

Wack International Fisheries Management: A Global U.N. Conference  
**INTERNATIONAL FISHERIES MANAGEMENT: HOW THE U.N.  
CONFERENCE ON STRADDLING AND HIGHLY MIGRATORY  
FISH STOCKS CHANGES THE LAW OF FISHING  
ON THE HIGH SEAS**

INTRODUCTION

Overfishing is one of the biggest threats to our oceans. Technological advances in the fishing industry have made it easier to catch larger numbers of fish<sup>1</sup> to satisfy an increasing demand for food by growing populations.<sup>2</sup> As a result, most of the commercially harvested fish species are either depleted or overexploited.<sup>3</sup> After peaking in 1989, yearly fish catches have steadily declined.<sup>4</sup> Several of these exploited fish stocks have collapsed and may never be replenished.<sup>5</sup> Others will be replenished only over a long period of time.<sup>6</sup> This situation has drastically effected the balance of our ocean ecosystems.

Overfishing has also had severe economic implications. The decrease in fish catches has depressed much of the global fishing industry. An estimated 100,000 jobs have been lost and once prosperous fishing industries and towns now survive on government subsidies and welfare.<sup>7</sup> Entire fishing-based

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1. Technological advances include satellite imagery to track and find fish, an increase in fleet capacity and larger nets. STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE SECOND SESSION, at 1-2, U.N. Doc. A/CONF.164/11 (1993). [hereinafter STATEMENT AT THE SECOND SESSION]; Evelyne Meltzer, *Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries*, 25 OCEAN DEV. & INT'L L. 255, 261-62 (1994); Jon L. Jacobson, *Symposium: Law of the Sea: International Fisheries Law in the Year 2010*, 45 LA. L. REV. 1161, 1164 (1985).

2. Anne Ketover, *International Environmental Law Colloquium: Fouling Our Own Nest: Rapid Population Growth and Its Effect on the Environment*, 7 TUL. ENVTL. L.J. 431, 443 (1994).

3. REPORT OF THE TECHNICAL CONSULTATION ON HIGH SEAS FISHING AND THE PAPERS PRESENTED AT THE TECHNICAL CONSULTATION ON HIGH SEAS FISHING, at 63-64, U.N. Doc. A/CONF.164/INF/2 (1993).

4. SOME HIGH SEAS FISHERIES ASPECTS RELATING TO STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS, at 2, U.N. Doc. A/CONF.164/INF/4 (1993). Total ocean fish catches were 86 million metric tons in 1989; by 1992 this was reduced by nearly 5 million metric tons. STATEMENT AT THE SECOND SESSION, *supra* note 1, at 1. Stocks were still deteriorating in 1995. STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE FIFTH SESSION, HELD ON 27 MARCH 1995, at 3, U.N. Doc. A/CONF.164/26 (1995) [hereinafter STATEMENT AT THE OPENING OF THE FIFTH SESSION].

5. Suzanne Iudicello & Margaret Lytle, *Biodiversity Symposium: Marine Biodiversity and International Law: Instruments and Institutions That Can Be Used to Conserve Marine Biodiversity Internationally*, 8 TUL. ENVTL. L.J. 123, 127 (1994).

6. Meltzer, *supra* note 1, at 259.

7. Unemployment is reaching 20% in Newfoundland's fishing towns and 25% of Newfoundlanders are on welfare. Michael L. Lyster, *Decimated Resources Fuel a Fish War*, SAN DIEGO UNION-TRIBUNE, April 19, 1995, at B7. The Canadian government has spent more than \$730 million in relief and promises over \$1 billion more for compensation due to the fishing moratorium it declared. *Id.*

cultures are disintegrating.<sup>8</sup> Unfortunately, overfishing continues without effective regulation or conservation efforts.

The international community has attempted to regulate fisheries in two ways. Part of the third United Nations Conference on the Law of the Sea in 1982 (UNCLOS III)<sup>9</sup> established a management regime for international fisheries. As this Comment will show, it has not been successful. Some states also formed regional fishery management organizations to regulate fishing of specific areas or specific fish stocks. These regional groups have not been successful either.

Two types of fish stocks are especially at risk from the lack of regulation: straddling stocks<sup>10</sup> and highly migratory fish stocks.<sup>11</sup> These stocks are difficult to regulate because they travel through waters within the jurisdiction of different coastal states and in the high seas. This is troublesome because unrestrained fishing on the high seas undermines any measures taken by coastal states to conserve these stocks. Currently, there is no effective international mechanism for regulating fishing of these species on the high sea.

In December 1992, the United Nations General Assembly agreed to hold a conference specifically on the issue of straddling stocks and highly migratory fish stocks.<sup>12</sup> After two years of negotiations and five substantive sessions, the United Nations Conference on Straddling Stocks and Highly Migratory Fish Stocks reached an agreement on August 4, 1995.<sup>13</sup> This

8. Many villages in Canada are completely dependent upon fishing for their income and culture. After Canada's fishing moratorium, their entire lifestyle was disrupted. Brad Knickerbocker, *Fishing Lessons for a Family and the World*, CHRISTIAN SCIENCE MONITOR, April 4, 1995, at 11. Overfishing and overpopulation are also destroying rural fishing communities in less developed countries. In Mexico, fish stocks in the Sea of Cortez have declined to the extent that many fishermen cannot catch even enough fish to pay for their boat fuel. Tom Knudson, *Despair for the Future is Fishermen's Daily Catch*, SACRAMENTO BEE, Dec. 12, 1995, at A12. Unlike Canada, there are no government subsidies. People either catch fish or they starve. *Id.* Rising population and decreasing fish stocks in the Philippines have led to a 50% malnutrition rate among children in fishing villages. Colin Nickerson, *Fish Stocks Decimated by World Feeding Frenzy*, THE TIMES-PICAYUNE, Dec. 25, 1994, at A30. The numbers are even higher in fishing communities in Bangladesh, Ecuador and Tanzania where local people cannot compete with the technology used by other nations off their shores. *Id.*

9. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, U.N. Doc. A/CONF.62/122, U.N. Sales No. E.83.V.5 (1983) [hereinafter UNCLOS III].

10. Straddling stocks are fish found in waters overlapping the boundary between a state's coastal waters and the adjacent high seas. Alison Rieser, *A.S.I.L. Observer Comments on UN Conference on Straddling and Migratory Fish Stocks*, A.S.I.L. NEWSLETTER, at 12, Nov. 1993.

11. Highly migratory fish stocks are fish with habitats that range over vast areas of the ocean, on the high seas and sometimes in the coastal waters of many states. *Id.*

12. G.A. Res. 47/192, 47th Sess., 93rd mtg., U.N. Doc. A/RES/47/192 (1993).

13. The first session was held April 19-23, 1993. At the second session, from July 12-30, 1993, delegates held formal sessions and informal consultations on each issue and created a draft negotiating text to serve as the basis for negotiation at the next session. The third session was held March 14-31, 1994. Delegates continued debate and reviewed the negotiating text. Much of the conference was held in closed, informal sessions and a new revised negotiating text was created. The fourth session was held August 15-26, 1994. General comments and informal sessions convened until a draft agreement was completed. Informal consultations on the difficult issues of enforcement and compliance were carried out between the Chair and interested

Agreement (the Fish Stock Treaty) establishes new international guidelines for fishing on the high seas.<sup>14</sup>

This Comment discusses how the Fish Stock Treaty changes international fisheries management from the UNCLOS III regime. Section I discusses the development of the law of the sea and how this law designated zones for fishery management jurisdiction. It focuses on regional management organizations and enforcement under UNCLOS III. Section II reviews the provisions in the Fish Stock Treaty and examines whether they will offer a solution to the problem of conserving straddling and migratory fish stocks. This Comment concludes that while the agreement does solve several problems, it falls short of establishing the provisions that would be necessary for truly effective conservation of these problematic fish stocks.

## I. BACKGROUND OF INTERNATIONAL FISHERIES MANAGEMENT

### A. *Historical Development of Fisheries Management*

The existing law of the sea has developed over the last two thousand years. Throughout this development, the seas have been split into two distinct regions: the territorial sea and the high sea.<sup>15</sup> The territorial sea is the area along the coastline extending into the ocean a specific distance from the shore of a coastal state. Throughout most of this century, the territorial sea extended three nautical miles from the shore.<sup>16</sup> The coastal state has complete jurisdiction and control over this region, including all fishing rights.<sup>17</sup> The high seas are the waters beyond the territorial sea and are

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delegations. At the fifth session, March 27-April 12, 1995, delegates generally spent time discussing high seas enclaves, enforcement and compliance. A new draft agreement was circulated. The last session was held July 24-August 4, 1995, when more informal sessions convened on the same difficult issues until delegates approved the draft agreement. See Chad Carpenter et al., *A Summary Report on the Fifth Substantive Session of the Straddling Fish Stocks and Highly Migratory Fish Stocks Conference*, 7 EARTH NEGOTIATIONS BULLETIN, No. 54 (Aug. 7, 1995). Meltzer, *supra* note 1, at 325-27.

14. 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, U.N. Doc. A/CONF.164/37 (1995) [hereinafter FISH STOCK TREATY].

15. Designations of territorial waters and the high seas date back at least as far as ancient Rome. The Romans believed the sea was *res nullius* and that it should, therefore, be open to all. This concept was also recognized in other parts of the Mediterranean and England through the middle ages to this century. At the same time, the right of a state to control a narrow belt of sea along its coast was also part of customary law. E.g., JAMES C.F. WANG, HANDBOOK ON OCEAN POLITICS AND LAW 75-76, 95-96 (1992); GEORGE P. SMITH II, RESTRICTING THE CONCEPT OF FREE SEAS: MODERN MARITIME LAW RE-EVALUATED 13-24 (1980). A similar concept of freedom of the seas developed in Southeast Asia as well. See R.P. Anand, *Maritime Practice in South-East Asia Until 1600 A.D. and the Modern Law of the Sea*, 30 INT'L & COMP. L.Q. 440, 442-47 (1981).

16. WANG, *supra* note 15, at 95-97.

17. Shigeru Oda, *Fisheries Under the United Nations Convention on the Law of the Sea*, 77 AM. J. INT'L L. 739, 739 (1983).

under no state's control. Freedom of the high sea has traditionally been one of the most fundamental principles in international law, and included the principle of open fishing on the high seas.<sup>18</sup> Until now, a state could not regulate fishing on the high seas except by agreement with other states.<sup>19</sup>

The primary obstacle to international fishery regulation is reconciling the interests of the coastal states with those of the distant water fishing nations (DWFNs) in the high seas. DWFNs are landlocked states and states that have the fleet capacity to fish distant regions.<sup>20</sup> DWFNs must often rely on high seas fisheries unless they have access to fishing in another state's coastal waters. DWFNs want to keep the high seas free from regulation by coastal states in order to protect their right to exploit straddling and migratory fish stocks. Coastal states control the resources in their coastal waters and can regulate the fish stocks found there.<sup>21</sup> Because they have an interest in the long-term viability of coastal resources, they also want to control the straddling stocks that travel into high seas areas.<sup>22</sup> Coastal states and DWFNs each strive for control of straddling and migratory fish stocks.

Coastal states and DWFNs also have competing interests in the fish stocks themselves. DWFNs do not always have an interest in the long-term sustainability of these fish stocks. They may only want to exploit the resource for a short time and then move to another area if catches decrease.<sup>23</sup> Coastal states, however, cannot move. Consequently, they will always want the resources in their coastal waters to be plentiful and stable. Furthermore, some coastal states, especially developing countries, do not have

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18. For thousands of years, states believed that ocean resources were inexhaustible. This belief did not change until new technological advances, increased demand for ocean resources, and emerging nations began to deplete once bountiful fishing grounds. WANG, *supra* note 15, at 78.

19. Jacobson, *supra* note 1, at 1170-71.

20. Major DWFNs include Japan, China, Taiwan, Korea and Poland. See WANG, *supra* note 15, at 137-139. Russia and the United States can be considered both coastal and DWFNs because each has expansive coastal waters and the capacity to fish distant high seas. In negotiations, each has sided with coastal states or DWFNs depending on what measures or regions were in question. William C. McLean & Sompong Sucharitkul, *Fisheries Management and Development in the EEZ: The North, South and Southwest Pacific Experience*, 63 NOTRE DAME L. REV. 492, 496-98 (1988). China also has an expansive coastline, yet is classified as a DWFN because its coastal waters are less abundant, and because it has invested heavily in high seas fishing technology. *Id.* at 500-01.

21. The most influential coastal states include Chile, Argentina, Canada, and the South Pacific Island States. Jon M. Van Dyke, *Modifying the 1982 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources: the Straddling Stocks Negotiations*, 10 INT'L J. MARINE & COASTAL L. 219, 221 (1995).

22. Coastal states may be interested because they want to exploit the fish itself or because they have been given the responsibility of stock management under UNCLOS III. BACKGROUND PAPER PREPARED BY SECRETARIAT, at 27, U.N. Doc. A/CONF.164/INF/5 (1993) [hereinafter BACKGROUND PAPER].

23. *Id.*

the resources to fish distant waters.<sup>24</sup> If coastal states cannot regulate fishing of straddling stocks adjacent to their shores, DWFNs may deplete those stocks through overfishing on the adjacent high seas. Any international fishing regulation has to balance these two interests carefully.

### B. Fishery Management Under UNCLOS III

In 1982, The United Nations Convention on the Law of the Sea agreed to changes in international law regarding jurisdiction over water and living resources. This agreement was a codification of customary international law.<sup>25</sup> Under UNCLOS III, the seas were divided into three categories: the territorial sea, the exclusive economic zone (EEZ) and the high sea.

UNCLOS III expanded the traditional territorial sea limit from three to twelve nautical miles from the shore.<sup>26</sup> The creation of the EEZ was a newer concept that extended limited coastal control 200 nautical miles from the shoreline.<sup>27</sup> Within its EEZ, the coastal state has exclusive rights for exploring, exploiting, conserving and managing living resources.<sup>28</sup> Territorial waters and the EEZs encompass about 40% of the world's oceans<sup>29</sup> and 90% of its marine resources.<sup>30</sup>

UNCLOS III only slightly modified the traditional principle of freedom of the high seas. It recognized the principle that all states have the right for their nationals to engage in fishing on the high seas.<sup>31</sup> It emphasized the fact, however, that this right was subject to the state's treaty obligations and the rights, duties and interests of coastal states, as established in other articles of UNCLOS III.<sup>32</sup> Among these articles, there was an obligation to cooperate and set up management measures with other states fishing for straddling

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24. See NASILA S. REMBE, *AFRICA AND THE INTERNATIONAL LAW OF THE SEA* 169 (1980); Frida Maria Armas Pflirter, *Straddling Stocks and Highly Migratory Stocks in Latin American Practice and Legislation: New Perspectives in Light of Current International Negotiations*, 26 *OCEAN DEV. & INT'L L.* 127, 128 (1995).

25. UNCLOS III, *supra* note 9, at pmb1. Codification means that the general accepted practice and custom of states is confirmed in written law. HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 95 (3d ed. 1993).

26. UNCLOS III, *supra* note 9, art. 3.

27. *Id.* art. 57.

28. *Id.* art. 56(1). Coastal control in the EEZ is over economic resources; it is not an extended territorial sea. See WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND* 30-43 (1994); UNCLOS III, *supra* note 9, at xxv.

29. Jacobson, *supra* note 1, at 1179.

30. Rieser, *supra* note 10.

31. UNCLOS III, *supra* note 9, art. 116.

32. *Id.*

and highly migratory fish stocks.<sup>33</sup> States were also obligated to act in “due regard” to the interests of other states exercising their right to fish these resources on the high seas.<sup>34</sup> Unfortunately, this duty to cooperate was not clarified further and states did not cooperate.<sup>35</sup> Regional organizations did not form in the manner anticipated by UNCLOS III and when they did form, there were no effective mechanisms for enforcement. Even after UNCLOS III, the high seas remained free and there was no effective international regulation for conserving straddling and highly migratory fish stocks.<sup>36</sup>

### C. Regional Fisheries Management Organizations

UNCLOS III encouraged states to cooperate in managing straddling stocks and highly migratory fish stocks, but did not set international guidelines for developing or operating these organizations. Several regional organizations emerged or were reorganized after 1982 in an attempt to follow UNCLOS III, but were unsuccessful. The examples that follow demonstrate how UNCLOS III failed to conserve straddling and highly migratory fish stocks.

The Northwest Atlantic Fisheries Organization (NAFO)<sup>37</sup> was organized in order to realize UNCLOS III principles for high seas fishing.<sup>38</sup> Its members sought to cooperate in utilizing, managing and conserving the fisheries of the Northwest Atlantic.<sup>39</sup> Unfortunately, NAFO could not fulfill this goal.<sup>40</sup> The treaty contained a provision which allowed any member

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33. *Id.* arts. 63, 64, 118; THE LAW OF THE SEA: THE REGIME FOR HIGH-SEAS FISHERIES: STATUS AND PROSPECTS, at 10-11, U.N. Sales No.E.92.V.12 (1992) [hereinafter REGIME FOR HIGH-SEAS FISHERIES]. The problems of straddling and migratory fish stocks were known to the participants of UNCLOS III, but their conservation was not seen as urgent. STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE ORGANIZATIONAL SESSION, at 1, U.N. Doc. A/CONF.164/7 (1993). Fish stocks were not at the level of depletion that they have reached in the past few years and states were content with the fact that articles 63 and 64 left the resolution of problems up to the duty to cooperate in good faith. *Id.*

34. UNCLOS III, *supra* note 9, art. 87.

35. BACKGROUND PAPER, *supra* note 22, at 24-25.

36. *See* Oda, *supra* note 17, at 741; Iudicello & Lytle, *supra* note 5, at 133; BURKE, *supra* note 28, at 348.

37. Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Oct. 24, 1978, transmitted for advice and consent as to U.S. accession as Sen. Exec. Doc. T, 96th Cong., 1st Sess. (1979) [hereinafter NAFO Convention]. The United States has yet to join NAFO.

38. NAFO membership includes Bulgaria, Canada, Cuba, Denmark (with respect to the Faroe Islands and Greenland), Estonia, the European Union, Germany, Iceland, Japan, Korea, Latvia, Lithuania, Norway, Poland, Romania and Russia. Max Collett, *Achieving Effective International Fishery Management: A Critical Analysis of the UN Conference on Straddling Fish Stocks*, 4 DALHOUSIE J. LEGAL STUD. 1, 7 n.18 (1995). NAFO covers the high seas between Canada, the Northeast U.S. and Greenland. Bernard Applebaum, *The Straddling Stocks Problem: The Northwest Atlantic Situation, International Law, and Options for Coastal State Action, in IMPLEMENTATION OF THE LAW OF THE SEA CONVENTION THROUGH INTERNATIONAL INSTITUTIONS* 282, 305 (Alfred H. A. Soons, ed. 1990).

39. Collett, *supra* note 38, at 7.

40. *See generally* Applebaum, *supra* note 38.

state to make objections to management measures.<sup>41</sup> When a state made an objection, it was no longer legally bound by that provision.<sup>42</sup> Although this made it easier to get initial cooperation, the ease with which states could object out of management measures led to NAFO's failure. For example, allocation levels were a contentious issue in the organization. When one member state objected to its allocation, it was able to set its own higher limit.<sup>43</sup> Consequently, the members did not cooperate in conservation efforts as required by UNCLOS III.

Another regional organization is the South Pacific Forum Fisheries Agency (F.F.A.).<sup>44</sup> The F.F.A. was originally founded by several South Pacific Island states whose livelihood depended on the conservation of ocean resources.<sup>45</sup> Establishing this organization was critical because 80% of the migratory fish stocks in the regulated area were being taken by DWFNs.<sup>46</sup> Unfortunately, DWFNs did not cooperate with F.F.A. regulations and continued to fish in the region. The United States, for example, routinely fished illegally in regulated areas until it was sanctioned twice.<sup>47</sup> This problem did not end until the United States and other DWFNs finally entered into agreement with the F.F.A. in 1987.<sup>48</sup> After this, the F.F.A. was one of the more successful organizations because of cooperation by its members,

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41. NAFO Convention, *supra* note 37, art. XII.

42. Collett, *supra* note 38, at 10-11.

43. At first all members followed NAFO regulations, but the European Union changed its position in 1985. It refused to be bound by NAFO's catch allocations and Spain and Portugal then set their own limits. Applebaum, *supra* note 36, at 285. This change of position preceded the scheduled entrance of Spain and Portugal into the European Union in January 1986, which significantly increased European Union fishing capacity. Collett, *supra* note 38, at 10.

44. South Pacific Forum Fisheries Convention of 1979, July 10, 1979, *reprinted in* Soons, *supra* note 38, at 330.

45. There are sixteen member states including Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Kingdom of Tonga, Tuvalu, Vanuatu and Western Samoa. McLean & Sucharitkul, *supra* note 20, at 523 n.108. For background on the development of the F.F.A., see William M. Sutherland, *Management, Conservation, and Cooperation in EEZ Fishing: The Law of the Sea Convention and the South Pacific Forum Fisheries Agency*, 18 OCEAN DEV. & INT'L L. 613 (1987).

46. Judith Swan, *Highly Migratory Species: The South Pacific Forum Fisheries Agency*, in Soons, *supra* note 38, at 318. Some of these states include the United States, Japan and Korea, the Soviet Union, Taiwan, Indonesia and the Philippines. McLean & Sucharitkul, *supra* note 20, at 524-30.

47. In 1982 a U.S. vessel, the *Danica*, was arrested and fined nearly \$200,000 for fishing without a license in Papua New Guinea territory. In 1984 another U.S. vessel, the *Jeannette Diana*, was arrested in the Solomon Islands and fined nearly \$540,000 for illegal fishing in its territory. Both times, the United States retaliated with embargoes against the charging state. McLean & Sucharitkul, *supra* note 20, at 528.

48. *Id.* at 529. Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America, April 2, 1987, 26 I.L.M. 1048. DWFNs that have entered into agreements with the F.F.A. include Russia, Japan, Korea and Thailand. McLean & Sucharitkul, *supra* note 20, at 524-26.

stronger enforcement provisions and clearer regulations.<sup>49</sup> The organization, however, will benefit from stronger international guidelines.

Another attempt to manage straddling stocks is the convention for the Bering Sea "Donut Hole."<sup>50</sup> This area has been particularly troublesome because although the United States and Russia control most of the area where the straddling stocks are found, other nations extensively fish the small area adjacent to U.S. and Russian EEZs.<sup>51</sup> States refused to cooperate or agree on measures for conserving fish stocks until there was a dramatic decrease in fish catches.<sup>52</sup> In 1994, all of the states involved finally agreed to suspend fishing until an agreement for conservation could be reached.<sup>53</sup> The Donut Hole treaty<sup>54</sup> was opened for signature in 1994.<sup>55</sup> The first annual conference was held in November 1995, but the treaty has not been in effect long enough to analyze its effectiveness.<sup>56</sup>

Other regulatory bodies primarily aimed at conserving a specific migratory species have also emerged. Migratory species are nearly impossible to regulate on a purely local level because they are often found primarily in the high seas. The main methods of regulation have been setting catch quotas and limiting the types of equipment that fishing vessels could use, such as prohibitions on certain types of nets.<sup>57</sup> These organizations have achieved varying levels of cooperation. The International Pacific Halibut Commission (IPHC)<sup>58</sup> has been one of the more successful because it consists of only two states, the United States and Canada.<sup>59</sup> This makes

49. The F.F.A. is one of the most comprehensive fisheries access agreements in the world. Swan, *supra* note 46, at 340. The F.F.A. maintains a registry of fishing vessels in which a vessel must maintain standing to fish in the regulated area. It also mandates that records of catch and effort data be maintained in a standardized logbook, that coastal state laws be followed and that flag states agree to specific enforcement responsibilities. *Id.* at 318-29.

50. The "Donut Hole" refers to a small area of high seas in the Bering Sea encircled by the EEZs of Russia and the United States. Unrestrained fishing by both coastal states and flag states have severely depleted the straddling stocks found there. CONSERVATION AND MANAGEMENT OF THE STRADDLING FISH STOCKS IN THE BERING SEA AND THE SEA OF OKHOTSK, at 1, U.N. Doc. A/CONF.164/L.33 (1993) [hereinafter BERING SEA].

51. *Id.* at 2; 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*, 26 CAL. W. INT'L L.J. 75, 100 (1995).

52. Total fish catches were 1.4 million metric tons in 1989. BERING SEA, *supra* note 50, at 1. By 1992 the yearly catch totaled only about 10,000 metric tons. *Id.*

53. Kaye, *supra* note 51, at 102.

54. Convention on the Conservation and Management of Pollack Resources in the Central Bering Sea, June 16, 1994, 34 I.L.M. 67 (1995), reprinted in 10 INT'L J. MARINE & COASTAL L. 127-34 (1995).

55. Kaye, *supra* note 51, at 102.

56. Cooperation is currently high between member states, but future success is still problematic. Many of these same states have tried to cooperate to conserve fish stocks in the Sea of Okhotsk "Peanut Hole" as well, but have not been successful. *Id.* at 106.

57. Iudicello & Lytle, *supra* note 5, at 134.

58. Preservation of the Halibut Fishing of the Northern Pacific Ocean and Bering Sea Convention, March 2, 1953, U.S.-Canada 5 U.S.T. 5.

59. Iudicello & Lytle, *supra* note 5, at 134 n.77.



cooperation and consensus easier but negotiations are not always successful. The United States and Canada have failed to agree on several measures recommended by the IPHC.<sup>60</sup> The International Commission for Conservation of Atlantic Tunas (ICCAT)<sup>61</sup> is one of the most important organizations because it covers nearly all of the Atlantic Ocean and has many member states, both coastal and DWFNs. It has been in existence for over twenty-five years and has been amended several times.<sup>62</sup> ICCAT has not fared as well as the IPHC because it suffers from the common problems of lack of consensus on management measures and allocation levels.<sup>63</sup> On the whole, organizations like these have simply been insufficient to regulate migratory stocks on an international level.

In summary, regional organizations have suffered from the lack of international guidelines for regulating high sea fisheries under UNCLOS III. Although there was a general duty to cooperate under UNCLOS III, states did not comply. Member states did not always cooperate with agreed measures and non-member states often ignored organization regulations. As a result, the organizations were unsuccessful at conserving straddling or highly migratory fish stocks.<sup>64</sup>

#### D. Enforcement Provisions Under UNCLOS III

One of the predominant reasons for the failure of regional organizations is that UNCLOS III did not establish international guidelines or mechanisms for enforcement. Because of this deficiency, the organizations formed under UNCLOS III did not establish effective mechanisms to enforce regulations on the high seas either.<sup>65</sup> Member states proved unable to enforce organization regulations against non-member states. They also lacked the ability to

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60. Bob Mottram, *Battling Over By-Catch: Negotiations Fail in Halibut Treaty with Canada*, NEWS TRIBUNE, Mar. 15, 1995, at C4.

61. International Convention for the Conservation of Atlantic Tuna, March 3, 1969, 20 U.S.T. 2887. Parties to the treaty are: the United States, Japan, South Africa, Ghana, Canada, France, Spain, Brazil, Portugal, Morocco, Korea, Senegal, Ivory Coast, Cuba, Angola and the Soviet Union. David C. Hoover, *A Case Against International Management of Highly Migratory Marine Fishery Resources: The Atlantic Bluefin Tuna*, 11 B. C. ENVTL. AFF. L. REV. 11, 16. For views on ICCAT, see *Id.* and Christopher M. Weld, *Critical Evaluation of Existing Mechanisms for Managing Highly Migratory Pelagic Species in the Atlantic Ocean*, 20 OCEAN DEV. & INT'L L. 285 (1989).

62. Meltzer, *supra* note 1, at 317.

63. Iudicello & Lytle, *supra* note 5, at 134 n.78.

64. *Id.* at 133; Oda, *supra* note 17, at 754. Edward L. Miles & William T. Burke, *Pressures on the United Nations Convention on the Law of the Sea 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks*, 20 OCEAN DEV. & INT'L L. 343 (1989). STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE OPENING OF THE FOURTH SESSION. HELD ON 15 AUGUST 1994, AT 2, U.N. DOC. A/CONF.164/21 (1994).

65. ICCAT, for example, did not provide any enforcement mechanisms. Meltzer, *supra* note 1, at 320; see also BURKE, *supra* note 28, at 303. Successful enforcement requires a high level of detection capability, procedures for inspection of proper gear and licenses, and the ability to arrest and apply sanctions. *Id.* at 307-11.

enforce cooperation among members, relied too much on flag state accountability and failed to provide guidelines for penalties and sanctions.

One of the difficulties that arose was the inability to require that non-member states follow organization regulations. Because only parties are bound by a treaty, states who were not parties could fish in regulated areas without being subject to the regulations.<sup>66</sup> UNCLOS III requires states to cooperate with these organizations<sup>67</sup> but does not provide a way to enforce this requirement. DWFNs often refused to join or defied the regulations outright.<sup>68</sup> This was one reason for NAFO's failure. The United States was not a member, but it fished in NAFO territory, exploiting straddling stocks without regard to any conservation efforts.<sup>69</sup> NAFO could do nothing to stop U.S. exploitation because it had no power to enforce provisions against non-members on high sea territory. Freedom of fishing on the high seas was still the law. This lack of enforcement power undermined NAFO's ability to conserve the regulated fish stocks.

Furthermore, there was no way to ensure that member states would cooperate for conservation purposes. UNCLOS III merely provided that states should form regional organizations, it did not set out methods which could be used by member states to enforce regulations. It was left up to each organization to develop enforcement provisions of its own. Those that were adopted, such as the monitoring of vessels and inspection of ships at sea,<sup>70</sup> could be rendered ineffectual if states refused to cooperate.

Enforcing conservation measures was also difficult under UNCLOS III because it did nothing to change accountability for enforcement. On the high seas, vessels were only accountable to the flag state<sup>71</sup> and laws imposed on them by the flag state.<sup>72</sup> If a regional management organization developed such rules for its members, each member could participate in inspection or surveillance of all others.<sup>73</sup> But once a violation was found, flag states alone had the ability to prosecute the offender.<sup>74</sup> Member states were usually unwilling to give other states the authority to take action against

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66. Miles & Burke, *supra* note 63, at 355.

67. UNCLOS III, *supra* note 9, art. 118.

68. REGIME FOR HIGH-SEAS FISHERIES, *supra* note 33, at 26-27.

69. Collett, *supra* note 38, at 11.

70. See BURKE, *supra* note 28, at 338-45. One reason that this approach has not been successful is that states are deterred by the high cost of this type of surveillance. This is a special concern for developing nations with few resources to spend on monitoring EEZ and high sea activity. Registers of vessels with good standing requirements and aerial surveillance are often easier and cheaper, but have not been put into effect by regional organizations. See Gerald Moore, *Enforcement Without Force: New Techniques in Compliance Control for Foreign Fishing Operations Based on Regional Cooperation*, 24 OCEAN DEV. & INT'L L. 197, 197-200 (1993).

71. The term "flag state" refers to the state that grants a vessel the right to sail under its flag. WANG, *supra* note 15, at 398.

72. Oda, *supra* note 17, at 749. Moore, *supra* note 70, at 201.

73. Few agreements have been specific enough in flag state responsibilities to make this an effective way to enforce regulations. REGIME FOR HIGH-SEAS FISHERIES, *supra* note 33, at 27.

74. *Id.* at 35.

violators.<sup>75</sup> Consequently, sanctions and prosecutions were not always carried through.

UNCLOS III also lacked international guidelines for the imposition of sanctions when regulations were violated. Under UNCLOS III, coastal states had jurisdiction to arrest vessels which violated laws within the coastal state's territorial waters or EEZ.<sup>76</sup> Financial penalties were the only available punishment for violation.<sup>77</sup> Regional organizations could also develop arrest provisions for vessels on the high seas.<sup>78</sup> UNCLOS III did not specify what penalties were available for high seas violations, but it would seem to follow that financial penalties would be the usual sanction for these violations as well. Because there were no standards under UNCLOS III for applying financial penalties, each arresting state was left to decide the penalty itself, thus leading to inconsistent fines.<sup>79</sup> All of these problems demonstrate how stronger enforcement provisions will be needed if conservation is to be successful.

#### *E. Unilateral Actions Resulting From the Lack of International Guidelines*

Due to the growing necessity of conserving straddling and highly migratory fish stocks and the ineffectiveness of UNCLOS III, several states acted unilaterally to regulate fishing on the high seas. For example, Canada recently adopted legislation to prohibit all fishing of straddling stocks off its coasts and in the adjacent high seas NAFO territory.<sup>80</sup> This legislation also attempted to protect straddling stocks beyond the Canadian EEZ by allowing Canada to seize foreign vessels that violated NAFO regulations.<sup>81</sup> In March 1995, Canada seized a Spanish ship believed to be fishing illegally in this area, resulting in continuing legal and diplomatic controversy with Spain.<sup>82</sup>

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75. *Id.* at 27; BURKE, *supra* note 28, at 303.

76. UNCLOS III, *supra* note 9, art. 73(1).

77. Oda, *supra* note 17, at 747.

78. REGIME FOR HIGH-SEAS FISHERIES, *supra* note 33, at 35.

79. One suggestion made and followed in the F.F.A.-U.S. agreement is to require that penalties set on flag state vessels be the same amount that would be applied to foreign vessels operating in the flag state's EEZ illegally. Moore, *supra* note 70, at 202. If adopted, this practice would lead to more consistency.

80. An Act to Amend the Coastal Fisheries Protection Act, May 12, 1994, ch. 14, 1994 S.C. (Can.).

81. Miles & Burke, *supra* note 63, at 344-45; Collett, *supra* note 38, at 2-3.

82. In March 1995, Canadian gunboats seized a Spanish ship, the *Estai* and cut the nets from another vessel. Spain responded by sending in its ships to protect Spanish fishermen. It was feared that shots would be fired. Ved P. Nanda, *Crisis Heats Up over Global Fish Stocks*, THE DENVER POST, Apr. 16, 1995, at D4. Spain also retaliated by requiring Canadian tourists to obtain visas before visiting and filed a lawsuit with the International Court of Justice. *Spain Brings a Case Against Canada*, I.C.J., Communique No. 95/8, March 29, 1995; John Darnton, *Two Feuding Nations with Fish Stories*, N.Y. TIMES, Apr. 2, 1995, § 4 at 4. As of March 1996, this claim was still pending before the International Court of Justice. *Justice for All from a Global Courtroom*, THE LAWYER, Mar. 19, 1996, at 9.

Out of the same concern that international law could not protect endangered resources, Chile introduced the idea of a "Presential Sea" in 1991.<sup>83</sup> This concept extended conservation measures similar to those taken within Chile's EEZ to the adjacent high seas.<sup>84</sup> It provided for increased surveillance, monitoring, and Chilean fishing.<sup>85</sup> The Presential Sea concept was not meant as a jurisdictional claim to the area.<sup>86</sup> Rather, it was thought that by undertaking more economic and monitoring activities in the high seas, Chile's national economy would be enhanced by ensuring that conservation efforts in its EEZ were not undermined.<sup>87</sup>

The international community should not have to rely on the unilateral actions of individual states to protect fish stocks. This approach leads to inconsistency among different regions and does not encourage cooperation. It may also lead to more international disputes, such as the one between Spain and Canada. These unilateral actions, the failure of regional organizations and continuing overfishing all demonstrated the need for a new international management regime to conserve straddling and highly migratory fish stocks.

## II. THE U.N. CONFERENCE AND FISH STOCK TREATY

### A. Background of the Conference

In 1992, participants at the Earth Summit in Rio agreed to an international conference under the auspices of the United Nations to deal with the specific problem of straddling and highly migratory fish stocks.<sup>88</sup> The goals of the conference were to identify and assess existing problems related to the conservation and management of these stocks, consider means of improving

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83. This idea was introduced by a high-ranking Chilean naval officer. Jorge Martinez Busch, *El Mar Presencial, Actualidad, Desafios y Futuro [The Presential Sea: The Present Situation, Challenges and the Future]* (transcript of a master class given by Navy Commander Jorge Martinez Busch at the Vina del Mar Municipal Auditorium on May 2, 1991, reprinted in *Revista de la Marina*) cited in Christopher Joyner & Peter N. de Cola, *Chile's Presential Sea Proposal: Implications for Straddling Stocks & the International Law of Fisheries*, 24 OCEAN DEV. & INT'L L. 120 n.53 (1993). It later became part of Chilean fisheries law. Law No. 19.079 (Chile), *Official Journal*, September 6, 1991.

84. Pfirter, *supra* note 24, at 136.

85. Francisco Orrego Vicuna, *Toward an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea*, 24 OCEAN DEV. INT'L L. 81, 87-89 (1993). For a general discussion of the Presential Sea proposal see Joyner & De Cola, *supra* note 83, at 99. Other Latin American States have been supportive of such claims. See Pfirter, *supra* note 24, at 135-37.

86. Pfirter, *supra* note 24, at 136.

87. Vicuna, *supra* note 85, at 88.

88. At the Earth Summit, the committee on global overfishing negotiated at length without success. The committee finally decided that the United Nations needed to hold an intergovernmental conference on this issue alone. REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, RIO DE JANEIRO, 3-14 JUNE 1992, at 145-46, U.N. Doc. A/CONF.151/26 (Vol. II). The resolution to hold the conference was adopted January 29, 1993; G.A. Res. 47/192, *supra* note 12.

cooperation among states and formulate appropriate recommendations.<sup>89</sup> Recommendations were to be made under the framework of UNCLOS III by clarifying and strengthening the relevant rights and duties of states pertaining to high seas fishing.<sup>90</sup> The chairperson of the Conference on Straddling Stocks and Highly Migratory Fish Stocks, Satya Nandan of Fiji, agreed that effective conservation required “global solutions” because it concerned “the international community as a whole,” not just individual states.<sup>91</sup>

A critical debate at the opening of the conference was whether the final product should be a binding agreement or merely a declaration or recommendation. Most DWFNs did not want to create a binding treaty.<sup>92</sup> Canada, Chile and other coastal states insisted that any decision needed to be binding in order to be effective.<sup>93</sup> In the end, the conference became a binding treaty.<sup>94</sup>

Every article in the treaty was eventually approved by consensus.<sup>95</sup> Two areas, however, were particularly controversial: compliance standards for regional fishery management organizations, and enforcement mechanisms.<sup>96</sup> Because these issues were behind many of the failures of UNCLOS III, this was to be expected.

The debate over these issues centered around the interests of the coastal states versus the interests of the DWFNs. On one hand, the coastal states wanted to increase their power to regulate in order to better manage straddling stocks outside their EEZs.<sup>97</sup> On the other hand, DWFNs resisted

89. A GUIDE TO THE ISSUES BEFORE THE CONFERENCE PREPARED BY THE CHAIRMAN, at 1, U.N. Doc. A/CONF.164/10 (1993).

90. See generally BACKGROUND PAPER, *supra* note 22.

91. STATEMENT MADE AT THE OPENING OF THE FIFTH SESSION, *supra* note 4, at 3.

92. LETTER DATED 26 MAY 1993 FROM THE DIRECTOR, OFFICE OF FISHERIES AFFAIRS, BUREAU OF OCEANS, INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, UNITED STATES DEPARTMENT OF STATE, ADDRESSED TO THE CHAIRMAN OF THE CONFERENCE, at 1, U.N. Doc. A/CONF.164/L.3 (1993). The U.S. took the position that it would be appropriate to have a resolution or declaration rather than attempt to create a binding agreement. *Id.* Japan was also against creating a binding treaty. A/CONF.164/L.6 at 2. Others opposed to a binding treaty include China, Korea and the European Union. Ted L. McDorman, *Stateless Fishing Vessels: International Law and the U.N. High Seas Fisheries Conference*, 25 J. MAR. L & COM. 531, 547 (1994).

93. LETTER DATED 28 MAY 1993 FROM THE CHAIRMAN OF THE DELEGATION OF CANADA TO THE CONFERENCE ADDRESSED TO THE CHAIRMAN OF THE CONFERENCE, at 1, U.N. Doc. A/CONF.164/L.5 (1993). Others who supported a binding treaty included Argentina and the South Pacific Island States. McDorman, *supra* note 92, at 547-48.

94. Although done under the framework of UNCLOS III, this treaty is not a codification of customary international law. Member states are nonetheless urged to encourage other states to sign and to deter any activities by non-member state vessels that undermine conservation efforts. FISH STOCK TREATY, *supra* note 14, art. 33(2).

95. REPORT ON THE SIXTH SESSION OF THE UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS, at 5, U.N. Doc. A/CONF.164/36 (1995). This consensus makes it more likely that the treaty will be ratified quickly.

96. Meltzer, *supra* note 1, at 326-27.

97. Van Dyke, *supra* note 21, at 221.

any further control by coastal states.<sup>98</sup>

During negotiations, the participants examined the rights and duties of states under UNCLOS III.<sup>99</sup> They agreed that the rights of states included the right to exploit a particular resource<sup>100</sup> and that their duties consisted of cooperating in conservation efforts by adhering to regional regulations and enforcing the regulations on their vessels.<sup>101</sup> The Fish Stock Agreement strengthens each of these rights and duties.

### *B. Regional Management Organizations Under the Fish Stock Treaty*

Although the conference's regulations are international in scope, most of its provisions will be implemented by regional management organizations. Such organizations may be newly established in furtherance of the Fish Stock Treaty or pre-existing organizations that are re-arranged or strengthened by it.<sup>102</sup> The Fish Stock Treaty sets out general and specific standards for the development of regional organizations. In recognition of the problems of cooperation faced by existing organizations, the Fish Stock Treaty strengthens the duty to cooperate and makes it clearer than it was under UNCLOS III.

Under the Fish Stock Treaty, all states with a "real interest" in the fisheries concerned must become members of these organizations or agree to comply with organization regulations.<sup>103</sup> Most importantly, if states refuse either to comply or become members, they will have no access to that fishery's resources.<sup>104</sup> This provision drastically alters the traditional idea of freedom of the high seas. For the first time, international law will limit access to high sea fisheries. If states do not cooperate, they will be barred from fishing the region in question.

As an improvement upon UNCLOS III, the guidelines for developing

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98. See ORGANIZATION OF WORK: LIST OF ISSUES SUBMITTED BY THE DELEGATION OF JAPAN, U.N. Doc. A/CONF.164/L.6 (1993) which states that the Convention did not stipulate special interests or preferential rights in coastal states with respect to conservation of living resources and that coastal states should not take unilateral action to conserve resources outside their EEZs. *Id.* at 1. In a subsequent letter, the delegation of Japan again stressed that the rights of coastal states must not impinge upon the freedom of fishing on the high sea. COMMENTS ON COMPATIBILITY AND COHERENCE BETWEEN NATIONAL AND INTERNATIONAL CONSERVATION MEASURES FOR THE SAME STOCK (SUBMITTED BY THE DELEGATION OF JAPAN), at 1, U.N. Doc. A/CONF.164/L.28 (1993) [hereinafter COMMENTS ON COMPATIBILITY].

99. See generally A GUIDE TO THE ISSUES BEFORE THE CONFERENCE, *supra* note 89.

100. *Id.* at 1-4. This was recognized as a general right, but not a guarantee of the ability to fish in all areas of the sea at any time. *Id.* at 12-13.

101. REGIME FOR HIGH-SEAS FISHERIES, *supra* note 33, at 10-11.

102. FISH STOCK TREATY, *supra* note 14, arts. 8, 13.

103. *Id.* art. 8(3). A state with a real interest is one which is fishing for the particular straddling or migratory fish stock regulated by the organization, or fishing generally in the region in question. Article 8 ensures that regional organizations will be open to all states without discrimination. *Id.*

104. *Id.* art. 8(4).

regional organizations are set out in the Fish Stock Treaty.<sup>105</sup> During the formation of an organization, states must identify which fish stocks to regulate and how the new organization will work with any existing organizations.<sup>106</sup> In setting up provisions, they must consider the biological characteristics of the stocks concerned and the socio-economic, geographical and environmental characteristics of the region involved.<sup>107</sup> The fact that the guidelines are to be agreed upon during the formation period<sup>108</sup> should encourage states to join together quickly or risk being left out of the negotiating process.

In order to further ensure cooperation, the treaty specifies how states are to fulfill this obligation. In general, they must promote and conduct scientific assessments of the regulated stocks, cooperate in monitoring and surveillance of regulated areas, agree on catch allocations and promote peaceful dispute settlements.<sup>109</sup> Particular requirements are established as well. For example, if an international body establishes conservation minimums, these minimums must also be adopted by the regional organizations.<sup>110</sup>

Because of the stronger duty to cooperate and the right of organizations to exclude non-members, DWFNs voiced concern about being denied entry into organizations.<sup>111</sup> This remained a controversial point because coastal states wanted to ensure that only states with a real interest in the fishery would become members.<sup>112</sup> The Fish Stock Treaty attempts to address this issue by setting out the rights of new members to ensure that DWFN interests are balanced with those of the coastal state. It mandates that needs of coastal states, the existing level of fishing, and new member contributions to conservation must be considered when deciding upon new entrants.<sup>113</sup> Non-governmental organizations also reserved the right to participate in organizational meetings as observers and receive records from meetings.<sup>114</sup>

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105. *Id.* arts. 9-10.

106. *Id.* arts. 9(1)(a) & (c).

107. *Id.* art. 8 (1)(b).

108. *Id.* art. 9.

109. *Id.* art. 10.

110. *Id.* art. 10(c).

111. Japan took the position that organizations should be open to all parties with equal participation. COMMENTS ON COMPATIBILITY, *supra* note 99, at 1.

112. This was a serious consideration because if the states already fishing in the area agreed to conservation efforts, new entrants would be "free riders" who could "reap the benefit of the conservation arrangement without assuming the obligation." BACKGROUND PAPER, *supra* note 22, at 25.

113. FISH STOCK TREATY, *supra* note 14, art. 11.

114. *Id.* art. 12. There were over sixty NGOs represented at the conference, ranging from environmental groups such as Greenpeace and Worldwide Fund for Nature, to Fishworker's Unions. FINAL ACT OF THE UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS, at 4-5, U.N. Doc. A/CONF.164/38 (1995). NGO participation was limited by the delegates at the Conference. In the first proposed rules of procedure NGO representatives were allowed to make oral statements upon invitation of the presiding officer of the body concerned. ADOPTION OF THE RULES OF PROCEDURE: PROVISIONAL RULES OF PROCEDURE, at 15, U.N. Doc. A/CONF.164/2 (1993). The final rules adopted further limited

Coastal states were especially concerned with their ability to control enclosed and semi-enclosed seas and enclaves.<sup>115</sup> These areas are of special concern to coastal states because they usually have jurisdiction over the entire sea except a small central section of high seas.<sup>116</sup> The duty to cooperate recognizes the rights of DWFNs to access the resources in these small high seas areas.<sup>117</sup> Coastal states did not want their interests undermined by allowing more fishing by DWFNs.<sup>118</sup> The treaty attempted to resolve this problem by requiring that natural characteristics (such as being an enclosed sea) and coastal state interests be part of the consideration when developing organization regulations and membership.<sup>119</sup> This requirement is expressed in relatively weak language and is identical to that of the general requirements to cooperate and organize. Thus it may not have the result coastal states wanted.<sup>120</sup>

The Fish Stock Treaty will increase the effectiveness of regional organizations. They will be made stronger by the ability to exclude non-members thereby limiting the problem of exploitation by non-party states.<sup>121</sup> Even though regional management organizations will become more effective, their ultimate success will depend on stronger enforcement provisions for both coastal and flag states.

### C. Enforcement Provisions Under the Fish Stock Treaty

The Fish Stock Treaty addresses many of the problems of compliance and enforcement under UNCLOS III. These were topics of intense debate

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participation by requiring NGOs to form themselves into constituencies with one spokesperson for each. RULES OF PROCEDURE, at 16, U.N. Doc. A/CONF.164/6 (1993).

115. For example, Russia endorsed stronger coastal state rights regarding enclosed and semi-enclosed seas, submitting several letters and proposals. *See, e.g.*, LETTER DATED 26 JULY 1993 FROM THE ALTERNATE CHAIRMAN OF THE DELEGATION OF THE RUSSIAN FEDERATION ADDRESSED TO THE CHAIRMAN OF THE CONFERENCE, at 4, U.N. Doc. A/CONF.164/L.25 (1993) [hereinafter LETTER FROM RUSSIAN DELEGATION]. Russia suggested that coastal states with enclosed and semi-enclosed seas should be able to independently determine fish quotas. *Id.*

116. Russian EEZs make up 97% of the Sea of Okhotsk and Russia wanted to ensure that fishing on the remaining 3% high sea area, the "Peanut Hole," would not deplete such an important fishery. BERING SEA, *supra* note 50, at 1-2.

117. By virtue of the fact that they are fishing in that region, DWFNs have a real interest, and according to Article 8 of the treaty, are to be included in negotiations.

118. LETTER FROM RUSSIAN DELEGATION, *supra* note 115, at 4.

119. FISH STOCK TREATY, *supra* note 14, arts. 15-16.

120. For example, the situation in the Bering Sea is unlikely to change substantially because it is surrounded by more than one state's EEZ and is thus controlled by Article 15. However, Article 16 is directed at high seas areas which are surrounded by only one state's EEZ, such as the Sea of Okhotsk "Peanut Hole." This is a stronger provision because states must act without delay to agree to management measures in these seas. If agreement cannot be reached, the provisions specifically stated in the Fish Stock Treaty must be applied. Even before agreement is reached, DWFNs must ensure that vessels flying their flag do not engage in fishing that could undermine the stocks concerned. *Id.* art. 16.

121. This is the key to the new treaty's strength and had been supported earlier by those states wanting more control over high seas resources. Miles & Burke, *supra* note 63, at 355.



between coastal states and DWFNs.<sup>122</sup> Coastal states wanted stronger enforcement powers under the regional organizations, while DWFNs wanted to keep accountability with the flag state alone.<sup>123</sup> The final draft attempts to balance these interests while making enforcement efforts within regional organizations more effective.

The problem of non-member states fishing in organization territory was a substantial concern under UNCLOS III. The ability to exclude the vessels of non-member states from fishing the regulated high seas will give states the enforcement power they need to successfully deter unregulated fishing. Member states will be able to investigate and possibly even seize those vessels fishing illegally.<sup>124</sup> Likewise, flag states have a stronger obligation to ensure that vessels flying their flags comply with organization regulations.<sup>125</sup>

The Fish Stock Treaty also provides stronger enforcement measures against the member states of each organization. States must cooperate through regional organizations to ensure compliance with and enforcement of, the organization's management measures.<sup>126</sup> Member states or flag states may undertake investigations directly or in cooperation with other interested states.<sup>127</sup> If a member state alleges a violation, the flag state has a duty to investigate.<sup>128</sup> All states have the duty to cooperate with concerned state authorities to make sure all alleged violations are investigated and sanctioned if violations are found.<sup>129</sup>

Furthermore, any member state may board and inspect fishing vessels flying the flag of other member states.<sup>130</sup> Inspectors can look at the vessel, its license, gear, equipment, records, facilities, fish and fish products, and any relevant documents needed to verify compliance.<sup>131</sup> Provisions for boarding and inspecting are clearly stated in the treaty, but organizations may choose to establish stronger provisions.<sup>132</sup> Unfortunately, they may also choose to

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122. Meltzer, *supra* note 1, at 326.

123. See COMMENTS ON COMPLIANCE AND ENFORCEMENT (SUBMITTED BY THE DELEGATION OF AUSTRALIA), at 1, U.N. Doc. A/CONF.164/L.19 (1993) (stating that obligations of flag states be supplemented and strengthened by regional monitoring, control and surveillance schemes). Russia suggested that coastal states should have a strong role in surveillance and inspections. SOME CONSIDERATIONS REGARDING THE QUESTION OF SECURING COMPLIANCE WITH CONSERVATION MEASURES FOR STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS, at 1, U.N. Doc. A/CONF.164/L.26 (1993).

124. FISH STOCK TREATY, *supra* note 14, art. 21.

125. *Id.* art. 19.

126. *Id.*

127. *Id.* art. 20(3).

128. *Id.* art. 19(1)(b).

129. *Id.* art. 20.

130. *Id.* art. 21(1).

131. *Id.* art. 22(2).

132. *Id.* art. 21(2).

limit these provisions.<sup>133</sup> The treaty also provides a specific penalty for refusal to let other member states board and inspect a vessel. If violations are found during these inspections, the flag state must be immediately notified.<sup>134</sup> The flag state must order the vessel to submit to investigation and suspend its authorization to fish if it does not comply.<sup>135</sup>

The resulting agreement still leaves flag states with the primary responsibility for making sure their vessels follow regulations.<sup>136</sup> However, flag state duties are clarified and strengthened. The treaty requires that flag states enforce conservation measures regardless of where violations occur.<sup>137</sup> They now have a duty to immediately investigate any alleged violation and quickly report their findings to the relevant regional organization.<sup>138</sup> Additionally, flag states must ensure that their vessels provide information about their activities to any investigating authority.<sup>139</sup> If a violation is found, the flag state must prevent that vessel from fishing the high sea until the sanction process is completed.<sup>140</sup> Flag states retained the right to impose penalties on their vessels according to their own laws, irrespective of prior proceedings by another state.<sup>141</sup>

Flag states must also undertake specific enforcement actions to ensure compliance. For example, flag states must control fishing vessels through licenses or permits and condition them on compliance with regional organization regulations.<sup>142</sup> Flag states must also maintain a national registry of fishing vessels and have provisions that give other states access to them on request.<sup>143</sup> They are also required to have their vessels report their fishing effort and catch totals.<sup>144</sup>

The Fish Stock Treaty does provide some further enforcement rights for coastal and member states. It states that when a vessel engages in prohibited activities, other member states may take action to keep it from fishing that

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133. *Id.* art. 21(15). States may limit boarding and inspection procedures, but they must develop others in their place that will still fulfill their obligation under the treaty. *Id.*

134. *Id.* art. 21(5).

135. *Id.* art. 22(4).

136. *Id.* art. 18.

137. *Id.* art. 19(1)(a).

138. *Id.* art. 19(1)(b).

139. *Id.* art. 19(1)(c).

140. *Id.* art. 19(1)(e).

141. *Id.* art. 21(13). This arrangement may be an effective balance between the need for strong surveillance and detection procedures to enforce obligations and the need to respect the rights of fishing vessels for whom lost time means lost profits. BURKE, *supra* note 28, at 307-08.

142. FISH STOCK TREATY, *supra* note 14, arts. 18(3)(a) & (b).

143. *Id.* art. 18(3)(c).

144. *Id.* art. 18(3)(e).

region until the flag state investigates.<sup>145</sup> This action must be in accordance with international law or regional procedures established for this purpose.<sup>146</sup> Port states are also given a role in supporting conservation efforts. They may board and inspect documents, fishing gear and catch when vessels are voluntarily in their ports or offshore terminals.<sup>147</sup> If a port state finds a violation, it may prohibit landings in its ports or prohibit transfer of the catch for shipping.<sup>148</sup> So, although flag states still have primary authority, other states can take some limited action against vessels who fish illegally.

The Fish Stock Treaty also addresses sanctions and penalty procedures. The problem with the lack of international standards in applying penalties is changed by the requirement that sanctions be "adequate in severity to be effective in securing compliance" and "deprive offenders of the benefits accruing from their illegal activities."<sup>149</sup> There may still be some inconsistency, but this at least provides guidelines for states to follow.

Overall, the Fish Stock Treaty provides for better enforcement among the regional management organizations. It gives member states more authority to monitor and conduct investigations. But because flag states still have primary authority over the investigation and sanctioning process, there will always be a risk that investigations will not be thorough or that penalties will not be strong enough. It is hoped that the clearer delineation of enforcement duties of flag states and the chance of losing access to fisheries will minimize this risk and make the conservation efforts of regional groups much more effective.

#### *D. Implementation of the Fish Stock Treaty*

The Fish Stock Treaty is clearly a step in the right direction for conserving straddling and highly migratory fish stocks. With any luck, the United States and other nations will ratify it quickly. The document was opened for signature on December 4, 1995.<sup>150</sup> It will go into effect thirty

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145. *Id.* art. 20(7). The chairman recognized that "If we are to achieve better management of fisheries, our Agreement must go beyond the concept that the flag state is the only authority for the taking of enforcement measures in all circumstances." STATEMENT MADE BY THE CHAIRMAN OF THE CONFERENCE AT THE CLOSING OF THE FIFTH SESSION, ON 12 APRIL 1995, at 3-4, U.N. Doc. A/CONF.164/28 (1995).

146. FISH STOCK TREATY, *supra* note 14, art. 20(7).

147. *Id.* art. 23(2).

148. *Id.* art. 23(3).

149. *Id.* art. 19(2). Measures apply to whomever is in charge of the vessel, but individual officers of the ship may have their credentials to serve in that capacity suspended or withdrawn. *Id.* This is not the only remedy available. The flag state itself will be liable in accordance with international law to any other state damaged by its actions in violation of this treaty. *Id.* art. 35.

150. *Id.* art. 37.

days after being ratified by thirty states,<sup>151</sup> which is likely to occur in late 1996 or 1997.<sup>152</sup>

The Fish Stock Treaty provides for a review conference four years after it enters into effect.<sup>153</sup> Four years may be too soon to determine its effectiveness, but it will allow for the redress of problems that become quickly apparent, such as lack of cooperation. During this four-year period, states will monitor the conservation efforts of regional organizations, cooperation by states and the effectiveness of enforcement provisions. The success of the agreement depends on state cooperation. If measures are not consistent or effective among the various regional management organizations, the provisions of the treaty will be further strengthened at the review conference.<sup>154</sup>

### CONCLUSION

As international law and relations now exist, regional management organizations may be more effective than one global body in preventing overfishing. Regional organizations can use local solutions to conserve straddling and highly migratory fish stocks within their regions. Under the U.N. Fish Stock Treaty, management organizations and enforcement provisions will become more effective than they had been under UNCLOS III.

The Fish Stock Treaty will not, however, fully solve the problem of worldwide overfishing and ecosystem destruction. This will require a global regulatory regime with the power to set regulations, monitor the various regions and enforce violations on an international level. Flag states, port states and coastal states all need to be involved in enforcement throughout the prosecution and sanction process. The oceans are a resource for the entire world and regional ecosystems are all interrelated. Therefore, every state has an interest in demanding conservation in all regions as well as in the one it most frequently exploits. At the very least, regional organizations should

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151. *Id.* art. 40(1). Twenty-six states signed the treaty including Argentina, Australia, Bangladesh, Belize, Brazil, Canada, Chile, Fiji, Guinea Bisseau, Iceland, Indonesia, Israel, Jamaica, the Marshall Islands, Micronesia, Morocco, New Zealand, Ninue, Pakistan, Papua New Guinea, Russia, Samoa, Senegal, Tonga, Ukraine, the United States and the ten British-ruled territories. The treaty was not signed by DWFNs such as Poland, China, Taiwan, Korea or Japan, or by any European Union member. *Fisheries: 26 Nations Sign U.N. Straddling-Stock Treaty* GREENWIRE, Dec. 5, 1995, available in LEXIS, NEWS Library, GRNWRE File; *U.N. Opens Treaty to Regulate Fishing on High Seas*, AGENCE FRANCE PRESSE, Dec. 4, 1995, available in LEXIS, NEWS Library, AFP File.

152. *Id.* art. 40. It is likely that ratification will occur quickly because other unilateral actions like those of Canada's and Chile's are possible. This conference shows that states have finally realized that international cooperation is necessary to increase long-term fish catches. Collett, *supra* note 38, at 32-33. Chairman Satya Nanda expects the treaty to be ratified within two years. Greenwire, *supra* note 150.

153. FISH STOCK TREATY, *supra* note 14, art. 36(1).

154. *Id.* art. 36(2).

have to adhere to high standards of conservation and enforcement. These standards must be agreed upon at an international level.

The problem of depleting fish stocks is likely to continue. The focus of the Fish Stock Treaty is only to maximize long-term fish catches by coordinating fishing efforts. It does not address the mounting problems of pollution, global warming or decreasing biodiversity in the ocean ecosystems. Nevertheless, it provides a better regulatory scheme than the one developed under UNCLOS III. It is also more reliable than dependence on the unilateral actions of various states to conserve fish stocks. This author hopes that it will be ratified and go into effect before it is too late to conserve these fish stocks at all.

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