use of position-fixing transmitters. An observer program is also established under these arrangements.

Enforcement provisions have also been strengthened as compared to the traditional approaches, allowing for the boarding and inspection of fishing vessels of the parties by officials of any other party, the obligation of the flag state to take appropriate measures to deal with violations, prosecute and impose penalties, and an enhanced role of the boarding state while the flag state takes control of the situation. The attention of non-parties may be called at any time, and measures consistent with international law may be taken individually or collectively to deter any operation adversely affecting the attainment of the conservation objectives.

The situation in the Sea of Okhotsk has led to similar trends except that unilateral action by Russia has been more prominent than the progress of international negotiations, thereby evidencing once again the point that if solutions are not found under international law then individual remedies are called into play. Two sessions of the international conference on the conservation and management of the marine living resources in the high seas of the Okhotsk Sea were held in 1993 with the participation of Russia, Japan, Poland, South Korea, and China, but no measures were agreed in this context except in terms of the preparation of scientific

generally on the United States fisheries policy Christopher C. Joyner, ''Ocean fisheries, US interests, and the 1982 Law of the Sea Convention,'' *Georgetown International Environmental Law Review*, Vol. 7, 1995, 749–763; M. M. Miller, ''Impressions of ocean fisheries management under the Magnuson Act,'' *Ocean Development and International Law*, Vol. 21, 1990, 263–287; J. L. McHugh, ''Fisheries management under the Magnuson Act: is it working?,'' *Ocean Development and International Law*, Vol. 21, 1990, 255–261.

reports.[40] A moratorium on fishing proposed by Russia met with mixed reactions, with Japan accepting a voluntary temporary suspension and China, Poland, and South Korea expressing their intention to reduce the fishing effort.[41] Bilateral negotiations have also been undertaken in this context.[42]

Because of the insufficiency of these steps unilateral measures have been taken by Russia, beginning with the restraint applied to its own fishing activities in the surrounding exclusive economic zone in implementation of the precautionary principle.[43] More importantly, a Russian resolution adopted in 1993 provided that Russia took on the responsibility for the conservation of the living resources in the high seas area concerned, established a temporary moratorium for Russian and foreign fishing vessels until international agreements could be reached, and expressly referred to the shortcomings of international law on this problem.[44] Further measures were adopted in terms of denying allocation of catch in Russian jurisdictional waters to entities having conducted

[40] Alex G. Oude Elferink, ''Fisheries in the Sea of Okhotsk high seas enclave – the Russian Federation's attempts at coastal state control,'' *International Journal of Marine and Coastal Law*, Vol. 10, 1995, 1–18, at 6; Alex G. Oude Elferink, ''Fisheries in the Sea of Okhotsk high seas enclave: towards a special legal regime?,'' in Blake, *Peaceful Management*, 461–474; see also generally Artemy A. Saguirian, ''Russia and some pending law of the sea issues in the north Pacific: controversies over high seas fisheries regulations and delimitation of marine spaces,'' *Ocean Development and International Law*, Vol. 23, 1992, 1; Emmanuelle Némoz, ''Les mers enclavées: l'exemple de la Mer d'Okhotsk: multilateralisme et unilateralisme,'' *Espaces et Ressources Maritimes*, No. 9, 1995, 197–205; United States Senate, Committee on Commerce, Science and Transportation, ''Sea of Okhotsk Fisheries Enforcement Act of 1993: report on S. 1515,'' 1993, Doc. 103-218. For the special situation of the Caspian Sea see Sergei Vinogradov and Patricia Wouters, ''The Caspian Sea: quest for a new legal regime,'' *Leiden Journal of International Law*, Vol. 9, 1996, 87–98.

[41] Elferink, ''Fisheries in the Sea of Okhotsk,'' at 6. See also Russian Federation, ''Report of the first session of the International Conference on the Conservation and Management of the Marine Living Resources in the High Seas of the Okhotsk Sea,'' UN Doc. A/CONF. 164/INF/6, 26 July 1993.

[42] See generally Tsuneo Akaha, ''Japanese–Russian fishery joint ventures and operations: opportunities and problems,'' *Marine Policy*, Vol. 17, 1993, 199–212; Tsuneo Akaha, ''Bilateral fisheries relations in the Seas of Japan and Okhotsk: a catalyst for cooperation or seed of conflict?,'' *Ocean Yearbook*, Vol. 11, 1994, 384–408.

[43] Russian Federation, ''Consequences of unscientific fishing for Alaska pollack in the enclave of the Sea of Okhotsk,'' UN Doc. A/CONF. 164/ L. 21, 22 July 1993. Russian Federation, ''Threat of the destruction of Alaska pollack stocks in the Sea of Okhotsk as a consequence of continued unregulated and unscientific fishing in its enclave,'' UN Doc. A/CONF. 164/L. 43, 23 March 1994; see also generally Jon K. Goltz, ''The Sea of Okhotsk peanut hole: how the United Nations draft agreement on straddling stocks might preserve the pollack fishery,'' *Pacific Rim Law and Policy Journal*, Vol. 4, 1995, 443.

[44] Resolution of the Supreme Soviet of the Russian Federation, ''On measures to protect

fishing activities in the ''peanut hole,'' denying service to such vessels in Russian ports and prohibiting the delivery of fuel and other services at sea.[45] It will be noted further below that similar measures had been established in the Chilean fisheries law of 1991.

It is also interesting to note that the Russian approach to this question is in turn connected with an interpretation of the Convention on the Law of the Sea regarding straddling stocks in enclosed or semi-enclosed seas, to the effect that such a situation would be governed not only by Articles 63 and 123 of the Convention but also by Articles 61 and 62, that is by the very provisions governing the fisheries regime within the exclusive economic zone.[46] The question of enclosed and semi-enclosed seas in the United Nations negotiations and agreement on straddling stocks and the Russian proposals thereon shall be examined further below.

Other arrangements have also dealt with high seas enclaves and the special interest of coastal states therein. In the Barents Sea Norway and Greenland, like Norway and the Faroes, have negotiated agreements relating to the fishing both in the high seas enclave and in the exclusive economic zones or fisheries zones of the parties.[47] Also Norway and Russia have entered into agreements to prevent fishing by Iceland in the high seas areas adjacent to both countries in the Barents Sea, including the prohibition of landing catches beyond the allocated quotas.[48] Similar port restrictions have been considered with the European Union. In a different setting transboundary and straddling stocks have also been influential in settling disputes and encouraging agreements in the Jan Mayen area involving Greenland, Iceland, and Norway,[49] as is also the case with a number of bilateral agreements throughout the world.

the biological resources of the Sea of Okhotsk,'' 16 April 1993, as cited in Elferink, ''Fisheries in the Sea of Okhotsk,'' at 7.

[45] Elferink, ''Fisheries in the Sea of Okhotsk,'' at 8.

[46] *Ibid*., at 9–10.

[47] *Ibid*., at 13. See also Per Ove Eikeland, ''Distributional aspects of multispecies management: the Barents Sea large marine ecosystem,'' *Marine Policy*, Vol. 17, 1993, 256–271; Brit Floistad, ''Fish and foreign policy: Norway's fisheries policy towards other countries in the Barents Sea, the Norwegian Sea, and the North Sea,'' *Law of the Sea Institute*, Occasional Paper No. 37, 1991; Olav Schram Stokke and Alf Hakon Hoel, ''Splitting the gains: political economy of the Barents Sea fisheries,'' *Cooperation and Conflict*, Vol. 26, 1991, 49–65; R. R. Churchill, *Marine Management in Disputed Areas: The Case of the Barents Sea*, 1992; G. Ulfstein, ''The conflict between petroleum production, navigation and fisheries in international law,'' *Ocean Development and International Law*, Vol. 19, 1988, 229–262.

[48] Elferink, ''Fisheries in the Sea of Okhotsk,'' at 13.

[49] Greenland (Denmark), Iceland and Norway, Agreement of 12 June 1989; International Court of Justice, ''Maritime delimitation in the area between Greenland and Jan

The practice relating to straddling stocks is most useful in highlighting the role of coastal states in the conservation and management of the resources concerned in the context of agreed regimes for the high seas. Particularly significant is the concept of consistency between measures adopted for the high seas and those in force for areas under national jurisdiction, the application of the precautionary principle, the role of coastal states in the management mechanisms and enforcement procedures and the related possibility of restricting access to fishing under national jurisdiction or coastal state ports if appropriate conservation is not observed by foreign fishing vessels.

Highly migratory species and the harmonization of coastal states' rights with international cooperation

The long-standing problems relating to the fishing of highly migratory species, and tuna in particular, have all centered around the question of whether coastal states' rights should prevail over the interest of distant-water fishing vessels.[50] Article 64 of the Convention on the Law of the Sea, as discussed above, purported to solve this matter by introducing, in addition to the rights of coastal states in the exclusive economic zone, the requirement of international cooperation for the management of the resource in a broader area covering both the waters under national jurisdiction and the high seas in the relevant region. Although serious problems of interpretation arose in this connection, positions gradually began to change in practice in light of the specific problems that had to be addressed. The essence of this effort has been to harmonize in a constructive manner the interests of both coastal states and fishing nations by means of enhanced forms of international cooperation.[51]

Mayen,'' Judgment, *ICJ Reports*, 1993, 38, particularly para. 90. For a discussion of the Atlantic doughnut hole and related arrangements see Evelyn Meltzer, ''Global overview of straddling and highly migratory fish stocks: the nonsustainable nature of high seas fisheries,'' *Ocean Development and International Law*, Vol. 25, 1994, 255–344, at 279–283. A doughnut-hole-type situation has also been reported in the Bay of Bengal area, Oceans Institute of Canada, ''Managing fishery resources beyond 200 miles: Canada's options to protect northwest Atlantic straddling stocks,'' 1990.

[50] See generally pp. 40–44 above, and the literature cited therein.

[51] See in particular the Convention for the Conservation of Southern Bluefin Tuna, 10 May 1993, *Law of the Sea Bulletin*, No. 26, 1994, 63; and the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, 9 July 1992, *International Legal Materials*, Vol. 32, 1993, 138–139. See generally Anthony Bergin, ''New fisheries agreements concluded in South Pacific,'' *Ocean and Coastal Management*, Vol. 19, 1993, 299–304; Anthony Bergin, ''Conservation and management of highly migratory

The early position of the United States, claiming that highly migratory species could only be managed through international arrangements and that no coastal state jurisdiction should intervene in the exclusive economic zone or otherwise, began gradually to change. This was first done by means of the 1987 Treaty on Fisheries between a group of Pacific island states and the United States, which in fact accepted both coastal states' jurisdiction and international cooperation in an effort to harmonize both sets of interests.[52] This proved to be a highly successful and innovative mechanism of cooperation dealing with the problems of access and licensing of fishing vessels throughout a broad ocean region, the requirements of compliance with national laws, enforcement by coastal states and the cooperation of the flag state therewith, placement of

species: the new bluefin tuna convention,'' *Ocean and Coastal Management*, Vol. 24, 1994, 139–144; Anthony Bergin and Marcus Haward, ''Southern bluefin tuna fishery – recent developments in international management,'' *Marine Policy*, Vol. 18, 1994, 263–273; Michael Lodge, ''Minimum terms and conditions of access: responsible fisheries management measures in the South Pacific region,'' *Marine Policy*, Vol. 16, 1992, 277–305; Florian Gubon, ''Development and management of marine resources in the Pacific islands region: an overview of some basic issues and constraints,'' *Ocean Yearbook*, Vol. 11, 1994, 409–425; Joeli Veitayaki, ''The peaceful management of transboundary resources in the south Pacific,'' in Blake, *Peaceful Management*, 491–506; T. Scovazzi, ''Il regime giuridico di alcune specie marine migranti,'' *Rivista di Diritto Internazzionale*, 1983, No. 4, 826; C. M. Weld, ''Critical evaluation of existing mechanisms for managing highly migratory pelagic species in the Atlantic Ocean,'' *Ocean Development and International Law*, Vol. 19, 1989, 285; D. Menasveta, ''Fisheries management in the exclusive economic zones of southeast Asia before and after Rio and prospects for regional cooperation,'' in SEAPOL, *Conference on Sustainable Development of Coastal and Ocean Areas in Southeast Asia*, Singapore, 26–28 May 1994, 98–134.

[52] Certain Pacific Island States–United States, Treaty on Fisheries, 2 April 1987, *International Legal Materials*, Vol. 26, 1987, 1048–1090. See also generally Anthony Bergin, ''Political and legal control over marine living resources: recent developments in South Pacific distant water fishing,'' *International Journal of Marine and Coastal Law*, Vol. 9, 1994, 289–309; Gordon R. Munro, ''The management of tropical tuna resources in the western Pacific: trans-regional co-operation and second tier diplomacy,'' in Blake, *Peaceful Management*, 475–490; Anthony Bergin and Marcus Haward, ''The last jewel in a disintegrating crown – the case of Japanese distant water tuna fisheries,'' *Ocean Development and International Law*, Vol. 25, 1994, 187–215; Anthony Bergin and Marcus Haward, ''Australia's approach to high seas fishing,'' *International Journal of Marine and Coastal Law*, Vol. 10, 1995, 349–367; Tatsuo Saito, ''Management of highly migratory species in the central western Pacific,'' *Law of the Sea Institute Proceedings*, Vol. 21, 1995, 536–553; Colin Hunt, ''Management of the South Pacific tuna fishery,'' *Marine Policy*, Vol. 21, 1997, 155–171; Donald R. Rothwell, ''The law of the sea in the Asian–Pacific region: an overview of trends and developments,'' *Chinese Yearbook of International Law and Affairs*, Vol. 13, 1994–1995, 81–110, at 96–99; James Crawford and Donald R. Rothwell, *The Law of the Sea in the Asian Pacific Region: Developments and Prospects*, 1995.

observers, closed areas, reporting, financial arrangements, and other matters of interest. The end result was that jurisdictional issues were subsumed within the broader framework of an integrated approach in relation to these species, involving strong concurrent interests of both coastal states and distant-water fishing nations. Significantly, the United States position was next changed in a general manner when in 1990 it began claiming jurisdiction over highly migratory species within the exclusive economic zone.[53]

Before this new kind of cooperative arrangement became the accepted approach, a number of other treaties and agreements had been prepared with varying degrees of success. The South Pacific Forum Fisheries Convention[54] and the Nauru Agreement on cooperation in fisheries management[55] were originally conceived to strengthen the position of coastal states in their confrontation with distant-water fishing nations and indeed had an influence on the need to come to the new arrangements referred to above. The International Convention for the Conservation of Atlantic Tuna[56] has also provided a broad framework for the harmonization of interests and the conclusion of bilateral agreements on access to the fisheries.[57]

[53] United States Aide-Mémoire of 22 May 1991, United Nations, *Law of the Sea Bulletin*, No. 19, 1991, at 21; for the amendment of the Magnuson Fishery Conservation and Management Act see United Nations, Office for Ocean Affairs and the Law of the Sea, *The Regime for High Seas Fisheries: Status and Prospects*, 1991, at 21. See further C. R. Kelly, ''Law of the sea: the jurisdictional dispute over highly migratory species,'' *Columbia Journal of Transnational Law*, Vol. 26, 1988, 475.

[54] South Pacific Forum Fisheries Convention, 10 July 1978; for comments see Hey, *The Regime for the Exploitation*, Annex III A.

[55] Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest, 11 February 1982; for comments see Hey, *The Regime for the Exploitation*, Annex III B. See also Forum Fisheries Agency, ''Second consultation on arrangements for south Pacific albacore fisheries management,'' Honiara, 2–7 March 1990, FFA Report No. 90/13, in *NILOS Yearbook*, Vol. 6, 1990, at 675; and ''Third consultation,'' Noumea, 17–20 October 1990, FFA Report No. 90/114, *NILOS Yearbook*, Vol. 6, 1990, at 689.

[56] International Convention for the Conservation of Atlantic Tunas, 14 May 1966, and Protocols of 1984 and 1992; for comments see Hey, *The Regime for the Exploitation*, Annex III G. For other regional developments see the FAO Indo-Pacific Fisheries Commission and the Tuna Management Committee for the Western Pacific; the FAO Indian Ocean Fisheries Commission; and the Western Indian Ocean Tuna Organization.

[57] See for example the fisheries agreement between the European Economic Community and Senegal of 15 June 1979, as commented by Hey, *The Regime for the Exploitation*, Annex III H. See also generally FAO, ''Report of the FAO Director-General on the activities of the ministerial conference on cooperation in fisheries among the African states bordering the Atlantic Ocean,'' Note by the United Nations Secretary-General, Doc. E/1994/79, 16 June 1994, in *NILOS Yearbook*, Vol. 10, 1994, at 466.

Less successful have been the efforts to come to an agreement in the Eastern Pacific region. The Permanent Commission of the South Pacific was not successful in dealing with the problems of highly migratory species and other approaches had to be tried. Neither did the Inter-American Tropical Tuna Commission succeed as a regulatory mechanism and, after a difficult period of confrontation, came to virtual collapse.[58] An agreement done in 1983 between the United States, Costa Rica, and Panama[59] has not entered into force and has proven to be quite unacceptable for other countries since licenses were to be granted by the Council of the Organization established under the agreement and no longer by coastal states for vessels of the states parties operating in the 200-mile area; rights of participation and distribution of revenues are provided for but this does not offset the renunciation of coastal states' sovereign rights in the exclusive economic zone.

A rival Eastern Pacific Tuna Fishing Organization was established in 1989[60] but neither has this agreement entered into force. Under this agreement total allowable catch is to be established for the area as a whole covering both the high seas and areas under national jurisdiction. Licenses would be granted by coastal states for areas under their jurisdiction while the Council would do so for the high seas. Member states would have priority in access to the surplus and the Council was empowered to adopt conservation measures.

As rightly concluded by one commentator, these agreements for the Eastern Pacific "do not appear to meet the conditions required to ensure an ample participation of interested states."[61] In fact, in the first case, the approach is somewhat distorted to the detriment of the coastal state since the latter's role is minimized in the exclusive economic zone, a situation which responded to the views of the United States at the time. In the second case, the approach was somewhat distorted to the detriment of the

[58] Inter-American Tropical Tuna Convention, 31 May 1949; for comments see Burke, *The Regime for the Exploitation*, at 241–242, 248–251. For a reference to the current work of the Permanent Commission of the South Pacific see Meltzer, "Global overview," at 315–316.

[59] Costa Rica, Panama, United States, Agreement and Protocol on Tuna Fishing, 12 April 1983; for comments see Jean-François Pulvenis, "Vers une emprise des états riverains sur la haute mer au titre des grands migrateurs?," *Annuaire Français de Droit International*, Vol. 35, 1989, 774–806.

[60] Eastern Pacific Ocean Tuna Fishing Agreement, 14 March 1983; for comments see Pulvenis, "Vers une emprise."

[61] Pulvenis, "Vers une emprise," at 806; see also Daniel Bardonnet, "Frontières terrestres et frontières maritimes," *Annuaire Français de Droit International*, Vol. 35, 1989, 1–64, at 52–53.

interests of other states in high seas fisheries, which are not fully taken into account in a scheme controlled entirely by a group of coastal states.

The practice examined reveals that, while the objective of the most recent agreements is consistent with the need to attain an acceptable harmonization of interests, the specific mechanisms to achieve this purpose are varied.[62] In some cases both the high seas and the areas under national jurisdiction are brought under the agreement while in other cases only the latter areas are covered. Participation of coastal states and distant-water fishing states is also varied since in some agreements it is more open and in others it is more restricted. The issuing of licenses and the collection of fees is in some cases entrusted to the organization established while in other cases this is done by the relevant coastal states.

The provisions of these agreements relating to conservation and management measures also reveal different approaches to their adoption. The joint determination by the parties in the text or annex of the treaty or by means of periodical meetings, or alternatively the determination made by a commission established, are some of the methods followed to achieve this end. On the other hand, while in some instances total allowable catches are adopted and allocation to states or vessels is also made, in other cases only allowable catches are established without reference to questions of allocation; in yet other instances, there is no reference to catches or allocation. International commissions in this field normally lack a regulatory function and at most they are entrusted with a recommendatory role, being in most cases restricted to scientific and biological determinations.[63] Because of these limited functions and divergent approaches it has been concluded that in a number of cases the agreements on highly migratory species do not meet the criteria of Article 64 of the Convention on the Law of the Sea,[64] a matter that would only become subject to a greater uniformity as a result of the United Nations negotiations concluded in 1995.

In spite of the shortcomings that this practice evidences there are also important developments that have greatly influenced the evolution of the

[62] For a comparative discussion of the various agreements on highly migratory species, see Hey, *The Regime for the Exploitation*, 99–107.

[63] For a discussion of the regulatory functions of fisheries commissions, with particular reference to the Pacific Salmon Commission and the Mixed Commission for Black Sea Fisheries, see Burke, *The New International Law*, at 248–250; for the latter see the 1959 Convention Concerning Fishing in the Black Sea. See also N'Diaye et Antonio Tavares de Pinho, "Une expérience africaine de coopération halieutique: la Commission sous-régionale des pêches," *Espaces et Ressources Maritimes*, Vol. 8, 1994, 237–251.

[64] Hey, *The Regime for the Exploitation*, at 106–107.

law in this and other fields. This is particularly the case with enforcement arrangements that have perfected the procedures for boarding, inspection and arrest of fishing vessels in areas of the high seas by authorized vessels and coordinated the prosecution and application of penalties by the flag state, without prejudice to the measures that apply under national jurisdiction.[65] The regional register established in the South Pacific and the potential blacklisting of violators has been a useful tool for ensuring a better record of compliance with the conservation measures in force.[66] The experience of some enforcement arrangements would also have a positive influence on the 1995 agreement.

Other aspects of contemporary international practice relevant to high seas fisheries

Various other expressions of contemporary international practice have proven to be most influential in the development of a general regime for the conservation and management of high seas fisheries. These expressions find their origin in the technical methods employed in the fishing industry, in the concern about special ocean areas, or in law of the sea questions not directly related to fishing.

The issue of driftnets has provided the first major example of regulation of high seas fishing independently from the species approach of the Convention on the Law of the Sea. While related in its origins to the harvesting of squid, albacore, and tuna, the concern for the use of long driftnets has become quickly generalized so as to apply to high seas fishing generally.[67] The United Nations General Assembly resolutions of

[65] For a comparative discussion of enforcement arrangements in the high seas, see Burke, *The New International Law*, at 335–347.

[66] Burke, *The New International Law*, at 308; see also Gerald Moore, "Enforcement without force: new techniques in compliance control for foreign fishing operations based on regional cooperation," *Ocean Development and International Law*, Vol. 24, 1993, 197–204; and Agreed Minute on Surveillance and Enforcement Cooperation Between the Parties to the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, *International Journal of Marine and Coastal Law*, Vol. 9, 1994, 308–309.

[67] See generally Douglas M. Johnston, "The driftnetting problem in the Pacific Ocean: legal considerations and diplomatic options," *Ocean Development and International Law*, Vol. 21, 1990, 5–38; I. A. Shearer, "High seas: drift gillnets, highly migratory species, and marine mammals," in Kuribayashi and Miles, *The Law of the Sea*, 237–258; W. T. Burke, "Regulation of driftnet fishing on the high seas and the new international law of the sea," *Georgetown International Environmental Law Review*, Vol. 3, 1990, 265–310; L. A. Davis, "North Pacific pelagic driftnetting: untangling the high seas controversy," *California Law Review*, Vol. 64, 1991, 1057–1102; A. Wright and D. J. Doulman, "Driftnet

1989 and 1991 have provided important criteria for the conservation and management of high seas fisheries in this context, developing the approach of the Convention on the Law of the Sea in a significant manner.[68] The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific,[69] action adopted under regional arrangements in the North Pacific,[70] the Caribbean,[71] and the European Commu-

fishing in the south Pacific,'' *Marine Policy*, Vol. 15, 1991, 303–337; Tullio Scovazzi, ''La pesca con reti derivanti nel Mediterraneo,'' *Rivista Giuridica dell'Ambiente*, Vol. 7, 1992, 523–545; J. K. Jenkins, ''International regulation on driftnet fishing: the role of environmental activism and leverage diplomacy,'' *Indiana International and Comparative Law Review*, Vol. 4, 1993, 197–218; Margarita Badenes Casino, ''La pesca con redes de enmalle y deriva,'' *Cuadernos Jurídicos*, Valencia, March 1994, 41–53; FAO, ''Protection of living resources from entanglement in fishery nets and debris,'' Doc. COFI/87/8, January 1987, in *NILOS Yearbook*, Vol. 3, 1987, at 156; M. Rafiqul Islam, ''Coastal states' control over driftnet fishing in the south Pacific and the freedom of fishing on the high seas,'' *Melanesian Law Journal*, Vol. 17, 1989, 81–91; M. Rafiqul Islam, ''The proposed 'driftnet free zone' in the south Pacific and the Law of the Sea Convention,'' *International and Comparative Law Quarterly*, Vol. 40, 1991, 184–198; M. Savini, ''La réglementation de la pêche en haute mer par l'Assemblée Générale des Nations Unies (à propos de la Resolution 44/225 sur les grands filets maillants derivants),'' *Annuaire Français de Droit International*, Vol. 36, 1990, 777–817; Simon P. Northridge, ''Driftnet fisheries and their impacts on non-target species: a worldwide review,'' *FAO Fisheries Technical Paper* No. 320, 1991; Simon P. Northridge, ''An updated world review of interactions between marine mammals and fisheries,'' *FAO Fisheries Technical Paper*, No. 251, Supplement 1, 1991; Ellen Hey, William T. Burke, Doris Ponzoni and Kazuo Sumi, ''The regulation of driftnet fishing on the high sea: legal issues,'' *FAO Legislative Study*, No. 47, 1991, in *NILOS Yearbook*, Vol. 7, 1991, at 621.

[68] Resolutions cited in notes 23 and 24 above. See the discussion by William T. Burke, Mark Freeberg and Edward L. Miles, ''The United Nations resolutions on driftnet fishing: an unsustainable precedent for high seas and coastal fisheries management,'' *Ocean Development and International Law*, Vol. 25, 1994, 127–186; and Grant James Hewison, ''The legally binding nature of the moratorium on large-scale high seas driftnet fishing,'' *Journal of Maritime Law and Commerce*, Vol. 25, 1994, 557–579. See also FAO, ''Large-scale pelagic drift net fishing,'' C 89/Inf/17, November 1989, in *NILOS Yearbook*, Vol. 4, 1988, at 194; FAO, ''Report of the expert consultation on large-scale pelagic driftnet fishing,'' Rome, 2–6 April 1990, Fisheries Report No. 434, FIPL/R434, in *NILOS Yearbook*, Vol. 6, 1990, at 192.

[69] Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 23 November 1989, *International Legal Materials*, Vol. 29, 1990, 1449–1463, and 1990 Protocols. See also Grant James Hewison, ''High seas driftnet fishing in the south Pacific and the law of the sea,'' *Georgetown International Environmental Law Review*, Vol. 5, 1993, 313–374.

[70] Burke, *The New International Law*, at 102–103, with particular reference to bilateral agreements between the United States, Japan, Korea, and Taiwan. See also Yann-Huei Song, ''United States ocean policy: high seas driftnet fisheries in the north Pacific Ocean,'' *Chinese Yearbook of International Law and Affairs*, Vol. 11, 1991–1992, 64–137.

[71] Eastern Caribbean States, The Castries Declaration of 24 November 1989, as cited in Burke, *The New International Law*, at 103, note 61.

nity,[72] and national legislation enacted in some countries,[73] have further contributed to the development of this area of the law. While it is generally thought that an answer to these issues may be found in the provisions of the Convention on the Law of the Sea,[74] the view has also been held that current developments go beyond the scope of those provisions.[75]

The 1989 United Nations General Assembly resolution recommended the termination of large-scale pelagic driftnet fishing unless appropriate conservation and management measures were introduced by a certain date, calling to this end for the consideration of available scientific data, cooperative regulation, and monitoring.[76] This termination referred to albacore tuna fishing in the South Pacific, but a moratorium was also established for the level of driftnet catch in all seas. Although a few countries had expressed their acceptance of these measures,[77] the General Assembly recommended in 1991 a 50 percent reduction in the high seas effort relating to driftnets by the middle of 1992 and a general moratorium to be attained by the end of 1992. It has been noted that since some of these measures have been adopted without full scientific evidence

[72] Burke, *The New International Law*, at 103. See also generally J. A. Gurish, ''Pressures to reduce bycatch on the high seas: an emerging international norm,'' *Tulane Environmental Law Journal*, Vol. 5, 1992, 473–455; United Nations General Assembly Resolution 49/118 of 19 December 1994, in *NILOS Yearbook*, Vol. 10, 1994, at 360; A/Res./50/25, 4 January 1996; A/Res./51/36, 21 January 1997; Report of the United Nations Secretary-General A/50/552, 12 October 1995; and Report of the United Nations Secretary-General on the ''Law of the sea: large-scale pelagic drift-net fishing and its impact on the living marine resources of the world's oceans and seas; unauthorized fishing in zones of national jurisdiction and its impact on the living marine resources of the world's oceans and seas; and fisheries by-catch and discards and their impact on the sustainable use of the world's marine resources,'' A/51/404, 25 September 1996, Section IV.

[73] New Zealand, ''Driftnet Prohibition Act 1991,'' *International Legal Materials*, Vol. 31, 1992, 214–226; United States, ''Driftnet Impact Monitoring, Assessment and Control Act,'' Public Law No. 100-220, 101 Stat. 1478, 1989; and ''High Seas Driftnet Fisheries Enforcement Act,'' 2 November 1992, *International Legal Materials*, Vol. 32, 1993, 530. See also United States Congress, Senate, Committee on Appropriations, Subcommittee on the Department of the Interior and Related Agencies, ''Expansion of the north Pacific high seas driftnet fisheries: hearing,'' 101st Congress, First Session, 1990; United States Congress, House, Committee on Merchant Marine and Fisheries, Subcommittee on Fisheries and Wildlife Conservation and the Environment, ''High seas driftnet fishing: hearing,'' 102nd Congress, First Session, 1991.

[74] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Regime for High Seas Fisheries: Status and Prospects*, 1991, at 19–20.

[75] Burke *et al*., ''The United Nations resolutions.''

[76] Burke, *The New International Law*, 102–107.

[77] *Ibid*., at 102, note 59, with reference to reactions from Japan, South Korea and Taiwan.

there is here an application of the precautionary principle leading to the termination of harvesting.[78] It should also be noted that the 1989 resolution expressly recognized the adverse effects that high seas driftnetting is likely to have within the exclusive economic zones.

A second major source of developments relating to the regime applicable to high seas fisheries has been the concern for certain broad ocean areas. The paramount example of such a situation is the Southern Ocean, as regulated under the Convention on the Conservation of Antarctic Marine Living Resources.[79] The negotiation of this treaty dealt specifically with the issue of whether it should be a traditional fisheries convention or a broadly conceived conservation regime, having opted for the latter in adopting the ecosystem approach and multispecies regulations that allow dealing with fisheries in the context of a modern conservation strategy. This has allowed for the enactment of conservation measures limiting the fishing effort by means of the limitation or prohibition of catches, appropriate reporting, and closing of fishing areas.[80]

The precautionary approach has also been applied under this convention in a number of respects that bring this regime in line with the most advanced developments in international environmental law.[81] Multispecies management, the regulation of by-catches, and the introduction of ''precautionary total allowable catches'' for a number of species and areas, have been expressions of this policy. The procedures for initiating a new fishery are an important application of the precautionary approach. The CCAMLR Ecosystem Monitoring Program has been an important tool

[78] *Ibid*., at 109.

[79] J. Barnes, ''The emerging Convention on the Conservation of Antarctic Marine Living Resources: an attempt to meet the new realities of resources exploitation in the Southern Ocean,'' in Jonathan I. Charney (ed.), *The New Nationalism and the Use of Common Spaces*, 1982, 239–286; David M. Edwards and John A. Heap, ''Convention on the Conservation of Antarctic Marine Living Resources: a commentary,'' *Polar Record*, Vol. 20, 1981, 353–362.

[80] Karl-Hermann Kock, ''Fishing and conservation in southern waters,'' *Polar Record*, Vol. 30, 1994, 3–22.

[81] Francisco Orrego Vicuña, ''The regime of Antarctic marine living resources,'' in F. Francioni and T. Scovazzi (eds.), *International Law for Antarctica*, 1996, 127–157; Francisco Orrego Vicuña, ''The effectiveness of the decision-making machinery of CCAMLR: an assessment,'' in Jorgensen-Dahl and Ostreng, *The Antarctic Treaty System in World Politics*, 1991, 25–42; John A. Heap, ''Has CCAMLR worked?,'' in Jorgensen-Dahl and Ostreng, *The Antarctic Treaty System*, 43–53; Matthew Howard, ''The Convention on the Conservation of Antarctic Marine Living Resources: a five-year review,'' *International and Comparative Law Quarterly*, Vol. 38, 1989, 104–149; Robert J. Hofman, ''Convention for the Conservation of Antarctic Marine Living Resources,'' *Marine Policy*, Vol. 17, 1993, 534–536.

in the management of this broad conservation strategy. It should also be noted that the issue of straddling stocks has been partly dealt with under this convention by requesting member states to ensure that their flag vessels harvesting stocks occurring both within and outside the convention area conduct their activities in the adjacent areas responsibly and with due respect for the conservation measures in force under the convention.[82] In this situation the straddling stocks occur between the convention area, in turn covering both high seas areas and areas claimed to be under national jurisdiction, and adjacent areas of the high seas, thus dealing with a framework much broader than the one usually taken into account in straddling stocks arrangements.

Inspection procedures have been improved under CCAMLR and a scheme of international scientific observation providing for scientific observers on board vessels operating in the area has also been enacted. The effectiveness of conservation measures has been greatly enhanced as a result of renewed institutional arrangements that have closely associated the decision-making process with the input of scientific advice. The experience of CCAMLR has also been significantly influential in the straddling stocks agreement concluded in 1995.

Since jurisdictional issues have for long been closely associated with the development of the law of the sea, a number of other precedents or situations offered relevant experiences for consideration in the context of high seas fisheries, particularly regarding coastal state action. As noted above, Article 7 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas provides for the adoption of measures by the coastal state if negotiations have not resulted in an agreement with other parties within six months; although such measures could be challenged under dispute settlement mechanisms they would remain in force pending such resolution or disagreement.[83] It has been rightly noted that there is no similar provision in the Convention on the Law of the Sea.[84] Similar proposals by the United States in the Seabed Committee have also been recalled in this context.[85] The Bering Sea negotiations and a number of other situations relating to high seas enclaves have been a major source of precedents for coastal state actual or

[82] CCAMLR, Resolution 10/XII, 1994.

[83] See pp. 18–21 above.

[84] International Law Association, report cited in note 3 above, at 270, note 70.

[85] *Ibid*., at 270, with reference to the United States proposal authorizing the coastal state to exercise jurisdiction to prescribe and enforce conservation measures if no agreement had been reached in four months, UN Doc. A/AC. 138/SC. II/L. 40.

intended action in connection with high seas fisheries.[86] Boarding and inspection in the high seas, as noted above, has also been a common practice in recent bilateral and multilateral arrangements.

Besides the case of fisheries arrangements and related matters there is also a growing practice concerning the exercise of jurisdiction over vessels in the high seas for the control of narcotic drugs[87] and serious environmental damage.[88]

The network of treaties and other arrangements that has been outlined evidences a strong international practice leading in the direction of corrective approaches to the problems that had emerged in the conservation and management of high seas fisheries. While this trend took hold and materialized in specific solutions, a process that normally takes time, national approaches to the very same question began to emerge involving different models of coastal state participation. This aspect of contemporary practice will be examined next.

[86] See generally notes 65 and 66 above and see also US Senate, Resolution 396, calling for negotiations with the Soviet Union to establish a moratorium on high seas fishing in the doughnut hole area, 21 March 1988; and the Republic of Korea–New Zealand Fisheries Agreement of 16 March 1978, under which New Zealand regulations for the exclusive economic zone shall be observed in the high seas, *New Zealand Treaty Series*, 1978, No. 4.

[87] For references to United States and other action in the high seas in relation to ships suspected of transportation of narcotic drugs and other crimes, see Tullio Treves, ''Codification du droit international et pratique des états dans le droit de la mer,'' *Recueil des Cours de l'Académie de Droit International*, Vol. 223, 1990-IV, 9–302, at 223; Olivier Jalbert, ''Straddling stocks, protection of the environment and drug control: unsolved problems of coastal states' powers and obligations,'' in Rudiger Wolfrum (ed.), *Law of the Sea at the Crossroads*, 1993, 411–419; Christina E. Sorensen, ''Drug trafficking on the high seas: a move toward universal jurisdiction under international law,'' *Emory International Law Review*, Vol. 4, 1990, 207–230; Jeffrey D. Stieb, ''Survey of United States jurisdiction over high seas narcotics trafficking,'' *Georgia Journal of International and Comparative Law*, Vol. 19, 1989, 119–147; 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, 1989, 1161–1229; Council of Europe, ''Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances,'' 31 January 1995. See also IMO, ''Resolution on prevention and suppression of acts of piracy and armed robbery against ships,'' 6 November 1991, A 17/Res. 683, 21 November 1991, *NILOS Yearbook*, Vol. 7, 1991, at 711; IMO, ''Resolution on measures to prevent and suppress piracy and armed robbery against ships,'' 4 November 1993, A 18/Res. 738, 17 November 1993, *NILOS Yearbook*, Vol. 9, 1993, at 797; and see the information contained in the Reports of the United Nations Secretary-General A/48/527, paras. 53–54, and A/49/631, Section IX, both cited in note 1 above.

[88] For an Italian case concerning environmental damage see Tullio Scovazzi, ''La cattura della nave *Fidelio*,'' *Rivista di Diritto Internazionale*, Vol. LXXV, 1992, 1015–1022.

Chile's presential sea approach: a restricted model of coastal state intervention

Chile's ''presential sea'' concept began to unfold forcefully when high seas fisheries pressures seriously built up in the southeast Pacific and threatened the productivity of the exclusive economic zone, in addition to continuing violations of the latter by foreign fishing vessels.[89] The Chilean fishing industry has also gradually become involved in high seas fisheries. The area where the concept was to be applied was geographically defined, not to signal a claim to a new maritime zone as has often been supposed,[90] but simply to identify such area of the high seas where Chilean interests were or could be more directly involved. The high seas nature of the area was never put in doubt and was expressly reaffirmed.

The new concept met with a degree of support and expression of interest[91]

[89] Jorge Martinez Busch, ''La gran tarea de esta generación es la ocupación efectiva de nuestro mar,'' Clase magistral dictada por el Comandante en Jefe de la Armada, Valparaiso, 4 May 1990; Jorge Martinez Busch, ''El mar presencial, actualidad, desafíos y futuro,'' Clase magistral dictada por el Comandante en Jefe de la Armada, Valparaiso, May 1991; Jorge Martinez Busch, ''El territorio oceánico de Chile y el desarrollo económico nacional,'' Seminario de la Armada de Chile, Valparaíso, 26–28 May 1993, 127–132; Jorge Martinez Busch, ''El mar presencial: un nuevo concepto unificador del derecho internacional del mar,'' *Revista de Derecho de la Universidad de Concepción*, Vol. 60, 1992, 7–24; Jorge Martinez Busch, *Oceanopolítica: Una Alternativa Para el Desarrollo*, 1993.

[90] Henkin, Pugh, Schachter, and Smit, *International Law: Cases and Materials*, 1993, at 1236; Armas, *El Derecho Internacional*, at 124; for a description of the concept as a ''territorial claim'' see *Geographical Magazine*, February 1994, at 5.

[91] Francisco Orrego Vicuña, ''The 'Presential Sea': defining coastal States' special interests in high seas fisheries and other activities,'' *German Yearbook of International Law*, Vol. 35, 1993, 264–292; Francisco Orrego Vicuña, ''Toward an effective management of high seas fisheries and the settlement of the pending issues of the law of the sea,'' *Ocean Development and International Law*, Vol. 24, 1993, 81–92; Francisco Orrego Vicuña, ''La 'Mer de Presence': un nouveau développement en droit international à l'égard de la pêche en haute mer,'' *Espaces et Ressources Maritimes*, Vol. 7, 1993, 32–46; Francisco Orrego Vicuña, ''De Vitoria a las nuevas políticas de conservación y aprovechamiento de los recursos vivos del mar,'' in Araceli Mangas Martín, *La Escuela de Salamanca y el Derecho Internacional en América: Del pasado al futuro*, 1993, 139–153; Francisco Orrego Vicuña, ''New approaches under international law to the issue of high seas fisheries,'' *Liber Amicorum Eduardo Jimenez de Aréchaga*, 1994, 745–761; Francisco Orrego Vicuña, ''Coastal states' competences over high seas fisheries and the changing role of international law,'' *ZaöRV*, *Heidelberg Journal of International Law*, Vol. 55, 1995, 520–535; Kwiatkowska, ''The high seas fisheries regime,'' at 340–341; Jane Gilliland Dalton, ''The Chilean Mar Presencial: a harmless concept or a dangerous precedent?,'' *International Journal of Marine and Coastal Law*, Vol. 8, 1993, 397–418; Ernesto J. Rey Caro, ''La conservación de los recursos vivos en la alta mar y las nuevas tendencias de la legislación en América Latina,'' Instituto Hispano-Luso-Americano de Derecho

and also with opposition by some academic writings[92] and diplomatic exchanges.[93] In a number of cases such opposition was based not on fact but on presumed intentions in the view that the 200-mile exclusive economic zone had originated in Chile; this led some authors to question the long-term implications behind this proposal.[94] However, if a strict legal analysis is undertaken and practice is examined it can be seen that there is no ground for such criticism. In fact, the specific references to the concept in the 1991 Chilean Fisheries Law[95] are devoid of any jurisdictional claims, and when there could be a jurisdictional implication

Internacional, XVIII Congreso, 1994; James L. Zackrison and James E. Meason, ''Chile, 'Mar Presencial,' and the Law of the Sea,'' *Naval War College Review*, Vol. 50, 1997, 65–83. On Latin American practice relating to the law of the sea see generally Ernesto J. Rey Caro, ''La conservación,'' 3–15; Frida M. Armas Pfirter, ''Straddling fish stocks and highly migratory fish stocks in Latin American practice and legislation: new perspectives in light of currrent international negotiations,'' *Ocean Development and International Law*, Vol. 26, 1995, 127–150; Francisco Orrego Vicuña, ''Trends and issues in the law of the sea as applied in Latin America,'' *Ocean Development and International Law*, Vol. 26, 1995, at 93–103; and generally Maria Teresa Infante (guest editor), *Latin America and the Law of the Sea*, *Ocean Development and International Law*, Vol. 26, 1995, 93–187.

[92] Thomas A. Clingan, Jr., ''Mar Presencial (the Presential Sea): déjà-vu all over again? – a response to Francisco Orrego Vicuña,'' *Ocean Development and International Law*, Vol. 24, 1993, 93–97; Christopher C. Joyner and Peter N. DeCola, ''Chile's Presential Sea proposal: implications for straddling stocks and the international law of fisheries,'' *Ocean Development and International Law*, Vol. 24, 1993, 99–121; José Antonio de Yturriaga Barberán, ''Los mares presenciales: del dicho al hecho no hay tanto trecho,'' *Anuario Hispano-Luso-Americano de Derecho Internacional*, Vol. 12, 1995, 389–439; José A. de Yturriaga, *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea*, 1997, 227–257.

[93] See in particular France, Diplomatic Note No. 184, 25 June 1992, addressed by the French embassy in Santiago to the Chilean Ministry of Foreign Affairs on behalf of the European Union; United Kingdom, Note No. 141/92, 17 November 1992, addressed by the British Embassy in Santiago on behalf of the European Union to the Chilean Ministry of Foreign Affairs; for replies see Diplomatic Notes of the Chilean Ministry of Foreign Affairs No. 015060, 13 July 1992, and No. 25562, 1 December 1992; see further Commission des Communautés Européennes, Note de dossier, 18 décembre 1992, à l'égard de la réunion du groupe de hauts fonctionnaires sur le droit de la mer à Londres de 14/15 décembre 1992, para. 5. See also references to a Danish diplomatic note, on behalf of the European Union, to the Chilean Ministry of Foreign Affairs in reply to Note No. 25562 CPE, copc 1369, 1993. For references to diplomatic *démarches* by Belgium and Spain see Kwiatkowska, ''The high seas fisheries regime,'' at 341.

[94] See for example Clingan, ''Mar Presencial,'' at 94.

[95] Chile, Law No. 19080, *Official Journal*, 6 September 1991, 10; and Decree No. 340, *Official Journal*, 21 January 1992, at 2, Art. 2(25). All references are to the Articles as updated by the latter decree. Other parliamentary initiatives have been introduced in Chile in order to include the presential sea concept in the Civil Code and other laws; see for example Motion No. 406–07, 1991, of the Socialist Group in the House of Representatives amending the Civil Code, and comments by María Teresa Infante in

attached to a given provision there is an express condition of it being subject to treaties in force or to international law generally.

One provision of the 1991 Chilean Fishing Law is the definition of an area of the high seas where national interests can have a role, a situation which is certainly not inconsistent with international law. On the contrary, it can be regarded in itself as a lawful exercise of the freedom of the high seas. A second provision provides incentives to Chilean fishing vessels operating in the area by waiving fishing fees,[96] a decision which falls entirely under the economic policy of the country so deciding. The 1991 Chilean Fishing Law has also entrusted the Navy and the Fisheries Department with the task of keeping a record of fisheries activities undertaken in the area in accordance with treaties and other agreements;[97] although nothing in this provision can be considered contrary to international law or the Convention on the Law of the Sea, for fisheries surveillance is a common practice under many international agreements, it has been specifically objected to in some diplomatic *démarches*.[98] A general reference to the presential sea can also be found in the 1994 Law on the Environment in respect of gathering information on the control of environmental quality in the area.[99]

One particular provision of the Fisheries Law could have potential jurisdictional implications in so far as conservation measures may be enacted for stocks existing in the exclusive economic zone and in the high seas, while other measures may also be enacted for highly migratory species, marine mammals, and anadromous stocks.[100] This aspect, however, is not so much related to the presential sea question as to the general issue of straddling stocks and highly migratory species under the law of the sea. It should also be noted that this provision is not mandatory in itself since measures ''may'' be enacted, and further the Ministry of Foreign Affairs must be consulted in all such cases. The policy followed in this matter is similar to that of various cases where the same kind of problems have been met, such as the Bering Sea, the Sea of Okhotsk, and certain high seas areas close to New Zealand.

Penalties can also be applied in certain cases, particularly in terms of

''Legislative Report'' No. 33, Centro de Estudios y Asistencia Legislativa, Universidad Católica de Valparaíso, May 1992.

[96] Art. 43. [97] Art. 172.

[98] France, Diplomatic note cited in note 93 above.

[99] Chile, Law on General Basis of the Environment, No. 19300, *Official Journal*, 9 March 1994, 3, Art. 33.

[100] Art. 165.

prohibiting or regulating the landing of straddling stocks fished in the high seas in violation of conservation measures. Also, when there is evidence that fisheries activities in the high seas are adversely affecting the resources or their exploitation by Chilean vessels in the exclusive economic zone, the landing of catches, the supplying of ships, or the provision of other direct or indirect services in Chilean ports or other areas of the exclusive economic zone and the territorial sea may be prohibited. It should be noted that none of these provisions purport to enforce conservation measures or penalties against third parties in the high seas, responding simply to the policy of not facilitating domestic services to vessels engaged in depredatory activities. The Russian approach to the Sea of Okhotsk conservation problems has not been entirely different. In the *Poulsen* case the European Court of Justice recognized that conservation measures in force for the European Community jurisdictional waters and even beyond such limits in certain areas, can be enforced in respect of vessels of third states in the internal waters or in a port of a member state, including the confiscation of fish cargo in transit.[101] The same court in the *Mondiet* case and other decisions has affirmed Community powers to regulate fisheries in the high seas, with particular reference to driftnets.[102]

It follows from the above discussion that the potential activities that Chile could undertake in relation to fisheries in the presential sea area are consistent with international law while involving a certain clarification and perfection of given aspects of the law in this context. A number of these innovations would also find a place in the 1995 agreement on straddling fish stocks and highly migratory fish stocks. Other activities that Chile has undertaken in this area have been mandated by international agreements in force, such as search and rescue, security of navigation, meteorological reporting, and pollution control.[103] Practice also shows that Chile has prosecuted vessels flying its flag for violation of conservation measures in the high seas enacted under international conventions;[104] furthermore, Chile has refrained from exercising jurisdic-

[101] Court of Justice of the European Communities, Decision of 24 November 1992 in Case C-286/90, *Anklagemyndigheden* v. *Peter Michael Poulsen, Diva Navigation Corp*.

[102] Court of Justice of the European Communities, Decision of 24 November 1992 in Case 405/92, *Etablissements Armand Mondiet SA* v. *Armement Islais SARL*.

[103] Orrego Vicuña, "The 'Presential Sea' concept: defining coastal states' special interests," at 269.

[104] Convention on the Conservation of Antarctic Marine Living Resources, report of the meeting of the Standing Committee on Observation and Inspection, 1992, in Commission, *Report of the Eleventh Meeting*, 1992, at 89, para. 25.

tion over foreign vessels navigating in the exclusive economic zone even in the event of collision with Chilean fishing vessels,[105] and that jurisdiction has only intervened in cases of fishing violations.[106]

It should also be noted that, as soon as the United Nations negotiations got under way, the presential sea concept was put on hold by the Chilean government, thus evidencing the intention of not pursuing unilateral solutions if other viable alternatives are available under international law. A statement by the President of Chile has endorsed the presential sea concept and has related it to Articles 116–119 of the Convention on the Law of the Sea, emphasizing at the same time the role of the United Nations negotiations and other related agreements. It was expressly stated on this occasion that the Chilean initiative ''does not pretend the modification of any of the maritime areas established under international law and it is rooted in the tradition of seeking a positive response when faced with the existing shortcomings of international law.''[107]

Argentina's jurisdictional claim: advancing coastal states' interests

A second model leading to potential unilateral action is provided for by the Argentine legislation enacted in 1991.[108] The Law on Maritime Areas of the Argentine Republic provides in connection with high seas fisheries that ''National regulations on conservation of resources shall apply beyond 200 miles to migratory species and to those associated with the trophic chain of species found in the Argentine exclusive economic zone.'' This approach differs from the presential sea concept in two important aspects. First, it is not related to a specific geographical area but to the high seas as far as connected with the exclusive economic zone in terms

[105] *Canadian Reefer*, as cited in Orrego Vicuña, ''The 'Presential Sea' concept: defining coastal states' special interests,'' at 272, note 20.

[106] Orrego Vicuña, ''The 'Presential Sea' concept: defining coastal states' special interests,'' at 270, note 14.

[107] Discurso del Presidente Eduardo Frei R. T. al inaugurar el mes del mar, Escuela Naval, Valparaíso, 2 May 1994.

[108] Argentina, Law No. 23.968, *Official Journal*, 5 December 1991, 1, Art. 5. For comments see Ernesto J. Rey Caro, ''Los espacios maritimos argentinos en la ley 23.968,'' *Revista La Ley*, Córdoba, 7 November 1991, 925–940, at 934; also in *Anuario Argentino de Derecho Internacional*, Vol. 4, 1990–1991, 225–248; Rey Caro, ''La conservacion,'' at 5–6; Armas, *El Derecho Internacional*, at 241–242; Frida M. Armas Pfirter, ''Más allá de la zona económica exclusiva,'' *Communitas*, 1994, 108–112, at 110. See also the Declaration of Argentina on ratifying the Law of the Sea Convention, 18 October 1995, para. (c). For a reference to the 1992 Peruvian legislation on straddling stocks beyond and adjacent to the exclusive economic zone see Meltzer, ''Global overview,'' at 272.

of species interaction or migratory patterns, a situation which may prove to be very broad indeed. Secondly, the Argentine approach is mandatory as indicated by the expression ''shall.'' A draft Law on the National Regime of Fisheries introduced in the Argentine Congress further confirmed this approach by providing for the extension of ''national jurisdiction'' beyond the exclusive economic zone in relation to straddling stocks and migratory species.[109]

Despite the fact that the Argentine legislation strongly advances coastal states' jurisdictional claims over the high seas it has not met with strong diplomatic or scholarly opposition. In 1992 the European Union and Argentina signed an agreement on relations in the sea fisheries sector, under which tariff reductions are granted in the European market and joint ventures and financial assistance shall be developed.[110] Under this agreement the parties shall cooperate in the promotion of the conservation and the rational exploitation of fish stocks on a sustainable basis ''in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea.''[111] A general safeguard is also written into the agreement to the extent that nothing in it ''shall affect or prejudice in any way the views of either Party with regard to any matter relating to the Law of the Sea.''[112]

The Argentine legislation has not been implemented by means of regulations on conservation, thus signaling the preference for a negotiated international solution as long as it will be effective and timely. Since Argentina was an active participant in the United Nations negotiations on straddling fish stocks and highly migratory fish stocks, it is quite likely that any further developments of the legislation of this country will be consistent with the provisions of the 1995 agreement.

Canada's high seas jurisdictional claims: new implications for international law

The third model of national practice that needs to be examined has far-reaching implications for international law. The Canadian amendment of

[109] Argentina, Draft Law on the National Regime of Fisheries, Art. 5, Cámara de Diputados, Trámite Parlamentario No. 162, 20 December 1991, 4590, as cited by Rey Caro, ''La conservacion,'' at 6, note 12. See further Alberto Luis Daverede, ''Medidas unilaterales a la luz del derecho internacional del mar,'' Comisión Permanente del Pacífico Sur, *Pacífico Sur*, No. 21, Lima, 1994, 68–80.

[110] Agreement on Relations in the Sea Fisheries Sector Between the European Economic Community and the Argentine Republic, 30 November 1992, Council Regulation (EEC) No. 3447/93, 28 September 1993, *EC Official Journal*, No. L318/1, 20 December 1993.

[111] *Ibid*., Art. 3. [112] *Ibid*., Art. 11.

1994 to the Coastal Fisheries Protection Act[113] and the subsequent amendments of the regulations made thereunder[114] have introduced for the first time direct exercise of jurisdiction by the coastal state over high seas fisheries of straddling stocks. This legislation is a part of the Canadian effort to solve the question of overfishing of straddling stocks in the high seas that has greatly affected the productivity of the exclusive economic zone of this country.[115] Serious disputes arose in connection with the enactment and the enforcement of this legislation, a matter which also significantly influenced the United Nations negotiations that were being held at the time.

The problems posed concern not only the unilateral action of Canada as a coastal state but also the effectiveness of the conservation measures adopted under the Northwest Atlantic Fisheries Organization as the major governing international agreement on the matter for this area.[116] NAFO had established in 1994 a moratorium for the fishing of certain straddling stocks, following similar actions taken by Canada in relation to its jurisdictional waters, but strong disagreement resulted from the allocation of quotas to the European Union leading to the unilateral determination by the latter of higher quotas for the fishing of Spanish and Portuguese vessels. The jurisdictional crisis then became inevitable. The quota limits have been finally settled by agreement,[117] under which the parties will comply with all the decisions of NAFO on conservation and

[113] Canada, Coastal Fisheries Protection Act, RSC 1985, c. C-33, and amendment of 1994, Statutes of Canada, 1994, c. 14, in *International Legal Materials*, Vol. 33, 1994, at 1383.

[114] Canada, C. P. 1994-836, 25 May 1994, and amendments of 1995, SOR/95-136, *Canada Gazette*, Part II, 1995, at 650. See generally Peter G. G. Davies, ''The EC/Canadian fisheries dispute in the northwest Atlantic,'' *International and Comparative Law Quarterly*, Vol. 44, 1995, 927–939.

[115] Oceans Institute of Canada, ''Managing fisheries resources.'' See also William E. Schrank, Blanca Skoda, Paul Parsons, and Noel Roy, ''The cost to government of maintaining a commercially unviable fishery: the case of Newfoundland 1981/82 to 1990/91,'' *Ocean Development and International Law*, Vol. 26, 1995, 357–390.

[116] Sergei Vinogradov and Patricia Wouters, ''The turbot war in the northwest Atlantic: quotas and the conservation and management of marine living resources,'' in Rudiger Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, 1996, 599–622; P. Fauteux, ''L'organisation des pêches nord-ouest et le conflit Canada–CEE,'' *Revue de l'INDEMER*, No. 2, 1994, 65–90.

[117] Canada–European Community, Agreed Minute on the Conservation and Management of Fish Stocks, 20 April 1995, *International Legal Materials*, Vol. 34, 1995, at 1260. As a consequence of this Agreement the controverted parts of the Canadian Coastal Fisheries Protection Regulations were repealed; SOR/95-222, *Canada Gazette*, Pt. II, Vol. 129, No. 10, 1995, at 1445. On action to exclude states not parties to NAFO from fishing in the high seas contrary to NAFO management measures in the area, see note 35 above and associated text. See also Canadian Mission to the United Nations in

management, while working together to exclude non-NAFO fishing vessels, revitalizing the organization, improving surveillance, and avoiding the abuse of objection procedures. This situation, however, quite clearly evidenced that the breakdown of mechanisms of international cooperation or their ineffectiveness to deal with the fundamental issues results in unilateral action as an alternative.[118]

The sequence of jurisdictional claims by Canada is also indicative of the close interconnection existing between the exclusive economic zone and high seas fisheries. Beginning with the Coastal Fisheries Protection Act in 1985 which dealt only with problems of fishing in the exclusive fisheries

Geneva, ''Canada–EU reach agreement to conserve and protect straddling stocks,'' *Environmental Conservation*, Vol. 22, 1995, 99.

[118] See generally Paul Fauteux, ''L'initiative juridique canadienne sur la pêche en haute mer,'' *Canadian Yearbook of International Law*, Vol. 31, 1993, 33–86; Paul Fauteux, ''The Canadian legal initiative on high seas fishing,'' *Yearbook of International Environmental Law*, 1993, 51–77; Douglas Day, ''Tending the Achilles' heel of the Northwest Atlantic Fisheries Organization (NAFO): Canada acts to protect the nose and tail of the Grand Banks,'' *Marine Policy*, Vol. 19, 1995, 257–270; Douglas Day, ''Public policy and ocean management in Canada,'' *Marine Policy*, Vol. 19, 1995, 251–256; William E. Schrank, ''Extended fisheries jurisdiction: origins of the current crisis in Atlantic Canada's fisheries,'' *Marine Policy*, Vol. 19, 1995, 285–299; Lennox O. Hinds, ''Crisis in Canada's Atlantic sea fisheries,'' *Marine Policy*, Vol. 19, 1995, 271–283; G. L. Lugten, ''Fisheries war for the halibut,'' *Environmental Policy and Law*, Vol. 25, 1995, 223–229; Clyde Kirby Wells, ''Foreign overfishing of the high seas adjacent to Canada's exclusive economic zone,'' *Studia Diplomatica*, Vol. 45, 1992, 17–28; R. Apostle and K. Mikalsen, ''Lessons from the abyss: reflections on recent fisheries crises in Atlantic Canada and North Norway,'' *Dalhousie Law Journal*, Vol. 18, 1995, 96–115; Peter Underwood, ''To manage quotas or manage fisheries? The root cause of mismanagement of Canada's groundfish fishery,'' *Dalhousie Law Journal*, Vol. 18, 1995, 37–43; ''After the collapse,'' *Dalhousie Law Journal*, Vol. 18, 1995, 5–167; Debora MacKenzie, ''The cod that disappeared,'' *New Scientist*, 16 September 1995, at 24. The extension of the 200-mile exclusive economic zone was considered as an alternative in Canada, for which see Douglas M. Johnston, *The Theory and History of Ocean Boundary-Making*, 1988, at 253; Michael Sean Sullivan, ''The case in international law for Canada's extension of fisheries jurisdiction beyond 200 miles,'' *Ocean Development and International Law*, Vol. 28, 1997, 203–268; and the statement by Canada's Fisheries and Oceans Minister John Crosbie, *Globe and Mail*, Toronto, 14 January 1992. For other fisheries questions see Philippe Maguedet, ''Les négociations franco-canadiennes en matière de pêche: analyse d'un contentieux non résolu,'' *Espaces et Ressources Maritimes*, No. 7, 1993, 69–86; Bruce N. Shibles, ''Implications of an international legal standard for transboundary management of Gulf of Maine–Georges Bank fishery resources,'' *Ocean and Coastal Law Journal*, Vol. 1, 1994, 1–34; Ted L. McDorman, ''The west coast salmon dispute: a Canadian view of the breakdown of the 1985 treaty and the transit license measure,'' *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 17, 1995, 477–506; Robert J. Schmidt, ''International negotiations paralyzed by domestic politics: two-level game theory and the problem of the Pacific Salmon Commission,'' *Environmental Law*, Vol. 26, 1996, at 95.

zone, following with the 1994 amendments which envisaged high seas fishing by vessels without nationality and vessels using flags of convenience, and culminating in the 1995 amendments to include European Union vessels, the sequence shows how one step inevitably led to the next if internationally agreed solutions had not been found in the process.

The jurisdictional content of the Canadian claims envisages prescriptive powers to identify the relevant straddling stocks and the class of foreign fishing vessel to which the legislation shall apply. Most importantly measures may be prescribed in order to ensure that such a vessel "does not engage in any activity that undermines the effectiveness of conservation and management measures" adopted under NAFO. Powers to arrest individuals and seize offending vessels, including where necessary the use of force, were also provided for under the legislation. It was under these powers that the Spanish fishing vessel *Estai* was seized in early 1995.

The legislative enactments of Canada and the action taken thereunder prompted strong diplomatic reactions and a debate about the meaning of international law in the matter of high seas fisheries.[119] Referring to the 1994 amendments the European Union stated:

> On the basis of the principles and practices of customary international law, the European Union expresses its utmost concern and preoccupation at this development, notably because this action calls into question the principles of management and exploitation of fishery resources on the High Seas, laid down in the United Nations Convention on the Law of the Sea. The European Union deeply regrets this action taken by Canada, which has stated that it would always abide by the provisions underpinning the current state of international law in this domain.[120]

[119] Francis Rigaldies, "La nouvelle loi Canadienne sur la protection des pêches côtières: légitimité n'est pas légalité," *Espaces et Ressources Maritimes*, Vol. 8, 1994, 252–272; Jean-Luc Prat, "La loi Canadienne du 12 mai 1994 sur la protection des pêches côtières ou l'unilatéralisme Canadien réactivé," *Espaces et Ressources Maritime*, Vol. 8, 1994, 273–305; L. Lucchini, "La loi canadienne du 12 mai 1994: la logique extrême de la théorie du droit préférentiel de l'état côtier en haute mer au titre des stocks chevauchants," *Annuaire Français de Droit International*, 1994, 864–875; William T. Abel, "Fishing for an international norm to govern straddling stocks: the Canada–Spain dispute of 1995," *University of Miami Inter-American Law Review*, Vol. 27, 1996, 553; Donald Fitzpatrick, "The Canada/Spain fishing dispute and the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks," Comment, *Review of European Community and International Environmental Law*, Vol. 4, 1995, 346–348.

[120] European Commission, Diplomatic Note of 20 May 1994 addressed to the Canadian Minister of Foreign Affairs and the Canadian Minister of Fisheries and Oceans. On the incident relating to the fishing vessel *Estai* see the letter of 31 March 1995 from the Permanent Representative of Spain to the United Nations addressed to the Secretary General, *Law of the Sea Bulletin*, No. 28, 1995, at 32.

A distinguished Spanish diplomat has also written that:

The actions of the Canadian Government constitute a flagrant violation of the freedom of navigation and fishing in the high seas consecrated both by customary and conventional international law. As the EC has observed, it is regrettable that Canada, which normally upholds and supports international law, has chosen the course of unilateral action. While distinguished jurists in Chile and Argentina elaborate ingenious theories such as the doctrine of the ''Presential Sea'' to justify what is unjustifiable, Canada does not bother about legal technicalities and resorts to gunboat diplomacy.[121]

The essential point of contention was precisely the changing role of international law in this matter. The various interpretations of the Convention on the Law of the Sea that were examined above in connection with high seas fisheries also came to the fore in this particular controversy, with particular reference to Articles 116–119. In this context the Canadian action has been both justified and deplored depending on the view taken on those interpretations.[122] Spain initiated proceedings before the International Court of Justice on the ground that the Canadian legislation affects the very principle of the freedom of the high seas beyond the issue of fisheries.[123] Canada also invoked in justification of its actions the doctrine of necessity and self-protection under international law, the question of reprisals and countermeasures,[124] and the precautionary principle embodied in both the Stockholm and Rio Declarations.[125] Again, these doctrines

[121] José A. de Yturriaga, ''Canada's Presential Sea 'de facto','' *LOS Lieder*, Law of the Sea Institute, April 1995, 1–2, at 2. See also generally José Antonio de Yturriaga Barberán, *Ambitos de soberanía en la Convención de las Naciones Unidas sobre el Derecho del Mar: una perspectiva española*, 1993.

[122] Yturriaga, ''Canada's Presential Sea,'' at 1–2; J. Alan Beesley, ''Canada and Spain: a conservation dispute,'' *LOS Lieder*, Law of the Sea Institute, April 1995, 1–3; Yturriaga, ''Canada's non-compliance with international law in the arrest of the Spanish vessel *Estai* in the high seas,'' *LOS Lieder*, September 1995, 5–7; José Juste Ruiz, ''La entrada en vigor del Convenio de las Naciones Unidas sobre el Derecho del Mar y los intereses españoles,'' *Anuario Argentino de Derecho Internacional*, Vol. VII, 1996–1997, 167–184, at 178–181; Beesley, ''The conservation dispute,'' *LOS Lieder*, December 1995, 1–2; David Freestone, ''Canada and the EU reach agreement to settle the Estai dispute,'' *International Journal of Marine and Coastal Law*, Vol. 10, 1995, 397–411.

[123] International Court of Justice, Communiqué, No. 95/8, 29 March 1995; see also Davies, ''The EC/Canada fisheries dispute,'' at 932–933.

[124] See generally B. Applebaum, ''The straddling stocks problem: the northwest Atlantic situation, international law, and options for coastal state action,'' in Alfred H. A. Soons (ed.), *Implementation of the Law of the Sea Convention through International Institutions*, 1990, 282–317.

[125] Beesley, ''Canada and Spain,'' at 3.

have been much debated in relation to both international law generally and this dispute in particular.[126]

It should be noted that commentators who have questioned the soundness of the Canadian attitude have also pointed to the problem of the Convention on the Law of the Sea being inadequate in terms of the conservation and management of high seas fisheries, with particular reference to straddling stocks.[127] To that extent these developments were not independent from the negotiations undertaken at the United Nations on straddling fish stocks and highly migratory fish stocks and can indeed be considered as a part of a broader Canadian strategy to ensure that the latter negotiations would move forward to accommodate the interest of affected coastal states.[128] The leading Canadian role in these negotiations was evidence that the preferred option for this country was to seek an effective solution under international law. It would follow that the passive role that the law of high seas fisheries had in the past needed to give way to new approaches.

Advancing international law: a conclusion on contemporary practice

The practice that has been examined, while not uniform nor always clear about its meaning and extent, evidences important trends in the law of high seas fisheries when fundamental national interests are confronted with the shortcomings of international law to cope with new situations and problems relating to the conservation and management of scarce resources. Coastal state action substituting for ineffective forms of international cooperation or the absence of agreement is a predominant development in current international practice, but in most instances this option has been approached with restraint in order to facilitate the possibility of reaching agreed solutions. Furthermore, in many cases the unilateral option has been the major factor inducing the attainment of solutions that had otherwise proven elusive.

In either alternative the end result is quite similar from the point of view of the introduction of conservation measures, establishment of allowable catches, and allocation of quotas among participants, although lesser forms of conservation are also quite common. In most cases, new

[126] Davies, ''The EC/Canada fisheries disputes,'' at 935–938; Rigaldies, ''La nouvelle loi Canadienne,'' at 270–272.

[127] Davies, ''The EC/Canada fisheries disputes,'' at 935; Prat, ''La loi Canadienne,'' at 303.

[128] Beesley, ''The conservation dispute,'' at 2.

entrants are restricted and required to abide by the conservation measures in force, while parties not willing to observe such arrangements are inevitably excluded. The improvement of enforcement is also a common feature of this practice, including the boarding, inspection, and seizure of vessels under agreed procedures or other options. It can be safely argued that the whole array of measures included in the most recent agreements had precedents under contemporary practice to a greater or lesser extent.

The experience gathered in recent years in terms of the interaction of national claims and the response of international law, not unlike many other historical experiences, also powerfully reveals that the issue lies not in the establishment of new maritime zones but in the exercise of badly needed regulatory authority to ensure conservation or the introduction of market mechanisms to this effect. The option of so doing under international law or under unilateral state action depends essentially on the effectiveness and timeliness of the solutions envisaged.

New concepts and views of international law have resulted in a changed role which is beginning to address this question by means of the development of effective international cooperation. Coastal states' recent claims and policies cannot be regarded in this context as a first indication of a process of nationalization of the high seas, but on the contrary can be identified as an inducement to new arrangements where the relevant interests can be accommodated in a manner compatible with current environmental realities. Nothing could be more harmful to international law than the continued present situation of uncontrolled high seas fisheries operations which would result in serious damage to the collective interest of the community of nations. As it will be examined next this accommodation is forcefully moving forward.

5 The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks

The evolution of the regime of high seas fisheries outlined in the preceding chapters had gradually pointed towards a greater integration between the traditional principles of international law governing fisheries and the emerging concerns about the environmental implications of the uses of the oceans in general and the exploitation of its resources in particular. Problems and issues associated with sustainable development, biodiversity, and ecosystem management had emerged prominently in this context. It was therefore quite natural that this discussion would be vigorously taken up in the preparations and deliberations related to the United Nations Conference on Environment and Development (UNCED) together with a host of other pressing environmental questions. Both the framework of these deliberations in UNCED and the specific mandate of the conference that was convened as a result perfected the link between fisheries and conservation of resources. This chapter will examine the preparatory process leading to UNCED, the convening of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and the general legal characteristics of the resulting 1995 agreement.

The preparatory work of the United Nations Conference on Environment and Development

The preparatory work leading to the United Nations Conference on Environment and Development (UNCED) provided a first major opportunity to undertake the identification of the basic principles that should govern the regime of high seas fisheries in the context of the problems and concerns that had emerged since the signing of the Convention on the Law of the Sea. This opportunity was not a matter of mere

convenience in order to have an available forum to discuss the issue of high seas fisheries but one which was very much related to the issues of substance involved in such regime, particularly in view of the environmental dimension that the relevant principles had acquired in the preceding decade. It was not therefore surprising that the United Nations General Assembly decided to include in its 1989 Resolution 44/228 a broad agenda item on ''Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources,'' which would later become Chapter 17 of UNCED *Agenda 21*.[1] Specific concern about the use of fishing methods and practices having an adverse impact on the conservation and management of marine living resources was also expressed by the General Assembly by its resolutions on the law of the sea in 1989 and 1990.[2]

The UNCED Preparatory Committee gave active consideration within its broad ocean-related mandate to the question of high seas fisheries and straddling stocks, including the problems posed by large-scale harvesting and use of technologies which had been identified as incompatible with the requirements of sustainable management of living resources under the United Nations General Assembly resolutions on driftnets mentioned above. Decision 1/20 adopted in 1990 by this committee referred to the adoption of appropriate measures for the conservation, rational use, and sustainable development of high seas fisheries, a matter that would in turn be linked to the issues of responsible fishing in the high seas which were beginning to be addressed by the FAO and other technical bodies.[3] A

[1] Barbara Kwiatkowska, ''The high seas fisheries regime: at a point of no return?,'' *The International Journal of Marine and Coastal Law*, Vol. 8, 1993, 327–358, at 345–346.

[2] *Ibid*., at 345.

[3] See in particular the following UNCED Decisions: Decision 1/20 of 31 August 1990; Decision 2/18 of 5 April 1991; Decision 3/21 of 4 September 1991; and the ''Report of the Preparatory Committee for the UNCED,'' Doc. A/45/46, 17 October 1990, *NILOS Yearbook*, Vol. 6, 1990, at 139; ''Report of the Preparatory Committee,'' Second Session, Doc. A/46/48, 1991, *NILOS Yearbook*, Vol. 7, 1991, at 260; ''Report of the Preparatory Committee,'' Third Session, Doc. A/46/48/Part II, 23 October 1991, *NILOS Yearbook*, Vol. 7, 1991, at 278; ''Report of the Preparatory Committee for the UNCED on work of its Fourth Session,'' UN Doc. A/CONF. 151/PC/128, 12 May 1992. For other source references see Kwiatkowska, ''The high seas fisheries regime,'' at 345, note 55. And on the UNCED documents on the protection of oceans see generally, Nicholas A. Robinson, *Agenda 21 and the UNCED proceedings*, 1992; Report of the Secretary General of the Conference, Doc. A/CONF. 151/PC/30 and Corr. 1, 30 January 1991, *NILOS Yearbook*, Vol. 7, 1991, at 302; Doc. A/CONF. 151/PC/100/Add. 21, 17 December 1991, *NILOS Yearbook*, Vol. 7, 1991, at 407; Joint Preliminary Contribution of the UNOALOS, UNEP, ECA, ECLAC, ESCAP, FAO, UNESCO, IOC, WMO, IMO, and IAEA, 20 June 1990, *NILOS Yearbook*, Vol. 6, 1990, at 149; ''UNCED

meeting of a group of technical experts on high seas fisheries was also convened in 1991 by the United Nations Office on Ocean Affairs and the Law of the Sea, thereby contributing further to the clarification of the issues involved in high seas fisheries and the possible approaches to developing a new regime on the matter.[4]

Other important initiatives were undertaken in conjunction with the preparatory work for UNCED. A Conference on the Conservation and Management of the Living Resources of the High Seas was convened by the Canadian government and held in St. John's, Newfoundland, 5–7 September 1990,[5] where the adoption of measures to avoid adverse effects of high seas fisheries on living resources under coastal state jurisdiction was emphasized, together with the central principle that management of straddling stocks in the high seas must be consistent with the management regime applied in the exclusive economic zone. This particular interest of the coastal state had already been raised by Chile in the United Nations General Assembly,[6] while the United States in connection with the ''doughnut hole'' question had argued in favor of a ''special interest in these stocks and their conservation.''[7] The interlinkages between the exclusive economic zone and the regime of high seas fisheries would become one of the crucial aspects of the negotiations that would follow.

This process of identification of basic principles governing the matter of high seas fisheries was taken a step further by means of a meeting of experts from Canada, Chile, and New Zealand that met in Santiago on 17 May 1991.[8] While relying on the prior work of the St. John's Conference, the Santiago meeting suggested specific measures to implement the principles mentioned above, with particular reference to the need that

and its implications for fisheries,'' Doc. COFI/93/INF/8, January 1993, *NILOS Yearbook*, Vol. 9, 1993, at 665; ''Survey of existing agreements and instruments and its follow-up,'' Report of the Secretary-General of the Conference, Doc. A/CONF. 151/PC/103, 20 January 1992, *NILOS Yearbook*, Vol. 8, 1992, at 327; and Add. 1, 9 December 1992, with reference to marine living resources at paras. 57–70, *NILOS Yearbook*, Vol. 8, 1992, at 341.

[4] United Nations Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: The Regime for High Seas Fisheries*, 1992. The meeting was held on 22–26 July 1991.

[5] Conference on the Conservation and Management of Living Resources of the High Seas, St. John's, Newfoundland, 5–7 September 1990, mimeo.

[6] Chile, Statement Before the United Nations General Assembly, 20 November 1989, mimeo.

[7] David A. Colson, Statement at the Conference on the Conservation and Management of Living Marine Resources of the Central Bering Sea, 20–21 February 1991, mimeo.

[8] Canada, Chile, New Zealand, ''Conservation and management of living resources of the high seas, principles and measures for an effective regime based on the Law of the Sea Convention and the conclusions of the 1990 St. John's Conference,'' Santiago, 17 May 1991.

the regime adopted for highly migratory species in the high seas must fully recognize the sovereign rights of the coastal state over such species in the exclusive economic zone and must take into consideration the interest of these states in such stocks beyond the areas of national jurisdiction. This approach was of course related to the questions of interpretation of Article 64 of the Convention on the Law of the Sea that were still open at the time.

A larger gathering of interested parties was held in New York on 26 July 1991 with the participation of Argentina, Australia, Barbados, Brazil, Canada, Chile, New Zealand, and the Forum Fisheries Agency, resulting in a Draft Proposal on Conservation and Management of the Living Resources of the High Seas.[9] A related draft resolution on the matter was also introduced at the United Nations General Assembly in 1991[10] but was not submitted to a vote in view that the consideration of the question had already been undertaken in the context of the UNCED preparatory work. The scope of these discussions was broader since they addressed the whole range of issues relating to the conservation and management of living resources of the high seas and not only the question of straddling stocks.

These very same considerations were the basis upon which an important document was introduced at the third session of the UNCED Preparatory Committee in 1991 by several sponsors.[11] The document examined the different provisions of the Convention on the Law of the Sea relevant to the matter and criticized some of the problems of their implementation in practice, with particular reference to unregulated fishing, reflagging, overfishing, and the lack of surveillance, control, and enforcement. As has been rightly commented by Kwiatkowska, the proposal emphasized the special interest of the coastal state in the stocks beyond the exclusive economic zone and the ''consistency rule'' to the

[9] Argentina, Australia, Barbados, Brazil, Canada, Chile, New Zealand, and the South Pacific Forum Fisheries Agency, ''Draft proposal on conservation and management of living resources of the high seas, principles and measures for an effective regime based on the Law of the Sea Convention,'' New York, 26 July 1991.

[10] United Nations General Assembly, Draft resolution on conservation and management of living resources of the high seas, 25 November 1991. For a related concern see the 1991 report of the Secretary General on the Law of the Sea, UN Doc. A/46/724, 5 December 1991, at 38, and discussion by Kwiatkowska, ''The high seas fisheries regime,'' at 348–349.

[11] Argentina, Barbados, Canada, Cape Verde, Chile, Fiji, Guinea-Bissau, Iceland, Kiribati, New Zealand, Peru, Samoa, Senegal, Solomon Islands, and Vanuatu, ''Conservation and management of living resources of the high seas,'' proposal submitted to the Third Session of the Preparatory Committee of UNCED, Doc. A/CONF. 151/PC/WG. II/L. 16, 15 August 1991, *Law of the Sea Bulletin*, No. 19, 1991, 42–44.

effect that the regime applied to straddling stocks beyond such zone should be consistent with that applied by the coastal state under its national jurisdiction so as to avoid any adverse impact on the resources of the exclusive economic zone.[12] It has also been noted that the United States, while not a participant in the core group of coastal States that had emerged in the context of these initiatives, had not been at odds with some of these principles since it had suggested ensuring ''that the high-seas fisheries are not directed toward straddling stocks of marine species fully utilized by fisheries on the same populations in adjacent coastal waters.''[13]

The proposal originally sponsored by thirteen coastal states was resubmitted to the UNCED Preparatory Committee in March 1992 with a total sponsorship of forty coastal states.[14] This revised document took into account the various principles and measures that had been suggested in the different phases of the diplomatic initiative and as a consequence offered a more comprehensive and systematic coverage of the issue of high seas fisheries. In the Preparatory Committee, however, opinions were divided between those favoring an integrated approach for the whole area of distribution of the stocks and those who would rather keep the high seas separate from the exclusive economic zone subject only to a link based on the consistency rule explained above and the high seas interests of the coastal state.[15] Ecosystem approaches were also proposed in this context.[16] To an extent the concept of the special interest of the coastal state in the high seas was also expressed in connection with the moratorium on commercial whaling.[17]

The environmental dimension of the 1992 coastal states' proposal was eloquently expressed in two of the basic principles suggested. The first

[12] Kwiatkowska, ''The high seas fisheries regime,'' at 347–348.

[13] *Ibid*., at 347–348 with reference to the United States proposal on ''Oceans – principles on the use and protection of the marine environment,'' UN Doc. A/CONF. 151/PC/WG. II/L. 15, 13 August 1991, para. 16.

[14] UN Doc. A/CONF. 151/PC/WG. II/L. 16, Rev. 1, 16 March 1992, *NILOS Yearbook*, Vol. 8, 1992, at 397.

[15] Francisco Orrego Vicuña, ''The 'Presential Sea': defining coastal states' special interests in high seas fisheries and other activities,'' *German Yearbook of International Law*, Vol. 35–1992, 1993, 264–292, at 286. See also Francisco Orrego Vicuña, ''New approaches under international law to the issue of high seas fisheries,'' in *International Law in an Evolving World: Liber Amicorum Eduardo Jiménez de Arechaga*, 1994, 745–761, at 752–753.

[16] United States, document cited in note 13 above.

[17] Kwiatkowska, ''The high seas fisheries regime,'' at 348, with reference to the ''Compilation Document – Report of the Secretary-General of the Conference,'' UN Doc. A/CONF. 151/PC/104, Annex II, 27 August 1991, 44–50; and Annex III, 15 October 1991, at 57–63, and Appendix I to Annex III, at 64–65.

principle addressed the issue of sustainable, ecologically sound fishing practices while the second dealt with the broader questions of sustained conservation and relations in the ambit of ecosystem management:

(a) High seas fishing must be carried out only on the basis of sustainable ecologically sound practices, effectively monitored and enforced, in order to ensure conservation and promote optimum utilization of the living resources.
(b) In order to ensure sustained conservation of those resources, fisheries management regimes must effectively maintain the ecological relationship between dependent and associated populations, prevent any decrease in the size of harvested populations below those necessary to ensure their stable recruitment, and avoid adverse impacts or changes in the marine ecosystem.[18]

Two additional principles emphasized the special interest and responsibility of coastal states in the high seas fisheries in relation to straddling stocks and highly migratory stocks and the objective that high seas fishing must not have an adverse impact on the resources under the jurisdiction of the coastal state.[19] Various specific measures were also proposed to give effect to such principles, including the monitoring and control of fishing by nationals, the availability of all data relating to catches and scientific research related thereto, compliance with the conservation and management rules in force, the establishment of penalties under domestic law, and cooperation to establish international organizations or arrangements.[20] The consistency rule appeared prominently among these measures in the following paragraphs of the proposal:

8. With respect to a stock occurring both within the exclusive economic zone of a coastal State and in an area of the high seas adjacent to it, the management regime applied to the stock must provide for consistency of the measures applied on the high seas with those applied by the coastal State within its exclusive economic zone.
9. With respect to a highly migratory species, the management regime on the high seas must fully recognize the sovereign rights of the coastal State in its exclusive economic zone and, taking into account the special interest of the coastal State in the species while outside its zone, avoid an adverse impact on the resources within that zone.[21]

These principles and measures found important support in several

[18] Document cited in note 14 above, Principles, paras. (a) and (b).
[19] *Ibid*., Principles (c) and (d).
[20] *Ibid*., Measures 1–7. [21] *Ibid*., Measures 8 and 9.

governmental and non-governmental meetings that were convened in conjunction with the work of UNCED. A number of non-governmental organizations and governments meeting in New York on 31 March 1992, endorsed the coastal states' proposal highlighting the need for states to control their vessels in the high seas, the importance of preparing multinational agreements on conservation, and the special rights of coastal states over straddling stocks, while also warning of the dangers of extending jurisdiction beyond 200 miles that would otherwise emerge as a result of the inability or unwillingness to cope with the existing problems.[22] The regulation of high seas fisheries, the special interests and responsibilities of coastal states and the utilization of sustainable and ecologically sound practices were also endorsed by the Oceans Day convened by the Oceans Institute of Canada at the Global Forum meeting parallel to the UNCED conference.[23]

Meetings held by various Latin American governments and organizations also had occasion to discuss the issues related to high seas fisheries and make recommendations that were supportive of the basic principles outlined above. A meeting of Latin American countries of the southeast Pacific in connection with UNCED, held in Santiago 11–12 May 1992, also endorsed the principle of sustainable and ecologically sound fishing practices,[24] while a ministerial meeting of the Permanent Commission of the South Pacific supported a precautionary approach in respect of fishing in adjacent high seas areas.[25] Similar views were expressed in the Meeting of American Ministers and Officials in Charge of Fisheries held in Santiago on 1 December 1992.[26]

[22] New York Declaration on "High seas overfishing – protecting the commons," proposed by NGOs and governments, 31 March 1992.

[23] Oceans Institute of Canada, Oceans Day at Global Forum, "The blue planet: oceans and the Earth Summit. Call for commitment," Rio de Janeiro, 8 June 1992. See also Oceans Institute of Canada, "Activating sustainable development of the oceans: the partnership agenda," NGO working meeting, Rio de Janeiro, 9 June 1992, preliminary report.

[24] Reunión de Coordinación de Paises Latinoamericanos ribereños del Pacifico Oriental en relación con la Conferencia Mundial sobre Medio Ambiente y el Desarrollo, Santiago, 11–12 May 1992.

[25] Declaración de la IV Reunión de Cancilleres de los Paises Miembros de la Comisión Permanente del Pacifico Sur, Lima, Peru, 4 March 1993, para. 8.

[26] First Meeting of Fisheries Ministers and Officials of American Countries, Santiago, 1 December 1992; see in particular the Statement by Mr. Robert Applebaum (Canada) and Mr. Andrés Couve (Chile), at 21–31 and 43–51 respectively.

The UNCED deliberations and the convening of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks

At the time the United Nations Conference on Environment and Development met in Rio de Janeiro, 3–14 June 1992, positions on the question of high seas fisheries were sharply divided between the group of coastal states sponsoring the documents on new principles and measures examined above and a group of distant-water fishing nations generally led by the European Community. The draft text of *Agenda 21* on this matter as prepared in the last meeting of the UNCED Preparatory Committee had quite clearly reflected the concerns of coastal states but at the same time also revealed the basic points objected to by fishing nations.[27] There was first a commitment to cooperate to ensure that high seas fishing did not have an adverse impact on the marine living resources under national jurisdiction of coastal states, although various alternatives to this text had also been submitted.[28]

More importantly, the draft text referred specifically to cooperation between fishing states and coastal states with a view to agreeing on measures to ensure the conservation and sustainable use of straddling stocks. Such measures included both the consistency rule and the special interest and responsibility of coastal states. However, by means of the use of brackets there was also clear indication that some fishing states objected first to the text as a whole and secondly to some of its specific language. In particular there was a disagreement about whether these measures should apply on the high seas, as favored by coastal states, or whether, by deleting such reference, the question of the area of application might have been left open or even hinted at application in areas under national jurisdiction, as favored by fishing nations.[29]

The paragraph dealing with highly migratory species met with similar problems.[30] Measures to ensure the conservation and management of such stocks were also called for, with particular reference to the recognition of sovereign rights of the coastal state in the exclusive economic zone and of its special interest beyond such zone so as to avoid adverse impacts on such stocks under national jurisdiction. Here again the text was

[27] UN Doc. A/CONF. 151/PC/WG. II/L. 25/Rev. 1, 30 March 1992.
[28] Kwiatkowska, ''The high seas fisheries regime,'' at 349–350.
[29] Document cited in note 27 above, para. 53.
[30] *Ibid*., para. 54.

objected to as a whole and in particular in relation to whether such measures would apply on the high seas.

While the initiatives underlying this discussion were clearly directed to deal only with high seas fisheries and not with questions relating directly or indirectly to the exclusive economic zone or other areas under national jurisdiction, fishing nations had successfully introduced the threat to extend any such regime to areas under national jurisdiction on the argument of the biological unity of the stocks and the inseparability of their area of distribution. However, it was only too obvious that this approach was designed to counter the coastal state initiative. This question would become the crucial issue of the negotiations in UNCED and beyond and still divides opinions about the meaning and interpretation of the 1995 agreement.

The fact of the matter is that, in view of these fundamental disagreements, any progress on this question in UNCED had become impossible. *Agenda 21* therefore resorted to a compromise under which an intergovernmental conference should be convened

> ... with a view to promoting effective implementation of the provisions of the United Nations Convention on the Law of the Sea on straddling fish stocks and highly migratory fish stocks. The Conference, drawing *inter alia* on scientific and technical studies by FAO, should identify and assess existing problems related to the conservation and management of such fish stocks, and consider means of improving cooperation on fisheries among States, and formulate appropriate recommendations. The work and the results of the conference should be fully consistent with the provisions of UNCLOS, in particular the rights and obligations of coastal states and states fishing on the high seas.[31]

Although the bracketed provisions of the draft mentioned above were deleted and the language used was neutral, the text of the compromise is not devoid of significance. The compromise first refers to the implementation of the provisions of the Convention on the Law of the Sea, thereby providing a linkage to specific Articles that deal with high seas fisheries. Secondly, the text provides for the need to ensure full consistency with such provisions. In spite of the intense discussion surrounding the negotiation and interpretation of those Articles, the issues involved have been quite clearly identified and the compromise does not therefore allow for the inclusion of separate questions not forming a part of the original framework or that would deviate from the reasonable meaning of the Convention's provisions in this matter. The practice of the implementa-

[31] *Agenda 21*, Chapter 17, para. 17.50. The compromise agreement was included in Doc. A/CONF. 151/4 (Part II), Chapter 17, Draft 4, of 6 June 1992.

tion of the Convention also becomes most relevant in this regard. The fact that this paragraph has been included in Section C of Chapter 17 of *Agenda 21* is also significant because this section deals exclusively with the ''Sustainable use and conservation of marine living resources of the high seas.'' Since the compromise is at the very heart of the mandate of the conference on straddling fish stocks and highly migratory fish stocks it provides a first criterion as to the interpretation of the provisions of the 1995 agreement and the correct understanding of their meaning and extent.

It should also be noted that Chapter 17 of *Agenda 21* includes other provisions on high seas fisheries that are meaningful. Paragraph 17.49 mandates states to take effective action to ensure that high seas fisheries are managed in accordance with the provisions of the Convention on the Law of the Sea and in particular to give full effect to the provisions on straddling stocks and highly migratory species, to negotiate effective management and conservation agreements, and to define and identify appropriate management units. It is of interest to note that throughout it refers to ''high seas fisheries'' and therefore the question of applying such a mandate elsewhere does not arise. Again this provision is included in Section C of *Agenda 21* dealing with high seas issues. Other paragraphs deal with questions of incidental catch, compliance, reflagging, driftnets, and the work of the International Whaling Commission, thus providing for a broad framework of high seas issues to be addressed in the context of various international regimes and reflecting the concerns of current international practice.[32]

Straddling stocks and highly migratory species are also referred to under paragraph 17.80 of Section D on living resources under national jurisdiction, again in the context of the implementation of the provisions of the Convention on the Law of the Sea. Access to the surplus of allowable catches is expressly conditioned by this paragraph to the objective that coastal states should obtain the full social and economic benefits from sustainable utilization of marine living resources within their exclusive economic zones and other areas under national jurisdiction, thus confirming that such access is governed by the coastal states' sovereign rights in the exclusive economic zone. To the extent that the access applies also to straddling stocks and highly migratory species it will be equally governed by the regime of the exclusive economic zone and not by international regimes in force for the high seas.

[32] *Agenda 21*, paras. 17.51, 17.52, 17.53, 17.55 and 17.62.

The high seas issues embodied in *Agenda 21* were also discussed in a number of other meetings held in conjunction with the UNCED negotiations or immediately thereafter. Particularly relevant was the Conference on Responsible Fishing convened by FAO, held in Cancun, Mexico, 6–8 May 1992,[33] which advanced the work leading to the FAO Code on Responsible Fishing that will be commented on further below; this conference called on states to resolve the differences then still existing in the UNCED Preparatory Committee to convene a special intergovernmental conference on high seas fisheries.[34] Following the UNCED mandate, the FAO also convened the Technical Consultation on High Seas Fishing held in Rome, 7–15 September 1992, the technical studies of which have been discussed above.[35] This consultation refrained, however, from discussing the legal issues involved in the high seas fisheries question because such an exercise would be undertaken by the conference on straddling fish stocks and highly migratory fish stocks foreseen in the UNCED compromise. Broad interregional meetings and understandings also began to emerge in preparation of the negotiations that would follow UNCED. A particularly interesting meeting was the one held jointly by ASEAN, the Pacific island states, and the Permanent Commission of the South Pacific in Manila on 12–13 October 1992, which brought together countries from the western, central and eastern Pacific to discuss fisheries problems of common concern, with particular reference to the management of tuna as a shared highly migratory species.[36] Depletion of resources both in the high seas and the exclusive economic zones, monitoring, enforcement, dispute settlement, and coordination of strategies were discussed on this occasion. The Canadian government convened a second meeting of coastal states sharing common positions in St. John's, Newfoundland, on 21–24 January 1993, to discuss strategies for the conference on straddling stocks and highly migratory stocks that would follow shortly thereafter.[37]

As a result of these developments the United Nations General Assembly after considerable discussion adopted on 22 December 1992, Resolution 47/192 convening the United Nations Conference on Straddling Fish

[33] FAO, International Conference on Responsible Fishing, Cancún, Mexico, 6–8 May 1992, and *Declaration of Cancún* adopted on this occasion.

[34] Declaration of Cancún, Agreement IV.

[35] See pp. 60–62 above.

[36] Kwiatkowska, "The high seas fisheries regime," at 352.

[37] Evelyn Meltzer, "Global overview of straddling and highly migratory fish stocks: the nonsustainable nature of high seas fisheries," *Ocean Development and International Law*, Vol. 25, 1994, 255–344, at 324.

Stocks and Highly Migratory Fish Stocks.[38] The mandate of the conference was the one set out in *Agenda 21*, the significance of which has already been examined. The resolution reaffirmed the requirement of consistency with the provisions of the Convention on the Law of the Sea and the need to give full effect to the high seas fisheries provisions on straddling stocks and highly migratory fish stocks, thereby further strengthening the framework devised by *Agenda 21*. The resolution also recalled in particular program area C of Chapter 17 on living resources of the high seas and decided that relevant activities at the subregional, regional, and global levels should be taken into account with a view to promoting the effective implementation of the Convention's provisions. There is here a direct link to current practice on the question of high seas fisheries, a practice which as examined is extremely meaningful as to the trends in the matter and the solutions devised to ensure conservation and related issues.

The 1992 resolution specified in addition that the conference should identify and assess existing problems related to the conservation and management of straddling stocks and highly migratory stocks, consider means of improving fisheries cooperation, and formulate appropriate recommendations. The mandate of the conference was later renewed by Resolution 48/194 of 21 December 1993, and by Resolution 49/121 of 19 December 1994.[39]

During the negotiations leading to the 1992 resolution the issues dividing coastal states from distant-water fishing nations were still very much in the forefront of the discussions. This meant that it was not possible at the time to move from the compromise reached in UNCED in spite of the fact that high seas fisheries involved a number of other matters beyond straddling stocks and highly migratory stocks. This situation deriving from a restricted mandate will not prevent of course the ongoing evolution of international law in the field as evidenced by contemporary practice, with particular emphasis on the question of the special interest of coastal states in the fisheries in adjacent high seas areas.[40]

[38] United Nations General Assembly, Resolution 47/192, 22 December 1992, *International Legal Materials*, Vol. 32, 1993, at 263.

[39] United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, ''Report of the Secretary-General,'' UN Doc. A/50/550, 12 October 1995, para. 6.

[40] Orrego Vicuña, ''New approaches,'' at 758.

Organization of the conference and the issue of the form of its outcome

The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks held six sessions in the period from April 1993 to August 1995.[41] In addition, several intersessional meetings of the main negotiating groups of states were convened.[42] The rules of procedure were adopted in the first session largely following the precedent of the Third United Nations Conference on the Law of the Sea.[43] As clarified by the conference chairman, the participation of observers would be guided by the normal practice of the General Assembly, thereby avoiding the delicate political problems associated with this issue.[44] It was also clarified that non-governmental organizations would have no negotiating role in the work of the conference, a matter which has been increasingly debated in view of the active role of a number of such organizations.[45]

The rules of procedure also dealt with the issue of the participation of the European Union and its member states, innovating in this regard in respect of the Third United Nations Conference. The representative of the European Union was entitled to participate in matters within its competence but without the right to vote, and in no case should this result in an increase of the representation to which member states would otherwise be entitled.[46] The matter was further clarified by the understanding recorded by the conference to the effect that the rule was agreed upon "in view of the fact that, with regard to the conservation and management of the sea fishing resources, States members of the European Economic Community have transferred competence to the Community, and in no way does it constitute a precedent for other United Nations forums where a similar transfer of competence does not occur."[47] It has been rightly

[41] Report cited in note 39 above, para. 7.

[42] D. H. Anderson, "The straddling stocks agreement of 1995. An initial assessment," *International and Comparative Law Quarterly*, Vol. 45, 1996, 463–475, at 467, with reference to the intersessional meetings held in New York, Buenos Aires, Geneva, and Washington. See also generally the reports of the United Nations Secretary-General on the Conference for 1993 and 1994, Docs. A/48/479, 7 October 1993, *NILOS Yearbook*, Vol. 9, 1993, at 237, and A/49/522, 14 October 1994, *NILOS Yearbook*, Vol. 10, 1994, at 326.

[43] United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter cited as UN Conference), *Rules of Procedure*, Doc. A/CONF. 164/6, 3 May 1993. See also Doc. A/CONF. 164/2, 12 April 1993, and Rev. 1, 21 April 1993.

[44] UN Conference, *Report on the Organizational session*, prepared by the Secretariat, Doc. A/CONF. 164/9, 2 June 1993, para. 20.

[45] *Ibid*., para. 20.

[46] *Rules of Procedure*, Rule 2.

[47] *Ibid*., note 1 to Rule 2.

noted that this was the first United Nations legal and fisheries conference in which the European Union was accepted as a full participant, albeit with the restrictions mentioned.[48]

In the first part of its work the conference was confronted with the issue of whether its final outcome should adopt the form of a recommendation or some similar arrangement entailing a non-binding agreement or whether it should proceed to adopt a formal and binding agreement.[49] Although General Assembly Resolution 47/192 had decided that the conference should formulate appropriate ''recommendations'' this was understood as not prejudging in any way the decision that the conference itself would take on the question of the form of the outcome.[50] While a number of coastal states favored the option of a binding agreement,[51] some fishing nations were inclined to non-binding recommendations and guidelines,[52] and other important participants in the conference were flexible on the matter.[53]

The discussion was of course linked to questions of substance since binding rules would facilitate the implementation and enforcement of the new arrangements designed to govern high seas fisheries as opposed to looser commitments that would largely depend on the goodwill of fishing states.[54] More importantly, the matter was also related to the issue

[48] Anderson, ''The straddling stocks agreement,'' at 467, with reference to the similar precedent established for the participation of the Community in the Northwest Atlantic Fisheries Organization and the North Atlantic Salmon Conservation Organization.

[49] Moritaka Hayashi, ''The role of the United Nations in managing the world's fisheries,'' in Gerald H. Blake *et al.* (eds.), *The Peaceful Management of Transboundary Resources*, 1995, 373–393, at 378–379.

[50] Informally, however, the issue of the conference's competence to go beyond the adoption of ''appropriate recommendations'' was raised in view of the terms of its mandate. See Moritaka Hayashi, ''The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: significance for the Law of the Sea Convention,'' *Ocean and Coastal Management*, Vol. 29, 1995, 51–69, at 52, note 7.

[51] Hayashi, ''The role of the United Nations,'' at 378, with reference to Argentina, Brazil, Canada, Chile, Colombia, Ecuador, Iceland, Mexico, Norway, Peru, Sierra Leone, and Sweden, and draft conventions introduced jointly by Argentina, Canada, Chile, Iceland, and New Zealand, and by Ecuador.

[52] Hayashi, ''The role of the United Nations,'' at 378, with reference to China, Japan, Poland, and the Republic of Korea.

[53] *Ibid*., at 379, with reference to the European Union, Morocco, the Russian Federation, and the United States.

[54] David A. Balton, ''Strengthening the law of the sea: the new agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Ocean Development and International Law*, Vol. 27, 1996, 125–151, at 134.

of whether the outcome of the conference would apply only in the high seas or also in the exclusive economic zone.[55] In the first case, fishing states would oppose binding instruments, while in the second case they were willing to accept them. The discussion was also influenced by the concern that, if no effective and binding solutions were found in the conference, coastal states might have felt inclined to enact unilateral measures for high seas fisheries.[56] The discussion was finally settled in the form of a package because, together with the option of a binding agreement, the application of basic principles to the exclusive economic zone was also decided in the terms that will be examined further below. In the light of these developments, at the time of the third session of the conference opinion had evolved towards a binding agreement and as a consequence the conference chairman gave to his proposed draft texts the form of a binding treaty.[57]

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'' was adopted by consensus on 4 August 1995 and opened for signature on 4 December 1995.[58] It has been aptly commented that the title of the Agreement clearly reflects the intention to provide rules for both straddling stocks and highly migratory stocks based on the framework of the Convention on the Law of the Sea, and while elaborating

[55] *Ibid*., at 134.

[56] *Ibid*., at 134. See also Anderson, ''The straddling stocks agreement,'' at 467, with reference to David Freestone, ''The effective conservation and management of high seas living resources: towards a new regime,'' *Canterbury Law Review*, Vol. 5, 1994, 341–362.

[57] UN Conference, ''Statement made by the chairman of the conference at the closing of the Fourth Session, on 26 August 1994,'' Doc. A/CONF. 164/24, 8 September 1994, para. 4.

[58] UN Conference Doc. A/CONF. 164/37, 8 September 1995. Hereinafter cited as 1995 Agreement. For the text of the 1995 Agreement see also *International Legal Materials*, Vol. 34, 1995, at 1542, and ''Report of the Secretary-General,'' Doc. A/50/550, 12 October 1995. For the Final Act of the conference see Doc. A/CONF. 164/38, 7 September 1995. Two resolutions on early and effective implementation of the 1995 Agreement and on reports on developments were adopted together with the 1995 Agreement and are annexed to the Final Act. As of 15 February 1997 fifty-nine States had signed the 1995 Agreement and twelve had ratified or acceded to it; for periodical updating of the state of ratifications see the following internet site: http://www.un.org/Depts/los. For United States action on ratification see the Message from the President Transmitting the Agreement to the Senate, Treaty Doc. 104-24, 1996; and the hearings on international straddling fisheries stocks, United States House of Representatives, Committee on Merchant Marine and Fisheries, Subcommittee on Fisheries Management, 103rd Congress, First Session, 22 September 1993.

on that framework the Agreement ''never strays beyond it.''[59] This is a

[59] Balton, ''Strengthening the law of the sea,'' at 135. For comments and discussion of the 1995 Agreement and its negotiation see also Ronald Barston, ''United Nations Conference on Straddling and Highly Migratory Fish Stocks,'' *Marine Policy*, Vol. 19, 1995, 159–166; Satya N. Nandan, ''Conservation and management of straddling fish stocks and highly migratory fish stocks under the Convention on the Law of the Sea,'' *Proceedings of the American Society of International Law*, Vol. 89, 1995, 452–455; Satya N. Nandan, ''Statement on the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and its potential impact on Pacific island tuna fisheries,'' Conference on Achieving Goals for Sustainable Living in the Aquatic Continent, Hawaii, 19–23 September 1995; Charles Higginson, ''The UN Conference on High Seas Fishing,'' *Review of European Community and International Environmental Law*, Vol. 2, 1993, 237–244; Note, ''Perspectives on the management of high seas fisheries: the UN Conference on straddling fish stocks and highly migratory fish stocks,'' *Reviews in Fishing Biology and Fisheries*, Vol. 5, 1995, 103; Note, ''Nations seek unity on the high seas. A report on the United Nations Conference on Straddling Stocks and Highly Migratory Species,'' *Australian Fisheries*, Vol. 53, 1994, 24; S. Chasis, ''The Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: an NGO perspective,'' *Ocean and Coastal Management*, Vol. 29, 1995, 71; Mark Christopherson, ''Toward a rational harvest: the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species,'' *Minnesota Journal of Global Trade*, Vol. 5, 1996, 357; Comment, ''Perspectives on the management of high seas fisheries: the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Reviews in Fish Biology and Fisheries*, Vol. 5, No. 1, 1995, 103; Comment, ''UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *World Fishing*, Vol. 44, 1995, 38; Comment, ''United Nations conference tackles enforcement,'' *Australian Fisheries*, Vol. 54, No. 5, 1995, 6; Carlos Dominguez Diaz, ''Towards a new regime for high seas fisheries?,'' *Hague Yearbook of International Law*, Vol. 7, 1994, 25; Gerald H. Blake *et al.* (eds.), *The Peaceful Management of Transboundary Resources*, 1995; Rafael Casado Raigon, *La Pesca en Alta Mar*, 1994; Rafael Casado Raigon, ''L'application des dispositions relatives à la pêche en haute mer de la Convention des Nations Unies sur le droit de la mer,'' *Espaces et Ressources Maritimes*, Vol. 8, 1994, 210–219; Jon M. van Dyke, ''Modifying the 1982 Law of the Sea Convention: new initiatives on governance of high seas fisheries resources: the straddling fish stocks negotiations,'' *International Journal of Marine and Coastal Law*, Vol. 10, 1995, 219–227; Donald M. Grzybowski, ''A historical perspective leading up to and including the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Pace Environmental Law Review*, Vol. 13, 1995, 49; Ryszard Piotrowicz, ''Straddling and Highly Migratory Fish Stocks Conventions,'' *Australian Law Journal*, Vol. 70, 1996, 533; Lisa Speer, ''Conserving and managing straddling, highly migratory fish stocks: United Nations takes a major step forward for marine conservation,'' *Fisheries*, Vol. 21, No. 2, 1996, 4; José A. de Yturriaga, *The International Regime of Fisheries. From UNCLOS 1982 to the Presential Sea*, 1997, 173–227; José A. de Yturriaga, ''Fishing in the high seas: from the 1982 UNCLOS to the 1995 Agreement of Straddling Stocks,'' *African Yearbook of International Law*, Vol. 3, 1995, 151; José A. de Yturriaga, ''Acuerdo de 1995 sobre conservación y ordenación de las poblaciones de peces transzonales y altamente migratorios,'' *Anuario Argentino de Derecho Internacional*, Vol. VII, 1996–1997, 15–61; Moritaka Hayashi, ''The management of transboundary fish stocks under the LOS Convention,'' *International Journal of Marine and Coastal Law*, Vol. 8, 1993, at 245; Moritaka Hayashi, ''United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: an analysis of the 1993

sessions,'' *Ocean Yearbook*, Vol. 11, 1994, 20–45; Ernesto Rey Caro, ''La conservación de los recursos vivos en la alta mar y las nuevas tendencias de la legislación en América Latina,'' Instituto Hispano-Luso-Americano de Derecho Internacional, 1994; R. Hannesson, ''Fishing on the high seas: cooperation or competition?,'' *Marine Policy*, Vol. 19, 1995, 371–377; Barbara Kwiatkowska, ''Straddling and migratory fish stocks in the new law of the sea: reconciling rights, freedoms and responsibilities,'' in R. St. J. Macdonald, *Essays in Honour of Wang Tieya*, 1994, 463–482; William T. Burke, ''Some comments on high seas fishing and international law,'' *ibid.*, 103–113; Patrick E. Moran, ''High seas fisheries management agreement adopted by UN Conference: the Final Session of the United Nations Conference on Straddling and Highly Migratory Fish Stocks,'' *Ocean Coastal Management*, Vol. 27, 1995, 217; Charlotte de Fontaubert, ''The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: another step in the implementation of the Law of the Sea Convention,'' *Ocean Yearbook*, 12, 1996, 82–91; A. C. de Fontaubert, ''The politics of negotiation at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Ocean and Coastal Management*, Vol. 29, 1995, 79; Julie R. Mack, ''International fisheries management: how the UN Conference on Straddling and Highly Migratory Fish Stocks changes the law of fishing on the high seas,'' *California Western International Law Journal*, Vol. 26, 1996, 313–333; André Tahindro, ''Conservation and management of transboundary fish stocks: comments in light of the adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Ocean Development and International Law*, Vol. 28, 1997, 1–58; Lawrence Juda, ''The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A critique,'' *Ocean Development and International Law*, Vol. 28, 1997, 147–166; Habib Gherari, ''L'Accord du 4 août 1995 sur les stocks chevauchants et les stocks de poissons grands migrateurs,'' *Revue Générale de Droit International Public*, Vol. 100, 1996, 367–390; Gwenaële Proutiere-Maulion, ''L'Accord sur l'application des dispositions de la Convention des Nations Unies sur le Droit de la Mer du 10 December 1982 relatives à la conservation et à la gestion des stocks chevauchants et des stocks de poissons grands migrateurs,'' *Espaces et Ressources Maritimes*, No. 9, 1995, 182–196; Emmanuelle Némoz, ''Le principe de liberté de pêche en haute mer et la gestion des ressources biologiques partagées,'' Mémoire de DEA, Institut du Droit de la Paix et du Développement, Faculté de Droit, Université de Nice-Sophia Antipolis, 1995; M. Lehardy, ''Les problèmes juridiques posés par l'exploitation des ressources biologiques de la haute mer,'' Thèse de Doctorat en Droit, IDPD, Université de Nice-Sophia Antipolis, 1966; Comment, ''Fishing on the high seas: the international debate,'' *Australian Fisheries*, Vol. 52, No. 11, November 1993, 28; Andrés Couve, ''Negociaciones sobre el régimen pesquero en alta mar en el marco de la Conferencia de Naciones Unidas,'' *Pacifico Sur*, No. 21, 1994, 137–148; Andrés Couve, ''Itinerario de la negociación en las Naciones Unidas sobre poblaciones de peces transzonales y altamente migratorios,'' *Pacifico Sur*, No. 22, 1996, 123–139; Comisión Permanente del Pacifico Sur, ''Seminario sobre legislación pesquera internacional,'' Lima, 2–4 December 1996; Ellen Hey, ''El régimen jurídico para recursos pesqueros que atraviesan la zona de 200 millas marinas: problema que requiere solución internacional,'' *Anuario Argentino de Derecho Internacional*, Vol. VI, 1994–1995, 151–174; Julie I. Thompson and Pragati Pascale, ''UN Conference on High Seas Fishing adopts legal agreement,'' *Review of European Community and International Environmental Law*, Vol. 4, 1995, 348–349; Elizabeth Wall, ''International developments: fisheries,'' Comment on the General Assembly Debate of the Agreement in 1995, *Review of European Community and International Environmental Law* Vol. 5, 1996, 185–186; ''Declaration of Buenos Aires on the adoption of an effective regime for the conservation of living

decisive point for the question of the interpretation of the relationship between the Agreement and the Convention and the extent to which the Agreement interacts with some fisheries questions in the exclusive economic zone.

The fact that this is an Agreement for the implementation of the Convention has also been related to the precedent of the Agreement relating to the implementation of Part XI of the Convention.[60] However, there are two important differences between these instruments. First, although the 1995 Agreement is closely connected to the Convention, it remains a separate treaty; thus it is possible to be a party to one without necessarily being a party to the other; this is not possible in the Agreement on Part XI where a party to the Convention is legally required to be a party to the Agreement.[61] The most important difference concerns the practical meaning of these instruments because the 1995 Agreement does not in any way amend the Convention while the Agreement on Part XI in essence introduces drastic changes to the Convention's seabed regime disguised in the form of implementation of its provisions.[62]

resources in the area adjacent to the exclusive economic zone,'' International Seminar, 9 June 1994, *NILOS Yearbook*, Vol. 10, 1994, at 157; Kwiatkowska, ''The high seas fisheries regime''; Meltzer, ''Global overview''; Hayashi, ''The role of the United Nations''; Hayashi, ''The 1995 Agreement,'' notes 49, 50; Anderson, ''The straddling stocks agreement''; Balton, ''Strengthening the law of the sea.'' For a collection of the documents of the Conference see Jean-Pierre Lévy and Gunnar G. Schram, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents*, 1996. For the practice of states and international organizations under the 1995 Agreement see the report of the United Nations Secretary-General on the law of the sea on this matter, Doc. A/51/383, 4 October 1996. See also the following resolutions of the United Nations General Assembly on the 1995 Agreement: A/Res./50/24, 22 December 1995; A/Res./51/35, 17 January 1997; and the following resolutions on the law of the sea: A/Res./49/28, 19 December 1994; A/Res./50/23, 22 December 1995 and A/Res./51/34, 17 January 1997.

[60] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, 29 July 1994, *International Legal Materials*, Vol. 33, 1994, at 1309; and see Balton, ''Strengthening the law of the sea,'' at 135.

[61] Anderson, ''The straddling stocks agreement,'' at 467–468.

[62] For a discussion of the 1994 Agreement see generally D. H. Anderson, ''Further efforts to ensure universal participation in the United Nations Convention on the Law of the Sea,'' *International and Comparative Law Quarterly*, Vol. 43, 1994, at 886; Moritaka Hayashi, ''The 1994 Agreement for the universalization of the Law of the Sea Convention,'' *Ocean Development and International Law*, Vol. 27, 1996, 31–39; J. P. Lévy, ''Les bons offices du Secrétaire Général des Nations Unies en faveur de l'universalité de la Convention sur le Droit de la Mer: la préparation de l'accord adopté par l'Assemblée Générale du 28 juillet 1994,'' *Revue Générale de Droit International Public*, Vol. 98, 1994, 871.

Interpretations and problems relating to the definitions of the 1995 Agreement

Some of the definitions provided for under Article 1 of the 1995 Agreement have touched upon important aspects of interpretation and position by the negotiating parties. A number of these questions will probably reappear in the context of the implementation of the 1995 Agreement or in disputes between states parties concerning specific issues.

A first aspect is related to the definition of ''conservation and management measures.'' In some proposals these were referred to as ''international conservation and management measures,'' with the specific meaning of their being applicable to the high seas and adopted under international mechanisms of cooperation.[63] The approach in this regard was borrowed from the definition of ''international conservation and management measures'' embodied in the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.[64] The definition of the 1995 Agreement, while not using the expression ''international,'' follows almost to the letter that of the FAO precedent in referring to ''measures to conserve and manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law as reflected in the Convention and this Agreement.''[65] It follows that in essence these are also international measures to be applied in the context of the matters covered by the 1995 Agreement, which are of course broader than those envisaged under the FAO instrument.

The 1995 Agreement has also defined the term ''arrangement'' as a cooperative mechanism for the purpose, *inter alia*, ''of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.''[66] The FAO precedent has referred to the matter in broader terms since it envisages global, regional, or subregional fisheries organizations.[67] The negotiations

[63] Argentina, Canada, Chile, Iceland, and New Zealand, ''Draft convention on the conservation and management of straddling fish stocks on the high seas and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 11/Rev. 1, 28 July 1993, Art. 1(a).

[64] FAO, ''Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas,'' 24 November 1993, *International Legal Materials*, Vol. 33, 1994, at 968, Art. I(b).

[65] 1995 Agreement, Art. 1(1)(b).

[66] 1995 Agreement, Art. 1(1)(d).

[67] FAO Agreement cited in note 64 above, Art. 1(b).

on this point in the context of the United Nations Conference were difficult in view of the concerns expressed about the effectiveness of global arrangements and for that matter of a treaty of global extent, with some participants having a preference for regional and subregional solutions.[68] On the other hand, the discussion was linked to the problems of participation in such arrangements because some countries insisted on guarantees of openness and transparency while others emphasized the need to ensure coastal state participation.[69] The solution adopted relies on regional and subregional arrangements but operating under common basic rules established by both the Convention and the 1995 Agreement, while the issues relating to participation have been dealt with in other parts of the 1995 Agreement.

In conjunction with the definition of ''States Parties'' the 1995 Agreement refers also to its application to other entities. It is firstly made applicable *mutatis mutandis* to the self-governing associated states and other territories mentioned in Article 305 of the Convention.[70] It is next made applicable to international organizations as provided for in Annex IX, Article 1, of the Convention.[71] This last provision basically solved the problems of participation of the European Union in that it covers organizations to which its member states have transferred competence over matters governed by the Convention.[72] The 1995 Agreement, however, has further refined these type of arrangements by providing in Article 47 for two separate situations. When the organization does not have competence over all the matters governed by the 1995 Agreement and it shares such competences with the member states, Annex IX of the Convention applies with minor adjustments for the signature of the 1995 Agreement and deposit of instruments of confirmation and accession,

[68] Balton, ''Strengthening the law of the sea,'' at 134.

[69] International Institute for Sustainable Development, *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, comments on the Agreement's Art. 1, at 3.

[70] 1995 Agreement, Art. 1(2)(b)(i).

[71] 1995 Agreement, Art. 1(2)(b)(ii).

[72] On developments relating to the European Union Common Fisheries Policy see generally Angela Del Vecchio, ''La politique commune de la pêche: axes de développement,'' *Revue du Marché Unique Européen*, No. 2, 1995, 27–36; Yann-Huei Song, ''The EC's Common Fisheries Policy in the 1990s,'' *Ocean Development and International Law*, Vol. 26, 1995, 31–55; David Symes and Kevin Crean, ''Historic prejudice and invisible boundaries: dilemmas for the development of the Common Fisheries Policy,'' in Blake, *Peaceful Management*, 395–411. See also the literature cited in note 7 p. 81 above.

delinking such steps from the requirement of a majority of member states having done the same.[73]

When the organization does have competence over all the matters governed by the 1995 Agreement, at the time of signature or accession it must make a declaration stating so and that its member states shall not become states parties, except to the extent that they keep responsibility for some territories; in that declaration the organization must also accept the rights and obligations of states under the 1995 Agreement, thus depriving its member states of any such rights. It is further provided that in case of conflict between the obligations under the 1995 Agreement and the obligations under the treaty establishing the organization, those under the Agreement shall prevail.[74] It has been appropriately explained that this Article is ''designed to make it clear for the benefit of other states in the world exactly where competence and responsibility lie, each time an issue arises, as between the Community and its member states.''[75]

Another novel provision on participation is that applying the 1995 Agreement *mutatis mutandis* to ''other fishing entities whose vessels fish on the high seas.''[76] While intended to cover the situation of Taiwan as a major fishing operator in the world,[77] such a broad definition could in the future give place to other claims in this context, including eventually private and non-governmental organizations.

The only definition relating to fish in the 1995 Agreement is to include in this category of molluscs and crustaceans, with the clarification that those belonging to sedentary species are excepted.[78] This clarification originates in disputes concerning the fishing of scallop by United States vessels in the Canadian continental shelf,[79] and to this extent it contributes to a better implementation of Article 77 of the Convention.

However, the 1995 Agreement does not define either straddling fish stocks or highly migratory fish stocks which are the core of its purpose and objectives. A number of proposals had envisaged the identification of

[73] 1995 Agreement, Art. 47(1).
[74] 1995 Agreement, Art. 47(2).
[75] Anderson, ''The straddling stocks agreement,'' at 474.
[76] 1995 Agreement, Art. 1(3).
[77] Anderson, ''The straddling stocks agreement,'' at 468; Balton, ''Strengthening the law of the sea,'' note 73, at 149.
[78] 1995 Agreement, Art. 1(1)(c).
[79] For reference to a Canadian–United States controversy on the matter in 1994 and subsequent arrangement see Anderson, ''The straddling stocks agreement,'' note 20, at 468. See generally S. V. Scott, ''The inclusion of sedentary fisheries within the continental shelf doctrine,'' *International and Comparative Law Quarterly*, Vol. 41, 1992, 788–807.

the stocks that should be considered by the conference but did not advance criteria to this effect.[80] Another approach was to make the 1995 Agreement applicable to such straddling fish stocks and highly migratory fish stocks in every regional agreement which are considered according to scientific evidence as belonging to these categories by ''virtue of their customary movements or range of distribution during their life cycle,'' and listed in annexes to each regional agreement.[81] In yet another view highly migratory fish stocks would be listed in an annex to the 1995 Agreement while straddling fish stocks would follow the definition of Article 63(2) of the Convention.[82] Other complex definitions based on the movements of species were also proposed.[83] Various proposals by Russia attempted to draw up the specific list of straddling stocks and to elaborate on definitions based on key biological characteristics;[84] various distinctions as to the area of exploitation were offered in relation to both species, a matter which was linked to the definition of the ''adjacent area'' for the purpose of the 1995 Agreement.[85]

The technical complexity of the discussion led to the decision to avoid a general definition of these stocks altogether, a matter which is left to be agreed upon in the context of each regional or subregional organization or arrangement negotiated.[86] This solution is indeed preferable since the specific reality of each region or subregion should be taken into account in such identification of species. In any event the concept of straddling stock is embodied in general terms in Article 63(2) of the Convention, just as Article 64 refers to highly migratory species and Annex I thereto lists

[80] Peru, ''List of issues,'' UN Conference Doc. A/CONF. 164/L. 1, 27 May 1993, Issue 1; Cuba, ''List of issues,'' *ibid*., Doc. A/CONF. 164/L. 12, 13 July 1993, Issue 1.

[81] Chile, Colombia, Ecuador, and Peru, ''Elements of an international agreement on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 14, 16 July 1993, IV, 1.

[82] Argentina, Canada, Chile, Iceland, and New Zealand, draft convention cited in note 63 above, Art. 1(l) and Annex I.

[83] Ecuador, ''Presentation of the working paper for a draft convention on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 44, 23 June 1994, Art. 1(1)(xxiv) and (xxv).

[84] Russian Federation, ''Definition of straddling stocks of marine life and list of their main species,'' Doc. A/CONF. 164/L. 18, 20 July 1993; and Doc. A/CONF. 164/L. 46, 12 July 1994.

[85] Russian Federation, ''Letter dated 27 July 1993 from the alternate chairman of the delegation of the Russian Federation addressed to the chairman of the conference,'' annexing proposed definitions, Doc. A/CONF. 164/L. 32, 27 July 1993; and Doc. A/CONF. 164/L. 32/Add. 1, 12 July 1994, and Doc. A/CONF. 164/L. 47/Corr. 1, 28 March 1995, both referring to the definition of adjacent area.

[86] 1995 Agreement, Art. 9(1)(a).

these species. In spite of the shortcomings of these definitions noted above, they are adequate enough for the purposes of the 1995 Agreement. It has been noted that the listing of highly migratory species of Annex I of the Convention applies with the omission of cetaceans since the 1995 Agreement refers only to highly migratory ''fish'' stocks and cetaceans do not qualify as fish; it has also been noted that anadromous and catadromous species are not covered by the 1995 Agreement, a matter in which the state of origin has a prevailing interest even in the high seas.[87] The 1995 agreement indeed consistently uses the expression ''straddling fish stocks'' and ''highly migratory fish stocks,'' the latter being narrower than the expression ''highly migratory species'' used by the Convention. A proposal by the members of the Permanent Commission of the South Pacific had also indicated in this respect that, for the southeast Pacific, the list of species should not include large cetaceans regulated under the International Whaling Commission nor other migratory species regulated under the Inter-American Tropical Tuna Commission.[88]

General international law provisions and final clauses

Some provisions of the 1995 Agreement refer to general aspects of international law that are important to keep in mind since they have a bearing both on the operation of the 1995 Agreement and on questions of interpretation and disputes that may arise in the future. Article 34 brings the concept of good faith into the fulfillment of obligations and of abuse of rights in connection with the exercise of rights under the 1995 Agreement, following closely on both counts the provision of Article 300 of the Convention. Similarly, Article 35 and its title refer to responsibility and liability under international law for damage or loss attributable to states parties in regard to the 1995 Agreement; again here Article 304 of the Convention has served as a source of inspiration, in addition to the liability under international law provided for under Article 235 of the Convention in the specific context of the protection of the marine environment.[89] Since the 1995 Agreement deals with a matter that relates both to economic and environmental issues, responsibility and liability in this context might become particularly significant to the extent that

[87] Anderson, ''The straddling stocks agreement,'' at 468.
[88] Chile, Colombia, Ecuador, and Peru, document cited in note 81 above, A/CONF. 164/L. 14/Corr. 1, 23 July 1993.
[89] Anderson, ''The straddling stocks agreement,'' at 473.

international law is rapidly evolving to accommodate some of the most pressing concerns in environmental protection.[90]

The effectiveness of the 1995 Agreement is to be assessed in a review conference convened four years after its entry into force, which may also propose means of strengthening the substance and methods of implementation in order to attend to continuing problems of conservation and management.[91] In one proposal this review would have been carried out by the Commission on Sustainable Development on the basis of preparations done by ministers of fisheries within the framework of the FAO, an approach which further evidences the close relationship between high seas fisheries and environmental issues.[92] The review conference is a useful tool for perfecting the arrangements for the conservation and management of high seas fisheries and it has been conceived in a very different spirit from that which inspired the review conference for the seabed regime under Part XI of the Convention on the Law of the Sea.

The usual clauses on signature, ratification, accession, depositary, and entry into force have been included in the final provisions of the 1995 Agreement.[93] It is interesting to note that only thirty ratifications are required to bring the 1995 Agreement into force, a figure which no doubt has been inspired by the difficulties associated with obtaining the sixty ratifications necessary under the Convention on the Law of the Sea arrangements.[94] Provisional application is also possible for those states consenting to this procedure and that have so notified the depository in writing.[95]

Like the Convention the 1995 Agreement does not allow for reservations and exceptions in order to preserve the unity of the instrument and avoid the problem of states accepting parts that are in their interest while rejecting other aspects that are not as convenient.[96] However, declarations and statements may be made provided they do not purport to exclude or to modify the legal effect of the provisions concerned, that is, provided

[90] Francisco Orrego Vicuña, ''Final report on responsibility and liability for environmental damage under international law,'' Institut de Droit International, *Annuaire de l'Institut de Droit International*, Session de Strasbourg, Vol. 1, 1997.

[91] 1995 Agreement, Art. 36.

[92] Sweden, ''Elements of a draft instrument on conservation and management of straddling fish stocks and highly migratory fish stocks compatible with sustainable development,'' Doc. A/CONF. 164/L. 39, 16 March 1994, V.

[93] 1995 Agreement, Arts. 37–40.

[94] Anderson, ''The straddling stocks agreement,'' at 473.

[95] 1995 Agreement, Art. 41.

[96] *Ibid*., Art. 42.

they do not amount to a reservation.[97] The example of a declaration made with a view to the harmonization of national laws and regulations with the provisions of the 1995 Agreement is given in Article 43, but the purpose of such declarations can be very varied as allowed under the *inter alia* reference made in that Article. Declarations and statements made in connection with the Convention on the Law of the Sea were important as to the interpretation of some of its provisions and as an expression of state practice, and a similar role can be expected in the context of the 1995 Agreement; some of the declarations made in connection with the Convention referred to issues which are again relevant under the terms of the 1995 Agreement, particularly in respect of straddling stocks and highly migratory species.[98]

The procedure for amending the 1995 Agreement is somewhat restrictive since the convening of a conference to this effect requires that the pertinent request obtains a favorable reply of not less than one half of the states parties.[99] Since the proposed amendments have to be submitted together with the request this means in fact that a majority favoring the amendments will be needed at the outset. The decision-making procedure and other aspects relating to the adoption of the amendments shall follow the same rules adopted for the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, but the entry into force of such amendments requires the ratification by two-thirds of the states parties, a figure that will in practice probably be more demanding than that required for the entry into force of the 1995 Agreement itself. A smaller or larger number of ratifications may also be specified to bring into force a given amendment.

[97] *Ibid*., Art. 43.

[98] Declarations made by Cape Verde, São Tomé and Principe, and Uruguay referred to straddling stocks and the obligation for fishing states to agree with the coastal state on appropriate conservation measures; declarations by Costa Rica and São Tomé and Principe reaffirmed the right of coastal states to regulate fishing of highly migratory species in the exclusive economic zone, while a declaration by the United States reaffirmed the obligation of cooperation in respect of these species; a declaration by Spain considered that the determination of the allowable catch, establishment of the harvesting capacity, and allocation of surplus in the exclusive economic zone does not fall within the coastal state's discretionary powers. For declarations of states in respect of the Convention on the Law of the Sea, see Daniel Vignes, ''Les déclarations faites par les états signataires de la Convention des Nations Unies sur le Droit de la Mer, sur la base de l'Article 310 de cette Convention,'' *Annuaire Français de Droit International*, 1983, 715–748; and Francisco Orrego Vicuña, *The Exclusive Economic Zone. Regime and Legal Nature under International Law*, 1989, 179–185.

[99] 1995 Agreement, Art. 45.

While normally the amendment procedure shall also apply to the revision of the annexes to the 1995 Agreement, there is added flexibility to the extent that if a revision is adopted by consensus at a meeting of states parties it shall be incorporated in the 1995 Agreement and shall take effect from the date of the adoption or such other date specified.[100] This approach, together with the requirement that revisions be based on scientific and technical considerations, is very much in line with the technique followed by environmental conventions normally providing for a more expeditious revision of technical annexes.

Following the general rules of the law of treaties the 1995 Agreement does not affect the rights and obligations of states parties arising from other agreements that are compatible with its provisions, but neither could this affect the rights and obligations of other states parties under the 1995 Agreement.[101] It is also provided that two or more states parties may conclude agreements modifying or suspending the operation of the provisions of the 1995 Agreement, but this is subject to a number of strict conditions. Such arrangements shall only apply to the relations between the parties concluding them; they cannot relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the 1995 Agreement; they shall not affect the application of the basic principles of the 1995 Agreement; they cannot affect the rights and obligations of other states parties under the 1995 Agreement; and the intention to conclude such an agreement and the modification or suspension sought have to be notified to other states parties. All these conditions aim for the stability and integrity of the 1995 Agreement, but in practice they are likely to lead to important problems of interpretation in the context of the meaning and extent of the regional and subregional organizations or arrangements.

States parties denouncing the 1995 Agreement are encouraged to indicate the reasons for this decision, but failure to do so does not affect the validity of the denunciation, which will take effect one year after the notification.[102] As an added precaution it is provided that denunciation does not affect the duty of a state party to fulfill an obligation embodied in the 1995 Agreement ''to which it would be subject under international law independently of this Agreement.'' As a matter of law this does not add anything new, but reflects well the mistrust guiding the negotiating attitudes of some participants.

[100] *Ibid*., Art. 48.
[101] *Ibid*., Art. 44.
[102] *Ibid*., Art. 46.

6 Conservation and management of fisheries in the high seas in the context of the evolving principles of international environmental law

The United Nations Convention on the Law of the Sea had already reflected the early concerns for the environment in dealing very specifically with the question of protection of the marine environment and more generally with the issues associated with resource exploitation. The 1995 Agreement relating to the conservation and management of straddling fish stocks and highly migratory fish stocks has further perfected this process by introducing conservation and management principles and approaches in the field of fisheries that are directly related to the evolving principles of international environmental law.[1] While the 1995 Agreement is still far from having accomplished the difficult task of ensuring fisheries exploitation in a manner fully consistent with the concept of sustainable development, it has significantly contributed to the attainment of this end. Furthermore, even if the 1995 Agreement applies only to straddling fish stocks and highly migratory fish stocks it has set an important precedent for the conservation and management of high seas fisheries generally, a precedent that will need to be taken into account in any future negotiation on high seas fisheries regimes.

The principle of sustainable development and the conservation of straddling fish stocks and highly migratory fish stocks

The principle of sustainable development has become the guiding element of contemporary regimes dealing with aspects of development

[1] On the principles and trends of international environmental law see generally Philippe Sands, *Principles of International Environmental Law*, 1994; Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment*, 1992; Edith Brown Weiss, *Environmental Change and International Law*, 1992; A. Kiss and D. Shelton, *International Environmental Law*, 1991.

that have a direct or indirect bearing on the environment. As noted above this principle has significantly influenced the evolution of the traditional concepts governing high seas fisheries and other developments in connection with the marine environment, and has been traced back at least to 1893 when it was invoked in the context of the dispute relating to the Pacific fur seals and the need to protect this species for the benefit of mankind.[2]

Specific legal elements of this principle have been identified in respect of the question of future generations, the rational use of natural resources, equity as applied to resource exploitation, and the general integration of environment and development.[3] All these questions have found important applications in the case of fisheries and related marine activities. The concept of future generations, for example, appears prominently in the International Whaling Convention[4] and other treaties dealing with the marine environment,[5] renewable natural resources,[6] and biological diversity,[7] in addition to its role in general treaties and declarations.[8]

The sustainable use of natural resources has also been closely associated with the fisheries conventions in terms of pursuing optimum sustainable yields and similar approaches, a concern which is quite natural in view of the serious depletion that has affected world fisheries. The evolution on this matter as reflected in the 1958 Geneva Convention and the Convention on the Law of the Sea has already been noted,[9] and can also be identified in the context of the International Whaling Convention,[10] tuna,[11] north Pacific fisheries[12] and Antarctic seals,[13] among many other

[2] Sands, *Principles*, at 199. [3] *Ibid*., at 199–208.
[4] International Whaling Convention, 1946, preamble.
[5] Protocol Concerning Cooperation in Combating Oil Spills in the Wider Caribbean Region, Cartagena de Indias, 24 March 1983; *International Legal Materials*, Vol. 22, 1983, at 240, preamble.
[6] Convention on Conservation of Nature in the South Pacific, Apia, 12 June 1976, preamble.
[7] Convention on Biological Diversity, 5 June 1992, *International Legal Materials*, Vol. 31, 1992, at 822, preamble.
[8] Convention for the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, *International Legal Materials*, Vol. 11, 1972, at 1358, Art. 4.
[9] See pp. 6–78 above.
[10] International Whaling Convention, preamble and Art. V(2).
[11] International Convention for the Conservation of Atlantic Tunas, 14 May 1966, Art. IV(2)(b).
[12] International Convention for the High Seas Fisheries of the North Pacific Ocean, Tokyo, 9 May 1952, preamble and Art. IV(1)(b)(ii).
[13] Convention for the Conservation of Antarctic Seals, 1 June 1972, *International Legal Materials*, Vol. 11, 1972, at 251, preamble.

situations. The related concept of rational utilization is also found in numerous conventions on marine fisheries.[14] The concept of the equitable use of natural resources is often found in regimes and conventions dealing with shared natural resources or more specifically with shared fisheries stocks.[15] The more general trend of integrating environment and development has been the core element of major international initiatives such as the Stockholm Conference,[16] the World Charter for Nature,[17] and the United Nations Conference on Environment and Development.[18]

The 1995 Agreement on straddling fish stocks and highly migratory fish stocks would naturally rely on the principle of sustainable development to build on the regime governing high seas fisheries. The objective of the 1995 Agreement as set out in Article 2 is quite explicit on this matter in purporting ''to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the Convention.''[19] This objective is also emphasized in the preamble together with the ''need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimize the risk of long-term or irreversible effects of fishing operations.''[20] It is interesting to note in this regard that the 1995 Agreement links conservation to sustainable use and no longer to mere utilization like the Convention on the Law of the Sea had done; in turn both instruments have reversed the order of priority established by the 1958 Geneva Convention when referring to fishing first and conservation second. The principle of sustainable development was so widely accepted that as early as the negotiations of 1993 the chairman of the conference was able to conclude that there was general agreement ''that the principle of resource sustainability is an essential component of conservation and management.''[21]

The specific meaning and content of this principle were more difficult to agree since there were different approaches to the standards of conservation that might be used. The first approach followed in the negotiations was to define the nature of conservation and management

[14] Sands, *Principles*, at 203. [15] *Ibid*., at 204–205.
[16] 1972 Stockholm Declaration, Principle 13.
[17] 1982 World Charter for Nature, paras. 7 and 8.
[18] See for example the Convention on Biological Diversity Art. 6(b); and the United Nations Framework Convention on Climate Change, 9 May 1992, *International Legal Materials*, Vol. 31, 1992, at 849, preamble.
[19] 1995 Agreement, Art. 2. [20] 1995 Agreement, preamble, paras. 2 and 7.
[21] Statement made by the chairman of the conference at the conclusion of the general debate on 15 July 1993, Doc. A/CONF. 164/12, 21 July 1993, at 2.

measures as including elements relating to both substantive principles and to the measures to be applied in the implementation thereof. The issues identified by the conference chairman at the outset of the negotiations[22] and both the negotiating text[23] and revised negotiating text[24] offered by him had referred in this matter to the standard of maximum sustainable yield, the interdependence of stocks, responsible fishing and the precautionary approach, while at the same time proposing the establishment of total allowable catches and quotas, limits to the fishing effort and size of fish, gear, and operational restrictions, and area and seasonal closures.

However, at a given point in time there was a need to reorder and clarify the approach followed. To this end two technical working groups were established to deal respectively with the precautionary approach and the reference points for fisheries management.[25] As a result of this reordering one major Article was devoted to the general principles and a separate one to the precautionary approach; the technical discussion on reference points led to a special annex on the precautionary approach. A number of the specific measures envisaged in the early part of the negotiations were separated from the general principles and placed among the matters to be agreed upon in the context of the functions of subregional and regional fisheries management organizations and arrangements.

Article 5 of the 1995 Agreement sets out the general principles of conservation and management and, together with the related provisions of Articles 6 and 7, have considerably advanced the "conventional international standards for fisheries management."[26] The adoption of measures to ensure the long-term sustainability of the resource and promote the objective of optimum utilization is the overall mandate established under this provision and as such it shall govern other elements and principles that follow.[27] As discussed in the context of the evolving standards of conservation, several new concepts have been advanced. In this regard "optimum utilization," taken together with sustainable development,

[22] A guide to the issues before the conference prepared by the chairman, Doc. A/CONF. 164/10, 24 June 1993, at 4–5.

[23] Chairman's Negotiating Text, Doc. A/CONF. 164/13, 23 November 1993, Section I. The text is also reproduced in *Environmental Policy and Law*, Vol. 23, No. 6, 1993, at 281.

[24] Revised Negotiating Text, Doc. A/CONF. 164/13/Rev. 1, 30 March 1994, Section III A.

[25] Statement made by the chairman of the conference at the closing of the Third Session, held on 31 March 1994, Doc. A/CONF. 164/19, 9 May 1994, at 3.

[26] D. H. Anderson, "The straddling stocks agreement of 1995: an initial assessment," *International and Comparative Law Quarterly*, Vol. 45, 1996, 463–475, at 469.

[27] 1995 Agreement, Art. 5(a).

offers a standard which allows for the development of resources in a manner which is both respectful of and compatible with conservation. Optimum utilization is also the standard used in Article 62 of the Convention on the Law of the Sea.

This overall objective is supplemented by the requirement of basing measures on the best scientific evidence available and the need to ensure the maintenance or restoration of stocks at levels capable of producing the maximum sustainable yield.[28] While the latter concept has also been open to question, the fact that it is the required standard under Articles 61 and 119(1)(a) of the Convention on the Law of the Sea had a considerable weight in the decision to keep with it under the 1995 Agreement, particularly since the 1995 Agreement was conceived of as implementing the Convention. As in those Articles, maximum sustainable yield is qualified by relevant environmental and economic factors, including the special requirements of developing states, and by the need to take into account fishing patterns, interdependence of stocks and generally recommended international minimum standards. The comments made further above on the significance of these criteria are equally applicable in the context of the 1995 Agreement.

Other general principles established under Article 5 are also closely related to the guiding principle of sustainable development. Ecosystem considerations are present in the assessment of the impacts of fishing, other human activities, and environmental factors on target stocks and associated and dependent species and other species belonging to the same ecosystem,[29] and also in respect of the need to adopt measures to maintain or restore populations of such species above levels at which their reproduction may become seriously threatened.[30] It has been rightly noted that these provisions apply also to other species and not to straddling fish stocks and highly migratory fish stocks alone.[31] On this point the language of Article 119(1)(b) of the Convention on the Law of the Sea has also been followed. Protection of the biodiversity in the marine environment is also an important new principle of conservation that has been introduced in the 1995 Agreement.[32] A commitment to responsible fisheries also appears prominently in the preamble of the 1995 Agreement.[33] As stated by the

[28] 1995 Agreement, Art. 5(b).
[29] 1995 Agreement, Art. 5(d).
[30] 1995 Agreement, Art. 5(e).
[31] David A. Balton, "Strengthening the law of the sea: the new Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks," *Ocean Development and International Law*, Vol. 27, 1996, 125–151, at 136.
[32] 1995 Agreement, Art. 5 (g).
[33] 1995 Agreement, preamble, para. 6.

chairman of the conference, the 1995 Agreement has resulted in the establishment of detailed minimum international standards for the conservation and management of the stocks envisaged.[34]

The general principles of the 1995 Agreement found support in a number of proposals and comments made by states participating in the negotiations, although there were also important differences of approach among them. The position statement submitted by the United States emphasized the principle of ''sustained utilization at high levels of productivity'' and had linked conservation to the long-term maximum sustainable yield;[35] it had also recommended multi-species and ecosystem-oriented management and the establishment of allowable catch levels based on the best available scientific information.[36] The list of issues submitted by Canada also referred both to the general standards of maximum sustainable yield and the effects on associated and dependent species and to specific measures to be included, among which total allowable catches and quotas, promotion of selective fishing gear and practices, and other measures were identified.[37] Australia relied on the concept of optimum sustainable yield and specific measures such as input controls, total allowable catches, quota allocations, and others;[38] Australia and New Zealand also emphasized the question of the effects on associated and dependent species.[39]

The position statement by the European Union included important

[34] Statement made by the chairman of the conference at the closing of the Fourth Session, on 26 August 1994, Doc. A/CONF. 164/24, 8 September 1994, at 2. On the principles and standards of conservation under the Convention on the Law of the Sea and the 1995 Agreement, see also André Tahindro, ''Conservation and management of transboundary fish stocks: comments in light of the adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Ocean Development and International Law*, Vol. 28, 1997, 1–58, at 3–12.

[35] United States, ''Position statement,'' annexed to the letter addressed to the chairman of the conference on 26 May 1993, Doc. A/CONF. 164/L. 3, 1 June 1993, para. 1.

[36] United States, ''Principles on straddling fish stocks and highly migratory fish stocks for use by States, entities and regional organizations,'' comments on a guide to the issues before the conference prepared by the chairman, Doc. A/CONF. 164/L. 15, 16 July 1993, I.2 and I.3.

[37] Canada, ''List of issues,'' annexed to the letter addressed to the chairman of the conference on 28 May 1993, Doc. A/CONF. 164/L. 5, 4 June 1993, Section III. Allowable catch quotas and other measures were also suggested by Uruguay, ''List of issues,'' Doc. A/CONF. 164/L. 34, 29 July 1993.

[38] Australia, ''Comments on issues before the conference,'' Doc. A/CONF. 164/L. 9, 1 July 1993, Section 8. On Australia's position see also generally Anthony Bergin and Marcus Haward, ''Australia's approach to high seas fishing,'' *International Journal of Marine and Coastal Law*, Vol. 10, 1995, 349–367.

[39] Australia and New Zealand, ''Conservation and management of ecologically related

criteria such as ''rational and sustainable utilization,'' responsible fishing, best scientific advice available, precautionary management with certain limits, and incidental catches,[40] and also referred separately to the maximum sustainable yield and to specific measures like the regulation of access, regulation of fishing instruments, regulation of fishing activity, and technical conservation measures.[41] Japan referred in very general terms to the utilization of living resources in the ''interest of mankind'' and that measures on conservation should be taken for the benefit of ''all states concerned'' with a view to ensure the objective of ''optimum utilization.''[42]

Russia[43] and the Ukraine[44] favored the concept of conservation and ''rational utilization,'' although on occasions complex distinctions were made, for example between ''management of stocks (reserves)'' and ''management of fisheries.''[45] The concept of maximum sustainable yield was discussed in detail by the Ukraine.[46] The proposal on the elements of an international agreement introduced by the member states of the Permanent Commission of the South Pacific emphasized the concept of optimum sustainable yield and listed the various specific measures of implementation, with particular reference to maximum catch allowable per species;[47] the draft convention submitted by Argentina, Canada, Chile, Iceland, and New Zealand relied on the language of Article 61 of

species in fisheries for straddling fish stocks and highly migratory fish stocks,'' Doc. A/CONF. 164/L. 23, 23 July 1993.

[40] European Union, ''Position statement,'' annexed to the letter of 14 June 1993 addressed to the chairman of the conference, Doc. A/CONF. 164/L. 8, 17 June 1993, Section I.

[41] European Union, ''Suggested guidelines,'' Doc. A/CONF. 164/L. 20, 21 July 1993, Section I.

[42] Japan, ''List of issues,'' Doc. A/CONF. 164/L. 6, 8 June 1993, I.1.

[43] Russian Federation, ''Main provisions of the regime relating to straddling fish stocks,'' annexed to the letter of 26 July 1993 addressed to the chairman of the conference, Doc. A/CONF. 164/L. 25, 26 July 1993, Section I.1. See also generally the ''List of issues'' submitted by the Russian Federation, Doc. A/CONF. 164/L. 2, 2 June 1993.

[44] Ukraine, ''Conservation and rational utilization of straddling and highly migratory fish species,'' Doc. A/CONF. 164/L. 40, 17 March 1994, 1.

[45] Russian Federation, ''Conceptual approach to the conservation of straddling fish stocks by improving their management,'' Doc. A/CONF. 164/L. 38, 2 March 1994. See also the ''Proposed definitions of some terms,'' annexed to the letter of 27 July 1993 addressed to the chairman of the conference, Doc. A/CONF. 164/L. 32, 27 July 1993.

[46] Ukraine, ''Applicability of the concept of maximum sustainable yield,'' Doc. A/CONF. 164/L. 42, 17 March 1994.

[47] Chile, Colombia, Ecuador, and Peru, ''Elements of an international agreement on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 14, 16 July 1993, Section II.

then Law of the Sea Convention,[48] and that by Ecuador referred to optimum utilization and related criteria.[49] The concept of ''greatest net annual increment'' used in the Convention on the Conservation of Antarctic Marine Living Resources was also present in the discussions of the conference.[50]

An interesting general definition of conservation and management in connection with both sustainable development and future generations' rights was proposed by Sweden: ''Conservation and management of straddling fish stocks and highly migratory fish stocks should be compatible with sustainable use and to that end promote the maintenance of the quantity, quality, diversity and availability of fisheries resources for present and future generations.''[51]

The technical discussion on the standards of conservation and management led both to the establishment of the expert working group referred to above and to the request that the FAO prepare a study on the question of reference points for fisheries management. Various suggestions emerging from these technical studies were later developed in connection with the precautionary approach. Despite the fact that the latter approach has been spelled out in Article 6 of the 1995 Agreement, it is still very much part of the general principles as provided for under Article 5(c).[52]

However difficult the negotiation of the general principles might have been, the end result is that the actual meaning of sustainable development has been specifically advanced in the context of high seas fisheries and related matters. The various principles already discussed reveal this quite clearly. Other principles have also been set out within the same broad objective as will be examined next, and above all the precautionary approach has intervened as a major new element in this process of

[48] Argentina, Canada, Chile, Iceland, and New Zealand, ''Draft convention on the conservation and management of straddling fish stocks on the high seas and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 11/Rev.1, 28 July 1993, Art. 4.

[49] Ecuador, ''Presentation of the working paper for a draft convention on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 44, 23 June 1994, Art. 5. The concept of ''optimal use'' in association with environmentally sustainable practices was also proposed by Argentina, ''List of issues,'' Doc. A/CONF. 164/L. 10, 12 July 1993.

[50] Moritaka Hayashi, ''The role of the United Nations in managing the world's fisheries,'' in Gerald H. Blake *et al.* (eds.), *The Peaceful Management of Transboundary Resources*, 1995, 373–393, at 382.

[51] Sweden, ''Elements of a draft instrument on conservation and management of straddling fish stocks and highly migratory fish stocks compatible with sustainable development,'' Doc. A/CONF. 164/L. 39, 16 March 1994, Section I. 3.

[52] 1995 Agreement, Art. 5(c).

advancement and linkage between the law of high seas fisheries and the present concerns of international environmental law.

The principle of preventive action in the context of the general principles of conservation and management of high seas fisheries

International environmental law has developed the principle of preventive action in order to ensure that action "be taken at an early stage and, if possible, before damage has actually occurred."[53] This principle is separate from the precautionary approach and also separate from the principle of sovereignty over natural resources and the ensuing responsibility not to cause damage to the environment of other states or to areas beyond national jurisdiction as established in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration; this last principle may require the adoption of preventive measures as well. It has been rightly noted that, while the responsibility foreseen in Principle 21 arises from the application of the principle of sovereignty, the principle of preventive action seeks to minimize environmental damage as an objective in itself.[54] This standing of the principle of preventive action on its own merits is particularly significant in relation to high seas fisheries since operations of this nature are not generally linked to questions of sovereignty over natural resources, although occasionally this link may exist in connection with activities under national jurisdiction that have effects on the high seas. Either way the principle will apply in order to prevent damage to such resources or the environment.

The principle of preventive action has been endorsed by major international declarations and treaties and also by specific conventions on fauna and flora, protection of the marine environment, adverse environmental impacts, transboundary impacts, and loss of biodiversity, many of which are directly or indirectly relevant for the situation of high seas fisheries activities.[55] It follows that it would be quite natural for the 1995 Agreement to rely on this principle both in terms of protection of the marine environment and in terms of conservation of the fisheries resources.

Preventive action in the context of the protection of the marine environment is included as a general principle directing states to mini-

[53] Sands, *Principles*, at 195. [54] *Ibid*., at 194–195.

[55] For a discussion of the various declarations and conventions relating to the principle of preventive action see Sands, *Principles*, at 195–197.

mize pollution, waste, and discards.[56] In addition such prevention is related to the need to minimize catch by lost or abandoned gear, catch of non-target species in terms of both fish and non-fish species, and impacts on associated or dependent species, with particular reference to endangered species. Non-fish species refer in particular to sea birds, marine mammals, sea turtles, and the like. The measures to this effect should to the extent practicable include the development and use of selective, environmentally safe and cost-effective fishing gear and techniques.

The objectives of preventive action were generally shared by the states participating in the negotiations, but there were important differences in connection with the use of selective gear. The drafts of the 1995 Agreement introduced by the chairman of the conference had envisaged the promotion and development of these types of gear in more mandatory terms, and the priority assigned to the matter was clearly expressed by way of referring to these gear in the opening sentence of the corresponding article;[57] in the negotiating text there had been an additional link to the protection of biodiversity and the need for multispecies and ecosystems-oriented management.[58] Environmentally safe technologies and responsible fishing practices had appeared prominently in the proposals by the United States,[59] Canada,[60] and Russia,[61] as well as in some of the draft conventions sponsored by some key participants.[62] Australia and New Zealand introduced a specific proposal on the question of the effects on associated and dependent species, which referred in particular to the situation of sea birds, marine mammals, and sea turtles.[63] However, in some other approaches selective methods of fishing were only related to a research priority[64] or ignored altogether.[65]

The ensuing result of these differences was that the 1995 Agreement qualified the development and use of these methods by a reference to ''the extent practicable'' and further displaced the question to the closing sentence of the provision by including it among other measures to be

[56] 1995 Agreement, Art. 5(f).
[57] Draft agreement, Doc. A/CONF. 164/22, 23 August 1994, Art. 5(e); Draft agreement, Doc. A/CONF. 164/22/Rev. 1, 11 April 1995, Art. 5(f).
[58] Negotiating text, I. 4(f). [59] United States, document cited in note 36 above, I. 7.
[60] Canada, ''List of issues,'' III(b)(iv). [61] Russian Federation, ''Main provisions,'' I(2).
[62] Chile, Colombia, Ecuador, and Peru, ''Elements of an international agreement,'' II(3); Argentina, Canada, Chile, Iceland, and New Zealand, ''Draft convention,'' Art. 4(b)(v).
[63] Australia and New Zealand, document cited in note 39 above.
[64] European Union, ''Position Statement,'' I. 7; and European Economic Community, ''Suggested Guidelines'' cited at note 41, I. 5(c).
[65] Japan, ''List of issues.''

adopted in pursuance of the principle set out. This discussion does not in any way of course affect the application of the various resolutions, conventions, and other rules which govern issues such as the use or moratorium of driftnets and related methods in high seas fisheries. The codes adopted by the FAO also have particular relevance in the matter as will be discussed further below.

Preventive action is also envisaged by the 1995 Agreement in terms of the general principle requiring that measures be taken to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources.[66] This general principle is of particular importance since it addresses the core problem of conservation in high seas fisheries, namely the question of overfishing which has troubled the law of the sea for the best part of the twentieth century. Preventive action is further rightly linked to the principle of sustainable development. As reiterated by the preamble to the 1995 Agreement, Chapter 17, programme area C, of *Agenda 21* had identified the concern for overutilization of resources, overcapitalization, excessive fleet size, and insufficiently selective gear, among other issues relevant to the question of overfishing.[67] The general principle on this point is therefore supported by a significant body of opinion. In spite of this consensual background few proposals and other initiatives introduced in the negotiations referred specifically to the question of overfishing, probably because in part the whole negotiation dealt with the issue of conservation of high seas fisheries and in part other sections of the 1995 Agreement envisaged related measures, such as quotas and other limitations of the fishing effort. One draft convention, for example, related the fishing effort, such as number of vessels, fishing capacity, and fishing days, to the total allowable catches and quotas to be established;[68] other proposals listed similar specific measures.[69]

One other expression of preventive action embodied among the general principles is that which mandates states to take into account the interests of artisanal and subsistence fishers, a matter that involves the adoption of preventive legislation and other measures necessary to attain this goal.[70]

[66] 1995 Agreement, Art. 5(h). [67] 1995 Agreement, preamble, para. 5.
[68] Argentina, Canada, Chile, Iceland, and New Zealand, ''Draft cconvention,'' Art. 4(b)(iii).
[69] See for example Australia, ''Comments,'' 8. [70] 1995 Agreement, Art. 5(i).

The emergence of the precautionary principle and the question of its application to high seas fisheries management

The precautionary principle has emerged rather recently in international environmental law but has taken a central place in the discussion of most international regimes for environmental protection.[71] Principle 15 of the Rio Declaration expressed the principle in the following terms: "When there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[72] Scientific uncertainty is the key element relating to the operation of this principle. Whether this is enough to justify international legal action has been one of the major issues sharply dividing opinions, since some will consider such anticipatory action essential while others will regard it as the source of paralyzing regulations.[73]

The 1990 Bergen Ministerial Declaration on Sustainable Development envisaged environmental measures adopted under the precautionary principle as those that "must anticipate, prevent and attack the causes of environmental degradation."[74] This Declaration is generally regarded as the first instrument that called for the general application of the principle.[75] Earlier conventions had relied either on the adoption of measures that should take into account the extent and probability of imminent damage[76] or on general references to precautionary measures.[77] A number of conventions have since adopted the precautionary principle and contributed to its further clarification in the context of some specific activities.[78] However, there is still broad disagreement about its meaning and extent, including discussion about whether the principle

[71] Sands, *Principles*, at 208–213. See further L. Gundling, "The status in international law of the principle of precautionary action," *International Journal of Estuarine and Coastal Law*, Vol. 5, 1990, 23; E. Hey, "The precautionary concept in environmental policy and law: institutionalizing caution," *Georgetown International Environmental Law Review*, Vol. 4, 1992, 303; David Freestone and Ellen Hey (eds.), *The Precautionary Principle and International Law. The Challenge of Implementation*, 1996.

[72] Declaration on Environment and Development, 1992, Principle 15.

[73] Sands, *Principles*, at 208–209.

[74] Bergen Ministerial Declaration, 16 May 1990, para. 7.

[75] Sands, *Principles*, at 210.

[76] International Convention relating to intervention on the high seas in cases of oil pollution damage, 29 November 1969, Articles I and V(3)(a), *International Legal Materials*, Vol. 9, 1970, 25.

[77] Convention for the Protection of the Ozone Layer, 22 March 1985, preamble, *International Legal Materials*, Vol. 26, 1987, 1529.

[78] See for example the Convention on Biological Diversity preamble, and references to other conventions of global or regional extent in Sands, *Principles*, at 210–211.

necessarily involves a shift in the burden of proof requiring the party willing to undertake an activity to prove that it is environmentally safe, as opposed to the traditional approach requiring the party opposing such activity to prove that it is likely to damage the environment.[79] As a consequence of these disagreements there are also differing views about whether the principle reflects customary international law.[80] It has been noted that many states consider the principle as a guideline and not as a substantive mandate for action.[81]

Because the precautionary principle has found important application in relation to the marine environment, there was a natural inclination to argue in favor of its extension in similar terms to the question of fisheries management. However, since scientific uncertainty is normally the rule in fisheries management a straightforward application of the precautionary principle would have resulted in the impossibility of proceeding with any activity relating to marine fisheries. It is on these grounds that the concept of the ''precautionary approach'' surfaced with a view to provide a more flexible tool for the specific needs of fisheries management.[82] The conceptual difference between these elements has been well explained in a document submitted by the Swedish delegation to the United Nations Conference on Straddling Stocks:

Fisheries have to be managed in a cautious manner. There has been a misconception about such management and there is an impression that it would immediately mean the imposition of drastic measures. This is certainly not the case. A moratorium, for example, is necessary only in extreme cases ... Precautionary management is basically very different from the application of the precautionary principle in pollution issues, e.g., when toxic substances are added to the water. It was in order to deal with such non-natural additions that the precautionary principle was created and it has subsequently been used, for example, in Environmental Impact Assessments ... In fisheries the meaning of

[79] Sands, *Principles*, at 211–213.

[80] *Ibid*., at 212–213.

[81] John M. Macdonald, ''Appreciating the precautionary principle as an ethical evolution in ocean management,'' *Ocean Development and International Law*, Vol. 26, 1995, 255–286, at 269.

[82] *Ibid*., at 270–271. See also S. M. Garcia, ''The precautionary principle: its implications in capture fisheries management,'' *Ocean and Coastal Management*, Vol. 22, 1994, 99–125; S. M. Garcia, ''The precautionary approach to fisheries with reference to straddling fish stocks and highly migratory fish stocks,'' *FAO Fisheries Circular* No. 871, 1994, reprinted in *NILOS Yearbook*, Vol. 10, 1994, at 632; Grant J. Hewison, ''The precautionary approach to fisheries management: an environmental perspective,'' *International Journal of Marine and Coastal Law*, Vol. 11, 1996, 301–332.

precautionary management has to be defined, in order that it does not remain a tool which no one knows how to use.[83]

At a time when the above-mentioned distinction had not yet been clearly made, a few efforts were directed to apply the precautionary principle to fisheries activities. This resulted in the enactment of moratoriums on given activities, such as that on whaling and that on high seas driftnets as discussed above, giving place to the interpretation that the precautionary principle necessarily meant a rather drastic solution.[84] The Declaration of the International Conference on Environmental Protection of the North Sea also envisaged in 1987 the application of the precautionary principle, but related to the question of marine pollution by the introduction of dangerous substances and technologies.[85] The Convention on the Law of the Sea did not address the question of the precautionary principle or approach directly, but of course a number of its provisions touch upon issues that are closely related, particularly in the context of conservation of living resources.

The precautionary approach has been devised as an expression that ''provides managers with the power to continue harvesting along with the flexibility to introduce stringent cutbacks or prohibitions only when a threshold has been reached that would threaten a stock's sustainability.''[86] The experience with this approach has thus far been rather limited. Both the FAO Technical Consultation on High Seas Fisheries and the Inter-American Conference on Responsible Fisheries referred to the need to adopt a precautionary approach to fisheries management but did not elaborate on its contents.[87] The experience of the European Inland Fisheries Advisory Commission and of the International Council for the Exploration of the Sea have also been mentioned.[88] In the latter organization total allowable catch is to be determined in accordance with the

[83] Sweden, ''Comments on precautionary management of fisheries,'' A/CONF. 164/L. 22, 22 July 1993, at 1.

[84] Macdonald, ''Appreciating the precautionary principle,'' at 274, with reference to the view of the European Union, Greenpeace, and other entities. See also Lee G. Anderson, ''A commentary on the views of environmental groups on access control in fisheries,'' *Ocean and Coastal Management*, Vol. 28, 1995, 165–189.

[85] Ministerial Declaration of the Second North Sea Conference, London, 25 November 1987.

[86] Macdonald, ''Appreciating the precautionary principle,'' at 273.

[87] FAO, ''The precautionary approach to fisheries with reference to straddling fish stocks and highly migratory fish stocks,'' Doc. A/CONF. 164/INF/8, 26 January 1994, paras. 30 and 31.

[88] Sweden, ''Comments,'' para. 4; and FAO, document cited in note 87, para. 32. See also Tahindro, ''Conservation and management,'' at 14.

precautionary approach when stocks cannot be assessed with acceptable precision so as to reduce the danger of excessive pressure on such stocks. The European Court of Justice, like the European Commission and the European Parliament, has had occasion to deal with the precautionary approach in the context of the use of driftnets;[89] the *Mondiet* case affirmed the legality of European regulations enacted in application of the precautionary approach.[90]

A most important experience in the matter has been that of the Convention on the Conservation of Antarctic Marine Living Resources. The precautionary approach has been applied to multispecies interaction, particularly in terms of the regulation and limitation of by-catches and the continued prohibition of some fisheries in order to protect non-targeted species.[91] Also precautionary total allowable catches have been established for a number of species and areas.[92] Incidental mortality, the protection of seabirds,[93] the prohibition of the disposal of synthetic material,[94] and the curtailment of large-scale pelagic driftnet fishing have all been addressed under the precautionary approach.[95] The initiation of a new fishery is subject to a specific review procedure by the Scientific Committee and the Commission of CCAMLR, pending which such activity shall not begin.[96] This means that in practice the CCAMLR area is closed to new fisheries unless a specific procedure of institutional review is followed, which does not amount to a formal authorization but to the possibility of adopting in advance conservation and management policies; this approach also has implications in terms of the shift of the burden of proof. Exploratory fisheries following the establishment of a new fishery are also subject to regulation, including precautionary catch limits, data collection, and other requirements.[97] The experience of CCAMLR was relevant for the consideration of the precautionary approach in the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

[89] Annie Cudennec, ''Les conflits de pêche dans le golfe de Gascogne: le concept de précaution a l'epreuve de la réalité,'' *Espaces et Ressources Maritimes*, No. 8, 1994, 306–334.

[90] Court of Justice of the European Union, Case C-405/92, 24 November 1993, *Recueil*, 1993-I, 6133.

[91] CCAMLR, Conservation Measure 68/XII, and Conservation Measure 66/XII, para. 2.

[92] CCAMLR, Conservation Measure 67/XII.

[93] CCAMLR, Conservation Measure 29/XII.

[94] CCAMLR, Conservation Measure 63/XII.

[95] Karl-Hermann Kock, ''Fishing and conservation in southern waters,'' *Polar Record*, Vol. 30, 1994, 3–22, at 14.

[96] CCAMLR, Conservation Measure 31/X.

[97] CCAMLR, Conservation Measure 65/XII.

Developing the precautionary approach in high seas fisheries

The implications of the precautionary principle and approach for high seas fisheries were discussed with particular attention at the United Nations conference.[98] At first, the distinction between these concepts was somewhat blurred and references to the precautionary principle were made in the proposals of some delegations.[99] However, two trends promptly emerged in these discussions, one favoring a broad application of the precautionary principle or alternative arrangements to high seas fisheries, the other adopting a more reserved attitude.[100] The latter position was concerned with the prospect that the precautionary principle might lead to the applications of moratoria; assurances given by the sponsors of the principle to the effect that this was not the case, except in a situation of overexploitation or collapse of the fishery, were not considered enough to allay those concerns.[101]

Precautionary management emerged as an alternative option in the view of a number of delegations that also made clear that a moratorium was not the necessary outcome of the application of this concept but that "utilization should maintain the stocks at a productive level and preserve future use options."[102] In other views precautionary management should take account of the fishing activities safeguarding biodiversity[103] and "does not necessarily require moratoria or any other unnecessarily restrictive measures";[104] the temporary character of precautionary management was also underlined in some proposals that related the concept to enhanced monitoring and continuous review.[105]

Precautionary measures were conceived in other initiatives in a more stringent manner. The draft convention introduced by a group of coastal states had called for appropriate precautionary measures and stated that "[W]here there are threats of serious or irreversible damage to straddling fish stocks or highly migratory fish stocks, the lack of full scientific certainty shall not be used as a reason to postpone such measures."[106]

[98] Hayashi, "The role of the United Nations," at 380–382; Tahindro, "Conservation and management," at 12–14; Habib Gherari, "L'Accord du 4 août 1995 sur les stocks chevauchants et les stocks de poissons grands migrateurs," *Revue Générale de Droit International Public*, Vol. 100, 1996, 367–390, at 373–374.

[99] See for example Colombia, "List of issues," Doc. A/CONF. 164/L. 4, 2 June 1993, 1.1.

[100] Hayashi, "The role of the United Nations," at 380–381.

[101] See note 84 above.

[102] United States, "Position statement," 4.

[103] European Union, "Position statement," 4.

[104] European Union, "Suggested Guidelines," I. 6.

[105] *Ibid*.

[106] Argentina, Canada, Chile, Iceland, and New Zealand, "Draft Convention," Art. 5.

Annex II of this draft elaborated on selected precautionary measures to be applied in the high seas, including the view that the relevant coastal state may assume management authority for an initial interim period in the case of a newly discovered stock; once the interim period was terminated management would be undertaken by a regional fisheries organization which could establish precautionary total allowable catches and quotas as well as precautionary management thresholds; other precautionary measures were proposed for existing fisheries, that would allow for emergency measures prescribed by the coastal state.[107] The Forum Fisheries Agency countries had also envisaged stringent precautionary measures and had placed the burden of proof on the state fishing for the stock.[108] Elaborate criteria on precautionary management was also offered in documents prepared on the subject by Sweden[109] and the Ukraine[110] which further clarified both the conceptual and the practical measures envisaged in the discussion of the conference.

Since the outset of the negotiations the chairman of the conference had rightly identified the use of a ''precautionary conservation and management approach'' as one of the key issues to be addressed in the deliberations.[111] The first approach offered in the negotiating text had been quite stringent since the precautionary approach should be applied widely by states to fisheries management, and it was specifically mandated that the absence of adequate scientific information ''shall not be used as the reason for failing to take strict measures to protect the resource''; also the use of all appropriate techniques had been called for, including where necessary the application of moratoria.[112] The use of the best scientific evidence available, enhanced monitoring, and specific measures limiting catch and efforts in new or exploratory fisheries were also envisaged.

However, in view of the differences dividing the position of the main negotiating groups, there was a need to refocus the discussions of the conference on this issue. Two technical working groups were established to deal respectively with the precautionary approach and reference points for fisheries management.[113] In turn, the FAO was requested to prepare important technical documents on both matters. The document on the precautionary approach made an effort to clarify the characteristics that

[107] *Ibid*., Annex II on ''Selected precautionary measures on the high seas.''
[108] Hayashi,''The role of the United Nations,'' at 381.
[109] Sweden, ''Comments.''
[110] Ukraine, ''The precautionary approach in fishery management,'' Doc. A/CONF. 164/L. 41, 17 March 1994.
[111] Chairman's guide cited in note 22, I(f).
[112] Negotiating text, 5.
[113] See note 25 above

are specific to this concept while it recognized that the differences with the precautionary principle were more perceived than real.[114] It then developed the criteria pertinent to the precautionary approach with particular emphasis on applicable norms, reference points, acceptable levels of impact and a practical guide of objectives and measures to be attained in the management of fisheries. This clarification greatly facilitated the task of the working group and its conclusions led to the new approach being introduced in the negotiating texts and the final agreement.

The application of the precautionary approach has been dealt with under Article 6 of the 1995 Agreement, which is considered one of the most innovative provisions of this instrument.[115] In fact, this is the first global agreement to deal comprehensively with the precautionary approach for high seas fisheries and to this extent it establishes a most significant precedent that will by far exceed the case of straddling fish stocks and highly migratory fish stocks. Article 6 has been conceived in mandatory terms since states ''shall'' apply the precautionary approach widely to the conservation, management and exploitation of the stocks envisaged by the 1995 Agreement.[116] Although the reference to a wide application was objected to, it prevailed as the governing criterion in this Article.[117] The specific objectives of the approach are to protect the living marine resources and preserve the marine environment, thereby combining elements of both the precautionary principle and the precautionary approach. It is important to note that the precautionary approach in Article 6 is a mandate of general application and not related only to cases where there is a lack of scientific information; in fact, when information is uncertain, unreliable or inadequate, states shall be ''more cautious,'' thus signaling that caution is always to be used.[118] Following the essence of the precautionary principle, it is also provided that the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.

The implementation of the precautionary approach is related to specific

[114] FAO, document cited in note 87 above, Section V.

[115] Satya N. Nandan, ''The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and its potential impact on Pacific island tuna fisheries,'' Statement made at the conference on achieving goals for sustainable living in the aquatic continent, Hawaii, 19–23 September 1995, at 3.

[116] 1995 Agreement, Art. 6(1).

[117] International Institute for Sustainable Development, *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, at 4.

[118] 1995 Agreement, Art. 6(2).

criteria in order to improve decision-making relying on the best scientific information available and on techniques for dealing with risk and uncertainty; to take into account uncertainties relating to size and productivity of stocks and other technical factors; and to develop data collection and research programs to assess the impact on non-target and associated or dependent species and their conservation.[119]

The key element in the implementation of the precautionary approach is given by the mandate for states to apply the guidelines set out in Annex II and determine stock-specific reference points and the action to be taken if they are exceeded.[120] While a few delegations proposed that the requirement to ''apply'' such guidelines should be changed to ''observe'' them, this initiative did not succeed since it could have weakened the meaning of the provision.[121] The guidelines of Annex II are based on the distinction between conservation or limit reference points, and management or target reference points.[122] The former category is designed to set boundaries intended to constrain harvesting within safe biological limits related to the maximum sustainable yield, while the latter category is intended to meet management objectives. Management strategies shall seek to maintain or restore stocks to the previously agreed precautionary reference points ensuring that the risk of exceeding conservation standards remains very low. Provisional reference points can also be established.

On the basis of these criteria states shall ensure that when reference points are approached they are not exceeded, and in the event that they are exceeded they shall without delay take the action necessary to restore the stocks.[123] Enhanced monitoring and the review of conservation and management measures is also called for.[124] Special rules are given for new or exploratory fisheries so that cautious measures are adopted as soon as possible, including catch and effort limits; these measures shall remain in force until there is sufficient data to allow for the assessment of the long-

[119] 1995 Agreement, Art. 6(3).

[120] 1995 Agreement, Art. 6(3)(b). See also FAO, ''Reference points for fisheries management: their potential application to straddling and highly migratory resources,'' Doc. A/CONF. 164/INF/9, 26 January 1994; Odd Nakken *et al.*, ''Reference points for optimal fish stock management: a lesson to be learned from the Northeast Arctic cod stock,'' *Marine Policy*, Vol. 20, 1996, 447–462.

[121] International Institute for Sustainable Development, *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995 at 3–4.

[122] 1995 Agreement, Annex II, ''Guidelines for the application of precautionary reference points in conservation and management of straddling fish stocks and highly migratory fish stocks.''

[123] 1995 Agreement, Art. 6(4).

[124] 1995 Agreement, Art. 6(5).

term sustainability of the stocks on the basis of which conservation and management measures may be adopted, allowing if appropriate for the gradual development of the fisheries.[125] Just as in CCAMLR the approach to new or exploratory fisheries is devised in a more stringent manner. Emergency measures are also called for when a natural phenomenon has a significant adverse effect on the status of stocks,[126] or when fishing activity presents a serious threat to the sustainability of the stocks;[127] emergency measures shall be temporary and also based on the best scientific evidence available.

The general principles of the 1995 Agreement and particularly the precautionary approach have introduced a sufficient number of new elements in connection with the conservation and development of the living resources of the high seas that the measures to be adopted by states will now be able to rely on much more specific criteria and guidelines to ensure their effectiveness. This is particularly so in relation to the standard of the maximum sustainable yield which, though formerly matter of criticism, how has been qualified in the 1995 Agreement in a detailed manner that ensures that the interests in both conservation and rational utilization, including their relationship to broader ecosystem management concepts, are duly taken into account. The FAO Code of Conduct for Responsible Fisheries adopted in 1995 has also introduced the precautionary approach both in its general principles and in the specific provisions dealing with fisheries management, following very closely the language of the 1995 Agreement.[128]

The principle of informed decision-making in the context of high seas fisheries

Informed decision-making has been recognized as an essential element related to the effectiveness of international regimes on environmental

[125] 1995 Agreement, Art. 6(6). [126] 1995 Agreement, Art. 6(7).

[127] For a reference to the proposal by Peru and Uruguay to introduce this alternative see International Institute, *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995 at 3. A proposal to the effect that emergency measures should be compatible with measures adopted by the coastal state in areas under national jurisdiction was not retained, for which see Andrés Couve, ''Negociaciones sobre el regimen pesquero en alta mar en el marco de la Conferencia de Naciones Unidas,'' 1995, mimeo, at 25.

[128] FAO, ''Code of Ccnduct for responsible fisheries,'' Doc. C 95/20-Rev. 1, 29 September 1995, Sections 6.5 and 7.5. See also the Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to Food Security, *International Conference on the Sustainable Contribution of Fisheries to Food Security*, Kyoto, 4–9 December 1995, para. 10.

protection.[129] The establishment of a special body to provide information and advice on scientific and technological matters pertinent to the Climate Change Convention[130] and a number of requirements on national reporting under other arrangements are examples of the application of the principle under consideration.[131] Information requirements are particularly important in the context of the regime governing high seas fisheries since some of the most serious problems affecting this sector are associated with the lack of appropriate data and scientific research. The precautionary approach itself, like many of the general principles examined, can only be applied properly if an effort is simultaneously made to gather the information on which decisions and measures are to be based.

The Convention on the Law of the Sea had already envisaged the gathering and exchange of available scientific information, catch, and fishing efforts statistics and other data relevant to the conservation of fish stocks both in the high seas and in the exclusive economic zone.[132] The 1993 FAO Agreement on Compliance with International Conservation and Management Measures in the High Seas has also relied on the provision of adequate information,[133] a matter on which the 1995 FAO Code elaborates in detail regarding both collection of data and scientific research.[134]

Given the insufficient availability of data on fisheries it was quite natural that the concern on this point would be present in the negotiations on straddling fish stocks and highly migratory fish stocks. Various information documents were introduced by the Intergovernmental Oceanographic Commission,[135] the Organization for Indian Ocean Marine

[129] David Hunter, ''Background paper for the Expert Group Workshop on international environmental law aiming at sustainable development,'' Washington DC, 13–15 November 1995, paras. 46–50.

[130] Convention on Climate Change, Art. 9.

[131] Hunter,''Background paper,'' para. 47.

[132] Convention on the Law of the Sea, Art. 61(5) and 119(2).

[133] FAO, ''Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas,'' 24 November 1993, *International Legal Materials*, Vol. 33, 1994, 968, Art. VI.

[134] FAO Code cited at note 128, Arts. 7(4) and 12.

[135] Intergovernmental Oceanographic Commission, ''Information on activities of the Intergovernmental Oceanographic Commission relevant to the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' Doc. A/CONF. 164/INF/3, 26 May 1993.

Affairs Cooperation,[136] and the FAO[137] on aspects being considered in the negotiations, with particular reference to scientific research programs and the collection and organization of fishery statistics. An *ad hoc* consultation on the role of regional fishery agencies in relation to high seas fishery statistics was also held at La Jolla, California, 13–16 December 1993.[138] Statistical reporting on high seas fisheries was also the subject of a special document introduced by the United States,[139] while a group of delegations addressed the question of requirements for developing countries in the field of scientific research cooperation.[140]

Most of the proposals introduced by delegations individually or jointly referred to the question of data collection and scientific research, but the emphasis on this point varied greatly, thereby revealing differences on substantive issues associated with this discussion. A number of delegations made general references to the collection and sharing of relevant data and to the conduct of scientific activities but did not elaborate on the matter with much detail. This was the approach followed by some proposals of the United States,[141] Australia,[142] Russia,[143] and the Ukraine.[144] The European Union assigned particular weight to scientific research and statistical data, but clarified that these should be collected by the international fisheries organizations concerned.[145] The need to improve on the availability of information was mentioned in most of these proposals but with the implicit or explicit requirement that no special role should be assigned to coastal states on the matter. One

[136] IOMAC, ''Comments on issues before the conference and information submitted by the delegation of the United Republic of Tanzania as chairman of the Organization for Indian Ocean Marine Affairs Cooperation (IOMAC),'' Doc. A/CONF. 164/L. 37, 10 August 1993.

[137] FAO, ''Comments by the coordinating working party on fishery statistics on Annex I of the draft agreement,'' Doc. A/CONF. 164/INF/13, 27 March 1995.

[138] ''Ad hoc consultation on the role of regional fishery agencies in relation to high-seas fishery statistics,'' La Jolla, California, 13–16 December 1993, Doc. A/CONF. 164/INF/10, 27 January 1994.

[139] United States, ''Statistical reporting on high seas fisheries,'' Doc. A/CONF. 164/L. 16, 20 July 1993.

[140] Australia, Cook Islands, Fiji, Kiribati, Marshall Islands, Micronesia, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Vanuatu, ''Scientific research cooperation and conservation and management objectives for straddling fish stocks and highly migratory fish stocks: considerations for developing countries,'' Doc. A/CONF. 164/L. 30, 27 July 1993.

[141] United States, ''Position statement,'' paras. 6, and 7; United States, ''Principles,'' paras. I.5, I.6.

[142] Australia, ''Comments,'' para. 2.

[143] Russian Federation, ''Main provisions,'' I.3.

[144] Ukraine, document cited in note 44, para. 9.

[145] European Union, ''Position statement,'' para. I.6.

delegation appeared to rely on the experience of present international fishery organizations, an approach which implicitly would not require further changes in the matter.[146] At the opposite end, the member countries of the South Pacific Forum Fisheries Agency heavily criticized the shortcomings of existing fisheries management bodies and called for significant changes in their role and decision-making, invoking among a host of other reasons the failure of parties to fulfill their commitments for data collection and research.[147]

In the view of some other delegations, however, there was a need for a ''full, detailed, timely and accurate reporting of catches and effort,'' including an active role of the coastal state therein.[148] Specific measures to this end were to include enhanced collection of data necessary for the conservation and management of straddling stocks and highly migratory stocks, incidental catches, stock assessment models, and monitoring and assessment programs.[149] The member countries of the Permanent Commission of the South Pacific also proposed very stringent information requirements, including information on the fishing vessels, the range and location of their operations, and the patterns and seasonal and special movements of fleets.[150]

The issues submitted by the conference chairman at the start of the negotiations clearly envisaged the need for the ''effective contribution and timely exchange of scientific information, catch and fishery effort statistics and other data relevant to the conservation of fish stocks in order to ensure that the best scientific evidence available is used in management decisions.''[151] This aspect was also of importance in view of the consensus reached in the negotiations that the absence or inadequacy of such information would trigger the application of the precautionary approach. The negotiating text submitted by the chairman in 1993 provided for the pertinent general principles on the matter and for a detailed annex on minimum data requirements, including questions relating to collection, stock assessment, vessel data and information, reporting, verification, and exchange.[152] Models on data flow arrangements were included in the proposal, which in the case of high seas

[146] Japan, ''List of issues,'' II.6(3).

[147] Solomon Islands, on behalf of the member countries of the South Pacific Forum Fisheries Agency, ''Comments on a guide to the issues before the conference prepared by the chairman (A/CONF. 164/10),'' Doc. A/CONF. 164/L. 29, 27 July 1993, 3(b).

[148] Argentina, Canada, Chile, Iceland, and New Zealand, ''Draft convention,'' 4(b)(vii).

[149] *Ibid*., Art. 6.

[150] Chile, Colombia, Ecuador, and Peru, ''Elements,'' Section VI.

[151] Guide cited in note 22 above, I(i).

[152] Negotiating text, para. 4(g) and Annex 1 on ''Minimum data requirements for the

fishing operations could have required transmittal of data to coastal states if required.

However, in view of the different positions outlined above, this approach did not meet with general acceptance. Some delegations sought the modification of Annex I to make it still more stringent, while distant-water fishing nations objected to some aspects of the proposal, particularly the requirement to send data to relevant coastal states.[153] Japan submitted in this context alternative texts.[154] The 1995 Agreement made a number of changes in this respect in order to accommodate the different interests. Two general principles refer to the question of data and scientific research. Under the first such principle states shall collect and share in a timely manner complete and accurate data concerning fishing activities and information from national and international research programs; among other items such data will relate to vessel position, catches, and fishing effort.[155] Under the second principle there is an obligation to promote and conduct scientific research and develop appropriate technologies in support of fishery conservation and management.[156]

These principles are developed in greater detail in Article 14 of the 1995 Agreement as one of the mechanisms established for international cooperation.[157] There is first a duty on states to ensure that fishing vessels flying their flag provide the necessary information, with particular reference to the collection and exchange of scientific, technical, and statistical data; this information should be sufficiently detailed to facilitate effective stock assessment and be provided in a timely manner. Appropriate measures should also be taken to verify the accuracy of the data supplied. Secondly, there is a general duty of cooperation either directly or through subregional or regional fisheries organizations or arrangements, in order to agree on the specification of data and format and to develop and share analytical techniques and stock assessment methodologies. Thirdly, there is also a general duty to cooperate to strengthen scientific research capacity and to promote research; the

conservation and management of straddling fish stocks and highly migratory fish stocks.''

[153] Hayashi, ''The role of the United Nations,'' at 383; for a reference to an informal working group of several Latin American delegations seeking to propose modifications to Annex I, International Institute for Sustainable Development, *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, at 3.

[154] Hayashi, ''The role of the United Nations,'' at 383. [155] 1995 Agreement, Art. 5(j).

[156] 1995 Agreement, Art. 5(k). [157] 1995 Agreement, Art. 14.

publication and dissemination of information and the participation of scientists from interested states is emphasized in this provision.

Annex I to the 1995 Agreement has set the standard requirements for the collection and sharing of data, addressing in great detail the main aspects of the matter as provided for under both the general principles and Article 14 of the 1995 Agreement.[158] The general principles and the principles of data collection, compilation, and exchange contained in Articles 1 and 2 of the Annex assign special importance to the timely collection, assistance, the role of the flag state, agreement on the specification of data and format, and verification. The basic fishery data refers particularly to time series of catch and effort statistics by fishery and fleet, total catch, discard statistics, effort statistics, fishing location, date and time fished, and other biological information. Vessel data and information is also required under the Annex, as well as the necessary elements of reporting, verification, and exchange. As mentioned above, both the 1993 FAO Agreement and the 1995 FAO Code provide additional requirements as to exchange of information and other data relevant to high seas fisheries.

Annex I paid particular attention to the question of sharing data with the relevant coastal state, in view of the objections that had been raised by distant-water fishing nations on this point. While under early versions of the agreement data should flow to coastal states if required,[159] or in another version if agreed,[160] Article 7 of the Annex provides that data shall be shared with other flag states and relevant coastal states through the appropriate subregional or regional fisheries management organizations or arrangements, under the terms and conditions established under such arrangements. The availability of data for the coastal state is thereby significantly limited and conditioned.

Although the solution reached can be understood in the context of the coastal state–distant water fishing nation option that was present in the negotiations, having in mind particularly the dispute between Canada and the European Union, other important elements of the problem do not seem to be equally present. This is the case, for example, of coastal states that have also developed a significant interest in high seas fisheries. In

[158] 1995 Agreement, Annex I on "Standard requirements for the collection and sharing of data."

[159] Draft agreement, DOC. A/CONF. 164/22, 23 August 1994, Annex 1, Data flow chart, at 30.

[160] Draft agreement, DOC. A/CONF. 164/22/Rev. 1, 11 April 1995, Annex 1, Data flow chart, at 36.

particular it should be noted that the Chilean National Fisheries Council[161] and the Chilean fisheries industry[162] have expressed doubts about the wisdom of sharing some types of information that might compromise the necessary confidentiality about high seas fisheries operations, particularly in the light of Article 3 of Annex I requiring detailed fishing information, including the location, date, and time of fishing operations. Although the Annex provides for the confidentiality of non-aggregated data,[163] this does not seem to be strong enough to prevent competitors taking advantage of the information that is required to be made available. The appropriate organizations will have to devise a foolproof mechanism to ensure such confidentiality if this aspect of cooperation is to succeed, a precedent for which might be found under Part XI of the Convention on the Law of the Sea in relation to the handling of confidential information by the Seabed Authority and its officials.[164]

The 1995 Agreement has made a most significant contribution to the implementation and development of the basic principles of international environmental law as relevant to high seas fisheries. In this respect it can be considered a unique instrument relating international law to the present concerns and approaches to environmental realities. The principles examined in this chapter are supplemented by other principles embodied in the 1995 Agreement, such as those on the role and needs of developing countries, monitoring and surveillance, and others that will be examined further below.

[161] Chilean National Fisheries Council, Statement of 20 July 1995, as cited in Luis Felipe Moncada, ''Comentarios al acuerdo de pesca de las Naciones Unidas,'' Conference on ''Los intereses pesqueros de Chile en Alta Mar,'' Santiago, 27 May 1996, notes 23 and 56.

[162] Moncada, ''Comentarios,'' at 14.

[163] 1995 Agreement, Annex I, Arts 1(1) and 7.

[164] Convention on the Law of the Sea, Art. 168.

7 Ecosystem management and the legal interactions between areas under national jurisdiction and the high seas

Scientific realities underlying the high seas fisheries of straddling stocks and highly migratory stocks and their relationship with fisheries under national jurisdiction were well known and not generally disputed at the time of the negotiations leading to the 1995 Agreement and related events.[1] The legal consequences of such realities were quite a different question and the views of states and other entities were again sharply divided, ranging from the argument of the need to extend national measures into the high seas to the opposite extreme of demanding the opening up of areas under national jurisdiction to international administration or extensive foreign participation.[2] Finding a common ground to achieve a standing compromise and an ultimate solution to these issues was one of the most difficult tasks confronted by the conference.[3]

Three elements were successfully developed and combined to reach an acceptable solution: the relationship between the 1995 Agreement and the 1982 Convention on the Law of the Sea; the careful definition of the geographical ambit of application of the 1995 Agreement; and the compatibility of conservation and management measures. Other related

[1] On scientific aspects of marine ecosystem management see generally "International Conference on the Large Marine Ecosystem (LME) Resource Management," Monaco, 1–6 October 1990; K. Sherman, *Large Marine Ecosystems as Global Units for Management: An Ecological Perspective*, Copenhagen, 1990; S. A. English, R. H. Bradbury, and R. E. Reichelt, "Management of large marine ecosystems: a multinational approach," in Choat, Barnes *et al.* (eds.), *Proceedings of the Sixth International Coral Reef Symposium*, Townsville, Australia, 1988, 369–374.

[2] Andrés Couve, "Negociaciones sobre la pesca en alta mar," Conference on "Los intereses pesqueros de Chile en alta mar," Santiago, Chile, 27 May 1996, at 5.

[3] Moritaka Hayashi, "The role of the United Nations in managing the world's fisheries," in Gerald H. Blake *et al.* (eds.), *The Peaceful Management of Transboundary Resources*, 1995, 373–393, at 379.

issues could be settled in this context, with particular reference to the question of enclosed and semi-enclosed seas and of high seas enclaves. The aggregate of these approaches and provisions allowed for the introduction of ecosystem management in the fisheries of straddling fish stocks and highly migratory fish stocks, not under a nationalized administration of the high seas nor under an international regime interfering with national jurisdiction, but in terms of allowing for the supplementary role of both coastal states and distant-water fishing states. This careful balance of interests will be examined next.

The legal relationship between the 1995 Agreement and the Convention

The compromise reached at UNCED and the later definition of the mandate of the conference had made very clear that the whole negotiation would be conducted in terms of strict compatibility with the provisions of the Convention on the Law of the Sea. As has been mentioned above, this decision was not deprived of specific legal consequences.[4] The very fact that the 1995 Agreement was concluded in implementation of the provisions of the Convention also has a specific legal connotation. Despite the fact that the 1995 Agreement was kept as a separate legal instrument and was not a protocol to the Convention nor requires a party to it also to be a party to the Convention, its links with the latter are so specific that the application and interpretation of the 1995 Agreement cannot be undertaken independently from the 1982 Convention.

This relationship was made explicit from the first proposals submitted by the chairman[5] and took on a specific legal language in the draft agreements.[6] The need to be fully consistent with the Convention was also highlighted by the chairman in respect of every key solution explored.[7] Such concern was also present in the proposals introduced by

[4] See generally pp. 127–128 above.

[5] A guide to the issues before the conference prepared by the chairman, Doc. A/CONF. 164/10, 24 June 1993, Part 1.

[6] Draft agreement, Doc. A/CONF. 164/22, 23 August 1994, Art. 4; Draft agreement, Doc. A/CONF. 164/22/Rev. 1, 11 April 1995, Art. 4.

[7] See for example the statements made by the chairman of the conference on 15 July 1993, Doc. A/CONF. 164/12, 21 July 1993, para. (g); on 31 March 1994, Doc. A/CONF. 164/19, 9 May 1994, para. 6; and 26 August 1994, Doc. A/CONF. 164/24, 8 September 1994, para. 5(d).

delegations.[8] The preamble to the 1995 Agreement begins by recalling the relevant provisions of the Convention on the Law of the Sea and further relates the implementation of such provisions to the maintenance of international peace and security.[9] Article 4 explicitly provides that nothing in the 1995 Agreement shall prejudice the rights, jurisdiction, and duties of states under the Convention and that the 1995 Agreement ''shall be interpreted and applied in the context of and in a manner consistent with the Convention.''[10] Other parts of the 1995 Agreement also rely on the provisions of the Convention, notably the procedures for the settlement of disputes that will be examined further below; courts and tribunals are mandated to apply the provisions of the Convention and other sources of law relevant to the disputes submitted.[11]

In spite of the explicit language of the 1995 Agreement, doubts have been raised about the prevalence of the Convention on the Law of the Sea in the application and interpretation of the 1995 Agreement. It has been pointed out that the 1995 Agreement does not safeguard the rights, duties, and interests of coastal states in high seas fisheries in the terms provided for under Article 116(b) of the Convention and that coastal states will not be able to apply provisional conservation measures in the high seas, the provisions on compatibility being a further erosion of coastal states' rights.[12] The relationship with the Convention has also been described as a ''gray area'' from the point of view of the rights of states in areas under national jurisdiction.[13] On the opposite side of the argument, the European Union after reminding the conference about its mandate to achieve results fully consistent with the Convention warned that it ''will

[8] See for example Ukraine, ''Conservation and rational utilization of straddling and highly migratory fish species,'' Doc. A/CONF. 164/L. 40, 17 March 1994, para. 7(e).

[9] 1995 Agreement, preamble, paras. 1 and 9.

[10] 1995 Agreement, Art. 4.

[11] 1995 Agreement, Art. 30(5).

[12] Luis Felipe Moncada, ''Comentarios al acuerdo de pesca de las Naciones Unidas,'' in conference cited in note 2 above, at 9–10; see also by the same writer ''Pesca en Alta Mar,'' *El Mercurio*, Santiago, Chile, 3 January 1996, A2. For adverse reactions to the 1995 Agreement by the Chilean press media based on the arguments noted and opposing the signature of the 1995 Agreement by the Chilean government, see ''Acuerdo inconveniente,'' leader in *El Mercurio*, Santiago, 24 November 1996, at A3; ''En defensa de nuestras doscientas millas,'' leader in *La Segunda*, 27 November 1996, at 6; and Fernando Zegers, ''Acuerdos maritimos,'' newspaper article, *El Mercurio*, 1 December 1996, at A2. For a discussion of the fisheries activities of the Chilean industry in the high seas of the Indian Ocean and other areas, see Begoña Bofill, ''La mina de oro del bacalao,'' newpaper article, *El Mercurio*, 15 December 1996, B3.

[13] Couve, ''Negociaciones,'' at 5.

evaluate the Agreement in order to see whether this mandate has been achieved.''[14]

Such reactions were quite naturally the consequence of the arguments made by both coastal states and distant-water fishing states during their confrontations in the conference. It has been pointed out that the conference ''in fact repeatedly rejected proposals that would have conflicted with the Convention, such as provisions that would have given coastal states fishery jurisdiction beyond 200 miles, or that would have undermined the exclusive fishery jurisdiction of coastal states within 200 miles.''[15] A proposal to give effect in the high seas to conservation measures enacted by the coastal state where regional organizations have not been established was introduced by Chile in the last session of the conference, this being an example of the first kind of initiative mentioned;[16] the proposal was rejected and it probably would have been diplomatically more convenient not to submit it at all at that late stage.[17] Various proposals by the European Union, Japan, and the United States envisaged the eventual opening up of the exclusive economic zone to distant water fishing operations, an example of the second kind of initiative that was also systematically rejected.[18]

As a result of Article 4 of the 1995 Agreement and related provisions it is clear that unilateral measures by the coastal state over high seas fisheries have been to a large extent curtailed, without prejudice to the influence that such states will necessarily have in the establishment of regional and subregional organizations and arrangements and other situations leading to conservation measures. But it is also equally clear that international or foreign interference with fisheries under national jurisdiction has been successfully prevented since the sovereign rights of coastal states in the exclusive economic zone in the terms of Article 56 of the Convention and the related provisions of Articles 63 and 64 of the Convention will remain unaltered. Moreover, the 1995 Agreement cannot be interpreted in a manner contrary to or inconsistent with such

[14] European Union, ''Letter dated 4 August 1995 from the European Community addressed to the chairman of the conference,'' A/CONF. 164/L. 50, 7 August 1995.

[15] David A. Balton, ''Strengthening the law of the sea: the new Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Ocean Development and International Law*, Vol. 27, 1996, 125–151, at 135.

[16] Moncada, ''Commentarios,'' at 10.

[17] On the rejection of this proposal see the statement by the President of the Chilean Fisheries Association, Mr. Sergio Sarquis, on the opening of the conference cited at note 2 above, at 4, mimeo.

[18] Couve, ''Negociaciones,'' at 5.

provisions. Discretional fisheries decisions by the coastal state are not affected by the 1995 Agreement, either generally or in connection with the determination of total allowable catches, nor can they be subject to compulsory dispute settlement in the light of Article 297(3) of the Convention and Article 32 of the 1995 Agreement. Article 4 is the provision governing the 1995 Agreement as a whole and the question of the geographical ambit of application and compatibility of conservation and management measures.

Geographical ambit of application of the 1995 Agreement

In referring to the areas of application of the 1995 Agreement, Article 3 sets out first the general rule and secondly provides for specific exceptions and conditions. The general rule is that the 1995 Agreement "applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction."[19] This element was essential to any solution in view of the arguments made in connection with the mandate of the conference as set out in program area C of Chapter 17 of *Agenda 21*, dealing specifically with high seas issues, and above all in view of the legal extent of Article 63(2) of the Convention applying to stocks in the adjacent area. The question of the sovereign rights of the coastal state in the exclusive economic zone was also very much at play in the matter.[20]

A number of proposals introduced during the negotiations of the conference relied on the application of conservation and management measures only to stocks in the high seas.[21] Most of these initiatives had also relied on the approach of extending national conservation measures into the high seas to a greater or lesser extent. A Russian proposal on the

[19] 1995 Agreement, Art. 3(1).

[20] Hayashi, "The role of the United Nations," at 379.

[21] Canada, "List of issues submitted by the delegation of Canada," Doc. A/CONF. 164/L. 5, 4 June 1993; Chile, Colombia, Ecuador, and Peru, "Elements of an international agreement on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas," Doc. A/CONF. 164/L. 14, 16 July 1993; Argentina, Canada, Chile, Iceland, and New Zealand, "Draft convention on the conservation and management of straddling fish stocks on the high seas and highly migratory fish stocks on the high seas," Doc. A/CONF. 164/L. 11, Rev. 1, 28 July 1993. The latter document was first submitted by Canada on behalf of the other sponsoring delegations as casting in the form of a convention the proposals made by Canada in Doc. A/CONF. 164/L. 5, as subsequently revised in informal consultations; see the letter by the chairman of the Canadian delegation, Doc. A/CONF. 164/L. 13, 16 July 1993, which further evidences the influence of this delegation in the negotiations.

conservation of straddling stocks in the high seas areas adjacent to the exclusive economic zone had envisaged, for example, that ''it is absolutely essential that the minimum conservation standards adopted should be standards which have been developed and tried and tested by the coastal state,'' further identifying several of these standards such as fishing areas, allowable catches, calculation of fishing effort, and others.[22] A proposal from the Ukraine advocated preferential rights for the coastal state and that the coastal state should assume responsibility for establishing regulatory mechanisms in the high seas adjacent areas.[23]

This proposed role of the coastal state met with adverse reactions on the part of other interests and particularly from distant-water fishing nations. Korea, for example, called for the examination of the legality of the unilateral conservation jurisdiction beyond the exclusive economic zone both under the Convention and under customary international law.[24] Japan also stated its belief that the sovereign rights of the coastal state must not impinge on the freedom of high seas fishing states[25] and that the Convention does not stipulate the special interests or preferential rights of the coastal state beyond the exclusive economic zone.[26] While this first type of reaction was mostly concerned with preventing the coastal state from exercising jurisdiction in the high seas, at a later stage it evolved into the counter-initiative mentioned above seeking to introduce internationally adopted measures in the high seas into the fisheries management of the exclusive economic zone and other steps that would have resulted in the weakening of the coastal states' sovereign rights.

The biological unity of the stocks concerned was the starting point of the approach that sought to manage fisheries in an integral manner in respect of both the high seas and the exclusive economic zone. China, the European Union, Japan, Poland, the Republic of Korea, and the United

[22] Russian Federation, ''On the application of minimum standards for the conservation of straddling stocks in high-seas areas adjacent to exclusive economic zones,'' Doc. A/CONF. 164/L. 27, 27 July 1993, para. 7.

[23] Ukraine, document cited in note 8 above, para. 7(d).

[24] Korea, ''List of issues submitted by the delegation of the Republic of Korea,'' Doc. A/CONF. 164/L. 7, 10 June 1993, para. 8.

[25] Japan, ''Comments on compatibility and coherence between national and international conservation measures for the same stock,'' Doc. A/CONF. 164/L. 28, 27 July 1993, para. 3.

[26] Japan, ''List of issues submitted by the delegation of Japan,'' Doc. A/CONF. 164/L. 6, 8 June 1993, paras. 2 and 6(4).

States have been listed as the main supporters of this view.[27] However, a distinction must be made between those countries that simply searched for a new type of management regime encompassing broad areas brought together under the concept of ecosystem and other countries that had seen in this approach the possibility of counterbalancing the position of coastal states as a matter of diplomatic strategy for the negotiations.

In fact, it is one thing to argue in favor of multispecies and ecosystem-oriented management, as the United States did,[28] and quite another to enlarge this approach so as to substitute international management for the coastal states' powers in areas under national jurisdiction. The European Union, for example, after having supported the notion that ''resource management be based on the principle of the unity of the stock within the totality of its distribution area,''[29] further elaborated that the measures adopted should take into account the impact on areas of national jurisdiction of the coastal states concerned.[30] Korea also proposed a linkage between conservation measures within and beyond the exclusive economic zone and a joint management regime ''under joint sponsorship of the states concerned.''[31] Japan also suggested the establishment of mechanisms to define the minimum standard of conservation and management applicable to waters both inside and outside national jurisdiction, while emphasizing that since the distribution area may cover ten or more countries ''it is not practical or wise to set separate conservation and management measures for the territorial and extraterritorial waters or separately for different zones under national jurisdiction.''[32]

Coastal states did not oppose the concept of the biological unity of the stocks since this is a scientifically accepted truth. However, while this concept could be taken into account in defining the conservation and management measures, it should not result in the imposition and binding effect of internationally defined measures within the exclusive economic zone since this is an area where the coastal state is the sole

[27] Hayashi, ''The role of the United Nations,'' at 379; Balton, ''Strengthening the law of the sea,'' at 133.

[28] United States, ''Position statement submitted by the United States of America,'' Doc. A/CONF. 164/L. 3, 1 June 1993, para. 2; United States, ''Principles on straddling fish stocks and highly migratory fish stocks for use by States, entities and regional organizations,'' Doc. A/CONF. 164/L. 15, 16 July 1993, I, 2.

[29] European Union, ''Position statement submitted by the European Economic Community,'' Doc. A/CONF. 164/L. 8, 17 June 1993, I, 2.

[30] European Union, ''Suggested guidelines,'' Doc. A/CONF. 164/L. 20, 21 July 1993, I, 3 (a).

[31] Korea, document cited in note 24 above, para. 1.

[32] Japan, document cited in note 25 above, paras. 6 and 7.

competent authority.[33] In the view of some coastal states the negotiations on this point became flawed as a consequence of the geographical discussions on the area of application having prevailed over the technical considerations associated with the biological unity of the stocks concerned.[34] Russia from the outset made a clear distinction between measures that would apply in the high seas, the high seas areas adjacent to the exclusive economic zone, and the special problem of enclosed and semi-enclosed seas, but did not envisage areas under national jurisdiction.[35] At a later stage it admitted the principle of the ''unity and inseparability of the straddling fish stocks which form part of the ecosystem of various areas of the world's oceans,'' the concept of the ecosystem management and the biodiversity of stocks and the need to keep the ecosystem intact,[36] but with an express caution that none of it should be used to gain access to the stocks within the exclusive economic zones.[37] The Ukraine also made the point that the areas covered by the habitats of straddling stocks, particularly those under national jurisdiction, ''may not be assigned any special status which would not be in conformity with the Convention.''[38] In the view of Sweden any measures involving the cooperation of coastal states in the exclusive economic zone shall be without prejudice to the sovereign rights of such states exercised in accordance with the Convention on the Law of the Sea.[39]

How to solve this confrontation became one of the most difficult issues of the negotiation since it touched upon fundamental interests of the major actors involved. The chairman of the conference rightly identified the issue at the very outset. In referring to the establishment of a minimum standard for high seas fisheries he raised the question of how this could also serve as a recommendation for adoption by the coastal state of a similar standard within the exclusive economic zone, ''without prejudice to the sovereign rights of coastal states over the living resources in that zone, as provided for in the Convention.''[40] Although the discussion at this point in time was concerned with the question of compat-

[33] Couve, ''Negociaciones,'' at 6. [34] *Ibid*.
[35] Russian Federation, ''List of issues,'' Doc. A/CONF. 164/L. 2, 2 June 1993, para. 10.
[36] Russian Federation, ''Main provisions of the regime relating to straddling fish stocks,'' Doc. A/CONF. 164/L. 25, 26 July 1993, I(1)–(3).
[37] Hayashi, ''The role of the United Nations,'' at 380.
[38] Ukraine, document cited in note 8 above, para. 7(e).
[39] Sweden, ''Elements of a draft instrument on conservation and management of straddling fish stocks and highly migratory fish stocks compatible with sustainable development,'' Doc. A/CONF. 164/L. 39, 16 March 1994, III, 2.
[40] Guide cited in note 5 above, Part 2, VIII.

ibility and coherence between national and international conservation measures for the same stock, which as such will be examined further below, it revealed quite clearly that any measures relating to the exclusive economic zone would of necessity have to observe the requirement of compatibility with the sovereign rights of the coastal states as provided for under the Convention. The recognition of the interdependence of stock components harvested in areas under national jurisdiction and on the high seas, together with respect for the sovereign rights of the coastal state, was again a central tenet of the negotiating text of 1993.[41]

The chairman's point of view on the matter is of particular relevance in understanding the rationale of the solution found. The effectiveness of conservation and management measures was first linked to the thought that any regime established to this effect "should be consistent over the range and distribution" of the stocks concerned.[42] Secondly, it was made abundantly clear that any such approach relating areas under national jurisdiction and the high seas should be respectful of the "various jurisdictional regimes established under the 1982 United Nations Convention on the Law of the Sea."[43] Most importantly, together with the view that management must be the responsibility of all states concerned in a particular fishery taking into account the biological unit of the stocks envisaged, it was emphasized that "[i]n respect of areas under national jurisdiction, there is an identifiable and accountable authority, that is, the coastal State. The responsibilities of the coastal State are clearly stated in the Convention and these have been further elaborated and reinforced in this Agreement in terms of better management standards and practices that are to be applied."[44] Ecosystem management did not prevent the high seas and the areas under national jurisdiction each having its own jurisdictional regime as provided for in the Convention since, as was also remarked by the chairman, "[i]t is clear from the mandate that this Conference is not about the extension of national jurisdiction or the

[41] Negotiating text prepared by the chairman of the conference, Doc. A/CONF. 164/13, 23 November 1993, para. 48.

[42] Chairman of the conference, statement of 15 July 1993 cited in note 7 above. See also André Tahindro, "Conservation and management of transboundary fish stocks: comments in light of the adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," *Ocean Development and International Law*, Vol. 28, 1997, 1–58, at 15.

[43] Chairman of the conference, statement of 31 March 1994 cited in note 7 above, para. 6.

[44] Statement of the chairman upon the adoption of the Agreement on 4 August 1995, Doc. A/CONF. 164/35, 20 September 1995, 3; see also the Statement of 12 April 1995, Doc. A/CONF. 164/28, 1 May 1995, para. 12.

abridgment of the right of States to fish in the high seas in accordance with the Convention. Nor is it a Conference for intrusion on, or the derogation of, the sovereign rights of coastal States in their exclusive economic zones.''[45]

Once the 1995 Agreement provides for its application to the high seas as the general rule, it then establishes specific exceptions in order to ensure the coverage of areas under national jurisdiction relevant for the effectiveness of conservation and management measures as justified under the approach of the biological unity of the stocks. The first exception relates to the application of the precautionary approach set out in Article 6 to the conservation and management of stocks within areas under national jurisdiction, while a parallel exception provides for the application of Article 7 on compatibility of conservation and management measures to such areas under national jurisdiction. In both cases this application is ''subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention.''[46] Thereby the sovereign rights of the coastal state are duly safeguarded since no measure that is contrary to its jurisdictional powers in the exclusive economic zone or derogates therefrom could qualify to be applied within areas of national jurisdiction. The revised negotiating text also explicitly provided that the coastal state has responsibility for conservation and management of stocks under national jurisdiction while also allowing for the application of the precautionary approach and the question of compatibility.[47] Although the reference to different legal regimes was omitted in the first draft of the 1995 Agreement, it was later reinstated in the terms examined.[48]

A third exception provides for the application in areas of national jurisdiction of the general principles of Article 5.[49] The conditions set out by the 1995 Agreement for the operation of this exception are still more strict since this is done ''[i]n the exercise of its sovereign rights for the purpose of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national

[45] Statement of the chairman of 19 April 1993 at the opening of the organizational session, Doc. A/CONF. 164/7, 4 May 1993, 3. For the origins of a dual management regime under the Convention on the Law of the Sea, see M. Dahmani, *The Fisheries Regime of the Exclusive Economic Zone*, 1987, at 115; and Tahindro, ''Conservation and management,'' at 9.

[46] 1995 Agreement, Art. 3(1).

[47] Revised negotiating text, Doc. A/CONF. 164/13/Rev. 1, 30 March 1994, II.

[48] Draft agreement of 11 April 1995 cited in note 6 above, Art. 3.

[49] 1995 Agreement, Art. 3(2).

jurisdiction.'' This condition not only follows the language of Article 56 of the Convention in relation to the sovereign rights of the coastal state in the exclusive economic zone, but also recognizes that such sovereign rights are exercised in respect of highly migratory species, thereby clarifying the meaning of the Convention on this point that had been much debated and bringing the ensuing national practice into a precise legal definition. The first draft 1995 Agreement had referred in this context to Part V of the Convention, thus further confirming the meaning of the present provision.[50] Moreover, the general principles of Article 5 shall be applied *mutatis mutandis* by the coastal state, thus allowing for their necessary adaptation to the jurisdictional regime governing the exclusive economic zone.

All these exceptions are also subject to the respective capacities and special requirements of developing countries as will be discussed further below.[51] It is also necessary to keep in mind that the interplay of these various exceptions considerably narrows down their scope. It might be thought, for example, that, since the exception relating to the application of the precautionary approach is not qualified by the expression ''mutatis mutandis,'' Article 6 might need to be applied without adaptation, but this is not the situation under the 1995 Agreement. In fact the precautionary approach is one of the general principles of Article 5, which is to be applied in accordance with Article 6,[52] and as such a general principle it is also governed by the expression ''mutatis mutandis,'' thereby allowing for the same adaptation that may be necessary for its application in areas under national jurisdiction. The same holds true of Article 7 and the question of compatibility since, as it will be discussed below, this can only operate to the extent of being fully respectful of the sovereign rights of the coastal state in the exclusive economic zone.

The conclusion that may be reached as to the meaning of Article 3 is that essentially it is designed to be applied to areas of the high seas and that the exceptions to this rule are qualified and conditioned in such a manner that they must fully observe coastal state sovereign rights within the exclusive economic zone to become applicable. To this extent such exceptions are compatible with the mandate of the conference and the provisions of the Convention on the Law of the Sea and cannot lead to any derogation of the jurisdictional powers assigned to the coastal state nor of

[50] Draft agreement of 23 August 1994 cited in note 6 above, Art. 3(2).
[51] 1995 Agreement, Art. 3(3).
[52] 1995 Agreement, Art. 5(c).

its discretionary management of fisheries under national jurisdiction in the terms of the Convention.

This conclusion is reinforced by the fact that the general principles of Article 5 to be applied within the exclusive economic zone are not different from those already established under Article 61 of the Convention, requiring in addition the appropriate adaptation.[53] These very principles have also been embodied in the national fisheries legislation of a number of countries.[54] It may even be argued that the 1995 Agreement does not mean that high seas principles will be introduced in areas under national jurisdiction, but on the contrary that the principles adopted by the coastal state under Article 61 of the Convention shall now "be applied in the adjacent high seas areas."[55]

As the precautionary approach is similarly conditioned, it cannot be understood as derogating from the discretionary powers of the coastal state within the exclusive economic zone. It is also interesting to keep in mind in this respect that the interpretation of Article 61 of the Convention had already hinted at the inclusion of the precautionary approach within the criteria to be followed by the coastal state in the conservation and management of fisheries,[56] and that some views have been expressed as to the general application of the precautionary approach to fisheries and other matters under international law.[57] The technical difficulties that the application of the approach and the reference points might entail do not impinge upon the legal regime of the exclusive economic zone and may need to be considered in the context of the special needs of developing countries. Such technical problems have not been an obstacle to the application of the approach either under national fisheries legislation or under the Convention on the Conservation of Antarctic Marine Living Resources.[58]

In addition to all of the above it must also be kept in mind that, as already noted, the coastal state's discretionary powers are excepted from the compulsory settlement of disputes in the terms of Article 297(3) of the Convention and Article 32 of the 1995 Agreement.

[53] Balton, "Strengthening the law of the sea," at 136; see also pp. 149–150 above.

[54] See for example Chile: Law on Fisheries and Aquaculture, No. 19.080, *Official Journal*, 6 September 1991.

[55] Statement by Ambassador Satya N. Nandan on "The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and its potential impact on Pacific island tuna fisheries," conference on achieving goals for sustainable living in the aquatic continent, Hawaii, 19–23 September 1995, at 3.

[56] See pp. 26–28 above.

[57] See pp. 153–155 above.

[58] *Ibid*.

The view occasionally held that coastal states have accepted the application under national jurisdiction of the principles that govern and control fisheries in the high seas, without further clarification, is misleading to the extent that it implies the opening up of the exclusive economic zone to the application of internationally defined measures of conservation and management.[59] The criticism of the 1995 Agreement in terms that it covers only 20 percent of world fisheries because of being restricted to the high seas[60] is equally misleading since the principles of conservation and management also operate in the exclusive economic zone but under a different jurisdictional regime. One area of biological unity and distribution of stocks, subject to different jurisdictional regimes conceived in a supplementary manner as to fisheries conservation and management, is what the 1995 Agreement seeks in essence to achieve.

The issue of compatibility of conservation and management measures in the high seas and in areas under national jurisdiction

The third basic element of the solution found by the 1995 Agreement in connection with the ecosystem management and the legal interaction between areas under national jurisdiction and the high seas is given by the question of compatibility of conservation and management measures. This issue also touched upon the fundamental interests of the main negotiating groups and proved difficult to settle.[61]

In point of fact once again the question of preferential rights or special responsibilities of coastal states in high seas management came to the fore in terms of the legal construction of the provisions of the Convention on the Law of the Sea or simply as a matter of policy in respect of the coastal states' dependency on fisheries, the danger for them of the collapse of the resource or their better position to monitor compliance.[62] Canada strongly argued in favor of the recognition of the special interest of coastal states in the high seas.[63] The draft agreement submitted by this

[59] Balton, "Strengthening the law of the sea," at 134, 136; David H. Anderson, "The straddling stocks agreement of 1995: an initial assessment," *International and Comparative Law Quarterly*, Vol. 45, 1996, 463–475, at 468–469.

[60] Greenpeace International, "Analysis of the UN treaty for the conservation and management of straddling fish stocks and highly migratory fish stocks," December 1995, as cited and commented upon by Anderson, "The straddling stocks agreement," at 468–469.

[61] Hayashi, "The role of the United Nations," at 388.

[62] *Ibid*.

[63] Canada, "List of issues," Doc. A/CONF. 164/L. 5, 4 June 1993, Section III(a)(iii).

country jointly with other coastal states also referred to the ''special needs of their coastal communities traditionally dependent on fisheries'' and that measures adopted for the high seas should be consistent with those applied by the relevant coastal state or states within their exclusive economic zones.[64] Proposals that had envisaged only high seas areas generally favored coastal states' rights in the areas adjacent to their jurisdiction.[65]

In other proposals by coastal states, however, this aspect had been to some extent qualified by other considerations. The working paper by the member countries of the Permanent Commission of the South Pacific recognized the ''unity of the ecosystem'' and the relationship between species and their habitats; it further envisaged that high seas standards should be no less stringent than those applied under national jurisdiction and, conversely, that if the agreed high seas standards were more stringent the coastal state would voluntarily apply them in its exclusive economic zone; if no consensus was reached on the minimum standard, that in force for the exclusive economic zone would be applied.[66] The latter approach involved indeed the prevalence of the coastal state's interest in the high seas and was the basis on which a later proposal by Chile was unsuccessfully made.[67] In any event, the working paper made a step forward to words identifying a common ground for finding a solution since it involved the interaction of both the high seas and the exclusive economic zone; it also provided for consultations and for the environmental impact assessment of fisheries activities in both areas. Following a similar approach the draft agreement introduced by Ecuador also emphasized the coordination of measures applicable in both areas.[68]

The adverse reaction of distant-water fishing nations to any extension of coastal state powers has already been noted. Here again different interpretations of the Convention on the Law of the Sea were emphasized, recalling in particular that earlier attempts to extend conservation measures to the high seas had failed,[69] and questions of equity and justice

[64] Argentina, Canada, Chile, Iceland, and New Zealand, document cited in note 21 above, Article 4(a)(iii) and (v). See also Argentina, ''List of issues,'' Doc. A/CONF. 164/L. 10, para. 1.4.

[65] See for example Russia, document cited in note 35 above, para. 10.5.

[66] Chile, Colombia, Ecuador, and Peru, document cited in note 21 above, Section X, 2–5.

[67] See note 17 and p. 174 above.

[68] Ecuador, ''Working paper on a draft convention on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 44, 23 June 1994, Arts 38–41.

[69] On these proposals see generally pp. 45–46 above.

were also raised.[70] A document introduced by Japan on compatibility and coherence raised the fundamental issue involved in the discussion, namely how to allocate a total allowable catch between coastal states and the high seas fishing states.[71] To this end as well as for other purposes the "due regard" principle of the needs, interests, and practices of both distant-water fishing states and coastal states was highlighted.[72] Japan also listed the criteria that in its view should guide the issue of consistency, including the complementary nature of the measures adopted within and outside the 200-mile area and regional management based on the participation on an "equal footing" of all concerned fishing and coastal states.[73] Due regard, consistency, and respect for the rights of all states were also proposed by the European Union.[74]

The essence of the controversy has been well summarized by one commentator: "Should high seas rules be made or altered to conform to preexisting EEZ rules (which could be viewed as an extension of coastal state control beyond 200 miles)? Should coastal states establish EEZ rules compatible with high seas rules adopted multilaterally (which could be seen as an infringement on coastal state jurisdiction)? Posed this way, the questions were nearly unanswerable."[75] This was the difficult question that the conference chairman had to answer with the acceptance of both interests in the negotiation.

The starting point of a solution was the recognition of the scientific basis of the policy sought. The chairman clearly stated that "[t]he biological nature and distribution of these stocks necessitate compatible and coherent management measures over their entire range. In this respect, fish know no boundaries, and at different times during their life cycles, they may be found both within areas of national jurisdiction and on the high seas."[76] The principle of compatibility and coherence was generally accepted from the outset, but how to do this was a point of

[70] Hayashi, "The role of the United Nations," at 388–389. See also generally Choung Il Chee, "Consistency and compatibility in conservation and management on straddling fish stocks and highly migratory fish stocks between the EEZ and the adjacent high seas," *Korean Journal of International Law*, Vol. 40, 1995, 171–182.

[71] Japan, document cited in note 25 above, para. 8.

[72] *Ibid*., paras. 3, 4 and 8.

[73] Japan, document cited in note 26 above, Section II.7.

[74] European Union, document cited in note 30 above, Section I. 3.

[75] Balton, "Strengthening the law of the sea," at 137.

[76] Statement made by the chairman of the conference on 12 July 1993, Doc. A/CONF. 164/11, 16 July 1993, at 3. See also note 42 above.

contention for a long time.[77] An essential requirement of any solution was also rightly identified by the chairman in that any harmonization of management regimes should be "without prejudice to the sovereign rights of a coastal state over the living resources of its exclusive economic zone, as provided for in the Convention."[78]

These basic elements were duly incorporated into the various texts suggested by the chairman during the negotiations. Particularly meaningful were the requirements of the negotiating text that measures adopted for the high seas should not result in transferring a disproportionate burden of the need for conservation action onto the coastal state, nor should they result in undue harmful impact on the living marine resources under national jurisdiction.[79] The principle that measures established in respect of the high seas should be no less stringent than those established in areas under national jurisdiction was of special significance and bears strongly on the interpretation of the 1995 Agreement.[80] In case that agreement resulted in the adoption of more stringent conservation measures for the high seas, the coastal state would then apply measures equivalent in effect under national jurisdiction on a voluntary basis; while efforts to reach agreement had not been finalized, states fishing in the high seas would provisionally and voluntarily observe conservation measures equivalent in effect to those in force under national jurisdiction.[81] A similar approach was followed by the revised negotiating text, with the difference that observance of measures equivalent in effect would no longer be voluntary but mandatory; other criteria were also refined under this text.[82]

Despite the fact that these suggestions by the chairman were gradually opening the way to a settlement, distant-water fishing states were still not satisfied, particularly in terms of the need to respect the measures adopted by the coastal state in the exclusive economic zone and the no less stringent clause for the high seas fisheries.[83] Questions of overall balance with other provisions of the 1995 Agreement were also raised by

[77] Statement made by the chairman of the conference on 30 July 1993, Doc. A/CONF. 164/15, 10 August 1993, at 4–5; Balton, "Strengthening the law of the sea," at 137; Hayashi, "The role of the United Nations," at 389.

[78] Statement of the chairman cited in note 76 above, at 3; Guide cited in note 5 above, Part 2, Section VIII.

[79] Negotiating text, paras. 48 and 49.

[80] *Ibid*., para. 49(c).

[81] *Ibid*., paras. 50 and 51.

[82] Revised negotiating text, Doc. A/CONF. 164/13/Rev. 1, 30 March 1994, paras. 5–8.

[83] Hayashi, "The role of the United Nations," at 390.

the European Union.[84] While coastal states could probably have accepted the chairman's approach and indeed no strong objections were made to it, the negotiating strategy led to a renewed insistence on a greater role for coastal state measures.[85]

The final text of the 1995 Agreement sets out the solution to the issue of compatibility in Article 7, which begins with an overall safeguard of the respective interests. Such solution is without prejudice to the sovereign rights of the coastal state to explore and exploit, conserve, and manage the living marine resources within areas under national jurisdiction as provided for in the Convention on the Law of the Sea.[86] The language of the safeguard followed that of Article 56 of the Convention in respect of the exclusive economic zone, while the reference to exploration and exploitation, in addition to conservation and management, is clearly related to the discretionary powers of the coastal state to this end under national jurisdiction. Next, Article 7 also safeguards the right of all states for their nationals to engage in fishing on the high seas, also in accordance with the Convention. Articles 116–119 of the Convention accordingly govern this matter, which also includes the relevant interests of the coastal state and the requirements of conservation in the high seas. This overall safeguard of interests means that coastal states' powers shall always prevail in areas under national jurisdiction and that high seas freedom of fishing remains, in both cases subject to the specific arrangements of the Convention. In addition, this safeguard does not stand in isolation but must be read in conjunction with Articles 3 and 4 of the 1995 Agreement, which in turn, as discussed above, provide specific guarantees about the area of application and the relationship with the Convention.

Based on this safeguard, the 1995 Agreement then reiterates the distinction made by the Convention in Articles 63 and 64, that is, with respect to straddling fish stocks the relevant coastal states and the states whose nationals fish in the high seas shall seek to agree on the measures necessary for conservation in the adjacent high seas area, while with respect to highly migratory fish stocks they shall cooperate with a view to ensuring conservation and promoting the objective of optimum utilization throughout the region, both within and beyond the areas under national jurisdiction.[87] As in the Convention, in the case of straddling fish

[84] International Institute for Sustainable Development, *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, 4.
[85] *Ibid*. [86] 1995 Agreement, Art. 7(1).
[87] 1995 Agreement, Art. 7(1)(a) and (b).

stocks measures relate to the adjacent high seas area and cooperation is not mandatory, while in the case of highly migratory fish stocks measures relate to the region as a whole and cooperation becomes mandatory. However, it must be remembered in the latter case that the ensuing problems of interpretation of Article 64 were solved in practice in favor of coastal state jurisdiction[88] and, moreover, Article 3(2) of the 1995 Agreement involves the exercise of sovereign rights not only with regard to straddling fish stocks but also in connection with highly migratory fish stocks.

The principle of compatibility is established in Article 7(2) of the 1995 Agreement in terms that the "Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety."[89] It is clear from the wording of this provision that the question is not that of high seas measures being applied under national jurisdiction, nor of national measures being applied in the high seas, but quite simply that both, adopted under their respective jurisdictional authority, will ensure compatibility by relying on similar standards of management that will not unbalance the system as a whole.[90]

Nature and extent of the duty to cooperate in establishing compatible measures

The 1995 Agreement next provides that coastal states and states fishing in the high seas "have a duty to cooperate" for the purpose of achieving compatible measures. The argument has been made that, since this provision applies to both straddling fish stocks and highly migratory fish stocks, it means an enlargement of the obligation to cooperate established under the Convention which applies only to highly migratory stocks,[91] and, moreover, it would negate the distinction made by the previous paragraph following the provisions of Articles 63 and 64 of the Conven-

[88] See pp. 97–98 above.

[89] 1995 Agreement, Art. 7(2).

[90] Nandan, "The United Nations Conference," at 4, with reference to the Convention on the Law of the Sea and the 1995 Agreement.

[91] Couve, "Negociaciones," at 7; Tahindro, "Conservation and management," at 19–20; Habib Gherari, "L'Accord du 4 août 1995 sur les stocks chevauchants et les stocks de poissons grands migrateurs," *Revue Générale de Droit International Public*, Vol. 100, 1996, 367–390, at 378.

tion.[92] All of it, it is also argued, would mean that conservation and management of straddling fish stocks would no longer be related to the adjacent high seas areas but to the exclusive economic zone as well, thus derogating from the discretionary rights of the coastal state.[93]

Because the duty to cooperate under Article 7(2) cannot be interpreted in any way in a manner contrary to the Convention nor to the guarantees established under Articles 3 and 7(1), the arguments just described are untenable. The duty to cooperate is not contradictory to the scope of Articles 63 and 64 of the Convention as set out in Article 7(1). This duty does not refer to the adoption of measures of conservation and management under one single arrangement as happens under the Articles of the Convention whether it applies to the adjacent high seas or to the region as a whole; the duty relates only to the observance of compatibility which, as explained above, operates under two different jurisdictional authorities, that of the coastal state and that defined for the high seas areas. This is the reason why Article 7(2) relates such duty to "this end," and it is to this end only that it has been established. It should be noted, moreover, that the language associated with this duty refers to coastal states and states fishing on the high seas, not to the states fishing in the region as used in Article 7(1)(b) of the 1995 Agreement and Article 64 of the Convention; while it still applies to both stocks concerned this different language is not without significance. Once the principle of two separate and distinct management authorities and jurisdictions has been accepted, then the 1995 Agreement seeks to clarify by means of the principle of compatibility "the relationship between the conservation and management measures adopted for the two zones."[94] This concept of a duty to cooperate had already been devised in the United Nations studies on high seas fisheries issues precisely as an approach that would overcome the problems that the Convention had left unsettled, including the question of straddling stocks.[95]

The nature and extent of compatibility and the associated cooperation is further clarified by the listing in Article 7(2) as to what precisely states shall take into account in determining conservation and management measures for the high seas and to the extent of Article 3 in areas under national jurisdiction. Scientific realities are paramount among such

[92] Moncada, "Commentarios," at 10–11. [93] *Ibid.*

[94] Moritaka Hayashi, "The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: significance for the Law of the Sea Convention," *Ocean and Coastal Management*, Vol. 29, 1995, 51–69, at 57–58.

[95] See pp. 69–71 above.

factors in that states shall take into account the biological unity and other biological characteristics of the stocks, the relationship between the distribution of stocks, the particularities of fisheries and geography of the region, and the extent to which stocks occur and are fished under national jurisdiction.[96] This last element points towards the prevalence of coastal states' interests to the extent that important fisheries may have been developed under national jurisdiction and this has to be taken into account. Similarly, the respective dependence of the coastal states and the state fishing on the high seas on the stocks concerned has to be taken into account, a criterion that will often point towards the prevalence of coastal states' interests.[97] States also need to ensure that the measures concerned do not result in harmful impact on the living marine resources as a whole;[98] this element had originally referred to the harmful impact of high seas fisheries on the stocks within areas under national jurisdiction,[99] and although the language has been broadened for the sake of balance the situation is still very much the same since the likely impact will be felt in the stocks under national jurisdiction as experience indicates.

The key factors of compatibility, however, refer to the interrelationship between the measures adopted for each of the two basic jurisdictional areas. First and foremost, the measures adopted by the coastal state in the exclusive economic zone in accordance with Article 61 of the Convention in respect of the same stocks shall be taken into account.[100] This means that any high seas measures cannot ignore the conservation efforts of the coastal state under national jurisdiction and must apply similar standards in the light of compatibility. Moreover, states have to ensure – not only take into account – that measures established for the same stocks for the high seas "do not undermine the effectiveness" of the measures adopted by the coastal state; this particular element is directly related to the early formulations that measures in the high seas should be no less stringent than those under national jurisdiction. The conservation policy of the coastal state will thus be the prevailing element of any high seas regime.

The states concerned also have to take into account the previously agreed measures established for the high seas in accordance with the Convention by the coastal state and the states fishing in the high seas or by a subregional or regional fisheries organization or arrangement as the

[96] 1995 Agreement, Art. 7(2)(d).
[97] *Ibid*., Art. 7(2)(e). [98] *Ibid*., Art. 7(2)(f).
[99] Negotiating text, para. 49(d)(iii).
[100] 1995 Agreement, Art. 7(2)(a).

case may be.[101] It must be noted that these measures established for the high seas require the participation of the coastal state in their adoption, either because of direct cooperation between the states concerned or because of its participation in regional or subregional arrangements or organizations. This is an important difference with the situation of measures adopted under Article 61 of the Convention, which are adopted solely under the discretionary rights of the coastal state in the exclusive economic zone.

States are further required under this duty to cooperate to make every effort to agree on compatible measures within a reasonable period of time, which is not specifically defined.[102] If no agreement is reached during this period the procedures for the settlement of disputes can be invoked by any of the states concerned.[103] It should be noted that the settlement of disputes operates only in respect of high seas areas, which are those specifically envisaged in Article 7 for the purpose of agreeing on compatible measures among the states concerned. When this Article applies to areas under national jurisdiction by extension under Article 3 of the 1995 Agreement, the measures adopted by the coastal state in its exclusive economic zone are not subject to agreement with other states but operate under the sole authority of Article 61 of the Convention; the coastal state shall take into account the measures adopted and agreed for the high seas with its own participation, but there is no negotiation or other agreement to this effect. As a consequence, the sovereign rights of the coastal state in the exclusive economic zone and its discretion in respect of fisheries conservation and management are specifically excluded from compulsory dispute settlement under both Article 297(3) of the Convention and Article 32 of the 1995 Agreement. The latter provision had been expressly mentioned in the draft texts of the 1995 Agreement in connection with settlement of disputes relating to compatibility measures,[104] and the fact that the final text does not retain such reference does not change the legal situation since it refers to settlement of disputes under Part VIII, which includes of course Article 32.

While an agreement on compatible measures is pending, states shall also make every effort to enter into provisional agreements of a practical nature, with due regard to the rights and obligations of the states concerned and without jeopardizing the reaching of a final agreement on

[101] *Ibid*., Art. 7(2)(b) and (c).
[102] *Ibid*., Art. 7(3). [103] *Ibid*., Art. 7(4).
[104] Draft agreements cited in note 6 above, Art. 7(4) of the respective texts.

the matter.[105] If the parties are unable to agree on provisional measures, any state concerned may submit this matter to dispute settlement under Part VIII, which again as explained above is only applicable to the high seas. Any agreement or decision on provisional measures must be without prejudice to the final outcome of any dispute settlement procedure on the substance of the matter.[106] As noted above, Chile and Peru had pressed for the application of coastal states' measures in the high seas on a provisional basis until compatible measures had been agreed to by the states concerned, but this proposal did not succeed.[107] This is not to say that the influence of the coastal state will not be considerable in the negotiation, including the interim period before the final agreement is reached, as shall be examined further below.

It has been rightly commented that few states would be willing to submit the issue of compatible measures or provisional agreements to third party dispute settlement in view of the uncertainty surrounding such a decision, and this would probably encourage agreement among the parties concerned.[108] However, with respect to provisional measures it should also be kept in mind that inevitably any such arrangement has a powerful influence on the final outcome irrespective of the intentions of the 1995 Agreement to the contrary.

Article 7 of the 1995 Agreement also provides for the coastal state regularly to inform states fishing on the high seas of the measures adopted for the stocks concerned under national jurisdiction, and conversely for the latter states to inform other interested states, which is particularly the case of the coastal state, of the measures adopted for regulating the activities of vessels flying their flag fishing such stocks on the high seas.[109] The conveying of the information can be done directly, through appropriate regional or subregional organizations or arrangements, or through other appropriate means.

Three overall conclusions can be reached in respect of the solution found to the question of compatibility under the 1995 Agreement. First, the sovereign rights of the coastal state in the exclusive economic zone are fully safeguarded because the application of Article 7 under national jurisdiction is at all times subject to the prevalence of the coastal state's

[105] 1995 Agreement, Art. 7(5).
[106] *Ibid*., Art. 7(6).
[107] See notes 16 and 17 and p. 174 above; for a reference to Peru sponsoring this initiative see Couve, "Negociaciones," at 7.
[108] Balton, "Strengthening the law of the sea," at 137.
[109] 1995 Agreement, Art. 7(7) and (8).

rights and in no circumstances could this be interpreted or enforced in a manner contrary to the Convention. There might be pressures on the coastal state to reach a given arrangement, but these in essence will not be different from those that could be exercised under the Convention. Conservation measures and the total allowable catch established by the coastal state for the exclusive economic zone are governed by its discretionary authority under Articles 61 and 62 of the Convention.

A second conclusion relates to the influence of the coastal state on the measures adopted for high seas fisheries. If the coastal state has enacted adequate conservation measures for the exclusive economic zone, as will probably be the case, it will have a strong case in the negotiations to require that measures established for the high seas be no less stringent. Compatibility in this context will play in favor of the coastal state. It has been rightly commented in this connection that "[l]'obligation de compatibilité imposera donc probablement dans les faits un alignement des Etats pêcheurs sur les mesures prises par l'Etat côtier, même si la rédaction de l'article est ici moins explicite que celle du texte de négociation."[110]

The third conclusion concerns the opposite situation, that is, a situation in which the coastal state lacks conservation measures within its exclusive economic zone. In this case the coastal state will not be able to require stringent measures for the high seas if it has not done a comparable effort under national jurisdiction and will have to adapt its policies in the light of the compatibility required by the 1995 Agreement.

There is still the possibility that measures adopted for the high seas might be more stringent than those established by the coastal state and that this might result in a pressure to reduce its catch under national jurisdiction as a consequence of a lower total allowable catch that needs to be distributed between all interested states.[111] However, this situation is more theoretical than real because it is unlikely that distant-water fishing states will press for stringent measures on the high seas and particularly because this determination would require the participation

[110] "in practice, the obligation relating to compatibility will therefore result in that fishing states shall have to abide by the measures adopted by the coastal state, even though the language of the article on this point is less explicit than that used in the negotiating text." Gwenaële Proutiere-Maulion, "L'Accord sur l'application des dispositions de la Convention des Nations Unies sur le Droit de la Mer du 10 décembre 1982 à la conservation et à la gestion des stocks chevauchants et des stocks de poissons grands migrateurs," *Espaces et Ressources Maritimes*, 1995, No. 9, 182–196, at 190. On the prevalence of the coastal states' interests and measures see also Tahindro, "Conservation and management," at 16, 18; and Gherari, "L'Accord," at 374, 376–377.

[111] Moncada, "Commentarios," at 11.

of the coastal state concerned in the adoption of the agreement. In any event those measures have to take into account the conservation measures enacted by the coastal state under Article 61 of the Convention, and total allowable catches under national jurisdiction are a part of the discretionary rights of the coastal state. It is precisely because the coastal state is the sole authority in the exclusive economic zone that the 1995 Agreement is only concerned with ensuring that measures adopted for the high seas do not undermine the effectiveness of those adopted by the coastal state and not the other way round. It must be also recalled that in the negotiating text the hypothesis of more stringent measures for the high seas was included but later abandoned, and in any event the coastal state was only required to adopt measures of equivalent effect on a voluntary basis.[112]

Ecosystem management as applied to enclosed and semi-enclosed seas and other areas of the high seas

The 1995 Agreement deals also with the situation of enclosed and semi-enclosed seas and of areas of the high seas surrounded entirely by an area under the national jurisdiction of a single state. The negotiations on these questions were very controversial as they dealt with the question of high seas enclaves and other comparable problems.[113] While the term ''enclave'' was deliberately avoided[114] because of the connotation it might have in reinforcing coastal state jurisdiction, the whole discussion about the ''doughnut hole,'' the ''peanut hole'' and other similar areas was very much present in the background and explains the difficulty in attaining a solution.[115] The solutions finally reached essentially follow the same rationale guiding the interaction between areas under national jurisdiction and the high seas that has been examined above.

Article 15 of the 1995 Agreement refers specifically to the implementation of this instrument in an enclosed or semi-enclosed sea.[116] To this end

[112] See note 81 and p. 186 above.

[113] Anderson, ''The straddling stocks agreement,'' at 470.

[114] *Ibid*., at 470.

[115] On the issues associated to the ''doughnut hole,'' the ''peanut hole'' and other situations see pp. 56 and 91–92 above. For a reference to the Barents Sea ''loop hole'' adjacent to the Russian and Norwegian exclusive economic zones and to the Svalbard fishery protection zone, and a reference to the Atlantic doughnut hole bounded by the exclusive economic zones of Norway, Denmark, and Iceland, see Tahindro, ''Conservation and management,'' at 32.

[116] 1995 Agreement, Art. 15.

states shall first take into account the natural characteristics of that sea, a requirement that in earlier drafts had referred to the ''geographical and ecological'' characteristics of that sea.[117] The expression retained by the 1995 Agreement is in fact broader since natural characteristics may include elements other than the geographical and ecological. Russia had supported a reference to all three elements, that is ''the geographical, natural and ecological'' characteristics.[118]

Secondly, Article 15 requires states to act in a manner consistent with Part IX of the Convention and other relevant provisions of such Convention, which provide for the basic rules on this type of sea and other questions. Here again the language retained is broader than that used in some earlier drafts which had referred only to Article 123 of the Convention,[119] or even to subparagraph (a) of this Article dealing only with the coordination of management, conservation, exploration, and exploitation of living resources between the states bordering that particular sea area;[120] Part IX encompasses those and other relevant provisions, including the marine environment, scientific research, and the role of international organizations, as well as the definition of an enclosed or semi-enclosed sea.

While the requirement of states to ''take into account'' the natural characteristics of such seas falls of course short of the strong demands made by coastal states in this respect, it is nonetheless a powerful indication of coastal states' interests in the matter. Russia in particular was a strong advocate of these interests as it had advanced the interpretation that straddling stocks in enclosed or semi-enclosed seas were governed not only by Articles 63 and 123 of the Convention but also by Articles 61 and 62, which govern fisheries within the exclusive economic zone.[121] The reference made by Article 15 of the 1995 Agreement to other relevant provisions of the Convention beyond Part IX can be taken to relate to this argument. Amendments proposed by Russia to this Article had also required taking into account the legal circumstances of the

[117] Draft agreements cited in note 6 above, Art. 13 of the respective texts.

[118] Russian Federation, ''Amendments proposed by the Russian Federation to Articles 1, 13 and 14 of the draft agreement,'' Doc. A/CONF. 164/L. 47, 24 March 1995, amendments to Art. 13.

[119] Negotiating text, para. 19; revised negotiating text, para. 18; Ecuador, document cited in note 68 above, Art. 17.

[120] Draft agreement of 1994 cited in note 6 above, Art. 13.

[121] Russian Federation, document cited in note 36 above, Section II; see also pp. 91–92 above.

conduct of the fishery, and to take into consideration the rights and interests of coastal states.[122]

If the situation of enclosed and semi-enclosed seas was difficult to settle, that of high seas enclaves was still more troublesome. From the very outset Russia had made the conference aware of the difficulties faced by conservation in the Sea of Okhotsk,[123] and together with the United States had addressed the question of both this sea and the Bering Sea.[124] Specific Russian proposals had listed the issue of conservation of straddling stocks in the enclaves of enclosed and semi-enclosed seas as a matter of priority,[125] and had supported the view that coastal states should independently determine the total allowable catch in these seas and establish annual catch quotas for each species; access to the surplus not utilized by the coastal state in these seas would be a matter of bilateral agreements, as under the regime of the exclusive economic zone, while priority in the allocation of quotas would be given to developing countries and states of a region whose fishermen had traditionally fished in the area.[126] The pertinent agreement would also provide for a duty of the parties to ensure that fishing activities in the enclave are not detrimental to the surrounding exclusive economic zones or to the ecosystem and environment; other provisions on quotas, inspection, and enforcement would be also included in such agreements. Two draft resolutions to be adopted by the conference were submitted by Russia, emphasizing the application of the precautionary principle in the enclaves and the right of coastal states to adopt interim protection measures while agreements between concerned states were finalized.[127]

[122] Russian Federation, document cited in note 118, amendments to Art. 13.

[123] Russian Federation, ''Consequences of unscientific fishing for Alaska pollack in the enclave of the Sea of Okhotsk,'' Doc. A/CONF. 164/L. 21, 22 July 1993; Russian Federation, ''Threat of the destruction of Alaska pollack stocks in the Sea of Okhotsk as a consequence of continued unregulated and unscientific fishing in its enclave,'' Doc. A/CONF. 164/L. 43, 23 March 1994; Russian Federation, ''Growing threat of the destruction of Alaska pollack stocks in the Sea of Okhotsk as a consequence of large-scale unregulated and unscientific fishing in its enclave,'' Doc. A/CONF. 164/L. 49, 30 March 1995; Russian Federation, ''Report of the first session of the international conference on the conservation and management of the marine living resources in the high seas of the Okhotsk Sea,'' Doc. A/CONF. 164/INF/6, 26 July 1993. See further pp. 91–92 above.

[124] Russian Federation and United States, ''Conservation and management of straddling fish stocks in the Bering Sea and the Sea of Okhotsk,'' Doc. A/CONF. 164/L. 33, 28 July 1993; see also pp. 91–92 above.

[125] Russian Federation, document cited in note 35 above, Corr. 1 to para. 5.7, 9 July 1993.

[126] Russian Federation, document cited in note 36, Section II.

[127] Russian Federation, ''Draft resolution of the United Nations conference on straddling

The reaction of some distant-water fishing nations, particularly Poland, was equally strong and resulted in objections to any form of coastal state control of high seas areas and in the rebuttal of any suggestions of unilateral action or the use of force that had been made during the debate.[128] Although bilateral agreements had been entered into between Russia and a number of the states fishing in the Sea of Okhotsk, including Poland, it was felt that any endorsement of such arrangements by a global agreement would result in the strengthening of coastal state claims and demands.[129] It is interesting to note that some fishing states such as China, Poland, and the European Union made the argument that a specific Article on enclaves was unnecessary because the matter could be settled under Article 7 on compatible measures;[130] this meant that, as explained above, coastal states' interests in conservation in adjacent high seas areas could be accommodated rather well in the context of Article 7.

In spite of these controversial negotiations Russian diplomacy was successful in obtaining a regime for the enclaves that basically responds to the coastal states' interests. The first draft of the agreement had contained a simple Article on the matter, referring in its title to the situation of an ''enclave'' and requiring that states shall ensure that measures adopted for such high seas areas ''do not undermine'' the effectiveness of conservation and management measures adopted by the coastal state in areas under national jurisdiction.[131] A Russian-sponsored amendment to this Article introduced more elaborate principles, with particular reference to the need to take into account the rights, responsibilities, and interests of the surrounding coastal state and the requirement that the adoption of measures be based on the best scientific data available.[132] Cooperation with the coastal state was also called for to ensure that the measures drawn up for the enclave should be ''no less effective'' than those in force for areas under national jurisdiction, and to prevent fishing contrary to or in the absence of conservation measures; provisional measures were also included in this proposal as well as the

fish stocks and highly migratory fish stocks relating to fishing in areas fully surrounded by the exclusive economic zones of one or more states,'' Doc. A/CONF. 164/L. 45, 29 March 1994; and Doc. A/CONF. 164/L. 48, 24 March 1995.

[128] *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, at 5; Emmanuelle Némoz, ''Les mers enclavées: l'exemple de la Mer de Okhotsk: multilateralisme et unilateralisme,'' *Espaces et Ressources Maritimes*, Vol. 9, 1995, 197–205, at 205.

[129] *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, at 5.

[130] Némoz, loc. cit., supra note 128, at 204.

[131] Draft agreement of 1994 cited in note 6 above, Art. 14.

[132] Russian Federation, document cited in note 118, amendments to Art. 14.

submission of disputes to compulsory settlement under the 1995 Agreement, but excluding any dispute relating to the sovereign rights of the coastal state in its exclusive economic zone.[133] A joint proposal of Russia, Canada, Peru, and the United States also sought amendments to the corresponding Article of the draft,[134] while revealing the strong concern for accommodating the Russian views. Some elements of these proposals were incorporated in the revised draft agreement, with emphasis on the principle of cooperation, the compatibility of measures adopted for the high seas in the application of Article 7, and provisional measures that also referred to those provided for under Article 7.[135]

Article 16 of the 1995 Agreement refers only to areas of the high seas surrounded entirely by an area under the national jurisdiction of a single state.[136] If more than one coastal state surrounds the area the matter shall be governed either by the rules on enclosed and semi-enclosed seas if the definition of the Convention is met or otherwise by the general rules of the 1995 Agreement. Fishing states and the coastal state shall cooperate to establish conservation and management measures for the high seas area. Having regard to the natural characteristics of the area (an expression that again was substituted for the ''geographical and ecological characteristics'' mentioned in the earlier draft) states shall pay special attention to the establishment of compatible measures under Article 7, thus providing for an additional application of the latter principle. Following closely the Russian proposals, the Article mandates that the measures adopted for the high seas shall take into account the rights, duties, and interests of the coastal state under the Convention, a language borrowed from Article 116(b) of the Convention, shall be based on the best scientific evidence available and, most importantly, shall take into account any measures adopted by the coastal state for its exclusive economic zone under Article 61 of the Convention. The aggregate of these requirements clearly points in the direction of the prevalence of the coastal state's interests. Furthermore, states shall also agree, and no longer make every effort to agree as in the preceding draft,[137] on measures for monitoring, control, surveillance, and enforcement of the measures adopted for the high seas. Cooperation is again emphasized and Article 7 is applied in regard to provisional arrangements or measures, including the settlement of disputes, in the terms discussed above.

[133] *Ibid*. [134] Némoz, ''Les mers enclavées,'' at 204.
[135] Draft agreement of 1995 cited in note 6, Art. 14.
[136] 1995 Agreement, Art. 16, title and para. 1.
[137] Draft agreement of 1995 cited in note 6 above, Art. 14(1).

Pending the establishment of provisional measures or arrangements, states shall take measures in respect of vessels flying their flag in order that they do not engage in fisheries which could undermine the stocks concerned.[138]

The special regimes provided for under Articles 15 and 16 of the 1995 Agreement again rely on the principle of ecosystem management, and like the general rules examined these regimes apply in areas of the high seas, except to the extent that the compatibility of measures under Article 7 also applies in this context. While adequate safeguards for the interests of fishing states are established, the prevailing influence of the coastal state is also apparent. Since the approach followed is basically modeled on the provisions of Article 7 and related Articles, both the regimes of Articles 15 and 16 and their negotiating history are of importance for the interpretation of the general rules and the confirmation of their legal and practical significance.

[138] 1995 Agreement, Art. 16(2).

8 Perfecting international cooperation through organizations and arrangements for high seas fisheries conservation and management

Once the basic principles on high seas fisheries conservation and management had been agreed to, there was still the question of how to put them into practice. To the extent that action is required to this effect in areas under national jurisdiction, the coastal state shall have clear authority to enact the appropriate rules and measures. In the high seas, however, the exercise of flag-state jurisdiction is not enough to ensure this objective, although it maintains an active role and significance. Various mechanisms to develop international cooperation in this respect have been devised by the 1995 Agreement, applying in a very specific context some of the more general guidelines already singled out in the Convention on the Law of the Sea.

The meaning and extent of the duty to cooperate to this end, issues of participation in the mechanisms devised, with particular reference to new entrants and non-participating states or entities, the functions of the mechanisms to be established and the requirements of developing countries are some of the major aspects of this matter dealt with under the 1995 Agreement.

Extent of the duty to undertake international cooperation

The Convention on the Law of the Sea had envisaged rather loose forms of cooperation in respect to both straddling stocks and highly migratory species; with respect to the former, states were called on to seek to agree on conservation measures, while with respect to highly migratory species cooperation was based on a more mandatory language.[1] However, no specific legal consequences were provided for in the event that these

[1] See generally pp. 40–44 above.

efforts might have ended in failure or some states might have refused to cooperate altogether. It has been rightly observed in this respect that the duty to cooperate under the Convention was not followed by the duty to join or establish regional organizations,[2] or for that matter to bring conservation measures into practice.

This legal loophole is what the 1995 Agreement essentially purports to close by defining with greater precision the duty to cooperate and by providing various mechanisms in order to give effect to such a duty. The preamble to the 1995 Agreement states the resolve of states parties to improve cooperation between states to ensure the long-term conservation and sustainable use of the stocks concerned.[3] The purpose of cooperation had been addressed in similar terms by the negotiating text[4] and the revised negotiating text,[5] the latter referring in addition to the preservation of the marine environment supporting these stocks; in the final text of the 1995 Agreement these objectives were elaborated upon in the context of the general principles of conservation and management.[6]

To this end, the 1995 Agreement first commits coastal states and states fishing on the high seas to pursue cooperation in respect of the stocks concerned "in accordance with the Convention."[7] This reference to the Convention is consistent with the provision of Article 4 of the 1995 Agreement and means that the distinction made by the Convention as to the different forms of cooperation in respect of straddling stocks and highly migratory species is to be adhered to; that distinction is relevant not only as it relates to the different degrees of cooperation envisaged, but also in terms of the different geographical areas involved, because straddling stocks are concerned with the high seas and highly migratory stocks with a broader regional ambit. This distinction is also a key element for the interpretation of the functions of organizations and arrangements.

The cooperation envisaged is to be pursued either directly or through appropriate subregional or regional fisheries management organizations or arrangements, taking into account the specific characteristics of the

[2] Moritaka Hayashi, "The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: significance for the Law of the Sea Convention," *Ocean and Coastal Management*, Vol. 29, 1995, 51–69, at 58.

[3] 1995 Agreement, preamble, para. 3, in connection with para. 2.

[4] Negotiating text prepared by the chairman of the conference, Doc. A/CONF. 164/13, 23 November 1993, para. 7.

[5] Revised Negotiating text, Doc. A/CONF. 164/13/Rev. 1, 30 March 1994, para. 10.

[6] See generally pp. 145–153 above.

[7] 1995 Agreement, Art. 8(1).

subregion or region. The decision to opt for a regional or subregional approach to conservation and management of high seas fisheries was a part of the debate on whether there should be a global treaty or agreement or else only different regional arrangements.[8] The compromise reached was to have regional organizations and arrangements operating under globally agreed rules and in application of the provisions of the Convention; as expressed by the chairman of the conference:

> It is acknowledged that conservation and management arrangements should take into account specific regional differences and situations and that regional conservation and management measures should be based on globally agreed principles in order to ensure uniformity and consistency in the application of the basic framework for fisheries management established by the 1982 Convention on the Law of the Sea.[9]

Article 8 of the 1995 Agreement further links cooperation to the objective of ensuring "effective conservation and management of such stocks," as was also done in the draft agreement[10] and its revision.[11] This objective is of fundamental importance in the establishment of organizations and arrangements and in defining the reach of the obligations under the 1995 Agreement for states parties and nonparties alike. As explained by one commentator, if a significant number of fishing vessels register in states that do not become members of the organization, or members do not supervise their fishing vessels or do not observe the measures adopted, the whole effort to prevent overfishing and ensure conservation will have failed.[12] This is the basis on which the duty to cooperate is perfected by the 1995 Agreement and rules are provided for new entrants, nonparties, and other issues.

The first requirement of the 1995 Agreement in order to perfect cooperation is that states shall enter into good faith consultations without delay with a view to establishing appropriate arrangements for conservation and management.[13] It should be noted in this respect that states are not under the obligation to undertake such consultations or give other connected steps in every conceivable situation, but only when

[8] David A. Balton, "Strengthening the law of the sea: the new Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks," *Ocean Development and International Law*, Vol. 27, 1996, 125–151, at 134.

[9] Statement made by the chairman of the conference on 15 July 1993, Doc. A/CONF. 164/12, 21 July 1993, 2(g).

[10] Draft agreement, Doc. A/CONF. 164/22, 23 August 1994, Art. 8(1).

[11] Draft agreement, Doc. A/CONF. 164/22/Rev. 1, 11 April 1995, Art. 8(1).

[12] Balton, "Strengthening the law of the sea," at 138.

[13] 1995 Agreement, Art. 8(2).

conservation problems have become evident or are likely to affect the state of the stocks concerned. The 1995 Agreement itself conveys this view in linking the process of consultations particularly to situations where ''there is evidence that the straddling fish stocks and highly migratory fish stocks concerned may be under threat of overexploitation or where a new fishery is being developed for such stocks.''[14] Consultations may be initiated at the request of any interested state, but neither is this an open-ended possibility because, as will be discussed below, the 1995 Agreement requires a real interest as a condition for participation in the mechanisms of cooperation. To the extent that differences may persist, states are required to observe the provisions of the 1995 Agreement, notably the general principles of conservation and management, and act in good faith with due regard to the rights, interests and duties of other states. Although no specific timeframe is provided for this process of consultations, the fact that states shall enter into it ''without delay'' is indicative of an active rather than an excessively prolonged negotiation. The process as a whole builds on the mechanisms of the Convention on the Law of the Sea by providing specific steps to be taken in pursuance of cooperation.

While general measures aimed at cooperation such as those discussed above could be agreed upon without great difficulty in the negotiations, the situation would be different in relation to specific mechanisms. In the view of some delegations, cooperation was to be greatly enhanced and should include the participation of all concerned states. The proposal of the European Union considered that international cooperation with broad participation ''must constitute one of the foundation stones'' for the management of stocks, while assigning responsibility for the application of measures to flag states and accepting the exclusion of noncontracting parties from fishing in regulated areas;[15] similar thoughts were elaborated upon with greater detail in other suggested guidelines by the European Union.[16] Cooperation on an equal basis was supported by Japan, who aimed also at discouraging nonparties from unregulated fishing activities.[17] The duty to participate in regional organizations or arrangements was promoted in the proposals by the member countries of the Permanent Commission of the South Pacific, who also suggested measures

[14] The reference to a new fishery being pursued was introduced in the revised negotiating text, para. 11.

[15] European Union, ''Position statement,'' Doc. A/CONF. 164/L. 8, 17 June 1993, II, 2, 4, and 6.

[16] European Union, ''Suggested guidelines,'' Doc. A/CONF. 164/L. 20, 21 July 1993, II.

[17] Japan, ''List of issues,'' Doc. A/CONF. 164/L. 6, 8 June 1993, para. 6(4) and 7(6).

regarding new entrants and nonparties.[18] In the view of another delegation the question was put in terms that participants in an organization should be entitled to accrue benefits from the obligations that they share to conserve the specified resource, while new entrants would be subject to conditions defined on a case-by-case basis and the implications of new fisheries should be duly considered;[19] some variations aimed at strengthening the duty of fishing states to participate in organizations were introduced in another proposal.[20]

In the view of some coastal states cooperation was conceived in a more restricted manner or virtually ignored because greater powers were envisaged for the coastal state in the handling of conservation and management. A Canadian proposal called for states participating in regional fisheries organizations or arrangements to ensure that such bodies adopt conservation and management measures and enforcement action, and provide for compulsory dispute settlement procedures, but did not elaborate on the duty to cooperate or on the questions of participation in these mechanisms.[21] A similar approach was followed in the draft agreement submitted by Canada jointly with other coastal states, and this proposal included provisions in respect of new entrants and other situations; the particular circumstances of each individual region was a question to be taken into account especially for the application of the provisions on regional organizations and arrangements.[22] The draft agreement submitted by Ecuador provided for preferential access of coastal states to the high seas stocks in the context of conditions to be applied to the acceptance of new entrants.[23] On the other hand, the Russian proposals were generally still more restrictive of international cooperation, listing as an issue in this context the existing practice of interstate cooperation within international organizations on highly migratory stocks only, and possible improvements to that coop-

[18] Chile, Colombia, Ecuador, and Peru, ''Elements of an international agreement on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 14, 16 July 1993, IV, 4, 8, and 9.

[19] United States, ''Position statement,'' Doc. A/CONF. 164/L. 3, 1 June 1993, para. 3.

[20] United States, ''Principles on straddling fish stocks and highly migratory fish stocks for use by states, entities and regional organizations,'' Doc. A/CONF. 164/L. 15, 16 July 1993, II, 2.

[21] Canada, ''List of issues,'' Doc. A/CONF. 164/L. 5, 4 June 1993, I.

[22] Argentina, Canada, Chile, Iceland and New Zealand, ''Draft convention on the conservation and management of straddling fish stocks on the high seas and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 11/Rev. 1, 28 July 1993, V.

[23] Ecuador, ''Working paper for a draft convention,'' Doc. A/CONF. 164/L. 44, 23 June 1994, Art. 14.

eration,[24] but otherwise ignoring the matter since most functions in this respect were to be assigned to the coastal state, particularly in respect of straddling stocks. The establishment of regional fisheries organizations was included in the proposal by the Ukraine, on the understanding that they would work on a consensus basis, but no other details were provided.[25]

The 1995 Agreement clearly took the option of strengthening the duty to cooperate and the mechanisms to accomplish this objective since it was in fact the only way to accommodate the divergent interests involved in the negotiation, with particular reference to the role of both coastal states and flag states. It is in this respect that the 1995 Agreement perfects to a significant extent the Convention on the Law of the Sea by means of giving a specific content to the duty to cooperate. This is done first by relating the duty to cooperate to both straddling stocks and highly migratory stocks, a matter in which, as mentioned above, the Convention distinguished between the duty to seek to cooperate in the former case and the duty to cooperate in the latter; the distinction does not disappear in view of the links between the 1995 Agreement and the Convention, as discussed above, but it does take on a more specific legal mandate as to how to achieve this objective.

Secondly, this overall duty to cooperate is related to specific mechanisms and no longer left in a state of uncertainty. To this end, where a regional or subregional organization or arrangement is in existence and has the competence to establish conservation and management measures, states shall give effect to their duty to cooperate by becoming members of the organization or participants in the arrangement, or by agreeing to apply the measures so established.[26] If such mechanisms are not in existence, states shall then cooperate to establish an organization or to enter into the appropriate arrangement, and shall participate in its work;[27] providing for an obligation to this effect was also a matter where opinions were sharply divided in the negotiations.[28] Again on this point the 1995 Agreement includes both straddling fish stocks and highly migratory fish stocks. Because the Convention did not require cooperation

[24] Russian Federation, ''List of issues,'' Doc. A/CONF. 164/L. 2, 2 June 1993, para. 6.1.

[25] Ukraine, ''Conservation and rational utilization of straddling and highly migratory fish species,'' Doc. A/CONF. 164/L. 40, 17 March 1994, para. 7(a).

[26] 1995 Agreement, Art. 8(3).

[27] 1995 Agreement, Art. 8(5).

[28] Moritaka Hayashi, ''The role of the United Nations in managing the world's fisheries,'' in Gerald H. Blake *et al.* (eds.), *The Peaceful Management of Transboundary Resources*, 1995, 373–393, at 384.

to establish such mechanisms where they were not in existence in respect of straddling stocks under Article 63(2), and had only envisaged this obligation for highly migratory stocks under Article 64, the 1995 Agreement has been interpreted to mean a change in the extent of the cooperation involved.[29] This approach in the 1995 Agreement, however, does not really innovate on the Convention since under Article 118, relating to cooperation in the specific case of conservation and management of high seas fisheries, there is a duty to ''cooperate to establish subregional or regional fisheries organizations to this end,'' and this encompasses high seas living resources in general.[30]

Further provision is made by the 1995 Agreement to coordinate the action before intergovernmental organizations with that under regional organizations or arrangements so as to avoid undue interference with the work of the latter. To this end, the state intending to propose action to be taken by the intergovernmental organization (and this is likely to have a significant effect on the measures established at the regional or subregional level) should consult with the members of the regional organization or participants in the arrangement, and to the extent practicable this should be done prior to the submission of the proposal.[31] The use of the expression ''should'' is to indicate that while these consultations are desirable they are not mandatory. This particular provision had not been envisaged in the early drafts of the 1995 Agreement[32] and can be explained by the troubled relationship between NAFO and the negotiations at the United Nations Conference and other forums, particularly in so far as that organization had been used as a model in the conference.[33]

Questions of participation in cooperation mechanisms and the right to fish in the high seas

Membership and participation in the mechanisms of cooperation became crucial questions in light of the objective of ensuring effective conservation and management of high seas fisheries. It is in this connection that the 1995 Agreement introduces important innovations in the law of high

[29] Hayashi, ''The 1995 Agreement,'' at 57. See also note 91 p. 188 and pp. 188–189 above.
[30] Convention on the Law of the Sea, Art. 118.
[31] 1995 Agreement, Art. 8(6).
[32] The reference to other intergovernmental organizations was introduced in the revised draft agreement cited in note 11 above, Art. 8(6).
[33] David H. Anderson, ''The straddling stocks agreement of 1995: an initial assessment,'' *International and Comparative Law Quarterly*, Vol. 45, 1996, 463–475, at 470.

seas fisheries and closes the loopholes that could still be found in the Convention on the Law of the Sea.

The first question relates to which states are entitled to become members of regional organizations or to participate in the alternative arrangements. The chairman's negotiating text had provided that participation should be open, on a nondiscriminatory basis, to all states with an interest in the stocks concerned,[34] but this approach was not very precise and could have led to demands for participation by states having a rather loose or remote interest in the fisheries. The European Union, with the support of Japan, Poland and the Republic of Korea, advocated open and unrestricted membership in fisheries organizations, while in the view of the United States, Norway, Namibia, the Solomon Islands, and Australia the text was appropriately flexible.[35] In some views the interest could only be related to actual fishing or research operations, but other delegations from coastal states were concerned that a mere statement of intention or the engagement in a few fishing trips might have been invoked as an interest giving rise to an entitlement to participate, a situation which could have put states with a real interest in a minority position within the organization or arrangement.[36] Peru and Uruguay also proposed an amendment to the extent that failure of a state to cooperate as envisaged in the 1995 Agreement should not prevent the establishment of a fisheries organization by other interested states in the region.[37]

The 1995 Agreement improved on the earlier texts by restricting participation to states "having a real interest" in the fisheries, and by providing that the terms of participation in the organizations or arrangements shall not preclude such states from membership or participation, nor shall those terms be applied in a discriminatory manner against any state having a real interest.[38] Therefore participation was open only to states meeting the condition of a real interest, and ensuring at the same

[34] Negotiating text para. 10. See also the revised negotiating text para. 14; draft agreement, Art. 8(3); and the revised draft agreement, Art. 8(3), which referred more generally to the fisheries concerned.

[35] International Institute for Sustainable Development, *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, at 4.

[36] Andrés Couve, "Negociaciones sobre la pesca en alta mar," in conference on "Los intereses pesqueros de Chile en alta mar," Santiago, 27 May 1996, at 8.

[37] *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, at 4.

[38] 1995 Agreement, Art. 8(3); see also André Tahindro, "Conservation and management of transboundary fish stocks: comments in light of the adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," *Ocean Development and International Law*, Vol. 28, 1997, 1–58, at 21. On the concept of interested state see Jean-Pierre Quéneudec, "La notion d'état intéressé en

time that no such state is left out if willing to participate. This last element was included to meet the concern that a group of states might form an organization excluding other states from membership, the argument having been made that such exclusion would be contrary to the good faith required by Article 34 of the 1995 Agreement, and also to the definition of conservation and management measures since it would not be applied in accordance with the Convention, the latter providing for the right of fishing states to participate in the establishment of such rules.[39]

The requirement for a real interest is significant since such an interest can only be taken to mean the conduct of actual fishing operations of significance in the region concerned, or as put by one commentator such organizations must accept as members "all states with a legitimate stake in the fishery concerned."[40] The fact of having fished in the past or the intention to do so in the future is not enough to qualify for membership or participation under the real interest criteria. These and other elements can justify an application as a new entrant into the organization or arrangement, but as will be discussed further below this situation is governed by different criteria and conditions. It is also possible that in the absence of distant-water fishing nations having a real interest an organization or arrangement may be formed by coastal states alone, to the extent that one or several of such coastal states actually conduct fishing operations in the high seas. The obligation to cooperate through mechanisms of this kind is triggered by the existence of conservation problems irrespective of whether these are caused by distant-water fishing nations or any other reason; and even where there is no obligation this may be done in any event in anticipation of possible problems of conservation as mandated by the precautionary approach.

Although the 1995 Agreement provides that states having a real interest "may" become members of or participants in the mechanisms for cooperation, this is not to be understood as a mere discretionary option but as an expression of entitlement. In fact the same paragraph earlier refers to membership or participation as mandatory in that states shall in this way give effect to their duty to cooperate. But more so than the problem of formal participation, that cannot ultimately be imposed on sovereign states,[41] what counts are the consequences of nonparticipation, where the 1995 Agreement has again profoundly innovated on the law of

droit international," *Recueil des Cours de l'Academie de Droit International*, Vol. 255, 1995, 343–461, with particular reference to the law of the sea at 389–397.

[39] Balton, "Strengthening the law of the sea," at 139.

[40] *Ibid*., at 139.

[41] *Ibid*., at 140.

high seas fisheries. As commented on by the conference chairman, ''[t]he Agreement is crafted in such a way that the end result is that no one can fish in the high seas area covered by a regional organization except through the regional organization or by observing the conservation and management rules established by the organization.''[42]

The 1995 Agreement has in fact provided that only those states members of an organization or participants in an arrangement, or otherwise agreeing to apply the measures adopted under those mechanisms, ''shall have access to the fishery resources to which those measures apply.''[43] The earlier negotiating texts had not taken quite such a mandatory stand in this respect since they had provided that only those states participating in the work of such mechanisms ''should'' have access to the resource.[44] The policy of linking access to the resources to participation in the mechanisms of cooperation had found support in key delegations at the conference.[45] If a state entitled to participate because of its fisheries activities in the region refuses to do so, then the consequence will be that it may be lawfully excluded from such fisheries. The provisions regarding nonparticipation and even deterrence measures shall then apply to these states, a matter to be discussed further below. Whether this solution amounts to a denial of the freedom of such states to fish in the high seas, as has been argued,[46] is debatable since the freedom to fish does not mean that it must be unregulated or done in a manner contrary to conservation and rational management. The whole evolution of the law of high seas fisheries has been pointing in this direction[47] and the 1995 Agreement has only made explicit what was already well advanced in international law. Furthermore, the 1995 Agreement can be identified in this respect with the establishment of an objective regime under international law, governing not only relations between parties to it but also the conduct of activities of other states in a particular area.[48] The right to fish is not affected by this solution, but the

[42] Statement by Ambassador Satya N. Nandan on ''The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and its potential impact on Pacific island tuna fisheries,'' Conference on Achieving Goals for Sustainable Living in the Aquatic Continent, Hawaii, 19–23 September 1995, at 4.

[43] 1995 Agreement, Art. 8(4).

[44] Negotiating text, para. 12; revised negotiating text, para. 15.

[45] See for example European Union, document cited in note 15 above, para. 8; and document cited in note 16 above, para. 10.

[46] Hayashi, ''The 1995 Agreement,'' at 58.

[47] See generally chapter 2 above.

[48] On objective regimes under international law see A. McNair, *The Law of Treaties*, 1961, at

conditions for its exercise are established under a particular organization or arrangement.[49]

Once the 1995 Agreement has identified which states are entitled to become members or participants in the respective mechanisms and the consequences of not doing so, there is still the question of new entrants into the fishery. This has also been a difficult matter to settle in the past since there is a need, on the one hand, to respect the freedom of high seas fishing and, on the other hand, to ensure the effectiveness of the arrangements made by the original participants. From the outset of the negotiations it was recognized that new entrants should be accommodated ''to the extent possible,''[50] thereby implying that it would not always be possible to accommodate them and that the conditions for this so doing might be different. Some delegations had sought that conditions to this effect should be established on a case-by-case basis and taking into account the implications of a new fishery on fully utilized resources,[51] or that new entrants should have the obligation to cooperate in good faith and comply with existing management measures.[52] In another proposal the allocation of any stock to new entrants should be subject to a waiting period, and allocation should only be made when the total allowable catch of a depressed stock exceeds the threshold level established; if the stocks have been fully allocated new entrants should only be accommodated to the extent that quotas are relinquished by existing participants, and in any event special consideration should be given to the interest of coastal states and developing countries.[53]

On the basis of these various proposals the 1995 Agreement sets out the criteria to be taken into account for determining the nature and extent of participatory rights for new entrants.[54] The most important criterion is the status of the stocks concerned and the existing levels of fishing effort,

259; see also *Yearbook of the International Law Commission*, 1964, Vol. II, 173–227, and 1966, Vol. II, at 231.

[49] Balton, ''Strengthening the law of the sea,'' at 139.

[50] Statement cited in note 9 above, at 3(k).

[51] United States, document cited in note 19 above, para. 3; United States, document cited in note 20 above, II, 2.

[52] Chile, Colombia, Ecuador, and Peru, document cited in note 18 above, para. 9.

[53] Argentina, Canada, Chile, Iceland, and New Zealand, document cited in note 22, above Art. 19. The issue of new entrants was linked at the start of the negotiations to the need to ensure an opportunity for developing countries to participate in high seas fisheries as they had not had the capacity to do so in the past; Statement by the chairman of the conference on 12 July 1993, Doc. A/CONF. 164/11, 16 July 1993, at 2–3.

[54] 1995 Agreement, Art. 11.

because if the stock is overfished or there is no surplus available quite obviously new entrants will not be allowed into the fishery. The interests and fishing patterns and practices of new and existing members, as well as their contributions to conservation and management, provision of data, or scientific research, are also to be taken into account. The needs of coastal fishing communities and of coastal states overwhelmingly dependent on the exploitation of marine resources, and the interests of developing countries in the region or subregion, are additional criteria. It has been noted that this listing of criteria involves conflicting factors,[55] and in fact the accommodation of new entrants will only be possible when there is a large surplus of the stock and other interests geographically more closely related have been ensured an adequate share of the available resources. The greater difficulty will be where a new entrant increases the pressure to become an original member or participant even if the requirement of having a real interest in the fishery is not clearly met.

The situations described above involve the membership or participation of states in the regional organizations or arrangements either *ab initio* or as a new entrant. But there is still the case of states that, being parties to the 1995 Agreement, have refused to become members or participants in the mechanisms of cooperation. The assumption in this case is that such states are entitled to join the mechanisms established in view of their real interests in the fisheries;[56] if they have no such interest they shall not be entitled to join and could only apply at a later point under the conditions of a new entrant. The possibility that such states might undermine the effectiveness of conservation and management measures agreed under the organizations or arrangements established was viewed with concern during the work of the conference. The European Union, for example, called for the obligation on those states to ensure that their fishing vessels did not engage in any activity that might undermine the effectiveness of internationally agreed measures,[57] and for the possibility of member states to undertake appropriate efforts consistent with international law to ensure that no vessels engage in any activity contrary to the objectives of the organization.[58] Japan also called for the encouragement of participation and to discourage unregulated fishing activities.[59] This concern

[55] Anderson, "The straddling stocks agreement," at 470.
[56] *Ibid*., at 471.
[57] European Union, document cited in note 16 above, para. 14.
[58] *Ibid*., para. 15.
[59] Japan, document cited in note 17 above, para. 7(6).

had also met with the general acceptance of the parties to the negotiations from the very outset.[60]

As a result of this concern the 1995 Agreement has provided for various obligations and measures aimed at the prevention of activities that may hinder the effectiveness of the system of conservation and management devised. The first step is that nonmembers or nonparticipants, or states which do not otherwise agree to apply the conservation and management measures established, are not discharged from the obligation to cooperate to this effect in accordance with both the Convention and the 1995 Agreement.[61] In point of fact, under Articles 63(2), 64 and 118 of the Convention there is a duty to cooperate in this regard, although the extent of this duty may vary from Article to Article; the duty to cooperate under Article 8(3) of the 1995 Agreement also applies to all states parties to it even if not members or participants in the mechanisms of cooperation. If the objective of the 1995 Agreement is conservation in the high seas, all parties to it are bound to comply with the measures established to this effect.

A second step is that states in this situation shall not authorize vessels flying their flag to engage in fishing operations for the stocks subject to conservation under the organization or arrangement in place.[62] This very thought had already been included in the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,[63] and in the 1995 Code of Conduct for Responsible Fisheries,[64] both of which will be discussed further below. Article 18 of the 1995 Agreement further elaborates upon the matter by requiring states to ensure that vessels flying their flag comply with regional and subregional conservation and management measures on the high seas and that they do not engage in activities which undermine the effectiveness of such measures.[65]

The third step envisaged by the 1995 Agreement is to make its provisions applicable to other fishing entities. The 1995 Agreement applies *mutatis mutandis* to other fishing entities, a provision intended to

[60] Statement cited in note 9 above, at 3(k).

[61] 1995 Agreement, Art. 17(1).

[62] 1995 Agreement, Art. 17(2).

[63] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 24 November 1993, *International Legal Materials*, Vol. 33, 1994, 968–980, Art. III(1)(a).

[64] Code of Conduct for Responsible Fisheries, FAO Doc. C 95/20–Rev. 1, October 1995, Art. 6(11).

[65] 1995 Agreement, Art. 18(1).

take care of the particular legal situation of Taiwan.[66] To this end member states or participants in the corresponding mechanisms shall, individually or jointly, request such fishing entities operating in the relevant area to cooperate fully in the implementation of the measures established for such area.[67] This provision was included in the text at a late stage in the negotiations.[68] Since such entities cannot become parties to the 1995 Agreement or otherwise formally participate in the mechanisms of cooperation envisaged, and hence cannot be legally bound, the aim of this clause is to have such measures applied *de facto* as extensively as possible to the fishing activities in the relevant area. Quite naturally the entities shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with the measures adopted.

The fourth relevant step envisaged by the 1995 Agreement is to provide for the exchange of information between member states and participants about the activities of other states not members or participants which are engaged in fishing operations, on the basis of which they shall take measures consistent with both the 1995 Agreement and international law to deter such activities undermining the effectiveness of the measures adopted.[69] Those other states also being parties to the 1995 Agreement, this provision goes further than the one envisaged in the 1993 FAO Compliance Agreement for a similar situation since the latter only allows for the activity to be drawn to the attention of the flag state concerned and eventually of the FAO.[70] This provision of the 1995 Agreement further reinforces the status of an objective regime and finds important precedents in the Convention on the Central Bering Sea[71] and in the 1959 Antarctic Treaty.[72]

Lastly, the 1995 Agreement also took into account the situation of

[66] 1995 Agreement, Art. 1(3). See also p. 139 above; and see generally Ted L. McDorman, ''Stateless fishing vessels, international law and the UN high seas fisheries conference,'' *Journal of Maritime Law and Commerce*, Vol. 25, 1994, 531–555.

[67] 1995 Agreement, Art. 17(3).

[68] Revised draft agreement, Art. 17(3).

[69] 1995 Agreement, Art. 17(4).

[70] Agreement cited in note 63, Art. VI(8)(b).

[71] Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, 16 June 1994, *International Legal Materials*, Vol. 34, 1994, at 67, Art. XII(3). See also Hayashi, ''The role of the United Nations,'' at 385, and Tahindro, ''Conservation and management,'' at 26. A similar provision is found in the Convention on the Conservation of Southern Bluefin Tuna of 10 May 1993, *Law of the Sea Bulletin*, No. 26, 1994, at 63, Art. 15(4), for a reference to which see also Tahindro, ''Conservation and management.'' at 26.

[72] 1959 Antarctic Treaty, Art. X.

nonparties to it, which is of course different from all of the above because these other states are not legally bound by its provisions. The European Union had expressed their concern on this point and had called for the appropriate solutions, suggesting that only states cooperating in decision-making and bearing responsibility for such decisions should fish for the regulated stocks, without prejudice to the policy of inviting them to join the relevant organizations.[73] The member countries of the Permanent Commission of the South Pacific had foreseen a mechanism similar to that of the FAO Agreement to call the attention of nonparties about fishing activities that might adversely affect the objectives of the organization, and further action could be agreed where necessary to prevent such occurrences.[74] Exchange of information and measures of deterrence were also included in the proposals of coastal states.[75]

The 1995 Agreement follows some of these suggestions in that states parties shall encourage nonparties to become parties to the 1995 Agreement and to adopt laws and regulations consistent with its provisions. In addition, deterrence of activities undermining the effective implementation of the 1995 Agreement can be undertaken by states parties in a manner consistent with the 1995 Agreement and international law.[76]

The fact that a state may decide not to become a party to the 1995 Agreement does not necessarily mean that some of its provisions might not reach him in any event. This can happen first by means of the interpretation of the Convention on the Law of the Sea in respect of states parties to it; since the 1995 Agreement has been made in implementation of this Convention and the legal interactions between these two instruments are so closely related, it will be difficult in practice to dissociate the provisions of the 1995 Agreement from the interpretation of Articles 63, 64 and others that are relevant to high seas fisheries.

The relevance of the 1995 Agreement in respect of nonparties may also be found in the eventual operation of customary international law. To the extent that some of its provisions, or even some of the related provisions of the Convention, might become rules of customary international law, they shall be applicable independently of these instruments.[77] Some of its provisions may also reflect existing customary international law, a situa-

[73] European Union, document cited in note 15 above, II, 6.
[74] Chile, Colombia, Ecuador, and Peru, document cited in note 18 above, para. 8.
[75] Argentina, Canada, Chile, Iceland, and New Zealand, document cited in note 22 above, Art. 25.
[76] 1995 Agreement, Art. 33(1) and (2).
[77] Balton, "Strengthening the law of the sea," at 140.

tion that is reflected in Article 46 of the 1995 Agreement to the extent that denunciation shall not in any way affect the duty of states parties to fulfill any obligation embodied in the 1995 Agreement "to which it would be subject under international law independently of this Agreement."[78] This reference to international law is equally applicable to nonparties if bound by similar obligations, and it may include both conventional and customary international law. Customary international law is also referred to in the preamble to the 1995 Agreement when affirming that matters not regulated by the Convention or the 1995 Agreement "continue to be governed by the rules and principles of general international law."[79]

While some of the basic principles of the 1995 Agreement might evolve into customary international law to the extent that they reflect a broadly accepted state practice, this will be more difficult in respect of detailed provisions that of necessity will not meet the standard of general acceptance in practice. The provisions relating neither to institutions nor to dispute settlement will be able to become a part of customary international law. The process of transformation of the exclusive economic zone into customary international law and its limits may provide a useful precedent in respect of the key provisions of the 1995 Agreement.[80] It is also useful to note that there has been no persistent objector in respect of the 1995 Agreement, and the fact that it was adopted by consensus and that a large number of states signed the Final Act and the attached Resolution I on early and effective implementation of the Agreement further confirms the absence of objections.

Establishing fisheries organizations and arrangements

The difficult debate about the nature and extent of conservation and management measures that is discussed above[81] resulted in a number of proposals concerning the main objectives and functions of regional and subregional organizations and arrangements to this effect. These proposals sought to identify the functions of organizations in accordance with the different views advanced about conservation and management measures that the 1995 Agreement should envisage, also following in this

[78] 1995 Agreement, Art. 46(2); and see further p. 144 above.

[79] 1995 Agreement, preamble, para. 10.

[80] On the exclusive economic zone and customary international law see Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law*, 1989, Chapter 8.

[81] See generally chapters 6 and 7 above.

respect the main interests expressed in the negotiations by distant-water fishing states and coastal states.[82]

The discussion on international fisheries organizations was further complicated by the fact that existing bodies have been much criticized.[83] An interesting document introduced on behalf of the member countries of the South Pacific Forum Fisheries Agency clearly stated in this respect that "cooperation through existing regional and international fisheries commissions has not proved effective in the management and conservation of high seas resources, particularly straddling stocks and highly migratory species, nor in resolving the major issues associated with high seas fisheries."[84] This contribution also listed a number of the reasons explaining the lack of success of such bodies, with particular reference to inadequate information for decision-making, the differing capacities of the parties to collect and analyze data relevant for the scientific discussion, the inability of members to agree on essential conservation measures recommended by scientists, the absence of key fishing states, divergent interests between coastal states and distant-water fishing states as well as between developed and developing countries, poor enforcement, the failure to adapt institutional frameworks to the circumstances of each region, and the lack of commitment to the precautionary approach in fisheries management.[85] Changes in decision-making processes, mandates, and structures, and the need to take into account scientific, and economic and social considerations, were suggested to improve this situation.[86]

These views were influential in the approach that the 1995 Agreement took in respect of fisheries organizations. First, states are mandated to agree on the stocks to which conservation and management measures shall apply, but with the specific requirement to take into account their

[82] United States, document cited in note 20 above, III; European Union, document cited in note 15 above, II; European Union, document cited in note 16 above, II; Canada, document cited in note 21 above, I; Russian Federation, "Main provisions of the regime relating to straddling fish stocks," Doc. A/CONF. 164/L. 25, 26 July 1993, I; Ukraine, document cited in note 25 above, para. 9; Chile, Colombia, Ecuador, and Peru, document cited in note 18 above, IV, V; Argentina, Canada, Chile, Iceland, and New Zealand, document cited in note 22 above, V; Ecuador, document cited in note 23 above, III.

[83] See pp. 61–62 above and note 37, p. 61 above.

[84] Solomon Islands on behalf of the member countries of the South Pacific Forum Fisheries Agency, "Comments on a guide to the issues before the conference prepared by the chairman," Doc. A/CONF. 164/L. 29, 27 July 1993, para. 2.

[85] *Ibid*., para. 3. [86] *Ibid*., paras. 4–6.

biological characteristics and the nature of the fisheries involved.[87] Secondly, states shall agree on the area of application, but again with the requirement to take into account the characteristics of the subregion or region concerned and its socio-economic, geographical, and environmental factors. A significant requirement in respect of the area of application is to take into account the different legal regimes of straddling fish stocks and highly migratory fish stocks as distinguished in Article 7(1) of the 1995 Agreement, which follows the same distinction made by the Convention.[88] This distinction means in essence that the area of application of any such organization or arrangement shall be restricted in the case of straddling stocks to the adjacent high seas area, while encompassing a broader region in the case of highly migratory fish stocks. This further confirms the separate jurisdictional regimes applying in the high seas and in the exclusive economic zone and proves wrong the criticism made of the obligation to participate in regional fisheries organizations on the argument that such organizations would have jurisdictional powers within the exclusive economic zone.[89]

In establishing the pertinent organizations or arrangements states shall also agree on the relationship between the work of the new organization and the role, objectives, and operations of any relevant fisheries management mechanism in existence.[90] This provision aims at the avoidance of duplication and competition, and is reinforced by a separate provision requiring states to cooperate in the strengthening of existing organizations and arrangements.[91] Also states shall agree on the mechanisms for obtaining scientific advice, including where appropriate the establishment of a scientific advisory body;[92] this mandate is of course linked to the principles and obligations governing scientific research.[93] Reiterating the policy of including all states entitled to participate, the 1995 Agreement requires states cooperating in the establishment of organizations or arrangements to inform other states having a ''real interest'' in the work of the proposed mechanism of such steps;[94] the meaning of a real interest is the same as discussed above. The listing of matters on which states shall

[87] 1995 Agreement, Art. 9(1)(a).
[88] 1995 Agreement, Art. 9(1)(b).
[89] Fernando Zegers, Report dated 1995, as cited in Luis Felipe Moncada, ''Comentarios al acuerdo de pesca de las Naciones Unidas,'' in conference cited in note 36 above, at 12.
[90] 1995 Agreement, Art. 9(1)(c).
[91] 1995 Agreement, Art. 13.
[92] 1995 Agreement, Art. 9(1)(d).
[93] 1995 Agreement, Art. 14; and see pp. 164–170 above.
[94] 1995 Agreement, Art. 9(2).

agree for the purpose of establishing organizations and arrangements of this kind is not exhaustive as revealed by the use of the expression ''*inter alia*'' in Article 9.[95]

The question of transparency in decision-making became one of the important issues of discussion in the context of provisions dealing with regional fisheries organizations. A number of nongovernmental organizations, particularly the Worldwide Fund for Nature,[96] had been advocating a broad public discussion on the establishment of catch quotas by regional organizations and sought to this end forms of participation in the proceedings of such organizations. This issue has become a common problem in fisheries organizations and other entities. The requirement of transparency in decision-making was taken up in the negotiating text[97] and gradually improved with the various drafts introduced by the chairman of the Conference;[98] the last draft agreement had also included the question of transparency among the functions of regional organizations but this was objected to by Russia[99] and was not pursued by the final agreement in the context of functions but only as a separate Article. A proposal from the United States strongly supported the demands of nongovernmental organizations by suggesting various specific steps to this effect.[100]

The 1995 Agreement is quite specific in requiring that states shall provide for transparency in the decision-making process and other activities of organizations and arrangements.[101] It also provides that representatives from intergovernmental and nongovernmental organizations concerned with the relevant stocks shall be afforded the opportunity to participate in meetings of regional organizations as observers or in some other capacity as appropriate. However, this opportunity shall be granted in accordance with the procedures of the respective regional organization. The concern for the charge of excessive fees regarding participation is reflected in the further requirement of the 1995 Agreement that the procedures governing participation should not be unduly restrictive. Again, subject to the applicable procedures, such organizations shall also have timely access to the records and reports of the regional organiza-

[95] 1995 Agreement, Art. 9(1).
[96] Anderson, ''The straddling stocks agreement,'' at 470.
[97] Negotiating text, para. 21.
[98] Revised negotiating text, para. 23; draft agreement cited in note 10 above, Art. 15; revised draft agreement cited in note 11 above, Art. 15.
[99] *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, at 4.
[100] *Ibid*., at 4.
[101] 1995 Agreement, Art. 12(1).

tions. Although views were expressed that such organizations were given better treatment than states,[102] the contribution of nongovernmental organizations was considered generally positive in this respect.[103]

The 1995 Agreement also dealt with the functions of organizations and arrangements, a matter which is linked to the fulfillment of the obligation of cooperation. These functions can be grouped into three main categories: conservation and management measures; scientific research and data; and institutional questions. The substantive content of these functions is developed in detail in other parts of the 1995 Agreement; this interrelationship allowed for some of the functions listed in earlier negotiating texts and drafts of the agreement to be moved to other parts of the text in order to facilitate agreement on the intricacies of the negotiating process.

The first group of functions requires states to agree on and comply with conservation and management measures to ensure the long-term sustainability of the stocks concerned, to agree as appropriate on participatory rights such as the allocation of allowable catch or levels of fishing effort, and to adopt and apply generally recommended international minimum standards for the responsible conduct of fishing operations.[104] Other related functions may be also grouped in this category, such as agreeing on the means to accommodate the fishing interests of new members and participants.[105] As discussed above, the area covered by the organization or arrangement, and hence where its functions can be exercised, is restricted in the case of straddling fish stocks to the high seas adjacent area and has a broader regional ambit in the case of highly migratory fish stocks.

This first set of functions has been criticized by the fishing industry as being excessively broad and including rather vague concepts such as the adoption of international minimum standards.[106] Based on this argument a proposal was made that in discharging these functions the organization should take into account the rights, duties, and interests of relevant coastal states,[107] an approach which in turn was linked to the provisional

[102] *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, at 4.
[103] Anderson, ''The straddling stocks agreement,'' at 470.
[104] 1995 Agreement, Art. 10(a), (b), and (c).
[105] 1995 Agreement, Art. 10(i).
[106] Moncada, ''Comentarios,'' at 12.
[107] Andrés Couve, ''Negociaciones sobre el regimen pesquero en alta mar en el marco de la Conferencia de Naciones Unidas,'' 1995, at 25.

application of measures defined by the coastal state while the pertinent high seas arrangements were set up.[108]

It is interesting to note in this respect that while the claim of some coastal states to enact conservation measures in the high seas concerning nationals of other states has not been generally recognized, and the possibility of enforcement of such measures has been much resisted, the coastal state will in most cases have an important influence in the adoption of measures by the respective regional or subregional organizations. This can be achieved in two ways under the 1995 Agreement. First, to the extent that the coastal state will have stringent conservation measures in force for the exclusive economic zone, in the light of the principle of compatibility these measures will necessarily have to be taken into account in establishing measures under a regional organization;[109] the functions of the organization cannot be exercised independently from the substantive principles governing conservation and management.

Secondly, because in a number of cases the coastal state will also be engaged in high seas fishing operations, it can enact conservation measures for its own nationals in such areas, and these will also have to be taken into account by any organization established in that region. Measures defined by the coastal state may of course include the allocation of the total allowable catch and the level of the fishing effort. The conservation measures enacted by the coastal states will prevail in the high seas until an organization is established, and both the establishment of such organization and the discharge of its functions will require the participation and consent of the coastal state. Again in this case the organization could not discharge its functions ignoring conservation measures in force for the area. While a number of these measures will be objected to and reopened for discussion in the context of a negotiation including other interests, the effectiveness of conservation and its compatibility with measures in force for the exclusive economic zone cannot be undermined. Even if other interests are accommodated in the negotiation, the measures established will in any event be influential in respect of future new entrants and participants. The essential point for the coastal states, as expressed by the chairman of the conference in relation to the members of the Forum Fisheries Agency, is that they ''must get ahead of the game.''[110]

[108] See notes 16 and 17, p. 174, and text on pp. 174–175 above
[109] See note 110, p. 193, and text on pp. 193–194 above.
[110] Nandan, ''The United Nations Conference,'' at 6.

It has been mentioned above that a regional or subregional organization might also be formed by the relevant coastal states in the area in the absence of other states having a "real interest" in the fisheries, particularly if one or more such coastal states are also high seas fishing states in their own right. Again in this case the measures adopted for the high seas will prevail until other negotiations are undertaken with new entrants. This might eventually be the case of the member countries of the Permanent Commission of the South Pacific, where Chile is both a coastal state and a high seas fishing state. Although the Commission has stated that it shall not become a regional fisheries management organization,[111] this may be done by a supplementary protocol or arrangement between the interested member states; members of the Commission have also been cautious in respect of ratifying or acceding to the 1995 Agreement.[112]

The second set of functions of regional organizations relates to the scientific information and advice necessary for adopting the appropriate decisions on conservation and management.[113] These matters are dealt with in detail under Article 14 of and Annex I to the 1995 Agreement. The functions listed relate to the acquisition and evaluation of scientific advice; reviewing the status of stocks and assessing the impact of fishing on non-target and associated or dependent species; agreeing on the standards for collection, reporting, verification, and exchange of data; compiling and disseminating accurate and complete statistical data, again with due care for confidentiality where appropriate; and promoting and conducting scientific assessments of stocks and relevant research, and disseminating the results obtained.

The third set of functions is associated with institutional matters and draws on the critical views introduced in this respect in the negotiations and related proposals.[114] Among such functions there is the establishment of appropriate mechanisms of cooperation for effective monitoring, control, surveillance, and enforcement; agreeing on decision-making procedures that facilitate the adoption of measures in a timely and effective manner; promoting the peaceful settlement of disputes; ensuring the full cooperation of the relevant national agencies and indus-

[111] Permanent Commission of the South Pacific, Meeting of Heads of National Sections, Lima, 21–23 August 1995, as cited in *Boletin Informativo*, No. 163, January 1996, at 15.

[112] Permanent Commission of the South Pacific, "Seminario regional sobre el nuevo Derecho del Mar," Guayaquil, 23–24 April 1996, Final Report, Recommendation 4.

[113] 1995 Agreement, Art. 10(d)–(g).

[114] 1995 Agreement, Art. 10(h) and (j)–(m).

tries in implementing decisions and recommendations; and giving due publicity to the measures adopted, a point also related to the requirements of transparency.

The principle of common but differentiated responsibility

Under international environmental law the principle of common but differentiated responsibility has also become a major new development that bears importantly on the questions dealt with under the 1995 Agreement. As stated in Principle 7 of the Rio Declaration, ''states shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.''[115] However, in view of the different contribution to environmental degradation, while there is a common responsibility to cooperate there are also differences to be taken into account; in particular developed countries acknowledge their responsibility in pursuing sustainable development ''in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.'' This principle has found important application in recent conventions,[116] and allows the establishment of different legal obligations for developed and developing countries in terms of both the substantive content of the rules and the procedural arrangements for their implementation. Compliance with obligations by developing countries is often made conditional on the availability of financial and technical resources and assistance to that effect.

This very principle had already been envisaged under the Convention on the Law of the Sea in relating the determination of allowable catches and other conservation measures in the high seas to the ''special requirements of developing States'' and other factors.[117] A number of proposals introduced in the negotiating process leading to the 1995 Agreement also suggested specific measures to deal with the needs of developing countries. In the view of Canada, the ability of developing countries to fulfill their obligations ''is dependent upon their capabilities, including the financial, scientific and technological means at their disposal,'' calling for broad cooperation in respect of conservation and management;[118] similar views were supported in the draft agreement introduced by other coastal

[115] Rio Declaration on Environment and Development, 1992, Principle 7.
[116] Philippe Sands, *Principles of International Environmental Law*, 1995, at 217–220.
[117] Convention on the Law of the Sea, Art. 119(1)(a).
[118] Canada, document cited in note 21 above, II.

states.[119] The European Union also made a similar linkage between the ability of developing countries to fulfill their obligations and the means at their disposal.[120] Japan related the assistance to developing countries only to the transfer of technology for scientific research, handling of data, and responsible fishing operations.[121] The member countries of the Permanent Commission of the South Pacific envisaged a broader cooperation since technical assistance and financial support was aimed at enabling developing countries "to participate in high seas fishing."[122]

The most comprehensive proposal in this respect was introduced by a group of countries from the south Pacific, explaining both the legal background of the need to provide assistance and the specific requirements of developing countries, with particular reference to small island states.[123] Human resources development, financial and technical assistance, technology transfer, and consultative and advisory services were referred to as the main types of assistance required. Among the various areas mentioned in this connection there was specific mention of the participation in the fisheries, including preferential access rights for developing countries in the high seas fisheries and promotion of the access to markets. The FAO has also considered the establishment of a special program of assistance to developing countries.[124]

The principle was also emphasized in a number of statements by the conference chairman, particularly with a view to developing the fishing capabilities of these countries and their contribution to conservation and management,[125] as well as to enabling them to discharge their obligations more effectively.[126] Consensus was soon reached on the need to provide

[119] Argentina, Canada, Chile, Iceland, and New Zealand, document cited in note 22 above, VI.

[120] European Union, document cited in note 15 above, IV; and document cited in note 16 above, para. 16.

[121] Japan, document cited in note 17 above, para. 7(8).

[122] Chile, Colombia, Ecuador, and Peru, document cited in note 18 above, para. 10.

[123] Australia, Cook Islands, Fiji, Kiribati, Marshall Islands, Micronesia, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Vanuatu, "Special requirements of developing countries in relation to straddling fish stocks and highly migratory fish stocks," Doc. A/CONF. 164/L. 24, 26 July 1993.

[124] FAO, "Technical consultation on high seas fishing," Rome, 7–15 September 1992, Final Report, United Nations Conference Doc. A/CONF. 164/INF/2, 14 May 1993, para. 96.

[125] Statement made by the chairman of the conference on 12 July 1993, Doc. A/CONF. 164/11, 16 July 1993, at 2–3.

[126] Statement made by the chairman of the conference on 30 July 1993, Doc. A/CONF. 164/15, 10 August 1993, at 4.

assistance.[127] The matter was also taken up in the guide to the issues before the conference submitted by the chairman at the opening of the negotiations,[128] and with significant details in the negotiating text[129] and the revised negotiating text.[130] These suggestions were heavily influenced by the proposal by a group of countries from the south Pacific mentioned above, and envisaged both questions of conservation and management as well as active participation in the fisheries.

The preamble to the 1995 Agreement recognizes the need for specific assistance to developing countries with the objective of allowing their effective participation in both conservation and management and the sustainable use of the resources; financial, scientific, and technological assistance are mentioned in this context.[131] This objective of the preamble finds specific expression in other clauses of the 1995 Agreement.

Particularly important in this respect is the provision on application of the 1995 Agreement,[132] requiring states to give due consideration to the respective capacities of developing countries to apply Articles 5, 6 and 7 within areas under national jurisdiction, that is the general principles on conservation and management, the precautionary approach, and the principle of compatibility, as well as to their need for assistance. Part VII, dealing in particular with the requirements of developing countries, is to be applied *mutatis mutandis* in respect of areas under national jurisdiction by express mandate of the 1995 Agreement. This means in practice that the application of the Articles mentioned in the exclusive economic zone or similar areas is conditioned on the capacity of developing countries to that effect and on the availability of the necessary assistance. To the extent that these conditions are not met it can be argued there are no corresponding legal obligations for those countries, thereby evidencing the application of the principle of common but differentiated responsibility in this context.

Part VII of the 1995 Agreement mandates states to give full recognition to the special requirements of developing states.[133] Again both conserva-

[127] Statement cited in note 9 above, at 3(l); see also statement made by the chairman of the conference on 4 August 1995 upon adoption of the Agreement, Doc. A/CONF. 164/35, 20 September 1995, at 3–4.

[128] ''A guide to the issues before the conference prepared by the chairman,'' Doc. A/CONF. 164/10, 24 June 1993, Part 2, II(d).

[129] Negotiating text, X.

[130] Revised negotiating text, IX.

[131] 1995 Agreement, preamble, para. 8.

[132] 1995 Agreement, Art. 3(3).

[133] 1995 Agreement, Art. 24(1).

tion and management and the development of fisheries are included in this mandate. Assistance to this end shall be provided either directly or through various international organizations listed, such as the United Nations Development Program, the FAO, the Global Environment Facility, the Commission on Sustainable Development, and other specialized organizations and regional bodies. Not all these organizations are qualified to provide the required assistance and a very detailed scrutiny should be made of this matter.

The special requirements of developing countries shall also be taken into account in the establishment of conservation and management measures. Because this provision is expressly linked to the duty to cooperate it can be argued that such a duty will not be properly discharged unless this requirement is satisfactorily met.[134] These considerations shall apply in particular to situations of vulnerability of those countries dependent on the exploitation of living marine resources, including questions of nutritional requirements; the need to avoid adverse impacts on subsistence, small-scale, and artisanal fisheries and indigenous people and to ensure their access to the fisheries; and the need to ensure that such measures do not result in transferring a disproportionate burden of conservation action onto developing states. Although it has been commented that these provisions are drafted in such a way so as not to benefit developing states that are major distant-water fishing nations, such as China and Korea,[135] this restriction is not evident from the text.

The objectives of cooperation are further elaborated upon so as to enhance the ability of developing countries to conserve and manage stocks and to develop their own fisheries, and to assist such states to enable them to participate in high seas fisheries of the stocks concerned.[136] Access to high seas fisheries shall also be facilitated to the extent that the general principles of conservation under Article 5 are met, and are also subject to the provisions on new entrants of Article 11; this last reference reinforces the interests of developing countries as a factor to be considered in establishing the conditions for new entrants and could be taken to mean that there is a certain preferential right in this respect. Facilitation of participation in regional organizations and arrangements is also an objective of the cooperation envisaged. The types of assistance considered follow closely those set out in the document of the

[134] 1995 Agreement, Art. 24(2).
[135] Anderson, ''The straddling stocks agreement,'' at 473.
[136] 1995 Agreement, Art. 25(1).

countries from the south Pacific.[137] Questions relating to data, stock assessment, scientific research, monitoring, and other aspects associated with compliance and enforcement are, among other matters, to be specifically targeted by assistance.[138]

Special funds to assist in the implementation of the 1995 Agreement, including the costs involved in the proceedings for the settlement of disputes, and other assistance to establish new organizations or arrangements, or strengthening those in existence, are also called for.[139] Despite the fact that the final text of the 1995 Agreement was strengthened in this respect as compared to an earlier draft that had only envisaged "voluntary funds,"[140] no great hope should be placed on this approach in light of the experience of many similar calls in other conventions, and of the experience of the voluntary fund established to assist developing countries to participate in the conference, that received contributions only from Canada, Japan, Norway, and the Republic of Korea.[141]

[137] 1995 Agreement, Art. 25(2).
[138] 1995 Agreement, Art. 25(3).
[139] 1995 Agreement, Art. 26.
[140] Draft agreement cited in note 10 above, Art. 24.
[141] Final Act of the conference, Doc. A/CONF. 164/38, 7 September 1995, para. 16.

9 Compliance and enforcement in high seas fisheries

Compliance with international law in general and with international environmental law in particular, and the establishment of adequate mechanisms for verification and enforcement, have become critical issues calling for increasing attention on the part of governments and scholars. Complex aspects of both international and domestic law are combined in this matter; attempted solutions have ranged from sanctions to the positive inducement by way of incentives, assistance, and preventive measures.[1] In the context of high seas fisheries, compliance and enforcement acquire an added dimension of difficulty since the traditional rules relating to flag-state jurisdiction are intertwined to some extent with the participation of international organizations and coastal states interests in the adoption of measures to this effect.

The concern for effective compliance with high seas conservation and management measures has been at the very heart of the evolution taking place in the law of high seas fisheries. The task of pursuing cooperation and establishing organizations for the purpose of conservation and management has been difficult enough, and the whole effort would be rendered fruitless if effective compliance was not adequately ensured. Two lines of action had proven necessary to this effect. The first was to strengthen the role of the flag state in order to increase its

[1] United Nations, "Report of the expert group meeting on identification of principles of international law for sustainable development," Background Paper No. 3, Geneva, 26–28 September 1995, at 35–36; Philippe Sands, *Principles of International Environmental Law*, 1995, chapter 5; Ibrahim F. I. Shihata, "Implementation, enforcement and compliance with international environmental agreements: practical suggestions in light of the World Bank's experience," *Georgetown International Environmental Law Review*, Vol. 9, 1996, 37–51. See also generally Albert W. Koers, "The enforcement of fisheries agreements on the high seas: a comparative analysis of international state practice," *Law of the Sea Institute Occasional Paper*, No. 6, 1970.

obligations and commitments in terms of compliance and enforcement in respect of fishing vessels flying its flag. The second line of action was to supplement this role, which had historically proven to be insufficient, with other actions to be undertaken by means of international cooperation and other forms of participation involving international organizations and even coastal states or other states with a relevant interest in the matter.

The contribution of the FAO Agreement on Compliance and the Code on Responsible Fisheries

The strengthening of the role of the flag state did not find much difficulty in the negotiations leading to the 1995 Agreement because this was a fundamental principle of international law that had not been questioned as such.[2] Furthermore, the matter had been discussed at length in the context of the negotiations undertaken by the FAO on the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,[3] and was also to be pursued in the negotiations that followed on the 1995 Code of Conduct for Responsible Fisheries.[4]

The 1993 FAO Compliance Agreement pursues the objective of tightening compliance with conservation and management measures in the high seas by specifying the responsibility of the flag state and by strengthening international cooperation and transparency in the exchange of information to this effect.[5] The practice of flagging and reflagging fishing vessels in order to avoid compliance had become a serious concern and the FAO Agreement seeks to stop this abusive

[2] Moritaka Hayashi, ''The role of the United Nations in managing the world's fisheries,'' in Gerald H. Blake *et al*., *The Peaceful Management of Transboundary Resources*, 1995, 373–393, at 386.

[3] FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 24 November 1993, *International Legal Materials*, Vol. 33, 1994, at 968, hereinafter cited as FAO Compliance Agreement; see also David A. Balton, ''Strengthening the law of the sea: the new Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Ocean Development and International Law*, Vol. 27, 1996, 125–151, at 140.

[4] FAO, Code of Conduct for Responsible Fisheries, adopted on 31 October 1995, Resolutions 4/95, 5/95 of the FAO Conference, Twenty-Eighth Session, 20–31 October 1995, Doc. C 95/REP, Annex I, hereinafter cited as FAO Code of Conduct.

[5] On the FAO Compliance Agreement see generally Gerald Moore, ''Un nouvel accord de la FAO pour contrôler la pêche en haute mer,'' *Espaces et Ressources Maritimes*, No. 7, 1993, 62–68; Gerald Moore, ''The FAO Compliance Agreement,'' *International Journal of Marine and Coastal Law*, Vol. 10, 1995, 412–416.

device.[6] This is done first by means of the obligation of states parties to adopt the measures necessary to ensure that vessels flying their flag do not engage in any activity that undermines the effectiveness of international conservation and management measures,[7] an obligation which as explained is reiterated in the 1995 Agreement in connection with regional and subregional conservation and management measures.[8] The FAO Agreement further requires that fishing vessels to be used for high seas fishing be specifically authorized by the flag state to this effect,[9] an authorization which is expressly conditioned to the ability of the flag state to exercise its responsibilities effectively in light of the link existing with the fishing vessel concerned,[10] thereby strengthening further the requirements of the Convention on the Law of the Sea as to the existence of a genuine link with the flag state,[11] but not as much as to include criteria governing the right to fly a flag in connection with fishing vessels as was proposed during the negotiations.[12] An interesting mechanism for blacklisting vessels that have undermined conservation and management measures is provided for under the FAO Agreement, following in some respect the successful experience of the Forum Fisheries Agency in this field.[13] Additional requirements are made in relation to records and exchange of information.[14]

Enforcement under the FAO Compliance Agreement is essentially left to the flag state, specifying that where appropriate it should make contravention of the FAO Agreement an offence under national legislation; in case of serious offences sanctions shall include refusal, suspension, or withdrawal of the authorization to fish on the high seas.[15] An additional mechanism for informing the FAO of activities undermining the effectiveness of measures is also provided for both flag and nonflag states, but this leads only to a limited procedure of comments and circulation of informa-

[6] Patricia Birnie, ''Reflagging of fishing vessels on the high seas,'' *Review of European Community and International Environmental Law*, Vol. 2, 1993, 270–276.

[7] FAO Compliance Agreement, Art. III(1)(a).

[8] 1995 Agreement, Art. 18(1).

[9] FAO Compliance Agreement, Art. III(2).

[10] FAO Compliance Agreement, Art. III(3).

[11] Convention on the Law of the Sea, Art. 91.

[12] Samuel Fernandez Illanes, ''El Código internacional de conducta para la pesca responsable: su creación y progresos,'' Sociedad Chilena de Derecho Internacional, *Estudios 1993*, 29–62, at 47.

[13] FAO Compliance Agreement, Art. III(5). See also ''Agreed minute on surveillance and enforcement cooperation between the parties to the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America,'' *International Journal of Marine and Coastal Law*, Vol. 9, 1994, 308–309.

[14] FAO Compliance Agreement, Arts IV, V, and VI.

[15] FAO Compliance Agreement, Art. III(8).

tion that has been noted above.[16] The FAO Agreement also deals with the question of encouraging nonparties to accept its terms and to adopt laws and regulations consistent with its provisions; as noted above the parties to the FAO Agreement shall cooperate in a manner consistent with the FAO Agreement and with international law to ensure that fishing vessels under the flag of non-parties do not engage in activities that undermine the effectiveness of the measures adopted, and they shall also exchange information with respect to such activities, either directly or through the FAO.[17] Procedures for the settlement of disputes are also provided for on the basis of consultations and other means, which if consented to by the parties to the dispute may lead to binding international adjudication or arbitration.[18]

While the FAO Compliance Agreement has contributed to the development of international law in respect of the duties and rights of flag states in the field of high seas fisheries, it nonetheless contains a number of shortcomings. The definition of fishing vessel is related to any vessel used or intended for use in the commercial exploitation of living marine resources, including mother ships and any other vessel directly engaged in fishing operations,[19] but it is not quite clear whether it covers factory ships or transportation vessels which are often linked to high seas fishing operations,[20] particularly in distant-water areas, a question that also arises under the 1995 Agreement. Another significant limitation is that a party may exempt vessels of less than 24 metres in length from the application of the FAO Agreement within certain restrictions relating to areas of operations or the undermining of the object and purpose of the FAO Agreement,[21] a clause that has been objected to by a number of Pacific states[22] in view of the fact that even those vessels have contributed to situations of overfishing in the area. The FAO Agreement is a legally binding treaty under international law, but it is subject to reservations which shall become effective only upon unanimous acceptance by all states parties to the Agreement.[23]

The Code of Conduct for Responsible Fisheries[24] was negotiated under

[16] FAO Compliance Agreement, Art. VI(8). See also note 70, p. 213, and p. 213 above.
[17] FAO Compliance Agreement, Art. VIII. See also pp. 213–214 above.
[18] FAO Compliance Agreement, Art. IX.
[19] FAO Compliance Agreement, Art. I(a).
[20] Fernandez, "El Código," at 42.
[21] FAO Compliance Agreement, Art. II.
[22] David H. Anderson, "The straddling stocks agreement of 1995: an initial assessment," *International and Comparative Law Quarterly*, Vol. 45, 1996, 463–475, at 471.
[23] FAO Compliance Agreement, Art. XII.
[24] See generally W. R. Edeson, "The Code of Conduct for Responsible Fisheries: an introduction," *International Journal of Marine and Coastal Law*, Vol. 11, 1996, 233–238;

FAO auspices at the same time that the negotiations of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks were taking place, a process that allowed the Code to take into account the provisions of the 1995 Agreement and facilitated the consistency between the two instruments. Furthermore, both the Code and the 1995 Agreement share common background documents and declarations, with particular reference to the Convention on the Law of the Sea, the 1984 FAO World Conference on Fisheries Management and Development, the 1992 Rio Declaration, *Agenda 21*, the Declaration of Cancun, and the 1992 FAO Technical Consultation on High Seas Fisheries.[25]

Of particular relevance in this context was the declaration adopted by the International Conference on Responsible Fishing held in Cancun, 6–8 May 1992,[26] which expressed its concern for the need to preserve the marine environment and the severe problems of excess fishing capacity, while pointing to the inadequacy of the management of high seas fisheries, including the adoption, monitoring, and enforcement of conservation measures.[27] The concept of responsible fishing was developed in response to these and other problems, encompassing among other aspects the sustainable utilization of fisheries resources in harmony with the environment.[28] The declaration was explicit in calling on states to take effective action, consistent with international law, to deter reflagging of vessels in order to avoid compliance with conservation measures in the high seas.[29]

While the Code is voluntary in nature, some of its provisions are based on binding treaties, such as the Convention on the Law of the Sea, the 1995 Agreement, and the FAO Compliance Agreement, the latter forming an integral part of the Code.[30] The Code is a broad instrument covering issues of fisheries management and operations, aquaculture development, coastal area management, trade, and research. Of particular interest are

Margarita Badenes Casino, ''La progresiva consolidación de la pesca responsable en el derecho internacional,'' *Anuario Argentino de Derecho Internacional*, Vol. VII, 1996–1997, 227–261; FAO, ''Administrative report of the technical consultation on the Code of Conduct for Responsible Fishing: Rome, 26 September–5 October 1994,'' 1995; FAO, ''Conservation and rational utilization of living marine resources with special reference to responsible fishing,'' COFI/93/5, January 1993, *NILOS Yearbook*, Vol. 9, 1993, at 621.

[25] Doc. C 95/20–Rev.1 cited in note 4 above, para. 2.

[26] International Conference on Responsible Fishing, Cancun, 6–8 May 1992, *Declaration of Cancun*, FAO Fisheries Report No. 484, Supplement, Annex II, FIPL/484 (Supplement) 1992, *NILOS Yearbook*, Vol. 8, 1992, at 557.

[27] Declaration of Cancun, Considerations, paras. 2, 3, and 4.

[28] *Ibid*., Considerations, para. 7.

[29] *Ibid*., Declaration, para. 13.

[30] FAO Code of Conduct, Art. 1(1).

the general principles of the Code, providing that the right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management,[31] and that states should prevent overfishing and excess fishing capacity.[32] Ensuring compliance with conservation and management measures and effective enforcement, the exercise of an effective control by flag states, and the establishment of appropriate mechanisms for monitoring and control of fishing vessels are also general principles embodied in the Code.[33] The provisions of the Code on fisheries management pursue the long-term conservation and sustainable use of fisheries resources and their availability for present and future generations,[34] assigning particular emphasis to the precautionary approach as noted further above.[35] The requirement of flag-state authorization for fishing vessels to engage in high seas operations and other requirements on monitoring, control, surveillance, inspection, and enforcement are based on both the FAO Compliance Agreement and the 1995 Agreement;[36] the latter was particularly influential in respect of flag-state duties and port-state duties.[37]

A new dimension of the question of compliance has emerged in the context of the world food problems and the recent developments of the concept of food security. The Declaration of Cancun emphasized the importance of fish as a source of nutrition and the objective of feeding present and future populations.[38] The FAO Code has also identified the objective of optimum utilization of fishery resources and the maintenance of their availability for present and future generations.[39] This aspect has been specifically addressed by the 1995 Kyoto Declaration and Plan of Action on the sustainable contribution of fisheries to food security,[40] leading to the statement that states should take steps for the effective application of the FAO Code of Conduct and should further consider becoming parties to the Convention on the Law of the Sea, the FAO Compliance Agreement and the 1995 Agreement, also enacting appropriate domestic legislation and regulations to this effect.[41] Immediate

[31] FAO Code of Conduct, Art. 6(1).
[32] FAO Code of Conduct, Art. 6(3).
[33] FAO Code of Conduct, Arts 6(10), 6(11).
[34] FAO Code of Conduct, Art. 7(1).
[35] FAO Code of Conduct, Art. 7(5). See also note 128, p. 164, and pp. 163–164 above.
[36] FAO Code of Conduct, Arts 7(6)(2) and 7(7)(3).
[37] FAO Code of Conduct, Arts 8(2) and 8(3).
[38] Declaration of Cancun, Considerations, para. 2; Declaration, para. 1.
[39] FAO Code of Conduct, Art. 7(1)(1).
[40] International Conference on the Sustainable Contribution of Fisheries to Food Security, Kyoto, 4–9 December 1995, *Kyoto Declaration and Plan of Action*, mimeo.
[41] Kyoto Declaration, para. 5.

action to enhance regional cooperation, including the establishment of conservation and management organizations for straddling and highly migratory fish stocks, is called for in the Declaration.[42] The effective application of the major agreements on the law of the sea and related matters, as well as the participation of states in such instruments, has thereby become inextricably linked to the question of food security. The Kyoto Declaration, together with decisions adopted by the parties to the Convention on Biological Diversity and the 1995 FAO Ministerial Conference on Fisheries,[43] were brought to the attention of the 1996 FAO World Food Summit.[44]

Strengthening the duties and rights of flag states under the 1995 Agreement

The Convention on the Law of the Sea provided general clauses on the obligation of states to exercise jurisdiction and control over vessels flying their flag, including the establishment of a register and ensuring safety at sea,[45] provisions that also referred in a general manner to the duty to take measures in respect of nationals for the conservation of the living resources of the high seas.[46] However, no specific measures to be adopted by the flag state regarding fishing in the high seas were envisaged at the time.[47] Provisions of a general nature were explained in part because the

[42] *Ibid*., Plan of Action, para. 2.

[43] Conference of the Parties to the Convention on Biological Diversity, Decision on conservation and sustainable use of marine and coastal biological diversity, November 1995; Rome consensus on world fisheries adopted at the FAO Ministerial Conference on Fisheries, March 1995; both as cited in the Kyoto Declaration, preamble, paras. 6 and 7.

[44] Kyoto Declaration, end para. See also the Rome Declaration on World Food Security and World Food Summit Plan of Action, Rome, 13–17 November 1996, Commitment Three, para. 33, Objective 3.2(d), calling for the ratification of the Convention on the Law of the Sea, the 1995 Agreement and other agreements; but see also note 3 thereto as to the nonprejudice of positions as regards signature and ratification.

[45] Convention on the Law of the Sea, Art. 94. See also the United Nations Convention on Conditions for Registration of Ships, 7 February 1986, and comments by Djamchid Momtaz, ''La Convention des Nations Unies sur les conditions de l'immatriculation des navires,'' *Annuaire Français de Droit International*, 1986, 715–736; and the International Convention for the Safety of Fishing Vessels, Torremolinos, 1977, and the 1993 Protocol.

[46] Convention on the Law of the Sea, Art. 117.

[47] Moritaka Hayashi, ''The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: significance for the Law of the Sea Convention,'' *Ocean and Coastal Management*, Vol. 29, 1995, 51–69, at 60; André Tahindro, ''Conservation and management of transboundary fish stocks: comments in light of the adoption of the 1995 Agreement for the Conservation and Management of

law of high seas fisheries was only beginning to develop and in part because the central attention of the negotiations was placed on the regime of fisheries in the exclusive economic zone. The 1995 Agreement would significantly contribute to the development of this particular aspect of the law of high seas fisheries, including action to reinforce the jurisdiction of the coastal state in the exclusive economic zone.

The effective enforcement of conservation and management measures relating to straddling fish stocks and highly migratory fish stocks by flag states, port states, and coastal states is a main concern of the 1995 Agreement,[48] one of its general principles referring to the implementation and enforcement of such measures through effective monitoring, control, and surveillance.[49] An important connection with the regime of the exclusive economic zone is established by means of this general principle. Since such principles also apply within the exclusive economic zone, the coastal state is under an added obligation to develop implementation and enforcement measures in respect of straddling fish stocks and highly migratory fish stocks, measures that will need to be considered in similar terms in the high seas in the light of the principle of compatibility.

This connection with the exclusive economic zone is also evident in other provisions of the 1995 Agreement, particularly in terms of the obligation of flag states to ensure that vessels flying their flag do not conduct unauthorized fishing within areas under the national jurisdiction of other states.[50] In line with this obligation, when there is reasonable ground for believing that such a violation has occurred, the flag state, at the request of the coastal state concerned, shall immediately and fully investigate the matter and undertake other forms of cooperation with that coastal state for enforcement action, including the authorization to the coastal state authorities to board and inspect the vessel in the high seas.[51] In addition the coastal state always has the right to undertake hot pursuit if the conditions of Article 111 of the Convention on the Law of the Sea are met.[52] These provisions have considerably strengthened the

Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Ocean Development and International Law*, Vol. 28, 1997, 1–58, at 33.

[48] 1995 Agreement, preamble, para. 4. [49] 1995 Agreement, Art. 5(1).

[50] 1995 Agreement, Art. 18(3)(b)(iv).

[51] 1995 Agreement, Art. 20(6). See also Balton, ''Strengthening the law of the sea,'' at 140.

[52] 1995 Agreement, Art. 20(6). See further Tahindro, ''Conservation and management,'' at 38–39; Robert C. F. Reuland, ''Interference with non-national ships on the high seas: peacetime exceptions to exclusivity rule of flag-state jurisdiction,'' *Vanderbilt Journal of Transnational Law*, Vol. 22, 1989, 1161–1229; Robert C. F. Reuland, ''The customary right

action in the high seas against violations of the fisheries jurisdiction of coastal states, providing additional mechanisms to those traditionally available under international law. Enforcement against high seas fisheries violations undertaken in areas under national jurisdiction is also provided for under the 1995 Agreement, a situation that will be discussed further below.

The duties of flag states in respect of compliance and enforcement were the subject of numerous proposals submitted during the negotiations of the 1995 Agreement. The United States called for flag states and other entities to ensure compliance by their vessels with conservation and management measures in the high seas, including monitoring, control, and surveillance, and for the establishment of adequate penalties to deter violations;[53] remote-sensing and satellite technology for monitoring high seas fishing vessels was also suggested in this context.[54] Flag-state measures on compliance and enforcement were to be supplemented and strengthened by the appropriate regional arrangements in the Australian proposals that made detailed suggestions to this effect, including questions of transshipment and the establishment of international registers.[55] An important proposal by a number of countries from the south Pacific suggested the establishment of national and regional registers of fishing vessels, as well as the granting of licences, authorizations, and permits by the flag state in accordance with internationally and regionally agreed procedures and requirements, a proposal which was based on the experience of the member countries of the South Pacific Forum in this matter.[56]

of hot pursuit onto the high seas: annotations to Art. 111 of the Law of the Sea Convention,'' *Virginia Journal of International Law*, Vol. 33, 1993, 557; William C. Gilmore, ''Hot pursuit: the case of R. v. Mills and others,'' *International and Comparative Law Quarterly*, Vol. 44, 1995, 949–958.

[53] United States, ''Position statement,'' Doc. A/CONF. 164/L. 3, 1 June 1993, para. 5; United States, ''Principles on straddling fish stocks and highly migratory fish stocks,'' Doc. A/CONF. 164/L. 15, 16 July 1993, IV. See also J. G. Sutinen, ''Measuring and explaining noncompliance in federally managed fisheries,'' *Ocean Development and International Law*, Vol. 21, 1990, 335–372.

[54] United States, ''Monitoring high seas fishing vessel operations by satellite,'' Doc. A/CONF. 164/L. 17, 20 July 1993; Japan, ''List of issues,'' Doc. A/CONF. 164/L. 6, 8 June 1993, para. 7(5).

[55] Australia, ''Comments on compliance and enforcement,'' Doc. A/CONF. 164/L. 19, 20 July 1993; Australia, ''Comments on issues,'' Doc. A/CONF. 164/L. 9, 1 July 1993, para. 10.

[56] Australia, Cook Islands, Fiji, Kiribati, Marshall Islands, Micronesia, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Vanuatu, ''National and regional registers of fishing vessels, licences, authorizations or permits for vessels fishing on the high seas,'' Doc. A/CONF. 164/L. 31, 27 July 1993.

Also Japan envisaged a cooperative scheme under an appropriate regional organization to complement enforcement by the flag state.[57] In the view of the Ukraine, sanctions for the breach of conservation measures were to be adopted under the national legislation of the flag state in respect of its vessels, but international organizations could also adopt measures affecting the flag state of the vessel.[58]

While most proposals made an effort to combine flag-state compliance and enforcement measures with some kind of international cooperation, particularly by means of regional organizations, in other views either the role of the flag state or that of the coastal state was significantly emphasized. The European Union referred only to monitoring, surveillance, and control, but not to enforcement, and these would all be functions to be exercised solely by the flag state,[59] while a later document referred generally to effective implementation and enforcement by member states of international fisheries organizations without clarifying which states would have a role in this matter.[60] Russia also referred generally to compliance and enforcement measures,[61] but later developed the concept of joint participation of coastal states and other interested states for the monitoring of straddling stocks,[62] and even of the application of enforcement measures by the coastal state over the entire habitat area of the stocks concerned.[63] Canada, both individually[64] and jointly with other states,[65] envisaged a system of surveillance and control which in important aspects, such as aerial surveillance, inspection, observers, and catch verification, would require agreements for the use or sharing of resources between the flag state and the relevant coastal state; detailed enforcement arrangements were also foreseen in these proposals, some

[57] Japan, ''List of issues,'' para. 7(4).
[58] Ukraine, ''Conservation and rational utilization of straddling and highly migratory fish species,'' Doc. A/CONF. 164/L. 40, 17 March 1994, para. 10(c), (d), and (e).
[59] European Union, ''Position statement,'' Doc. A/CONF. 164/L. 8, 17 June 1993, III.
[60] European Union, ''Suggested guidelines,'' Doc. A/CONF. 164/L. 20, 21 July 1993, para. 13.
[61] Russian Federation, ''List of issues,'' Doc. A/CONF. 164/L. 2, 2 June 1993, paras. 7 and 8.
[62] Russian Federation, ''Main provisions of the regime relating to straddling fish stocks,'' Doc. A/CONF. 164/L. 25, 26 July 1993, paras. 3 and 4.
[63] Russian Federation, ''Some considerations regarding the question of securing compliance with conservation measures for straddling fish stocks and highly migratory fish stocks,'' Doc. A/CONF. 164/L. 26, 26 July 1993, para. 2.
[64] Canada, ''List of issues,'' Doc. A/CONF. 164/L. 5, 4 June 1993, IV and V.
[65] Argentina, Canada, Chile, Iceland, and New Zealand, ''Draft convention on the conservation and management of straddling fish stocks on the high seas and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 11/Rev. 1, 28 July 1993, Parts III and IV.

dealing with flag-state authorization and others with coastal state and port-state intervention. Proposals by the member states of the Permanent Commission of the South Pacific suggested general measures relating to compliance, the harmonization of penalties, and a system of effective enforcement which included a potential role for the coastal state and an active intervention by regional mechanisms.[66]

On the basis of this preparatory work the 1995 Agreement sets out in detail the duties of the flag state[67] and the functions of the flag state on the specific issue of compliance and enforcement.[68] The FAO Compliance Agreement is followed in many respects in these matters, but it has been rightly noted that the 1995 Agreement improves on its provisions in some cases and covers entirely new ground in other matters, such as duties of monitoring, control, and surveillance of vessels and the regulation of the high seas transshipment of catches.[69] On the other hand, some of the shortcomings of the FAO Agreement are eliminated, in particular by including fishing vessels under 24 metres in length,[70] thereby increasing the acceptability of the 1995 Agreement.

The key provision in respect of the duties of the flag state is the obligation discussed above to adopt measures to ensure that subregional and regional conservation and management measures are complied with and that vessels do not engage in activities that undermine their effectiveness.[71] As a consequence of this obligation the authorization that the flag state shall grant to fish in the high seas is conditioned to the ability of such state to exercise effectively its responsibilities in respect of its vessels both under the Convention on the Law of the Sea and under the 1995 Agreement, thereby again strengthening the requirement of a genuine link as a condition for the right to fly a flag.[72]

The measures that the flag state can take to this effect are varied. They include the control of vessels by means of fishing licenses, authorizations, and permits; the establishment of regulations attaching terms and conditions to licenses, authorizations and permits in order to fulfill the international obligations of the flag state and eventually prohibiting

[66] Chile, Colombia, Ecuador, and Peru, ''Elements of an international agreement on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 14, 16 July 1993, VII and VIII.

[67] 1995 Agreement, Art. 18. [68] 1995 Agreement, Art. 19.

[69] Balton, ''Strengthening the law of the sea,'' 140.

[70] Anderson, ''The straddling stocks agreement,'' at 471.

[71] 1995 Agreement, Art. 18(1). See also note 65, p. 212, and text on p. 212 above.

[72] See generally H. Meyers, *The Nationality of Ships*, 1967.

fishing in the high seas which is not in conformity with such terms and conditions; establishment of a national register of fishing vessels authorized to fish in the high seas and providing access to such information, taking into account the requirements of national laws on the release of information; requirements for marking of fishing vessels;[73] requirements for recording and reporting of vessel position, catch, and other data; verification of catches; and the regulation of fishing activities to ensure compliance with international measures.[74] The regulation of transshipments in the high seas is also provided for to ensure that the effectiveness of conservation and management is not undermined by this other activity.[75] Many of these measures are specifically related to the application of procedures and obligations agreed under subregional, regional, or global arrangements. Monitoring, control, and surveillance are based on national and regional inspection schemes and observer programs, including access by inspectors or observers from other states, as well as on vessel-monitoring systems such as satellite transmitters.[76] Measures established by flag states are required to be compatible with any regional arrangements in effect.[77]

Earlier drafts of the 1995 Agreement and proposals by the chairman envisaged additional elements in connection with flag-state duties. The observance of minimum international standards for responsible fishing practices, including standards of transshipment, had been listed in the guide to the issues prepared by the chairman.[78] The negotiating text referred specifically to the issue of flagging and reflagging and had not yet clearly separated questions of compliance from those of enforcement.[79] The revised negotiating text had required the enactment of national legislation for a number of measures to be adopted by the flag state,[80] an approach also followed by the draft agreement.[81] Most of these questions were reordered under the 1995 Agreement, particularly by grouping

[73] See generally the FAO Standard Specifications for the Marking and Identification of Fishing Vessels; FAO, ''Report of the expert consultation on the technical specifications for the marking of fishing vessels,'' Rome, 1986–1987, *Fisheries Report*, No. 367.

[74] 1995 Agreement, Art. 18(3). [75] 1995 Agreement, Art. 18(3)(h).

[76] 1995 Agreement, Art. 18(3)(g). [77] 1995 Agreement, Art. 18(4).

[78] ''A guide to the issues before the conference prepared by the chairman,'' Doc. A/CONF. 164/10, 24 June 1993, Part 2, IV(j) and V(x).

[79] ''Negotiating text prepared by the chairman of the conference,'' Doc. A/CONF. 164/13, 23 November 1993, paras. 24(d) and 25.

[80] ''Revised negotiating text prepared by the chairman of the conference,'' Doc. A/CONF. 164/13/Rev. 1, para. 24(b)(i).

[81] ''Draft 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

substantive obligations on conservation and management, flag-states duties and compliance and enforcement issues in more clearly separated sections. In other cases changes in the language led to the same result, and in yet other instances flag states were provided with greater flexibility as to the option between legislation or administrative enactment of regulations.

Article 19 of the 1995 Agreement deals specifically with compliance and enforcement by the flag state. The essential element in this respect is that the flag state shall ensure compliance with subregional and regional conservation measures,[82] an obligation which in prior drafts extended to ensure compliance with rules and regulations adopted consistent with the Convention and the 1995 Agreement,[83] but this latter reference was not retained by the final agreement. Compliance with international minimum standards was also considered in various drafts,[84] but later this aspect was regrouped with the provisions on conservation and management measures. Enforcement of measures shall be done irrespective of where the violation occurs,[85] but of course the flag state can only take action in the high seas or in areas under its own national jurisdiction.

The mechanisms set out by the 1995 Agreement to this end deal with both investigation and prosecution. Any alleged violation is to be investigated immediately and fully and may include the physical inspection of the vessels concerned; the vessel may be required to give information on its position, catches, fishing gear, operations, and activities in the area of the alleged violation. Reports on the progress and outcome of the investigation shall be made promptly to the state and relevant organization concerned.[86] If sufficient evidence is available the case shall be referred to the authorities for the institution of proceedings and the vessel may be detained if necessary.[87] Both the investigation and the judicial proceedings shall be carried out expeditiously. Sanctions shall be severe enough as to be effective in securing compliance and to discourage violations, and shall deprive offenders of the benefits accruing from their illegal activities; measures leading to the refusal, withdrawal, or suspen-

and management of straddling fish stocks and highly migratory fish stocks,'' Doc. A/CONF. 164/22, 23 August 1994, Art. 17(3)(b).

[82] 1995 Agreement, Art. 19(1).

[83] Draft Agreement cited in note 81 above, Art. 18(1); Revised draft agreement, Doc. A/CONF. 164/22/Rev. 1, 11 April 1995, Art. 19(1).

[84] Draft agreement cited in note 81, Art. 18(2); Revised negotiating text, para. 27.

[85] 1995 Agreement, Art. 19(1)(a).

[86] 1995 Agreement, Art. 19(1)(b) and (c).

[87] 1995 Agreement, Art. 19(1)(d).

sion of authorizations to serve as masters or officers may be included as sanctions in this context.[88] In case of serious violation the flag state shall ensure that the vessel does not engage in fishing operations on the high seas until all the sanctions imposed have been complied with.[89] These provisions, like those in the FAO Compliance Agreement, may serve the purpose of improving the record of investigations, prosecution, and sanctions by the flag state, which has been historically quite poor in respect of fishing and commercial vessels.

The argument has been made that the duty envisaged in Article 117 of the Convention on the Law of the Sea to take measures in respect of nationals for the conservation of the living resources of the high seas could have become a rule of customary international law, and that Articles 18 and 19 of the 1995 Agreement on implementing and strengthening that duty might also be considered a part of customary international law.[90] While this may well be so in the future the situation at present regrettably does not seem to meet the requirement of a consistent and widespread international practice to support the argument.

Advancing international cooperation and nonflag-state enforcement in high seas fisheries

As noted above, international law has been rapidly evolving on the issue of compliance and enforcement in the high seas, a development that is particularly noticeable in the case of high seas fisheries.[91] Precisely because exclusive flag-state enforcement in the high seas as envisaged under traditional international law[92] has become a rather limited and often unreliable mechanism for the adequate observance of the legal order, other alternatives began to emerge.[93] The right of visit, piracy, and

[88] 1995 Agreement, Art. 19(2). [89] 1995 Agreement, Art. 19(1)(e).

[90] Tahindro, ''Conservation and management,'' at 36.

[91] See notes 86 and 87, p. 106, and pp. 105–106 above. See also generally G. Moore, ''Enforcement without force: new techniques in compliance control for foreign fishing operations based on regional cooperation,'' *Ocean Development and International Law*, Vol. 24, 1993, 197–204; OECD, *Fisheries Enforcement Issues*, 1994; P. Flewweling, *An Introduction to Monitoring, Control and Surveillance Systems for Capture Fisheries*, FAO, 1994; E. Bisiaux, ''La police des pêches,'' *Revue Juridique du Centre-Ouest*, No. 18, 1996, 98–111.

[92] For the discussion of the principles of international law governing jurisdiction over vessels on the high seas, see generally the *Lotus*, Permanent Court of International Justice, Ser. A, No. 10, 28.

[93] Statement made by the chairman of the conference on 12 April 1995, Doc. A/CONF. 164/28, 1 May 1995, para. 13.

hot pursuit as the traditional exceptions to flag-state jurisdiction on the high seas have been supplemented by the Convention on the Law of the Sea with new jurisdictional rules on unauthorized broadcasting from the high seas.[94] A number of treaties have also dealt specifically with jurisdiction relating to the slave trade, the protection of submarine cables, liquor smuggling, illegal immigration, and, more recently, with illicit traffic in narcotic drugs and other substances.[95]

The problem became more pressing in connection with high seas fisheries because of the adverse impact of inadequate enforcement arrangements on the conservation of stocks and the management of the fisheries concerned. Recent surveys of high seas fisheries enforcement arrangements show a clear trend towards the strengthening of mechanisms by means of the development of international cooperation and the intervention of states other than the flag state, without prejudice to the always important role of the latter.[96] Boarding and inspection by nonflag-state officials are provided for in a number of treaties establishing regional fisheries organizations and in bilateral agreements.[97] Seizure and arrest of vessels are in addition provided for

[94] Convention on the Law of the Sea, Arts 100–111. See also generally Ian Brownlie, *Principles of Public International Law*, 1990, Chapter XI; and Françoise Odier, "La Piraterie," *Espaces et Resources Maritimes*, No. 8, 1994, 107–114.

[95] For references to these treaties and associated developments see Moritaka Hayashi, "Enforcement by non-flag states on the high seas under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks," *Georgetown International Environmental Law Review*, Vol. 9, 1996, 1–36, at 7–9; see also note 87, p. 106, and pp. 105–106 above. See further William C. Gilmore, "Narcotics interdiction at sea: the 1995 Council of Europe Agreement," *Marine Policy*, Vol. 20, 1996, 3–14; M. Tousley, "United States seizure of stateless drug smuggling vessels on the high seas: is it legal?," *Case Western Reserve Journal of International Law*, Vol. 22, 1990, 375–401.

[96] William T. Burke, *The New International Law of Fisheries*, 1994, chapter 7; Hayashi, "Enforcement," at 8–9.

[97] Hayashi, "Enforcement," at 9–10, with particular reference to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 24 October 1978, 1135 UNTS 369, Art. 18; Convention on the Conservation and Management of Pollack Resources in the Central Bering Sea, 16 June 1994, *International Legal Materials*, Vol. 34, 1994, at 67, Art. 11 (6); Convention on Conduct of Fishing Operations in the North Atlantic, 1 June 1967, *International Legal Materials*, Vol. 6, 1967, at 760, Art. 9(5); Agreement Between the Government of the United States and the Government of the USSR Relating to Fishing for King Crab, 5 February 1965, 541 UNTS 97, para. 3. See also the 1993 Memorandum of Understanding between the Government of the United States of America and the Government of the People's Republic of China on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215 of 20 December 1991, as refered to by Balton, "Strengthening the law of the sea," at 146, note 24.

in other cases.[98] It has been rightly noted in this respect that most of these treaties allow only for flag-state prosecution and sanctioning, and that no treaty allows for prosecution by a nonflag state, while all of them are regional in nature.[99]

These issues would be very much present during the negotiations leading to the 1995 Agreement and turned out to be another of the difficult aspects to be agreed on.[100] Again in this matter the starting point for the position of distant-water fishing states and for coastal states was dramatically different.[101] As noted above, while for some states exclusive flag-state jurisdiction should continue, and at the most they were willing to consider forms of regional cooperation, in other views coastal states should have jurisdictional powers relating to compliance and enforcement in the high seas, including the power of seizure and arrest and eventually of prosecution.[102] The discussion became still more active after the enactment of Canadian legislation to this effect in 1994 and the incidents that followed.[103]

A Canadian proposal introduced during the negotiations envisaged that the authorities of any state party to the 1995 Agreement could board, inspect, and arrest a vessel of another state in the high seas where there were reasonable grounds to believe that contravention of conservation and management measures had taken place, and prosecution could also be undertaken in respect of unregistered vessels.[104] This was also the approach taken by the draft agreement submitted by Canada jointly with other coastal states.[105] The members of the Permanent Commission of the South Pacific, however, earlier suggested an approach that favored regional arrangements and had not taken a position with regard to enforcement powers since the proposal referred to the alternatives of flag-state arrest and prosecution, joint enforcement procedures agreed with coastal states, or reciprocal authorization for arrests or prosecutions,

[98] Hayashi, "Enforcement," at 10, with particular reference to the International Convention for the High Seas Fisheries of the North Pacific Ocean, 9 May 1952, 205 UNTS 77, Art. 10(1)(a) and (b); and the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, 11 February 1992, *Law of the Sea Bulletin*, No. 22, 1993, at 21.

[99] Hayashi, "Enforcement," at 10.

[100] Balton, "Strengthening the law of the sea," at 140; Anderson, "The straddling stocks agreement," at 471.

[101] Hayashi, "The role of the United Nations," at 386.

[102] Balton, "Strengthening the law of the sea," at 141.

[103] See pp. 112–117 above.

[104] Canada, document cited in note 64, Section V, D, E, and F.

[105] Argentina, Canada, Chile, Iceland, and New Zealand, draft convention cited in note 65 above, Arts 13–15.

especially by the coastal state in cases of violations that directly affected their interests.[106]

The 1995 Agreement organizes the question of nonflag-state participation in compliance and enforcement matters into three main sets of provisions. First, Article 20 deals with the general elements of international cooperation in enforcement. Secondly, Article 21 provides for subregional and regional cooperation in this matter, while Article 22 lays down the basic procedures for boarding and inspection. Thirdly, Article 23 introduces important elements of port-state enforcement. The aggregate of these provisions introduces important changes in the international law of high seas fisheries, having been considered "a globally established exception, under Article 92 of the Convention, to the principle of flag state jurisdiction on the high seas"[107] or, as stated by the conference chairman, in this respect the 1995 Agreement "changes international law that has existed for more than 500 years."[108]

The provisions on international cooperation are mainly concerned with the obligation of states to cooperate to ensure compliance with and enforcement of conservation and management measures for straddling fish stocks and highly migratory fish stocks. In earlier drafts prepared by the chairman these provisions had been much simpler,[109] and had at the beginning been grouped with the general duties of the flag state,[110] but as negotiations unfolded the text became more complex and elaborate. In the final text of the agreement this cooperation can be undertaken directly or through the appropriate organizations and arrangements;[111] but even this clause did not pass unchallenged since a number of distant-water fishing states were of the view that cooperation should be undertaken only by means of regional organizations or arrangements and not directly.[112] Even if these provisions refer to specific categories of fish stocks, the precedent established will of course be most influential

[106] Chile, Colombia, Ecuador, and Peru, document cited in note 66 above, Section VII(1)(e).

[107] Hayashi, "The 1995 Agreement," at 62.

[108] Satya N. Nandan, "Statement on the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and its potential impact on Pacific island tuna fisheries," Conference on achieving goals for sustainable living in the aquatic continent, Hawaii, 19–23 September 1995, at 4.

[109] Draft agreement cited in note 81 above, Art. 19.

[110] "Guide to the issues" cited in note 78 above, para 13, IV; Negotiating text, paras. 24–28; revised negotiating text, paras. 27–30.

[111] 1995 Agreement, Art. 20, para. 1. See also generally Comment, "United Nations conference tackles enforcement," *Australian Fisheries*, Vol. 54, No. 5, 1995, 6.

[112] Hayashi, "Enforcement," at 18.

in respect of many other kinds of high seas fisheries. In terms of the cooperation envisaged, when the flag state conducts an investigation of an alleged violation it may request the assistance of any other state, and reasonable requests to this effect shall be met by such other states.[113] Investigations can be undertaken directly, in cooperation with other states, or through relevant organizations, and information on the progress and outcome of the investigation shall be provided to states interested in or affected by the alleged violation.[114] Assistance for identifying vessels reported to have engaged in activities undermining the effectiveness of conservation and management measures, and arrangements for making evidence available to the prosecuting authorities in other states, are also envisaged by the 1995 Agreement.[115] As mentioned above, a specific provision governs flag-state enforcement in respect of vessels having engaged in unauthorized fishing in areas under national jurisdiction of a coastal state, which may include authorizing the authorities of the coastal state to board and inspect the vessel on the high seas.[116]

It is to be noted that these provisions refer to states generally and not only to states parties to the 1995 Agreement, thereby involving a broader reach under international law. One other provision refers specifically to states parties which are also members or participants in regional fisheries organizations and arrangements, allowing for action to deter vessels engaged in undermining or violating conservation and management measures from fishing in the high seas in the area concerned until such time as appropriate action is taken by the flag state.[117] The latter provision reinforces action in respect of vessels engaged in activities that undermine the effectiveness of conservation and management measures by applying pressure on the flag state to abide by its commitments and obligations in situations of this type. In an earlier draft this particular provision had been included in the Article dealing with regional arrangements for compliance and enforcement, but because it concerned mainly the potential inaction of the responsible flag state it was moved to the general provisions on international cooperation.[118]

[113] 1995 Agreement, Art. 20(2). [114] 1995 Agreement, Art. 20(3).
[115] 1995 Agreement, Art. 20(4) and (5) [116] 1995 Agreement, Art. 20(6).
[117] 1995 Agreement, Art. 20(7).
[118] Revised draft agreement cited in note 83, Art. 21(13).

Specific issues relating to boarding and inspection

The second set of provisions deals with subregional and regional cooperation in enforcement and it is in this connection that some of the most difficult problems of the negotiations arose. While the first documents and drafts by the chairman had envisaged regional cooperation basically as a means to complement flag-state enforcement, eventually under regionally agreed procedures, and had included additional clauses on reflagging and unidentified vessels,[119] as negotiations progressed it proved necessary to deal with a number of other elements, particularly boarding and inspection[120] and ultimately seizure, arrest, and prosecution.[121] The experience and arrangements for boarding, inspection, and related measures under regional organizations such as NAFO, CCAMLR, and the Bering Sea Agreement were most valuable to guide the discussions on this matter.[122]

The essential provision of this regime is the right granted to any state party to the 1995 Agreement which is a member or participant in a regional organization or arrangement, to board and inspect fishing vessels under the flag of another state party, which does not necessarily have to be a member or participant in the organization or arrangement, for the purpose of ensuring compliance with the conservation and management measures established by that organization or arrangement.[123] During the negotiations distant-water fishing nations had made the point that boarding and inspection should be allowed only when there are reasonable grounds for suspecting that the vessel has acted contrary to or in violation of the conservation and management measures, but this more stringent requirement was not retained in view of the opposition of several coastal states.[124] Such action may take place in any high seas area covered by the organization or arrangement.

While both states involved have to be a party to the 1995 Agreement, only the inspecting state has to be a member of the regional organization or a participant in the arrangement concerned;[125] in this sense this is a

[119] Guide to the issues, cited in note 78, para. 13 V(b)–(e); Negotiating Text, cited in note 79, paras. 29–32.

[120] Revised Negotiating Text, cited in note 80, para. 34.

[121] Revised draft agreement cited in note 83 above, Art. 21(6)–(8).

[122] Anderson, "The straddling stocks agreement," at 471. On regional developments and practice see generally Moore, "Enforcement."

[123] 1995 Agreement, Art. 21(1).

[124] Hayashi, "Enforcement," at 20.

[125] For comments on this provision see Anderson, "The straddling stocks agreement," at 471; Tahindro, "Conservation and management," at 37.

conventional right that reaches beyond the membership or participation in a given organization in order to bind any state that becomes a party to the 1995 Agreement. It has been rightly noted that the first draft agreement introduced by the chairman had implied that both the inspecting and the inspected states had to be members of the regional organization, an approach that was objected to on the ground that it would suffice for a state party to the 1995 Agreement not to become a member of the regional organization to avoid possible inspections; following a Norwegian proposal the approach was broadened in the final text to close this potential loophole.[126]

It should also be noted in this respect that enforcement is related to the conservation and management measures established by the regional organization or arrangement, thereby settling the discussion about the enforcement of coastal state measures in the high seas area concerned.[127] However, the issue became mute as a consequence of the provisions on compatibility discussed above,[128] since regional organizations will need to take into account the measures enacted by the coastal state in establishing their own compatible measures, and to the extent that coastal states' measures are more stringent they will in practice prevail in the high seas. Another question that needs to be kept in mind is that the 1995 Agreement does not define a ''fishing vessel'' thereby opening the door for potential disagreements about what kind of vessels might be inspected;[129] just like in the FAO Compliance Agreement the issue concerns factory ships and other vessels engaged in fishing activities although not actually undertaking catch operations.[130] Neither are below-deck inspections expressly referred to in the 1995 Agreement, a situation that has been the cause of disputes in state practice,[131] but this is a matter that falls clearly within the inspector's powers in the context of Articles 21 and 22 of the 1995 Agreement.

Any action relating to boarding and inspection is to be conducted by duly authorized inspectors of the inspecting state.[132] Several requirements as to the identification issued to inspectors and the marking of

[126] Hayashi, ''Enforcement,'' at 17. The Norwegian proposal was introduced in 1994 at the Fourth Session of the Conference, for references to which see Hayashi, *ibid*., at 16.
[127] *Ibid*., at 17. [128] See pp. 189–191 above.
[129] Tahindro, ''Conservation and management,'' at 37–38.
[130] See notes 19 and 20, p. 230, and pp. 230–231 above.
[131] Tahindro, ''Conservation and management,'' at 38, with particular reference to J. E. Carroz and A. G. Roche, ''The international policing of high sea fisheries,'' *Canadian Yearbook of International Law*, Vol. 6, 1968, 78.
[132] 1995 Agreement, Art. 21(1).

vessels in government service used to this effect are specified in the 1995 Agreement, particularly in terms of the information to be made available to states whose vessels fish in the area and the designation of appropriate authorities to receive notifications in this matter, thereby ensuring due publicity.[133]

The question of procedures to be followed in connection with boarding and inspection became a critical point in the negotiations and required the convening of intersessional consultations[134] and took up a good part of the discussions held during the last session of the conference. Important progress was made on the basis of the Norwegian proposal mentioned above to the extent that it introduced the requirement of notification of the flag state, a deadline for its objections, and other safeguards,[135] and on the basis of a United States proposal which set out standard procedures and detailed safeguards.[136] Agreement was gradually made possible by separating boarding and inspection from seizure and arrest, the latter alternative being restricted to rather exceptional circumstances.[137]

The basic contention involved the issue of whether enforcement should only be allowed on the basis of procedures set out by regional organizations, and be restricted to boarding and inspection, as distant-water fishing states would argue, or could be undertaken on the basis of a globally defined obligation, and include seizure and arrest, as some coastal states would favor. The compromise that began to emerge centered on global basic or minimum rules being set out under the 1995 Agreement, with regional organizations having the possibility of establishing different but compatible arrangements.[138] This compromise approach is reflected in Article 21 of the 1995 Agreement. States are mandated to establish through regional organizations or arrangements the procedures for boarding and inspection, as well as the procedures to deal with other types of enforcement action provided for under the Article; the latter reference is obviously to the arrest of the vessel, an alternative that was retained in the final text in spite of the objections by distant-water fishing states.[139] The procedures so established by regional organizations are to be compatible with Article 21 and with the rules of

[133] 1995 Agreement, Art. 21(4).

[134] Hayashi, "Enforcement," at 17, 19–20, with reference to the intersessional consultations held in Geneva, 13–17 February 1995; to those convened by the United States in Washington DC, June 1995; and to those convened by the chairman, 19–21 July 1995.

[135] Hayashi, "Enforcement," at 16. [136] *Ibid*., at 19–20. [137] *Ibid*., at 16.

[138] *Ibid*., at 16. [139] *Ibid*., at 21.

Article 22, and shall not discriminate against non-members of such organizations. Boarding, inspection, and other enforcement action shall be conducted in accordance with such procedures, thereby avoiding the risk of action defined independently from the organization concerned; due publicity of such procedures is also required by the 1995 Agreement.[140]

The second element of the compromise is the residual application of the basic procedures laid down under Articles 21 and 22. In fact, if within two years of the adoption of the 1995 Agreement a regional organization has not established the procedures referred to above, boarding, inspection, and other enforcement action shall, pending the establishment of such procedures, be conducted in accordance with the rules of the 1995 Agreement.[141] The purpose of this provision is to avoid states circumventing boarding, inspection, and enforcement by paralyzing the action of the appropriate regional organization, in which case the alternative regime of the 1995 Agreement will come into effect. However, in so doing difficult questions of international law have emerged. First, it should be noted that although the obligation to establish procedures through regional organizations refers to states generally, it is to be assumed that these are the states parties to the 1995 Agreement, for otherwise there would be a binding legal obligation on third states; but this conclusion can only be reached by way of interpretation on the basis that the procedures referred to are those undertaken pursuant to Article 21(1), which in turn refers to states parties. Secondly, but even then this obligation relates only to states that are members of regional organizations, since otherwise they could not discharge the mandate; in such an alternative, members of regional organizations would define the rules applicable to other states parties of the 1995 Agreement that are not members of such an organization, a solution which is consistent with Article 21(1) but which no doubt places member states in a privileged position, with the sole requirement of not discriminating. Thirdly, it is important to note that the two-year period for the residual application of the procedures of the 1995 Agreement is counted from the date of adoption of the 1995 Agreement, and not from its entry into force. It has been commented that this clause involves an obligation on states that might not even be by then parties to the 1995 Agreement, or the 1995 Agreement might not be in force, and would therefore be contrary to Article 34 of the Vienna Convention on the Law

[140] 1995 Agreement, Art. 21(2). [141] 1995 Agreement, Art. 21(3).

of Treaties;[142] again by way of interpretation the clause could be read as referring only to states parties, since boarding and inspection is pursuant to Article 21(1) and this refers to states parties, in which case it could also be concluded that the 1995 Agreement has to be in force since otherwise there would be no states parties to it. If all of this is so, then it would have been easier to spell it out clearly; and if it is not so, disputes about interpretation under international law will not be few.

Because of the reluctance of distant-water fishing states to have enforcement procedures separate from regional organizations, a proposal was made to allow for derogation from the provisions of the 1995 Agreement on boarding and inspection in the event that a regional body would have adopted an effective alternative enforcement mechanism,[143] a derogation which in a chairman's discussion text could have been decided by the organization or arrangement.[144] This approach was objected to by several coastal states on the ground that Article 44 already allows for agreements modifying or suspending the provisions of the 1995 Agreement, provided they keep with the requirements of compatibility, safeguards, and others,[145] and on the ground that such an organization could take the decision by majority vote.[146] This proposal became Article 21(15) which refers to the establishment of alternative mechanisms by a regional organization effectively discharging the obligations under the 1995 Agreement of its members or participants in respect of compliance; in such a case members of the organization may agree to limit the provisions on boarding and inspection of Article 21(1) as between themselves.[147] It is to be noted that this is no longer a decision to be taken by the regional organization but is to be agreed to by the members, and it is therefore a specific application of the provision of Article 44 in the matter of boarding, inspection, and enforcement.

Several other substantive and procedural safeguards were also the subject of proposals introduced by the European Union and the United States;[148] in the view of the latter some of these procedures would have been included in an additional annex to the 1995 Agreement, but it was opted finally to include some of them in Article 21 and a number in Article 22, which deals in particular with basic procedures for boarding

[142] José Antonio Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, 1996, at 414–415.
[143] Hayashi, "Enforcement," at 21–22. [144] *Ibid*., at 21–22.
[145] See p. 144 above. [146] Hayashi, "Enforcement," at 22.
[147] 1995 Agreement, Art. 21(15).
[148] For references to these proposals see Hayashi, "Enforcement," at 24–25.

and inspection. Article 21 provides in this context that inspectors shall be required to observe generally accepted regulations, procedures, and practices relating to the safety of the vessel and crew, minimize interference with fishing operations and to the extent practicable avoid actions that may affect the quality of the catch on board; no action should be conducted in a manner that would constitute harassment of any fishing vessel.[149] Generally accepted regulations, procedures, and practices are also referred to under Article 94(5) of the Convention on the Law of the Sea. A related provision concerns state liability for damage or loss attributable to it as a result of action taken on enforcement when such action is unlawful or exceeds that reasonably required in the light of the information available;[150] although this provision parallels that of Article 35 on responsibility and liability, it has been justified on the ground that it concerns damage caused to private entities and not to states.[151]

The procedural safeguards are related to three main aspects: information, conduct of the inspection, and the use of force. As to the first aspect, the inspecting state shall ensure that inspectors present their credentials to the master of the vessel and a copy of the relevant conservation and management measures and regulations; initiate notice to the flag state at the time of the boarding and inspection, a requirement introduced by Malta at a late stage;[152] and do not interfere with the master's ability to communicate with the authorities of the flag state.[153] A related duty of the flag state is to ensure that the master of the vessel allows the inspectors to communicate with the authorities of both the flag state and the inspecting state.[154] In respect of the conducting of the inspection, inspectors shall have the authority to inspect the vessel, its license, gear, equipment, records, facilities, fish, and fish products, and any relevant documents to verify compliance;[155] as discussed above, the scope of this action seems to be broad enough to include below-deck inspection and eventually vessels associated to the fishing operations where, for example, fish products may be stored. The flag state also has corresponding duties in this regard since it shall ensure that vessel masters accept and facilitate prompt and safe boarding, cooperate with the inspection and assist in it,

[149] 1995 Agreement, Art. 21(10). [150] 1995 Agreement, Art. 21(18).

[151] Hayashi, "Enforcement," at 25. On Art. 35 and the issue of responsibility and liability see note 90, p. 142, and pp. 141–142 above.

[152] International Institute for Sustainable Development, *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, at 6.

[153] 1995 Agreement, Art. 22(1)(a)–(c). [154] 1995 Agreement, Art. 22(3)(d).

[155] 1995 Agreement, Art. 22(2).

and provide reasonable facilities to the inspectors, including eventually food and accommodation.[156] In ending the inspection, the inspector shall provide a copy of the report to the master and the flag state, noting any objection or statement made by the master, and shall promptly leave the vessel if there is no evidence of a serious violation;[157] the master shall on his part facilitate the safe disembarkation by the inspectors.[158]

A provision of particular importance concerns the refusal of the master to accept boarding and inspection, where the flag state shall direct the master to submit immediately to such procedures, unless there are circumstances justifying a delay in accordance with generally accepted regulations, procedures, and practices; if the master does not comply with such a direction, the flag state shall suspend the vessel's authorization to fish and order its immediate return to port. The flag state shall also advise the inspecting state of the action taken in these circumstances.[159]

Refusal to allow inspection is in turn connected with the issue of the use of force. A chairman's proposal had envisaged restricting the use of force to the minimum necessary to ensure compliance with the instructions of inspectors, but this was considered too broad and met, like other suggestions, with strong opposition from the European Union, Panama, and other participants.[160] The approach generally favored was to use force only in self-defense and this is reflected in the 1995 Agreement.[161] In fact, inspectors shall avoid the use of force except when and to the degree necessary to ensure their safety and where the inspectors are obstructed in the execution of their duties; even then the degree of force shall not exceed that reasonably required in the circumstances.[162] The master is correspondingly under the obligation not to obstruct, intimidate, or interfere with the inspectors in the performance of their duties.[163] In spite of this restricted use of force, the European Union and China have expressed their concern about the outcome of the negotiations on this point.[164] It has been rightly commented in this regard that the restrained

[156] 1995 Agreement, Art. 22(3)(a), (b), and (e).
[157] 1995 Agreement, Art. 22(1)(d), and (e)
[158] 1995 Agreement, Art. 22(3)(f). [159] 1995 Agreement, Art. 22(4).
[160] Hayashi, "Enforcement," at 25–26; Andrés Couve, "Negociaciones sobre la pesca en alta mar," 1996, mimeo, at 8; also in Academia Diplomática de Chile, *Diplomacia*, No. 69, March–June 1996, 124–129.
[161] Hayashi, "Enforcement," at 26. [162] 1995 Agreement, Art. 22(1)(f).
[163] 1995 Agreement, Art. 22(3)(c).
[164] Hayashi, "Enforcement," at 26, with reference to the statement made by the European Union upon adoption of the 1995 Agreement on 4 August 1995, and to the statement by China in the United Nations General Assembly, GAOR, 50th. Session, 81st plenary meeting, 5 December 1995, Doc. A/50/PV. 81, at 8.

use of force is in accordance with the rules of international law governing the exercise of police powers at sea.[165]

Specific issues relating to investigation and prosecution

Another set of major issues emerged in the negotiations in connection with what steps should be taken after boarding and inspection have taken place. These additional steps require that there are clear grounds for believing that the vessel has engaged in activities contrary to the conservation and management measures since otherwise the whole procedure will come quickly to an end. In such an event the inspecting state shall secure the necessary evidence and shall promptly notify the flag state of the alleged violation.[166] The flag state is required to respond to this notification within three working days of its receipt, or such other period that is prescribed in procedures established under regional organizations,[167] a deadline that was originally of forty-eight hours and did not allow for separate arrangements.[168] The flag state is given the option of either to fulfill without delay its obligations to investigate and take enforcement action, informing the inspecting state of the results of such action, or to authorize the inspecting state to investigate.[169] If the latter authorization is given the inspecting state shall without delay communicate to the flag state the results of its investigation; the flag state may again opt between taking enforcement action on its own or authorizing the inspecting state to do so as specified by the flag state in a manner consistent with the 1995 Agreement.[170]

One important development in the negotiations was the clear separation between boarding and inspection and the eventual arrest of a vessel,[171]

[165] Anderson, ''The straddling stocks agreement,'' at 472, with reference to the *I'm Alone*, Interim Report of the Joint Canadian and United States Commission, 5 January 1935; the *Red Crusader*, *International Law Reports*, Vol. 35, at 485; and the French Law No. 94-589 of 15 July 1994 on ''modalités de l'exercise par l'état de ses pouvoirs de contrôle en mer,'' *Revue Générale de Droit International Public*, Vol. 99, 1995, at 242. See in addition the French Law No. 96-359 of 29 April 1996 on narcotic drugs traffic in the high seas, *JORF*, 30 April 1996, at 6558. See also Louis Balmond, ''Les pouvoirs de contrôle de l'état en mer et les lois du 15 Juillet et du 24 Avril 1996,'' *Espaces et Ressources Maritimes*, No. 10, 1996, 145–152.

[166] 1995 Agreement, Art. 21(5).

[167] 1995 Agreement, Art. 21(6).

[168] Norwegian proposal cited in note 126 above, as discussed by Hayashi, ''Enforcement,'' at 16.

[169] 1995 Agreement, Art. 21(6)(a) and (b).

[170] 1995 Agreement, Art. 21(7).

[171] This separation was first made under the draft agreement cited in note 81, Article 20(2); see also the discussion by Hayashi, ''Enforcement,'' at 16.

thereby facilitating the agreement on the requirements for different types of action. The notion of "serious violation" introduced separately by Canada and the United States was also helpful in making a necessary distinction as to the different forms of violation that might be envisaged and the corresponding enforcement action.[172] The draft agreement had envisaged a situation in which if the flag state failed to respond in three working days to the notification, the inspecting state could take charge of the vessel and require it to proceed to the nearest appropriate port for further investigation;[173] the same enforcement procedure could be followed if the flag state refused to take control of the vessel or refused to authorize the inspecting state to do so.[174] A similar approach had been taken by a Canadian proposal that also called for prosecution by the inspecting state in certain circumstances.[175]

In view of the opposition of distant-water fishing states to this approach,[176] the final text of the 1995 Agreement introduced a number of changes in this respect. First, seizure and arrest of the vessel is no longer mentioned as such, or not even in terms of taking control or taking charge of the vessel, the original language having been replaced by the weaker right of inspectors to remain on board and secure evidence and eventually require the master to assist in further investigation including, where appropriate, by bringing the vessel without delay to the nearest appropriate port, or such other port as specified under regionally agreed procedures.[177] In spite of the changes in the language, the fact remains, however, that in essence a vessel may be subject to seizure and arrest in given circumstances. A second change is that this type of enforcement can only take place where there are clear grounds for believing that a vessel has committed a serious violation and the flag state has either failed to respond or failed to take action when notified. In any event, the inspecting state shall immediately inform the flag state of the port to which the vessel is to proceed. The inspecting state and the flag state, and

[172] Canada, Informal paper on Article 20, 4 April 1995, as discussed by Hayashi, "Enforcement," note 77 and associated text; for the United States proposal on this matter see Hayashi, "Enforcement," at 20–21.

[173] Revised draft agreement cited in note 83, Art. 21(6).

[174] *Ibid*., Art. 21(7).

[175] Canada, document cited in note 172 above, and discussion by Hayashi, "Enforcement," at 18.

[176] Hayashi, "Enforcement," at 22–23.

[177] 1995 Agreement, Art. 21(8). See also Canada–European Community, "Agreed minute on the conservation and management of fish stocks," 20 April 1995, Annex I, II.7, *International Legal Materials*, Vol. 34, 1995, 1260; and comments by Anderson, "The straddling stocks agreement," at 472.

eventually the port state, shall take the necessary steps to ensure the well-being of the crew regardless of their nationality.[178]

The 1995 Agreement is mute on the question of eventual prosecution by the inspecting state and it has been commented that the latter cannot prosecute or even take other enforcement action without the consent of the flag state.[179] The revised draft agreement dealt with the question of prosecution requiring the inspecting state to inform the flag state of the results of any further investigation and, if there was adequate evidence, it could seek ''the concurrence of the flag state in prosecuting the vessel'' on specified charges of having violated the pertinent regional conservation and management measures.[180] The final text of the agreement retained only the duty to inform about the results of further investigations but not the reference to prosecution.[181] Moreover, the whole Article is without prejudice to the right of the flag state to take any measures, including proceedings to impose penalties, according to its laws;[182] the draft agreement had referred to the exercise of this right irrespective of prior proceedings by another state, but this reference was dropped together with the language allowing for prosecution or enforcement by a state different from the flag state.[183]

In the understanding that the flag state will exercise its duties under the 1995 Agreement relating to compliance and enforcement, it is reasonable to rule out prosecution and other enforcement action by the inspecting state, and this is the assumption that underlies the provisions of the 1995 Agreement. However, if the flag state refuses to take any action and fails to respond to the notification of the inspecting state or to exercise its options under the 1995 Agreement, then it does not seem reasonable that the inspecting state ought simply to release the vessel. Such an alternative would undermine the whole purpose of the 1995 Agreement since total inaction by the flag state would suffice to evade all of its obligations and those of the vessel. There is always the possibility of setting in motion the procedures for the settlement of disputes,[184] but

[178] 1995 Agreement, Art. 21(8).

[179] Anderson, ''The straddling stocks agreement,'' at 472; Balton, ''Strengthening the law of the sea,'' at 141.

[180] Revised draft agreement cited in note 83, Art. 21(8).

[181] 1995 Agreement, Art. 21(9). See also on this point the discussion of the United States proposal cited in note 172, in Hayashi, ''Enforcement,'' at 23.

[182] 1995 Agreement, Art. 21(13).

[183] Revised draft agreement cited in note 83, Art. 21(18).

[184] Balton, ''Strengthening the law of the sea,'' at 141; Revised draft agreement cited in note 83, Art. 21(10).

this is hardly appropriate as a substitute for proper prosecution and enforcement. In given circumstances, the prosecution and enforcement by the inspecting state should not be entirely ruled out, and in fact this alternative has not been prohibited by the 1995 Agreement.

The flag state can at any time take action to fulfill its obligations under Article 19 with respect to an alleged violation,[185] thereby benefiting from an important right of preemption in respect of the inspecting state. The revised draft agreement also referred to enforcement in the context of this clause.[186] If such action is not taken then it is only natural that the whole matter will remain within the jurisdiction of the inspecting state. Furthermore, the inspecting state is under the obligation to release the vessel, but this shall only be done at the request of the flag state, and the vessel shall be released to such flag state along with the full information on the progress and outcome of the investigation. If there is no action and no request by the flag state, the inspecting state is the only available authority to carry on with the proceedings.

The revised draft agreement had envisaged other provisions on enforcement, requiring the flag state to give reasons if it did not consent to the prosecution by the inspecting state,[187] and allowing the flag state to invoke dispute settlement procedures if enforcement action was taken without its consent.[188] Prompt release of the vessel and the crew had been provided for upon posting of a reasonable bond or other financial security, and the application of Article 292 of the Convention on the Law of the Sea had been specifically called for.[189] These provisions were not retained in the final text of the 1995 Agreement, but those relating to dispute settlement, including the question of prompt release of vessels under Article 292,[190] may operate under Part VIII of the 1995 Agreement on dispute settlement. The fact that some of these provisions have not been retained does not alter the conclusion that in given circumstances the inspecting state could still prosecute or take enforcement action, because all such provisions assume that the flag state would fulfill its duties and exercise its options; action by the inspecting state could only find justification in the inaction of the flag state, which is a different situation altogether.

As noted above the procedures for undertaking further investigations are tied in the 1995 Agreement to situations where there are clear

[185] 1995 Agreement, Art. 21(12).
[186] Revised draft agreement cited in note 83, Art. 21(9).
[187] *Ibid*., Art. 21(8). [188] *Ibid*., Art. 21(9). [189] *Ibid*., Art. 21(11).
[190] Tahindro, ''Conservation and management,'' at 38.

grounds for believing that a vessel has committed a "serious violation." The original United States proposal had listed as serious violations a limited number of activities, such as fishing without a license, authorization, or permit issued by the flag state; fishing in a closed area, a closed season, or in excess of the established quotas; using prohibited gear; and other violations defined under regional organizations.[191] Various proposals to enlarge or restrict the list of violations were made during the negotiations.[192] The 1995 Agreement has identified in addition to the above-mentioned violations a number of other activities, such as the failure to maintain accurate catch records or misreporting of catch; directed fishing for a stock subject to a moratorium or where its fishing has been prohibited; falsifying or concealing the markings, identity, or registration of a fishing vessel; concealing, tampering with, or disposing of evidence relating to an investigation; and incurring multiple violations which together constitute a serious disregard of conservation and management measures. Other violations specified by relevant regional organizations are also brought under the scope of the 1995 Agreement.[193] The seriousness of the violation is also relevant as a standard for the action that might be taken by states other than the flag state in case of activities contrary to conservation and management measures, the 1995 Agreement having required that any such action must be proportionate to the seriousness of the violation.[194]

Just as the 1995 Agreement provides for action in the high seas when a vessel has been engaged in unauthorized fishing in an area under the national jurisdiction of a coastal state,[195] it also provides for action under national jurisdiction of the inspecting state for violations in a high seas area. In fact, Article 21 applies *mutatis mutandis* to the boarding and inspection by a state party when a vessel under the flag of another state party believed to have engaged in activities contrary to conservation and management in the high seas subsequently, during the same fishing trip, enters into an area under the national jurisdiction of the inspecting state.[196] Following the basic approach of Article 21, the inspecting state must be a member of a regional organization while the flag state is only required to be a party to the 1995 Agreement and not necessarily of that

[191] Hayashi, "Enforcement," at 23.
[192] *Earth Negotiations Bulletin*, Vol. 7, No. 54, 7 August 1995, at 5; Hayashi, "Enforcement," at 23–24.
[193] 1995 Agreement, Art. 21(11). [194] 1995 Agreement, Art. 21(16).
[195] See notes 50–52, p. 234, and pp. 234–235 above.
[196] 1995 Agreement, Art. 21(14).

organization. The violation has also to take place in the high seas area covered by that particular organization. In this case the inspecting state will be also the relevant coastal state and it shall be acting on behalf of the organization and its members under the concept of *dédoublement fonctionnel*.[197] Proposals made during the negotiations were aimed at including cases in which the vessel would subsequently at any time have entered into other areas of the high seas or areas under the national jurisdiction of any state party to the 1995 Agreement, but these proposals were not retained because they were considered too broad[198] and might even have prompted difficult legal issues associated with innocent passage[199] and with other law of the sea questions. A number of coastal states were quite naturally opposed to boarding and inspection by any other state in areas under national jurisdiction;[200] the final text of the Article clearly precludes any such possibility, which would have come close to a kind of delayed hot pursuit in reverse.

Broad powers of boarding and inspection are granted where there are reasonable grounds for suspecting that a fishing vessel on the high seas is without nationality.[201] It must be noted that these powers are given to any state, not restricted to the parties to the 1995 Agreement or to members of a regional organization. Where evidence so warrants, the inspecting state may take action as appropriate under international law. A doubt has been raised about whether action under this Article refers to the question of the ship lacking a nationality or to fisheries violations.[202] Although the language is broad indeed it should be noted that questions of nationality are in any event included in the right of visit under Article 110 of the Convention;[203] the 1995 Agreement being a fisheries convention, it is only natural to assume that the main purpose of this particular provision is to deal with fisheries violations, a provision which has been further included in the section dealing with subregional and regional

[197] On the concept of *dédoublement fonctionnel* see René-Jean Dupuy, ''Politiques nationales et système juridique issu de la Troisième Conférence sur le Droit de la Mer,'' Société Française pour le Droit International, *Perspectives du droit de la mer à l'issue de la 3e Conférence des Nations Unies*, 1984, 249–275; René-Jean Dupuy, *L' Océan Partagé*, 1979, at 84.

[198] Hayashi, ''Enforcement,'' at 24.

[199] Tahindro, ''Conservation and management,'' at 39.

[200] Hayashi, ''Enforcement,'' at 24.

[201] 1995 Agreement, Art. 21(17). See also Ted L. McDorman, ''Stateless fishing vessels, international law and the UN high seas fisheries conference,'' *Journal of Maritime Law and Commerce*, Vol. 25, 1994, 531–555.

[202] Tahindro, ''Conservation and management,'' at 40.

[203] Convention on the Law of the Sea, Art. 110(1)(d).

cooperation in enforcement. The text of the draft agreement also supports the latter interpretation since a state, where evidence so warranted, could institute proceedings in accordance with international and national law; this reference to evidence was associated with prosecution and enforcement for fishing violations, and despite the fact that prosecution was not retained as such it still survived in respect of vessels without nationality.[204] The situation envisaged in this Article is of course totally different from that of fishing entities referred to under Article 1(3) of the 1995 Agreement, since the latter entities have a government exercising jurisdiction in spite of questions of statehood being controversial under international law.[205]

Boarding, inspection, and associated actions under the 1995 Agreement have been rightly evaluated as "a significant step forward in getting vessels to play by the rules."[206] Indeed, it has also been concluded that this is the first global agreement to allow for nonflag-state boarding and inspection in the high seas, including the residual application of its rules in case of a lack of action by a regional organization; its provisions reach beyond specific membership in a regional organization thereby providing the latter with a significant authority for conservation and management.[207] The view has also been expressed that the 1995 Agreement, particularly when combining the provisions on enforcement with those on compatibility:

revient donc purement et simplement à autoriser l'Etat côtier à étendre au-delà de sa ZEE, les mesures qu'il est en droit de prendre dans cette zone … pour assurer le respect des lois et règlements qu'il a adopté,

further considering that there is a:

sorte de reconnaissance implicite d'un intérêt spécial de l'État côtier à la gestion et à la conservation des stocks.[208]

Strong as the coastal state interest is, the 1995 Agreement has qualified

[204] Revised draft agreement cited in note 83 above, Art. 21(15) in connection with Art. 21(8).
[205] See notes 76, and 77, p. 139, and p. 139 above.
[206] Balton, "Strengthening the law of the sea," at 141.
[207] Hayashi, "Enforcement," at 27.
[208] "simply leads to entitle the coastal state to extend the measures that it can adopt in the EEZ beyond this area in order to ensure the observance of its laws and regulations," further considering that there is "a kind of implicit recognition of a special interest of the coastal state in the management and conservation of stocks." Gwenaële Proutiere-Maulion, "L'Accord sur l'application des dispositions de la Convention des Nations Unies sur le Droit de la Mer du 10 décembre 1982 relatives à la conservation et à la géstion des stocks chevauchants et des stocks de poissons grands migrateurs," *Espaces et Ressources Maritimes*, No. 9, 1995, 182–196, 192–193.

nonflag-state action in a detailed manner and built in a number of safeguards for the interest of the flag state, thereby qualifying as a special treaty allowing for certain derogations from exclusive flag-state jurisdiction over vessels in the high seas, a derogation permitted under both Articles 92 and 110 of the Convention on the Law of the Sea.[209]

Port-state enforcement and the issue of access of fishing vessels to foreign ports

One other aspect in which the 1995 Agreement has significantly contributed to the development of the international law of high seas fisheries is that concerned with port-state enforcement. A limited role for port-state intervention had been envisaged under the MARPOL Convention in connection with inspection of certificates, reporting, and prosecution of certain violations,[210] an approach which was considerably enlarged in Article 218 of the Convention on the Law of the Sea in respect of marine pollution in order to allow for investigation and prosecution of violations having taken place in the high seas and other areas.[211]

The 1993 FAO Compliance Agreement expanded the concept of port-state jurisdiction to the field of fisheries by requiring the port-state promptly to notify the flag state when a fishing vessel is voluntarily in its port and there are reasonable grounds for believing that it has engaged in

[209] Convention on the Law of the Sea, Arts. 92 and 110; Anderson, ''The straddling stocks agreement,'' at 472.

[210] MARPOL 1973/1978, Arts. 5(2) and (3) and 6(2) and (5); see the discussion by Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment*, 1992, at 268–269. For an amalgamation of IMO resolutions on port-state control see Resolution A. 787/19, 1995; for European Union action on port-state control see European Council Directive 95/21/EC, and the corresponding amendments to the 1982 Paris Memorandum of Understanding; for regional developments relating to Memorandums of Understanding see the Tokyo Memorandum of Understanding for the Asia–Pacific Region, that of Viña del Mar for Latin America, and that of Barbados for the Caribbean Region, and those in preparation for the eastern and southern Mediterranean, the Persian Gulf area, west and central Africa and eastern Africa and the Indian Ocean; all of it as reported by the United Nations Secretary-General, ''The Law of the Sea,'' 15 October 1996, paras. 100–104.

[211] Pierre-Marie Dupuy and Martine Remond-Gouilloud, ''La préservation du milieu marin,'' in René-Jean Dupuy and Daniel Vignes, *Traité du Nouveau Droit de la Mer*, 1985, 979–1045; Daniel Vignes, ''La juridiction de l'état du port et le navire en droit international,'' Société Française pour le Droit International, *Le Navire en Droit International*, 1992, 127–150; George C. Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port State Regime*, 1993. See also generally Choung Il Chee, ''Jurisdiction of port state over private foreign vessel in international law,'' *Korean Journal of International Law*, Vol. 39, 1994, 55–67.

an activity undermining the effectiveness of international conservation and management measures.[212] However, beyond notification, special arrangements would have to be made for the port state to undertake investigations. Various proposals were made during the negotiations of the 1995 Agreement to deal with port-state enforcement in a more elaborate manner.[213] In particular, a Canadian proposal envisaged port-state action as regards inspection to be exercised in its own right or at the request of any other state, the information to the flag state and the requesting state if there was evidence of contravention of conservation and management measures, and the power to detain the vessel until the port state and the flag state agree on the action to be taken.[214] These initiatives prompted the inevitable adverse reaction from distant-water fishing states that opposed the extension of port-state powers to fisheries activities.[215]

The 1995 Agreement provides that a port state has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional, and global conservation and management measures, with the condition of not discriminating in form or in fact against the vessels of any state.[216] Earlier negotiating texts had referred more generally to international conservation and management measures,[217] following closely the 1993 FAO Agreement, to the broader approach of applicable conservation and management measures,[218] or to the more restricted concept of subregional and regional conservation and management measures.[219] The reference in the final text to subregional, regional, and global measures indicates the intention of a larger scope in this respect, without prejudice of course to the specific developments that may take place at the regional level. A broad power of dockside inspection at each port of call is provided for, for example, in the Canada–European Union agreed

[212] FAO Compliance Agreement, Art. V(2).

[213] Hayashi, "The role of the United Nations," at 386–387.

[214] Canada, "List of issues" cited in note 64 above, V; Argentina, Canada, Chile, Iceland, and New Zealand, draft convention cited in note 65 above, Art. 11; Ecuador, "Working paper for a draft convention on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas," Doc. A/CONF. 164/L. 44, 23 June 1994, Art. 31.

[215] Hayashi, "The 1995 Agreement," at 63; R. Barston, "United Nations Conference on straddling and highly migratory fish stocks," *Marine Policy*, Vol. 19, 1995, 159–166, at 166.

[216] 1995 Agreement, Art. 23(1).

[217] Negotiating text, para. 33.

[218] Revised negotiating text, para. 36.

[219] Draft agreement cited in note 81, Art. 21(1).

minute on conservation of 1995.[220] The reference to international law is also indicative of the compatibility of this clause with the Convention on the Law of the Sea[221] and other international law standards, such as nondiscrimination, expressly referred to in the Article.

In the exercise of these powers the port state may, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels.[222] The ''*inter alia*'' clause indicates that other measures may be taken as well. The draft agreement explicitly referred to the power to inform the flag state and to request it to take control of the vessel for enforcement purposes in cases of violations, and provided for the officials of the port state to continue the boarding until the flag state took control;[223] detention of the vessel was also within the powers of the port state in earlier negotiating texts,[224] subject though to such authority being established in a regional organization.[225] Although detention, arrest, or continued boarding are not referred to in the text of the 1995 Agreement, such a situation may again arise in the case of inaction of the flag state. It should also be noted that the port state may take action in its own right and it does not need a request from another state to do so; in earlier texts the request of another state[226] or of the flag state[227] was mentioned as an additional possibility and either may be made to ensure action by the port state. The 1995 Agreement further requires that the vessel is voluntarily in the ports of the port state or at its offshore terminals.

A second aspect of particular significance is concerned with the access of fishing vessels to foreign ports. The 1995 Agreement has rightly stated the governing principle of international law in terms that nothing in Article 23 ''affects the exercise by states of their sovereignty over ports in their territory in accordance with international law.''[228] In fact, it is a generally accepted principle of international law that states are under no legal obligation to grant access to merchant vessels to their ports, although a presumption of ports being opened may operate in certain circumstances;[229] in practice ports are open to foreign trade as a matter

[220] See the Canada–European Community agreed minute cited in note 177 above, Annex I, II. 7.
[221] Hayashi, ''The 1995 Agreement,'' at 63. [222] 1995 Agreement, Art. 23(2).
[223] Draft Agreement cited in note 81 above, Art. 21(3).
[224] Revised negotiating text, para. 38. [225] Negotiating text, para. 34.
[226] *Ibid*., para. 33. [227] Revised negotiating text, para. 37.
[228] 1995 Agreement, Art. 23(4).
[229] A. V. Lowe, ''The right of entry into maritime ports in international law,'' *San Diego Law Review*, Vol. 14, 1977, 597–622, at 622. See also Tullio Treves, ''Navigation,'' in

of convenience or commercial interest.[230] Consequently, a state may also deny access to its internal waters.[231] Denial of the right of access or entry to foreign ports is always subject under international law to the exception of *force majeure* or distress, concepts that were included in the drafts and negotiating texts leading to the 1995 Agreement,[232] but which were not retained in the final text since the reference to international law suffices to cover these exceptions. The decision in the *Aramco* case upholding a right of entry to foreign ports[233] has been criticized for stating the law incorrectly.[234]

States may of course grant rights of access by means of treaties and other agreements that will create a legal obligation. This is particularly the role of treaties of friendship, commerce, and navigation.[235] However, fishing vessels are usually excluded from such treaties.[236] The 1923 Statute of the International Regime of Maritime Ports provided for equality of treatment on the basis of reciprocity to vessels of the contracting parties, and expressly stated that this ''Statute does not in any way apply to fishing vessels or to their catches.''[237] Even in the specific context of fishing agreements, it is quite common that access to ports and other services will be restricted, particularly when violations of conservation and management measures have taken place.[238] Even more often fishing agreements have established prohibitions on landing of catches, transshipment, and other operations, again with particular emphasis on the question of

René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the new Law of the Sea*, 1991, Vol. 2, chapter 17, 835–976, at 940–942.

230 See ''Canadian practice in international law: law of the sea,'' *Canadian Yearbook of International Law*, Vol. 32, 1994, 306–307.

231 Institut de Droit International: Resolution on ''The distinction between the regime of the territorial sea and the regime of internal waters,'' Amsterdam Session, 24 September 1957, *Annuaire*, 1992, Resolutions 1957–1991, 5–9, Art. II; William T. Burke, *International Law of the Sea, Documents and Notes*, 1993, at 28–29.

232 Draft agreement cited in note 81 above, Art. 21(2); Revised negotiating text, para. 37.

233 *Saudi Arabia* v. *Arabian American Oil Co*., 1958, *International Law Reports*, Vol. 27, 117, at 212.

234 Lowe, ''The right of entry,'' at 598.

235 *Nicaragua* v. *United States* (Merits), *ICJ Reports*, 1986, 98, paras. 270–282, *International Legal Materials*, Vol. 25, 1986, 1023; see also *Case Concerning Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), International Court of Justice, Judgment on preliminary objection, *Communiqué*, No. 96/33, 12 December 1996.

236 Canadian practice cited in note 230, at 307.

237 Convention and Statute of the International Regime of Maritime Ports, 9 December 1923, *League of Nations Treaty Series*, Vol. 58, 285, Art. 14.

238 See for example the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 23 November 1989, *International Legal Materials*, Vol. 29, 1990, 1449–1463, Art. 3(2)(d).

violations.[239] National legislation requiring licenses for fishing vessels to enter a port and establishing restrictions or prohibitions on landings, transshipment, and other similar activities is numerous,[240] to the point that Article 62 of the Convention on the Law of the Sea has authorized the coastal state to enact laws and regulations relating to "the landing of all or any part of the catch by such vessels in the ports of the coastal state."[241] Although the latter provision refers to conservation in the exclusive economic zone, in the application of the principle of compatibility the same standard will naturally apply to fishing activities beyond such zone.

A number of distant-water fishing states, including the European Union, China, Japan, Korea, and Poland, during the negotiations of the 1995 Agreement, objected to port states being given such powers, but in view of the developments explained this became quite inevitable, and with the support of the United States and a number of countries from Latin America a specific clause was included to this effect.[242] The Agreement allows states to adopt regulations empowering national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner that undermines the effectiveness of subregional, regional, or global conservation and management measures on the high seas.[243] These measures can be taken by any state individually and do not require collective action. Earlier drafts and texts had been more limited since they had envisaged only subregional or regional measures,[244] but in including global measures the final agreement has covered all sources of such measures;[245] another limitation in a prior text had been that of referring only to catch and not to transship-

[239] See for example the 1957 Interim Convention on Conservation of North Pacific Fur Seals, *US Marine Mammal Commission Compendium of Selected Treaties*, Vol. II, 1581, 1585, Art. VIII; and the Agreement of 20 December 1962 between Denmark, the Federal Republic of Germany, and Sweden on the Protection of Salmon in the Baltic Sea, Art. 7.

[240] See for example United Kingdom, Fishery Limits Act 1976, Section 3(6), *FAO Fishery and Agricultural Legislation*, Vol. 26, No. 2, 1977, at 89; Sri Lanka, Fisheries Act No. 59 of 1979, Regulation of Foreign Fishing Boats, *ibid*., Vol. 29, No. 1, 1980, at 89; Trinidad and Tobago, Archipelagic Waters and Exclusive Economic Zone Act 1986, Section 32, *ibid*., Vol. 36, No. 2, 1987, at 107.

[241] Convention on the Law of the Sea, Art. 62(4)(h).

[242] Hayashi, "The role of the United Nations," at 387; Couve, "Negociaciones," at 9.

[243] 1995 Agreement, Art. 23(3).

[244] Revised draft agreement cited in note 83 above, Art. 22(3).

[245] Habib Gherari, "L'Accord du 4 août 1995 sur les stocks chevauchants et les stocks de poissons grands migrateurs," *Revue Générale de Droit International Public*, 1996, No. 2, 367–390, at 382.

ment,[246] a situation that was also corrected in the final agreement since often transshipment is more important than local landings.

A concern has been expressed to the effect that in conditioning the adoption of measures on restricting port access to the undermining of conservation and management, this could be understood as denying the rights of a port state to adopt such measures either generally or in other situations.[247] The reality, however, appears to be somewhat different. As discussed above, the port state has in the exercise of its sovereignty the right under international law to allow or not to allow access by foreign vessels, and this right is expressly safeguarded by the 1995 Agreement. If by treaty or otherwise the port state has decided to allow open access to its ports, and this would include access by fishing vessels, then it can further introduce the restrictions established under the 1995 Agreement. Therefore, the 1995 Agreement is to be understood as supplementary to the general rights of the port state and not as a derogation therefrom.

Again in this context the principle of compatibility has an important role to play. If regional or subregional conservation and management measures are less stringent than those applied by the coastal state in the exclusive economic zone, the compliance by fishing vessels with the former does not mean that they will be entitled to access to the ports of the coastal state if their activities undermine the effectiveness of conservation in the exclusive economic zone. This type of situation has already been dealt with under national legislation and judicial decisions.[248] In particular, the Chilean Fisheries Law allows for the prohibition of landings, supplying of ships, or other services in Chilean ports, the exclusive economic zone, or the territorial sea in respect of fishing vessels engaged in high seas activities affecting fishery resources or their exploitation by Chilean vessels in the exclusive economic zone;[249] this provision is compatible with the 1995 Agreement and may of course operate independently from it in accordance with the powers of the port state under international law. The Chilean Fisheries Law also provides for the enactment by the coastal state of conservation measures in the high seas; these may of course be applied in respect of nationals but their application to

[246] Revised negotiating text, para. 39.

[247] Luis Felipe Moncada, ''Comentarios al acuerdo de pesca de las Naciones Unidas,'' Conference on ''Los intereses pesqueros de Chile en alta mar,'' Santiago, 27 May 1996, mimeo, at 14.

[248] See pp. 109–111 above.

[249] See notes 95, p. 108, and 100, p. 109 above, and associated texts, with particular reference to the Chilean Fisheries Law of 1991, Art. 165.

foreign vessels is the very issue that led to the negotiation of the 1995 Agreement and its complex arrangements; in any event, it has been stated that enforcement of such measures would only be undertaken in areas under national jurisdiction.[250] Coordination of measures relating to port access by the countries of the same region has also been suggested, with particular reference to the member countries of the Permanent Commission of the South Pacific.[251]

The argument has been made that restrictions on the access by fishing vessels to foreign ports would be contrary to free trade and the provisions of the GATT/WTO.[252] It has been argued in particular that the free transit provisions of Article V would be compromised by such restrictions. However, it should be noted that nothing in the GATT/WTO derogates from the basic principle of state sovereignty over ports and no right of entry is established under these provisions. On the contrary, the authoritative interpretation of Article V relies on the terms of the 1923 Statute of the International Regime of Maritime Ports,[253] which as explained above expressly excludes fishing vessels from its provisions. Furthermore, the kind of transit envisaged in Article V bears no relationship to the high seas. Beyond the question of entry, measures restricting or prohibiting landings and transshipments when associated with a violation of conservation and management measures are a normal feature of environmental agreements and other agreements aiming at the conservation of natural resources; in this light the point has also been made that if GATT rules were applicable such restrictions could qualify under the exception of GATT Article XX(g) in so far as it promotes the conservation of exhaustible natural resources.[254]

Port-state jurisdiction under the 1995 Agreement and the measures that may be adopted pursuant to it also have a bearing on the role of customary international law in this respect. It has been stated that the new regime of port-state jurisdiction binds only those states that accept it by becoming parties to the 1995 Agreement and that in no way could this be considered a part of customary law.[255] It should be noted, however,

[250] Chilean Diplomatic notes cited in note 93, p. 108 above.
[251] Moncada, ''Comentarios,'' at 14.
[252] Anderson, ''The straddling stocks agreement,'' at 472; for references to the views of the European Union, Korea, and China in this respect, see Couve, ''Negociaciones,'' at 9.
[253] WTO, *Guide to GATT Law and Practice*, 1995, Vol. 1, 213–217, at 214, note 1.
[254] Canadian practice cited in note 230 above, at 307.
[255] Hayashi, ''The 1995 Agreement,'' at 63; Tahindro, ''Conservation and management,'' at 41.

that the 1995 Agreement refers in Article 23 to a port state in general, or to states adopting regulations restricting landing and transshipment also in general, not limiting these references to states parties to the 1995 Agreement or to members of regional organizations. This broader scope is quite natural since the sovereignty of the state over its ports and the conditions of entry are governed by customary international law, and therefore apply to all states irrespective of them being or not being parties to the 1995 Agreement. In addition, to the extent that measures relating to the effectiveness of conservation become more common in practice, legislation, and agreements, they may also be considered as a part of the ancient rule or qualify as a new rule under customary international law. The broad scope of these measures under regional arrangements certainly points in that direction.[256]

[256] Gherari, "L'Accord," at 383.

10 Perfecting the regime of high seas fisheries through effective dispute settlement

Given the fact that most high seas fisheries regimes lack appropriate procedures for the settlement of disputes, or these are not effective,[1] the negotiations relating to straddling fish stocks and highly migratory fish stocks had to pay special attention to this matter. As explained by the chairman of the conference, dispute settlement is the third essential pillar on which the 1995 Agreement is built, together with the principles on conservation and management and the mechanisms on compliance.[2] Since the Convention on the Law of the Sea had significantly advanced the procedures for the settlement of disputes,[3] the 1995 Agreement did not need to conceive an entirely new approach and could rely on the work already done.[4] However, important adaptations and innovations were necessary in the context of a new regime on high seas fisheries as will be examined in this chapter.

General obligations on dispute settlement

The 1995 Agreement has reiterated the obligation of states to settle their disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[5] While this is an obligation already

[1] David A. Balton, ''Strengthening the law of the sea: the new Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Ocean Development and International Law*, Vol. 27, 1996, 125–151, at 142.

[2] Statement of the chairman on 4 August 1995 upon the adoption of the Agreement, Doc. A/CONF. 164/35, 20 September 1995, at 2.

[3] Convention on the Law of the Sea, Part XV.

[4] Statement by the chairman at the closing of the Fifth Session on 12 April 1995, Doc. A/CONF. 164/28, 1 May 1995, para. 20; Balton, ''Strengthening the law of the sea,'' at 142.

[5] 1995 Agreement, Art. 27.

existing under a number of major multilateral treaties, including the Charter of the United Nations,[6] and is generally considered to have been firmly established under customary international law,[7] its reiteration in the 1995 Agreement is not devoid of significance. First, it should be noted that the provision refers to states generally and not only to states parties to the 1995 Agreement. Secondly, it adds the resort to regional agencies or arrangements as one option particularly relevant in fisheries arrangements. And thirdly, it combines both the global approach and the regional approach in a scheme that allows a party to opt for any appropriate alternative. This last comprehensive choice is meaningful in the light of the preference for a regional procedure that had been expressed by a number of delegations during the negotiations, including the European Union, Japan, Papua New Guinea, and the United States.[8]

A broad listing of choices is also relevant in a different context. During the early part of the negotiations opinions were divided about the need to have recourse to binding dispute settlement procedures. Distant-water fishing states were generally opposed to such binding alternatives, while coastal states were generally in favor of them since most of the issues associated with fisheries in the high seas adjacent area had remained unsettled because of the lack of appropriate procedures.[9] It should also be kept in mind that during the negotiations of the Law of the Sea Conference those delegations that aimed at the recognition of coastal state powers in the adjacent high seas area had also proposed making the binding dispute settlement procedures applicable to situations where there was a failure to agree on conservation measures in the adjacent areas, directing the tribunal to take into account the measures adopted by the coastal state in its exclusive economic zone.[10]

[6] Charter of the United Nations, Art. 33(1).

[7] Nguyen Quoc Dinh, Patrick Daillier, and Alain Pellet, *Droit International Public*, 1987, 713–717.

[8] Moritaka Hayashi, "The role of the United Nations in managing the world's fisheries," in Gerald H. Blake *et al.* (eds.), *The Peaceful Management of Transboundary Resources*, 1995, 373–393, at 387. See in particular United States, "Principles on straddling fish stocks and highly migratory fish stocks for use by states, entities and regional organizations," Doc. A/CONF. 164/L. 15, 16 July 1993, I. 8.

[9] Hayashi, "The role of the United Nations," at 387–388.

[10] Doc. A/CONF. 62/L. 114, 1982, in *Official Records: Third United Nations Conference on the Law of the Sea*, Vol. 16, 1984, 224. See also note 102, p. 41, and pp. 41–42 above; and André Tahindro, "Conservation and management of transboundary fish stocks: comments in light of the adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," *Ocean Development and International Law*, Vol. 28, 1997, 1–58, at 49.

As a result of this difference of opinions the first negotiation texts introduced by the chairman had only referred to the obligation to settle disputes by peaceful means,[11] or by negotiation or other peaceful means.[12] As the negotiations progressed, however, arbitration or other binding dispute settlement procedures emerged as appropriate alternatives, and led to the comprehensive language of the final text of the 1995 Agreement. As the chairman concluded on this issue: ''While providing for various possibilities of non-binding settlement, in the end result every dispute can be submitted to a court or tribunal for a binding decision.''[13]

The 1995 Agreement has also emphasized dispute prevention in line with the most recent trends in international environmental agreements.[14] In fact there is a specific mandate for states to cooperate in order to prevent disputes, with the establishment or strengthening of efficient and expeditious decision-making procedures within regional or subregional organizations and arrangements directed to this end.[15]

Early options for dispute settlement: regional procedures, arbitration, and application of the Convention

As noted above, during the early part of the negotiations the preferred options had concentrated on dispute settlement through regional procedures, with particular emphasis on the role of arbitration. This indeed is the line followed by most fisheries agreements that provide for dispute settlement. A United States proposal had called for regional organizations to include dispute settlement mechanisms that could be readily invoked and could dispose of the dispute expeditiously.[16] The European Union also referred to dispute settlement in the context of regional institutional structures, without further elaboration,[17] or to procedures specially adapted to the functions of institutional mechanisms for international cooperation on conservation and management.[18] Japan suggested

[11] Negotiating text prepared by the chairman of the conference, Doc. A/ CONF. 164/13, 23 November 1993, para. 39.
[12] Revised negotiating text, Doc. A/CONF. 164/13/Rev. 1, 30 March 1994, para. 44.
[13] Statement by the chairman cited in note 2 above, at 2.
[14] Ibrahim F. I. Shihata, ''Implementation, enforcement and compliance with international environmental agreements: practical suggestions in light of the World Bank's experience,'' *Georgetown International Environmental Law Review*, Vol. 9, 1996, 37–51.
[15] 1995 Agreement, Art. 28.
[16] United States, ''Principles'' cited in note 8 above, I. 8.
[17] European Union, ''Position statement,'' Doc. A/CONF. 164/L. 8, 17 June 1993, II. 5.
[18] European Union, ''Suggested guidelines,'' Doc. A/CONF. 164/L. 20, 21 July 1993, II. 11.

retaining existing procedures for dispute settlement, with particular reference to the precedent of the Convention on the Conservation of Antarctic Marine Living Resources, which is based on arbitration.[19]

A Canadian proposal contained a more elaborate arrangement, calling for settlement through consultation, negotiation, mediation, or other peaceful means of the choice of the states concerned.[20] However, if after thirty days those states had not been able to settle the dispute, other alternatives came into play. First, if all states concerned were parties to the Convention on the Law of the Sea, Part XV of the Convention would apply; or else they could agree on the application of that Part irrespective of being parties to the Convention. Secondly, if none of those situations applied, the dispute would be submitted at the request of any state concerned to arbitration. An appendix on arbitration was attached to the proposal. An identical approach was followed in the draft agreement proposed by a group of coastal states, with the additional reference to the establishment of a voluntary fund to enable developing countries to defray the costs of dispute settlement under these arrangements.[21]

A Russian proposal also envisaged the broad resort to the peaceful means specified in Article 33(1) of the Charter of the United Nations, but failing settlement the dispute would be submitted at the request of one of the parties to the special arbitration provided under Annex VIII of the Convention on the Law of the Sea, which among other matters applies to fisheries and to the protection and preservation of the marine environment.[22] A reference to the establishment of this arbitral procedure at the regional level was also made in the Russian proposal.

The member states of the Permanent Commission of the South Pacific called for the application of Part XV of the Convention on the Law of the Sea when it would enter into force or submission by agreement to procedures under regional or subregional organizations.[23] These arrangements would include the choice of specific peaceful means by the parties

[19] Japan, ''List of issues,'' Doc. A/CONF. 164/L. 6, 8 June 1993, II. 7(7).

[20] Canada, ''List of issues,'' Doc. A/CONF. 164/L. 5, 4 June 1993, VI.

[21] Argentina, Canada, Chile, Iceland, and New Zealand, ''Draft convention on the conservation and management of straddling fish stocks on the high seas and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 11/Rev. 1, 28 July 1993, Art. 26.

[22] Russian Federation, ''Main provisions of the regime relating to straddling fish stocks,'' Doc. A/CONF. 164/L. 25, 26 July 1993, I. 5. See also Convention on the Law of the Sea, Annex VIII.

[23] Chile, Colombia, Ecuador, and Peru, ''Elements of an international agreement on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas,'' Doc. A/CONF. 164/L. 14, 16 July 1993, IX.

or otherwise the submission of the dispute at the request of one of the parties to the competent court or tribunal. Techniques for environmental dispute settlement were also suggested in this proposal, with particular reference to the recourse to national courts on which both parties have conferred authority, technical panels, environmental hearings, and periodic reports from governments that could be discussed in regional or international fora, such as the Commission on Sustainable Development. Conciliation was also favored in this proposal. Some of these suggestions would hardly be appropriate for effective dispute settlement.

The procedures of the Convention on the Law of the Sea having been proposed as one alternative, and regional procedures combined with arbitration as another possibility, the various negotiating texts came to explore the best way in which these options might be accommodated. The chairman's negotiating text envisaged the procedures of the Convention for those disputes between states parties to the Convention, and as an additional mechanism the strengthening and adaptation of the procedures established under regional or subregional fisheries organizations.[24] Special arbitration was encouraged in this context and an annex on the matter was attached;[25] this arbitration would become the residual mechanism if other options failed. For states not members of regional organizations the possibility of a voluntary submission to its procedures was foreseen, leading in such a case to a binding decision. The same approach was followed by the revised negotiating text.[26]

The draft agreement also privileged arbitration as the central procedure for the settlement of disputes, either as a choice of the parties or as the binding procedure to be adopted under subregional or regional fisheries organizations.[27] Annex 3 of the draft was devoted to the arbitration procedure. The use of the procedures of the Convention was also provided for as an alternative, but it would become compulsory in relation to disputes concerning the interpretation or application of the 1995 Agreement and in cases where the parties to the dispute were unable to agree on the same procedure to be applied under regional or subregional arrangements.

Arbitration, procedures under regional organizations, and dispute settlement under the Convention thus appeared as the main elements of

[24] Negotiating Text, paras. 42–45.
[25] *Ibid*., Annex 2.
[26] Revised negotiating text, paras. 44–48.
[27] Draft agreement, Doc. A/CONF. 164/22, 23 August 1994, Art. 28(1) and 29.

an agreement.[28] Towards the end of the negotiations, however, a consensus began to emerge to rely only on the procedures of Part XV of the Convention since, as explained by one commentator: ''Rather than reinvent the dispute settlement wheel, the conference decided essentially to import the scheme for dispute settlement laid out so elegantly in Part XV of the 1982 Convention.''[29] This new approach was in part founded on the suggestions made by some delegations that all disputes relating to the interpretation and application of the 1995 Agreement, or to the interpretation and application of fishery agreements, should be subject to settlement under Part XV of the Convention,[30] suggestions that had already found their way into the draft agreement.[31]

Disputes of a technical nature

The 1995 Agreement makes a useful distinction between disputes of a technical nature and other types of disputes involving legal and policy issues. The concern about the need to dispose expeditiously of this type of dispute had been evident since the first proposals and negotiating texts introduced by the chairman.[32]

With regard to such disputes, states may refer the matter to an *ad hoc* expert panel established by them, the functions of which shall be to confer with the states concerned and endeavor to resolve the dispute expeditiously without recourse to binding procedures for dispute settlement.[33] These functions had been described in an earlier text as to ''assist and advise'' the states concerned to enable them to resolve the matter speedily.[34]

The role of such an expert panel is indeed helpful in finding solutions to problems of a technical nature,[35] although the concern that this alternative might duplicate the work of subsidiary organs established

[28] Tahindro, ''Conservation and management,'' at 46.
[29] Balton, ''Strengthening the law of the sea,'' at 142.
[30] Tahindro, ''Conservation and management,'' at 46, with reference to United States proposals made during the Fourth Session of the Conference in 1994 and during the informal consultations held in Geneva, 13–17 February 1995.
[31] Draft agreement cited in note 27 above, Art. 28(2).
[32] See for example ''A guide to the issues before the conference prepared by the chairman,'' Doc. A/CONF. 164/10, 24 June 1993, para. 13. VII; Negotiating text, para. 41.
[33] 1995 Agreement, Art. 29.
[34] Revised negotiating text, para. 49.
[35] Habib Gherari, ''L'Accord du 4 août 1995 sur les stocks chevauchants et les stocks de poissons grands migrateurs,'' *Revue Générale de Droit International Public*, Vol. 100, 1996, No. 2, 367–390, at 388.

under fisheries organizations has been expressed.[36] However, since the panels are to be established by the concerned states themselves it is only natural that before taking this step they will have examined the alternatives available under regional organizations.

It has been rightly noted that the panel of experts provided for under the 1995 Agreement is totally different from the role of scientific or technical experts under Article 289 of the Convention,[37] since the latter are appointed to sit with the court or tribunal in disputes involving scientific or technical matters, without the right to vote, in situations which are a part of the procedures entailing binding decisions. Neither is the panel of experts in any way similar to the lists of experts and the role they play in the special arbitration procedures under Annex VIII of the Convention,[38] since such arbitration is also a part of binding dispute settlement procedures which, as noted above, apply particularly in the field of fisheries, protection and preservation of the marine environment, and other matters. In any event, these types of expert intervention under the Convention may always have a role to play to the extent that the respective procedures are applied under Part XV of such Convention in the light of the provisions to be discussed next.

Extending and adapting the application of dispute settlement procedures under the Convention

With regard to disputes concerning the interpretation or application of the 1995 Agreement, the procedures established under Part XV of the Convention apply *en bloc*, that is to say they are imported into the 1995 Agreement as a whole. One interesting feature of this solution is that it applies to disputes between states parties to the 1995 Agreement irrespective of whether or not they are also parties to the Convention.[39] In practice this solution results in extending the application of Part XV to all states parties to the 1995 Agreement and thus it overcomes the difficult distinctions made during the negotiations between the situation of those states that were parties to the Convention and those that were not, which would have led to different procedures for each group. The Convention itself envisaged a similar situation when providing that a court or

[36] Tahindro, ''Conservation and management,'' at 48.
[37] Gherari, ''L'Accord,'' at 388; Convention on the Law of the Sea, Art. 289.
[38] Tahindro, ''Conservation and management,'' at 48; Convention on the Law of the Sea, Annex VIII.
[39] 1995 Agreement, Art. 30(1).

tribunal referred to in Article 287 shall also have jurisdiction over any dispute "concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement";[40] since this extension of jurisdiction is not restricted to agreements between states parties to the Convention it may also cover agreements involving nonparties, which is precisely the case here.

Dispute settlement procedures under the Convention have been discussed in detail elsewhere.[41] In essence they provide first for nonbinding procedures, notably conciliation, and secondly for compulsory procedures entailing binding decisions, that include the choice of the International Tribunal for the Law of the Sea, the International Court of Justice, arbitration, and special arbitration. Binding procedures are subject to important limitations and exceptions in order to safeguard coastal state rights under the Convention, as will be discussed further below.

The application of Part XV of the Convention to disputes under the 1995 Agreement has rightly been praised as a solution limiting the multiplicity of fora for the settlement of fisheries disputes and thereby reducing the danger of a plurality of interpretations of the relevant provisions of the Convention and the 1995 Agreement.[42] However, the extension of such complex arrangements cannot be done in an unqualified manner and it requires some adaptation. The final text introduced a general clause relating to such adaptation by applying Part XV *mutatis mutandis* to disputes under the 1995 Agreement, that is, requiring that this be done with the necessary changes. Some of the changes and adaptations are spelled out under the 1995 Agreement while many others will be developed with the intervention of the various dispute settlement procedures and the practice relating thereto.

[40] Convention on the Law of the Sea, Art. 288(2) and Annex VI, Arts 20 and 21. See the comments by Gherari, "L'Accord," at 387; and Tahindro, "Conservation and management," at 46.

[41] Raymond Ranjeva, "Settlement of disputes," in René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea*, 1991, chapter 25; Gunther Jaenicke, "Dispute settlement under the Convention on the Law of the Sea," *ZaöRV*, Vol. 43, 1983, 813–827; W. Riphagen, "Dispute settlement in the 1982 United Nations Convention on the Law of the Sea," in C. L. Rozakis and C. A. Stephanou (eds.), *The New Law of the Sea*, 1983, 281–301; A. L. C. De Mestral, "Compulsory dispute settlement in the Third United Nations Conference on the Law of the Sea: a Canadian perspective," in T. Buergenthal (ed.), *Contemporary Issues in International Law: Essays in Honour of Louis B. Sohn*, 1984, 181; E. D. Brown, "Dispute settlement and the law of the sea: the UN Convention regime," *Marine Policy*, Vol. 21, 1997, 17–43.

[42] Tahindro, "Conservation and management," at 45.

Precisely what kind of disputes can be brought under Part XV as applied to the 1995 Agreement is one aspect that will require consideration in the practice of the parties to it and the case law that might be developed, since the 1995 Agreement is not always entirely clear about the matter. Technical disputes settled with the intervention of an expert panel are of course treated separately as discussed above; however, if no settlement is reached for those disputes then the question arises whether they can be submitted to the procedures of Part XV. It must be noted that Part XV applies to disputes concerning the interpretation or application of the Convention, and this requirement is repeated by the 1995 Agreement, in respect of procedures involving both nonbinding and binding decisions. To the extent that a technical or other dispute involves a question of interpretation or application of the 1995 Agreement there can be no doubt that they may be submitted to procedures not entailing binding decisions under Section 1 of Part XV, and if no settlement is reached it may then be submitted to procedures entailing binding decisions in application of Article 286 of the Convention. The question of whether such disputes can be submitted directly to procedures entailing binding decisions, after having passed unsuccessfully through the stage of expert panel, can also be raised.

The meaning of a dispute concerning the interpretation or application of the 1995 Agreement assumes that a legal issue is involved, but this can be somewhat vague. For example, for the purpose of regional, subregional, and global fisheries agreements such meaning includes the disputes concerning the conservation and management of the relevant stocks,[43] but this clarification is not made in connection with disputes on the interpretation and application of the 1995 Agreement itself. The question remains whether these types of disputes are meant to be covered by the 1995 Agreement under the concept of interpretation and application or should be treated differently because of their technical nature or for other reasons. Because that concept is quite broad, and in one respect it has been clarified that it includes disputes on conservation and management, it can be safely said that such disputes are indeed generally covered under the 1995 Agreement since its very purpose is the conservation and management of straddling fish stocks and highly migratory fish stocks. It should also be noted that the competent court or tribunal shall apply in addition to the provisions of the Convention and the 1995 Agreement the generally accepted standards on conservation and

[43] 1995 Agreement, Art. 30(2).

management,[44] thereby also signaling that disputes on this very matter are included within the scope of the 1995 Agreement. Other situations might involve a degree of uncertainty that will need to be clarified through practice and interpretation.

The 1995 Agreement has not resorted to a mere automatic extension of Part XV procedures but has contributed some important innovations in respect of dispute settlement. A major innovation is that it also applies Part XV *mutatis mutandis* to any disputes concerning the interpretation or application of a subregional, regional, or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks, thus addressing "the fact that virtually no regional fishery agreement contains provisions for compulsory, binding dispute settlement."[45] This arrangement applies to disputes between states parties to the Agreement which are also parties to such other regional, subregional, or global agreements, again irrespective of whether or not they are also parties to the Convention.[46] There is here a second step in the extension of Part XV procedures, reaching this time beyond the 1995 Agreement so as to include other fisheries agreements. As mentioned above, disputes concerning the conservation and management of such stocks are expressly included in this case. It has been rightly noted that the effectiveness of regional agreements might be greatly enhanced by this element of innovation.[47]

A second major innovation concerns the law applicable by a court or tribunal to which a dispute has been submitted under Part XV as applied to the 1995 Agreement. Such a body shall apply not only the Convention and other rules of international law not incompatible with it, as mandated under the Convention's system,[48] but it shall also apply the relevant provisions of the 1995 Agreement and of any relevant subregional, regional, or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources, all with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned.[49] This broad mandate allows for the application of both specific provisions under these various treaties and agreements and generally accepted standards of conservation and management; elements such as the precautionary approach and

[44] 1995 Agreement, Art. 30(5).
[45] Balton, "Strengthening the law of the sea," at 142.
[46] 1995 Agreement, Art. 30(2).
[47] Balton, "Strengthening the law of the sea," at 143.
[48] Convention on the Law of the Sea, Art. 293(1).
[49] 1995 Agreement, Art. 30(5).

other principles of international environmental law might be applied under these standards to the extent they meet the criteria of being generally accepted.

It has also been noted that under this clause not only the procedural arrangements of the Convention will apply but also the relevant substantive provisions, even if one of the parties to the dispute is not a party to the Convention and therefore not bound by it, a situation that in the view of one commentator could be explained in the light of the general nature of those provisions, their connection with customary international law, and the requirement of compatibility between the 1995 Agreement and the Convention.[50] However, to the extent that this mechanism might entail the application of a specific conventional provision to a state not otherwise bound by it, and therefore contradict the Vienna Convention on the Law of Treaties,[51] it might well constitute a situation in which the *mutatis mutandis* safeguard will be called into play. As noted above, the fact that generally accepted standards of conservation and management are also part of the law to be applied in the context of dispute settlement, is also helpful in reaching a positive conclusion about whether disputes involving conservation and management are included within the scope of dispute settlement under Part XV and its application to the 1995 Agreement.

The procedure chosen by a state party to the Agreement that is also a party to the Convention, pursuant to Article 287 of the Convention, shall apply to the settlement of disputes under the 1995 Agreement, unless that state has accepted another procedure pursuant to Article 287 for the purpose of dispute settlement under the 1995 Agreement. This option may be done when signing, ratifying, or acceding to the 1995 Agreement, or at any time thereafter.[52] Since under the Convention a state may choose one or more of the procedures listed in Article 287, this same situation will remain for the purposes of the 1995 Agreement. If no choice has been made a state party to the Convention shall be deemed to have accepted arbitration in accordance with Annex VII,[53] a residual clause that shall also be kept for the purposes of the 1995 Agreement. The question has been raised, however, about whether it would have been more appropriate to have special arbitration under Annex VIII of the

[50] Gherari, "L'Accord," at 388.
[51] 1969 Vienna Convention on the Law of Treaties, *International Legal Materials*, Vol. 8, 1969, 679, Art. 34.
[52] 1995 Agreement, Art. 30(3).
[53] Convention on the Law of the Sea, Art. 287(3); and Annex VII.

Convention as the residual clause in the context of the 1995 Agreement since this is a case concerning specifically fisheries disputes.[54] Under the Convention the choice is to be made by means of a written declaration, and although the 1995 Agreement does not mention this requirement in respect of this option, as a prior draft had done,[55] it is to be presumed that the same means will be also used under the 1995 Agreement. In spite of the availability of a change of option, it is quite likely that states that have opted for a given procedure under the Convention will keep the same procedure under the 1995 Agreement; the United States, for example, having recommended the choice of special arbitration for fisheries disputes under Annex VIII of the Convention, also recommended to Congress the choice of the same procedure for disputes arising under the 1995 Agreement.[56]

The situation of a state party to the Agreement which is not a party to the Convention is different since it will not have had the opportunity to make a choice under Article 287. In this case, it shall choose one or more of the means listed in Article 287 for settlement of disputes under the 1995 Agreement when signing, ratifying, or acceding to the 1995 Agreement, or at any time thereafter.[57] The requirement of a written declaration is made in this context, thus also confirming the presumption made above. Again if no choice is made, the state party shall be deemed to have accepted arbitration under Annex VII, since Article 287 applies to such declarations or the absence thereof. Furthermore, states in this situation are entitled to nominate conciliators, arbitrators and experts to be included in the lists referred to in Annexes V, VII, and VIII of the Convention dealing respectively with conciliation, arbitration, and special arbitration, thus being placed on an equal footing with the states that have this right under the Convention.

The revised draft agreement included a provision by which states parties accepted the jurisdiction of the court or tribunal having jurisdiction in accordance with Part XV of the Convention as applied to the 1995 Agreement for the purpose of dispute settlement under the latter.[58] This clause, however, was not retained since jurisdiction under agreements

[54] Gherari, "L'Accord," at 389.

[55] Revised draft agreement, Doc. A/CONF. 164/22/Rev. 1, 11 April 1995, Art. 29(3).

[56] "Message from the President of the United States transmitting the Agreement," February 20, 1966, Senate, Committee on Foreign Relations, Treaty Doc. 104-24, US Government Printing Office, 1996, at xiv.

[57] 1995 Agreement, Art. 30(4).

[58] Revised draft agreement cited in note 55 above, Art. 29(6).

related to the purposes of the Convention is recognized under Article 288(2), which is applicable to the 1995 Agreement as a consequence of the extension to it of Part XV.

There is one other peculiar situation to keep in mind. Although states parties to the 1995 Agreement that are not parties to the Convention are allowed to make a choice of procedures on the assumption that they could not do this before, it so happens that in some cases it is possible to have made a choice under the Convention in spite of not being a party to it. In fact, under Article 287 the choice may be made among other occasions when signing the Convention; a state having made this choice on signing will not necessarily become a party to the Convention thereafter. In such a case, can the state be held to the original choice or, because of not being a party to the Convention, has it the right to make a fresh choice under Article 30(4) of the 1995 Agreement? Since even a state party to the Convention can change its choice in respect of the 1995 Agreement, it would appear to be appropriate that a state technically not a party to the Convention might make a new choice in respect of the 1995 Agreement in spite of having made an earlier choice as a signatory to the Convention. The problem will probably not be posed when a new choice is made but rather when such a state remains silent in respect of the 1995 Agreement. In such a situation, would the original choice prevail or could the state be deemed to have accepted arbitration as the residual clause for disputes not covered by a declaration in force? A possible answer to this question lies in the fact that under the Convention dispute settlement can only be invoked in respect of states parties to it, and therefore declarations made before becoming a state party might be held not to be ''in force'' in a practical sense since they cannot be invoked for the purpose of applying dispute settlement procedures; it would follow that neither for the purpose of the 1995 Agreement would that declaration be in force and, therefore, either a new choice is made or else arbitration will be deemed to have been accepted.

Dispute settlement in the context of provisional measures

The 1995 Agreement considered the issue of dispute settlement relating to provisional measures separately given the difficulty normally associated with these kind of measures and the influence they inevitably have on the final outcome of the dispute. A general obligation is established to the effect that the parties to the dispute, pending its settlement under the 1995 Agreement, shall make every effort to enter into provisional arrange-

ments of a practical nature.[59] Since not much can be expected of these efforts, specific third party intervention follows.

A first set of relevant provisions are those of Article 290 of the Convention, which applies to the 1995 Agreement under the general extension of Part XV. The revised draft agreement was in this respect largely based on the language of Article 290 of the Convention.[60] However, the 1995 Agreement itself adapted this extension by specifying the subject matter of the provisional measures, which is of course more specific than that envisaged under the Convention. To this end, the court or tribunal to which the dispute has been submitted under the 1995 Agreement may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent damage to the stocks in question.[61] In addition, provisional measures may be prescribed in the event that the states concerned are unable to agree on provisional arrangements pending an agreement on compatible conservation and management measures;[62] in such circumstance any of the states concerned may submit the dispute to a court or tribunal under the 1995 Agreement for the purpose of obtaining provisional measures. This last mechanism also applies to provisional arrangements and measures relating to areas of the high seas surrounded entirely by an area under the national jurisdiction of a single state,[63] and therefore it also allows for the operation of dispute settlement under Article 31(2) of the 1995 Agreement. As discussed in chapter 7, none of these provisions on dispute settlement relating to compatible measures or surrounded high seas areas apply to the rights of the coastal state in areas under national jurisdiction, since such rights are generally excepted from dispute settlement entailing binding decisions;[64] this exception will be discussed below.

In stating that prescription of provisional measures is without prejudice to Article 290 of the Convention, the 1995 Agreement has in fact enlarged the subject matter of provisional measures. Indeed, in addition to the matters pertaining to the 1995 Agreement explained above, those referred to under the Convention may also apply, with particular reference to the prevention of "serious harm to the marine environment."[65] It

[59] 1995 Agreement, Art. 31(1).
[60] Revised draft agreement cited in note 55 above, Art. 30.
[61] 1995 Agreement, Art. 31(2).
[62] 1995 Agreement, Art. 7(5).
[63] 1995 Agreement, Art. 16(2).
[64] See pp. 191–192 above.
[65] Convention on the Law of the Sea, Art. 290(1).

should also be noted that the 1995 Agreement has grouped together two situations which are procedurally different. The first part of Article 31(2) refers to a court or tribunal to which the dispute on the merits has been submitted, which can then prescribe provisional measures pending the final decision. The second part of the Article, however, deals with provisional arrangements on compatible measures or measures relating to surrounded high seas areas which are submitted to a court or tribunal "for the purpose of obtaining provisional measures," that is, such a body will not have been seized of the merits of the dispute; the dispute on the merits can be submitted separately to settlement under the 1995 Agreement.[66]

The 1995 Agreement also made special provision for states that are not parties to the Convention in the context of the situation envisaged under Article 290(5) of the Convention. The latter Article applies to the specific situation in which the constitution of an arbitral tribunal to which the dispute is being submitted is pending; in this event, the parties to the dispute may agree for a court or tribunal to prescribe, modify, or revoke provisional measures, if such body considers that *prima facie* the arbitral tribunal will have jurisdiction and the urgency of the situation so requires.[67] If there is no agreement among the parties to choose the court or tribunal to this end, then the International Tribunal for the Law of the Sea may undertake this function of prescribing provisional measures. Under the 1995 Agreement, however, a state party which is not a party to the Convention may declare that the International Tribunal for the Law of the Sea shall not be entitled to prescribe, modify, or revoke provisional measures without the agreement of such state.[68] It is quite natural that the status of nonparties to the Convention be protected by excepting them from highly institutionalized functions such as those of the International Tribunal for the Law of the Sea which in this matter has the residual jurisdiction,[69] although the adverse effect that this solution might have in connection with the policy of urgency and expediency characterizing provisional measures has been also noted.[70]

It should be noted that Article 31(3) of the Agreement, in connection with Article 290(5) of the Convention does not apply to provisional measures under Article 7(5), since under this last provision settlement of

[66] 1995 Agreement, Art. 7(4).
[67] Convention on the Law of the Sea, Art. 290(5).
[68] 1995 Agreement, Art. 31(3).
[69] Tahindro, "Conservation and management," at 44, 47.
[70] Gherari, "L'Accord," at 389.

disputes is sought specifically for the purpose of obtaining provisional measures and is not related to the pending constitution of an arbitral tribunal to which the dispute on the merits is being submitted. Even where the constitution of the tribunal might be also pending this is the very tribunal that will have jurisdiction on the question of provisional measures. There is no purpose, therefore, in providing for yet another tribunal to consider provisional measures, and the residual jurisdiction of the International Tribunal for the Law of the Sea does not arise either. The situation is different if the dispute relates to the question of not having reached an agreement on compatible measures within a reasonable period of time and it is submitted to settlement under Article 7(4), since this is a dispute on the merits of the matter, in connection with which provisional measures may also be requested; Article 31(3) will apply to this other situation if the constitution of the arbitral tribunal is pending and there is a need for another tribunal to look into the question of provisional measures in the meanwhile. Measures relating to surrounded high seas areas might also fall into these various situations, since Article 16(2) makes reference to both Article 7(4) and Article 7(5).

Safeguarding a coastal state's sovereign rights and jurisdiction

The shortest article in the 1995 Agreement concerns one of the most meaningful issues of the whole negotiation. Article 32 provides for the limitations on applicability of procedures for the settlement of disputes in the following terms: ''Article 297, paragraph 3, of the Convention applies also to this Agreement.''[71] Strictly speaking, it would have been unnecessary to include a specific reference to Article 297(3) of the Convention since it is also included within the general extension of Part XV. However, the issue of safeguarding a coastal state's sovereign rights and jurisdiction was of such importance that the very success of the negotiation depended on the clarity of this point.

An earlier draft agreement had expressed the point in a different manner, stating that the provisions for the settlement of disputes ''do not affect in any way the provisions of Article 297 of the Convention.''[72] This reference was indeed broader since it covered Article 297 in its entirety, that is, the whole array of matters relating to the exercise by a coastal state of its sovereign rights or jurisdiction that are submitted to compul-

[71] 1995 Agreement, Art. 32.
[72] Draft agreement cited in note 27 above, Art. 31.

sory dispute settlement entailing a binding decision and the exceptions thereto.[73] Some of these matters are appropriate in the context of the Convention, like navigation, scientific research, and others, but unrelated to the purpose of the 1995 Agreement which is essentially concerned with fisheries. The latter category of disputes is that addressed under paragraph 3 of that Article, hence justifying a more restricted reference. The revised draft agreement introduced this limited reference,[74] with which some changes in the language led to the final text of the agreement. It is also interesting to note that the revised negotiating text had excluded the application of the provisions on dispute settlement "to disputes with coastal states relating to the sovereign rights of coastal states with respect to the living resources in their exclusive economic zone or the exercise of those rights,"[75] further referring to Article 297 as a whole. A similar exclusion had been made in the draft agreement proposed by Ecuador, with reference to the exploration, exploitation, conservation, or administration of the living resources of the exclusive economic zone, and to the fact that these disputes may be submitted only to conciliation.[76]

Under Article 297(3), disputes concerning the interpretation or application of the provisions of the Convention with regard to fisheries shall be settled by recourse to compulsory procedures entailing a binding decision. However, the exceptions to this rule are so broad that the paragraph does not necessarily mean that in practice the general rule will be that of submission to a binding decision, since, as commented by a distinguished writer, the exceptions can be quantitatively greater than the general principle.[77] In fact, the coastal state is not obliged to submit to such procedures "any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other states and the terms and conditions established in its conservation and management

[73] Francisco Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law*, 1989, at 121–129.

[74] Revised draft agreement cited in note 55, Art. 31.

[75] Revised negotiating text, para. 50.

[76] Ecuador, "Working paper for a draft convention on the conservation and management of straddling fish stocks and highly migratory fish stocks on the high seas," Doc. A/CONF. 164/L. 44, 23 June 1994, Art. 47(2).

[77] Shabtai Rosenne, "Settlement of fisheries disputes in the exclusive economic zone," *American Journal of International Law*, Vol. 73, 1979, 89–104, at 98. See also Shigeru Oda, "Some reflections on the dispute settlement clauses in the United Nations Convention on the Law of the Sea," *Essays in Honour of Judge Lachs*, 1984, 645–655.

laws and regulations.''[78] A coastal state's sovereign rights over the resources of the exclusive economic zone are reaffirmed by this exception, while its discretion is adequately safeguarded in crucial matters such as the determination of the allowable catch and the harvesting capacity; the terms and conditions established in its laws and regulations on conservation and management govern the matter.[79]

At the time of the negotiation of the Convention, the possibility was discussed that a court or tribunal might rule on the very existence of a sovereign right or its extent in a manner preliminary to the discussion about its exercise,[80] but it was then concluded that such an alternative did not harmonize with the broad scope of the exception indicated which excludes all disputes on sovereign rights from binding procedures.[81] It was also discussed at the time whether this exception applied only to the exclusive economic zone, as one view held,[82] or also to disputes involving the interest of the coastal state beyond such zone, with particular reference to straddling stocks and highly migratory species, as another view suggested.[83] This last situation gave place precisely to the negotiation of the agreement and the accommodation of a coastal state's interests with those of distant-water fishing nations.

Because the exception effectively rules out binding procedures, the Convention has provided instead for compulsory conciliation if no settlement to a dispute on this matter has been reached by other peaceful means.[84] But even submission to conciliation is subject to strict conditions, such as the coastal state having ''manifestly'' failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered; or when it has ''arbitrarily'' refused to determine the allowable catch and its harvesting capacity, or ''arbitrarily'' refused to allocate the surplus declared. Furthermore, it has been clearly provided that in no case shall the conciliation commission ''substitute its discretion for that of the coastal state,'' thus reaffirming

[78] Convention on the Law of the Sea, Art. 297(3)(a).
[79] Orrego Vicuña, *The Exclusive Economic Zone*, at 129.
[80] Maria Teresa Infante, ''The settlement of disputes regarding the law of the sea and its bearing on the legal nature of the exclusive economic zone,'' in Francisco Orrego Vicuña (ed.), *The Exclusive Economic Zone: A Latin American Perspective*, 1984, 159–171, at 166.
[81] Orrego Vicuña, *The Exclusive Economic Zone*, at 130.
[82] Rosenne, ''Settlement of fisheries disputes,'' at 98.
[83] Infante, ''The settlement of disputes,'' at 166.
[84] Convention on the Law of the Sea, Art. 297(3)(b).

the discretion of the latter with regard to fisheries conservation and management in the exclusive economic zone. The report of the conciliation commission, however, shall be communicated to the appropriate international organizations, which in the case of the 1995 Agreement would include the relevant regional or subregional organizations and arrangements. The very nature of the exclusive economic zone is linked to these exceptions to binding dispute settlement, and specifically to that relating to fisheries disputes.[85]

As a consequence of the extension of Part XV of the Convention to disputes under the 1995 Agreement all such disputes are subject to compulsory procedures entailing binding decisions. However, as a consequence of the application of the limitation embodied in Article 297(3) of the Convention a significant exception allows coastal states to "prevent disputes concerning the management of fisheries within their EEZs from being brought to any forum other than nonbinding conciliation."[86]

This approach of the 1995 Agreement to dispute settlement is particularly relevant in the context of compatibility measures and associated issues. As discussed in chapter 7, the measures adopted by the coastal state in giving effect to the obligation of compatibility within the exclusive economic zone or other areas under national jurisdiction respond to the exercise of its own jurisdiction over fisheries in such areas and are subject to its exclusive authority; there is no question here of applying measures decided for the high seas by a regional or subregional organization or arrangement since the two jurisdictional ambits are clearly separate and distinct.[87] This very solution is reaffirmed by the provisions on dispute settlement since again the two jurisdictional ambits and the procedures applicable to each are clearly separate. Fisheries in the exclusive economic zone fall exclusively within the jurisdictional ambit of the coastal state and its sovereign rights, being excepted from binding dispute settlement and subject only to compulsory conciliation; fisheries in the high seas fall within the ambit of cooperation envisaged by the 1995 Agreement and are subject to binding dispute settlement procedures. The specific nature of both the exclusive economic zone and the high seas is fully safeguarded by the dispute settlement arrangements of the 1995 Agreement.

The fact that no agreement on compatible conservation and management measures has been reached within a reasonable period of time can

[85] Orrego Vicuña, *The Exclusive Economic Zone* at 131–132, 139.
[86] Balton, "Strengthening the law of the sea," at 142.
[87] See pp. 190–194 above.

lead to dispute settlement under the 1995 Agreement,[88] and that this may also apply to provisional arrangements and measures[89] does not at all alter the applicability of the limitation of Article 297(3) of the Convention. It follows that these disputes are also subject to the same exception to binding procedures when involving a coastal state's sovereign rights and jurisdiction. While it has been rightly commented that the 1995 Agreement strengthens the dispute settlement arrangements of the Convention by extending their application to important aspects of fisheries, by not making the necessary distinctions in connection with Articles 7(4) and 7(5) of the Agreement it would appear as if binding procedures also apply to compatibility measures within the exclusive economic zone,[90] which is not the case.

Other commentators, while noting the distinction between jurisdictional solutions and related dispute settlement procedures for the exclusive economic zone and the high seas beyond, have posed the question of whether this is the right solution in view of the biological unity underlying the principle of compatibility of conservation and management measures, and have advanced the idea that a uniform procedure for the settlement of disputes relating to the whole geographical area of distribution of stocks would have been more appropriate.[91] This view, however, would have nullified the specific legal nature and characteristics of the exclusive economic zone and would not have been acceptable in the context of the negotiations of the 1995 Agreement nor in that of the Convention, just as a number of proposals aimed at substituting the principle of compatibility for the sovereign rights of the coastal state were not acceptable in the negotiation of the substantive provisions of the 1995 Agreement.

The discussion about the extent of the applicability of the limitation of Article 297(3) and related issues of substance will undoubtedly be raised in the light of specific disputes under the 1995 Agreement, a perspective that has already elicited adverse reactions and increased the doubts about the benefit of signing the 1995 Agreement.[92] If at any point in time the 1995 Agreement is construed in a way amounting to the derogation of a

[88] 1995 Agreement, Art. 7(4).

[89] 1995 Agreement, Art. 7(5).

[90] David H. Anderson, ''The straddling stocks agreement of 1995: an initial assessment,'' *International and Comparative Law Quarterly*, Vol. 45, 1996, 463–475, at 473.

[91] Tahindro, ''Conservation and management,'' at 49; Gherari, ''L'Accord,'' at 389–390.

[92] Luis Felipe Moncada, ''Comentarios al acuerdo de pesca de las Naciones Unidas,'' Conference on ''Los intereses pesqueros de Chile en alta mar,'' Santiago, 27 May 1996, mimeo, at 15–16.

coastal state's sovereign rights in the exclusive economic zone, either directly by means of the expansive interpretation of the principle of compatibility or indirectly by means of restricting the limitation that safeguards these rights in the context of dispute settlement, the end result will be the breakdown, not of the exclusive economic zone that has ample backing in the Convention, state practice, and customary international law, but of the 1995 Agreement itself, since it would have failed to maintain the essential balance that made possible its very existence. This is perhaps the best safeguard to ensure that the provisions on dispute settlement are faithfully interpreted and applied.

Conclusion: Preserving the freedom of high seas fishing and ensuring conservation

The 1995 Agreement has contributed significantly to the development of the law of high seas fisheries. The obligations relating to conservation and management have been further refined by means of the introduction of specific measures and procedures, cooperation has been particularly enhanced, and a number of innovations have ensured that monitoring, control, surveillance, and enforcement have become effective mechanisms.[1] Procedures for the settlement of disputes have also been provided for in the context of a stronger institutional structure supporting international fisheries agreements of this kind.[2]

While the 1993 Agreement has fully observed the mandate of keeping within the limits of the Convention on the Law of the Sea and implementing its basic provisions in respect of straddling fish stocks and highly migratory fish stocks, in so doing it has quite naturally also contributed to the progressive development of international law in this field. The task of clarifying provisions that involve general principles and basic obligations necessarily entails a measure of progressive development. Enforcement by nonflag states, including port-state jurisdiction, and closing high seas fishing in certain areas to those states that do not become members of regional or subregional organizations or arrangements, or that do not apply the measures adopted under such organizations and arrangements, have been singled out as the paramount examples in which the 1995

[1] André Tahindro, "Conservation and management of transboundary fish stocks: comments in the light of the adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," *Ocean Development and International Law*, Vol. 28, 1997, 1–58, at 50; Habib Gherari, "L'Accord du 4 août 1995 sur les stocks chevauchants et les stocks de poissons grands migrateurs," *Revue Générale de Droit International Public*, Vol. 100, 1996, 367–390, at 390.

[2] David H. Anderson, "The straddling stocks agreement of 1995: an initial assessment," *International and Comparative Law Quarterly*, Vol. 45, 1966, 463–475, at 475.

Agreement could have gone beyond the limits set under the Convention.[3] If looked upon from the perspective of the traditional freedoms of the sea there is here undoubtedly a departure from those principles; but if the same matter is looked upon from the perspective of the need to ensure effective conservation and management, which is also a principle embodied in both the Convention and many other agreements, the conclusion is then entirely different since such developments are the necessary corollary to implement effectively these other objectives.

While conservation has been a long-standing concern of the law of high seas fisheries, and indeed has prompted the changes that since the 1950s have permeated the essence of international law in this matter, it has been the role of international environmental law to introduce the specific concepts and principles that have made possible a new and more effective approach to conservation and management.[4] The Convention on the Law of the Sea had already provided for specific mechanisms associated with conservation and management, mainly in connection with the exclusive economic zone but also extending in terms of general obligations to high seas fisheries.[5] The concepts of large marine ecosystems and ecosystem management were not alien to that Convention.[6]

The 1995 Agreement has in turn updated this framework by introducing both the concept of sustainable development and the precautionary approach as the central criteria guiding conservation and management and making them specifically applicable to high seas fisheries as far as straddling fish stocks and highly migratory fish stocks are concerned. On the other hand, the principle of compatibility has ensured that measures adopted for the high seas shall be not less effective than those adopted by the coastal state for areas under national jurisdiction, while at the same time the coastal state will not be able to ignore the necessary conservation in its exclusive economic zone, thus bringing both sides of the equation closer to a more stringent standard of conservation and management, while respecting the different jurisdictional arrangements that apply to each.[7] The concern that had been expressed as to the possible inaction by

[3] Tahindro, ''Conservation and management,'' at 50.

[4] Anderson, ''The straddling stocks agreement,'' at 475, with reference to modern concepts of environmental management.

[5] See note 8, p. 25, and pp. 24–25 above.

[6] See, note 9, p. 25, and pp. 24–25 above; see also William T. Burke, *The New International Law of Fisheries*, 1994, at 349.

[7] David A. Balton, ''Strengthening the law of the sea: the new Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks,'' *Ocean Development and International Law*, Vol. 27, 1996, 125–151, at 143.

the coastal state in respect of conservation in the exclusive economic zone in the context of the provisions of the Convention on the Law of the Sea,[8] has been now attended to by the 1995 Agreement at least in respect of the stocks envisaged by it.

Despite the fact that the 1995 Agreement is concerned only with certain kinds of fish stocks, it will have an influence on the overall framework of high seas fisheries. This is already quite evident in connection with the various international fisheries agreements adopted in the past five years, all of which follow the same basic approach.[9] State practice will be increasingly influenced by these developments[10] as they respond to values and concerns shared by the international community in terms of the need for environmental protection and the rational management of high seas fisheries.

The 1995 Agreement, like most recent developments in the field of high seas fisheries, is based on the genuine compromise between the interests of distant-water fishing states and coastal states. This situation explains both its merits and its shortcomings, combining the advancement of basic principles with the necessary safeguards as to the existing rights and arrangements. This balanced outcome is the best assurance that the 1995 Agreement meets the expectation and acceptance of the essential interests involved in the negotiations. It should be noted, however, that distant-water fishing states and coastal states do not represent the only main interests that must be met. There is also a third and more subtle interest, namely that of states that are both coastal states and high seas fishing states, and which in this joint capacity have common views with the former groups but also have differences with them. While this third type of interest was also present in the negotiations, the solutions did not always adequately take into account its views since the most pressing concern was to accommodate the more extreme positions. This other interest is by its very nature a more balanced one and hence it responds with greater expediency to the very purpose of international law, a body of law which always shies away from the extremes and makes the best effort to advance solutions that are respectful of fundamental rights. The

[8] Burke, *The New International Law*, at 348.

[9] Moritaka Hayashi, ''The role of the United Nations in managing the world's fisheries,'' in Gerald H. Blake *et al.* (eds.), *The Peaceful Management of Transboundary Resources*, 1995, 373–393, at 390, with reference to the Convention for the Conservation of Southern Bluefin Tuna, the Convention on the Pollock Resources in the Central Bering Sea and the 1993 FAO Compliance Agreement. See further the 1995 FAO Code of Conduct on Responsible Fisheries.

[10] Anderson, ''The straddling stocks agreement,'' at 475.

latter interest will, therefore, have an increasing influence in the interpretation and application of the 1995 Agreement and of the general body of law relating to the high seas fisheries.

Beyond specific negotiations relating to certain agreements and conventions, there is a broader interest that must be duly safeguarded and that is the general interest of the international community in the conservation of high seas fisheries resources. There is here not only a question of states' interests, which may or not coincide with the general interest,[11] but also one involving the more fundamental rights of future generations. The international law of high seas fisheries has gradually brought this broader concern into perspective, not only as a result of introducing concepts and principles associated with international environmental law but also in the long-term historical evolution that has characterized this field, which has built on the value of conservation and rational management bringing it to an equal standing with that of fisheries development, a step that has attained new significance and effectiveness with the 1995 Agreement and related negotiations.

Because of this balanced perspective of international law, the unrestricted open access historically characterizing high seas fisheries has been gradually qualified by new concepts and mechanisms. From the limited scope of the abstention principle of the 1950s, the linkage of the freedom of fishing with the duty to undertake conservation and related cooperation a decade later,[12] and the early standard of the ''due regard'' concept specifically designed for the conduct of fisheries,[13] to the adoption of the exclusive economic zone and the extension of national jurisdiction to prevent the depletion of the ocean resources in the Convention on the Law of the Sea, and the new standards and requirements associated with conservation and management of high seas fisheries, there is a continuing trend in the same direction which again is the salient feature of the 1995 Agreement.

But precisely because all of this evolution tends to attain a balance between two legitimate values such as fisheries development and conservation, the emphasis on environmental factors that has strongly come to the fore should not result in law or in practice in the demise of the freedom of high seas fisheries as some have feared.[14] This freedom cannot

[11] See pp. 8–13 above.

[12] See pp. 13–18 above; see further Anderson,''The straddling stocks agreement,'' at 475, with reference to the 1958 Convention on High Seas Fishing.

[13] Anderson,''The straddling stocks agreement,'' at 475.

[14] Angela Del Vecchio, ''La libertà di pesca in alto mare: un principio ancora valido?,''

any longer be conceived as absolute or unrestricted as in the past, but this does not mean that it should be replaced by overwhelming international regulations that, as experience has shown in many matters, would not ensure the effectiveness of either value. The freedom of fisheries is as a result of this evolution a specifically qualified freedom,[15] and this should be perfected to the extent required by effective conservation.[16] The balance should remain, since a shift in the balance either way would not be to the advantage of states' interests nor to the interests of the international community, present or future.

The effectiveness of international arrangements in attaining the desired objectives of fisheries development and conservation is also important from another point of view. Unless these central values are satisfied by means of proper, workable arrangements, the option of unilateral coastal state action might reappear as a viable alternative since this was the solution found when the 200-mile area was brought under national jurisdiction. In this context future extensions of coastal state authority cannot be ruled out if the international arrangements fail.[17] International cooperation such as envisaged under the 1995 Agreement and other fisheries agreements is a desirable alternative that must be given an opportunity to succeed. Regrettably though, historical experience is not entirely favorable to solutions based only on cooperation.

An additional and novel option that can simultaneously be considered and which does not involve highly regulatory mechanisms, coastal state extension of jurisdiction, or more traditional arrangements of international cooperation, is the introduction of market economy mechanisms in the management of high seas fisheries.[18] Mechanisms such as individual transferable quotas prevent the adverse effects of unrestricted open access, require the intervention of governmental or international authority only for the allocation of quotas, supervision of the market, and enforcement of rights, and as result allow for both fisheries development and conservation since there will be a specific interest in ensuring the availability of resources on a sustainable basis. This approach, however, requires a totally different attitude to the role of the intervention of

Diritto Marittimo, Fasc. II, 1995, 328–347; Jon M. van Dyke, Durwood Zaelke, and Grant Hewison (eds.), *Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony*, 1993.

[15] Anderson,"The straddling stocks agreement," at 475.

[16] Burke, *The New International Law*, at 350.

[17] *Ibid*., at 350; Wayne S. Ball, "The old grey *mare*, national enclosure of the oceans," *Ocean Development and International Law*, Vol. 27, 1996, 97–124.

[18] See note 80, p. 72, and pp. 72–73 above.

public authorities, whether in the form of coastal state action or in that exercised under international organizations, since this authority would be restricted only to allowing the enhancement of private initiative in the management of high seas fisheries. Difficult as the challenge may prove to be, it is nonetheless fully in accordance with both the objectives and the balanced efforts of the international law of high seas fisheries.

The changing international law of high seas fisheries that has been discussed is the best example of how divergent interests have come to be accommodated in a common framework of understanding and convenience throughout a long historical evolution. This very same pattern is the one now being followed in the interests of both development and conservation, with the added advantages that nowadays accommodations can be reached in a matter of a few years and not centuries and, above all, that development and conservation are mutually supportive values and objectives. In the light of the innovations and improvements experienced by international law in this field in the past twenty-five years, it can only be expected that the way ahead will be still more constructive and that positive solutions will be found to the many problems still outstanding. The basic framework to this effect is now in place and its gradual implementation is already evidencing the positive trends on which the international law of high seas fisheries is based.

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